

## IMPEACHMENT BY OMISSION

In this example, you want the out-of-court omission credited.

On direct, the witness has said that the person who robbed her had a scar on her cheek. Your client has a very noticeable scar on his cheek. In a statement given to the police, which she signed, the witness never said anything about a scar.

- Q: You got a pretty good look at the person who robbed you?
- A: Yes.
- Q: You were able to see his face?
- A: Yes.
- Q: You spoke to the police right after you were robbed?
- A: Yes.
- Q: The police arrived just minutes after the event?
- A: Yes.
- Q: They drove you to the police station?
- A: Yes.
- Q: The police asked you questions?
- A: Yes.
- Q: You remembered everything that had just happened?
- A: Yes.
- Q: You remembered it pretty clearly?
- A: Yes, very clearly.
- Q: You wanted the person who robbed you to be caught? A: Yes.
- Q: You wanted to give the police as much information as you possibly could?
- A: Yes.
- Q: The police asked you to describe the person?
- A: Yes.
- Q: You told them everything you noticed about the person?
- A: Yes.
- Q: The police were typing as you spoke with them?
- A: Yes.
- Q: You had a chance to review the statement?
- A: Yes.
- Q: You had a chance to make any changes that you wanted to make?
- A: Yes.
- Q: You did make some changes?
- A: Yes, I did.
- Q: You signed the statement?
- A: Yes.
- Q: You signed right under a sentence saying that the statement was true, accurate and complete?
- A: Yes.
- Q: And the statement was true, accurate and complete?
- A: Yes.
- Q: When you described the person who robbed you, on the very day of the event, you did not say the person had a scar?
- A: Yes I did.

- (Have statement marked, show it to the government.
- Q: I'm showing you defense one for identification. That is a copy of the statement you gave to the police on (day of robbery)?
- A: Yes

[The next series of questions and any of the following questions which refer to the length of the statement may not be appropriate in a given case. On the one hand, the statement is so long that you would expect it to cover all details. On the other hand, if the only use you make of the statement is to impeach on one point, the fact finder may quite correctly assume that everything else is consistent. The choice you make for your case depends on the circumstances of your particular case.]

- Q: The statement is five pages long
- A: Yes
- Q: That's your signature at the bottom, take a moment and look up when you are done.
- A: You never mentioned the word scar in the five page statement you gave to the police the very night of the incident.

With impeachment by omission, you probably do not want to introduce the document because it will likely be filled with prior consistent statements which will overwhelm the impact of any omissions. Also, a typical redirect by the government would be something along the lines of "Did the police ask you about any scars?" To limit the effectiveness ((if any)) of such redirect ((which, by the way, is leading and should be objected to)) you should make sure to have "close out" sentences in the statements you take from witnesses, particularly when they are describing people. E.g. "The person had a medium complexion, braces on his teeth, light eyes, and no facial hair. I DO NOT REMEMBER ANYTHING ELSE ABOUT THE PERSON'S FACE."

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