CHAPTER 1

Impeachment with Inconsistent Statements

This is the most important of the methods of impeachment. If for no other reason, it is the most important because it is the impeachment method most used by trial lawyers. When you stop and think about it you will agree that somewhere in the neighborhood of seventy percent of the time you impeach a witness, it will be with an inconsistent statement.

It has a good, if not outstanding, "impact" score. It does not carry the "impact" of a FRE 609 impeachment with a conviction. Still, you are scoring points by showing the witness is either a liar or at the least mistaken.[1]

There are legal limitations on inconsistent statement impeachment. The first, spelled out in FRE 613(b), should not create a problem if you follow the "Fishing Rules"[2] in perfecting your impeachment. (See specifically Fishing Rule #4.) FRE 613(b) requires you to allow the witness an opportunity to explain or deny the statement, which seems to suggest you show the witness the statement. We thought we did away with the Rule in Queen

[1]As mentioned, most would opt for "liar." Indeed, particularly in criminal cases, this may be the only alternative available. That said, however, when given your choice opt for "mistaken," this is a much easier sell to the jury.

[2]We use and teach the "Six Fishing Rules" to suggest how to impeach with an inconsistent statement. This will be explained later.

Caroline's Case.[3] (Again, see Fishing Rule #4.) This should not present a problem. Out Fishing Rule #4 requires you show the witness the statement.

The second limitation is not spelled out in FRE 613, but it does apply. Inconsistent statement impeachment is subject to the "collateral" limitation. If the inconsistent statement is "collateral," or if you will, not particularly important (this will be further explained in the presentation of Fishing Rule #2), you will not be able to prove the inconsistent statement through "extrinsic evidence."[4]

How important is impeachment with an inconsistent statement? Put it this way – it is as if (no, this will not happen) you were to start by addressing the jury and representing to them that you are about to prove that the witness is either a liar or totally mistaken. Obviously, you better deliver.

In truth and in practice, most trial lawyers are neither comfortable nor skilled when it comes to impeaching with an inconsistent statement.

Confronted with the witness who suddenly insists the car was red and not green, as mentioned in what will be the inconsistent statement, less experienced lawyers want to gently strike their forehead, curse to themselves, and reluctantly proceed to do a seven-second impeachment. It goes something like this: "You said something else to someone else sometime else." Obviously, this does not do justice to the potential of impeachment.

Conversely, an experienced trial lawyer, when presented with the same situation will rejoice. They do not hit themselves in the forehead. Rather than curse to themselves, they look to heaven and give thanks to their God.

They give thanks that their God has just done them an enormous favor. Their case is weak, and up until then they had little, if anything, to work with. Now their God has given them this great gift.

They proceed with alacrity and not reluctance. For that matter, their impeachment will take more than seven seconds. How long will it take? This usually depends upon just how bad their case is. The worse the case, the longer the impeachment will be. This may be the only time during the trial when they are "looking good" and scoring points. This is the type of impeachment we will strive to emulate.

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[3]*The Queen's Case*, 2 Br. & B. 284, 129 Eng. Rep. 976 (1820).

[4]See the chapter on Truthfulness Impeachment, which is always "collateral." You will be provided possible ways to negate or offset the limitations of this rule of evidence.

The Law

To find out more about this subject you would look to the trial advocacy or evidence books, most probably under the heading Impeachment with Prior Inconsistent Statements. Truth be known, you will not find a great deal of particularly helpful information. Again, impeachment in general is not a popular subject.

Let us take those four terms, Impeachment with Prior Inconsistent Statement, and use them to talk about the law related to this subject.

IMPEACHMENT

Three issues are obvious. For the most part, only the third or last of these is of major importance to us as trial lawyers.

1. You may impeach your own witness (FRE 607)

Many think this rule was a great breakthrough – that it created something that was not there. This is not totally accurate.

At common law one could impeach their own witness. To do so you were required to show the judge you were "surprised" by what the witness had said. Trial lawyers, usually gifted in dramatics, found this requirement relatively easy. It required far less than falling to the floor in disgust or explaining: "Oh my God, how can you say that?" In any event, once the trial judge was satisfied that you were surprised by the answer of the witness, you could impeach your own witness.

This said, do you really want to impeach your own witness?

You may prefer to merely refresh recollection. (This is explained later.) Or you may wish to utilize a technique most experienced prosecutors have developed into an art form.

Prosecutor Direct: "What did you see?"
Witness: "A red car."
Prosecutor: "Was not the car you saw green?"
Defense Attorney: "Objection your Honor. The prosecutor is leading the witness."

Judge: "Sustained."
Prosecutor: "Now, once again, what color was the car you saw?"
Witness: "Come to think of it, it was green and not red."

Impeaching your own witness is not something experienced trial lawyers are anxious to do. This is particularly so when it comes to criminal defense lawyers.

This said, we read with much interest, and even more skepticism, the suggestion of former Chief Justice Warren Burger that criminal defense lawyers impeach their defendants when they believe the witness is perjuring himself.[5] Carrying this suggestion out to its natural conclusion creates, at best, a comical and ridiculous scenario.

In any event, FRE 607 is not all that much a new thing. For that matter, many judges still require the showing of "surprise" before allowing the impeachment. Also, there is understandable judicial concern when a lawyer puts a witness on the stand with the purpose of getting in impeaching material.[6]

2. Some inconsistent statement impeachment comes in as "substantive evidence"

This again appears to be a major change and a major consideration. Although this is a major change, most trial lawyers, with the obvious exception of federal prosecutors, are not concerned with or affected by it.

At common law the inconsistent statement used to impeach came in only to impeach the witness. It did not come in as "substantive evidence." For most trial lawyers this posed no problems. Trial lawyers were more than satisfied to have the jury hear the impeaching statement. At the very least it raised serious questions, usually about the truthfulness, and,

[5]*Nix v. Whiteside*, 475 U.S. 157, 169 (1986).
[6]*See McCormick on Evidence* § 38 at 141 n.10 (Rosenstiel et al. eds., 5th ed. 1999) (Surprise is required by several statutes, D.C. Code § 14-104; Ga. Code § 38-1801 (if "entrapped"); and Ohio R. Evid. 607. The concept of "surprise" varies in the various jurisdictions. Sometimes "actual" or genuine surprise is required; in other decisions it is not. *See* Comment, 49 Va.L.Rev. 996 (1963)).

at the very least, the accuracy of the witness's testimony. Also, when the impeachment was properly done (as described in the Fishing Rules), the jury believed the truth and accuracy of the impeaching statement and not the witness's testimony. The traditional cautionary instruction, that the impeaching statement could be considered only to impeach, as with most cautionary instructions, had little effect on the jury's thinking. Once they have seen the pink elephant it does little good to tell them they did not see the pink elephant. As Justice Jackson said, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury. . . all practicing lawyers know to be unmitigated fiction."[7]

Our favorite explanation of this issue is to be found in the wonderful movie *Anatomy of a Murder*. During his cross-examination of a doctor, criminal defense attorney Jimmy Stewart asks a question the judge rules to be improper. The witness answered the question before the judge could rule on the objection. The judge then gives the jury the traditional "curative instruction" to disregard both the question and the answer.

This was the end of the cross-examination and Stewart returned to counsel table where the defendant whispered to him "how can the jury disregard what they just heard"? Stewart's short but accurate reply, which he repeated twice was, "They can't."

What then was the problem, and why the change?

One group of trial lawyers, few in number but incredibly persuasive, had a problem with the common law limitation on how the impeaching statement was treated. We refer to federal prosecutors. Truth be known, their concerns before FRE 801(d)(1) were real.

To explain. In a major investigation into mob activities, it would not be uncommon for federal agents and prosecutors to put pressure on "Mr. Small." The pressure would usually come in the way of threats, and occasionally promises. Either you cooperate with us or terrible things will happen to you. On the other hand, of course, if you cooperate, the terrible things would not occur, and for that matter good things will come your way.

Not surprisingly, "Mr. Small" often got the message. The cooperation required was to give evidence against "Mr. Big." To make the threats go

[7]*Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring).

away and earn the goodies offered, "Mr. Small" would indeed give information against "Mr. Big."

The next step required "Mr. Small" to appear and testify before a federal grand jury. When this was done "Mr. Big" was indicted and eventually tried.

However, as often was the case, still another group of individuals, friends of "Mr. Big," also approached "Mr. Small" before the trial. Once again, there were threats and warnings. In the words of the trade, "Mr. Big's" friend made "offers he could not refuse."

"Mr. Small," obviously not to be envied, was between a "rock and a hard place." However, nature being what it is, "Mr. Small" understandably considered the "offer he could not refuse" to be the more substantial of the threats. He decided to change his mind and to renege on his agreement with the prosecutors.

Now the moment of truth – actually, a poor play on words. "Mr. Small" is called to the stand by the federal prosecutors. Unsuspiciously, or maybe not so, the federal prosecutor asks him what he knows about the defendant, "Mr. Big." "Mr. Who?" "I never heard of him."

Recall we earlier talked about the right to impeach your own witness, even before the Federal Rules of Evidence. An experienced prosecutor could and would easily show the required "surprise," be it real or simply necessary.

Using the grand jury testimony, "Mr. Small" could and would be effectively impeached. Moreover, as already mentioned, the jury was inclined to believe the truth of the grand jury testimony. Still, the prosecutor had a problem.

The grand jury testimony came in "merely to impeach." It did not come in as substantive evidence.

If, as often was the circumstance, "Mr. Small's" grand jury testimony was the only evidence against "Mr. Big," the prosecutor would lose the case when "Mr. Big's" defense attorney made a motion for judgment of acquittal at the close of the prosecution's case-in-chief.

Given the chance, would the jury have convicted, cautionary instruction notwithstanding? Of course. The jury would accept and believe what he told the grand jury, rather than his new version or story told on the stand. But without substantive evidence the judge was required to grant the motion for judgment of acquittal.

So you see, federal prosecutors did have a real problem. They wanted the impeachment with inconsistent statement to come in not merely to impeach, but as substantive evidence.

In major part they got what they wanted. The result, FRE 801(d)(1), allows an inconsistent statement to come in as substantive evidence if the impeaching statement was given under oath.

Obviously, as intended, this takes care of the federal prosecutors when they use grand jury statements.

Many trial attorneys and evidence teachers misread the requirement by mistakenly adding a second requirement, that the inconsistent statement was also subject to cross-examination. This is not so for if it were, grand jury statements, the intended purpose of the rule change, would not come in as substantive evidence. The "subject to cross-examination" requirement does not apply to the impeaching statement, but rather the witnesses' appearance at trial.

For additional information, if not further elucidations, you may read *California v. Green*, 399 U.S. 149 (1970), which preceded FRE 801(d)(1).

So where does all of this leave trial lawyers who are not federal prosecutors? For the most part, you are back to where you started and where you are content to be. The jury, under all circumstances, gets to hear the inconsistent statement when you impeach the witness with it.

The only change would occur where the inconsistent statement was under oath, most probably during a deposition. Given this situation, you should request the judge instruct the jury that "the impeaching statement comes in not merely to impeach the witness but as substantive evidence as well."

Wait a minute; you appear to be talking out of both sides of your mouth – not unlike the witness. Earlier you said that as long as the inconsistent impeachment comes in and the jury hears it, it is not important to trial lawyers, other than federal prosecutors, that it comes in as substantive evidence. Yes, this is what we said and we stand by it. However, the opportunity to have the trial judge call attention to the impeaching statement and in effect "loop" it would help and not hurt. Besides, if you are a criminal defense lawyer and the judge denies your request for the instruction, you will have still another "harmless error" argument for the appellate court.