

Back to Basics: Impeachment by Prior Inconsistent Statement

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I have spent thousands of hours in the courtroom, tried civil and criminal cases, and had the opportunity to observe all kinds of lawyers advocating for their clients. Of all of the mistakes a lawyer can make in trial, one is far more gut churning than any other. Imagine the following scene: a lawyer is in trial listening to an adverse witness testify on direct examination. The lawyer hears the witness make several inconsistent statements about critical facts. The lawyer begins vigorously flipping through documents at counsel table, highlighting reports and deposition transcripts, and eagerly waits to destroy the witness on cross. The lawyer gets to the podium, pulls out a deposition transcript, and immediately demands to know whether the witness made one of the highlighted statements in the deposition transcript. The opposing counsel stands up, and in an unassuming voice says, “objection, improper impeachment.” Before the lawyer knows it, the judge sustains the objection. The lawyer, not as aggressive this time, asks the same question but refers to a different highlighted statement. The opposing counsel makes the same objection, which the judge quickly sustains. At this point, the lawyer has lost all color from his face. The courtroom is silent, with the exception of the noise the lawyer is making by aimlessly shuffling paper on the podium. The lawyer, now frantic and aware that the jury is watching him, gives up and moves on to the comfort of his prepared cross.

The scene I just described is not limited to new lawyers. I have observed lawyers of all experience levels try and fail to impeach a witness using a prior inconsistent statement. This is heartbreaking, because one of the most powerful and effective forms of trial advocacy is impeachment by prior inconsistent statement. There is no better way to drive a knife into the heart of the credibility of a witness. However, this deceptively simple tool is often used improperly. A sustained “improper impeachment” objection is not only embarrassing, it also greatly reduces the efficacy of your cross examination. Therefore, if you are about to find yourself in trial, it is critical to review this skill and ensure you are comfortable employing it properly and in a way that inflicts maximum damage. Below is a brief review of the mechanics of impeachment by prior inconsistent statement, as well as some tips I have learned during my time in the courtroom.

Terminology

Impeachment by prior inconsistent statement is used when a witness remembers a fact, but previously made a different statement about that fact. Impeachment by prior inconsistent statement has three basic steps, which have been described in

a number of ways. One of the most popular is the “three Cs,” confirm, credit, and confront. Alternatively, the three steps have been described as follows: repeat, build up, impeach. Whatever way you choose to remember the three steps of impeachment by prior inconsistent statement, the process is the same.

1. Repeat

First, the most basic step, is to have the witness repeat the testimony from today’s hearing that you want to impeach. You cannot effectively impeach unless the witness repeats a fact they said during the current hearing that clearly contradicts a prior statement. While this seems simple enough, you can easily run into trouble by tipping off the witness that you are about to impeach them. An experienced witness, such as a police officer, will immediately know what you are trying to do and offer an explanation. To avoid alerting an experienced witness of what is about to happen, try to ask the question in a more casual manner. For any other witness, a more aggressive form of questioning is appropriate. For example, using phrases like “today you say. . .” or “today you claim . . .” alerts the jury that you are questioning the accuracy of the witness’s statement and that you will soon draw a contrast. I have also found that asking something like, “there is no question in your mind that the statement you gave today is true,” as well as asking the witness if they ever gave a different answer to the question that will be the subject of the impeachment, creates added effect.

2. Build Up

The second step is to credit, or build up, the prior statement. There are two purposes for this step. First, it is to show that the prior statement was more reliable and accurate. Second, it is to establish a foundation that will allow you to use extrinsic evidence of the prior inconsistent statement. OEC 613(2).

The means by which you establish the accuracy and reliability of a prior statement depends on the nature of the prior statement. For example, if the prior statement is an oral statement given to a police officer, it is important to emphasize the following: (1) where the witness was when they made the statement; (2) the fact that the witness made the statement right after the event when it was fresh in their mind; (3) the importance of giving police officers accurate information; (4) the witness’s desire to give the police accurate information to make sure the right person is arrested; and (5) that the witness did in fact give the police accurate information. If, however, the witness made the prior statement in a deposition, you should emphasize slightly different facts: (1) where and when the deposition occurred; (2) the presence of a court reporter; (3) the fact that the witness took an oath to tell the truth and was subject to penalties for perjury; and (4) the fact that the witness had an opportunity to read their testimony and ensure it was accurate; and (5) that the witness did in fact confirm their deposition testimony was accurate.

In addition to establishing the details of the prior statement to credit, or build up, that statement, you must also ask the witness whether they in fact made the statement in order to use extrinsic evidence of the statement. There are three possible responses the witness can give to this question. First, the

witness may admit making the prior inconsistent statement. If this happens, you are done. Although OEC 613(2) does not prohibit introduction of extrinsic evidence of a prior inconsistent statement after a witness admits making it, such evidence is cumulative and likely to be excluded under OEC 403. *State v. Klein*, 243 Or App 1, 13-14, 258 P3d 528, 534-35 (2011). Second, the witness may say they do not remember making the prior inconsistent statement. This response is the equivalent of a denial, and extrinsic evidence is allowed. *State v. Bruce*, 31 Or App 1189, 1194, 572 P2d 351, 353 (1977). Third, the witness may deny making the prior inconsistent statement, which of course permits the use of extrinsic evidence.

A common misconception regarding this step is that it renders the prior inconsistent statement substantively admissible. However, just because you can present extrinsic evidence of a prior inconsistent statement, it does not mean that the statement is admissible as substantive evidence. To be substantively admissible, the prior inconsistent statement must also be relevant, authentic, and either non-hearsay or subject to an exception to the hearsay rule. Common examples of substantively admissible prior inconsistent statements are prior sworn statements (OEC 801(4)(a)) and admissions of a party opponent (OEC 801(4)(b)).

3. Impeach

The final step is to impeach the witness with the prior statement. It is critical to use the actual words of the prior statement. If you are using a deposition or other transcribed testimony, be sure to let your opposing counsel know the page and line numbers you are reading from.

A common mistake made during this step involves the use of oral statements. If the witness gave an oral statement to another person who included it in a written report, you cannot impeach the witness by referring to that report. For example, if a detective prepared a report that includes the witness's statements to that detective, it would be improper to ask "didn't you say in the detective's report that . . ." Assuming you otherwise laid a proper foundation for the statement, you could, however, ask "didn't you say to the detective that . . ." The reason is that OEC 613 requires that the prior inconsistent statement be that of the testifying witness. In this example, the report is not the witness's statement. The witness's statement is their words to the author of the report.

Best Practices

There are several important principles to keep in mind that span each of the above three steps. First, impeach with only one fact at a time. Keeping it simple allows the jury to understand the difference between the two statements. Long, meandering statements may not be totally inconsistent and can easily cause you to lose the attention of the jury. In addition, impeaching a witness using one fact at a time gives you more opportunities to impeach, which further erodes the credibility of the witness. Second, when impeaching with prior sworn testimony, you must read the questions and answers verbatim. It is improper to summarize or paraphrase the testimony because the summary is not the witness's actual statement. Third, be mindful of your tone. For example, if you want to show the witness is lying, project a sharp professional attitude

and use questions that employ irony, curiosity, or surprise. If you want to show the witness is forgetful, use a more empathetic tone or allow the witness to explain the inconsistent statement. Your tone during impeachment should match your tone during closing arguments when you discuss the witness's testimony. Fourth, do not impeach with facts taken out of context. Remember, OEC 106 gives your opposing counsel the ability to require you to read the entire relevant portion of a statement, not just the portion you wish to use. Finally, be selective when choosing what facts to use as a basis for impeachment. Not only is extrinsic evidence of a prior inconsistent statement on a collateral matter inadmissible, impeachment on a collateral matter needlessly distracts the jury and undermines the power of your impeachment on more material issues.

Conclusion

When used properly, impeachment by prior inconsistent statement can change the outcome of a trial. A botched attempt, however, can leave you with egg on your face in front of the jury. Even worse, a failed attempt could look like you took a cheap shot at a witness. A short review of this fundamental skill can get you a long way.