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'Same Question, Different Answer': The One Courtroom Tool You Should be Using, But Probably Aren't

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Impeach a witness on matters that are not trivial when you know you can.

Impeachment. It's one of the most powerful things an attorney can do in the courtroom, and yet so few lawyers do it. Perhaps it's due to trepidation about the mechanics of impeachment. Or maybe lawyers are worried that the time it takes to impeach a witness will create unwanted delay in a courtroom full of impatient jurors. Maybe lawyers shy away from it because of this familiar scene: A lawyer begins to impeach, and the first thing opposing counsel says is that they can't find the transcript. Then they can't find the proper page. Then they need more time to read the excerpt. Then they say, "Your Honor, this isn't proper impeachment!" even if the previous testimony directly contradicts what the witness just said on the stand. By the time the witness is actually confronted with the prior testimony, the jury may have forgotten the question. Whatever the reason, I've noticed that many lawyers—even very good lawyers—just don't seize the opportunity to impeach a witness even when they have the ammunition to do so.

Here's my advice: Impeach the witness on matters that are not trivial when you know you can.

The truth is, *properly* impeaching a witness yields fruit that greatly outweighs any downside caused by the mechanics or the time it takes to impeach. Why? Because proper impeachment gives the cross-examiner two of the things they're trying to establish most during the course of a trial: credibility and control.

Credibility. The jury's job is to weigh the facts that are presented to them and to make a decision as to which side's account is more credible. As a lawyer, your job is to show the jury that you are the truth-teller: You know the facts, you're going to present the facts to them, and you're going to correct anyone who tries to present factually incorrect evidence. Properly impeaching a witness shows the jury just that—you know the witnesses' prior testimony even better than they do, you're going to make sure the jury hears the things the witnesses have said previously that help your side of the case, and the jury can count on you to correct anyone who tries to misstate, exaggerate or mislead.

Control. Certain witnesses will walk all over you if you let them. It could be an expert witness who has testified hundreds of times before. Or it could be one of those witnesses who is just so likable that, if the jury had to choose at first blush between you and them, well, you may come in second place. But, even one well-executed moment of proper impeachment shows the witness, and the jury, that *you* are in control. You're not here to play games, and, if after testifying differently elsewhere the witness wants to change his story, you're going to know it, you're going to call him out on it, and he is not going to enjoy the process.

When I go to trial, I have all of the witness's prior testimony available in a bright red binder (more on this red binder below). When the witness makes an impeachable statement, I grab my bright red binder—which is located in a position in the courtroom that is easily visible to the jury—and begin my process for impeachment. Witnesses are smart. Usually, it only takes one or two times for witnesses to figure out (a) that my questions tend to track the questions that the witness has been asked previously, and (b) that if their statements at trial deviate in a material way from prior testimony, I'm going to impeach them using my bright red binder. Done correctly, witnesses begin to assume that if Mr. Williams is asking the question that way, he must know the answer. The result is that I eventually will obtain many short, affirmative responses to my leading questions. And on those rare occasions that the witness doesn't figure out that there is a method to the questioning, even better. The repeated impeachment further creates a credibility surplus for me, and a credibility deficit for the witness.

I can think of multiple occasions where, after getting stung a couple of times for giving impeachable testimony, as soon as I turn to grab the bright red binder, the witness falters. I've even experienced witnesses who have started to testify and then suddenly changed their story *mid-sentence* when I reached for the red binder. Sometimes they'll even refer to the red binder, acknowledging that I probably have a record of them testifying differently elsewhere. Jurors see everything. When this happens, I take my time to point out to the jury that the witness just changed his testimony *because* I had my red binder: "Doctor, if I hadn't reached for the red binder containing the testimony that contradicts [X statement] that you made earlier today, would you have allowed this jury to believe that [X statement] was true?" It doesn't matter what the witness says at that point; any answer is the wrong answer.

Have I convinced you yet? I hope so.

Now, for the important stuff: how to impeach properly. Be forewarned, impeachment done *improperly* not only fails to help your case, it hurts it. We've probably all seen a lawyer who poorly attempts to impeach a witness, fails, and then becomes too afraid to impeach the witness again. Like I said, jurors see everything, and that means that they can see fear too. The witness then takes full advantage of that timidity, and dominates that lawyer. It can hurt to watch.

So how to impeach properly? I have three basic rules: (1) Only impeach non-trivial statements; (2) prepare meticulously; and (3) be patient.

The first rule: This is self-explanatory. Impeaching every little point makes you look petty and is tiresome for everyone. The jury is tired, the judge is tired, your client is tired, and your team is definitely tired. So, if the witness previously testified that the evening in question was "35 degrees" and today he says the evening in question was "chilly," provided it's a trivial deviation, just let it go.

The second rule: Prepare meticulously. The citations in your outline to previous testimony of the witness must be absolutely, 100% accurate. There is *nothing* worse than directing the Court and counsel to the wrong page. Also, your cross-examination outline should include the impeachment testimony. Don't just include a page and line reference in the outline; include the questions and answers themselves. I know I talked about the red binder above, but I'll let you in on a secret: I don't need it. My cross-examination outline already contains the potential impeachment material for the witness. This has two benefits. First, speed. I'm ready to impeach as soon as the witness says something that deviates from his or her prior testimony. I have the prior testimony right in front of me. Second, and more importantly, I can ask the question in exactly the way I need to in order to eliminate those pesky claims that the excerpt I'm reading is "not proper impeachment."

Here's a simple example. Let's say the witness previously testified at her deposition, "I am not an epidemiologist." At trial I don't ask, "You were never trained to read epidemiological studies, correct?" If the witness can testify truthfully that her training permits her to analyze epidemiological studies even though she doesn't self-identify as an epidemiologist, the judge may rule that the impeachment is improper because the deposition and trial questions are materially different. And even if the judge lets the impeachment proceed, the attempt to impeach will probably fall flat. The proper question is, "You are not an epidemiologist, right? This ensures that opposing counsel will be unable to credibly dispute whether the impeachment is actually impeachment (though, they may still try!) and gives the witness no wiggle room.

Now, back to the binders. Prepare bright binders for yourself, opposing counsel, and the judge, containing the witness's previous sworn testimony. If there is more than one transcript, the binder should be tabbed and organized so that anyone can quickly find the relevant volume. Again, bonus points if the binder is bright red or a different, easily recognizable color. Remember, even though at the appropriate moment you will walk to your binder, hold it, and turn to the proper page, *you* don't actually need it because you already have what you need in your outline. But, as I described above, the act of grabbing your bright red binder has the effect of signaling to the witness and the jury that you're about to discipline the witness for not telling the truth. Powerful stuff.

To save time when the moment comes, provide the binders to opposing counsel and the court *before* you begin your cross-examination. When you impeach the witness with prior testimony, opposing counsel will likely want to verify that it is proper impeachment. If you don't have binders prepared you run the risk of opposing counsel claiming that they cannot find their own copy. This will create unnecessary and unwanted delay. Providing the judge and the opposing counsel with a copy of the same red binder that *you* grab when it's time to impeach ensures that they have the impeachment testimony, and has the added benefit of signaling to everyone, before you even begin, that you're ready to impeach.

Does the witness get a copy of the binder with his previous testimony? Not in federal court, and not in many state courts. Federal Rule of Evidence 613 regarding Witness's Prior Statements provides: **(a) Showing or Disclosing the Statement During Examination.** When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

The third rule: Be patient. The process takes time. It may even take a few minutes between the moment when you say, "Your Honor, permission to read from Dr. Smith's sworn testimony on January 15 of this year," and the moment when the judge allows you to proceed with, "Dr. Smith, you were asked the following question(s) and gave the following answer(s)"—but it will be worth it. And by the time you have impeached the witness effectively on two or three occasions, the jury will begin to resent opposing counsel's delay tactics, the judge will lose patience with unfounded objections by the other side, the jurors won't be so sure that they still think Dr. Smith is a straight shooter, and most importantly, you will have taken steps to *earn* your position as the truth-teller in the courtroom.

Impeachment is the single most under-utilized tool in the courtroom. Executed properly, it helps the jury to see your case in the way you want them to see it. And, prepared properly, you'll be able to defeat any challenge from opposing counsel with the simple, confident refrain: "Your Honor, it's the same question, different answer."

This article is part of a lecture video series that Proskauer is creating around trial advocacy, written with the assistance of litigation associate Christina Kroll.

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