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Impeaching with a deposition

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Impeachment with a prior inconsistent statement begins, of course, with a prior statement.

Witness statements can be sorted into three basic categories: (1) statements made under oath with a transcript (such as a deposition, grand jury proceeding or pre-trial hearing); (2) statements made under oath without a transcript (such as an affidavit); and (3) everything else (such as a statement to a police officer or investigator).

Effective impeachment using a statement made in, say, a police report can be difficult, because the witness can say (often quite credibly) that he was misquoted.

Statements in affidavits are usually easier to use, but the witness will often say that a lawyer drafted it, and that's why it isn't quite right. Of course, if that's all you have, you have to make do.

But let's focus on the first category — specifically, depositions. By far the most common way that witnesses are impeached in a civil case is by confronting them with the transcript of their deposition. This rarely goes as smoothly as it should; the problem normally begins with the deposition itself. There are at least three reasons for this.

1. **The questions aren't clear.**

Deposition questions are often tangled, fragmented or otherwise muddled. Some of that is inevitable. A lawyer taking a deposition is normally questioning the witness for the first time, and the lawyer doesn't normally know what the witness is going to say.

Because the testimony may take all kinds of unexpected twists and turns, the lawyer has to make up many of the questions on the spot. Some degree of fumbling is always going to occur.

However, lawyers tend to make matters worse in a variety of ways. First, some lawyers barely prepare their deposition questions at all. But just because you can't prepare for everything doesn't mean you can't prepare for anything. Prepare as much as you can, and that will help you even when you're operating well off your outline.

Second, many lawyers structure their questioning of deposition witnesses around a stack of exhibits. That's fine to a point, but it often results in awkward or ungainly questions, because the lawyer tends to incorporate material from the documents into the questions.

Also, many attorneys become prisoners of their exhibit stack and fail to ask questions about other topics, or to follow up on answers not strictly tied to a document.

Third, many lawyers aren't thinking about the trial at all. Lawyers typically examine many more witnesses by deposition than at trial; the ratio is probably greater than 100 to 1. Because so few civil cases go to trial, the attorney is often thinking solely about obtaining concessions for use in summary judgment, and little else.

In any event, what you wind up with is something like this:

Q: *So, insofar as you — strike that. Did you — strike that. With regard to the color of the, um, traffic light as to which you've previously testified, and as reflected in Exhibit 17.3 that we've previously reviewed, can you tell me — can you say — what, if any color you observed with regard to that light?*

A: *I seem to remember, although I wouldn't swear to it, that some greenish tones may have been involved.*

All right, we're exaggerating — a little. But this is a constantly recurring problem. If you ask a bad question in a deposition, try to fix it right then and there:

Q: *I'm going to try to be more clear. What color was the traffic light?*

2. **The answers aren't clear.**

Deposition witnesses (like trial witnesses) often give vague or rambling or incomplete answers. Again, if a deposition witness gives you such an answer, stop and try to fix it on the spot:

Q: *What color was the traffic light?*

A: *Like I said, I seem to remember, I think, that the light was more or less greenish-looking.*

Q: *Mr. Jones, was the traffic light green?*

A: *Yes.*

3. **The lawyer didn't ask the right questions.**

Lawyers at trial are occasionally surprised by an unexpected answer from a witness — in particular, an answer that doesn't seem to match the deposition transcript. But every answer that surprises you may not involve an actual inconsistency.

Perhaps a quick tutorial on depositions is in order here. Depositions normally have three principal functions: (1) a discovery function (that is, the lawyer is learning the witness's version of the facts); (2) a locking-in function (that is, the lawyer is both eliciting and recording the witness's testimony, making it harder for the witness to change it later); and (3) a cross-examination function (that is, the lawyer is gleaning concessions for use at a later time, such as in a motion for summary judgment).

The first two functions normally require open-ended, non-leading questions (*"What happened at the meeting?" "Have you told me everything you remember about the meeting?*).

The cross-examination function normally requires the opposite (*"So Mr. Jones was not present at the meeting?"*).

A good examiner will typically switch back and forth between the different types of questions. Sometimes, it's important to ask the open-ended question but then follow it with one or more leading questions to lock it in.

Remember to keep all three functions in mind. If you are over-focused in the deposition on the cross-examination function, you are likely to forget to ask open-ended questions, and therefore more likely to be surprised by the witness's trial testimony. This may lead to the following type of exchange:

Q: *Mr. Smith, you never mentioned that in your deposition, did you?*

A: *Well, you never asked me.*

Impeachment with a prior inconsistent statement is difficult if the witness never made any prior statement on the subject. Make sure to ask open-ended questions during depositions.

In short, try to ask clear, uncluttered questions when taking a deposition, and insist on reasonably clear answers. You'll be very glad you did if you have to use the transcript to impeach a witness at trial.

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.