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Impeachment by Prior Inconsistent Statement

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IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT

> It is with these aims, duties, and dangers in mind that the advocate rises to his feet to begin his cross-examination. It is the moment for him to remember the advantages he possesses over the witness. He, and not the witness, chooses the parts of his evidence on which to ask the questions. He may not choose to cross-examine about his evidence at all. He may choose to attack in an entirely different quarter. He, and not the witness, chooses the words with which to do it. He, and not the witness, knows the rules which bind them both. He, and not the witness, knows the foibles of the Judge who is to referee the contest. He, and not the witness, is familiar with and at home in the court in which they both stand, and he is dressed in a medieval armor sufficient to intimidate most well-brought-up children and a few adults. He, and no the witness, knows where to start and when to stop. Above all, no witness knows how much the advocate knows."[1]

1 Richard Du Cann, *The Art of the Advocate*, Rev ed (London: Penguin, 1993) at 129

I. Introduction

The most valuable weapon in the cross-examiner's arsenal is the ability to deftly impeach on a prior inconsistent statement. It is the skill that grants counsel the greatest advantage over the witness. It is the act of felling the witness using only his or her own words. Nothing could be simpler and deadlier in the arena of trial.

Great cross-examiners may have vastly different styles and approaches. But one thing that they all have in common is the ability to effortlessly deploy this skill when necessary. The best have made it automatic and reflexive in the same way that Serena Williams swings a racquet and Steph Curry shoots a basketball.

In the pages that follow I will provide a brief overview of the legislative framework that governs impeachment by prior inconsistent statement. I'll then discuss the proper method for deploying the skill. I'll then provide some of my own views on how best to plan and conduct this type of impeachment.

II. Legislative Framework

The respective federal and provincial evidence acts govern both the procedure for cross-examining on a prior statement and the procedure for proving a prior statement where the witness has denied making it. These acts are the descendants of a piece of British legislation, the *Common Law Procedure Act, 1854*[2], which was enacted to reform the previously non-sensical state of the common law.

The relevant provisions of the *Canada Evidence Act* are quite similar in substance to those of the British Columbia *Evidence Act*, R.S.B.C. 1996, c. 12 . For the purposes of this paper I will focus on the federal legislation.[3]

> **10 (1) Cross-examination as to previous statements –**
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> On any trial a witness may be cross-examined as to previous statements that the witness made in writing, or that have been reduced to writing, or recorded on audio tape or video tape or otherwise, relative to the subject-matter of the case, without the writing being shown to the witness or the witness being given the opportunity to listen to the audio tape or view the video tape or otherwise take cognizance of the statements, but, if it is intended to contradict the witness, the witness' attention must, before the contradictory proof can be given, be called to those parts of the statement that are to be used for the purpose of so contradicting the witness, and the judge, at any time during the trial, may require the production of the writing or tape or other medium for inspection, and thereupon make such use of it for the purposes of the trial as the judge thinks fit.
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> **11. Cross-examination as to previous oral statements –**
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> Where a witness, on cross-examination as to a former statement made by him relative to the subject-matter of the case and inconsistent with his present testimony, does not distinctly admit that he did make the statement, proof

2 (1854), 17 & 18 Vict., c. 125

3 The relevant provisions of the British Columbia *Evidence Act*, R.S.B.C. 1996, c. 124 are ss. 13, 14 and 16.

> may be given that he did in fact make it, but before that proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, shall be mentioned to the witness, and he shall be asked whether or not he did make the statement.

These provisions are best understood in concert with the eminently wise ruling of the Ontario Court of Appeal in *R. v. P.G.*[4] In that case, Rosenberg J. concluded that the word "oral" in the marginal note associated to section 11 ("Cross-examination as to previous oral statements") should be ignored. The effect of this interpretation is as follows:[5]

- "Section 10 (1) deals with the procedure for cross-examination of an opponent's witness on a written statement (or which has been reduced to writing or recorded).
- The common law still governs cross-examination on oral statements. The procedure mirrors that which is set out in section 10(1) of the Canada Evidence Act.
- "Section 11 governs proof of prior inconsistent statements both oral and written."

III. The Method of Impeachment on a Prior Inconsistent Statement

With a working knowledge of the legislative framework now in hand, we can now turn to the all-important matter of method. A competent impeachment on a prior inconsistent statement will always involve three steps. (1) Recommittal of the witness to the relevant part of their current testimony (that which is contradicted by the prior statement), (2) Validation of the prior statement, and (3) Confrontation of the witness with the inconsistency from the prior statement. In some cases, and depending on counsel's strategy and objectives, a fourth step will be undertaken: (4) Adoption of the previous statement as evidence

A. Recommittal

Recommittal is the first step in the process. Here, the witness is asked to confirm the impugned portion of trial testimony (the "present testimony"). The present testimony should be put to the witness by way of a leading question that quotes, to the greatest extent possible, the *exact* words of the witness. A failure to quote the witness accurately may result in confusion for the trier of fact. It may also provide a slippery witness with an opportunity to explain, qualify or re-contextualize the present testimony in a way that deflates the planned impeachment. Accuracy is essential. So, too, is extracting an unequivocal confirmation from the witness that he or she did in fact give the present testimony as suggested by counsel.

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4 (1996), 112 C.C.C. (3d) 263 (Ont. C.A.)

5 The Hon. Justice Richard A. Saull, "Cross-Examination on Prior Inconsistent Statements to Impeach Credibility", (Paper delivered at the National Criminal Law Program, Victoria, British Columbia, August 2012) [unpublished]., at 4 [Saul]

B. Validation

1. Confirm that the Witness, in fact, Made the Statement (Primary Purpose)

Next, counsel must establish the validity of the prior statement. In other words, he or she must prove that the witness did, in fact, make the prior statement. This is the primarly purpose of the validation stage of the procedure. Drawing the witness' attention to the circumstances surrounding the making of the statement is usually a good idea in order to provide context to the inconsistency for the benefit of the trier of fact. If the prior statement was reduced to writing, its contents will likely include details that shed light on the context within which the statement was taken (Ex. the witness' name, the witness' signature, date, time and location that the prior statement was taken). This is always the case, of course, with a police statement or court transcript. By directing the witness to those details while, again using primary leading questions, counsel should be able to complete this task fairly swiftly. If the witness ultimately denies making the statement, counsel must prove the statement otherwise.

2. Have the Witness Accredit the Prior Statement (Secondary Purpose)

If counsel seeks to do more than simply prove the inconsistency and aims to prove that the prior statement is the more accurate of the two, he or she should take steps to prove that the prior statement was made under circumstances that make it the more accurate of the two.[6] This is what is meant by *accredit*. The examiner may accredit the prior statement in a number of ways. One way is to have the witness confirm that the circumstances of the prior statement were such that the witness had an important reason to be accurate at the time.[7] Another is to have the witness confirm that the circumstances were such that they were under a *duty* to ensure the accuracy of the prior statement.[8] This is typically employed with police witnesses. Yet another way is to have the witness confirm that the circumstances were such that the witness' memory of the facts described (the subject of the inconsistent statement) was more fresh at the time of the prior statement.[9]

C. Confront

The impeachment crystalizes at the point when counsel confronts the witness with the inconsistency itself. The purpose of the confrontation is to lead the witness to make the inevitable admission that he or she, indeed, uttered the specific contradictory portion of the prior statement. It is said that "specificity is the soul of narrative"[10]. If counsel is not specific with respect to the precise portion of the prior statement that he or she is confronting the witness with, he or she may provide the witness yet another opportunity to quibble over what

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6 Steven Lubet (Adapted for Canada by Cynthia Tape & Lisa Talbo), Modern Trial Advocacy: Analysis & Practice, 3d ed (Louisville: NITA, 2010) at 151 [Lubet]

7 Lubet at 152

8 Lubet at 155

9 Lubet at 155

10 John Hodgman, (31 May 2014 at 6:41), online: Twitter<https://twitter.com/romanmars/status/472727849200517120?lang=en>

was actually previously uttered. For the confrontation to be impactful (from the perspective of the trier-of-fact), the witness must be confronted with the exact, specific contradicting words.

While it is essential that counsel remain in control of the speed, flow and direction of the examination of all times, this is especially so at the point of confrontation. The examiner is wise to follow two rules of thumb when 'putting' the prior inconsistency to the witness.

1. Only the Examiner Reads the Inconsistency Aloud

The first rule is that counsel, rather than the witness must be the one that actually reads the inconsistency aloud in court. Remember, counsel is not permitted to interrupt the witness' answer to any question. So to allow the witness to read the inconsistency aloud is to, effectively, provide the witness an opportunity to editorialize explain and argue about the meaning of the inconsistency at the same time that he or she reads it allowed. This may significantly blunt the impact of the inconsistency. It may also impede any momentum that counsel has built up in the leadup to the confrontation. It also provides the witness the chance to present the inconsistency while using whichever vocal inflection they desire.[11]

Presentation matters. If it is not in the witness' interest to present the inconsistency impactfully (and by definition, it almost always won't be), then you can count on a less than impressive performance. The examiner's hard work in preparing for the confrontation and taking the witness through the first two steps of impeachment will be for naught.

Good practice dictates that counsel (a) direct the witness to the relevant portion of the prior statement; (b) ask the witness to follow along while counsel reads the relevant portion aloud; (c) read, verbatim, the relevant portion to the witness and do so in a "loud, clear and contrasting tone of voice"[12]; (d) ask the witness to confirm that it was read accurately; and (e) ask the witness to confirm that he or she was "asked those questions and gave those answers".

2. Don't ask the Witness to Explain the Inconsistency

Another good way to lose control of the impeachment is to offer the witness an open-ended opportunity to explain the inconsistency. For obvious reasons, this is a bad idea. Asking "Why?" will inevitably lead to an explanation that favors the witness' ends, not counsel's ends.

In many cases proof of the inconsistency itself, absent an explanation from the witness, will suffice to provide counsel a solid basis to submit to the trier-of-fact that the witness shouldn't be believed. There is no need to seek an explanation for the inconsistency.

In situations where counsel's theory of the case includes a theory about the reason for the inconsistency (like a motive to lie), it may be appropriate to put that theory to the witness. Tactically, this can be an opportunity to preview your theory to the trier-of-fact in advance of final argument. In a given case it may also be necessitated by counsel's obligations pursuant to the rule in *Browne v. Dunn*.[13]

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11 Lubet at 158-159

12 Lubet at 158

13 (1893) 6 R. 67, H.L

If counsel does elect to explore the reason for the inconsistency it should only be done by putting counsel's theory in that regard to the witness by way of closed, leading questions and with a plan as to how to deal with an anticipated denial.

D. Adoption

If the Advocate aims, through cross-examination, to change the witness' testimony so that it matches the prior statement, he or she must move to have the witness explicitly adopt the prior testimony. It is trite law that unless the witness does so, the admissibility of the prior statement is limited to the extent to which it demonstrates an "undefined capacity to err"[14] or, in other words, the witness' credibility and reliability. Of course, this does not apply to admissions made by a party (including the accused in a criminal case). In that context, prior inconsistent statements are admissible for the truth of their contents regardless of whether or not they are ultimately adopted by that party during examination.

If the Advocate aims to have a non-party witness adopt a prior inconsistent statement he or she will have laid the groundwork prior to the confrontation stage. They will have worked hard to accredit the prior statement at the validation stage of the impeachment. The hope being that at the point of confrontation the witness will be forced to either concede the truth of the prior statement or face the consequences of sounding ridiculous in the eyes of the trier-of-fact. The classic example of this, of course, is a police officer who took contemporaneous notes of an event (while also under a duty to take accurate notes of course) and then comes to trial years later and testifies to a completely different version of events. The officer is forced to either admit the truth of the prior statement (the notes) or testify to some absurd explanation of why, contrary to common sense notions of how the human mind and memory operate, his current recollection of the event is accurate.

IV. Prior Inconsistent Omission

Sometimes it is the fact that a witness has left a significant fact out of a previous statement that forms the basis for an impeachment based on prior inconsistency. The statement is almost identical to what is outlined above regarding prior inconsistent statements. For an excellent guide of the 'ins and outs' of impeachment by prior inconsistent omission, the writer recommends the relevant section of Stephen Lubet's "Modern Trial Advocacy: Analysis & Practice (Canadian 3rd Edition; As adapted for Canada by Cyntia Tape and Lisa Talbot).[15]

V. Proving the Prior Statement

As mentioned above, it is section 11 of the Canada Evidence Act that governs the procedure when a witness denies a prior statement. The burden falls to counsel to prove the statement in those circumstances. Before proof of the statement can be offered, the circumstances of the statement must be put to the witness.

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14 David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law, 2015) at 486.

15 Lubet at 167-175

As to *when* proof of the statement can be offered, the default position is that counsel will have to call the evidence necessary to prove the statement in his own case. In practical terms for a criminal lawyer, this means that the necessary witnesses will be called in reply, after the Crown has closed it's case. An exception to this arises in circumstances where the Crown agrees to call the statement-taker within it's own case after the witness being cross-examined on the inconsistency.

Before the statement may be proved, though, the Advocate must satisfy the trier of fact the statement he or she seeks to prove is, in fact, inconsistent with the present testimony.[16]

As well, counsel must satisfy the trier-of-fact that the statement being proven is "relative to the subject matter of the case". This does not limit matters to statements relating to only substantive aspects of the case. In circumstances where the credibility of the witness in question is adjudged to be of major importance in the case, courts have allowed for poof of statements relating solely to a witness's credibility.[17]

VI. Preparation for Impeachment

A. Index the Material by Topic and Witness

The well-executed impeachment of a lying witnesses can be the exhilarating high point of a successful cross-examination. But in order to bring about such a fleeting moment of glory, counsel must first put in hours and hours of painfully dull preparation. This means doing more than simply reading, re-reading and reviewing all of the material (statements, transcripts, etc.). Counsel must organize the material so that its substance is indexed and organized by witness and by topic for quick reference. Undertaking this process is the best way to master the material. It will also place counsel in a position to anticipate the contradictions that are likely to arise in the witness's testimony and create a plan of attack.

B. Be Purpose Driven in Deciding Whether or Not to Impeach

When deciding whether or not to impeach a given witness at all, counsel must be mindful of what, precisely, they seek to accomplish through cross-examination. Not every discovered inconsistency needs to be acted upon. If the witness's credibility is not in issue, for instance, counsel should not impeach the credibility of the witness just because they can. The trier-of-fact will likely be left unimpressed by counsel who put a well-meaning witness through an unnecessary impeachment. An impeachment in such circumstance will gain nothing of value to the case and, at the same time, come with a cost to counsel's reputation. Counsel must be selective about whom they impeach and only conduct impeachments where they are both necessary and aligned with legitimate case objectives.

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16 Saul at 13

17 *R. v. Eisenhauer* (1998), 123 C.C.C. (3d) 37 at 61

C. Plan the Timing and Order of Impeachment

Prior inconsistent statements can be used to their greatest effect when their order and timing are planned for in advance. An understanding of primacy and recency bias is valuable for this process. This is simply a recognition that information presented at the beginning (primacy) and end (recency) of a cross-examination tend to be retained better by a trier of fact than information presented in the middle of the cross-examination. In other words, starting with a bang and ending on a high note will ensure that the cross-examination is memorable. The cross-examiner should plan to unleash his or her most potent impeachments at the beginning or end of an examination.

Another factor to consider in planning the optimal timing and ordering of impeachments is whether or not the cross-examination has constructive elements. Very few cross-examinations are purely destructive in nature. With most witnesses, the cross-examiner seeks to both prove helpful facts and nullify unhelpful evidence within the same examination. That being the case, it only makes sense that counsel deal with constructive elements earlier in the examination. After all, common sense dictates that he or she will face a greater struggle to obtain agreement with the witness at a point in time in the examination after he or she has accused the witness of being a liar.

VII. Conducting the Impeachment

While it is important that counsel have well-thought out plan for cross-examination, it is just as critical that they be flexible enough in their approach to abandon that plan if the circumstances require. Witnesses are unpredictable. They may contradict themselves in damaging ways that could not have been anticipated. As Mike Tyson once said, "everyone has a plan until they get punched in the mouth". Counsel must be ready to deviate from the plan and counter punch. Failure to 'correct' these unexpected pieces of testimony via impeachment could mean the difference between success and defeat at trial. This is why counsel must be ready to read and react to new opportunities for impeachment when they arise.

To be ready, it is essential that counsel listen with great care to the witness' testimony[18] After all, if counsel isn't able to identify the inconsistency when it arises the opportunity for impeachment will never be uncovered.

Counsel must also arrange their trial notebook to allow for flexibility. Each individual line of cross-examination (including those devoted to anticipated impeachments) must be placed on its own individual page. This allows counsel the opportunity to reorder the pages when the necessity to change course from the original plan arises. As well, counsel's trial notebook should include the indexed tables of witness evidence referred to above. These documents allow counsel the ability to quickly find the prior contradicting passages so that impeachment can occur relatively seamlessly.

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18 David S. Morritt, "The Art and Science of Cross-Examination", (Paper delivered at the Advocates' Society Program: Winning Through Cross-Examination – November 2, 2004" (Toronto, Ontario, 2 November 2004) [unpublished]., at 11

VIII. Learning & Improving at Impeachment

Impeaching a difficult witness, to the inexperienced, can be a truly harrowing experience. It's only after some considerable time 'in the saddle', as they say, that counsel gains anything approaching comfort in undertaking the task. The great American lawyer, judge and professor of trial advocacy, Irving Younger, once claimed that "a competent advocate must have behind him at least twenty-five jury trials. When he has tried his twenty-five, he begins to know what to do."[19] He may be right.[20]

It can be a painful process of trial and error to find improvement in cross-examination skill. It starts with learning the fundamentals. In a book or paper like this one, junior counsel learn the legislative landscape and the basic fundamentals of a skill like impeachment. They then immerse themselves in experiential learning through the process of attempting real witness examinations. With hard work and resilience, eventually, some competency will take hold.

Only with time and experience; the application of impeachment fundamentals to new, different and more complex witnesses will counsel have any chance at becoming truly great. Josh Waitzkin's description of attaining mastery of chess can be reapplied to the skills of impeachment and cross-examination at large:

> A chess student must initially become immersed in the fundamentals in order to have any potential to reach a high level of skill. He or she will learn the principles of endgame, middlegame, and opening play. Initially one or two critical themes will be considered at once, but over time the intuition learns to integrate more and more principles into a sense of flow. Eventually the foundation is so internalized that it is no longer consciously considered, but is lived. This process continuously cycles along as deeper layers of the art are soaked in.[21]

As trial (and especially jury trials) continue to dwindle, so to do the opportunities for young advocates to gain experience practicing the core skills of cross-examination (including impeachment) and work toward mastery. For this reason it is more important than ever that the young advocate seek out opportunities to learn and practice the craft. They must carve time out of their busy schedules to watch the great cross-examiners at work. They must seek out any opportunity to act as junior for those senior counsel who know their way around an impeachment. And they must seek out opportunities to get on their feet (even if it's for a mock examination[22] traffic hearings or small claims court) to test their mettle.

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19 Irving Younger and M. Tullius Cicero, "A Letter in Which Cicero Lays Down the Ten Commandments of Cross-Examination" (Winter 1977), Vol. 3, No. 2, 49

20 The writer humbly admits to only having conducted 6 jury trials in his 9 and 1/2 years at the bar.

21 Josh Waitzkin, *The Art of Learing*, (New York: Free Press, 2007) at xix

22 The CLEBC's Annual Winning Advocacy Skills Workshop provides an excellent opportunity for this.