

Friday, January 6, 2006

HEADLINE: **Trial Advocacy, Impeachment With a Prior Inconsistent Statement**

BYLINE: **Ben B. Rubinowitz** and Evan Torgan

BODY:

One of the most exhilarating parts of cross-examination is impeachment and one method of impeaching is through the use of a prior inconsistent statement.

Unfortunately, many attorneys turn what could be a dramatic event in the trial into a disaster. Specifically, the effectiveness of this technique is often diminished by failing to properly set up the impeachment. Sometimes, attorneys get ahead of themselves by being too eager, too impatient and they hand over the prior statement too fast. Moreover, this important trial tactic fails because the attorney neglects to first secure a strong commitment to the present in-court testimony he is seeking to discredit.

Before undertaking to impeach a witness, the examiner has to know why he is doing it. The purpose of impeachment is to show that the witness is lying about a material fact. It is to show that he is intentionally trying to hurt your client's case. Simply put, it is to demonstrate that the witness is telling less than the truth, not that the witness is mistaken. Disaster strikes when an attempted impeachment results in uncovering that the witness is not in fact lying, but is honestly mistaken. Disaster results when in his haste, the only thing the cross-examining attorney has accomplished is refreshing a witness's hazy recollection or cajoling the witness into an honest answer that has simply just slipped his mind.

#### Cement In-Court Testimony

To properly impeach someone, it is critical to initially lock in the witness's present in-court testimony. Without first doing that, the intelligent or slick witness can easily wiggle out of any impeachment attempt. For example, you have a written statement signed by the witness saying that he never saw the color of the traffic light. Yet he testified on direct examination, by the defendant's attorney that the plaintiff, your client, went through a 'red' light. You eagerly try to impeach him with that statement:

Q. Sir, isn't it true that you gave a statement saying you didn't see the color of the light at the time of the accident?

A. I wasn't looking at the light, but I did see that all the other cars facing in your client's direction were stopped at the time your client went through the intersection. That's how I know the light was red for your client.

Even if the witness complies, it is not very dramatic to go right to the statement without first committing the witness to his direct testimony:

Q. Sir, I show you this document and ask you, isn't it true that at the time of the accident you didn't see the color of the light?

A. Yes.

#### Beginning the Impeachment

Here is the better way to begin the impeachment, by first committing the witness to his present, in-court, direct testimony:

Q. Sir, you testified on direct that you saw that the light was red for my client, true?

A. True.

Q. You have no doubt about that?

A. Correct.

Q: In fact, you have a specific recollection as you sit here now of the color of the light?

Now let the jury know that something is awry. Let them know that the battleground has been set:

Q. Sir that wasn't always your position, was it?

A. Yes it was.

Q. Isn't it a fact that you never, ever saw the color of that light?

A. No it is not.

Now, establish the existence of that prior statement:

Q. You spoke to an investigator on the day of the accident, true?

A. True.

Q. You told him you never saw the color of the light, correct?

A. No.

Q. He was writing down notes as you were talking, wasn't he?

A. Yes

Q. He prepared a statement as to what you said, right?

It is very important that you next establish the accuracy of the statement:

Q. You signed that statement didn't you?

A. Yes.

Q. You were aware of the importance of that statement, weren't you?

A. Yes.

Q. You read it before you signed it, true?

A. True.

Q. You checked it for accuracy, right?

A. Right.

Q. It was accurate, true?

A. True.

Q. You would never sign a statement that wasn't accurate, would you?

A. No.

Now, have the document marked for identification. Ask to approach the witness, and drive your point home:

Q. I show you this document marked as plaintiff's one for identification and ask you, isn't it true that on the date of the accident you said you didn't see the color of the light?

A. Yes.

Q. There is no question about that, right?

A. Right.

Notice the total control you can have over the witness. There was no room for him to explain away the inconsistency. You did not even have to offer the document into evidence. This is particularly important where the statement has additional information which hurts your case.

#### Examination Before Trial

A typical source for impeachment in a civil case is through the use of the Examination Before Trial (or EBT). Before using the EBT, however, a few words of warning are in order. Never impeach on insignificant issues. Always be prepared with the page and line number of the prior testimony. Always stay within the proper form. And always mirror the precise language from the transcript. Take for example a medical malpractice trial where an issue is the side effect of a certain drug that breaks through blood clots that cause heart attacks. The defendant physician who prescribed the drug denied on direct examination that a primary side effect was bleeding into the brain.

Q. You testified on direct that bleeding into the brain was not a primary side effect of the drug, TPA (tissue plasminogen activator), true?

Q. You said that specifically when Mr. Jones was questioning you, correct?

A. Correct.

Q. Well, sir, that wasn't always your testimony in this case, was it?

A. It was.

Q. Sir, you were questioned under oath at an examination before trial on May 2nd, 2002, correct?

Q. You swore to tell the truth at that time?

A. Yes.

Q. In fact, you took the same oath then that you took today?

Q. Sir, on page 151, line 7, you were asked this question and gave this answer: 'Question: Is bleeding into the brain the primary side effect of TPA? Answer: Yes, without a doubt.'

Q. Sir, you were asked that question, true?

Q. And you gave that answer, didn't you?

Now underscore the inconsistency:

Q. Sir, your answer today is different today than it was then, correct?

Q. As a matter of fact it is now diametrically opposed to what it was at the deposition true?

Q. Now doctor, you knew prior to testifying here today that the side effects of TPA would be in issue in this case, right?

Q. Something changed your testimony, didn't it?

Q. Correct me if I'm wrong sir, but before testifying today you spoke to your attorney, didn't you?

Q. And I'm not going to ask you what you discussed, but sometime thereafter you had a change of heart as to whether the primary side effect of TPA was a bleed into the brain, true?

Q. And when you were sitting in the back of the courtroom you were holding your deposition transcript, right?

Q. A copy of the very transcript I read to this jury, true?

Q. You certainly had an idea that I would be asking you that very question, correct?

Q. So in essence sir, you are saying to us: 'Believe what I say today, not what I said yesterday,' right?

There are times when a witness will deny that he ever made a prior inconsistent statement. Although it would be unlikely in the scenario above, there are certain situations where the witness does not remember making the prior statement, does not think you are aware that he made a prior inconsistent statement, or does not think you will find it. In those circumstances you may have to prove the prior inconsistent statement.

Take the situation where you are cross-examining a defense medical expert in a case involving a common injury: the bulging disc. Most defense experts testify that a bulging disc is a degenerative condition, not caused by trauma, but rather by aging. You, in doing your homework, however, find a prior transcript from another trial where the defense expert had testified as a treating physician for a patient of his where he swore that the bulging disc his patient sustained was causally related to a traumatic accident. Here is the impeachment:

Q. Sir, you testified on direct that my client's bulging disc was caused by aging, not trauma, true?

Q. You further testified on direct that bulging discs are never caused by trauma, but just by aging, correct?

Q. Sir, that is absolutely false, isn't it?

Q. As a matter of fact, in the past when testifying for a plaintiff, you have in fact sworn that a bulging disc was in fact caused by trauma, haven't you?

A. No.

Q. Sir, you once had a patient named Sam Jones, true?

A. I don't remember.

Q. Well you testified on his behalf in this very courthouse, didn't you?

A. If you say so.

Q. Sir, the case of Sam Jones against Ace Corp. in Supreme Court, Kings County, Jan. 29, 1999, before the Honorable Judge Verity. You were asked by the plaintiff's lawyer at page 55 of the trial transcript, line 11: 'Question: Do you have an opinion, to a reasonable degree of medical certainty, as to whether or not the trauma of the automobile accident caused the bulging disc to my client? Answer: Yes, the trauma caused the bulging

disc.'

Q. Sir, you were asked that question, true?

Q. You gave that answer, correct?

Q. After swearing before God that the testimony you gave was the truth, the whole truth and nothing but the truth so help you God?

Q. So let me get this straight, sir: When you testified on behalf of your patient you told a jury that the bulging disc was caused by trauma, but today, when testifying for a defendant, you told this jury that a bulging disc is never caused by trauma?

Q. Sir, how much is the defense paying you to be here today?

Impeachment with a prior inconsistent statement is a critically effective tool. It is an exciting part of the trial which the examiner, with proper technique should never abdicate.

#### The Pitfalls

Avoid the common pitfalls. Never impeach in a minor area or with an irrelevant inconsistency. Before beginning the impeachment, always first firmly commit the witness to the present in-court testimony. When impeaching with prior sworn testimony, never ask the witness if he 'remembers' giving the prior testimony-- he will probably say no. Tell him he gave it. Always impeach with tight, leading questions which compel the witness to give an affirmative answer. Do not show the witness the prior statement until you must. When questioning with a transcript, show the jury your preparation and confidence and alert the witness to the time, place, page number and line number while actually reading the question and answer verbatim. Finally, always drive the point home before moving to another area. A well-accomplished impeachment can win a case for you, and win it big.