

Reexamining Rule 609 – Prior Conviction Impeachment

Monica Milton, NACDL

Strengthening
the **sixth**
JUSTICE FOR ALL

Roadmap

- I. Background on prior conviction impeachment:
 - History;
 - Maine;
 - Other states of interest.
- II. The need for reform
- III. What advocates can do right now
- IV. Proposed rule changes



Historical Context

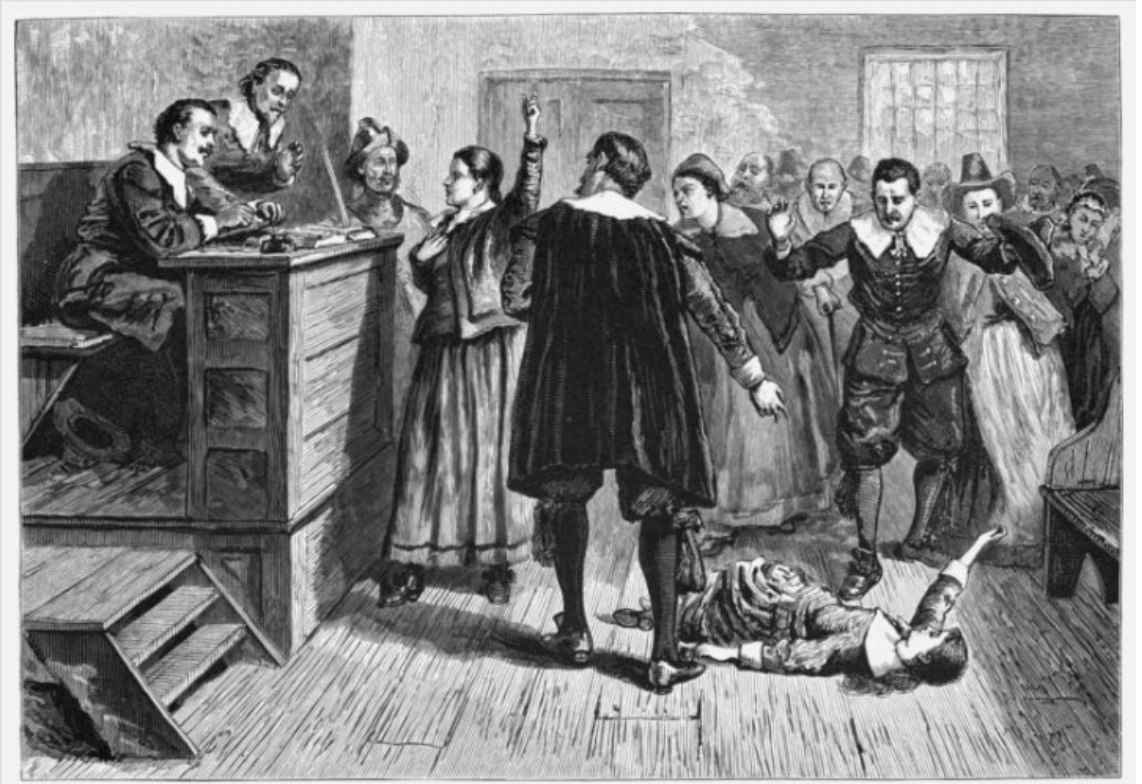
Prior Conviction Impeachment is Rooted In English tradition of “Competency Rules”

- Deals with whether a witness could offer testimonial evidence.
 - English traditions more strict - barring anyone with an interest in the outcome of a case.
 - Defendants could not testify because the assumption was it would necessarily be perjurious.



American Competency Rules

- Interested parties.
- Those who refuse to swear oaths or lack a religious affiliation
- Those with criminal convictions



Racialized Exclusion

- African-Americans
- Native Americans
- Chinese Americans (included in category of non-white) prohibited from testifying



Witness
disqualification
through dishonor

No honor = no
credibility

Reform lead by Chief Justice John Appleton, of the Supreme Court of Maine

1864 Maine enacted
the first general
legislative measure
deeming parties
“competent” to testify



Chief Justice John Appleton Cont'd

- Defendant's testimony is crucial in order to ascertain the whole truth
- That the defendant is most apt to be familiar with the true facts
- that he is no more interested than the complainant;
- Testimony from defendants important and undermines the presumption of innocence to presume perjury.



Impeachment

Transition to Impeachment

- Prior crimes
- Prior Bad Acts
- Reputation for Truthfulness
- Bad moral character



FRE 609 Was Born

- Prior to 1965, most prior convictions were admissible to impeach defendants.
- *Luck v. United States* influenced the future of prior convictions
- Created discretion to exclude prior convictions and acknowledged the potential for prejudicial effect.

Prior conviction impeachment usually falls into two categories

2 categories of admissible conviction under 609:

1. **Felony conviction**, if court finds that its probative value outweighs the prejudice;
2. Conviction (felony or misdemeanor) for crime that “**involved dishonesty or false statement**”* –generally no judicial discretion to exclude.

Prior conviction impeachment in Maine

2 categories of admissible conviction under **Me. R. Evid. 609**

1. **Felony conviction**, if court finds that its probative value outweighs the prejudice;
2. Conviction (felony or misdemeanor) for “any crime if the court can reasonably determine that establishing the elements of the crime required proving-or the witness admitting-a dishonest act or false statement”.

* Maine Courts required to conduct a reverse 403 balancing

Other states of interest

- **Hawai'i & Kansas:**
 - No prior conviction impeachment of those testifying in their own defense in criminal trials (unless the witness is found to have “opened the door”);
- **Montana:**
 - No prior conviction impeachment of any witness (unless the witness is found to have “opened the door”).

Constitutional Right to Testify

- Every defendant's right to testify on his or her own behalf is rooted in the Fourteenth Amendment's due process clause, the Sixth Amendment's compulsory process clause and the corollary to the Fifth Amendment's protection against compelled testimony. See Rock v. Arkansas, 483 U.S. 44, 51-52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)



The Need For Reform

Flaws with Underlying Rationale

1. Prior convictions are not necessarily the outcome of a well-functioning criminal legal system.
 - Systemic inequalities burden D's ability to go to trial
 - Pleas may not relate to conduct on the ground
 - Discrimination in the system means one defendant may have no prior convictions to be impeached with while another may, even with identical behavior.
2. Even prior conviction indicates actual past conduct, no proof that we can learn something about a witness's propensity for lying from the existence of a previous criminal conviction

Silences Defendants: Double Edged Sword

- Governmental conduct and evidence may go unchecked
- Fact finders may assume guilt
- The lost testimony may constitute an actual narrative of innocence
 - John Blume

What do fact-finders do with prior convictions?

- Lower the burden of proof
- “Evidence against a defendant with a prior conviction appears stronger to the jury”

Unfair prejudice

- Deterrence of testimony:
- Forbidden propensity risk.
- Prior conviction impeachment by its very nature is highly prejudicial.
 - Instructions can't fix this.
- Risk jurors will convict someone they view as “bad.”

Number of People with Felony Convictions Has Drastically Increased



Size of U.S. criminal legal system has increased exponentially.



Number of adults with felony convictions increased from fewer than two million people in 1948 to nearly 20 million in 2010

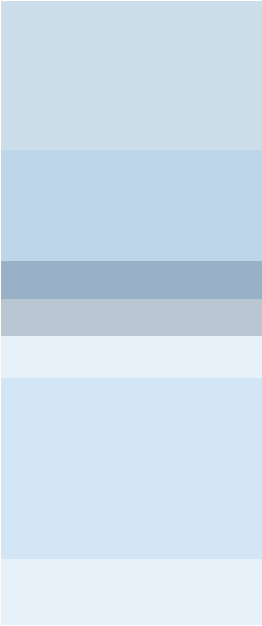
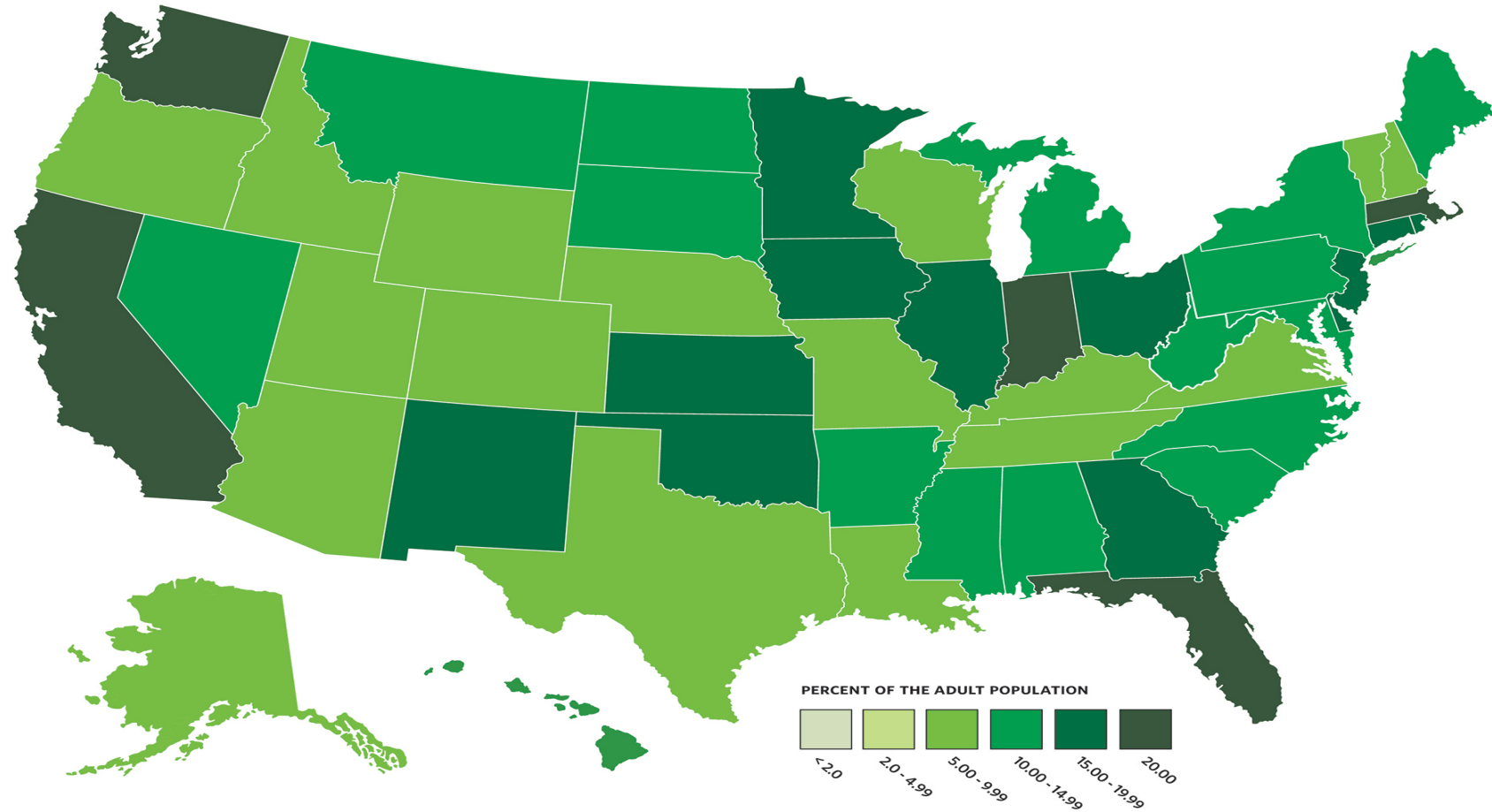


The statistics are even more grim for African-Americans, with approximately 33 % of the African-American adult male population having a felony conviction

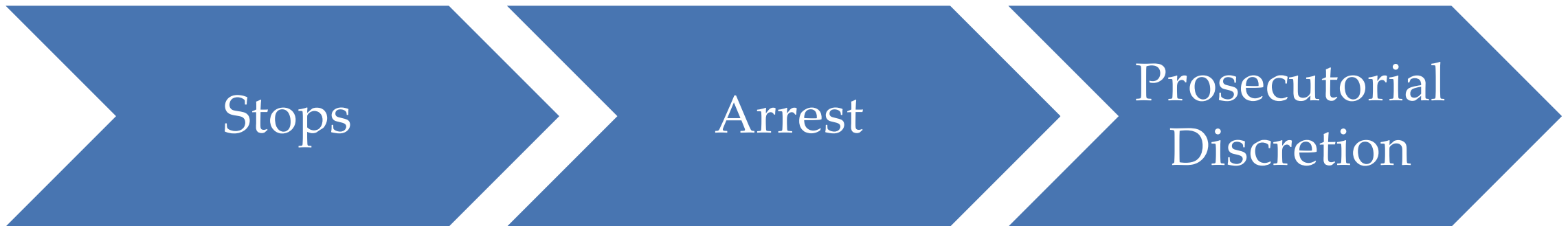
POPULATION OF PERSONS WITH FELONY CONVICTIONS



PERCENT OF AFRICAN AMERICAN ADULT POPULATION WITH FELONY RECORDS BY STATE, 2010



System Actors and Implicit Bias



A System of Coerced & Untried Convictions

- Throughout the pretrial process, the balance of power is heavily skewed toward prosecutors.
 - charge the same act as a misdemeanor or a felony;
 - Prosecutors may add enhancements
 - Leverage a prior convictions

Racial Disparities In The Courtroom

- Race has evidentiary value in America's courtrooms in that it "tends to prove or disprove something in the American justice system just as it does in society at large."
- Prior Convictions presents the risk Black pathological criminality.

Racial Disparities In Convictions: Juries treat defendants of color differently



Juries formed from all-white jury pools convict black defendants (16 percentage points) more often than white defendants

Gap in conviction rates is entirely eliminated when the jury pool includes at least one black member.



What Advocates Can Do Now

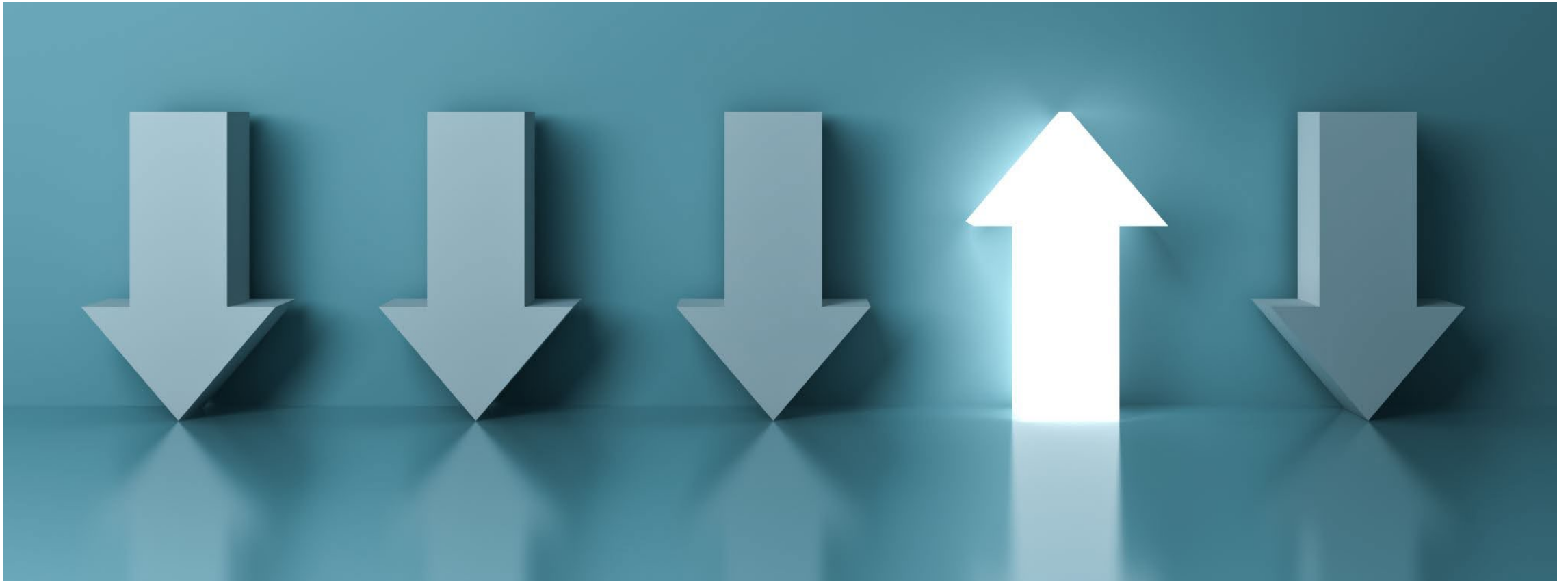
Arguing probative value under ME case law

- Recency or remoteness of the prior conviction.
- "the gravity of the offense, and whether prior conviction is suggestive of untruthfulness
- The cumulative effect of multiple convictions
 - cf. State v. Gray, 755 A.2d 540 (rejecting the defendant's argument that he was unfairly prejudiced by evidence of fourteen prior convictions, in part because that evidence was probative of his credibility)
- The similarity between the prior conviction and the pending charge
- Overemphasis of the evidence and the risk that the jury would improperly compare the details of the prior convictions to those of the current case.

Constitutional Issues

- **Right to testify.** "A criminal defendant has a constitutional right to be heard in his own defense. State v. Tuplin, 2006 ME 83, ¶¶ 9–11, 901 A.2d 792, 795–96..." State v. Ericson, 13 A.3d 777, 2011 ME 28 (Me. 2011)
 - Note state constitutional protections as well as federal.
 - Note that it was a Due Process claim, citing the right to testify, that led Hawai'i to prohibit this form of impeachment of those facing criminal charges.
- **Right to a fair trial.**

Raise and Preserve the Issue for Appeal



Raising the Issue



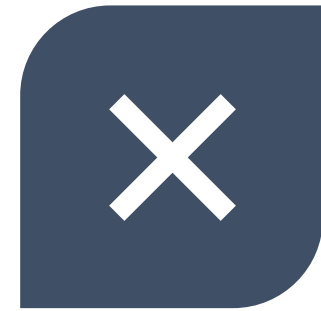
MAKE TIMELY OBJECTIONS



CLEARLY FRAME THE ISSUE
FOR APPEAL



MORE DEFENSE-FRIENDLY
STANDARD OF REVIEW (DE
NOVO VS. PLAIN ERROR)



EASIER TO OVERCOME
HARMLESS ERROR
ARGUMENTS

Waiver vs. Forfeiture

Waiver

- Intentionally relinquish a known right
- Invited error (seek a particular result, cannot challenge same on appeal).
- Expressing satisfaction (no objection).
- Extinguishes the error and courts don't need to review.

Forfeiture

- Failing to timely raise an issue for appeal
- Failing to object
- Failing to seek a final ruling
- Will be reviewed for obvious error

Making the Record



Object! Object! Object! (Timely)



Get a final ruling



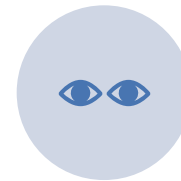
Memorialize off-record discussions-side bars, in-chambers.



Watch for inadvertent waiver



State legal grounds for the objection(s)



Be the eyes and ears of the appellate court: make note of glitches, physical movements of witnesses, or inability to assess witness demeanor.



Motions practice



Changing The Rule

Reforms

1. Eliminate Impeachment with Prior Convictions
2. Permit Only Impeachment with Evidence of Lying under Oath

Impeachment with Evidence of Lying under Oath – Rule Proposal

EVIDENCE OF LYING UNDER OATH. A witness, not the defendant, may be impeached with evidence that he or she was untruthful about a material matter when making a statement under oath within the past ten years. This provision does not apply to past testimony by a witness as a defendant.

Reforms

1. Eliminate Impeachment with Prior Convictions
2. Permit Only Impeachment with Evidence of Lying under Oath
3. Permit Only Impeachment with Prior Convictions Involving Dishonesty or False Statement

Impeachment with Prior Convictions Involving Dishonesty or False Statement – Rule Proposal

IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION.
A witness, not the defendant, may be impeached with evidence that he or she was convicted of perjury or subordination of perjury, false statement, embezzlement or false pretense within the past ten years if the probative value of the conviction outweighs the risk of unfair prejudice.

Reforms

1. Eliminate Impeachment with Prior Convictions
2. Permit Only Impeachment with Evidence of Lying under Oath
3. Permit Only Impeachment with Prior Convictions Involving Dishonesty or False Statement
4. Prohibit Impeachment with Prior Convictions of Criminal Defendants

Prohibit Impeachment with Prior Convictions of Criminal Defendants – Rule Proposal

IMPEACHMENT OF DEFENDANT BY EVIDENCE OF A CRIMINAL CONVICTION. In a criminal case where the defendant takes the stand, the prosecution shall not ask the defendant or introduce evidence as to whether the defendant has been convicted of a crime for the purpose of attacking the defendant's credibility. If the defendant denies the existence of a conviction, that denial may be contradicted by evidence that the conviction exists

Reforms

1. Eliminate Impeachment with Prior Convictions
2. Permit Only Impeachment with Evidence of Lying under Oath
3. Permit Only Impeachment with Prior Convictions Involving Dishonesty or False Statement
4. Prohibit Impeachment with Prior Convictions of Criminal Defendants
5. Permit Criminal Defendants to Impeach the Witnesses Against Them

Permit Criminal Defendants to Impeach the Witnesses Against Them – Rule Proposal

DEFENDANT'S RIGHT TO IMPEACH. In a criminal case, impeachment by prior conviction is prohibited, except where the exclusion of such evidence would violate the defendant's constitutional rights.



Thank You

Questions: mmilton@nacdl.org