1. In this presentation, we will provide an overview of impeachment by character for untruthfulness.

2. Impeachment by character for untruthfulness is just one of the ways that a witness’ credibility may be attacked. But in and of itself, impeachment by character is a large and fairly heavily tested topic. In fact, there are three different topics that are included under the rubric of impeachment by character, which will be the subject of the next three video presentations in this module.

First, we will talk about impeachment of a witness’ character for truthfulness through the reputation or opinion testimony of second witnesses.

Second, we will talk about impeaching a witness’ character for truthfulness by cross-examining them about acts in their past that are probative of truthfulness or untruthfulness, regardless whether they ever resulted in an arrest, criminal charge, or conviction.

And third, we will talk about impeaching a witness through evidence that they were convicted of a crime, which is covered as a separate topic since it is dealt with under a separate rule with separate standards from prior acts that do not result in convictions.

3. You hopefully recall that when we discussed character evidence over the course of five modules, we developed an approach that has us start by identifying whether the evidence is past acts or general tendency evidence as opposed to evidence about the event in question, such that a character evidence objection would even get off the ground. We talked about two theories where evidence wasn’t barred as character evidence, either because it was past acts offered circumstantially to show something other than action in conformity with a propensity on a particular occasion – the so-called MIMIC purposes – or because it was character evidence in any of its three forms in the relatively rare instance where the trait itself was an element of a claim, charge or defense – where character is “at issue,” so to speak – and so it is being offered to prove the trait itself, not action in conformity therewith on an occasion. We also talked about various exceptions that might apply to allow evidence to be used for the propensity inference. These included a criminal defendant offering
evidence of his good character or the victim’s bad character for a relevant trait – limited, of course, by the rape shield law where applicable. They included similar acts of the defendant in sex assault or molestation cases, which is sort of an inverse of the rape shield law which expands admissibility of defendant’s sexual history. And we talked about habit and custom, which is where there is sufficient regularity and specificity, and the act is of a sufficient semi-automatic nature, that we allow it to suggest that someone acted in conformity with the routine practice or behavior on a particular occasion.

We also mentioned briefly that there was one other exception that we were going to get to later, and that is character evidence used to impeach witness credibility. Well, later has now arrived. Before we get into the rules on impeachment by character for untruthfulness, and the procedures for introducing such evidence, let’s make sure we understand conceptually the distinction between using character evidence to prove the underlying events in the case, and using character evidence to attack witness credibility.

4. The classic character inference involves evidence that the defendant has a general trait, or has acted in the past in a way that demonstrates a general trait.

It is used to suggest that the defendant acted in conformity with that trait on the event of the particular occasion at issue in the lawsuit.

And as a result, the jury is asked to conclude that someone did in fact act that way on the event in question. So, for example, you have a history of stealing bikes, that shows a propensity to steal bikes, and I want to use that to suggest that you stole a particular red bike on March 5, for which you are now facing prosecution.

5. With impeachment by character for untruthfulness, it starts the same way. We have evidence that witness has a general trait of lying, or that the defendant has acted in the past in a way that demonstrates a trait of dishonesty.

We ask the jury to engage in the propensity inference to suggest that the witness is acting in conformity with that general trait of dishonesty on a particular occasion. However, the particular occasion is not the March 5 bike theft. It’s the trial that the witness is currently testifying in.
And we use this evidence to try to show that the witness should not be believed in his or her testimony, because of the chance that they are acting in conformity with their trait of dishonesty when they testify. Sometimes, it should be obvious how this is being used. If an eyewitness to the bike theft has lied in the past, that may make it more likely that the eyewitness is lying now during their testimony, but how the witness has behaved before says nothing about how the defendant likely acted on the event in question. It’s not the defendant’s history after all, it’s the witnesses. The only way it connects to showing whether the defendant committed the crime is because it casts doubt on whether we can believe the witness when they say the defendant committed the crime. But what if it’s evidence about the defendant himself, or maybe about the plaintiff in a civil case? You can imagine that might make it a bit tougher to determine whether the character evidence is offered to show something that happened in the case, or whether it’s offered to attack witness credibility.

6. But the rules governing character evidence to attack witness credibility are different than the rules governing character evidence to suggest what went on in the case itself.

Thus, it is critical that you be able to distinguish when character evidence is being used for impeachment or for classic propensity. That’s the bad news.

The good news is, there’s a fairly straightforward two-step test you can use to determine whether character evidence is being used for impeachment.

7. So what is the two-pronged test?

The first question is, is the character trait in question the trait of truthfulness or untruthfulness, as opposed to violence, or laziness, or drunkenness, or promiscuity, or any other trait. Only the character trait of honesty or dishonesty can be used to attack a testifying witness’s credibility through the character inference.

No other trait is permitted. You can’t say: you’re a drunk, so you’re likely a dishonest witness, or you’re violent, so you’re likely a dishonest witness. Only honesty or dishonesty may be used.
Now like virtually every rule in law, there is a caveat to this which we’ll get to soon when we talk about impeachment by conviction, but for the most part this is a good rule to follow.

The second question is, is a party trying to prove that trait of honesty or dishonesty in a testifying witness?

If someone hasn’t testified before the jury, hasn’t told them what went on in the word in connection with the underlying case, the jury doesn’t need to evaluate how honest they are, because they are not a source of information the jury is being asked to rely upon. So if you’re trying to prove that the plaintiff is dishonest, but the plaintiff hasn’t testified, you cannot rely on a theory of impeachment by character. We’ll practice utilizing this two-step test, and it will become much more familiar to you, as we do lots of examples together throughout this module and beyond.

8. Okay, let’s actually get to the law. Where do we get that character evidence may be used to impeach?

Well, if you recall, Rule 404(a)(1) laid out the general ban on character evidence used for the propensity inference.

Then 404(a)(2) laid out some exceptions in criminal cases.

The first one was the criminal defendant offering good character, and the prosecution’s right to rebut if defendant opened the door.

The second was a criminal defendant’s right to offer evidence of the victim’s character, and the prosecution’s right to rebut either by rehabilitating the victim’s character or going tit-for-tat and offering evidence of the defendant’s bad character.

The third was what I called the homicide quirk, which is where in a homicide case, because the victim’s not around to dispute the defendant’s account, even non-character evidence that the victim was the first aggressor triggers the prosecution’s right to offer reputation and opinion evidence of the victim’s peacefulness.

But we skipped over 404(a) subsection 3. That provision says that there is an exception to the ban on propensity evidence if admissible under Rules
607, 608, and 609. So it is to those rules that we now turn.

9. We’ve already seen Rule 607, and all it says is that “Any party, including the party that called the witness, may attack the witness's credibility.” So it doesn’t say how you can use character evidence to impeach, it just lets you know that in theory, a party could impeach the character for truthfulness of their own witness if they wanted to. It’s rules 608 and 609 that lay out the substance of how to use character to impeach.

10. **Rule 608 is titled: “A Witness's Character for Truthfulness or Untruthfulness.”** Subsection a, titled “reputation or opinion evidence,” provides:

“A witness’s credibility may be attacked or supported by testimony about the witness’s reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness’s character for truthfulness has been attacked....” Notice that it has to pertain to a testifying witness, and it has to be the character trait of truthfulness or untruthfulness, no other trait is allowed. The second sentence also is consistent with the general ban on bolstering evidence, but providing that the attack has to come first.

So Rule 608(a) lays out our first method for impeaching by character: calling a second witness to testify in the form of reputation or opinion about a first witness’ character for truthfulness.

11. The other part of Rule 608, subsection (b), titled “specific instances of conduct,” says: “(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of [the witness]....” Again, notice how it’s focused on truthfulness or untruthfulness, not any other trait, and how it has to be that trait in a testifying witness, not just a party.

So Rule 608(b) lays out the second method of impeachment by character: cross-examining the witness him or herself about unconvicted acts pertaining to honesty or dishonesty. Now, you may be looking at the rule and thinking, “Wait a minute. I know this rule is kind of dense, and it’s new to me, but I’m pretty sure I don’t remember it saying anything about
unconvicted bad acts, so why is he saying that that’s what this second method pertains to?” Well, the reason is that there is a third method which is specific to acts that have resulted in a criminal conviction, and so to distinguish that, this second method is referred to as pertaining to unconvicted bad acts.

12. That third method we just alluded to is set forth in Rule 609. It's a very long, multi-part rule, but the first sentence makes it clear that it pertains to “attacking a witness’s character for truthfulness by evidence of a criminal conviction.”

So that’s our third method of impeachment by character, introducing evidence of convictions. And as a practical matter, one big difference between convictions and unconvicted bad acts is that whereas you can prove up a conviction used for impeachment either by cross-examining the witness or by introducing a record of conviction, for unconvicted bad acts, where there is no record of conviction, your only option is cross-examining the witness him or herself.

13. Remember when we first talked about character evidence, and we said that you need to consider not only whether it’s a circumstance where character evidence is admissible, but even if it is, whether the evidence is in the right form.

We said that character evidence would come in one of three forms: reputation, opinion, and specific instances. This framework of forms of evidence sort of fits for impeachment by character, but we’ll need to make one key modification.

With impeachment by character, you still have reputation, and you still have impeachment. However, with specific instances, we have to split it up into two subcategories.

There are specific instances of prior acts that have not resulted in convictions.

And then there’s convictions themselves.

In terms of the impeachment methods we’ve discussed in this presentation, if you want to introduce reputation evidence regarding a witness’ truthfulness or untruthfulness, the way to do it is by calling a
second witness to testify about the first witness.

So to with opinion evidence about a first witness’ veracity, you call a second witness to testify about the first witness.

These two things together are covered by that first method we discussed under Rule 608(a).

If you want to get into specific acts that have not resulted in a conviction, you’re going to have to cross examine the witness themselves about it.

That’s that second method we mentioned under Rule 608(b).

Then, if you want to bring up a specific act that has resulted in conviction, you’re going to do so either by cross-examining the witness or by introducing the record of conviction.

That’s that third method we addressed under Rule 609. So those are our three methods of impeaching a testifying witness’ character for truthfulness, and will be the subject of each of the next three presentations, in that order.

Accordingly, our next video will deal with method 1: calling a second witness to testify in the form of reputation or opinion about a first witness’ character for honesty.