

7 basic points for impeaching with prior inconsistent statement

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Lawyers often seek to impeach the credibility of a witness on cross-examination by showing that the witness said something different at an earlier time. But attempted impeachment with a prior inconsistent statement is frequently ineffective; it's surprisingly easy to have the whole thing fall flat.

If you're going to try to impeach a witness, make sure it's worth doing, and if it is, take the trouble to do it right.

Here are some basic points about impeachment:

1. **Stop and think whether it's worth doing at all.**

People say inconsistent things all the time. Not every little thing is important. Don't eat up precious time and patience trying to impeach a witness over something that's basically meaningless. It's easy to look petty or lose the jury's attention.

2. **Stop and think whether it can be done informally.**

Not every inconsistency requires a full-fledged confrontation with a transcript. Many witnesses will acknowledge right away that they made a mistake or said something different on an earlier occasion.

3. **Have the prior statements at your fingertips.**

One of the many reasons that you need to prepare a trial notebook is that you need (1) an outline of the anticipated testimony, and (2) cross-references to page numbers so you can find the earlier statements when you need them. The middle of a cross-examination is a bad time to be leafing through a thick transcript, trying to find the page you want. And yellow sticky notes tend to fall off. If you can't find it immediately, you need to move on.

4. **Make sure you have a prior statement that is both (a) inconsistent and (b) clear.**

If the statement is not clearly inconsistent, the attempted impeachment may not work. The witness may fight you, the jury won't get it, or both. The prior statement not only needs to be inconsistent; it needs to be clear. A cumbersome or sloppy question, or a purposely vague answer, may make impeachment difficult. Often, the lawyer has a good deal of control over this — for example, if the prior statement was made in a deposition. We'll talk more about deposition questions in a future column.

5. **Take the time to set it up.**

If you're going to use a transcript, take the time to do it right. Set the stage. Make sure the jury knows what a "deposition" is (or an "affidavit," or anything else that isn't obvious). Take the time to show that a deposition is a reasonably formal proceeding, with a stenographer there to create a record and (usually) a lawyer for the witness. Make sure you point out that the testimony was under oath, just like courtroom testimony (as an added benefit, under the Federal Rules of Evidence, a prior inconsistent statement made under oath is admissible for its truth). Establish that the witness had a chance to prepare beforehand. Establish that the witness had a chance to read the transcript afterward and make corrections (and, ideally, signed it). And so on.

6. **Confront the witness directly.**

Confront the witness with the prior inconsistency directly. But just point it out; don't give the witness room to wiggle:

Mr. Jones, will you turn to page 68 of your deposition transcript?

Do you have that page in front of you?

Will you read along with me?

I asked you: ... [pause] ... "What color was the traffic light?"

And your answer was ... [pause] ... "It was green."

Did I read that correctly?

That was your sworn testimony in April 2010, correct?

Don't let the witness read it aloud; read it yourself. You won't like the way he reads it. And don't give him a chance to explain. Don't ask, "Can you tell us why you said it was green then, and you say it was red now?" You won't like the answer.

7. Don't argue with the witness about it.

Often, the best — and most prudent — course is to point out the inconsistency and to leave it at that. Many lawyers like to add another question or two:

Is it fair to say that your memory [of the event] was better three years ago than it is today?

or

Which statement was truthful: the one you gave under oath three years ago, or the one you gave under oath here today?

or

In fact, the truth is that the traffic light was red, right?

This may work, or it may not. It certainly has its dangers. It may lead to squabbling with the witness. The witness may also take the opportunity to try to squirm out of the inconsistency. You'll have to make your best judgment as to what is most effective. Usually, though, if you've made your point, you probably ought to stop right there.

In Judge Saylor's experience, nothing makes the jurors' eyes roll quite as much as a poorly executed effort at impeachment. Sometimes it's so tedious that the mere act of picking up the deposition transcript is enough to elicit silent groans from the jury. So pick your spots and try to do it right.

Previous installments of Tried & True can be found here. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.