

Cross-examination and the three C's of impeachment

By: F. Dennis Saylor IV and Daniel I. Small ◉ November 2, 2017

For this week's column, we'll turn things over to Dan for some thoughts on impeaching witnesses.

Could it be? Did you hear it right? You look discreetly at your co-counsel, and her efforts to mask a look of surprise and elation confirms it: The other side's key witness just directly contradicted something he said in his deposition. It's the kind of adrenaline rush that trial lawyers live for.

Then a hint of panic creeps in with the surprise. What do I do now?

First, don't risk offending the judge or jury, or alerting opposing counsel, by demonstrations of glee. Keep your poker face throughout the trial, no matter what. Be patient and wait for cross-examination. You'll get your turn.

And don't forget your common sense and what you're trying to achieve. Trials are about persuasion — ideally, dramatic persuasion. You want to maximize the drama and the clarity of the contradiction. That's where the "three C's" of impeachment come in: commit, credit and confront.

1. **Commit.** Trials can be long and complicated. The witness may have made the statement that you want to impeach hours or even days ago. Make it fresh and clear to the jury by repeating it. At the same time, you are locking the witness into the statement, trying to prevent him from wiggling out, once confronted, by claiming confusion or mistake. The simplest way is just to ask:

"On direct, you testified X?"

Sometimes, you don't care which version is true; you just want to show the jury the witness can't keep his story straight. However, if you believe the version on direct was false, don't let the witness repeat it without making that clear to the jury. Instead of the neutral question above, ask something like:

"So, your story on direct was X?"

"You want the jury to believe X?"

Don't give up until the witness has either committed to, or backed off from, the statement.

2. **Credit.** Assuming the earlier statement is the one you prefer, you want to give it as much weight and credibility as possible and try to anticipate and block any effort to explain or waffle. Don't just focus on the prior statement itself; set it in context.

For example, as we pointed out in our last column, if it's a statement from a deposition, ask questions about the deposition process — that the witness had a chance to prepare, his lawyer was at his side, he took an oath to tell the truth, and so on.

But a word of caution: Slow down. Lawyers too often jump too fast to the document. Remember the bigger picture: The issue is not the document; it's whether the original statement was correct, or maybe just whether the witness is a liar. Many times — depending on the issue and the level of certainty — you can confront the witness with the fact and only then make a decision whether to bring in the prior statement. In other words, rather than rushing to ask:

"In your prior statement, you said the light was green?"

Maybe you should start with:

"The light was green, wasn't it?"

Sometimes on cross-examination you ask questions when you don't care what the answer is. It can go either way. Maybe the witness will give in and give it to you. If not, then you can decide whether to use the prior statement, and hopefully show that you were right all along.

Think, too, about sequencing. Sometimes, if the "credit" is going to take a while, you may want to put it first, so as not to create too long a gap between "commit" and "confront." If there are multiple uses for the prior statement, maybe "credit" it early. I have had cross-examinations in which the very first thing I did was credit the prior statement and leave a copy in front of the witness.

3. **Confront.** Now that you've locked in the current testimony and the weight of the prior statement, confront the witness with the inconsistency. Again, don't be in a hurry. It's not about the piece of paper. You don't have to show the document right away. Instead, you might ask:

"In fact, in that sworn deposition, you said something completely different than your story today?"

"In your sworn deposition, you said X?"

Don't paraphrase or summarize; quote the prior statement precisely. If you do, whatever the answer is, you're happy:

"Yes"— Great, you won the point!

"No"— Confront with the transcript.

"I don't recall"— Refresh with the transcript.

To confront effectively, give the witness a copy, display it to the jury if allowed, then read it out loud and ask the witness if you read it correctly.

Then consider other ways to emphasize the prior statement. Do you want to try to offer it as an exhibit? To blow it up either electronically or on poster board? By itself, or comparing the two statements? Technology in the courtroom creates even more potential for drama. Use the monitors. Underline or highlight the prior statement.

Consider carefully the point you want to make, or whether there even is a point. I once observed a lawyer go on at length, impeaching a minor witness on a minor conflict from a prior statement. When I asked counsel later what his theme was with that witness, the answer was, *"Oh, nothing really. He didn't hurt me at all."* Really? Then why impeach? Why not just say, *"No questions!"*

Finally, remember that impeachment alone isn't the only goal. Under the right circumstances, you can turn a "mere" prior inconsistent statement into something more — a demonstration that your side (and by extension, you the lawyer) are a credible and reliable source of the truth.

Previous installments of Tried & True can be found. 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.

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