Memorandum

Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P.

To:

From: Mary Kennedy

Date:

Subject: Impeaching with Prior Statements

INTRODUCTION

Before impeaching a witness with a prior inconsistent statement, a lawyer has to decide whether impeaching the witness advances the defense theory and whether the goal of the impeachment is to have the fact finder believe the prior statement or simply to show that the witness is contradicting himself or herself. The foundation you lay and the questions you ask will depend on your goal.

TRADITIONAL METHOD - "THREE C'S"

In your law school trial advocacy class, you were probably taught some variation of the "three C's" method of impeachment: **C**ommit the witness to the direct testimony; **C**onfront the witness with the inconsistent statement; and **C**omplete the impeachment.

This traditional method should be used in situations where you are not asking the fact finder to credit the out-of-court statement. Instead, you are not endorsing either the in-court or out-of-court statement. Your goal in this situation is to show that the witness cannot be believed because the witness can't keep the story straight. Assume for example that your client is charged with destruction of property. On direct examination, the complaining witness states that your client threw a brick threw a window. In a statement to your investigator, the complaining witness asserted that your client threw a bottle threw the window. Your position is that the client didn't throw anything. You are not asking the fact finder to believe that a bottle was thrown. Instead, you want the fact finder to disbelieve the complaining witness because the story has changed

To make it crystal clear that the witness is being inconsistent, you want to lock in the direct testimony so that the fact finder will see the direct contrast. You are not asking the fact finder to believe the out-of-court statement so you do not want to build up the reliability of that statement to make it seem more trustworthy than the in-court statement. You do want to bolster the statement enough to show that it was not made by mistake or in passing.

Commit the witness to the direct testimony

Confront the witness with the inconsistent statement(Lay foundation showing out-of-court statement is reliable though not more reliable than in-court statement)

Complete the impeachment

TWO C'S - CREDITING THE OUT-OF-COURT STATEMENT

You should use a variation on the traditional approach when you want the fact finder to believe the prior. The method should be reduced to two C's when you want the fact finder to ***credit*** the out-of-court statement. You do *not* repeat the statement made during direct testimony on the theory that you do not want to repeat the "bad stuff." Therefore, you skip the first "C" and do not commit the witness to the direct testimony. Instead, you begin by asserting the statement you want credited, the out-of-court statement. When the witness disputes the favorable statement, [1] you confront the witness with the out-of-court statement. You want to build up the out-of-court statement in a way that suggests that the statement is the most reliable thing ever uttered because you want the fact finder to credit that out-of-court statement.

Confront the witness with inconsistent out-of-court statement (lay foundation that shows out-of-court statement was most trustworthy statement ever made)

Complete the impeachment

---

[1] In the unlikely event that the witness actually agrees with that assertion, you can stop. You do not need to impeach the witness. The witness has agreed with the statement that you want the fact finder to credit.

EXAMPLES

What follows are some examples of methods of impeachment. Some of the examples are for situations where you want to **credit** the out-of-court statement. Others are where you **don't care to credit** the out-of-court statement, you just want to show that the witness is inconsistent and cannot be believed. The examples also show when you might want to introduce prior inconsistent statements. *See* FRE 613 and FRE 801(d)(1)(A). The examples do not and could not possibly cover every situation and every tactical choice that may be appropriate in your case. When there are very obvious tactical choices, we have tried to mention them. However, these examples should in no way be considered word-for-word outlines of how your impeachment questions would look in a particular case.

Bear in mind that the examples that follow are somewhat generic and are just suggestions. The examples do not cover situations when you may need to refresh the witness' recollection or when you have to **beware of prior consistent statements** (see FRE 801(d)(1)(B). *See also Tome v. United States*, 513 U.S. 150 (1995).

GRAND JURY IMPEACHMENT (SWORN TESTIMONY)

In the following example, you want the out-of-court statement **credited**:

During direct testimony, the witness has said that the person who robbed him had a mustache. Your client had a mustache on the day of the robbery. At the grand jury, the witness said that the person who robbed him did not have facial hair.

Q: Sir, the person who robbed you did not have any facial hair, did he?

A: Yes he did. He had a mustache.

Q: You testified before a grand jury in this case?

A: Yes.

Q: The prosecutor was in the room with you?

A: Yes.

Q: There were 12 to 18 citizens in the room?

A: Yes.

Q: And there was a court reporter in there?

A: Yes.

Q: The court reporter was writing down the questions asked and the answers given?

A: Yes.

Q: That was on (month, day, year)?

A: Yes.

Q: That was (# of months) after the incident?

A: Yes

Q: And now we are (# of months plus) after the incident?

A: Yes.

Q: Your memory was at least as good when you testified before the grand jury as it is today?

A: You could say that.

Q: When you testified before the grand jury, you swore to tell the truth? (Or if you want to be dramatic "You raised your right hand to God?")

A: Yes.

Q: And you did tell the truth?

A: Of course.

Q: You were asked this question and you gave this answer: (tell prosecutor page and line)

[Reading from transcript (***slowly***)]

"Question: Did the man who robbed you have any facial hair?"

Answer: No."

That was the testimony you gave under oath before the grand jury?

A: Yes.

(You definitely want to submit a redacted copy of the grand jury testimony as an exhibit in the defense case. The prior inconsistent statement comes in for the truth because it was under oath. See FRE 801(d)(1)(A)). *See also Gray v. United States*, 589 A.2d 912, 915 (D.C. 1991).)

GRAND JURY IMPEACHMENT (SWORN TESTIMONY)

In this example, you are trying to show the **inconsistent statements**.

During direct testimony, the witness has said that he had drunk three beers on the night of the incident. At the grand jury, the witness said that he had drunk 4-5 beers on the night of the incident.

Q: You've just told us that you had drunk three beers?

A: Yes.

Q: Sir, you testified before a grand jury in this case?

A: Yes.

Q: That was back on (month, day and year)?

A: Yes.

Q: You were under oath?

A: Yes.

Q: Just like you are today?

A: Yes.

Q: Back on (date of grand jury testimony), you knew that it was important for you to be truthful?

A: Of course.

Q: Just like today?

A: Yes.

Q: And when you testified before the grand jury, you were asked this question and you gave this answer: (tell prosecutor page and line)

[Reading from transcript **(*slowly*)**]

"Question: How many beers did you drink that night?

Answer: Four or five."

That was the testimony you gave under oath before the grand jury?

(Even though you don't care which statement is credited, you may want to introduce a redacted copy of the grand jury transcript in your case to remind the fact finder of the witness' inconsistency.)

PRIOR INCONSISTENT ORAL STATEMENT

In this example, you want the out-of-court statement **credited**.

On direct, the witness testified that the person who robbed him had a dark complexion. Your client has a dark complexion. When the witness first reported this incident to the police, he told the police that the person had a light complexion. The police officer recorded this description in a PD 251.

Q: During this incident, you got a very good look at the man who robbed you, right?

A: Yes, very good.

Q: Even though it happened quickly, you were able to notice a few important details about the person?

A: Yes.

Q: The person who robbed you had a light complexion?

A: No, dark.

Q: The same day you were robbed, you talked to the police?

A: Yes.

Q: The police arrived on the scene within minutes?

A: Yes.

Q: And you were taken to the police station?

A: Yes.

Q: The incident was fresh in your mind?

A: Yes.

Q: The police asked you questions about the robbery?

A: Yes.

Q: You told the police as much as you could remember?

A: Yes.

Q: You wanted the police to find the person who robbed you?

A: Absolutely.

Q: So you tried to be as accurate as you could be?

A: Yes.

Q: You tried to be very careful when you spoke to the police?

A: Yes.

Q: You tried to give them the best information that you could?

A: Yes.

Q: You told the police that the man who had robbed you had a light complexion?

(If the witness agrees, the impeachment is complete. If disagrees, you need to call the police officer in your case to complete the impeachment. You can't use the PD 251 to impeach the witness because the witness did not create the document.)

If the witness does agree, depending on the case, you may want to ask the witness a question like "And that's because the person who robbed you had a light complexion." Whether you want to ask that question depends on the facts of your case, the type of witness, your own level of experience, and many, many other factors.

PRIOR INCONSISTENT SIGNED STATEMENT

In this example, you want to show the **inconsistency.**

On direct, the complainant testified that she was wearing a dark blue sweat suit when she was robbed. In a statement given to your investigator, she said she was wearing a white shirt and red skirt.

Q: You just told us that you were wearing a blue sweat suit on the day of the incident?

A: Yes.

Q: You are certain that is what you wearing?

A: Yes.

[At this point, some lawyers will ask the following question. Not everyone likes it:

Q: You are as certain about that fact as you are about everything else you have testified about today?

A: Yes.]

Q: About one week after the incident, you spoke to a young woman about this case?

A: I think so.

Q: She told you that her name was Mary Jones?

A: Yes.

Q: And she told you that she was an investigator for Mr. Client?

A: Yes.

Q: She was asking you questions about the robbery?

A: Yes.

Q: And you answered her questions?

A: Yes, I did.

Q: Ms. Jones was writing down what you had to say?

A: Yes.

Q: After she was done writing, you had the chance to read over the statement?

A: Yes.

Q: And Ms. Jones also read the statement aloud to you?

A: Yes.

Q: At the end of the statement, you signed your name?

A: Yes.

Q: Right above your name, there is a paragraph stating that the statement is true and accurate?

A: Yes.

Q: You told Ms. Jones that you were wearing a white shirt?

A: Yes.

Q: And you told Ms. Jones you were wearing a red skirt?

A: Yes.

(Again, you can introduce redacted statement in your case.)

IMPEACHMENT BY OMISSION

In this example, you want the out-of-court omission **credited**.

On direct, the witness has said that the person who robbed her had a scar on her cheek. Your client has a very noticeable scar on his cheek. In a statement given to the police, which she signed, the witness never said anything about a scar.

Q: You got a pretty good look at the person who robbed you?

A: Yes.

Q: You were able to see his face?

A: Yes.

Q: You spoke to the police right after you were robbed?

A: Yes.

Q: The police arrived just minutes after the event?

A: Yes.

Q: They drove you to the police station?

A: Yes.

Q: The police asked you questions?

A: Yes.

Q: You remembered everything that had just happened?

A: Yes.

Q: You remembered it pretty clearly?

A: Yes, very clearly.

Q: You wanted the person who robbed you to be caught?

A: Yes.

Q: You wanted to give the police as much information as you possibly could?

A: Yes.

Q: The police asked you to describe the person?

A: Yes.

Q: You told them everything you noticed about the person?

A: Yes.

Q: The police were typing as you spoke with them?

A: Yes.

Q: You had a chance to review the statement?

A: Yes.

Q: You had a chance to make any changes that you wanted to make?

A: Yes.

Q: You did make some changes?

A: Yes, I did.

Q: You signed the statement?

A: Yes.

Q: You signed right under a sentence saying that the statement was true, accurate and complete?

A: Yes.

Q: And the statement was true, accurate and complete?

A: Yes.

Q: When you described the person who robbed you, on the very day of the event, you did not say the person had a scar?

A: Yes I did.

(Have statement marked, show it to the government. Ask for permission to approach unless judge has said you don't need to or if judge's procedures say you don't need to.)

Q: I'm showing you defense one for identification. That is a copy of the statement you gave to the police on (day of robbery)?

A: Yes.

[The next series of questions and any of the following questions which refer to the length of the statement may not be appropriate in a given case. On the one hand, the statement is so long that you would expect it to cover all details. On the other hand, if the only use you make of the statement is to impeach on one point, the fact finder may quite correctly assume that everything else is consistent. The choice you make for your case depends on the circumstances of your particular case.]

Q: That's your signature at the bottom of each page?

A: Yes.

Q: The statement is five pages long?

A: Yes.

Q: Take a moment to read the statement and look up when you are done.

(Witness looks up.)

You never mention the word “scar” in the five-page statement you gave to the police the very night of the incident?

A: No, I didn't.

(Or, if you want drama:)

Q: Take this red pen and circle the word “scar” every place you see it in the statement you gave the police the very night of the incident?”

(With impeachment by omission, you probably do not want to introduce the document because it will likely be filled with prior **consistent** statements which will overwhelm the impact of any omissions. Also, a typical redirect by the government would be something along the lines of "Did the police ask you about any scars?" To limit the effectiveness ((if any)) of such redirect ((which, by the way, is leading and should be objected to)) you should make sure to have "close out" sentences in the statements you take from witnesses, particularly when they are describing people. E.g. "The person had a medium complexion, braces on his teeth, light eyes, and no facial hair. **I DO NOT REMEMBER ANYTHING ELSE ABOUT THE PERSON'S FACE."**