

Getting Maximum Impact From Prior Inconsistent Statements

One of the most valuable tools for use in cross-examination is the prior inconsistent statement. Whether derived from written statements obtained by police or private investigators, video or audio recordings or testimony given at a preliminary hearing, the confrontation of a witness by his or her own words on a previous occasion against testimony given at trial can be devastating to the witness' credibility. Trial judges frequently refer to such inconsistencies in reasons for judgment in rejecting the evidence of a witness as being false or unreliable.

As with many aspects of advocacy, however, there are many decisions to be made with respect to the use of prior statements. The effectiveness of this approach may range from overwhelmingly successful to embarrassing the case for the defence depending on counsel's presentation. Notwithstanding that many of the comments set out below may be a familiar restatement of principles, a structured review of the decision making process in this method of impeachment may prove valuable and worthwhile.

1. Where Do You Want To Go (With the Witness)

It is essential to determine that at the outset of preparing any cross-examination of a Crown witness to determine what you will want the trier of fact to conclude with respect to the witness' testimony. Whether you wish to submit that the witness is a liar, is making an honest mistake with respect to the testimony or is so inconsistent in recollections as to be inherently unreliable, a clear understanding of the purpose of the exercise in cross-examination as it relates to the ultimate issues to be determined must be the starting point in preparing and executing a cross-examination at trial.

2. Review The Existing Material and How It Came Into Existence

Preparation for trial will necessarily involve careful examination of any statements given by the witness during the course of the investigation.

Video and audio statements must be transcribed (in the event that transcripts are not provided by the Crown) and should be compared with the original recording for counsel to be satisfied that the transcript is accurate. Signed statements should be examined for corrections which may have been made by the witness, as well as location of initials and

signature by the witness and any witnesses to the statement.

A detailed summary of the statement must be prepared, breaking it down point by point using the exact words given by the witness on any key issues.

The summary should be prepared in a fashion which makes its contents readily retrievable, including page references, time references on the video tape and categorizing lengthier statements by events and facts.

In addition, careful attention should be paid to the circumstances giving rise to the statement. In this regard, the police notes may indicate additional conversation with the witness which was not included in the statement, the presence of officers during the interview process, the time frame during which the interview was conducted, and telephone or personal contact preceding and following the interview of the witness. Police observations as to the demeanor of the witness and even the status of the investigation with respect to facts known to the police as of the time of the interview may also form part of the cross-examination.

In the event that there are a series of statements, a chart comparing the successive versions of the same events will make contradictions readily

apparent.

3. Use Of Previous Statements At A Preliminary Inquiry

The temptation is always great to destroy or attack the credibility of a witness at a preliminary inquiry. Notwithstanding that counsel are aware that the judge at such an enquiry makes no finding of credibility, skills in cross-examination at trial lead to habits that are hard to restrain at the preliminary. It is generally advisable not to confront the witness at a preliminary hearing with a prior inconsistent statement that should be saved for trial.

It may be preferable to take the witness through many of the same areas of evidence as in the statement but in a different sequence or with a view to eliciting additional information. If the witness gets “off the track”, he should be permitted the latitude to proceed merrily along the contradictory path without a hint of the error of his ways.

To prevent the witness from diminishing the significance of the prior statement or otherwise explaining an inconsistency at trial, questions asking the witness to confirm that in the prior interview, his recollection was clear, he described everything he remembered, his description was truthful and his description was accurate, will all likely gain affirmative responses. Similar confirmation should be sought with respect to written statements to establish that the language used was that of the witness, that the statement was read over before being signed, that the signature reflected that the accuracy and completeness of the statement and the witness had the opportunity to correct or change any part of it. The witness who provided

a video or audio statement should be asked whether there was any additional information given to the police which was not recorded and whether there were any other circumstances surrounding the taking of the statement which affected the statement being complete, accurate and truthful.

4. Preparation For Trial

Again, the testimony from the preliminary hearing should be summarized

in detail for easy and accurate retrieval as necessary. A comparison chart between the prior statement and the testimony on the same points should be prepared. Areas which will likely be used for contraction at trial should be highlighted, including known contradictions between the witness' evidence in chief and in cross-examination at the preliminary, contradictions between the initial statement and the subsequent testimony and obvious problems in the statements or testimony which may be "corrected" at trial.

5. Listen and Record the Evidence Given By The Witness On Examination

in Chief At Trial

Precision is essential as is the utmost concentration.

6. Identify The Areas Of Inconsistency

7. *Select Those Points Worth Pursuing*

Consider whether the present answer is preferable to the previous statement. If so, there is no advantage to contradiction. Alternatively, a decision will be required on whether it is worthwhile to attempt to bring the witness back to the previous statement to adopt same in current testimony or, alternatively, whether the purpose will be to demonstrate so

many inconsistencies that the witness is manifestly unreliable. It is important to prioritize the items of inconsistency by determining what contradiction will most likely succeed in undermining the credibility of the witness with the maximum impact possible.

8. **Decide Upon The Sequence In Which To Make Use Of The
Inconsistencies**

In this regard, consideration must be given to the point at which the specific inconsistencies will be used, not only with respect to any other inconsistencies but within the overall context of the cross-examination. It

may be that the most effective use of the dramatic contradiction is at the outset of the cross-examination; alternatively, counsel may choose to save the best for last, using various other inconsistencies at selected areas in the cross-examination.

9. *Commit The Witness To The Precise Language Which Will Be The Subject Of The Contradiction*

It is not sufficient to lead the evidence of the witness in approximately the same language as the prior testimony or statement. Rather, the identical language, including specific words and phrases ought to be elicited from the

witness, leaving no room for ambiguity as to what the witness says (and means to say) at trial.

10. Set Up The Point For Emphasis

The witness should be asked to confirm the certainty of his or her recollection on the specific point being reviewed. There should be no question as to the clarity of the witness' recollection, the asserted basis for that recollection and the importance of that point within the overall testimony of the witness.

11. Draw The Witness's Attention To The Circumstances Of The Prior Statement

The witness must be asked about the particular occasion upon which the statement was made or testimony given. Emphasis may be placed on the proximity in time between the original event and the making of that statement, the opportunity for the witness to consider what information was given at that time and the ability to have done so accurately and truthfully, the accuracy of the recording of the statement on that occasion and the witness' awareness of the importance of being accurate and

complete at that time. Without letting the witness read the statement or transcript, he should be asked to or identify or acknowledge that he made the statement or gave evidence on the date in question.

12. Confront The Witness With The Prior Inconsistent Statement

The specific portion of the statement should be read slowly and emphatically to the witness by counsel. For evidence given at a preliminary hearing, all questions and answers, both on examination in chief

and cross-examination on the specific points, will have to be presented to the witness. It may be desirable to do these one question at a time or by groups of questions, indicating in fairness to the witness that additional questions and answers will also be read. In the appropriate (although rare) case, it may even be desirable to have the witness read his own words in the particular passage aloud.

13. The Litany

Counsel will then confirm that the witness acknowledges having been asked the question and having given the answer on the previous occasion or, alternatively, having made the statement. If the witness claims a lack of recollection of having made the remark, it may be desirable to ascertain the extent of the witness' recollection about other answers or details contained within the statement to demonstrate that it is only on the inconsistent portions that the witness has a lack of recollection. Alternatively, the use of other aspects of the prior statement may "refresh the witness's memory" to lead the witness to acknowledge having made the statement in question.

If the witness denies having given the prior testimony, it will either be necessary to call the court reporter or otherwise prove the validity of the transcript.

If the witness has acknowledged giving the answer, he or she should be asked, "was that the truth?". The use of the phrase "the truth" carries with it a ring of certainty which may have more effect than simply determining that the answer was "true", which may give the witness somewhat more latitude to assert that although true, the comment was simply inaccurate.

14. NOW WHAT?

The witness having been confronted with a prior inconsistent statement, great care should be taken in the choice of expression, emphasis and pace on the next series of questions.

It may well be desirable to have the witness adopt the prior statement.

Letting him “save face” by acknowledging that the current testimony may simply be erroneous, given the additional passage in time since the last statement and allowing for the fact that the prior statement was not made in the pressure of the court room setting.

If the witness continues to assert the current evidence, counsel may choose

to explore the process by which the witness was able to give such a clear, unequivocal, detailed and apparently accurate version of the exact same events on a previous occasion which is very different from the description now. Such an exploration may demonstrate that the way this witness' mind works, when asked about the identical events on different occasions several months apart, come to mind in a very different series of images.

Alternatively, the witness may acknowledge that the version given initially was false. In this regard, counsel may wish to explore whether the witness told the version with the same kind apparent sincerity and

certainty as he now displays before the court. In the appropriate case, the witness might be asked to tell the court which version of events was the truth and which one was the lie.

An explanation for the change in the description may be based on the witness having learned of additional information including problems in his original description of events. The change in the account is meant to accommodate what might now be needed to enhance the witness's credibility.

The cumulative effect of several inconsistencies may be advanced to show

collectively the witness's lack of reliability.

Realizing that there is always a risk in asking an open-ended question, counsel's observations of the witness throughout the testimony may even permit asking the witness why the change in the story has occurred.

Counsel may choose to suggest to the witness the reason for this new description.

In any case, after the point of the contradiction has been made, the

cross-examination should then proceed to another area to prevent either boredom on the part of the trier of fact, undue sympathy for the witness or an explanation being offered which might not have come to the witness' mind earlier and which may negative the effect of the cross-examination.

Just as every case has its own unique qualities, so does every witness.

However, the principles of impeachment, the issues to be considered and the exercise of judgment will always present great challenge to the advocate and great satisfaction when employed most effectively.

