

Impeaching a Witness with a Prior Inconsistent Statement

By: Hon. Scott M. Grossman

Impeaching a witness with a prior inconsistent statement – particularly in bench trials – is quite simple, straightforward, and easy to do. Yet I have been surprised how few attorneys do it correctly.

In theory, impeachment should be done the same way we all learned it in law school, regardless of whether during a jury trial or a bench trial. But in practice, in bench trials lawyers typically do not need all of the dramatic flair and build-up you may have been taught in law school. In other words, you don't need to ask all the questions to establish the solemnity of the witness's deposition testimony: questions about going to a lawyer's office, sitting around a conference room table, all the lawyers there, the court reporter, raising your right hand, etc. Instead – since judges know full well what it means for a witness to testify under oath at a deposition – all you really need to do is establish that the witness previously testified under oath, and that the witness gave a different answer.

So here is a short refresher on how to do it. The first step, of course, is to be prepared. When cross-examining a witness, a well-prepared lawyer will have at hand the page and line number from the witness's deposition transcript for any question the lawyer asks the witness. This way, when you ask "what color was the traffic light as you approached the intersection?" you know that on page x, line y of her deposition transcript, the witness testified "it was red." Then, when the witness answers at trial "it was green," you know immediately where to go to impeach her testimony.

And it is quite simple – particularly in a bench trial – to impeach a witness with her prior inconsistent statement. All you have to do is:

1. Ask the witness if she had her deposition taken, was asked questions under oath, and swore to answer truthfully?
2. Then – as required by Federal Rule of Evidence 613(a) – tell (or show) opposing counsel the page and line number of the transcript from which you are about to read.
3. Next, ask the witness if you asked the following question and she gave the following answer?
4. Then read – verbatim – the question and answer from the transcript.
5. And, finally, confirm with the witness that was the testimony she gave.

That's it. You have now successfully impeached the witness with her prior inconsistent statement. You do not need to argue with her, or ask the argumentative (and objectionable) question "were you lying then or are you lying now?"

Notwithstanding the simplicity of this process, I have too often seen attorneys do it wrong. Again, suppose you ask the witness what color the traffic light was, she answers "green," and you know she testified at her deposition that it was red. Here are some examples (many variations of which I have seen) of how not to impeach a witness:

Q. Well that's not what you said at your deposition, was it?

Q. Didn't you tell me it was red during your deposition? Were you lying then or are you lying now?

Q. Why are you saying it is green when you previously said it was red?

Q. Judge, I have a deposition transcript where she said it was red!

Q. Your Honor, I'd like to offer into evidence the transcript of the witness's deposition, where she said it was red.

As discussed above, none of these questions is proper, appropriate, or effective to impeach a witness's testimony. Rather, here is an example of how to do it properly:

Q. What color was the traffic light when you approached the intersection?

A. It was green.

Q. I took your deposition on [date]?

A. Yes.

Q. At that deposition, you swore to tell the truth?

A. Yes.

Q. And you answered my questions under oath?

A. Yes.

Q. At that deposition, I asked you the following question, and you gave the following answer [give opposing counsel page and line number]: "Q. What color was the traffic light when you approached the intersection? A. Red." Was that the testimony you gave under oath at your deposition?

A. Yes.

That's it. You are done. You have successfully impeached the witness with a prior inconsistent statement, and you can move on to your next question.