Cross Examination

Impeachment of a Witness

One of the most effective ways of impeaching a witness at trial is through the use of depositions and inconsistent statements. Unfortunately, many trial attorneys do not know how to properly impeach using depositions and inconsistent statements. This results in embarrassing situations for those attorneys.

Depositions

When a witness makes a statement in trial that is inconsistent with his or her deposition testimony, you should first highlight the question that was answered differently at trial. Make sure that the trial testimony being impeached is a direct inconsistent statement with the deposition given before trial. You should then ask the following questions:

- Do you remember having had your deposition taken on (state the date)?
- Do you remember that a court reporter was present at your deposition?
- Do you remember having been sworn in to tell the truth?
- Did you tell the truth on that date?
- (If applicable) Do you remember having your attorney present at your deposition?

After you have set the foundation for the impeachment, then you should ask the witness the following question: “Do you remember having been asked the following question and you’re giving the following answer.” At this point, you should read the question previously asked and the answer given by the witness in the deposition.

Use of Inconsistent Statements in Documents

A similar method may be used to impeach a person using an inconsistent statement in a document such as an affidavit, sworn statement or letter. The trial attorney should first highlight the inconsistent trial testimony that will be impeached. Next, the lawyer should identify and authenticate the document that will show the inconsistent statement given by that same witness. In order to establish the foundation necessary to impeach an individual with the use of an inconsistent statement, the witness should be asked the following questions:

- Do you remember having given a statement to (person) regarding how the accident occurred?
- Did you give that statement freely?
- Who was present when you gave your statement?
- When was the statement given?
The witness should then be shown the exhibit and asked the following question: I show you what has been marked as Plaintiff's Exhibit "A" for identification. Is this a copy of your sworn statement?

Finally, read the relevant portion of the statement that directly contradicts the trial testimony of the witness.

Impeachment through the use of depositions or documented inconsistent statements should be accomplished in an organized fashion and should be performed smoothly and directly. The relevant pages and sections of the deposition should be marked and highlighted beforehand so as not to fumble through pages or lose control of the witness.

There is nothing more impressive than to see an attorney properly impeach a witness through the use of inconsistent statements in documents or in a deposition. It is a very simple procedure to learn and, once mastered, will prove to be an effective means of cross-examining even the most "dangerous" witness at trial.

**Expert Witness**

At trial, there may be nothing more challenging and dangerous than cross-examining an expert witness. The lawyer about to cross-examine an expert witness needs to be very careful and very well prepared prior to cross-examining the expert. One of the problems that the trial practitioner encounters in attempting to effectively cross-examine an expert is that the expert usually controls the testimony by being very knowledgeable in the area he is testifying about. What makes it more difficult is that the lawyer usually is not as well versed in the subject as the expert. Nevertheless, an attorney may successfully cross-examine an expert witness by zeroing in on the weaknesses of the expert or of the expert's testimony and exposing them to the jury.

A trial attorney preparing to cross-examine an expert witness should first read and summarize the deposition taken of the expert witness in the case or read and summarize prior depositions given by that same expert in other cases. You will probably find many helpful statements in the prior depositions that will assist you in your case. Additionally, research whether the expert has written any articles, books or editorials that may contradict his opinion in your case. Next, determine what school the expert has graduated from and see if any of the professors that taught the expert have different opinions that may be introduced and compared to the expert's opinion at trial.

A trial attorney should be thoroughly prepared on the subject that will be the basis of the cross-examination. It is not advisable to directly challenge an expert within his or her field. However, it is always very helpful to be knowledgeable in the area so that if the expert's testimony deviates from the accepted norm, you may expose him or her as an advocate or as a hired gun.
A trial attorney should always cross-examine an expert witness. There is nothing worse than allowing an expert witness to give his opinions without challenge. The jury may believe that by failing to cross-examine the expert you have accepted the expert's opinion.

The most effective way of beginning cross-examination is to affect or attempt to affect the expert witness's credibility. To do this, you should attempt to expose the expert's. The expert witness will either be biased because of friendship, money or his relationship with the attorney or the attorney's client. Bringing this out to the jury's attention by using short precise leading questions will be very helpful. Attempt to point out, if possible, the disproportionate amount of time in court which the expert spends in comparison to the amount of time he spends in his given field of expertise. Additionally, point out the number of times that the expert witness has testified on behalf of the particular opposing lawyer or the lawyer's law firm. Point out the number of times the expert has testified for parties that stand for similar things, for example, insurance companies, large manufacturers, or big businesses.

After you have exposed the expert's bias, you should attempt to attack his qualifications. No matter how qualified an expert witness may be in a given field, there are probably levels in his field that the expert has not reached. For example, if the expert witness only has a master's degree, you may point out that he lacks a Ph.D. in his given field. Moreover, do not do this if your expert does not have a Ph.D. in his given field. If applicable, you should point out that the expert witness has not published any articles in his learned field, or has not held any teaching positions in colleges or universities. Obviously, you need to discover this information before cross examining the expert witness. One way of learning this background information is by obtaining the expert's curriculum vitae or detailed resume well in advance of the trial. Another inexpensive way of attaining information on experts is by serving expert interrogatories on your opponent.

Another way of effectively cross examining an expert witness is by making the expert your witness. If you are able to have the opposing expert testify as to general principles that are consistent with your theory of the case, you will have succeeded in your cross-examination. While this may be very difficult to accomplish if the expert is honest and if the questions that you are asking are basic leading question which cannot be denied, you have a good chance of prevailing as the expert will have to admit the facts suggested in your question or appear foolish.

Another way of successfully cross-examining the expert witness is by attacking the expert's facts. You will always be able to point out that the expert received his facts and materials from the opposing attorney. Use this to your advantage and use hypothetical questions in order to change the facts so that they are consistent with your theory of the case; then, ask the expert controlled questions within the restricted scenarios that you have presented. This will allow you to tell your version of the case through the opposing expert. Be very careful when you do this so as not to allow the expert too much room when testifying. You should present the hypothetical question in long detailed factual patterns followed by a direct leading question relating to the factually restricted hypothetical. Even if the expert
refuses to provide you with a favorable response, you have told the jury your story repeatedly by using the hypothetical question.

Although there are many ways to effectively cross-examine an opposing expert, you should only choose two or three areas of attack at trial. If you try all of them you will probably make the cross examination too lengthy or overly confusing. Moreover, the longer an opposing expert witness is on the stand, the greater the likelihood that the expert will hurt your case. Therefore, when cross-examining the opposing expert, be prepared, be thorough, hit your two or three areas of attack, expose the expert's weak points, then politely thank the expert and sit down. Other way to successfully cross-examine the expert witness is by impeaching the expert with an article, journal or chapter of a book from his field. In your research, you will probably find positions and opinions that are contrary to the expert witness's opinion. Attempt to have the expert witness agree that the author of the article, book, or treatise is authoritative or at least a well recognized expert in the field. Next, identify the article, and read the relevant portions that contradict the opinion of the expert. Finally, ask the expert if he agrees with the statement that you just read. It does not matter whether the expert agrees or disagrees; you have effectively demonstrated to the jury that other published experts do not agree with the opposing witness's position.

Finally, if you consider yourself to be extremely knowledgeable and an expert in the opposing expert's field, you may attempt to directly attack him. Be extremely cautious as this is very difficult and dangerous. You should only attempt this if you are sure that you will succeed, or if the expert has made an obvious error in his investigation or in his calculations. Before attacking an expert "head on," you should confer with your own expert to make sure that the direct attack will be successful. This information has been provided by http://caught.net/prose/advtt/hbcross.htm