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Impeachment: Let's Go to the Video Tape

By Ben Rubinowitz and Evan Torgan

With the abundance of smart phones and other similar devices the creation of videos has never been more popular. Although videos can serve to capture friendly memories, they can also serve to provide ammunition for the advocate. A video can discredit a witness more quickly than the mere written word ever could. Clearly, the use of a video as a weapon at trial is no longer a rare event. Indeed, the sheer number of videotape statements makes its use at trial commonplace. Whether the video is in the form of a deposition, surveillance footage or an event captured on a nearby security camera, the trial lawyer must think carefully how to best exploit the video as a strategic tool for helping her win the case before ever questioning a witness. If used properly, a video can serve to leave an indelible impression that there is no doubt that the witness is a liar, cannot be trusted and is anything but credible.

Perhaps one of the best examples of the use of video as a tool for discrediting an individual are the recent events surrounding the replacement of Supreme Court Justice Ruth Bader Ginsberg. Statements made in the past by public figures are being used to both attack and impeach the credibility of those who have gone on record promising one thing and delivering another. Take, for example, the statements of Sen. Lindsey Graham made before the Senate Judiciary Committee back in 2016 when he brushed off partisan politics and invited critics to hold his feet to the fire after he opposed President Barack Obama's Supreme Court pick to replace Justice Antonin Scalia. His own words were videotaped. They were clear. They were deliberate. They were unequivocal. The video captured Senator Graham stating: "I want you to use my words against me. If there is a Republican president in 2016 and a vacancy occurs in the last year of the first term, you can say Lindsey Graham said 'let's let the next president whoever it might be make that nomination.'"

But less than 24 hours after Justice Ginsberg's death in September 2020, Senator Graham made another statement: "I will support President Trump in any effort to move forward regarding the recent vacancy created by the passing of Justice Ruth Bader Ginsberg." To say this is contradictory would be the understatement of the year.

Putting aside partisan politics for a moment, the statement by Senator Graham provides a clear teaching lesson for the use of video impeachment at trial. If used properly the video can serve as a tool to deliver a dramatic cross-examination that both crushes the witness and helps to strengthen the argument for summation. If used improperly, however, the cross will fizzle out and the point will be lost.

Imagine the scenario in which Senator Graham is called as a witness at trial. At issue is his 2016 statement versus his 2020 statement dealing with the Supreme Court nomination. A cross examiner could immediately attack by pointing out the inconsistency:

Q: In 2016 you stated that the next president should make the nomination, true?

Q: You held that belief until 2020 true?

Q: And then you changed your mind, correct?

Q: You no longer believe that the next president should make the nomination, true?

Q: Let's go to the video and see what you said in 2016 (The 2016 video is played).

Q: That was your statement, true?

Q: Now, let's look at what you said in 2020 (2020 video played).

Q: That was your statement true?

A: Yes, I carefully and diligently rethought my position and I have come to a different opinion.

In this example, the impeachment was there for the taking; however, the set up was poor, the delivery was worse, and the point was lost. Not only did the cross examiner lose the point but he failed to secure crucial admissions before attacking the witness with the video. The better approach is to set the witness up fully before ever using the video. Given the type of witness that is going to be cross examined—

analogous to a seasoned and well-rehearsed expert—the creation of the line of attack must be presented in a way that methodically and successfully dissects the witness.

Although we are dealing with television-type video statements, there are still basic rules to follow when impeaching with a prior inconsistent statement. It is best to follow the normal protocols for impeachment. First, commit the witness by locking him into his present in-court testimony so he cannot wiggle out of what he said. Then, direct his attention to the date, time and place of the prior statement without physically confronting him with it. Build up the credibility and the importance of the prior statement. Next, impeach him with the actual language from that prior statement. Another way to think of this type of impeachment is the alliterative technique known as the three “Cs” of impeachment: commit; credit; and confront. But there is a fourth “C” to be used when working with an out and out liar: Crush.

Whether it is a standard impeachment with a written prior inconsistent statement or with a video of the witness’ statement, one of the best places to start is with the use of voice of reason questions that demand affirmation. These voice of reason questions, if used properly, allow no wiggle room. These are questions that are so reasonable that if the witness dares to disagree, he will look foolish in front of the jury. Voice of reason questions can be used before ever “committing” the witness to his prior testimony.

Voice of Reason Questions

Q: You take your job seriously don’t you sir?

Q: As a senator you realize that you are in a position of trust, true?

Q: You represent that you’re looking out for the best interests of your constituents, true?

Q: You want them to trust you, true?

Q: You want them to believe you, true?

Q: At all times, am I right?

Q: Your motto is “Lindsey Graham: trustworthy and honest,” true?

Next, the line of attack must continue by using “negative” questions—by focusing on those things that the witness would never do:

Q: You would never tell less than the truth to your constituents, would you?

Q: You would never deliberately mislead them, would you?

Q: You would never make false statements for political gain, would you? Q: That type of conduct would be unacceptable by you, true?

Q: That type of conduct would cut against your own values, true?

Q: That type of conduct would be contrary to your core beliefs true?

Q: That type of conduct would go against your own principles as a senator of the United States, correct?

Q: That's why we know that statements made by Lindsey Graham are reliable, true?

Q: That's why we know that statements made by Lindsey Graham are always honest, true?

Q: And that's why we know that statements made by Lindsey Graham are trustworthy, true?

Q: In fact, you would be the first to say, "If I said it, you can go to the bank on it, true?"

Q: Because we know that integrity matters to you?

Q: Because we know that honesty is a way of life for you, true?

Next, the set up must continue by gently working in the facts of the case, securing admissions and closing the doors to potential avenues of escape.

Q: Senators have an important role with respect to the Supreme Court, true?

Q: You take that role seriously, don't you?

Q: A nomination to the Supreme Court must be made based on reasoned thought, true?

Q: A nomination to the Supreme Court must never be made based on gamesmanship, agreed?

Q: That's why in 2016 you wanted your position made clear?

Q: You wanted all people to know you were concerned about their future?

Q: You wanted all people to know that a decision of this magnitude would not and should not ever be rushed, correct?

Q: That it's better to wait and make a well-reasoned decision, true?

Q: Not one based on political partisanship, correct?

Q: Or political expediency, true?

Commit

Here, the attorney should prepare to show the video, seek a concession that it is him and his statement, and if denied, lay the proper foundation for admissibility during a voir dire conducted outside the presence of the jury. The questioning for admissibility would be conducted as follows:

Q: Let's take-a-look at what you said.

Q: First-of-all, sir, that is your likeness on the screen, true?

Q: And your voice, true?

Q: And that was before the Senate Judiciary Committee in 2016, true?

Q: This is your video statement from 2016, correct?

Q: In fact, it's what YOU said, true?

Q: Your honor, I offer that in evidence.

Next, the questioning must continue in front of the jury.

Q: Sir, today is not the first time you've seen this video, correct?

Q: You agree, don't you, that the words used are not just a fair and accurate representation of what you said, they are exactly what you said true?

Q: In 2016 you had an opportunity to speak about this very issue, true?

Q: In 2016 you voiced your position with righteous indignation, didn't you?

Q: Indeed, you said, and I quote, "You could use my words against me and you'd be absolutely right," true? (emphasis added through intonation)

Q: Let's take a look at those words together (video played in part).

Credit

Q: There is no doubt that those were your words, true?

Q: Those words came out of your mouth, true?

Q: You wanted people to believe you?

Q: You wanted people to trust you?

Q: That's why you were so deliberative in the words you chose, true?

Q: You made a promise at that time, didn't you?

Q: You were telling the people of this country "believe me, trust me, rely on me," true?

Q: Would you agree that when a person is in a position of trust he or she should never deceive?

Q: That he or she should never make false statements?

Q: That he or she should never lie for political gain?

Confront

Q: Now, Let's take-a-look at your own words in September 2016 (video played in part).

Q: You wanted us to hold your feet to the fire in the event this issue ever came up again, true?

Q: Now, I suppose you'll say "no big deal, I've changed my mind?"

Q: Now, I suppose you'll say "forget what I said in 2016," right?

At this point, the entirety of the video should be shown to the jury without interruption.

Crush

To enhance the effect of the impeachment the confrontation must be delivered with emphasis:

Q: Are you prepared to admit before this jury that your statements are slightly different (sarcasm in tone)?

Q: Are you prepared to admit, if I can use the analogy, that you have given two very different answers to the very same question?

At this point it makes no difference what the witness says, as he has been discredited. But to lock in the point, the cross examiner should now point at the video and ask:

Q: Those are your words sir, correct?

Q: No one forced you to use those words, did they?

Q: Those are completely different statements, aren't they?

Q: Are you familiar with the term "Hypocrisy," sir?

Q: Are you prepared to admit that you broke your promise?

Based on the careful questioning, even if there are denials, the point has been made for summation. To the extent the witness chooses to fight, other strategies can be used to make the point:

Q: Would it be fair to say your decision to make two different statements was based, at least in part, on consultation with at least one other member of the Senate, true?

Q: You are familiar with Mitch McConnell, true?

Q: He is the majority leader of the Senate, right?

Q: Would you say that your "integrity" is on par with his?

Q: You relied on his guidance in this instance, didn't you?

Q: And his guidance, like yours, was very different in 2016, true?

Q: But like you, he took a different position in 2016, when the country had a democratic president, true?

Q: At that time, he was concerned about the fact that the appointment was being made in an election year, right?

Q: He wanted the people to make the decision, correct?

Q: And you supported and reinforced that position, correct?

Q: Because you believed the president should never appoint a life-time justice in an election year?

Q: Suddenly all that changed, didn't it?

Q: It changed this election cycle, true?

Q: It changed after Ruth Bader Ginsberg died, true?

Q: Do you agree with this statement: The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president?

Q: Do you know who made that statement?

Q: You are aware that both you and McConnell made this statement?

Q: Do you agree with this statement: The American people should not have a voice in the selection of the next Supreme Court Justice?

Q: You would agree that those are two completely different positions?

Q: Diametrically opposed, true?

Q: Is that what you meant when you said "Count on Lindsey Graham: trustworthy and honest?"

Videotape, cable news, the Internet and smartphones have changed the world. Videos of this type are a treasure trove for use as evidence, at a later date, in the courtroom. To be used effectively, the trial lawyer must lay the proper foundation for the admissibility of any video footage. But before using the video, a careful and strategic line of attack must be carried out. After having committed the witness to his prior statement, the import of that statement must be made clear before confronting the witness and driving the point home. If used effectively, video impeachment will not only be captivating and compelling, but will pave the way to a successful verdict.

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