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Liar! Liar! Impeaching a Witness on Cross-Examination

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Off the Record

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by Maureen A. Howard

There are certain trial moments that can set an advocate's heart a-flutter. One is the opportunity to show the jury that an adverse witness is not to be trusted. Even better is the chance to expose the witness to be a bald-faced liar.

Welcome to the wonderful world of impeachment. Impeachment is the art of discrediting the witness on cross-examination. There are seven impeachment techniques:

- Bias, interest, and motive
- Contradictory facts
- Prior convictions — FRE 609
- Prior bad acts — FRE 608 (b)
- Prior inconsistent statements — FRE 613
- Bad character for truthfulness — FRE 608 (a)
- Treatises — FRE 803 (18)

Impeachment is mostly governed by common law and requires a good-faith belief on the part of the advocate. The challenging attorney is also required to raise impeachment on cross-examination, giving a witness a chance to explain before introducing any extrinsic evidence. Although FRE 607 permits an attorney to impeach her own witness, the better course is to either clarify the question, or, using some other non-confrontational technique, re-examine the witness's testimony.

Collateral vs. Non-Collateral. In addition to having a good-faith belief, an attorney must be ready to "prove up" the impeachment if it is non-collateral — meaning the issue directly affects the disputed issues in the case. On the other hand, if the witness denies a collateral matter (one not central to the case), the lawyer will be stuck with the false denial by the witness because she cannot introduce contradictory evidence showing that the witness is lying. Some types of impeachment are always deemed non-collateral (such as bias, interest, or motive), while others can be either collateral or noncollateral.

Prior Inconsistent Statements. Impeaching by prior inconsistent statements (PIS), one of the seven impeachment techniques, can be particularly devastating. It is premised on the concept that the jury cannot believe the adverse witness's testimony at trial because on an earlier date, under circumstances far more reliable, she stated something different.

Impeachment by PIS consists of three steps: commit, credit, and confront.

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Commit. First, confirm there is a worthwhile fight ahead, and that you will be the victor. If done correctly, impeachment is time-intensive, so you don't want to finish with a squeak, but with a bang. This means you must ensure you have a fight before you go down the long impeachment road (otherwise the jury might resent your efforts). Imagine taking 20 minutes to set up an impeachment where you ultimately confront the witness: "And you told the officer that the light was red for the Volkswagen?" To which the witness responds, "That's right, it was was red for the Volkswagen." Hmm. Now you are in a dialogue with the witness — someplace you never want to be on cross-examination. "I thought you said on direct examination that the light was green for the Volkswagen." Witness: "No. Is that what I said? I must have misspoken — no, no — the light was red for the Volkswagen."

For the same reason, resist the urge to impeach on insignificant matters, on quasi-inconsistencies, or where there is a risk you will fail. And, no matter how tempting, do not impeach by PIS when the witness's trial testimony was helpful to your case.

Commit: Old School vs. New School. There are two ways to think of the PIS "commit" phase. One is to "commit" the witness to the lie. The other is to commit in your own mind that you have a fight. I advocate the latter technique.

When committing the witness to the lie, the lawyer asks the witness to confirm his false testimony. Many lawyers embrace this technique because they like to catch a witness in a lie and spank them in front of the jury. I prefer to confront the witness with the truth and ask for agreement. If the witness agrees, we have nothing to argue about (no further impeachment); if the witness resists, then I impeach.

The advantage to the modern approach is twofold.

First, the lawyer does not want to utter the "lie" to the jury. This may seem of small consequence, but, as Thomas Wolfe wrote in *Bonfire of the Vanities*: "Even the messiest housekeeper, during the course of a two-week trial, will notice the dirt on the courthouse windows." This is to say that all jurors' minds wander. Think back to law school: how often did your mind wander during even the most invigorating of classes? In trial, if I have done my job well (such that the jury likes me, thinks me competent, thinks me intelligent and prepared), why do I want any juror to misremember me in the jury deliberation room as saying, "Well, remember Maureen Howard said X, Y, and Z (i.e., the lies)? And I trust her, so it must be true."

Second, by stating the truth (the PIS words), you have set up the confrontation most effectively because the exact words of the PIS have been rejected by the witness, and so when confronted, there is no doubt in the jury's mind that the witness is a liar. Otherwise, the witness may quibble with a lie, but one which is not 180 degrees opposite of the PIS. If you commit the witness to

the lie (the witness's alternative wording), there may not be an effective "confrontation" because the jury may miss the absolute contradiction of the two statements.

Credit. This is the "accreditation" phase where the advocate walks the jury through the conditions under which the PIS was made, and establishes why the prior statement is more credible than the trial testimony.

Frequently, PIS will be deposition testimony. My practice is to begin the "accreditation" phase by asking: "Sir, this is not the first time you and I have talked about this case? You came to my office last summer? Your attorney was with you? I asked you some questions and you answered them? There was someone taking down my questions word-for-word, and your answers? That was the court reporter? He also had you take an oath? An oath to tell the truth? The whole truth? And I told you it would be the same oath you would take if the case went to trial? I also said that it was important to give full, truthful answers to my questions, because if the case went to trial and you gave different answers, then the jury would be entitled to hear the answers you gave that day?"

The "commitments" phase of a deposition is thus extremely useful when impeaching a witness. For an excellent discussion of the "commitments" one might obtain at the outset of a deposition to effectively impeach at trial, see Malone and Hoffman, *The Effective Deposition* (NITA).

Confront. The confrontation phase is brief. The lawyer informs opposing counsel what document she is using ("Counsel: deposition page 53, line 17") and asks for permission to approach. Remember, you are still on cross-examination and all questions should be leading. "Mr. Smith, I am handing you a copy of your deposition. Please look at the last page, page 89. There is a signature there? That is your signature? And above that signature is a statement that reads: 'I have reviewed the foregoing testimony and I declare under penalty of perjury under the laws of the State of Washington that forgoing is true and correct'?"

Then, the lawyer reads the PIS. "Mr. Smith, please read along silently as I read aloud." This is the better practice because the lawyer can control the "presentation" of the PIS to the jury — and put some "attitude" into it. The final step in this stage is to ask the witness, "Did I read that correctly?" Do not ask if that is what the witness actually remembers or what the witness recalls testifying. If you ask, you will be disappointed. The witness who lies on direct examination is highly motivated to defend that testimony!

Impeachment by Omission. Here, the witness "remembers" more details at trial than they documented in a prior statement. Most commonly, this occurs with a professional witness charged with creating detailed, reliable records, such as an investigating police detective. The argument is: this witness is trained to include important information in her reports, and so it is not believable that she now remembers critical facts that she didn't write down in her report. A satisfying method of conducting the "confrontation" phase in this case is to hand the witness a marker and ask them to search through the report for the "detailed facts" they testified to at trial and to mark them in the PIS. When the witness hesitates, mumbling, "It's not there," turn to the jury and say "No, please, Officer, take your time…"

Hearsay? Not a Problem. A PIS is admissible at a minimum, not for the truth of the prior statement, but for the purpose of showing the witness to be unreliable. In such cases, it is not substantive evidence, and cannot be argued as fact in closing argument or used for sufficiency of the evidence on appeal. However, many PISes are admissible for substantive purposes over a hearsay objection because there is a hearsay exception: admission of a party opponent, excited utterance, present sense impression, etc. The well-prepared advocate will look to see if the evidence is admissible substantively. ◊

"Off the Record" is a regular column on various aspects of trial practice by Professor Maureen Howard, director of trial advocacy at the University of Washington School of Law. She can be contacted at mahoward@u.washington.edu. Visit her webpage at www.law.washington.edu/Directory/Profile.aspx?ID=110.

Contract Drafting Basics

by Anne Tiura

Whereas, heretofore inasmuch as party of the first part notwithstanding…" Ouch! Do we really need all this antiquated multisyllabic mumbo-jumbo to bring a legally binding contract into being?

There is a better way. Here are a few tried-and-true contract-drafting tips to create a document (in 21st-century prose) that will enable you to serve your clients' objectives.

Know the deal and anticipate the unanticipated. Start by thinking through the client's objective and all the known terms of the deal. Next, identify the important issues that the parties may not yet have considered. The parties are likely thinking through only the desired series of future events, but the lawyer needs to size up the "worst-case scenarios" (what if the payments are not made, or services not performed?) and spell out the consequences in the contract in a way that reflects the parties' intentions.

Avoid the "agreement to agree." Although it's often tempting to "punt" certain critical contract terms for future agreement, this is risky and likely unenforceable. If the parties simply cannot come to agreement on some of the contract terms up front, they must be advised that a court cannot force them to come to agreement at a later date.

Identify parties and date. The opening paragraph is the place to identify the contract date and all the parties to the agreement (including the state of organization for entities, and "husband and wife" designation for married persons). Use easy-to-remember defined terms for the party names — e.g., "Seller" and "Buyer," or "Roadrunner" and "Acme."

Use recitals. Spell out the background facts giving rise to the contract in clear, succinct terms and in a logical sequence, including a description of existing agreements that are being implemented or modified. Recitals can be invaluable in putting the transaction in context if the contract must be revisited at a later date when memories have faded or personnel have changed, especially with a complex transaction. Consider using a simple "A, B, C" format rather than the somewhat archaic "Whereas" preamble for your recitals.

Define your terms. Concepts that will be revisited repeatedly in the contract should be defined the first time they are used in the document, and assigned capitalized shorthand terms — e.g., "Burdened