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Collective Wisdom: When to Impeach with an Inconsistent Statement

A. J. Bellido de Luna

COLLECTIVE WISDOM

WHEN TO IMPEACH WITH AN INCONSISTENT STATEMENT

JULES EPSTEIN

NITA®

Introduction

Rarely is a cross-examination limited to an attack on credibility. There are often multiple goals that may include eliciting positive/supportive facts and ultimately telling or reinforcing the "story" the witness's examiner is presenting.

The recognition of multiple goals of cross-examination is nothing new. Despite early emphasis on cross-examination as being needed to expose "mendacity," Dean Wigmore viewed cross-examination as the essence of the trial and truth-seeking process in the United States. He viewed it as capable of serving two ends: proving untruths and completing the story by eliciting facts that "remained suppressed or undeveloped" on direct examination, including "the remaining and qualifying circumstances of the subject of testimony, as known to the witness."

Precisely because of the presence of dual objectives, timing is everything. Said differently, assume a witness has information useful to the cross-examiner but also made an averment during direct examination that must be impeached with a clearly contradictory prior inconsistent statement.
Is it best to:

- **Begin cross with the impeachment?**
- **End cross with the impeachment?**
- **Place it chronologically in the flow of the cross?**

Or is the answer that classic law professor response of "it depends?" This conundrum was presented to trial advocacy experts nationally.

What follows is their guidance, the "collective wisdom" of the trial advocacy academy.

A.J. Bellido de Luna, J.D.

Hardy Director of Advocacy Programs

St. Mary's University School of Law

I have a few rules about impeachment that I treat as the first step in determining when or if I should impeach:

- Make sure the impeachment is clear to everyone.
- Do not nitpick.
- Know what is important.
- Most importantly, *know what is not important.*

I enjoy going to court and watching juries. I like to predict the outcomes based on the reactions of the jury, and I have a pretty good track record of predicting outcomes. A few years ago, I watched the trial of a couple accused of first-degree assault by their dog on an elderly woman. Everything was caught on video. There was no doubt where it happened, when it happened, or how it happened. The only question was whether the owners of the dog had actual criminal liability. The defense was doing a great job with this theme and there seemed to be some reasonable doubt.

The prosecutor called a neighbor to the stand who was also elderly and did not have all of the facts exactly right. Immediately on cross, the defense attorney jumped all over the minutia (remember, we all know what happened) and in an outburst, the elderly man rose from his chair, pointed at the defense attorney and yelled at him, "You're trying to trick me!" The case was essentially done. The jury became upset and turned away. They stopped listening. When the defense attorney made excellent strides that went toward the theory of his client's case, the jury was not paying attention. The defendants were convicted.

While the defense attorney was attempting to impeach the witness, I realized that he was nitpicking certain facts that were not in dispute. This was confusing to me and it had to be to the jury as well. Their facial and body movements showed their displeasure and their sense that the attorney was wasting their time. These facts were not in dispute, everyone saw the tape, there was no need to get into minor details. These details of exact times or the date were minutia and the jury did not care or think it was important—and because it was not that important, the defense lost the opportunity to advance the theory of the case.

Perhaps these details were important and if they had been delivered in a different order, they would have made more sense and the jury could have bought in to the defense theory. In other words, the impeachment did not work because the attorney focused on the impeachment instead of focusing on the theory of his case. For me, when you decide to impeach boils down to two things:

1. **Tell my clients story first.**
2. **Get the jury's permission before you attempt to impeach.**

There is a reason why TED Talks are seventeen minutes long and not a second longer: The attention span of individuals is very short. While impeaching is fun for the attorney, it routinely gets lost on the jury. I am a believer that every witness provided by the opposing counsel can advance the theory of my case.

I formed the basis for this belief when I watched a famed Maryland attorney defend a man accused of kidnapping his ex-wife and her boyfriend and then torturing them for hours. Charged with multiple felonies including two counts of attempted murder, the attorney did not object to a single prosecution witness. Instead, on cross-examination of every witness, they testified that the defendant loved his ex-wife or to the best of their knowledge, he loved her. Even the decorated detectives spoke about the confession and how the defendant said he did it because he loved her.

The facts were never in doubt. Two surviving victims gave gruesome details of the many hours of torture and the steps the defendant took to set up their deaths. The defendant's taped confession mimicked the details given by the victims. The defense opening was that the case was about love. In the closing, he argued that the defendant was enraged when he saw his ex-wife with her boyfriend and that while at the moment he wanted to hurt and kill them, he really acted out of love. There is much more to this story, but when the jury came back, they convicted the defendant of a misdemeanor, second-degree assault. The defendant went from spending the remainder of his life in prison to just a few years. A solid win for the defense based on the facts.

The lesson here is that sticking to telling your client's story first must be the first thing on your mind whenever you decide to cross and consider an impeachment.

When the defense attorney on the case crossed the first responders, detective, and the victims themselves, he made sure he discussed all of the things the defendant did that told his client's story; then in a soft impeachment, every witness untangled the prosecutor's attempt of making the defendant a monster. Every witness painted a horrible human being on direct, but on cross admitted that the defendant loved his wife and it was she who left him. By doing this, the defense did not try to minimize the actual acts. Instead, the jury was on the edge of their seats. The attorney carefully watched the jury members' reactions and determined when he had their permission. The jury knew where the defense attorney was going, and they understood the soft impeachment.

I do not think it matters if you begin or end your cross with the impeachment or place it chronologically into the story, because while the classic answer is "it depends." I think the real answer is that you can place it anywhere—so long as you have the permission from the jury to do so. If you watch your jury, the opposing counsel may ask questions that leave the jury questioning what they just heard. If so, start the cross with an impeachment. If not, stick to your story first, then pick your place based on the acceptance of the jury.

One last thing to consider. I once was crossing the author of one of the FBI's books on evidence. In it, the author wrote that under no circumstances should an agent or technician testify a certain way because it was not backed by science. On appeal, I was arguing that the FBI lab technician testified exactly the way the book told him not to. We had an evidentiary hearing with the author on the stand. I was in the middle of my cross and was clearly leading up to the impeachment when the judge stopped the questioning and would not allow me to continue. To this day, I do not know why this happened. My client spent several more years in prison while we sorted out the appeals. Ultimately, we won the case because the technician made a statement that was not backed by science. My best-laid plan did not materialize when I needed it to the most, but because the impeachment attempt was clear, the appeals court understood and we won freedom for an innocent man wrongfully accused of a crime he did not commit.

I mention this sometimes, regardless of your preparation and the facts, impeachments are a powerful tool, but sometimes they get lost because the trial of fact does not understand the impeachment, you are nitpicking over minor details, impeachment does not further your client's story, or there is some other reason that you will never know about. In every case, preparation is the key and you must keep your client's story moving forward first.

Justin Bernstein

Director of A. Barry Cappello Program in Trial Advocacy

UCLA School of Law

The best place for impeachment by prior inconsistent statement depends on your primary purpose. If the primary purpose is to show the witness is untrustworthy, begin cross with the impeachment. Suppose an expert testified that she is neutral and doesn't really know the parties. If I had evidence that the witness actually had a personal relationship with my opposing party, I would start the cross there. As another example, if a defendant employer testified that he cared a great deal about employee safety but he had previously made had contradictory statements, I would start the cross there. The message is, "Members of the jury, this witness is not who you thought they were."

But if the prior inconsistent statement is more useful as rebuttal to a substantive fact or conclusion, then it's better used topically. If an eyewitness testified at deposition that the light was green and at trial that the light was red, I would deliver that impeachment when I get to the part of the cross where I had planned to establish the light was green. The message is, "Members of the jury, my client is correct about this important fact."

Jurors, like all of us, are best at understanding ideas if they only need to understand one idea at a time. Thus, it's useful to determine which idea you want to highlight: that the witness is untrustworthy, or that a particular fact is true. Once you decide that, it's easier to find the right sequence for the impeachment.

Marian Braccia

Director, LL. M. in Trial Advocacy

Temple Beasley School of Law

Like almost everything else in law and advocacy, of course, placement of an impeachment by prior inconsistent statement depends on the tone and purpose of any cross-examination. My general inclination, however, is to avoid placing the impeachment at the end of the examination, mainly because my "out piece," that recency material I want the jurors replaying long after the witness leaves the stand, has already been curated. If the witness is one whom the jury should distrust, I tend to proceed with the impeachment at the very beginning of the cross-examination so that the remainder of the testimony is viewed as incredible, inconsistent, or potentially tainted.

I agree with my colleague, Professor Lippy (see page 10), that another smooth, logical place to place an impeachment by prior inconsistency is within the chapter covering that particular topic. I understand Professor Lippy's motivation to gain credibility as the questioner before venturing into a witness impeachment. This is another area where she and I have different perspectives based on our professional experience. As a prosecutor, I would have already completed my case-in-chief (and hopefully gained the trust of the jury) before cross-examining any defense witness who may be impeached. If it were my own witness's testimony that warranted impeachment, ordinarily that was a foreseeable circumstance and one that I would preview for the jury during my opening statement. Hence, my preference is to open an examination with the impeachment as a sort of "I told you so" to the jury when that opportunity presents itself and thereby my credibility as the advocate is reinforced.

H. Scott Fingerhut

Assistant Director, Trial Advocacy Program

Florida International University College of Law

In that trial is competitive storyshowing in context, H.T. Smith, Director of FIU's Trial Advocacy Program, rightly insists that the trial lawyer necessarily filters most every advocacy decision through the prism of "it depends," including when on cross-examination to impeach a witness with a prior inconsistent statement.

Whether the prior statement helps you, hurts you, or, albeit inconsistent, does neither, the when question takes these factors into consideration:

- **Significance**—the contrast between the statements
- **Materiality**—the importance of the impeachment to your case
- **Timing**—when you learn of the impeachment opportunity

Do the math.

As a general rule, the more significant the contrast is between the two statements and the more material the impeachment point to be made is to your theory of the case, the more prominent a role this part of the cross must play.

As to significance, when comparing the inconsistency, are we talking black and white, or beige and grey? And as to materiality, just how important is the point that we intend? Does it make our theory of the case (or break theirs), sufficiently undermining the witness's testimony or the witness themself, or does it fall somewhere short of that mark?

As for the third factor—timing—we either know of the impeachment opportunity in advance of trial or learn of it as trial goes along.

And so, again, as general rules:

- If you know of the opportunity in advance of trial and nothing during the witness's direct alters your cross-examination plan, stay the course and keep in place. Otherwise, adapt accordingly.
- If the opportunity arises while the witness is on direct, do your math—and lest you have an idea for a stronger placement, consider using it to begin your cross, and then transition into what you had intended all along, circling back for emphasis, as appropriate.
- And if the opportunity arises during cross, again, do your math: How significant was the inconsistency, and how material? And then, decide whether to impeach right then and there, while the iron is hot, so to speak; whether

to flag the inconsistency aloud, raise the level of suspense, but hold back, for just a while, until you decide it's the right time to return to that impeachment; or whether the better course is to not say a word at all at the time—to save it, put it in your pocket—and unleash the impeachment at the moment you calculate (feel) it serves your case and client best.

One final point: the matter of "safety nets." Whether on cross-examination you clearly have the goods and are going strong or, in dire straits, you have little to go on and are forced to take a flyer with a barely inconsistent, marginally important, prior statement, a safety net—a powerful, sure-fire, safe harbor in which to land—is the cross-examiner's great comfort.

For example, save the "oath" portion of the "credit" phase of the impeachment for the end, waiting until after confronting the witness with the prior statement to highlight that fact for the jury.

Or better yet (if you have it), cross the witness into a corner—forcing them to admit that when it comes to their inconsistencies, the best they can hope for is that the jury takes their word for it—and then follow through with your safety net: a strong character impeachment point for untruthfulness, or (even better) impeachment with a prior conviction for a crime of dishonesty.

This is the math we employ to best determine when to execute the classic commit–credit–confront prior inconsistent statement impeachment protocol: whether to start strong

as an opening salvo; to end strong; or use as a pass-through, exploiting illogic in order to set up another headline.

As trial lawyers, we constantly assess the temperature of the room. On cross, like Coach Valvano, our mission at base is to survive and advance. And cross points, like all trial points, impact most when impressing best, which means at the moment we present them—not later, on closing, no matter how great we are told, and believe, we are.

Cross-examination is a controlled conversation, and you are the witness, confirming your story about their story. Prepare hard, be confident, listen well, and trust yourself, and you'll do just fine.

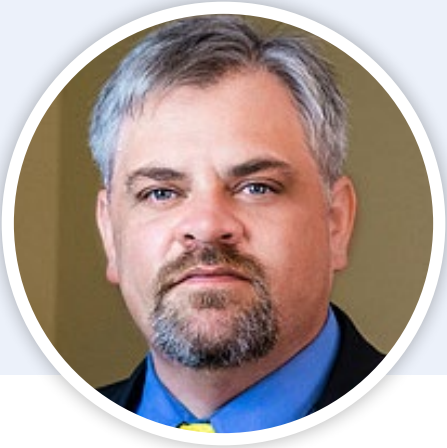
Elizabeth Lippy

Director of Trial Advocacy

Temple Beasley School of Law

Of course, the answer is the classic law professor response that "it depends." When isn't that the answer? No two cases are the same, nor are any two cross-examinations the same. Thus, as a practitioner, one needs to make the right choice based on the circumstances of the case. That being said, I rarely begin a cross-examination with an impeachment. I find that many jurors don't truly understand the import of an impeachment with prior inconsistent statement, so I choose to use the primacy of a cross for different purposes, such as reiterating my theory.

I usually lean toward impeaching a witness with a prior inconsistent statement during the chapter of the cross-examination that relates to the impeachment. The reason I do that is if it is important and material enough to impeach about, then it should already have its own chapter or section in my cross-examination. Thus, there would be a smooth place to insert the impeachment into the cross. If there is no such chapter in my cross, then I would end it with the impeachment. If done properly, impeachment with a prior inconsistent statement can be very successful to help call into question the credibility of the witness. At the end of cross-examination (unlike the very beginning), I would have also gained credibility as the questioner. Thus, the jury would most likely have an easier time understanding what I am doing when I point out the inconsistencies. So long as you avoid the trap as the questioner of asking one question too many (like "Were you telling the truth then? Or now?"), ending on the impeachment can help further the goals of cross.



Robert Little

Director of Advocacy Programs and Lecturer

Baylor Law

My assumption here is that the witness, while on direct examination, has testified to a fact that contradicts their prior sworn testimony—whether in a deposition, prior trial testimony, or an affidavit—or that contradicts a statement they made in a previous document of some sort—like an email or a letter. Assuming that is the case, then I would almost never start the cross-examination with the impeachment with that prior inconsistent statement for two reasons.

First, to the extent the witness will testify to any facts or opinions that are helpful to my case, I would want to elicit that testimony before doing anything that might damage the credibility of the witness. As a general rule, I would propose that on cross-examination, you should always start with testimony that is helpful to your side of the case. Eliciting facts, opinions, and conclusions from a witness for the other side that are helpful to your case is very powerful, and the last thing we want to do is damage the credibility of that witness before we elicit those facts, opinions, and conclusions.

The second and more important reason why the impeachment with a prior inconsistent statement should not be done first is because I don't think it would make any sense to start the cross that way. Assume for a moment that at trial, on direct examination, the plaintiff testifies that when he went through the light it was green; however, in his deposition, the plaintiff testified that he couldn't remember what color the light was. Now, if that is a fact of consequence, then you would assume that it would already be a part of the cross-examination of the plaintiff you were intending to do, and at some point you were planning on asking the plaintiff something like, "You can't remember what color the light was, can you?" If that is the case, then it would be bizarre to begin your cross by impeaching the witness with that stand alone fact, then launch into your planned cross-examination, and then arrive back at that fact later on in the course of the story you're trying to tell on cross-examination with that witness. It just makes more sense that the impeachment would happen when the fact in question naturally comes up in your cross-examination story.

That being said, let's assume that the fact that the plaintiff testified to during direct examination—that the light was green when he went through it—is not a material fact and that you do not intend on including it as part of your cross-examination. At that point, I think you have to ask yourself whether the contradiction is substantial enough on a meaningful enough fact that it is worth raising? If not, then you may not score that many points with

the jury by pointing out the contradiction, which may mean that the better choice is just to leave it out altogether. However, if the contradiction is substantial and the fact is meaningful enough—even though it was not originally intended to be a part of your story on cross-examination—then I would propose that you should include that impeachment only after you are able to elicit from the witness those fact, opinions, and conclusions that are helpful to your case. There is no reason to undermine the witness's credibility when they are about to agree with you.

The only time that I would start with the impeachment would be if the witness truly has no testimony to offer on cross-examination that helps your side of the case, in which case the entire cross is likely to be an attack on the witness's credibility. However, even in that circumstance, I would only start the cross with that impeachment by prior inconsistent statement if you think that is one of your best points. Otherwise, I would want to stick the impeachment somewhere in the middle of the cross-examination, bookended by better cross points at the beginning and end of the cross.

Suparna Malempati

Associate Professor of Law

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In every trial attorney's arsenal of weapons, the impeachment by prior inconsistent statement is one of the most powerful. The decision regarding when to use this potent tool depends on the goal. In order to make the decision, keep in mind an important guideline for effective storytelling. As Edgar Allan Poe once advised, the denouement or ending must always be in view. Every plot must be elaborated to its closing. In trial, each witness examination must be tailored to the closing argument.

The first step is always to decide what you will argue in closing about the witness. Is the witness lying? If so, is the witness lying about everything or just some things? If the witness is lying, what is the motivation to lie? If you have nothing to present as a potential reason for the lie, then you may not want to frame the witness as a liar. Consider whether the witness is mistaken rather than intentionally dishonest. Should the jury believe parts of the witness's testimony? If so, you may not want to start with the impeachment because it will color everything else the witness says. Is the prior inconsistent statement on a pertinent matter or a collateral matter? If it is a collateral matter, how much attention do you want to draw to the inconsistency? How significant is the inconsistency?

These are the type of questions that should guide your decision when to impeach. If you plan to ask the jury to discount the entirety of the witness's testimony, begin with the impeachment and systematically dissect and destroy his or her credibility throughout the rest of the cross-examination. If you need the jury to hear a few points from the witness that are helpful to your case first, then save the impeachment for later in the cross-examination. Be certain that the impeachment is necessary and consider whether you can simply refresh the witness's recollection rather than pointing out an inconsistency.

Think of cross-examination as a deconstruction of your opponent's case, rather than a demolition. Approach every cross-examination as a surgeon approaches an operation: methodically, deliberately, and with precision. When you do that, you increase the likelihood of success with the jury, whatever your point may be in closing.

Kelly Navarro

Associate Director of the Center for Advocacy and Dispute Resolution

UIC John Marshall Law School

Impeachment with a prior inconsistent statement is frightening for novice attorneys. Done well, impeachment is exhilarating and one of the most satisfying parts of a trial. Impeachment can occur unexpectedly and spontaneously, or it can be anticipated and predicted. Executing a clean impeachment requires careful planning and preparation. As for timing, there are no are hard and fast rules. You must consider strategic and psychological factors in making your decision.

Sometimes you can't plan for impeachment—lighting strikes and out of the blue a witness testifies to something different than a prior statement. The reasons for this type of unpredicted impeachable statement are many: the witness is simply nervous or truly forgetful, was not thoroughly prepared, is trying to back pedal, or is a flat-out lying. While you can't plan for this unexpected impeachment, you can be ready. When a witness unexpectedly changes their testimony, you must act calmly and with precision. You must keep your cool and not tip off the witness. Be sure to follow your impeachment steps to elicit a clear inconsistent statement, not a mush of an answer with cloudy qualifications.

In some instances, you can predict an inconsistent statement. Perhaps a witness used harsh language or made an admission to a police officer. On cross, you will confront the witness about these statements. If the witness denies the statement, you impeach.

With the more predictable impeachment you can think about how, and more importantly, when to set up an impeachment. There are also inconsistent statements you can count on. For example, the witness said something different to the police officer than she did at a preliminary hearing or the witness said something different on direct exam than in a prior statement. It's often said that timing is everything, and now you need a plan. Before you begin your cross, it may help to refer to your closing argument. What concessions do you need from this witness, and what exactly will you argue about this impeachment? Strategically, you need to maximize the impact of the inconsistent statement while minimizing loss of control over the witness.

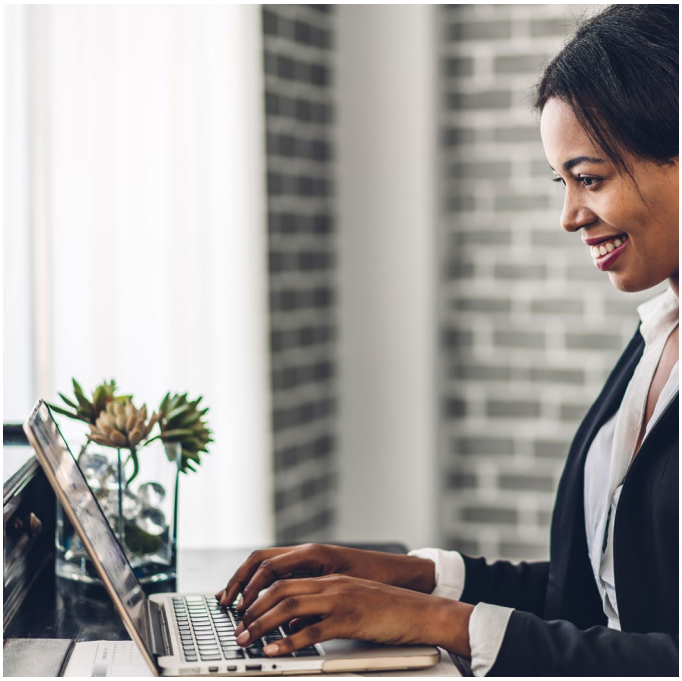
You can reap all kinds of benefits by starting cross with a strong impeachment. Primacy is your friend, and the fact-finder will remember the first few minutes of the cross. You will also establish that everything the witness says should be called into question. Impeaching up front works well for a very clear impeaching statement,

particularly one that has not been fronted during the direct. If the impeaching statement is not strong, you should consider not beginning your cross-examination with it. Putting time between the impeaching statement and the redirect explanation reduces the impact of the witness's explanation on redirect.

This strategy is not without risk. Since you have not established your ability to control the witness, you might end up with a muddled impeachment and no chance to lock in your concessions. Once you establish a pattern of asking short declarative questions, it's easier to get concessions. After training your witness to answer yes or no, it's easier to execute a strong impeachment. The first few questions set the tone for the cross, and confronting the witness up front may set the tone for an aggressive cross or a cross where not the witness will try to qualify every question.

Perhaps you wait until later in the cross to impeach. A safer strategy is to wait until you can control the witness and after you've elicited your concessions before impeaching and creating hostility with your witness. It also might make sense to tie the statement to where it fell chronologically within the case. The cons: Anything buried in the middle risks becoming forgettable.

Asking the impeachment at the end is safe and effective. Like primacy, recency is also your friend. The fact-finder will remember the end of the testimony. You've minimized risk by locking in your must-have questions. And who doesn't love the twist ending? The flourish of ending with a statement that calls into question



the very essence of the witness's testimony, that nothing the witness said can be believed, can be advocacy at its best. The cons: When you've ended with an impeachment, the redirect examiner will most likely follow up with an explanation or clarification of the previous testimony, which may minimize the impact. It also forces a predictable move by your opponent.

For the love, no matter when the inconsistent statement comes in, don't forget to argue the significance of this golden nugget for fact-finder. The jury instruction can be effective way to frame the impeachment's significance. No matter which strategy you decide on, you must practice the steps to be efficient and clear. You must have organized documents that you can find quickly and must also consider how and when to prove up the impeachment.

Professor Laurence Rose

Emeritus Professor of Law and former director of the Litigation Skills Program

University of Miami School of Law

I teach that cross-examination should be separated into three sections. Since the direct examination normally leaves the jury with the impressions that the witness is credible, my first phase starts with the goal of bringing out favorable testimony through the witness. In the second phase, the lawyer attacks the witness's direct testimony, usually through leading questions showing the lack of accuracy. In the third phase, we do a direct attack on witness credibility and, hopefully, leave the jury with the belief that the witness cannot be trusted. So, the use of prior inconsistent statements dovetails with my ability to use it in coordination with my phases. If I can argue that the prior statement is "the truth" (either exception to hearsay or not hearsay, such as a party statement), then I bring it out in phase one. If I want to contradict the direct, I bring it out in phase two. And if all I want to do is to attack credibility, I save it for phase three.

Catherine Stahl

Director of Trial Advocacy

University of Illinois College of Law

My short answer is that there is no hard and fast rule. When an inconsistent statement is elicited on cross-examination, I recommend impeaching the witness right then and there. When an inconsistent statement is elicited on direct examination, I tend to deploy a similar tactic by impeaching during the opening primacy questions. Ideally, beginning with impeachment will discredit further testimony from that witness or at least encourage the jury to view the witness with skepticism going forward. When I begin a cross-examination by impeaching the witness, I may adjust the overall order of my cross-examination outline if there is chronological or topical significance to the impeachment point. That being said, I may delay impeaching a witness when there is helpful or affirmative information to be gained during cross-examination. Impeachment with a prior inconsistent statement tends to have a negative impact on any rapport established with the witness.

Matthew Williams

Judge, Washington State Superior Court

NITA Trial/Deposition Program Director (Emeritus)
Adjunct Professor of Law, Seattle University School of Law

Generally, it is best to begin with constructive cross first and to save the destructive cross for later in the examination. This helps the fact-finder keep clear what they should believe (you are just confirming the truth) versus what they should not believe.

But, of course, there is no one-size-fits-all solution. The placement of your confrontation with an inconsistent statement really depends on what you are trying to accomplish, and the behavior of the witness.

- **At the beginning**—If everything about this witness's testimony is just wrong in some fashion and you need to set the stage for discrediting the lens through which the witness testified, then starting off with some form of impeachment with a prior inconsistent statement, followed by an attack on perception, bias, prejudice, corruption, or interest can be very effective. It establishes that (remember My Cousin Vinney?) "everything that guy just said is BS."
- **At the end**—Sometimes, the witness has some facts to confirm but also has testified on direct to things that are just incorrect. There, it usually is best to structure your cross so that the impeachment comes toward the end of the cross. You can get the confirmation of facts easier if you are not in a pitched battle with the witness. And the direct conflict is memorable. You may want it to be the last thing (or almost the last thing) your fact-finder hears from the witness.
- **During the course of cross**—And of course, there is the situation where the witness has just gone off-script during the course of confirming things that should be undisputed. If the witness starts being creative or changing their testimony during the regular course of cross, the prior inconsistent statement (or even a "hard" refreshment) can and should be used at any time as a control device. Usually, this happens a few minutes into the cross. Teaching the witness that you've "got the goods" when they start deviating from their prior statement will make the rest of cross go more smoothly. When done quickly and with precision, the witness learns rapidly that the answer to any question you ask is yes—because you already have them on record.

Jules Epstein

Director of Advocacy Programs

Temple Beasley School of Law

The decision of where in a cross-examination to place an impeachment by inconsistent statement is a function of four variables:

- The significance and detrimental impact of the testimony being impeached.
- When in the direct that testimony occurred.
- Whether the impeachment is intended to portray the witness as a liar or just as someone who, due to a memory lapse or other frailty, made an error.
- Where it fits into the overarching story the cross-examiner needs to tell.

The more detrimental the impact of the testimony, and the closer to the end of the direct examination, the more important it is to start the cross with the impeachment. The exception here may be if two conditions are met—the testimony will be branded a mistake rather than a lie, and there are so many positive points to elicit from this witness that an initial attack will sound discordant. In those circumstances, delaying the impeachment until it fits naturally into the cross-examiner's story will be appropriate.

Even if the testimony being impeached was not at the climax of the direct or was not especially devastating, the cross should start with the impeachment if the witness is likely to be uncooperative and a tight, controlling attack is needed to rein them in early.

Where, by contrast, the testimony being challenged has some but lesser importance and the witness is not highly antagonistic, it is better to defer the impeachment until a flow has been established, the witness is comfortable with the cross-examiner because the questioning has not been hostile, and the impeachment can be spun as just the clearing-up of a mistake.

One last point, an essential one, is the matter of tone. Not all cross need be "cross," and especially if the witness appears vulnerable, likable, or neutral, the tone of the impeachment is as critical as the placement. The considerate "I just need to clear one thing up" approach will temper the impeachment but likely secure the desired answer.