TRIAL
TECHNIQUES
AND TRIALS

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saying is because they have cut a deal with the plaintiff, and under these circumstances the jurors should not believe them.

Finally, remember that bias, interest, and motive as an impeachment category is always considered important (noncollateral). This means that if the witness does not admit the impeaching fact, you must later prove it up with extrinsic evidence. Proving up is discussed in Section 6.12.

2. Prior Inconsistent Statements

Use of prior inconsistent statements is the most common impeachment method. Whenever a witness testifies about something during the trial, and the witness said something different (or failed to say anything) at an earlier time, the inconsistency detracts from the witness’s credibility. Witnesses frequently make oral statements to police or other investigators. They make written and signed statements. They prepare reports and forms. They testify at depositions, hearings, and other proceedings. They fail to say something under circumstances in which they would be expected to say something. These are all potential areas for impeachment at trial. If the inconsistency is significant, bring it out.

Effective impeachment with a prior inconsistent statement requires two things: an effective technique and an appropriate attitude. Effective technique is necessary because impeachment must be simple and clear. It must create an impact now. The enemy of effective impeachment is complexity and confusion.

Think of impeachment with a prior inconsistent statement as holding up before the jurors two flash cards, one white, the other black. The white card contains what the witness said today; the black card contains what the witness said at an earlier time. If the flash cards are simple, the contrast is stark and clear. If the flash cards are complicated and muddled, they turn grey, and the contrast disappears. Effective technique is based on the 3 Cs, accompanied with an appropriate attitude. The 3 Cs are:

- Commit
- Credit
- Confront

First, commit. Commit the witness to the fact she said during the direct examination that you now want to impeach. Make it as specific, focused, and short as possible. Use the witness’s actual words. Committing the witness is important because it reminds the jurors what the witness said on direct, and lets the jurors know that something important and interesting is about to happen.

Examples:

Q: Mr. Jones, you say that the defendant’s Chevy was going 30 miles per hour, is that right?

A: Mr. Jones, you just said on direct that the defendant’s Chevy was going 30 miles per hour, right?

Committing the witness must also communicate an appropriate attitude. In the preceding examples, the “you say” and “you just said on direct” questions are neutral. In most cases, however, you want to convey an attitude that signals to the jurors why the prior inconsistency happened. Is your position that the witness
is confused, mistaken, or doesn’t remember? If so, your questions, tone of voice, and body language must project that attitude.

Examples:

Q: Mr. Jones, as you remember it, the Chevy was going 30 miles per hour?
A: Mr. Jones, you think the Chevy was going 30 miles per hour?

Is your position that the witness is intentionally changing his testimony, or even lying? If so, your questions, tone of voice, and body language must project that harder attitude.

Examples:

Q: Mr. Jones, are you claiming today that the Chevy was going 30 miles per hour?
A: Did I hear you right? You want us to believe that the Chevy was going 30 miles per hour?

These different forms—"as you remember it," "you think," or "are you claiming today," and "you want us to believe"—send clear messages about why the inconsistency happened, and must be accompanied with appropriate body language and tone of voice: soft and understanding, or doubting and accusatory. They tell the jury: Stay tuned, things are going to get interesting. Word choices, tone, and body language are all important here.

Second, credit. Build up the source of the impeaching statement. Jurors need to know where, when, and how the prior inconsistent statement was made. They need to know that the prior inconsistent statement was made in a serious environment, when the facts were fresh (or at least fresher) in the witness’s mind. Create a picture of the place where the impeaching statement was made.

Example:

Q: Mr. Winston, you talked to a police officer after the crash?
A: Yes.
Q: That was Officer Smith, the uniformed police officer?
A: Yes.
Q: That was about 30 minutes after the crash?
A: About that.
Q: You talked to Officer Smith while sitting in her squad car?
A: Yes.
Q: You knew she was investigating the crash?
A: Sure.
Q: You told her that you were a witness?
A: Yes.
Q: You knew that it was important to tell Officer Smith what you saw?
A: Yes.
Q: As accurately as possible?
A: Yes.
Q: And as completely as possible?
A: Yes.
Q: As you were talking, Officer Smith was taking notes?
A: Well, she was writing things down, but I couldn't read it.

Example:

Q: Ms. Joseph, you had your deposition taken in this case?
A: Yes.
Q: A deposition is when you are asked questions under oath?
A: Yes.
Q: That's the day you came to my office?
A: That's right.
Q: We sat in a small conference room?
A: Yes.
Q: In the conference room were you, me, the other lawyer, Mr. Phelps, and a court reporter?
A: Yes.
Q: I asked you questions, and the lawyer for the other side asked you questions?
A: That's right.
Q: Before we started, a court reporter swore you in to tell the truth, right?
A: Yes.
Q: The same oath you took today in this courtroom?
A: Yes.
Q: And you knew it was important to tell the truth about what you saw, heard, and did when the crash happened, right?
A: Of course.
Q: You knew that the court reporter would write down everything that was said, word for word?
A: Yes.
Q: After the deposition was over, you had a chance to look at all the questions you were asked and the answers you gave?
A: Yes.
Q: Those questions and answers were in a booklet, what's called a deposition transcript?
A: Yes.
Q: You were given a chance to look over those questions and answers to make sure they were accurate, right?
A: Yes.
Q: And make any corrections if that was needed?
A: Yes.

Do you need to do this second C—credit—every time you impeach a witness with a prior inconsistent statement? No. Do it once, so that the jurors understand how a statement is made to a police officer or how a deposition transcript is created. After that, jurors will know why a statement to a police officer or a deposition question and answer is reliable. You can then abbreviate or even drop the "credit" step, and go immediately from committing the witness to what he said during direct examination and bring out the prior inconsistent statement. This makes the contrast cleaner and more immediate.
Third, **confront.** Bring out the prior inconsistent statement and ask the witness to admit making it.

**Examples:**

Q: Mr. Winston, didn’t you tell that police officer that “the defendant’s car was going at least 50 miles per hour”?
A: Yes.

Q: (Counsel, page 33, line 10): Mr. Adams, weren’t you asked this question, and didn’t you give this answer?: “Question: How fast was the defendant’s car going? Answer: At least 50 miles per hour.”

After you have finished with the 3 Cs—commit, credit, and confront—stop. Let the impeachment linger in the air for a few seconds to give the jurors a chance to absorb its importance. Don’t ask follow-up questions that give the witness an opportunity to explain or start an argument. Let the redirect examiner bring out any explanation for the inconsistency.

When there is more than one inconsistency between what the witness says today and what the witness said in an earlier statement, bring out and contrast those inconsistencies one at a time, to keep things simple and clear.

**Example:**

Q: You say today that the Chevy was going 30 miles per hour?
A: Yes.

Q: You told Officer Jackson that the Chevy was going at least 50, isn’t that right?
A: Yes.
Q: Today you say that the Chevy had the yellow light at the time the two cars crashed?
A: That’s right.
Q: Back then you told Officer Jackson that you weren’t sure what color the lights were at the time the two cars crashed, right?
A: I guess so.
Q: Today you say that the rain had stopped at the time of the crash?
A: Yes.
Q: Back then you told Officer Jackson that it was still raining at the time the two cars crashed, isn’t that right?
A: Yes.

In this example, the witness has been impeached with three separate inconsistencies. Only when you expose them, one inconsistency at a time, will the jurors recognize them and understand their significance.

In many jurisdictions, judges permit lawyers to create a visual aid to make the contrast clear between what the witness says today and what the witness said earlier. As you start the impeachment, have a foam-core poster board or butcher paper set up on an easel. As you commit the witness to what he said on direct, and confront him with his earlier statement, write the key words on the board. Make sure that what you write is accurate and fair. Using a visual aid makes the inconsistency easy to see and understand.
Example:

Q: Mr. Earl, you say today that the defendant’s car was going 30 miles per hour?
A: That’s right. [Put a heading labeled “Today” on the left side of the board, then write “Def. going 30 mph” under it.]
Q: You talked to a police officer right after the crash?
A: Yes.
Q: You told him you had seen the crash, right?
A: Yes.
Q: And you told the police officer that day what you had just seen, right?
A: Yes.
Q: Didn’t you tell the police officer that “the defendant’s car was going at least 50”?
A: I guess so. [Put a heading labeled “Day of crash” on the right side of the board, then write “Def. going at least 50” under it.]

Such a visual aid makes the impeachment obvious to everyone, and keeps it before the jurors much longer. If there are additional prior inconsistent statements, they can be added to the board as you bring them out.

Sometimes it can be effective to vary the commit-credit-confront order. For example, you can begin with crediting the prior inconsistent statement, then committing the witness to the fact you want to impeach, and then confronting the witness with the inconsistent statement. This order—credit-commit-confront—puts the two statements immediately side-by-side for contrast. This order can be effective with lay witnesses who have little courtroom experience. It does not work as well for experienced witnesses like police officers and experts, who immediately recognize that you are setting them up for impeachment.

Example:

Q: Ms. Jamison, you talked to a police officer after witnessing the crash?
A: Yes.
Q: You told the officer what you had seen?
A: Yes.
Q: You knew it was important to the officer investigating the crash to learn what the eyewitnesses saw?
A: Sure.
Q: And you told the officer what you had just seen as accurately as you could?
A: Yes.
Q: Ms. Jamison, today you tell us that the Chevy had the green light?
A: That’s right.
Q: But you told the police officer right after the crash that you weren’t sure what color the light was, right?
A: I don’t remember.

What happens if the witness does not admit making the prior inconsistent statement? Such statements are taken on a case-by-case basis: some are important
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(noncollateral), others are unimportant (collateral). This means that if the witness denies or equivocates about making an important prior inconsistent statement, you must later prove up the statement with extrinsic evidence.

Always remember that effective impeachment with a prior inconsistent statement requires a clear technique (the 3 Cs) and an appropriate attitude. If you don’t act as if the impeachment is important, neither will the jurors. There are four principal sources of prior inconsistent statements: oral statements; written or signed statements; sworn testimony in depositions, hearings, and other proceedings; and impeachment by omission.

a. Oral Statements

Impeachment with a prior oral statement is common. Witnesses frequently talk to police officers, investigators, family, friends, and co-workers about things they have witnessed. All those statements become potential impeachment material if the witness says something different when testifying.

Use the 3 Cs—commit, credit, and confront—when impeaching with an oral statement. Make sure you build up the circumstances under which the statement was made. Be specific. Let the jurors know that the statement was important and seriously made.

Example:

Q: You say today that the Chevy involved in the accident had the yellow light?
A: Yes.
Q: Two days after the collision, on June 3, an investigator came to your house and asked to talk with you, right?
A: Yes.
Q: The two of you sat at your kitchen table?
A: Yes.
Q: He told you he had been assigned to investigate the collision and wanted to talk to the eyewitnesses?
A: Something like that.
Q: You knew he wanted to know how the collision happened, right?
A: Sure.
Q: And you told him what you saw and heard that day?
A: Yes.
Q: You knew that what you told the investigator was important, right?
A: Sure.
Q: You told him what you saw and heard that day as accurately as possible, didn’t you?
A: I tried to, yes.
Q: And the investigator was taking notes as you talked?
A: It looked like it.
Q: Mr. Rosen, didn’t you tell the investigator that the Chevy involved in the collision ran the red light?
A: Yes.

Witnesses are more likely to deny or equivocate about making a prior oral statement, sometimes reasoning that it’s their word against another person’s. For
that reason, it is important to bring out the details surrounding the oral statement. This shows the witness and the jurors that you know all about the prior statement, and the witness is more likely to admit making it.

Example:

Q: Ms. Quigley, your testimony is that the Chevy had the yellow light at the time the two cars collided, is that right?
A: That's right.
Q: Let's turn for a moment to where you work. You work at Jones Electronics?
A: That's right.
Q: At lunchtime most of you eat in the company's lunchroom?
A: Most of the time.
Q: The day after the collision, you ate in the company's lunchroom, didn't you?
A: I'm not sure, but probably.
Q: In the lunchroom that day were the usual co-workers?
A: Probably.
Q: And you were sitting with your usual friends at the large round table?
A: Probably.
Q: That day, the day after the collision, you talked to your friends about the collision, didn't you?
A: I'm not sure, but I may have.
Q: Ms. Quigley, didn't you tell your friends, at the round table in the lunchroom, the day after the collision, that the Chevy went right through the red light?
A: I may have.

A common impeachment mistake happens when lawyers try to impeach a witness with someone else's written report containing the witness's oral statement. For example, a police report contains a notation that "eyewitness said Chevy going 50 mph." The report cannot be used to impeach the witness, because the report is the police officer's statement, not the witness's. It is improper to ask the witness: "Didn't you say in the police report that the Chevy was going 50 miles per hour?" However, the witness can be impeached with her oral statement to the police officer. It is proper to ask: "Didn't you tell the police officer that the Chevy was going 50 miles per hour?" This is probably the most recurring mistake involving impeachment with an oral statement.

b. Written Statements

Impeachment with a prior written statement is also common. These can include statements that the witness herself writes or signs, as well as statements that are written or typed by someone else that the witness signs.

Use the 3 Cs—commit, credit, and confront—when impeaching with a written statement. Make sure you build up the circumstances under which the statement was made. Be specific. Let the jurors know that the statement was important and seriously made. With written statements, however, you also must have the statement marked as an exhibit, show it to opposing counsel, and show it to the
witness, before using it to impeach. Although this procedure is only partially required by FRE 613, most judges require it, and it is the more effective impeachment technique.

**Example (Written Statement):**

Q: You say today that the Chevy was going 30 miles per hour?
A: Yes.
Q: You’re sure about that?
A: Pretty sure.
Q: Ms. Blumenthal, you made a written statement about the car crash you witnessed, right?
A: Yes.
Q: You did that two days after the crash?
A: I’m not sure of the exact date, but that sounds about right.
Q: You did that because an accident investigator came to your house and asked you to make a written statement about what you saw, right?
A: Yes.
Q: Please mark this document “Plaintiff’s Exhibit No. 20.” [Hands exhibit to court clerk, who marks it as an exhibit.] I’m now showing it to opposing counsel. [Hands exhibit to lawyer, who examines it and hands it back.] I’m now showing Plaintiff’s Exhibit No. 20 to the witness. [Hands exhibit to witness.] That’s the statement you made on June 3, 2010?
A: Yes, it is.
Q: It’s in your handwriting?
A: Yes.
Q: That’s the statement you made, in your handwriting, describing what you saw when the cars crashed on June 3?
A: Yes.
Q: Ms. Blumenthal, follow along while I read from your statement, beginning here [pointing]. Make sure I read it right. Your statement says, “I saw the two cars crash. The Chevy was going at least 50 miles per hour.” Did I read it right, word for word?
A: Yes.

Note that the lawyer read the impeaching part of the written statement, not the witness. You always want to keep control over the impeachment, like everything else during cross-examination. When you read the impeaching part, you can read it with the volume, inflection, and body language that highlight the impeachment. This will not happen if the witness reads it. Note also where you should stand when impeaching. If permitted to position yourself anywhere in the courtroom, the best place is to stand next to the witness, where you will not block the jurors’ view of the witness. You will then be next to the witness, facing the jury, and will be able to read the impeaching part, and still have the witness follow along.

The statement, because it is something used during the trial, is kept by the court clerk and becomes part of the trial record. The statement, however, has not been admitted as an exhibit and does not go to the jury when it deliberates (unless the statement has received a foundation that permits it to be formally admitted in evidence).
Example (Signed Statement):

Q: Mr. Wolf, you claim today that the other car, the Chevy, ran a red light?
A: Yes.
Q: You saw that?
A: Yes.
Q: One week after the crash, you wrote a letter to your insurance company, right?
A: I don’t remember the date.
Q: But you sent your company a letter?
A: Yes.
Q: Didn’t you write your insurance company that at the time of the crash you didn’t really notice the color of the lights?
A: I don’t remember.
Q: Please mark this exhibit Defendant’s Exhibit No. 10. [Hands exhibit to court clerk, who marks it as an exhibit.] I’m now showing the exhibit to opposing counsel. [Hands exhibit to lawyer, who examines it and hands it back.] Mr. Wolf, take a look at Defendant’s Exhibit No. 10. [Hands exhibit to witness.] Is that the letter you sent to your insurance company?
A: Yes.
Q: Look at the top. It’s dated June 8, 2010?
A: Yes.
Q: Look at the bottom. That’s your signature at the bottom?
A: Yes.
Q: Look at the third paragraph of the letter [pointing]. Doesn’t your letter say “At the time of the crash, I didn’t really notice the color of the lights”?
A: Yes.
Q: That’s what you said in writing one week after the crash?
A: Yes.

When impeaching from a writing, keep in mind the requirements of FRE 106, the so-called rule of completeness. It provides that when a writing or recorded statement is introduced, an adverse party “may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time.” This rule prevents, among other things, unfair impeachment by reading statements out of context. Accordingly, it is improper to read only part of a statement to create an unfair impression. For example, consider a statement that says: “The light was green. However, I only caught a glimpse of it and I may have been mistaken.” The cross-examiner cannot use only the first sentence to impeach, because omitting the qualifying second sentence would be unfair.

Example (Statement Signed by Witness):

Q: Ms. Hart, you say that you had several thousand dollars missing from the store after the burglary, right?
A: Yes.
Q: After the burglary, you were interviewed by a police detective?
A: That’s right.
Q: That was in the police station?
A: Yes.
Q: The same day as the burglary?
A: Yes, right after we discovered the burglary.
Q: The detective asked you questions and you answered them?
A: Yes.
Q: In fact, the detective typed your answers in a statement form, right?
A: Yes.
Q: He showed the statement to you?
A: Yes.
Q: And he asked you to sign it if the statement accurately contained what you had told him, right?
A: Yes.
Q: After reading it over, you signed the statement?
A: Yes.
Q: Ms. Hart, didn’t you tell the detective that you couldn’t find anything missing from your store after the burglary?
A: I’m not sure.
Q: Please mark this Defendant’s Exhibit No. 10. [Hands exhibit to court clerk, who marks it as an exhibit.] I’m showing the exhibit to plaintiff’s counsel. [Hands exhibit to lawyer, who examines it and hands it back.] I’m now showing Defendant’s Exhibit No. 10 to Ms. Hart. Please take a look at it. [Hands exhibit to witness.] Is that the statement you made at the police station the day you discovered the burglary?
A: Yes, it is.
Q: It has the date of June 1, 2010, at the top [pointing]?
A: Yes.
Q: It has the title “Statement of Helen Hart” at the top?
A: Yes.
Q: At the bottom there’s a signature. That’s your signature, right?
A: Yes.
Q: Take a look at the middle of the page [pointing]. Make sure I read it accurately, word for word. “After I discovered the burglary I looked around the store but I couldn’t see anything that was missing.” Did I read that right?
A: Yes.
Q: Word for word?
A: Yes.

Finally, don’t overlook pleadings and discovery responses as potential sources of impeaching written statements. For example, if a complaint or answer has been signed by a party (usually called a verified pleading, and permitted in some jurisdictions), or a discovery response has been signed by a party, it can be used to impeach. The most common situation involves impeachment using an interrogatory answer, because Fed. R. Civ. P. 33(b)(1) requires that the answers be made “in writing under oath” and “signed by the person making them.” The impeachment procedure is like impeachment using a signed statement.
Example:

Q: Ms. Carter, you say today that you were not present at the board meeting on June 1, 2009?
A: That's right.
Q: [To court clerk] Please mark these interrogatory answers Defendant's Exhibit No. 5. [Show exhibit to opposing counsel.] Ms. Carter, I'm now showing you what has just been marked Defendant's Exhibit No. 5. [Holds exhibit in front of witness.] At the top it says "Plaintiff's Answers to Defendant's Interrogatories," right?
A: That's right.
Q: On the last page, it has a date and signature, right?
A: That's right.
Q: The date is May 1, 2010?
A: Yes.
Q: That's in your handwriting?
A: Yes.
Q: The signature here, that's your signature?
A: Yes.
Q: You signed these interrogatory answers on May 1, 2010?
A: Yes.
Q: Just above your signature, it says "I hereby swear that my answers to the above interrogatories are true and correct," right?
A: Yes.
Q: You then swore before a notary public that your answers were true and correct?
A: Yes.
Q: And over here, that's the notary's affidavit and seal?
A: Yes.
Q: Ms. Carter, let's take a look at interrogatory No. 12 and your answer to it. The interrogatory says: "State who was present at the board meeting of Ajax Corporation on June 1, 2009." Did I read that right?
A: Yes.
Q: Your sworn answer says: "Mr. Franklin, Mr. Williams, Ms. Henderson, Mr. Adams, and I were all present." Did I read your answer right, word for word?
A: Yes.

c. Sworn Transcripts
Whenever a witness testifies under oath, and a transcript of the testimony is prepared by a court reporter, the transcript becomes a potential source of impeachment if the witness testifies differently at trial. Common examples are transcripts of depositions, preliminary hearings, grand jury testimony, and other hearing or trial testimony.

Once again, use the 3 Cs—commit, credit, confront—when impeaching with sworn transcripts. Make sure you build up the circumstances under which the transcript of the witness's testimony was made. Be specific. Let the jurors know that the proceeding was important, that the witness was sworn to tell the truth, and (with depositions) was later given a transcript of her testimony to review, note
any mistakes, and sign. Create a picture of the witness testifying at the deposition or hearing. As with any written statement, show or refer opposing counsel to the transcript page and line, and show it to the witness, before using it to impeach.

Example (Deposition):

Q: Mr. Hoffman, you say today that the Chevy was going 30 miles per hour?
A: That’s right.
Q: You’re sure about that speed?
A: Yes.
Q: Mr. Hoffman, wasn’t that Chevy actually going more than 50 miles per hour?
A: No, I’d say more like 30.
Q: Let’s turn back to December 1, 2010. You testified that day at what’s called a deposition, right?
A: I don’t remember the exact date, but I did have my deposition taken.
Q: That’s when you came to my office?
A: Yes.
Q: We sat in a small conference room?
A: Yes.
Q: You were there, I was there, the other lawyer was there, and a court reporter was there?
A: Yes.
Q: The court reporter swore you in to tell the truth?
A: Yes.
Q: The same oath you took today?
A: Yes.
Q: Then I asked you questions about the collision?
A: Yes.
Q: And the other lawyer asked you questions?
A: Yes.
Q: You knew it was important to answer as accurately and truthfully as possible, didn’t you?
A: Yes.
Q: And you did that—answered accurately and truthfully?
A: Yes.
Q: After the deposition, you received a booklet containing all the questions and answers?
A: Yes.
Q: You had a chance to review your answers to make sure they were accurate?
A: Yes.
Q: In fact, there was a correction sheet where you could make any corrections you felt needed to be made, right?
A: Yes.
Q: There was a signature page for you to sign, if the deposition transcript was accurate, right?
A: Yes.
Q: And you signed that signature page, didn’t you?
A: Yes.
Q: Mr. Hoffman, I’m going to show you a page from your deposition in just a moment. It’s already been marked Plaintiff’s Exhibit No. 3. [Stands next to witness, and puts the deposition transcript before the witness.] But first, look at the first page of this exhibit. It says “Deposition of Henry Hoffman, taken on December 1, 2010,” right?
A: Yes.
Q: Now look at the last page. It says “I hereby certify that the questions asked and answers given in this transcript are true and correct,” right?
A: Yes.
Q: Right after that, there’s a signature. That’s your signature, Henry Hoffman, right?
A: Yes.
Q: Now look at page 42, line 15. I’m going to read from that page, beginning there [pointing].”Question: Did you see the Chevy before the crash? Your answer: Yes, I did. Question: How fast was the Chevy going when it crashed into the other car? Your answer: At least 50 miles per hour.” Did I read those questions and your answers right, word for word?
A: Yes.

This approach—reading the questions and answers, and asking the witness to admit that you read them accurately—is the better approach. Many lawyers ask: “Is that what you said on that date?” However, that question form gives the witness a chance to say “I don’t remember,” “I’m not sure,” or “I don’t think so.” Asking the witness if you read the questions and his answers word for word gives the witness no wiggle room.

Example (Preliminary Hearing):

Q: Mr. Williams, you say that you saw the defendant with a gun in his hand?
A: Yes.
Q: That’s what you’re saying today?
A: Yes.
Q: But that’s not what you said when you testified at the preliminary hearing, is it?
A: I’m not sure.
Q: Well, let’s talk about that preliminary hearing. That was held on September 1, 2010?
A: Around then.
Q: Right here in this courthouse?
A: Yes.
Q: You were a witness at that hearing?
A: Yes.
Q: You testified at that hearing under oath?
A: Yes.
Q: Just like you’re under oath today?
A: Yes.
Q: You were in a courtroom?
A: Yes.
Q: Just like this courtroom?
A: Yes.
Q: You testified from the witness stand?
A: Yes.
Q: Just like you’re testifying today?
A: Yes.
Q: At that hearing, you testified about what you saw, heard, and did as you witnessed the robbery, right?
A: Sure.
Q: You told the truth at that hearing, didn’t you?
A: Of course.
Q: Mr. Williams, I’m going to show you Defendant’s Exhibit No. 10, a transcript of your testimony at that hearing. Counsel, it’s page 12, beginning on line 15. [Shows transcript to witness, and stands next to him.] Follow along to make sure I read it right. Weren’t you asked this question and didn’t you give this answer: “Question: Did you see the defendant with any weapon? Answer: I don’t know. It was too dark to see.” That’s what the transcript of your testimony says, right?
A: Yes.

Make sure the other lawyer has a copy of the transcript you are using to impeach. If not, make sure you show her. Better yet, give her a copy of the transcript.

Note that in each of these examples of impeachment using a transcript of the witness’s sworn testimony, the lawyer had the transcript marked as an exhibit, showed it to opposing counsel, then showed it to the witness and stood next to the witness while reading the impeaching part. As noted earlier, FRE 613 does not require showing the witness a “prior statement” before cross-examining the witness with the statement; it requires only that you show the statement to opposing counsel on request. However, showing the transcript to the witness is the more effective technique (it avoids responses like “I don’t know; can I see that transcript?”) and is perceived by the jurors as the fair thing to do.

d. Impeachment by Omission

Impeachment by omission is an important impeachment technique, but it must be used only in appropriate situations. Whenever a witness has made a report or record of an event, and the witness failed to put in that report or record the fact that he is now testifying about, the witness can be impeached by that omission. However, such impeachment is effective only when it is used to expose important omissions, under circumstances in which the exposure is fair. The omission must be important, so that the jurors believe the omission cannot be explained by inadvertence or mistake. Always ask: If this fact actually existed, would the witness have recorded it in this report or record? The omission must also be fairly exposed. Always ask: Did the witness have control over the making of the report or record, so that the failure to put this fact in the report or record can fairly be attributed to the witness?
**Example (Police Report):**

Q: Officer Smith, you claim today that right after you got to the scene of the crash, Mr. Williams told you, “I’m sorry, it was my fault”?
A: That’s what he said.
Q: You sure about that?
A: I’m sure.
Q: Officer Smith, you went through the police academy?
A: Yes.
Q: They trained you how to prepare police reports?
A: Yes.
Q: They told you to put the important facts in the report, didn’t they?
A: Yes.
Q: Not every single fact, but all the important ones?
A: Yes.
Q: And that’s what you do when you write your reports—put in all the important facts?
A: I try to.
Q: Officer Smith, have you ever arrested someone for a crime?
A: Yes.
Q: And they’ve confessed?
A: Yes.
Q: When someone you’ve just arrested says, “I did it,” that’s important, isn’t it?
A: Of course.
Q: You put his statement—“I did it”—in your report, don’t you?
A: Yes.
Q: You’ve also been to the scenes of car crashes, right?
A: Yes.
Q: And sometimes one of the drivers will tell you that the accident was his fault, right?
A: That sometimes happens.
Q: When someone just involved in a car crash in which another person was seriously hurt says, “It’s my fault,” that’s important, isn’t it?
A: It can be, but it depends on the circumstances of the case.
Q: And if it’s important, it goes in the report?
A: If it’s important.
Q: Officer Smith, I’m showing you Plaintiff’s Exhibit No. 10, which has already been marked. [Hands exhibit to witness.] Counsel, you have a copy of this exhibit, right? [Opposing counsel nods.] That’s a copy of your accident report?
A: That’s right.
Q: That’s the report you prepared of the facts of this car crash?
A: Yes.
Q: Officer Smith, show me where your report contains Mr. Williams’s words, “It’s my fault.”
A: It’s not there.

You can heighten the omission by asking the witness to circle the nonexistent words with a felt-tip pen. That increases the tension, and makes the omission even more prominent.
Example:

Q: Officer Smith, I'm handing you a red felt-tip pen. Look at the front page of your accident report. Please circle Mr. Williams's words—"It's my fault"—as they appear on that page.
A: I can't do that.
Q: Why not?
A: It's not in my report.
Q: Well, let's look at page two of your report, the narrative portion. Please circle Mr. Williams's words—"It's my fault"—as they appear on page two.
A: I can't do that.
Q: Is there a problem?
A: It's not in my report.

Example (Business Report):

Q: Ms. Dowd, your job as the secretary for the board is to record what happens during board meetings?
A: That's right.
Q: You record the board members who attended the meeting?
A: Of course.
Q: You take notes during the meeting?
A: Yes.
Q: Those notes include the topics under discussion?
A: Yes.
Q: The positions the board members in attendance take on those topics?
A: Yes, if they speak and take positions.
Q: Whether the board approved or disapproved some matter?
A: Yes.
Q: And the way the board members in attendance voted?
A: Yes, and if they abstained from voting.
Q: The reason you take notes is so that you can write an accurate account of what happened at the meeting?
A: Yes.
Q: The account of the meeting, those are called the minutes?
A: Yes, the minutes of the board meeting.
Q: Ms. Dowd, you say today that the board during its meeting on June 1, 2010, approved the contract with Jones Chemical Company?
A: Yes.
Q: Approving that contract was a big deal, wasn't it?
A: It was an important contract, yes.
Q: I'd like this document marked as an exhibit. [Hands exhibit to court clerk, who marks it as an exhibit.] I'm showing what has just been marked as Defendant's Exhibit No. 12 to plaintiff's counsel. [Hands exhibit to lawyer, who hands it back.] I'm now showing it to the witness. [Hands exhibit to witness.] That's the minutes of the board meeting of your company held on June 1, 2010, right?
A: Yes.
Q: In fact, that's your signature as secretary of the board at the bottom of the last page, isn't it?
A: Yes.
Q: Ms. Dowd, show us where the minutes of the board meeting say that the board approved the contract with Jones Chemical Company.
A: It's not in the minutes.
Q: In fact, the only notation in the minutes is on page two, where it says "The board discussed the proposed contract with Jones Chemical," right?
A: Yes.
Q: It says "discussed"?
A: Yes.
Q: It says "proposed contract," doesn't it?
A: Yes.
Q: It doesn't say "approved contract," does it?
A: No.

Remember that jurors will put weight on the omission only if it is fair to do so. This means that the witness must have control over the making of the report. Be careful about impeaching witnesses with "omissions" during depositions. If the witness never said something during the deposition that he now testifies about, it may be that the witness was never asked a question during the deposition that would have brought out that fact. In that situation, the omission is insignificant, and trying to make something of it fails, because the witness has no control over the questions the lawyers ask, or don't ask, during the deposition. In fact, the redirect examination can expose this effectively. For example, if the cross-examiner brings out that the witness in his deposition never said that "the defendant's car was going 50 miles per hour," on redirect the witness can say that "that lawyer never asked me how far the defendant's car was going; if he had, I would have told him 50."

You can frequently combine impeachment with a prior inconsistent statement with impeachment by omission. This in effect impeaches the witness twice.

**Example:**

Q: Ms. Jackson, you say today that the light for Main Street was green when the two cars crashed?
A: That's right.
Q: You talked to Officer Jones right after the crash, right?
A: Yes.
Q: You told Officer Jones that the light for Main Street was red at the time of the crash, right?
A: Yes, I did.
Q: And you never told Officer Jones that the light for Main Street was green, did you?
A: No, I didn't.

Some lawyers like this "double impeachment," others think it complicates things unnecessarily. However, it can be a useful technique, particularly if you are going to argue later that the witness is confused and doesn't really know what color the light was at the time of the crash.
Prior inconsistent statements are taken on a case-by-case basis. If the witness denies or equivocates about making the statement, it must be proved up with extrinsic evidence if the statement is important (noncollateral).

3. Contradictory Facts

Whenever a witness says one thing at trial, the witness can be asked to admit a contradictory fact. For example, if the witness says he was 20 feet from the collision, he can be asked if he was in fact more than 100 feet away. Impeachment with contradictory facts, or impeachment by contradiction, is well recognized by the case law, although there is no specific rule governing it.

The good-faith requirement for impeachment is an important part of impeachment with contradictory facts. The cross-examiner cannot suggest a contradictory fact unless she has a good-faith basis to believe that the contradictory fact exists. Model Rule 3.3 prohibits a lawyer from knowingly offering false evidence, and Model Rule 3.4 prohibits a lawyer from alluding to any matter the lawyer does not reasonably believe will be supported by admissible evidence. For example, the witness cannot be asked to admit that he was in fact more than 100 feet away unless the cross-examiner has a good-faith basis to believe that this was so. The cross-examiner must have a factual basis for this belief, such as information from another eyewitness that this witness was more than 100 feet away. If the cross-examiner has no good-faith belief, she cannot ask the question suggesting this fact. Cross-examination is not an opportunity to throw unsubstantiated dirt at a witness.

If you have a good-faith basis for asking the witness to admit the contradictory fact, simply ask the question with the appropriate accompanying attitude. If the witness admits the contradictory fact, nothing more need be done. If the witness denies or equivocates, you must prove up the unadmitted impeachment with extrinsic evidence if it is important (noncollateral). Contradictory facts are treated on a case-by-case basis, like prior inconsistent statements; some are important, others are not.

Common sources of contradictory facts are facts that attack the witness’s credibility, such as liquor or drug use that affected the witness’s perception of the event.

Example:

Q: Mr. Quigley, you say that you had been home all afternoon and had just gone outside when the crash happened?
A: That’s right.
Q: Weren’t you in fact at O’Brien’s Tavern that afternoon?
A: No.
Q: Didn’t you have several beers that afternoon before the crash happened?
A: No.

If the witness denies or equivocates about the contradictory fact, it must be proved up if it is important (noncollateral). In a situation like the preceding example, you must prove up the impeachment, which was not admitted, if the impeachment is important (noncollateral). If this witness is an important eyewitness, whether he was home or had been in a bar drinking several beers