Evidentiary Demonstrations – Effective Impeachment of Adverse Witnesses

Presented by

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SELECTIVE EXAMPLES OF PROPER EXAMINATION

I. IMPEACHMENT WITH A PRIOR INCONSISTENT STATEMENT.

The impeachment of a witness with a prior inconsistent statement can be one of the most dramatic moments of a trial. If done well, it can leave a witness's credibility in tatters with no one in the courtroom believing a thing the witness has to say. But a poorly executed attempt at impeachment can have the effect of actually bolstering a witness's credibility and turning the judge and jury against the cross examining lawyer. The following is a discussion of how to effectively impeach a witness with a prior inconsistent statement.

In civil litigation, impeachment with a prior inconsistent statement usually arises because the witness's testimony at trial differs in some respect from the witness's deposition testimony. Depositions are such a ubiquitous part of family law practice that it is quite common for discrepancies to occur between the witness's testimony at trial and in a deposition. Impeachment with a prior inconsistent statement can also occur when the witness has given a written statement or made oral statements that differ from the trial testimony, but these are much less common than impeachment with a deposition.

1. The Law. The witness must be told the contents of the statement, time, place and person to whom statement was made, and must be afforded the opportunity to explain or deny the statement. *Ramsey v. Lucky Stores, Inc.*, 853 S.W.2d 623, 637 (Tex.App.–Houston [1st Dist.] 1993, writ denied); TEX. R. CIV. EVID. 612. Before impeaching a witness with a prior inconsistent statement, the witness must be "told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement.". TEX.CIV. R. EVID. 613(a); *Osteen v. State*, 61 S.W.3d 90, 91 (Tex. App. - Waco 2001, no pet.). Not to be confused with Recorded Recollection [TEX. R. CIV. EVID. 803 (5)]. The witness does not have total memory failure as to the event, but relies on a writing to refresh his recollection of the event. If the witness uses the writing to refresh his memory, the opposing party is entitled to use it to cross examine and introduce the portions relating to the witness's testimony. The court reserves the right to conduct an in camera inspection of the writing and excise any irrelevant portions.

Practice Note: Use of an otherwise privileged writing to refresh a party's memory will constitute a waiver of that privilege. *City of Dennison v. Grisham*, 716 S.W. 2d 121, 123 (Tex. App. - Dallas 1986, orig proceeding).

2. Prior Consistent Statements. Recent fabrication of events or a statement are commonplace in family law cases. A counterpart to impeachment by use of a prior inconsistent statement is the use of a prior consistent statement of a witness to cure any such accusations. When applicable, the questioner is permitted to show that the witness did, in fact, previously testified the same as in trial. See, *Missouri Pacific R. Co. v. Vlach*, 687 S.W.2d 414 (Tex. App. – Houston 14th Dist. 1985).

3. Tactical Considerations. Impeach only on important matters. Witnesses have fallible memories just as do judge and jurors. As a result, judges and jurors tend to be forgiving of minor errors in a witness's testimony. Impeaching a witness with a prior inconsistent statement over trivial matter with no importance to the case is likely to engender a response from the judge and jury of "So

what?" or questions about why the examining lawyer is picking on the witness. Impeachment should be saved for important matters where the judge and jury can easily see that this is a matter where an honest witness would not make a mistake.

The prior statement must actually be inconsistent with the witness's trial testimony. Merely because a witness testifies using different language than in the prior statement is not enough; the previous statement and the present testimony must be inconsistent. For example, there is no inconsistency if the witness testifies in the deposition that "the car was going fast," but at trial states the car was going 30 miles over the speed limit." A useful rule of thumb is to ask whether the witness could testify truthfully to what is in the prior statement and what is being said at trial. Impeachment is appropriate if only one of the versions can be correct.

Sometimes the prior inconsistent statement is favorable to the impeaching side although most often it is unfavorable. In those situations where the prior statement is favorable, the goal usually is not to discredit the witness, but to have the fact finder accept the prior statement as true. The method of impeachment is conducted differently when the goal is to discredit the witness. The examining lawyer must decide on the objective--discredit the witness or credit the prior statement--before beginning the impeachment.

Where a friendly witness has made a mistake, it is usually more effective to attempt to refresh the witness's memory than to impeach the witness. If necessary to impeach, it is usually done with a friendlier and gentle tone of voice. Similarly, a more friendly and gentle tone of voice is usually used, even with hostile witnesses, when the goal is to have the fact finder accept the prior inconsistent statement as true.

II. STEPS FOR IMPEACHING WITH A PRIOR INCONSISTENT STATEMENT.[1]

Impeaching with a prior inconsistent statement is most easily done by following the three "C's"--Confirm, Credit, and Confront. The following are the steps of a successful impeachment with a prior inconsistent statement using the three "C's" approach.

A. C = Confirm the Testimony Being Impeached. The first step is to confirm the statement being impeached. The reason for confirming the statement is to make the contrast as vivid as possible between the witness's testimony and the prior inconsistent statement. There are two methods for setting up the contrast. The first method is simply to have the witness repeat the statement being impeached:

Q. Are you telling us the light was red for the westbound traffic?
or
Q. Did you just testify the light was red for the westbound traffic?

If this method is used, it is important that the question be asked with a skeptical or incredulous tone of voice. If the question is asked in the same tone of voice as used in other parts of the

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[1] Excerpts from "**Evidence Demonstrations**" - State Bar of Texas – 34th Advanced Family Law Course, San Antonio, TX (August 2008). Presented with H. King and P. Hoffman. Article presented was written by W. Cole and P. Hoffman

examination, there is a risk that the judge and jury will believe that the examiner is merely confirming the previous testimony because it is true. Therefore, it is necessary to ask the question with pronounced skepticism and with an incredulous tone. The skeptical or incredulous tone of voice, because it is out of the ordinary, will also alert the judge or jury that something important is about to occur.

The second approach is to confirm the prior inconsistent statement by using the exact language of the prior statement. For example, if the witness has testified that the light was red for the westbound traffic, but the deposition testimony is the light was green, the question would be:

Q. The light was green for the westbound traffic?

The expected answer is "No, the light was red."

Pointers: Please note that the testimony to be impeached should never be confirmed when the objective is to have the fact finder accept the prior inconsistent statement as true. Instead, the goal is to have the fact finder quickly forget what the witness has testified and to only remember the prior inconsistent statement. Repeating the trial testimony being impeached only increases the chances that the judge and jury will accept it as the true version of events.

B. C = Credit the Prior Inconsistent Statement. The second step in the process is to build up the importance of the prior inconsistent statement. The goal is to make it appear that the only explanation for the differences between the prior inconsistent statement and the present testimony is because the witness is a liar and therefore should never be believed.

Start by alerting the fact finder to the fact that the witness is about to be impeached:

Q. That hasn't always been your testimony, has it?
or
Q. You have testified in the past that the light was green?

Where the prior inconsistent statement was oral or written, the question would be:

Q. That isn't what you said before this trial, it?

Although the Texas Supreme Court has never held such, some trial court judges believe that some form of the above question is a necessary prerequisite to impeaching the witness with a prior inconsistent statement.

Assuming this is a jury trial and the witness denies testifying differently, the crediting process continues:

Q. You have testified about this accident before today?
Q. You came to my office on May 5th of last year?
Q. I was there?
Q. The lawyer for Mr. Smith was there?

Q. And a court reporter was there?
Q. Just like the court reporter we have here? [pointing to the court reporter]
Q. The court reporter had you raise you right hand? [the lawyer's right hand is raised while asking this question]

Q. And you swore to tell the truth, the whole truth and nothing but the truth?
Q. Just like the oath you took here today?
Q. Then I asked you questions about the accident?
Q. And in answering my questions you testified under oath about the accident?
Q. You were testifying only six months after the accident? [this question is asked if the goal is to have the fact finder believe the prior inconsistent statement is true]
Q. It is now two years after the accident? [same]
Q. The court reporter took down everything I said and everything you said?
Q. Just like the court reporter here? [again pointing to the court reporter]
Q. And after you were through testifying, the court reporter typed up my questions and your answers into a booklet? [lawyer holds up deposition transcript while asking the question]
Q. You had an opportunity to read over my questions and your answers? [if the witness has actually made corrections, the question can be changed to "you read my questions and your answers?"—never ask whether the witness actually read the transcript unless you know that the witness has done so]
Q. And you had the opportunity to correct your answers?

Pointers: The elaborate explanation of the deposition process is not required in a bench trial and will only offend the judge if done so. Instead, it is only necessary to ask:

Q. You gave a deposition in this case on May 5th of last year?

C. C = Confront the Witness with the Impeaching Statement. The final step of the process is to confront the witness with the prior inconsistent statement. This is the conclusion to the impeachment and should be done in a dramatic manner so the judge and jury realize that something important is happening.

Q. Let's now look at what you testified to under oath about the color of the light. Your Honor, may I approach the witness?
Q. I am handing to you your deposition testimony. Turn to Page 24, Line 6. [many lawyers announce the page and line as they approach the witness. "Counsel, Page 24, Line 6."]
Q. I asked you the following question, "What color was the light for the westbound traffic?" Did I read that correctly?
Q. And your answer, under oath, was, "The light was green for the westbound traffic?"

Pointers: The last two questions and answers about the prior inconsistent statement should be asked slowly, with pauses, and with a dramatic tone of voice. The examiner's voice and manner should compel the fact finder to pay attention. The questions and answers must be read verbatim. Paraphrasing is objectionable and runs the risk of drawing an answer of "No, that is not what you asked me." If the judge permits, standing over the witness while pointing to the questions and answers is an effective method of controlling the witness. Be careful, however, that a male

lawyer does not appear to be intimidating a female witness. If the page and line are not announced, there is a risk that at the dramatic moment opposing counsel will interrupt the examination to ask what page and line is being referred.

It is usually ineffective to test the witness's memory about what occurred in the deposition before the witness is able to see and read the testimony being attacked. Instead, put the deposition in front of the witness while asking about the questions and answers.

Always ask "I read that correctly, didn't I?" rather than "That's what I asked you, isn't it?" With the latter question there is a substantial risk that the witness will say "No, that's not what I recall." Asking whether the question has been read correctly has the same effect, but it is nearly impossible for the witness to deny, assuming the question was read correctly.

It is very effective in jury trials to project the deposition page so the jury can read the impeaching testimony along with the lawyer and witness.

D. C = Contrast. Some lawyers add a fourth "C," Contrast. The problem with adding the fourth "C" is that most witnesses do not enjoy being humiliated and therefore will attempt to explain away the prior inconsistent statement. The more questions asked after the witness is confronted with the prior inconsistent statement, the more likely the witness will be able to slip in the explanation. Therefore, it is recommended that if the fourth C is added, it is limited to no more than the following two questions.

Q. You did not testify the light was green?
Q. You testified the light was red?

Pointers: Although it is great fun to ask, most courts consider the question "Were you lying then or are you lying now?" to be argumentative.

III. USE OF TREATISES AND OTHER WRITTEN MATERIALS - *Tex. R. Civ. Evid. Ann.* 703 and 803 (18).

A. When Used. Only when called to the attention of an expert upon cross-examination or relied upon by him on direct. A proponent cannot have his expert read from the treatise on direct, but can have the treatise qualified as a reliable authority. If the witness is asked to read from it on cross, clarifying excerpts can be read on redirect. If admitted, the statements may be read into evidence, but may not be received as exhibits.

B. Calling Attention to the Authority (on cross). The questioning attorney need only to have the expert acknowledge that the treatise in question is authoritative and relied upon in their particular field. Even if the witness does not commit to a position, the attorney has called it to his attention and that it is a published work. The proponent's expert can then qualify the writing as authoritative at a later time. See, *King v. Bauer,* 767 S.W.2d 197, 199-200 (Tex.App.–Corpus Christi 1989, writ denied).

C. How to Qualify a Treatise. There are several ways to qualify a learned treatise. Some examples are:

- Judicial Notice (it should be noted that many courts are reluctant to take judicial notice of a lot of treatises, pamphlets, etc. unless no question exists as to its authoritativeness.
- Testimony of Witness on Direct (whether it is the adverse expert or the proponent's expert)

Learned Treatises - 803 (18)

- *Calling Attention to the Authority* (on cross).
    1. establish that the witness relies on certain reference materials in his field of expertise;
    2. establish that he routinely reviews such materials (to stay abreast of changes);
    3. ask if he is familiar with the materials you seek to use;
    4. have witness look at the material and ask if it appears to be duly published;
    5. have witness review the particular section or chapter you desire to use;
    6. ask if he has an opinion as to the statement or position in the book.

IV. GENERAL IMPEACHMENT

Two Types of General Impeachment: Character Evidence and Prior Convictions

A. Character Evidence (a.k.a. using reputation and opinion testimony) - A lawyer is permitted to elicit evidence of a witness's character for truthfulness.

- TRE 608 permits a party to attack a witness's character for truthfulness.
- Thus, a lawyer may call a witness specifically for the purpose of giving reputation or opinion testimony of another witness
- Limits on character testimony – Testifying witness is only permitted to give reputation or opinion testimony solely about another witness's character for truthfulness (not moral character).
    1. The witness must simply answer the question.
    2. Witnesses are strictly prohibited from testifying about another witness's specific instances of conduct when impeaching a witness's general character for truthfulness.
    3. So, if a specific act/conduct is being offered for a reason other than character impeachment, Rule 608(b) will not affect admissibility.
    4. No evidence of truthful character unless truthful character is attacked.

Predicate:
To Prove Character for Truthfulness

1. person attacked has appeared as witness;

2. person's character has been attacked in this proceeding;

3. establish facts showing witness' knowledge of character (i.e. business partner, neighbor, etc.);

4. ask if witness has opinion as to character for truthfulness or untruthfulness;

5. ask for opinion.

To Prove Reputation for Truthfulness

1. person attacked has appeared as witness;

2. person's reputation in community for truthfulness has been attacked in this proceeding;

3. establish facts showing witness' knowledge of community opinion;

4. ask if witness knows person's reputation in community for truthfulness;

5. ask for opinion.

To Prove Character/reputation for Untruthfulness

1. person under attack appeared as witness;

2. establish basis for witness' knowledge of person's lack of trustworthiness;

3. ask if they have opinion or know reputation;

4. ask what reputation is in community or what character is for truthfulness.

B. Prior Conviction - To be Admissible for impeachment purposes, it must either be a felony or a crime involving moral turpitude.

- TRE 609 provides that evidence of a witness's conviction of a crime shall be admitted, to attack credibility, where the crime was either a felony, or a misdemeanor involving moral turpitude.
- Generally, convictions must be less than 10 years old to be admissible
- Must provide written notice to opposing party if conviction is over 10 years old.
- Moral turpitude has been defined by Texas Courts as:
    1. (1) the quality of crime involving grange infringement form statutory *mala prohibita*; (2) conduct that is base, vile, or depraved; and (3) something that is inherently immoral or dishonest.
    2. Probative value must not be outweighed by its prejudicial effect.
        - Before admitting a conviction or crime of moral turpitude, court must perform a balancing test.
- Trial judge has wide discretion in deciding to admit prior convictions.
    - Nonexclusive factors to be considered by trial court (1) impeachment value of the crime; (2) temporal proximity of the past conviction to the charged offense and the witness's subsequent criminal history; (3) the similarity of the crime charges to the previous conviction; (4) the importance of the defendant's

testimony; and (5) the importance of the credibility issue. *Theus v. State, 845, S.W.2d 874, 881 (Tex. Crim. App. 1992)*

- TRE 609 provides that evidence of a witness's conviction may be established either by the witness's testimony or a public record.
- Existence of conviction are admissible, but details are not.
- TRE 609 provides specific limits - No prior conviction to impeach if:
    1. Subsequent finding of innocence
    2. Conviction pending an appeal
    3. Conviction subject of pardon, annulment or certificate of rehabilitation.

Predicate:
Specific Instances of Conduct
Evidence that a person acted in a certain way by proving prior instance(s) of conduct is inadmissible.

Exceptions - [404 (a)(1)-(3) (b); 405 (b)]

1. Conduct involving moral turpitude.

2. Violent or assaultive conduct (self-defense) or peaceable character.

R. 607, 608, 609.

1. Motive, opportunity, intent, preparation, etc.
2. Character or trait is an essential element of claim or defense (i.e. fraud).