



CROSS COUNTRY

BY LARRY POZNER

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Impeachment by Behavior Inconsistent With Witness's Story

The complaining witness's central allegation causes jurors to picture the emotions that would accompany that event and the witness behaviors that would logically be expected. We turn against the witness the emotional or logical force of the damaging assertion.

We can impeach the witness by using leading questions that cause that witness, or other perceiving witnesses, to admit facts that strike jurors as logically or emotionally inconsistent with that allegation. Our juxtaposition of facts inconsistent with allegations causes jurors to think: "Your actions don't match your allegations." Or jurors may think: "If that happened to me, that is not what I would have done."

Examples:

A. The prosecution witness says his former company engaged in fraud. He testifies that through a detailed letter and a long-sought meeting, he raised his concerns to management. However, nowhere in his letter or in his important meeting did he tell management that he believed the company's conduct was fraudulent.

Impeachment: Witness A alleges X, but A did/did not do Y. (internal logical inconsistency)

B. The complaining witness alleges that she was too incapacitated by alcohol to consent to sex. However, in the hours before the sexual conduct, she walked around campus with her friends and displayed no signs of impairment.

Impeachment: Witness A alleges X, but Witness B saw Witness A do/not do Y. (observed logical inconsistency)

C. There is an allegation of rape countered by a consent defense. The prosecution calls complainant's 16-year-old brother, who testifies that while walking nearby he witnessed the assault. However, he did not cry out, interrupt the act, or report it to anyone. Instead, he then joined his sister and the defendant at a large party.

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Impeachment: Witness A alleges X, but, in response, Witness B, who is closely aligned with Witness A, did/did not do Y. (internal logical inconsistency)

Step 1. Set the scene of the allegation.

We can impeach any allegation by showing behavior inconsistent with that scenario. However, the technique's greatest impact results when the allegation is central to the opponent's theory of the case. That allegation generates the strongest picture of what behaviors are to be expected. An ambiguous or less important situation leads to a broad spectrum of reasonable responses.

Our technique accepts the emotional substance of the witness's testimony. Our voice can be neutral because the facts themselves generate the emotion. A useful introductory phrase is, "As I understand your testimony..." Another useful phrase is, "Your testimony is that..." Sarcasm is counterproductive, as is objectionable phraseology such as, "You expect the jury to believe..."

We simply want to tie the witness to a state of mind that we will undermine by inconsistent conduct.

Step 2. Make vivid the assertion to be impeached so that the factfinder can envision what conduct would be logically or emotionally consistent.

Our leading questions cause the witness to embrace a mental state. If we choose, we can push the witness into answers that make even more emphatic and limited the expected conduct. Applying this to our three examples, we might ask these questions:

Example A — Q: *You were adamant that the fraud needed to be exposed?*
Q: *You were determined to tell management in detail that the fraud must stop?*

Example B — Q: *At 11 p.m. you were suddenly so overcome by the alcohol you drank at 8 p.m. that you no longer had any*

idea what was happening? Q: You were so dizzy you could not stand up? Q: You did not know where you were?

Example C — Q: *You love your sister? Q: You would do anything to protect your sister from harm?*

Step 3. Show facts that are inconsistent with those logical and emotional expectations.

We then use chapters that expose in detail the illogical conduct of that witness or of a witness who observed or engaged in illogical conduct given that allegation. We are impeaching not by prior inconsistent statement, but by prior or subsequent inconsistent conduct. The elegance of this form of impeachment is that it concedes that the complaining witness will stick to their story, while causing the complaining witness, or a prosecution witness aligned with the complaining witness, to testify in detail to facts that contrast with the jurors' logical and emotional expectations.

When jurors are shown the picture painted by our facts, and that picture is logically or emotionally inconsistent with the allegation we have targeted, the jurors are likely to prefer the facts over the allegation, reasoning that "I wouldn't have behaved that way," or saying, "That story makes no sense."

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About the Author

NACDL LIFE MEMBER Larry Pozner is recognized as America's authority on cross-examination. *Pozner on Cross* lectures are entertaining programs that demonstrate how to become a master of cross without years of trials. His book is *Cross-Examination: Science and Techniques* (Lexis 3d edition 2018, by Pozner and Dodd).

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