**EVIDENCE ESSENTIALS PODCAST**

**IMPEACHMENT**

* 1. You asked for episodes dealing with evidence issues
  2. “Evidence Essentials”
  3. Garon Muller helping us with these evidence episodes
  4. Impeachment
  5. Impeachment is calling into question the witness’ credibility
     1. 24-6-607 allows a witness’ credibility to be attacked, even by the party calling the witness
     2. Old “Vouching Rule” has been abolished.
  6. Each question must have a good faith basis to believe
     1. Those facts are true
     2. The witness has personal knowledge
     3. The facts are admissible in evidence
  7. Ways to Impeach
     1. Contradiction- § 24-6-621
     2. Prior Inconsistent Statement- § 24-6-613
     3. Bias- § 24-6-622
     4. Bad Character-§ 24-6-608
     5. Conviction- § 24-6-609
     6. Incapacity
     7. Lack of Knowledge- § 24-6-602
  8. Extrinsic Evidence -§ 24-6-608(b)
     1. Generally, we cannot get into specific instances of conduct to impeach
     2. However, DURING CROSS EXAMINATION (NOT DURING DIRECT) the Court may allow specific instances of conduct if probative of truthfulness and the instance is:
        1. Concerning the witness's character for truthfulness or untruthfulness; or
        2. Concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
  9. Contradiction-§ 24-6-621
     1. A witness may be impeached by disproving the facts testified to by the witness
     2. A defendant may “open the door” to otherwise inadmissible character evidence through their own testimony. Parker v. State, 339 Ga. App. 285 (2016).
  10. Prior Inconsistent Statement- § 24-6-613
      1. Do not have to show the witness the prior statement but must show opposing counsel if requested
      2. No extrinsic evidence unless the witness is afforded an opportunity to explain the statement and the opposing party is afforded the opportunity to cross regarding the statement
         1. Does not apply to admissions by a party opponent
      3. A prior consistent statement may be admitted to rehab the witness
  11. Bias- § 24-6-622
      1. Never Collateral- May use extrinsic evidence
      2. Religious Beliefs- § 24-6-610
         1. Not to attack credibility
         2. Okay when relevant to bias
  12. Bad Character-§ 24-6-608
      1. **Do not let the sideshow overtake the circus**
      2. 608 governs when character evidence is being used for the limited purpose of attacking or sustaining a witness's credibility
      3. Either reputation or opinion testimony is allowed but only as to the subject's specific character for truthfulness or untruthfulness. Testimony as to truthfulness is admissible only after the subject witness's credibility has been attacked.
      4. The use of specific instances of conduct on direct examination to prove a person's general good or bad character is not allowed. The only exceptions to this are prior convictions and conduct indicating bias.
      5. Under subsection (b)(1), a character witness can be asked on cross-examination about specific instances of conduct probative of the veracity of the person about whom he testified in order to test the extent and basis of the character witness's knowledge.
      6. Subsection (b)(1) also allows impeaching any witness on cross-examination with specific instances of the witness's own conduct that are probative of the witness's untruthfulness, even if they are unrelated to the issues in the case.
      7. Subsection (b)(1) expressly gives the trial court discretion on whether to allow the use of specific instances of conduct to attack or rehabilitate the credibility of a witness
      8. Whenever the cross-examiner confronts a witness with specific instances of conduct, the examiner must accept the witness's answer. No external evidence is admissible to prove or disprove the specific instances of conduct raised unless they are relevant to the issues in the case.
  13. Conviction- § 24-6-609
      1. Felony or crime of dishonesty, and
      2. less than ten years have passed from the date of conviction or date of release from confinement- whichever is later.
      3. If more than ten years old, proponent must give notice to adverse party
      4. Cannot use First Offender, Nolo, or Juvenile Adjudications
      5. Pendency of Appeal does not make the conviction inadmissible but the fact that the conviction has been appealed is admissible.
      6. Always use a 403 Balancing Test
  14. Lack of Knowledge- § 24-6-602

1. Lack of opportunity to observe
2. It is generally improper to ask whether another witness is lying. U.S. v. Schmitz, 634 F.3d 1247, 1268–1270 (11th Cir. 2011).
   1. Giving “an unauthorized charge on impeachment is generally harmless error.” Hardy v. State, 240 Ga. App. 115, 120 (6), 522 S.E.2d 704 (1999).

**CONCLUSION**

1. All forms of impeachment should be filtered through a 403 balancing test.
2. Any witness may be impeached, whether on direct or cross.
3. Generally, extrinsic evidence is only allowed to attack the credibility of a witness who has already testified.
   1. **Even then, the Judge must determine the extrinsic evidence passes the 403 balancing test.**
   2. Do not let the sideshow overtake the circus.
4. To impeach with a prior inconsistent statement, the questioner must first confront the witness with the prior statement and provide an opportunity for the witness to explain.
5. Where counsel makes prejudicial statements or improperly attempts to impeach, the Court shall rebuke and give a curative instruction. O'Neal v. State, 288 Ga. 219 (2010).
   1. If the prosecutor is the offender, the Judge may order a mistrial. O.C.G.A. § 17-8-75

[ending script]