“Impeachment Done Right”

Canadian Bar Association

Advocacy before the Courts in Intellectual Property Matters

Ottawa, Ontario

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May 5, 2011

"IMPEACHMENT DONE RIGHT"
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INTRODUCTION

Cross-examination deals with the separation of truth from falsehood. The purpose of cross-examination is "to weaken, qualify or destroy the case of the opponent; and to establish the party's own case by means of his opponent's witness."[2] Impeachment of a witness is one of the hallmarks of cross-examination and assists in meeting this goal. It is one of the most effective ways to demonstrate to the trier of fact the weaknesses of your opponent's witness. Impeachment can be based on a number of different grounds: the witness's bias, his inaccuracy, his interest in the litigation, or a previous criminal conviction.

Impeachment has one purpose only: to discredit the testimony advanced by your opponent. In a sense, impeachment is a defensive measure. It seeks to limit your opponent's case; impeachment does not strengthen your case.

The classic opportunity of impeachment occurs when there is an inconsistency between the evidence given by the witness at trial and his or her earlier testimony at an examination for discovery. Before invoking this technique, counsel must be familiar with the law and procedure relating to impeaching a witness.

The predominant impeachment technique is cross-examining a witness on prior inconsistent statements which will be the main focus of this paper. The prior inconsistent statement is the most powerful impeachment weapon, as well as the most effective, frequently

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[2] Ed Ratushny, "Basic Problems in Examination and Cross-Examination" (1974) 52.2 Can. Bar Rev. 209 at 232, citing *Jones v. Burgess* (1914), 43 N.B.R. 126.

used method of impeachment[3] and is considered by some as the only impeachment method.[4] The fundamental purpose of this method of impeachment is stated by Wigmore as follows:

> We place his contradictory statements side by side, and, as both cannot be correct, we realize that in at least one of the two he must have spoken erroneously. Thus, we have detected him in one specific error, from which may be inferred a capacity to make other errors.[5]

By eliciting a prior inconsistency with earlier testimony, the cross-examiner demonstrates that the witness's current testimony is incorrect, or their earlier testimony is incorrect. The other categories of impeachment include omission, the character of the witness such as bad character or prior convictions and also the relationship of the witness to the outcome of the litigation, better known as bias. Each of these will be briefly discussed in this paper.

The first part of this paper will note some objectives to think about before using prior inconsistent statements to impeach a witness on cross-examination. This will be followed by outlining considerations when using this method of impeachment and a discussion of the steps used to properly use prior inconsistent statements to impeach a witness. The second part of this paper will examine impeachment by omission which is concentrating on what was not said in the witness's prior statement. This paper will conclude with a brief discussion of other methods of attacking a witness's credibility.

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[3] Alan W. Bryant, "The Adversary's Witness: Cross-Examination and Proof of Prior Inconsistent Statements" (1984) 62 Can. Bar Rev. 43.

[4] Alan D. Gold, "The Inconsistent Witness" (Paper presented to the Criminal Lawyers' Association Annual Convention and Education Programme, "Witness for the Prosecution: Successful Impeachment Strategies, Toronto, Ontario, 21 and 22 November 1997), Alan D. Gold Collection of Criminal Law Articles at para. 2 (QL).

[5] J.H. Wigmore, *Evidence in Trials at Common Law*, vol. 3A (Chadbourn rev. 1970), s. 1017, p. 993, cited in Alan W. Bryant, "The Adversary's Witness: Cross-Examination and Proof of Prior Inconsistent Statements" (1984) 62 Can. Bar Rev. 43.

EFFECTIVELY USING PRIOR INCONSISTENT STATEMENTS – HOW TO DO IT RIGHT

What is the Cross-Examiner's Objective?

In preparing for the cross-examination of the witness, counsel must ask themselves "why do I wish to confront the witness with his prior testimony?" There is usually only one reason for confronting the witness with their prior testimony, that being the witness's evidence-in-chief is harmful towards the cross-examiner's case. Counsel must decide whether they want the witness to adopt their earlier testimony or whether they wish to attack the credibility of the witness during the cross-examination.

If the witness's present testimony is more favourable than the earlier testimony, then there is probably no reason to confront the witness about their earlier statement. It should be noted that the use of a prior inconsistent statement serves a limited purpose, that is, to destroy or to weaken the witness's credibility. It may be one of the cross-examiner's goals to have the witness adopt their earlier testimony as it is more favourable to the cross-examiner's case, thereby forcing the witness back to their original account and to negative the testimony given in chief. However, the cross-examiner's goal may be to demonstrate that the trier of fact should not believe any of the witness's testimony.

By demonstrating the inconsistency in the witness's testimony, the cross-examiner is now able to argue in closing that the witness's evidence is unreliable; the prior inconsistent statement shows that the witness erred in his testimony either on this occasion or at the time he made the earlier statement. It is even more effective if a witness denies making the previous inconsistent statement and counsel is forced to prove the statement. Counsel would have both the inconsistency and the witness's denial of making the earlier statement.

Considerations for the Cross-Examiner

In order for impeachment by prior inconsistent statements to be used effectively, there a number of considerations that must be thought through by counsel. First, do not attack or ask the witness about trivial facts or minor inconsistencies. These are not sufficient to invoke the cross-examiner's tool of impeachment. As Alan Gold explains, "quibbles are blanks… [q]uibbles are worse than not cross-examining on inconsistencies because it shows you are dredging the bottom of the barrel."[6] Only impeach a witness on actual inconsistencies.

Secondly, it is usually advisable to maximize cooperation by beginning with inquiries that do not challenge or threaten the witness. For example, ask questions of the witness that would illicit evidence that is not contested between the parties but helps lay the foundation for your questioning on their prior inconsistent statements. As counsel will be confronting the witness, it is best to have obtained all favourable information that you intend to obtain from the witness prior to commencing impeachment, as it is unlikely you will have the witness's cooperation once you begin questioning on their previous inconsistent testimony.

Thirdly, impeachment should fit into the counsel's overall strategy for cross-examination. The cross-examination is usually most effective if there is a structure or order to it. If counsel jumps around demonstrating inconsistencies, this may not be effective and may be difficult for the trier of fact to follow. It is best to provide inconsistencies about various parts of the case which will demonstrate to the trier of fact that the witness may lack credibility in multiple aspects of this litigation.

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[6] Alan D. Gold, "The Inconsistent Witness" (Paper presented to the Criminal Lawyers' Association Annual Convention and Education Programme, "Witness for the Prosecution: Successful Impeachment Strategies, Toronto, Ontario, 21 and 22 November 1997), Alan D. Gold Collection of Criminal Law Articles at para. 17 (QL).

The last consideration is that the trial judge has the discretion to order production of the impeaching document pursuant to section 10 of the *Canada Evidence Act*.[7] Counsel should have copies of the impeaching document ready, highlighted and tabbed to produce to opposing counsel and the bench if such an order is made. In *R. v. Savion, Zuber* J.A. held that this power to order production "flows from the ability of the Court to control its process so as to manifestly ensure fundamental fairness and see that the adversarial process is consistent with the interests of justice."[8]

How to Execute this Technique of Impeachment – The Four "C's"

There are four steps in impeachment of a witness on prior inconsistent statements: confirm, confront, contradict and commit. The cross-examiner first has to confirm or "anchor" the witness's present testimony; then the cross-examiner has to confront the witness with the making of a prior statement or proving the prior statement, usually by providing the circumstances in which it was made; third, the cross-examiner has to contradict the present evidence-in-chief with the prior inconsistent statement; and fourth, if the cross-examiner wishes the witness to adopt their earlier testimony, to have the witness commit to the prior statement.[9] Each of these steps is briefly discussed below to demonstrate how to properly use prior inconsistent statements.

Step 1: Confirm the Present Testimony

The first step in impeaching a witness with a prior inconsistent statement is to confirm the witness to his or her evidence-in-chief or current testimony. This is sometimes known as anchoring or committing the witness to the current testimony. In confirming the witness's

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[7] *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 10(1). See also, *R. v. Savion & Mizrahi* (1980), 52 C.C.C. (2d) 276 (Ont. C.A.), discussed in Early J. Levy, *Examination of Witnesses in Criminal Cases* (Toronto: Carswell, 1987) at 131.

[8] *R. v. Savion & Mizrahi* (1980), 52 C.C.C. (2d) 276 at 283-285 (Ont. C.A.).

[9] Lee Stuesser, *An Advocacy Primer*, 3d ed. (Toronto: Thomson Canada Limited, 2005) at 294.

present testimony, counsel should make sure that the answer is crystal clear. A cross-examiner should avoid using such words as “reasonable” or “large”. The use of such words could “stretch or contract to hide the inconsistency” that you are trying to highlight for the trier of fact.[10] Counsel should try to confirm the present testimony both in a positive fashion, as well as a negative fashion, in order to build the inconsistency. For example, ask “so, you are absolutely sure it was a blue car? It was not a yellow car, not a black car, not a green car.” This helps foreshadow the inconsistency with the prior statement which you will prove during your cross-examination of the witness.

There are two ways to confirm the witness’s current testimony. The traditional method is for the cross-examiner to restate the in-chief testimony as accurately as possible. For example, counsel could state: “you said in chief that the light was green…” The cross-examiner should use short, leading questions during this step. This allows the cross-examiner to retain control over the witness in preparation for impeachment.

The alternate method, also known as the elegant way, [11] is rephrasing the evidence-in-chief in language that is beneficial to the cross-examiner’s own case. For example, counsel could ask “the light was red, wasn’t it?” and the witness would say, “No, it was green.” The elegant method allows counsel to immediately move to impeach the witness on his or her prior statement, as it follows that the witness has denied that the light was red. There is a chance that the witness may agree with you, and then impeachment will be unnecessary. Furthermore, the witness’s revised testimony as to the colour of the light will be admissible as substantive evidence, not merely as impeachment.

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[10] Alan D. Gold, “The Inconsistent Witness” (Paper presented to the Criminal Lawyers’ Association Annual Convention and Education Programme, “Witness for the Prosecution: Successful Impeachment Strategies, Toronto, Ontario, 21 and 22 November 1997), Alan D. Gold Collection of Criminal Law Articles at para. 28 (QL).

[11] Steven Lubet, Sheila Block & Cynthia Tape, *Modern Trial Advocacy: Canada*, 2d ed. (Notre Dame, Indiana: National Institute of Trial Advocacy, 2000) at 151.

Step 2: Confront the Witness about the Prior Inconsistent Statement – The Impeachment

After committing the witness to their current testimony, the cross-examiner will have to confront the witness about their earlier testimony by setting out the circumstances of when and how the prior statement was made (such as at an examination for discovery). There are certain technical rules that must be followed before you attempt to impeach a witness. These rules allow the witness to indentify the circumstances in which the statement was made, avoids any unfair surprise and gives the witness an opportunity to deal with or otherwise explain the contradiction.[12] The technical rules are as follows:

1. If you intend to contradict the witness with the prior inconsistent statement, both section 10 of the Canada Evidence Act and its provincial counterparts require you to put to the witness those parts of a previous written statement on which you rely.

2. In addition, the witness's attention must be drawn to the occasion and the circumstances in which the statement was made.

3. If the witness does not recall making the prior inconsistent statement, you are entitled to prove the statement. Wigmore argues that even if the witness admits making the statement , the cross-examiner is still entitled to prove the statement to emphasize the point. The purpose of the preliminary question is not to prove the prior inconsistent statement, but merely to warn the witness of your intention to prove it.

Step 3: Contradict the Witness

This is the final necessary step of impeachment and where the fun begins. The prior inconsistent statement is put to the witness in verbatim form. The purpose of this is to extract from the witness an admission that the earlier statement indeed was made and recall that it is the fact of the prior inconsistency that is admissible as impeachment. You want to highlight and reiterate the conflict in multiple ways for the trier of fact.

[12] 3A Wigmore, *Evidence*, Chad. Rev., §1025. The statutory provisions are designed to alleviate the unfairness created by the common law whereby the cross-examiner was not obligated to give the witness an opportunity to explain the inconsistency: Bryant, "Adversary's Witness," at 57-58.

In order for this contradiction to be effective, counsel should be clear and concise leaving the witness no room for evasion or argument. Simply read the witness his or her own words. The impeachment can be enhanced by the cross-examiner directing the witness to read along from the document containing the prior inconsistent statement.

There are two rules to be followed in contradicting a witness about a prior inconsistent statement: (1) do not ask the witness to read the statement aloud, and (2) do not ask the witness to explain the inconsistency or to agree that the two statements are inconsistent or different. Doing so could undermine your control of the cross-examination of the witness. Moreover to ask the witness to explain the inconsistency may provide the witness an opportunity to undermine the cross-examiner's impeachment. The classic pitfall is for the examiner to ask "were you lying then or are you lying now" which provides the witness an opportunity to explain the inconsistency, thereby taking the clear edge off of the effect of the inconsistent statements" that the examiner has highlighted.

An example of how one might confront a witness on a prior inconsistent statement is as follows:

> **Q.** Is it fair to say that liquidity was not at the heart of the agreement?
> **A.** I would say it's fair to assume that that wasn't the corner-stone, that wasn't the most critical thing in mind at the time.
>
> **Q.** It wasn't at the heart of the agreement?
> **A.** That's right. Security, in my mind, was the heart of the agreement.
>
> **Q.** Now, do you remember being cross-examined [on affidavits filed by the witness] by myself, Mr. W.?
> **A.** Yes, I do. I think you cross-examined me on two occasions, did you not?
>
> **Q.** Actually, it was three occasions.
> **A.** Three occasions.
>
> **Q.** You don't remember that you were cross-examined on three separate occasions?
> **A.** I guess I do, yes.

Q. Now you do?
A. Yes.

Q. Just to refresh your memory, you were cross-examined on February 17th, 1984, May 23rd, 1984 and October 31st, 1984.

Step 4: Commit the Witness to the Earlier Statement (Optional)

This final step is optional to counsel who wish to have the witness adopt their earlier statement. If the witness does not adopt the prior statement, then the prior inconsistency only goes to credibility. If the cross-examiner wishes for the witness to adopt their previous statement, then you may ask the witness whether their earlier question was true.

Summary of Steps of Impeachment on Prior Inconsistent Statements

The cross-examination may proceed as follows, continuing with the red and green light example from above:

1. Cross-examiner firmly establishes the witness's evidence-in-chief is that the light was green.

2. Cross-examiner suggests to the witness that the traffic light was red (counsel does not need to disclose the existence of the statement at this stage).

3. Cross-examiner asks the witness if he or she has previously made a statement to anyone that the light was red.

4. If the witness admits he or she did make such a former statement, the cross-examiner may produce the statement and attempt to prove it by reading verbatim the relevant part to the witness or by placing the document in the hands of the witness and requesting that the witness refresh his or her memory.

5. (i) If the witness unequivocally admits making the former statement, counsel may ask the witness whether he adheres to his present testimony or whether the account set out in his former statement is correct.

(ii) If the witness denies making the former statement and denies that the traffic light was red, cross-examiner is stuck with the answer unless counsel independently proves the self-contradiction pursuant to section 11 of the *Canada Evidence Act*.

6. If the witness admits the former statement is correct, that is, the traffic light was red, that ends the matter and the impeachment is over.[13]

An example of a successful impeachment is illustrated in Lee Stuesser's primary on advocacy:

[Commit the witness to their evidence from examination in chief]

Q. When my friend asked you what the man who was running down the street was wearing, you told him that he had on a bright red coat and beige pants. Isn't that what you swore?
A. Yes

Q. You're sure it was the coat that was bright red, not the pants?
A. I'm sure.

Q. In other words there's no possibility that the man's pants were bright red and his coat beige?
A. Not at all.

Q. You are absolutely certain.
A. Yes.

At this point the witness' testimony is clearly and unequivocally imprinted both on the transcript and, more importantly, in the mind of the court. Then you might proceed as follows:

[Confront the witness with making a prior statement]

Q. I'm going to show you a document. Is that your signature on it?
(pointing out his signature at the bottom of the last page)
A. Yes, it is.

Q. Are those your initials at the bottom of each page?
A. Yes, sir.

Q. Do you remember my interviewing you about this robbery on September 15, 1981, and writing down what you told me?
A. Yes.

Q. Then I read it back to you, and you signed and initialled it?
A. Yes, I recall I did.

Q. And Mr. Johnson of my office was also present?
A. Yes – I don't remember his name – but I do remember another man there.

[13] Alan W. Bryant, "The Adversary's Witness: Cross-Examination and Proof of Prior Inconsistent Statements" (1984) 62 Can. Bar Rev. 43 at 58.

Q. Is this the statement that you gave me on that date?
A. It appears to be.

[Contradict the witness with the inconsistent statement]

Counsel then moves to stand beside the witness and points to a line on the statement:

Q. Read what you told me there?
A. Where?

Q. On the line I am pointing to – read what you told me – read it to the jury.
A. "I was looking out the bus window when I saw a man running down the street with a black bag in his hand."

Q. Was that true?
A. Yes, that's what happened.

Q. Read the next sentence.
A. "The man was wearing a beige leather or vinyl jacket that came down to his waist and dark brown or black pants."

Q. Is that what you told me on September 15, 2004 at your examination for discovery?
A. Well, it appears to be.

[Commit the witness to the statement]

Q. Well, were you trying to tell me the truth?
A. What I said, I said.

Q. The man was wearing a beige leather or vinyl jacket. That's what you told me?
A. I said that, but now I recall it was red.

Q. So you want to change your statement now?
A. Well, it was red.

Q. You want to change your statement about the colour of that jacket from beige to bright red?
A. I don't know if it is a change.

Q. You will agree with me that the jacket can't have been both beige and bright red?
A. Yes.

Q. It certainly wasn't a reddish beige?
A. No, it was red.

Q. So your evidence before the jury about the colour of the coat has changed completely from what you told me?
A. I guess so.

Q. You'll agree that your memory of the robbery was much clearer on September 15th, two and a half months after it took place, than it is today?
A. I'm not sure of that.

Q. I'm suggesting to you that the coat might well have been beige?
A. Well, it might have been – that's what I said there.

Q. All right, I'll take that answer.[14]

IMPEACHMENT BY OMISSION - EXPOSING OMISSIONS IN THE WITNESS' EVIDENCE/TESTIMONY

Another method of impeaching a witness on prior written statements is to focus on what is not included in the witness's prior statement. This technique is effective because the failure to disclose a fact when it would have been natural to relate it can only result in one conclusion, that is, the fact did not exist. Counsel should always ask themselves: "what is missing from the statement?"[15] During impeachment by omission, a witness's current testimony is rendered less credible because her earlier version of the story did not contain facts which she now claims are true. In effect, impeachment by omission is proven by demonstrating a disagreement between the earlier statement of silence with the witness's evidence-in-chief.

The same steps must be followed as discussed above regarding impeachment on prior inconsistent statements. The difference comes at the validation stage by exposing the fact that there was a lack of an answer prior to trial. Three steps must be accomplished in successfully impeaching by omission:

1) Either by professional duty or by factual circumstances of the case, the person who is being impeached by his or her omission must have understood the need to be complete on important details;

2) The document, report, or hearing must have been an appropriate place (and hopefully *the* appropriate place) to speak of or note the important matters that were omitted; and

3) Under the factual circumstances of this case, at the time of the making of the document, report, or hearing, the matters were known or were important.[16]

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[14] Lee Stuesser, *An Advocacy Primer*, 3d ed. (Toronto: Thomson Canada Limited, 2005) at 298-301.

[15] John A. Olah & Colin Piercy, *The Art and Science of Advocacy*, looseleaf, v. 2 (Toronto: Carswell, 1990) at 13-34 to 13-35.

[16] Larry S. Pozner & Roger J. Dodd, *Cross-Examination: Science and Techniques*, 2d ed. (San Francisco: LexisNexis Matthew Bender, 2004) at 17-1.

There must have been some duty or moral responsibility on the part of the witness to provide or record information. A witness that was under a duty to provide this information such as being under oath at an examination for discovery, and the fact was omitted when questioned, leads to the conclusion drawn from the omission is that the fact did not occur. Examples of duty include a police officer's duty to file a police report, as well as a business duty where it could be shown that a witness did not include facts in a docket entry, a sales record, a service report, a transmittal letter, a bill of lading, an invoice, or any of numerous other documents that are expected to contain complete records of transactions.17 Similar duties may also be established for expert witness under the recently amended *Ontario* and *Federal Court Rules* regarding impartiality.

The witness had to have had the opportunity to have disclosed the facts previously. There must have actually been an omission by the witness. If he or she was not provided the opportunity prior to the trial, then the witness cannot be challenged during cross-examination. Therefore, a witness cannot be impeached on the basis of omission at an examination for discovery unless a question was asked that reasonable called for that information. Proof of opportunity may not be sufficient in some cases, as the witness may have misunderstood the question, was temporarily forgetful or confused. Counsel will usually have to go further and show that the absent statement would have been made if it had been true.

Thirdly, at the time when the statement was made, there must have been some importance to have disclose it. The previous silence can be inconsistent with a current statement if the earlier omission occurred in circumstances where the witness should have been naturally inclined to speak. While a witness may not have been under a legal or business duty

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[17] Steven Lubet, Sheila Block & Cynthia Tape, *Modern Trial Advocacy: Canada*, 2d ed. (Notre Dame, Indiana: National Institute of Trial Advocacy, 2000) at 174.

to have mentioned the facts to the individuals affected or involved, it is a reasonable inference that the witness would have told someone.

A good example of impeachment by omission is illustrated in Larry S. Pozner & Roger J. Dodd's text:

> **Q:** Doctor, you have looked carefully through your medical records, and there is no statement about doing a hemocult test?
> **A:** No.
>
> **Q:** There is no statement about finding "no blood" in the stool?
> **A:** No, there isn't.
>
> **Q:** But that's exactly what you testified to on direct examination, isn't it?
> **A:** Yes.
>
> **Q:** Now, you have thoroughly reviewed the records?
> **A:** Yes.
>
> **Q:** You have looked at every page?
> **A:** Yes.
>
> **Q:** In 39 pages of medical records concerning your treatment of Mr. Moffitt, there is not one sentence of performing a hemocult test, regardless of the results?
> **A:** No.

ATTACKING THE WITNESS'S CREDIBILITY

In addition to impeachment by prior inconsistent statements and omission, there are a multitude of methods of attacking the witness's credibility. In all of these methods of impeaching a witness, the cross-examiner is attacking the *integrity of the witness* or the *integrity of the testimony* or both. These include asking questions that undercut the witness's evidence, demonstrating that the witness has bias or personal interest in the outcome of the litigation or cross-examining on prior convictions.

Undercutting the Witness's Evidence

As mentioned above, if the cross-examiner does not wish the witness to adopt their previous statement, then the cross-examiner may attack the witness's credibility by asking

questions that demonstrate the witness's limited opportunity to observe events that gave rise to the litigation, assumptions that have been made by the witness, limitations in the witness's ability to recall and gaps in his or her memory, and inaccuracies in the witness's evidence. Each of these undercuts the witness's evidence and it follows that it would undermine the witness's credibility to the trier of fact.

Bias or Personal Interest in Outcome of Litigation

Bias covers a wide range of matters in impeaching a witness. The witness may be biased against your client; he may be motivated by hostility, malice, or enmity toward your client. Money may be behind the witness's antagonism, or perhaps it is friendship, kinship, or identification with the opposing party. If counsel strongly believes that bias exists, then it must be exposed to the trier of fact. The cross-examiner must advance questioning that will illicit evidence from the witness to prove the bias, or at least undermine the witness's credibility.

CONCLUSION

If performed successfully, impeachment can be an extremely effective way to undermine your opponent's case. However, it is double-edged. If your attempt to impeach fails, the witness will emerge stronger and her evidence reinforced. Use this technique carefully.

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