



CROSS COUNTRY

BY LARRY POZNER



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Techniques for Impeachment by Prior Inconsistent Statement: The Mistaken Witness vs. the Lying Witness

Impeachment by prior inconsistent statement is done for one of two reasons, and the reason drives the techniques to be employed.

Mistaken Witness

A lawyer will ordinarily impeach with an inconsistent statement in order to show that a recent change is not to be believed.

Roy is a victim/eyewitness of an armed robbery of the convenience store where he worked. In his report to police shortly after the robbery, Roy reported that the robber was quite tall. In fact, he was taller than Roy, who is six feet tall. Our client is five feet ten inches. At trial, Roy not only identifies our client as the robber, but he also adds that the robber was tall, but shorter than him.

We will impeach with the prior inconsistent statement. The primary purpose in introducing the prior inconsistent statement is to show that the first version was the accurate version. We seek to accredit the first version. We draft chapters that demonstrate the following:

- ❖ The witness was in a position to observe the robber.
- ❖ The lighting conditions were good.
- ❖ The counter separating victim/witness from the robber was only three feet.
- ❖ The robbery consumed enough time that the witness was able to get a good view.
- ❖ The victim/witness wanted to get a good look at the robber.
- ❖ Within a short time, the witness wanted to and did provide the police with the best possible (accurate) description of the robber.

We need not take the position that the witness was too frightened to be accurate, or that the robbery was so sudden and brief that an accurate description of height was impossible. Of course, if the witness offers any of these excuses when confronted with the prior inconsistent statement, we can accept the excuses and assist the witness in embroidering the reasons why it was impossible to get an accurate description of the robber. But absent these excuses, our goal is to provide the context for the first identification that reinforces the belief that it was the more accurate description.

Lying Witness

There is a completely different scenario in which we impeach by inconsistent statement. In some cases, we seek to show that the witness is not to be believed — not as to the first statement, not as to the witness's changed statement, not as to any version.

Michael, an adult, is a suspect in a homicide. The police find him in possession of the expensive 18-wheel truck and trailer owned by the deceased. When arrested, Michael relates that it was his father who killed the truck owner. Michael tells of hearing, but not seeing, the homicide. Later, Michael tells the grand jury that he saw his father commit the homicide.

Our defense is that Michael is the likely killer and that neither version is to be believed. In this use of prior inconsistent statements, we do not seek to accredit either version. Our techniques are to show that Michael made each version under circumstances where there was a need and an ability to be honest, and that the multiple versions are the result of fabrications. We set up the reasons why Michael was a viable or most viable suspect. Then we show how the law enforcement agents were very professional, very demanding of detail, and very exacting in their questioning. And then we show that the witness was equally

adamant and detailed in his version of events. We take our time in this cross-examination, establishing how law enforcement wanted specifics and how a thing not said was a thing not seen. Michael was not skipping over any of the important aspects of what he witnessed. In fact, the police drilled down repeatedly, and what Michael related was the extent of what he saw or heard. Or so he says.

By accrediting the circumstances of both statements, we cast doubt that either is true. If Michael had really witnessed his father commit the homicide, he certainly would not have translated that into an assertion that he did not see the homicide but heard it. And if he only heard the homicide, but did not see it, then it would be impossible for Michael to relate details of watching the homicide take place.

As to each version given by the witness, we cross to show that the witness recalled the events in that version in great detail. We help the witness tell first one very detailed story, and then we help the witness tell another equally vivid story — but a story that is at odds with another version. The more important we make each opportunity for Michael to tell the truth, and the more detail the witness has given in each version, the less likely it is that the truth could change so dramatically. ■

About the Author

NACDL LIFE MEMBER NACDL Past President
Larry Pozner is co-author (with Roger Dodd) of *Cross-Examination: Science and Techniques* (3d edition 2018).

Larry Pozner

Reilly Pozner LLP
Denver, Colorado
303-893-6100

EMAIL lpozner@rplaw.com

WEBSITE www.rplaw.com