

The Art of Advocacy

The Thrill and Excitement of Impeachment by Contradiction

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Introduction

Wednesday afternoon, the Fort Swampy courtroom. You are in the second day of a contested general court-martial before a panel of officer and enlisted members. The accused—your client—has been charged with conspiracy to distribute cocaine in violation of Article 81 of the Uniform Code of Military Justice. Your client claims he had no involvement in the conspiracy and has been set up by a confidential informant intent on saving her own skin. For the past two days, you have heard a mind-numbing procession of expert witnesses and CID agents talking about cocaine, surveillance procedures, suspects, and “late-model, red-in-color vehicles” (your client, of course, owns one of the many on post). You have not made much headway in the case, and both you and your client are starting to get discouraged.

The government calls its final witness, Specialist (SPC) Sheera M’endassity, the confidential informant. Specialist M’endassity is testifying under a grant of immunity, and she has been the government’s key witness in the trials of three other alleged co-conspirators. Specialist M’endassity has committed all sorts of misconduct, both drug-related and not, about which you would love to cross-examine her to taint her as a witness in the eyes of the panel. However, your worthy opponent prevailed in a motion in limine under Military Rule of Evidence (MRE) 608(b), and the judge has ruled that you may only question SPC M’endassity about specific instances of misconduct that are directly related to her character for truthfulness or untruthfulness. “Specialist M’endassity is not on trial here,” said the judge in her ruling. “I am not going to let you turn this trial into a circus.”

Specialist M’endassity testifies on direct that your client was heavily involved in the conspiracy. She modestly admits to her own minor role in the conspiracy. In an effort to remove the “sting” of your expected cross-examination, the prosecutor questions her about the grant of immunity. M’endassity discusses her own arrest, the maximum punishment she would have faced at trial, and the fact that she is testifying under immunity. The following exchange then occurs:

Q: Specialist M’endassity, I would like you to discuss your grant of immunity. Why are you testifying here today?

A: Because I feel bad about what happened and I want to help make things right. Also, the CG ordered me to testify and cooperate in this case. And that is what I am doing.

Q: In return for your testimony and cooperation, what will happen to you?

A: Well, I will not be prosecuted for what I did.

Q: And what else does the agreement require you to do?

A: I have to tell the truth. Which I have done. And I also have to stay clean—I cannot use drugs or be around people who use or sell them. And I have to stay away from the DISCOM area.

Q: And have you done those things?

A: Yes. All of them. In fact [she adds with a smirking look of self-righteousness], since the day I was arrested, I have not even had anything to drink. I have really turned myself around.

Q: Thank you. No further questions.

You grip your pen tightly. Specialist M'endassity has just told a whopper. She is a regular fixture at the DISCOM barracks party scene, and you have witnesses who have seen her in the barracks area as recently as last weekend. These witnesses also saw her drinking on several occasions since her arrest. You know she is a liar. You want desperately to prove it, but you are not sure how. You think back to your days at the Criminal Law Advocacy Course at the JAG School, draw a mental blank, and then ask yourself: What am I going to do?

In order to destroy SPC M'endassity's credibility as a witness, you need to understand and apply the principle of impeachment by contradiction. Impeachment by contradiction is a potentially valuable weapon in your advocacy arsenal. Because it is not specifically listed in either the Federal Rules of Evidence (FRE) or Military Rules of Evidence (MRE), it is "often misunderstood and either misused or not used at all."¹ The purpose of this article is to equip counsel with the ability effectively to use impeachment by contradiction at military courts-martial.

Impeachment by contradiction: Definition and Legal Framework

Definition

Impeachment by contradiction, or impeachment by specific contradiction as it is sometimes known, is one of the five primary modes of impeachment at trial.² In concept, impeachment by contradiction is rather simple. When a witness makes an assertion of fact, the attorney can impeach him by showing that the fact is not true; this can be done either by cross-examining the witness, using extrinsic evidence, or both. For example, if the witness testifies that an incident occurred at "high noon at the OK Corral," the attorney can show by cross-examination or by calling witnesses that the incident actually occurred at midnight at the Circle K convenience store. If the fact-finder believes the counterproof offered by the attorney, the witness has been impeached in two ways. First, the fact-finder will believe that the witness lied or made a mistake on the specific fact contradicted.³ But second, and perhaps more significantly, the fact-finder may begin to doubt everything else the witness has said.⁴ Because the attorney can use extrinsic evidence rather than simply relying on cross-examination, impeachment by contradiction can be devastating to a witness's credibility.

Legal Framework

In order to make the argument for the use of impeachment by contradiction at trial, counsel must understand and be able to explain to a military judge what the doctrine is and why it is appropriate in their particular case. The following framework will assist counsel in this endeavor:

Requirement of Significant Factual Statement that Demands Contradiction

In order for an attorney to use impeachment by contradiction, the witness must make a statement of fact that is significant to the case at hand. The normal rule, drawn from the common law, is that impeachment by contradiction should not be used for collateral matters.⁵ Thus, if a complaining witness testifies that on the morning of the alleged rape she had oatmeal for breakfast, defense counsel would probably not be permitted to use impeachment by contradiction to demonstrate that the witness actually had cornflakes. A good rule of thumb is that the statement should either relate closely to the facts of

¹ Lieutenant Colonel James Moody & Lieutenant Colonel Leellen Coacher, *A Primer on Methods of Impeachment*, 45 A.F. L. REV. 161, 181 (1998).

² The five modes of impeachment are (1) attacking a witness's bias, (2) demonstrating defective mental or sensory capacity, (3) showing the witness's character for truthfulness, (4) pointing out inconsistent statements, and (5) specific contradiction of statements the witness has made in the courtroom. CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, *EVIDENCE* § 6.18, at 464-65 (3d. ed. 2003).

³ *See id.* § 6.43, at 529.

⁴ *See id.*

⁵ *See* MUELLER & KIRKPATRICK, *supra* note 2, at 530-31.

the case or be so closely tied to the witness's credibility that impeachment by contradiction is necessary.⁶ The statement can arise either on direct examination or cross-examination.⁷

Counsel should be particularly alert for broad, gratuitous statements in which a witness attempts to bolster his own character or credibility. For example, in *United States v. Trimper*,⁸ the accused, an Air Force JAG captain, was on trial for cocaine use. He made a broad statement on direct that he had never in his life used cocaine. This permitted trial counsel to introduce extrinsic evidence as impeachment by contradiction that the accused had gone to an off-base hospital and requested a private urinalysis to screen for cocaine metabolites.⁹

Impeachment by Contradiction and the Military Rules of Evidence

Drafters Analysis and Case Law Provide Basis

As previously mentioned, impeachment by contradiction is not specifically listed in either the FRE or MRE. This has led to some confusion about impeachment by contradiction's availability and operation under both sets of rules.¹⁰ The analysis of the MRE in the *Manual for Courts-Martial* (MCM), however, makes it clear that the drafters of the Rules intended for impeachment by contradiction to retain a valid role at courts-martial. The analysis notes that the FRE (from which the MRE were taken) "are not exhaustive, and that a number of different types or techniques of impeachment are not explicitly codified."¹¹ Specifically, "impeachment by contradiction . . . remain[s] appropriate . . . to the same extent it is permissible in the Article III courts."¹² Military case law also supports this proposition.¹³

MREs 401 and 402 Support Admissibility of the Evidence

The Military Rules of Evidence favor the admissibility of relevant evidence. Military Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."¹⁴ Military Rule of Evidence 402 states the general rule that all relevant evidence is admissible.¹⁵ These two rules form the theoretical foundation of the MRE in their emphasis on the admissibility of relevant evidence. The default rule for any piece of evidence is admissibility (unless, of course, a specific rule or policy says otherwise).¹⁶

Thus, counsel should argue that impeachment by contradiction evidence is relevant because of its tendency to make a fact of consequence in the trial (either a statement of an opposing witness or the credibility of the witness) less probable.

⁶ Cf. *United States v. Banker*, 15 M.J. 201, 211 (1983) (citing several treatises for the proposition that impeachment by contradiction should not apply to a collateral matter). Neither the facts of the case nor witness credibility are collateral matters. *Id.*

⁷ Some courts will not permit impeachment by contradiction of facts asserted during a cross-examination. In the military, however, impeachment by contradiction is available for facts asserted on cross-examination so long as the fact is not collateral. Moody & Coacher, *supra* note 1, at 190.

⁸ 28 M.J. 460 (C.M.A. 1989).

⁹ *Id.* at 467.

¹⁰ In a recent article, two distinguished evidence scholars discuss the tendency to overlook the specific contradiction doctrine in modern evidence law. They note that judges and attorneys tend to forget about the doctrine or blur it together with other doctrines such as "opening the door" or "curative admissibility". See generally Francis J. Gilligan & Edward J. Imwinkelreid, *Bringing the "Opening the Door" Theory to a Close: The Tendency to Overlook the Specific Contradiction Doctrine in Evidence Law*, 41 SANTA CLARA L. REV. 807 (2001). See also Moody and Coacher, *supra* note 1, at 182 (noting that impeachment by contradiction is often misunderstood, misused, or not used at all).

¹¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 608 analysis, at A22-46 (2002) [hereinafter MCM].

¹² *Id.*

¹³ See, e.g., *United States v. Hall*, 58 M.J. 90 (2003) (discussing the interplay between impeachment by contradiction and hearsay); *United States v. Swift*, 53 M.J. 439, 450 (2000), *cert denied*, 531 U.S. 1150 (2001) (observing that an accused who testifies risks impeachment by contradiction or even a later prosecution for perjury); *United States v. Sojfer*, 47 M.J. 425, 427 (1998) (noting that impeachment by contradiction is one of several available methods at military courts-martial).

¹⁴ MCM, *supra* note 11, MIL. R. EVID. 401.

¹⁵ See *id.* MIL. R. EVID. 402.

¹⁶ Military Rule of Evidence 402 provides that all relevant evidence is admissible, "except as otherwise provided by the Constitution of the United States . . . , the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces." *Id.*

Impeachment by contradiction evidence is admissible because MRE 402 favors admissibility.¹⁷ The argument is simple, but it is sound. Military Rules of Evidence 401 and 402 form the theoretical foundation of the MRE, and counsel should have those rules engraved on their hearts (or at least tattooed on the backs of their eyelids), always ready for use in arguing the admissibility of evidence.

MRE 403 Analysis

Military Rule of Evidence 403 permits a judge to exclude even relevant evidence if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”¹⁸ Counsel should keep in mind two important considerations when facing the MRE 403 hurdle with impeachment by contradiction evidence. First, MRE 403 favors admissibility of relevant evidence. Once an attorney has successfully argued that the evidence is relevant, it should come in absent the existence of any of the factors listed in 403.¹⁹ Second, the burden of persuading the judge that MRE 403 requires the exclusion of evidence rests with the opponent of the evidence.²⁰ In other words, the attorney *opposing* admissibility of impeachment by contradiction evidence must persuade the judge that MRE 403 requires its exclusion.

In general, counsel can avoid MRE 403 problems by concentrating their impeachment by contradiction efforts on significant issues in the case. The more significant the evidence—the more closely related to the core facts of the case or critical witness credibility issues—the less likely a judge is to find that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, waste of time, and so forth.

MRE 102 Supports Admissibility

Military Rule of Evidence 102 provides additional guidance on evaluating the admissibility of impeachment by contradiction evidence at trial. According to MRE 102, the rules of evidence “shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the *truth may be ascertained and proceedings justly determined.*”²¹ Military Rule of Evidence 102 sets a high standard—nothing less than truth and justice—for military judges to follow in deciding evidentiary issues, and counsel should not hesitate to remind them of it.

Military Rule of Evidence 102 is not an affirmative rule of admissibility, but it provides a useful reference point for examining an impeachment by contradiction evidentiary issue. Counsel should point out how the impeachment by contradiction evidence will assist the panel in determining the true facts of the case. For issues involving the credibility of witnesses, counsel should connect the concept of justice to the admission of impeachment by contradiction evidence.

Suggested Impeachment by Contradiction Methodology

Preparation

The key to successfully impeaching a witness by any method is preparation.²² This is particularly true with impeachment by contradiction because of the possibility of using extrinsic evidence. In the open discovery system of a military court-martial,²³ there is little excuse for counsel to be taken totally unaware by a witness’s performance on the stand.

¹⁷ For a more detailed discussion of the interplay of MRE 401, MRE 402, and impeachment by contradiction, see Gilligan & Imwinkelreid, *supra* note 10, at 811-16, and Moody & Coacher, *supra* note 1, at 183.

¹⁸ MCM, *supra* note 11, MIL. R. EVID. 403.

¹⁹ See Gilligan & Imwinkelreid, *supra* note 10, at 815. Gilligan & Imwinkelreid note that the list of factors in MRE 403 is exhaustive. *Id.*

²⁰ See *id.*

²¹ MCM, *supra* note 11, MIL. R. EVID. 102 (emphasis added).

²² See Lieutenant Colonel Stephen Henley, *The Art of Trial Advocacy: Impeachment by Prior Inconsistent Statement*, ARMY LAW., Feb. 1998, at 35 (providing an excellent example of how to prepare for another type of impeachment—impeachment by prior inconsistent statement). Colonel Henley’s article provides suggested questions, trial notebook formats, and other materials to assist counsel in preparing to impeach with prior inconsistent statements.

²³ See, e.g., UCMJ art. 46 (2002) (stating that “trial counsel, defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence . . .”) and MCM, *supra* note 11, R.C.M. 703 (stating that the prosecution, defense, and court-martial shall have equal opportunity to obtain witnesses and evidence).

By interviewing witnesses and conducting pretrial investigation of the case, counsel will be able to determine if a particular witness's story will vary significantly from other evidence that could be offered at trial.²⁴

Once an impeachment by contradiction opportunity is identified, counsel should determine whether to go ahead with that method of impeachment. The chief consideration should be the significance of the matter at issue: if it is central to the facts of the case or in determining the credibility of the witness, it will be worthwhile to plan the impeachment. If not, there is little point in wasting anyone's time with a meaningless attempt to impeach a witness on a trivial matter.

Counsel should have witnesses or other admissible evidence identified and ready for presentation at the court-martial. Trial counsel must pay special attention to potential impeachment by contradiction issues in order to be prepared for rebuttal. For example, if the accused claims in a drug case never to have used drugs in his life, a trial counsel will want to be ready with witnesses or admissible evidence to impeach the accused's testimony. The opportunity to impeach with extrinsic evidence will disappear forever if the witnesses and evidence are not at hand.

Listen Carefully

Listen at trial for broad factual assertions on direct that cry out for impeachment by contradiction. Words such as "always," "never," or "not since [insert date or event]" are statements of fact that, in many cases, beg for contradiction. Counsel who have carefully prepared their case will recognize these phrases as the red flags that they are.

Cross-examination can also be a fruitful source for impeachment by contradiction opportunities. Consider the O.J. Simpson trial, when F. Lee Bailey set up Mark Furman, the LAPD detective, for impeachment by getting Mr. Furman to state unequivocally on cross-examination that he had never used a particular racial epithet during the previous ten years.²⁵ The defense was then able to call witnesses who testified that they had heard Mr. Furman use that epithet within the ten-year period.²⁶ Counsel will need to carefully plan impeachment by contradiction opportunities for facts elicited on cross-examination; military courts will permit such impeachment only so long as the fact is not collateral.²⁷

Effectively Use Cross-Examination to Develop the Impeachment

Once a witness has made a factual assertion on direct, counsel must decide whether to pursue the matter on cross-examination, wait until later to introduce extrinsic evidence, or both. Counsel must perform a cost-benefit analysis to determine whether the benefits of cross-examination outweigh the risks.

It may be possible, for example, to get a witness to admit on cross-examination that what he said on direct was wrong.²⁸ For example, a skilled cross-examiner could conceivably force a witness who just testified "the light was red" to admit that it was actually green. "[D]ramatic turnarounds are more the stuff of fiction than courtroom life,"²⁹ however, and there is plenty of potential for counsel, to embarrass themselves trying to get a witness to change his mind on the stand. In some cases, the better course might be to leave the matter alone and call several other witnesses to testify about the light being green.

Cross-examination, however, does serve a useful function in setting up an impeachment by contradiction by fleshing out factual assertions that the witness made on direct. This sets the witness up for a potentially devastating impeachment when

²⁴ For example, in the author's first general court-martial as lead prosecutor, the complaining witness in an indecent assault case made the statement that she had never dated or had any type of relationship with the accused. Several other people, however, had seen them attending social functions together and had specifically observed them kissing and closely touching each other at a party. Through pre-trial interviews of the witnesses, both the trial and defense counsel were aware of the areas in which the complaining witness's testimony differed from the other witnesses at the party. The trial was much like watching the old Nebraska offense: one knew what was coming but could do nothing to stop it. The complaining witness testified as expected, and on the defense case-in-chief, her testimony was impeached by that of three disinterested witnesses. Her credibility—and with it, the government's case—was totally destroyed.

²⁵ See *Live Report: Simpson Trial* (CNN television broadcast, July 27, 1995) (transcript #120-1) (LEXIS, Newsgroup All). In the transcript of the court hearing, Mr. Gerald Uelman, a member of O.J. Simpson's defense team, told the judge that the impeachment witnesses were intended not to prove that Mr. Furman was a racist, but rather that he was a liar. See *id.*

²⁶ See *id.*

²⁷ Moody & Coacher, *supra* note 1, at 190.

²⁸ Mueller & Kirkpatrick refer to this as "close questioning" on cross-examination, and they note that it is a rare thing indeed to succeed at it. See Mueller & Kirkpatrick, *supra* note 2, § 6.43, at 530.

²⁹ *Id.*

the attorney later introduces specific extrinsic evidence contradicting the witness's testimony. Returning to the SPC M'endassity example from the beginning of this article, counsel could structure the cross-examination as follows:

Q: Didn't you say in your earlier testimony that the CG ordered you to stay away from the DISCOM area?

A: Yes.

Q: This order was effective on 1 May 200x?

A: Yes.

Q: And you testified that you have stayed away from the DISCOM area since 1 May 200X?

A: Yes.

Q: You did not attend a party at the HHC DISCOM barracks on 15 May 200x?

A: No.

Q: And you didn't visit the barracks room of SPC John Johnson on the 18th of May 200X?

A: No.

Q: Of course, you were not at the party in the 555th Forward Support Battalion barracks this past weekend?

A: No.

At this point, the trap has been set, and all the attorney needs to do is introduce extrinsic evidence that SPC M'endassity appeared at these locations at a specific date and time. This evidence is not admitted to prove that SPC M'endassity has the character trait of being a party animal, but rather to prove that SPC M'endassity is a liar. It is a subtle distinction, but a critical one.

Counsel should keep in mind that impeachment by contradiction is not the same as impeachment by specific instances of conduct under MRE 608(b). Under MRE 608(b), a cross-examiner can ask a witness about specific instances of conduct that are themselves probative of truthfulness or untruthfulness.³⁰ This would include, for example, questions about a witness falsifying an employment application or lying to a supervisor. When asking these types of questions, the examiner is bound by the witness's answer; MRE 608(b) specifically prohibits the introduction of extrinsic evidence.³¹

Present the Contradictory Evidence

In most cases, an attorney using impeachment by contradiction will seek to introduce extrinsic evidence to complete the impeachment. It is critical to remember, however, that the rules of evidence still apply. A document that impeaches a factual assertion made by a witness, for example, is not independently admissible in evidence unless it has been properly authenticated under Section IX of the MRE.³² Hearsay rules,³³ privileges,³⁴ and MRE 412³⁵ still apply to impeachment by contradiction evidence.

³⁰ MCM, *supra* note 11, MIL. R. EVID. 608(b).

³¹ *Id.*

³² *See id.* sec. IX., at III-43.

³³ *See id.* sec. VIII, at III-39. In fact, in a recent case, the CAAF held that when an out-of-court assertion by a witness is introduced as impeachment by contradiction, it will violate the hearsay rule if the manner of the evidence's presentation makes it inevitable that the fact-finder will have to consider it for its truth. In *United States v. Hall*, the appellant testified that her mother had given her an herbal tea that might have accounted for the cocaine metabolites in her system. The government called a CID agent to testify that the appellant's mother had told him she had never given any such herbal teas to the appellant. The evidence did not fit within any of the hearsay exceptions. The military judge admitted this statement not for the truth of the matter asserted, but as impeachment by contradiction. The CAAF reversed, holding that it was impossible for the members not to consider the statement for the truth of the matter asserted therein. *United States v. Hall*, 58 M.J. 90 (2003).

³⁴ *See MCM, supra* note 11, sec. V, at III-23.

³⁵ *Id.* MIL. R. EVID. 412.

As part of the pretrial preparation process, counsel should ensure that they know how to admit extrinsic evidence as impeachment by contradiction. Few things can damage an attorney's credibility in the courtroom so much as inept and unsuccessful attempts to introduce evidence.

Present Proper Argument

Although not technically part of the impeachment itself, closing argument is nevertheless a critical component of impeachment by contradiction. Counsel should point out the impeachment and its significance to the fact-finder; otherwise, there is little point in doing it. For instance, in the SPC M'endassity case, counsel could exploit the impeachment as follows:

Let's talk about SPC M'endassity's credibility. She came into this courtroom and testified under a grant of immunity. She told you that she was telling the truth, but she also said a couple of other things. She said she had stayed away from the DISCOM barracks area after May of 200x. But you heard testimony from five other witnesses who saw her in the DISCOM barracks after May 200x. She was at a party at HHC on 15 May. She visited SPC Johnson in his room on 18 May. Just last weekend, she attended a party at the 555th FSB barracks. She lied to you when she testified she had stayed away from the DISCOM barracks. And so you must ask yourselves: what else did she lie about? Or better yet: did she tell the truth about anything?

Conclusion

Impeachment by contradiction can be a valuable part of an attorney's advocacy arsenal. Effective use of it requires preparation, planning, and a sound understanding of the evidentiary rules relating to impeachment. The ability to use extrinsic evidence makes this method of impeachment especially powerful. For significant evidentiary or credibility issues, impeachment by contradiction may well be the best tactical choice for counsel to make.