Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we're doing another in our "Listen and Learn" series, about Evidence. This is about Impeachment. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you can be the best law student and lawyer you can be. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on LawSchoolToolBox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Welcome back! Today, we are diving into part one of a two-part series on the topic of Impeachment. Impeachment is a subsection of Evidence, which is a commonly-tested area on Evidence exams and the bar exam.

Lee Burgess: As a general matter, Evidence covers what can and cannot be introduced in a court of law. It is the set of rules that govern proper testimony and the submission of evidence into the record to ensure fairness, reliability, and relevance. As it relates to our episode today, Evidence covers how and why a witness can be impeached during a trial. Impeachment of a witness refers to the attempts by opposing counsel to discredit a witness or call into question their credibility. Counsel does this by presenting evidence or asking questions that may show their testimony was biased, inconsistent, or untrue. Basically, opposing counsel wants the jury – or judge – not to trust that witness or what they say.

Lee Burgess: As I mentioned, this is a two-part series, because we have a lot of ground to cover on impeachment. To make it as concrete and memorable as possible, I have divided impeachment up into two major categories: impeachment of a witness's character and impeachment of the testimony itself. In other words, is the witness credible and is the testimony itself reliable? Today, we're going to focus on character impeachment – that is, whether or not the witness is credible.

Lee Burgess: When opposing counsel seeks to impeach a witness's character, they are trying to show that the witness's testimony cannot be believed because it is coming from a person who cannot be trusted, for one reason or another.

Lee Burgess: Now, to be clear, opposing counsel does not have free reign to attack witnesses or impugn their character. They cannot just bring out every skeleton in a witness's closet to try to turn the jury against them, especially when those skeletons have no bearing on the trial or issue at hand. If that were allowable,

no one could be a witness! There are no perfect people. To ensure relevant and probative evidence comes in while mudslinging stays out, rules are in place to guide impeachment of a witness's character. Let's go through each one together. As with all rules of evidence, keep in mind the overarching goals of evidentiary rules – the admission of probative, relevant, reliable evidence and only probative, relevant, reliable evidence, to guide an adjudicator to a just outcome.

Lee Burgess: Okay, let's jump in with a relatively straightforward one – bias. Bias of a witness is always fair game. A witness's bias, motive, partiality, or corruption is always relevant for impeachment. Again, remember the purpose of rules of evidence – we want evidence to be relevant, reliable, and probative. If a witness is biased towards one result or another, their testimony may not be reliable. If they are incentivized to see one side win, their testimony may be partially, or even wholly, influenced by that desire and not by the truth alone. Now, that doesn't mean their testimony is necessarily unreliable. They might be telling the truth! But their possible bias is fair game for opposing counsel to ask questions about to see whether that bias is affecting the witness's testimony.

Lee Burgess: Let's move on to another relatively straightforward rule – character for truthfulness. Opposing counsel may cross-examine a witness on their character for truthfulness – it goes to their credibility as a witness and, therefore, the credibility of their statement. A witness's credibility may be attacked by the introduction of two things: 1) reputation testimony about the witness's character for truthfulness or untruthfulness; or 2) opinion testimony. I want to flag here that evidence about the witness's character for truthfulness may also be admissible, but it can only be introduced if and when the witness's character for truthfulness is attacked. The court will not admit evidence bolstering a witness's credibility if that credibility is not in question. That runs the risk of swaying the adjudicator to believe the witness just because they like them and think they're an upstanding person. While that may be true, likeability is not relevant to a just outcome.

Lee Burgess: Character of truthfulness covers the admissibility of others' opinions of a witness, but what about evidence about a witness's conduct? Specific instances of conduct are also admissible as impeachment, but only in certain circumstances. A witness's credibility may be attacked with specific instances of conduct (prior bad acts) only if the conduct is probative of the witness's character for truthfulness or untruthfulness. Now, remember when I said the court doesn't like mudslinging? The court is not going to admit into evidence every bad or unsavory act a witness has ever committed. Again, that isn't relevant, and no witness would survive such viciousness! But if their prior bad act speaks to their character for truthfulness, that's a different story. The court

is trying to get at whether a witness can be believed. The court doesn't care if a witness ran a red light, but they might care if they then lied about it after being pulled over. Why? Because it is probative to the question of whether the witness is honest, truthful, and believable. I also want to note here that extrinsic evidence is never admissible to attack or support such instances of a witness's credibility. Testimony alone is admissible here.

Lee Burgess: So, let's take a look at a hypo to give us a sense of how some of these rules play out during testimony. This question is adapted from the February 2016 California bar exam:

Lee Burgess: "Mike, Sue, Pam, David, and Ed worked at Ace Manufacturing Company. Pam was fired. A week later, David circulated the following email to all the other employees:

Lee Burgess: 'I just thought you should know that Pam was fired because she is a thief. Sue caught her stealing money from the petty cash drawer after Pam's affair with Mike ended.'

Lee Burgess: A month later, Mike died. Pam sued David for defamation. At trial, Pam testified that, although it is true that she was fired, the remaining contents of the email were false. In defense, David called Sue, who testified that she had caught Pam stealing $300 from the petty cash drawer, and that when Sue confronted Pam and accused her of taking the money, Pam simply walked away. David himself testified that the contents of the email were true. Is Sue's testimony that she caught Pam stealing $300 admissible?"

Lee Burgess: So, what do you think? Remember that evidence of a witness's bad behavior is not typically admissible. Smearing the witness does not help the adjudicator get to the truth of the claim at hand. But some evidence of bad behavior is relevant to truthfulness. Let's review the rules we've learned so far: bias, character for truthfulness, and specific instances of conduct. Do any of those apply here?

Lee Burgess: Sue's testimony about witnessing Pam steal and her lack of reaction don't really go to Pam's bias, so we can skip that one. What about character for truthfulness? To review, a witness's credibility may be attacked by the introduction of two things: 1) reputation testimony about the witness's character for truthfulness or untruthfulness; or 2) opinion testimony. Sue's testimony definitely touches on Pam's character for truthfulness. Both David and Sue see Pam as dishonest, and they base that on their prior experiences with her. Remember, though, now that character testimony has been introduced against Pam, she has the opportunity to introduce positive character evidence about herself, so she might want to take that opportunity.

Lee Burgess: Alright, let's look at the last rule – specific instances of conduct. I think this is another way the court could admit this testimony. The specific instance of Pam's theft is admissible, even though it is prejudicial because the conduct is probative of her character for truthfulness. Stealing money is taking something for your own and lying about it, or failing to tell the truth about the fact that you did that. So, it impacts a person's character for truthfulness. In this case, the court would be correct to admit this testimony about Pam, but again, she may be able to introduce evidence of her good and truthful character, if any exists, to combat this impugning evidence.

Lee Burgess: I hope that hypo helped solidify some of those rules. With those covered, we now have the murkiest of the character impeachment rules – prior convictions. Evidence of a prior conviction may be admitted in certain instances, but not always. The key is remembering which type of prior convictions may be admitted to impeach a witness. First, prior crimes – whether felonies or misdemeanors – that involved dishonesty, are always admissible to impeach a witness. Again, we're looking at whether a witness can be trusted. If they have a prior conviction for a crime related to honesty, that is important information to know. I do want to point out here, though, that theft crimes are not crimes of dishonesty, so try to keep that in mind when analyzing whether a witness can be impeached with a prior crime.

Lee Burgess: Apart from the very specific circumstances of misdemeanors involving dishonesty, misdemeanors are not admissible to impeach a witness. Some other felonies, however, are. Remember, a felony is a crime punishable by death or by a sentence of more than one year. Evidence about felonies that do not involve dishonesty may be admissible, but only if the witness is not the defendant. This permissibility, however, subject to Rule 403 exclusions – most relevant being whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Be sure to review Rule 403 exclusions if you're not familiar with them. We've been talking about felonies – criminal cases – but the rule I just stated also applies to civil cases. An opposing party may submit impeachment evidence regarding a civil case not involving dishonesty, but only if the witness is not a defendant and, of course, subject to Rule 403 exceptions.

Lee Burgess: But what if the witness is the defendant? In that case, the evidence is limited to criminal cases, and it is only admissible if the probative value outweighs any prejudicial effect. That is a bit of a squishy rule, so be sure you carefully analyze both the potential probative value and potential prejudicial effect on an exam.

Lee Burgess: It is important to note that there are two exceptions to the admission of prior convictions. The first is commonly known as the 10-year exception. If 10 years have passed from the later of the date of conviction or the release from jail, a

conviction is not admissible, unless, 1) its probative value outweighs its prejudicial effect; and 2) the proponent provides reasonable written notice to the adverse party. You may notice a trend here. In considering impeachment evidence, the court is very concerned about weighing probative value versus prejudicial effect. The 10-year exception stands out, however, in that it requires reasonable written notice to be given to the opposing party if the evidence is going to be admitted.

Lee Burgess: Don't worry, I haven't forgotten the second exception! The other exception to the admission of prior convictions regards a conviction that has been pardoned or annulled. Evidence of a conviction is not admissible if it's been pardoned or annulled based on a finding of innocence. That makes sense, right? Why should a conviction be admissible if the witness did not actually commit the crime? That conviction has no probative value – it doesn't tell you anything helpful about the witness.

Lee Burgess: To help us drill these rules into memory, let's look at another hypo. This hypo is adapted from the February 2020 California bar exam, so like the prior one, it's a good example of something you might see on a real exam. I've shortened it a bit to focus on the issues at hand. Ready?

Lee Burgess: "Des is on trial for possession with intent to distribute hundreds of pounds of cocaine. At trial, the prosecution called Carol, a severed co-defendant, who had pleaded guilty to reduced charges in exchange for testifying against Des. Carol testified that she had acted as a distributor for a ring of cocaine dealers. In that role, Carol had sold hundreds of pounds of cocaine to many people, including Des, during the period of the charged crime. Carol further testified that Des agreed to sell cocaine.

Lee Burgess: During cross-examination, Des's attorney introduced evidence that Carol had received a reduced sentence in exchange for agreeing to testify against Des. The prosecution objected, but the court allowed the evidence to be admitted.

Lee Burgess: Next, Des took the stand in his own defense. On cross-examination, Pete asked Des if it was true that eleven years earlier he had been convicted of forgery, a felony. Des answered, 'Yes.'

Lee Burgess: Did the court properly admit:
1. Evidence of Carol's agreement with the prosecutor?, and
2. Evidence of Des's prior conviction for forgery?"

Lee Burgess: Let's take each question one at a time. What do you think? Was it proper for the court to admit evidence that Carol cut a deal with the prosecution for a reduced

sentence in exchange for her testimony? Remember all the way back at the beginning of this episode when we covered bias? You might remember me saying that a witness's bias is always fair game – it's always relevant for impeachment. Do you think Carol's deal might make her biased? Of course, we don't know if her testimony is truthful or not, but I think we can certainly argue that this agreement raises some questions about her impartiality. She would not get a deal from the prosecution for testifying that Des was innocent. Her reduced sentence relies on her testimony in support of the prosecution, which is arguing Des's guilt. For that reason, I think this evidence is pretty squarely admissible.

Lee Burgess: Now, what about the second question? Did the court properly admit Des's prior conviction for forgery? The prosecution clearly wants to use this conviction to impeach Des – to show that Des is a liar, and his testimony cannot be trusted. Think back – when is the opposing party able to introduce evidence that impugns the witness's character for truthfulness? I see two that are relevant here. First, a party may introduce evidence of a prior conviction that relates to dishonesty. Remember, prior crimes that involve dishonesty are always admissible to impeach a witness. And while theft crimes are not crimes of dishonesty, forgery is something different. If Des committed forgery, he was holding himself out to be someone he was not, or have permission he did not have. He lied. This is intrinsically a crime of dishonesty. So, I think it is admissible as a prior conviction related to dishonesty.

Lee Burgess: Second, was this also a proper impeachment via evidence of a prior bad act? In a criminal case, a prosecutor can ask a defendant about bad acts committed in the past that reflect the defendant's character for truthfulness. As we just discussed, forgery is exactly the type of behavior that calls into question a person's honesty and truthfulness. Thus, this evidence is properly admitted to impeach Des and show that he was not a credible witness.

Lee Burgess: Now, wait. You might be thinking, "Doesn't an exception apply here? I thought crimes committed more than 10 years ago weren't admissible as prior convictions." If you caught that, excellent issue spotting! As a refresher, if 10 years have passed from the date of conviction or the release from jail – whichever is later – the conviction is not admissible, unless, 1) its probative value outweighs its prejudicial effect; and 2) the proponent provides reasonable written notice to the adverse party. We need to analyze a couple of things to understand whether this exception applies.

Lee Burgess: First, it's clear from the question that Des's conviction took place 11 years ago. But did he go to prison? If so, when was he released? We don't know the answer; the prompt does not tell us. So, when answering this question on an

exam, it is important to note that if Des went to jail and was released less than 10 years ago, this exception does not apply. But, since we don't know that, we need to finish the analysis. Presuming the exception does apply, we need to weigh whether the probative value of the evidence outweighs its prejudicial effect, and whether proper notice was given to Des's attorney. Again, we don't know the answer to the second prong, so we'll just flag it as an issue in our answer. If proper notice was not given, the evidence is not admissible.

Lee Burgess: What about the first prong, though? Do you think the probative value of Des's forgery conviction outweighs its prejudicial effect? Evidence that Des was dishonest is quite probative in determining his credibility. On the other hand, it is quite prejudicial, and doing one dishonest thing over a decade ago, with no convictions since, may not be very strong evidence that Des remains a dishonest person. I think you can go both ways here, but I think the court would lean toward admitting the evidence. In all, I would argue the court properly admitted both pieces of evidence for impeachment purposes.

Lee Burgess: I know it's a lot, but try not to get overwhelmed by all the possibilities and iterations. Just take each test one step at a time, and make sure you're quite familiar with the rules. Evidence questions always have a lot going on and a lot to keep track of, so being able to quickly spot and apply the rules will go a long way in helping you write a solid exam answer.

Lee Burgess: And that's all the time we have for today, but we'll be back soon with part two of impeachment evidence. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to Lee or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website contact form at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!

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