

IMPEACHMENT BY INCONSISTENT STATEMENT & OMISSION: REVEALING THE WITNESS'S TRUE COLORS

A.K.A. - "**R.A.C.** 'Em Up Boys'"

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I. INTRODUCTION

There is nothing quite as satisfying as destroying a witness's credibility and reliability, particularly when lying, by using the witness's own words against him. The jury can watch in "real time" and see a truthful witness make a mistake that shows she is unreliable or can watch a lying witness get caught in a lie. Whether attacking credibility, reliability or both, revealing the witness's inconsistent words for maximum persuasive impact requires effective use of the technique of impeachment by inconsistent statement, omission, or conduct.

Cross-examination often involves discrediting a witness through impeachment. Impeachment simply means that you introduce evidence undermine the credibility and reliability of a witness. Witnesses may be impeached in a variety of ways: 1) introducing inconsistent statements or omissions; 2) introducing the witness's convictions; 3) by showing bias or motive to lie; 4) establishing lack of capacity (i.e. through mental illness, intoxication, or simply that they could not see or hear what they claim they saw and heard); 5) bad character; and so on. Effective impeachment is an important cross examination tool that affirmatively strengthens the client's theory of defense, helps reveal the story of innocence, and establishes reasonable doubt in the minds of the jurors.

As with everything at trial, success depends on having a persuasive legal and factual theory of the case that accommodates the facts beyond change, and that logically and emotionally persuades the jury that the just verdict is an acquittal. Within that theory of the case is our theory of each witness that the prosecutor will call. Having walked in each witness's shoes in both the physical and psychological sense, we bring an informed and nuanced view of how to handle the witness on cross. We know whether the cross should be constructive, and if so, there should be little or no impeachment. If the cross should be destructive, we know which battles we have to win and that there are some battles we need not fight with the witness. We also know what tone to take with the witness because not all destructive cross examinations need to be delivered in a hostile manner.

What follows is a synopsis of lessons I learned as a new public defender about impeachment by inconsistent statement, omission, or conduct. I was and still am blessed to learn from excellent lawyers in the Public Defender Division of the Committee for Public Counsel Services in Massachusetts and at National Criminal Defense College. The technique they taught me is known by a variety of acronyms in the criminal defense trial advocacy world. Some call it CAC (commit, accredit, confront). I learned it as the RAC method (recommit, accredit, confront). Whatever the acronym, the heart of the technique is the same. Great trial lawyers use it because it works and the good news is that anyone can learn it and use it well at trial.¹

II. FIRST PRINCIPLES

We control witnesses on cross by using a combination of technique and strategy. We use precisely worded short leading statements containing only one new fact per statement to give the witness as little room to run away from us as possible. We avoid statements that include characterizations and conclusions because they involve subjective judgments with which the witness disagree and get away with it.² One new fact for each statement allows us to both paint and control the factual image the jury sees so that we know that they all see the same image at the same time. Think of this as “baby stepping”³. Taking daddy long legged sized steps through the cross interferes with painting the pictures we want the jurors to see in their heads and gives the witness more chances to be difficult.

We construct and organize the cross into topics or chapters of information and this allows us to control what the jury hears and in what order they hear it. We plan, structure and execute the cross in a particular sequence of topics to tell the defense story through the witness in the order that will be best understood by the jury. Greater safety and sabotage are possible through cross that is carefully structured with those goals in mind. Some witnesses are more dangerous to our client’s case than others. Keep in mind that the more the witness is likely to dislike the topic, the greater the resistance you are likely to encounter from the witness. The witness’s escape routes can be shut down if anticipated and methodically closed before you get to the topics the witness wants to fight about. Ideally, it is best to close off the escape routes before you get to the material that may cause the witness to feel a need to run for it. Finally, you can structure your cross to take advantage of the power of primacy

¹ Posner & Dodd’s “Cross-Examination: Science and Techniques” Second Edition (LexisNexis, 2004) is a wonderful trial advocacy book and it is a great resource for attorneys at every level of experience. I relied on it for this summary.

² The exception to this rule of thumb is where the witness herself has used that characterization or conclusion in describing the relevant facts. Otherwise, making statements that ask the witness to agree with a subjective characterization is an invitation to the witness to kick you hard in the shin.

³ Stephanie Page and John Prescott taught me to think of cross in these terms.

and recency (jurors tend to accept the information they hear first and evaluate everything they hear afterward against that first perception. Jurors tend to remember best what they heard last.) All of these principles apply to the discreet skill of impeachment by inconsistent statement or omission.

FUMBLE!!!!

The prosecutor's best moment in the trial is right after the last lines of her opening statement and before the first witness takes the stand. After that, the prosecutor will lose exclusive control over the case that the jury hears because she has to rely on live witnesses to convey the facts of the case. The human dynamic comes into play. Even truthful witnesses make mistakes or exaggerate and lying witnesses continue to work on the lie. To borrow a football metaphor, these are the moments when the prosecution fumbles the ball. We need to be ready to recover the fumbled ball and run it back for as much yardage as possible.

In essence, effective impeachment comes down to making theory centered decisions about whether and how to impeach; using "bullet proof" technique; and performing the impeachment so that it will have maximum impact on the minds and hearts of the jury. In the end, it is our job to be sure that the jurors recognize that the witness is saying something different from what was said at another time, understand that it matters, and remember it during deliberations.

Exhaustive preparation wins the day. Deep familiarity with each and every one of the witness's statements and pretrial testimony as well as the other witnesses' statements and testimony puts you in the position to recognize that the witness has changed his version. But recognition of difference is not enough. You also have to be able to **find** the original description of the fact in the discovery, transcripts, and defense investigation materials. And you have to be able to find it quickly. Indexing each witness's versions of each fact they have talked about before trial is crucial to your ability to find the source of the inconsistency quickly and calmly at trial. When you impeach the witness, the preparation pays huge dividends. First, having just fought and lost a battle, the witness will be less likely to "mess" with you through the rest of the cross. Second, you convey to the jury (and the witness) tremendous control, reliability and thoroughness. The witness's credibility dips and at the same your credibility goes up. Third, the jury gets to watch the witness's demeanor before, during and after the impeachment. This becomes powerful material for your closing argument. Lastly, the jury sees and hears information they need to acquit your client.

Deciding whether, when and how to impeach a witness takes good judgment and common sense. Let's face it, as cross examiners we know that it can be invigorating to prove that in the past the witness said something different from what they are now saying in court. This is especially true when we dislike the

particular witness. However, we **do not** impeach simply because we can. Not every prior inconsistent statement is worth revealing to the jury. You must decide whether you should impeach the witness and you cannot decide that issue in a vacuum. Both your theory of the defense and your theory of this witness within that theory of the defense guide your thought process. We only impeach to further our theory of the case or to undermine the government's theory. Before you decide whether it makes tactical sense to impeach the witness, you should subject the potential impeachment material to a three-part litmus test.

1. Which version works best in your theory of the defense?

First, decide whether the new trial testimony or the prior statement is more helpful to your client's case. In other words, which version of the fact makes it easier to persuade the jury that your theory of the witness and of the case is right? Does the prior statement or the present testimony help you more with that goal?

You should only impeach when the prior statement is at least as helpful to your theory as the current version. You recover the fumbled football by impeaching to reveal the inconsistency and developing demeanor evidence through challenging the witness's current version of the fact.

Obviously, when the present testimony is better for your client's case than the witness's previous statements about the fact you should not impeach the witness. In this situation, you recover the fumbled football and run it back by deciding to accept today's version without challenging it. The case has improved from the paper version of the facts. What the jurors heard at the trial is actually better for your case. There are times when adrenaline may cloud your thought process if you do not explicitly ask yourself this question. So develop the discipline to ask it, especially when in the heat of the moment and the change in version is a surprise. That way you will be sure that your cross always is consistent with your theory.

Here's an example: your client is a victim of mistaken identification. On the night of the robbery, the witness described the perpetrator as being 5' 5" tall. Your client is 5'5" tall. At trial the witness testifies that the assailant was 6'1" tall. While the testimony is inconsistent, deciding to impeach the witness to reveal an earlier description that matches your client would be counterproductive at best. On the other hand, if the situation is reversed, (that is, the original description was 6'1" and the trial version is 5'5") it would be essential to impeach the witness with the prior description. This may seem obvious, but sometimes when you hear the witness say something different your first instinct will be to

impeach. Adrenaline is a powerful substance in the trial lawyer's veins, and it can cause you to act when the best course is to do nothing.

There are times when it is helpful to impeach because both the current and the past statements help advance your theory of the case. Sometimes a witness changes his version every time he opens his mouth and with this witness, you may not care about which of his statements (today's or yesterday's) is the more reliable or helpful. Your purpose in impeaching this witness is not merely to reveal the particular inconsistent statements, but to reveal that this witness can't be relied upon or believed about anything either because he is lying or because he is unreliable for other reasons. Of course, the impeachment will be even more powerful when you can prove through another witness or extrinsic evidence that both statements are wrong.

2. Are the statements inconsistent enough to matter?

If you decide to impeach because it helps advance your theory of defense, you must then decide whether it is **fair** to impeach the witness. In the case of a prior inconsistent statement, determine if the prior statement is sufficiently different from the current version of the statement to justify exposing it to the jury. (Legally speaking, the prior statement must be different either because of what the witness explicitly said or because of something the witness did not say when given the chance. This is not to say that the two statements must be polar opposites. They need only tend in a different direction in order to be admissible. Where the impeachment is by omission, the point is that if today's testimony were true, the witness would naturally have said it when she spoke about the subject earlier).

Asking ourselves whether it is fair to impeach the witness is not merely a legal issue. It is a factual issue. Our concern is about what the jurors will think and feel if we impeach the witness on this fact with this statement. If the versions are not different enough to change the meaning of what the witness intended to convey about a given fact, the jurors may see us as bullies and sympathize with the witness. Never forget that jurors generally have more empathy for the witness than with us for lots of reasons. Many jurors think we have more power in the courtroom than the witness who, after all, is only allowed to speak when asked questions by us, the perceived tricksters. But worst of all, impeaching when it is not fair to do so can be devastating because the jurors may lose whatever trust they had in us, not just because they see us as slick, but because we have shown bad judgment and no common sense about what is important in the case.

Here is an example to illustrate this point. If the witness testifies at trial that the white assailant had a "pale" complexion, it may not be "fair" to impeach the witness with a prior statement describing the complexion as "light." The jurors

may see the “fair” versus “light” impeachment as an unfair “lawyer trick” designed to needlessly embarrass the witness. Worse yet, the jurors may conclude either you have no facts to argue in support of your theory, or you are an idiot if you think that these versions are different enough to matter.

3. Can you prove the inconsistency or omission?

So, you have decided to impeach based on the answers to the first two questions of the litmus test. In other words, the earlier statement is more helpful than today’s version and it is different enough to matter to the jury. Now you have to ask whether you can prove the witness made the different statement. What is the source of the statement? Is it prior testimony? Is it something the witness wrote in a statement, letter, or note? Is it something the witness said to another person and if so, is that person available to testify about it? In these scenarios proving the inconsistent statement should be straightforward. You will either call the witness who heard the statement or read from the prior testimony.

Beware: If the inconsistent statement you want to use is something that the witness said to you, you cannot impeach unless there was a witness to that conversation (sometimes called a “prover”). If not, you cannot prove that the witness made the inconsistent statement. You may not be a witness in the case.⁴ Ethically, you cannot even ask the witness about the conversation with you because it is improper to put your own credibility in issue. There is no way to complete the impeachment because you do not have a person who can testify that the witness said the inconsistent thing. Because you cannot prove the earlier statement, you cannot impeach.

This is another great reason to index your cross examination to the source of the fact that you intend to elicit. It allows you to be sure that you can prove the inconsistency if the witness disagrees with you. When the source of the fact is indexed and set forth in the relevant part of your cross, you will be able to find it immediately and impeach the witness with confidence.

III. PRACTICE TIPS

A. Where should you place the impeachment in your cross of the witness?

We plan the structure, that is, the order of the topics we will cover in the cross to achieve our goals of storytelling, safety, and sabotage. When the witness says something different on direct examination, it can be tempting to leap out of your

⁴ Always bring a “prover” with you when you talk to prosecution witnesses about the case. If for some reason you don’t have a prover with you during the conversation, you can always send an investigator or other person to interview the witness after the fact. If the witness refuses to speak to the investigator or denies the substance of what he said to you, you may need to withdraw as counsel so that you are available as an impeachment witness at trial.

chair and begin the cross by impeaching the witness. That is seldom a good idea. Remember, you structured the cross-examination to clearly and safely tell a coherent, persuasive story supporting innocence through the adverse witness. Don't change your game plan for the order of your cross topics just because the witness says something new and different on direct examination. Instead, as you listen to the witness say something that you will impeach on cross, place a note next to the relevant chapter and write down the witness's exact words. (Because every fact you intend to elicit on cross is you indexed and noted in your written cross examination, you already have and can find the source of what is now the inconsistent statement). When the witness says something that passes the litmus test for impeachment, plan to do the impeachment where it will do the most good within the structure you already designed. You give up control if you allow yourself to be pulled out of your plans by the inconsistent witness. Stick to your plan and your guns to win the battles and ultimately, the war.

B. Dealing with multiple inconsistencies – how much is enough and which one do you use first?

When a witness testifies inconsistently about many things, it may be more effective to limit your impeachment to the few inconsistencies that are the most significant. However, if your theory of the case requires you to do a destructive cross-examination of a witness whose reliability or credibility is the issue in the case, it may be effective and even necessary to impeach on every inconsistency that passes the litmus test.

If you are going to impeach with a number of prior inconsistent statements, begin with the strongest inconsistency. This is not necessarily the most important inconsistency. It is best to begin with the clearest and cleanest inconsistency because this will be the one over which you have the greatest degree of control. The inconsistency that gives you the greatest amount of control is one that also has a high degree of safety because it is clearly different and easily proven with the witness on the stand. A witness who has been effectively and fairly impeached may feel embarrassed and perhaps chastised even when the tone used to impeach is not hostile. Having just fought and lost the first impeachment battle, the witness will be less likely to fight with you throughout the rest of the cross. Consequently, your control over the remaining impeachment will be easier to maintain. Most witnesses quickly realize that the less they fight over the impeachment the sooner the painful moment will end.

You will be using the RAC (recommit, accredit, confront) method to impeach, which is described and explained in further detail in the following sections. After you impeach the witness once, and are about to impeach again using the same source for the inconsistent statement, you ought to begin to cut down the amount of time you spend on the accreditation phase of the impeachment. This

will help you keep the pace of the cross moving forward. It is enough to use fewer questions to remind the jury and witness about the circumstances under which the earlier statement was made.

C. Forget Remember!

Many lawyers make the mistake of asking the witness if they remember saying something in particular on direct examination or when the lawyer confronts the witness with the inconsistent statement. ("do you remember saying X on direct examination?" or, "Do you remember writing Y in your police report?") You are impeaching the witness, not refreshing recollection. Refreshing recollection is usually done when we are questioning our witnesses. When we are confronting a witness on cross, we almost always want to use the technique of impeachment which uses only leading questions to control and witness and discipline him when he disagrees with our statements on cross. Asking the "do you remember" question gives the witness an excuse and allows the witness to disrupt our flow and rhythm by saying she does not remember.

IV. TECHNIQUE: There are Three Steps: Recommit, Accredit, and Confront

There are three steps to impeach the witness effectively by prior inconsistent statement or omission.⁵ These steps should be followed regardless of whether you are impeaching the witness's present testimony by using a prior statement: a) made under oath; b) "recorded" in a report or other document; c) made orally to another person and not "recorded"; or d) that was omitted from previous testimony, reports or other statements. Note that these same three steps are used in a "destructive" cross-examination (when you want the jury to completely reject the witness's testimony in every respect); in a constructive cross (when you want to bring out helpful facts from a prosecution witness whom you want the jury to believe); and, in a cross that is a mixture of both approaches.

The witness has just said something on direct examination that is different from what he or she said about the same subject matter in the past. You have decided that it will help your theory of the case to impeach the witness with the prior statement, that is different enough to matter, and that you can prove that the witness made the inconsistent statement. Here are the three steps to happier impeachment.

Step One

RECOMMIT the Witness and **ALERT** the Jury that you have a problem
with the witness's current version

⁵ Some people reference to these steps as "Commit, Accredit and Confront".

Begin by recommitting the witness to the present testimony that you intend to impeach. You may want to signal the jury that something different is coming by starting the question with "Today, when asked about x, you said y." Try to use the exact words of the witness when recommitting him or her to the present testimony. You should recommit the witness with just one or two questions.

Recommit, as Laurie Shanks is fond of saying, is different from redirect. DO NOT ask the witness if he or she "remembers" saying "when asked about x, you said y." It is confusing, is not a leading question, and therefore does not allow you to control the witness's answer. You are impeaching the witness, not refreshing recollection.

Be deliberate in choosing your tone of voice and demeanor so that you alert the jury to the fact that you have an issue with the witness's present testimony. Many people have analogized the trial lawyer's good use of tone, pace and movement to the theme music in the movie that tells the jury/audience how to feel about what is about to happen in the scene. That is Laurie Shanks calls this first step in the impeachment "Alert". Be sure to use silence, movement and or tone to alert the jury that something important is about to happen. Using a confused or amazed or skeptical tone of voice together with a consonant facial expression goes a long way to alert the jury. The tone you take depends among other things on your theory of this witness within your theory of the defense and the witness's demeanor in the moment. The point to remember is that you have choices not just about what to say, but also how you say it. Variety is crucial – it makes it easier for your jury emotionally and mentally to stay with you in the courtroom.

Step 2

ACCREDIT and close off the witness excuses for the inconsistency or omission.

There are two good reasons for accrediting the circumstances under which the earlier statement was made. First: successful control cross-examination comes from closing off the escape routes and the excuses a witness may use to attempt to diffuse the power of your point on cross. To the degree that that principle is true about cross-examination in general, it is exponentially true about impeachment. The best impeachment anticipates, preempts and nullifies all excuses and

explanations a witness might offer for the different versions they gave about the fact.

The second reason we accredit is to educate the jury about why the earlier statement was important when it was made. You want the jury to know that the earlier statement was given under circumstances when the witness would have been expected to tell the truth. You want the jury to believe that the witness understood the importance of the earlier statement when it was made, and that the prior statement was not merely an off-hand comment. Show the jury that the earlier statement is more accurate and reliable - that it should therefore be credited instead of the present trial testimony.

For instance, a police officer's number one excuse for testifying to something new at trial that was not in the police report is that the report is "just a summary" of the facts. Accreditation is the phase in impeachment when you teach the jury about the purpose and importance of police reports as official documents in which the officer records and preserves the important information gathered in the case. It simultaneously and systematically closes off the officer's avenues of escape. Accrediting the report allows you to argue in closing that if the new fact really existed, it would have been in the officer's report. The reason the new fact is not in the report is that the fact is not true and did not happen.

You must accredit before exposing the inconsistent statement.

Therefore you will accredit the circumstances of the previous statement before you reveal the inconsistency. This is how you close off the escape routes before witness gets to them. If you confront the witness with the inconsistent statement before you have adequately accredited that statement, you invite the witness to dilute the power of the impeachment. The witness may feel freer to volunteer explanations or excuses that may sound plausible to the jury because you did not take the time to anticipatorily take the excuse away. Accrediting the statement before revealing the inconsistency itself will either dissuade the witness from trying to make an excuse or if she does make one it will look lame.

Accredit the earlier statement even when you do not want to suggest that the earlier statement is true. It is still helpful to accredit in situations where you want to show that the witness is unreliable, inaccurate, and/or unbelievable as a "reporter" of the events. To accredit the statement, you must establish circumstances that demonstrate that the witness meant what was said on the earlier occasion. Therefore, you should bring out,

through leading questions, the circumstances that reveal the earlier statement's importance such as:

- the earlier statement was made closer in time to the incident;
- the details were fresh in the witness's mind
- the witness was able to focus and think about what he said
- it was made to an official such as a police officer
- it was made under oath at a previous hearing;
- the witness was cooperative and it was in the witness's interest to tell the truth at that time; and
- the witness knew that what he or she was saying was important at the time the statement was made.

At times you will need to accredit a witness's training, professionalism and attention to detail. At times you will accredit the person to whom the witness made the earlier statement as someone who is responsible, concerned and reliable. Sometimes you will accredit the "place" where the statement was made (e.g. the police report, a handwritten statement, a police station, a courtroom under oath, the prosecutor's office, the witness's home in a meeting with the defense investigator).

Try to create a visual image in the jurors' minds about what it looked like at the place and time when the witness made the statement. In order to do that for the jury, you will find it helpful to imagine and picture the physical circumstances of the prior statement and then walk through the process step by step in your mind. This will help you visualize and baby step the accreditation picture in your mind whether you are dealing with a transcript of previous testimony, police report, 911 call, witness statement or conversation. Then when you cross-examine the witness you can do it from the picture in your head and there will be no need to memorize or stumble through the details. The jurors will see it as you describe it. This is the best way to persuade.

It is always useful to try to think of every excuse a particular witness might try to offer to explain away an inconsistent statement. Then construct the accreditation so that you knock down those potential excuses so the witness can't persuasively use them when you confront her with the inconsistent statement.

Step 3

CONFRONT and Reveal the inconsistent statement to the jury

Now you get to polish the witness off. Confront the witness with the prior inconsistent statement, using the **witness's exact words**. For example: "When you spoke to Officer Flynn just minutes after the incident happened you told him that Z happened." If you use a transcript or other document for the impeachment, hold it in your hand and read the words exactly as they appear on the page. This will enhance your credibility with the jury and visually reinforce the fact that something different was said before. Again, DO NOT ask the witness if he or she "remembers" saying the earlier statement. It is confusing, not a leading question, and therefore does not allow you to control the witness's answer. You are impeaching the witness, not refreshing recollection.

When you have finished exposing the earlier statement to the jury, STOP!!! Many lawyers make the mistake of trying to convince the witness that she said something different for the reasons that the lawyer wants the jury to believe. The witness will never agree with these things. Trying to get the witness to agree may cause the whole thing to blow up in your face. The point of the confrontation is not to get the witness to agree with your interpretation of what the inconsistent statement means. It is to prove that the witness said something different. We use closing argument to persuade the jury that the story changed in an important way for reasons that are consistent with the theory of the defense.

Be aware that your tone and demeanor while confronting the witness is likely to be different depending on whether your theory is that the witness is mistaken or that the witness is lying or cheating at trial. Make your tone consistent with the theory.

Practice Tip for impeaching the experienced witness

When cross-examining an experienced witness such as an expert or a seasoned police officer, it may be preferable to use the A R C approach to impeaching the witness. In this scenario, the accreditation phase is done first to lock the witness in to the circumstances that indicate the earlier statement is reliable. Then you recommit the witness to the present testimony before you reveal the inconsistent statement in the confrontation phase. For example, you might want to accredit the police report, then recommit the witness to the present testimony, and finish by confronting the officer with the inconsistency in the report. The reason for accrediting first is that the officer

may not guess where you are going and it makes it harder to try to explain the inconsistency away. Whether you choose to use RAC or ARC, it is essential that the confrontation is the last step. It has to occur after the accreditation and recommit you confront the witness as the final step in the impeachment.

V. Examples

Facts: your client is charged with robbery; your defense at trial is that he was mistakenly identified and is innocent. Ms. Smith, the complainant, described the assailant as being 5'5" tall to Officer Wesson who took her description of the incident and the assailant within 10 minutes of the incident. You feel good because your client is six feet tall. She identified your client three hours later as he sat in the back of a marked police car; he was never shown to her standing up. She testified at a motion to suppress and described the assailant as 5'5" tall (your client was out of view at the time). Ms. Smith's gold chain was stolen in the incident and was never recovered. Officer Wesson made the arrest and wrote a report in which no statements of the defendant are noted. The prosecutor has told you that none exist.

At trial Ms. Smith, who has seen your client standing and talking to you in the hall the morning of trial, now says on direct that the assailant was six feet tall. Officer Wesson claims, for the first time, that while in the cruiser on the way to the station, he asked your client where the chain was located. Your client supposedly replied that he sold it for crack on Main Street.

A. IMPEACHMENT OF MS. SMITH USING THE POLICE REPORT (to be completed by calling or crossing the officer to show that the Ms Smith said something different when they spoke.)

[RECOMMIT]

Q. Ms. Smith, I want to talk with you about what the robber looked like. ***Today*** you've told us that he was six feet tall?

A. Yes he was

Q. You are sure about that?

A. Yes

[ACCREDIT] *pause and move to a different place in the courtroom. Her most likely excuses for the change in the height of the robber are: she was really upset and in shock when she spoke to the officer; she never had much of a chance to see how tall the robber was; she is bad at judging height; or the officer got it wrong*

- Q. after the man ran away you called the police
- Q. as soon as possible?
- Q. Just minutes later?
- Q. You spoke to Officer Wesson?
- Q. He was wearing a police uniform?
- Q. You knew he was there to help you?
- Q. He asked you if you were OK?
- Q. he offered to call an ambulance?
- Q. You told him you did not need medical attention?
- Q. He asked you to tell him what happened?
- Q. You told him about what had just happened to you?
- Q. You told him that you had been robbed?
- Q. By a stranger?
- Q The stanger demanded your chain?
- Q He was standing in front of you?
- Q Then the stranger grabbed your chain?
- Q and ripped it off of your neck?
- Q You told officer Wesson about that?
- Q. The details were fresh in your mind?
- Q. You wanted to help the police to catch the person who did this to you?
- Q. You hoped that you would get your chain back?
- Q. Officer Wesson asked you questions?
- Q. You answered his questions?
- Q. He asked you what the assailant looked like?
- Q. You knew it was important to be as accurate as possible?
- Q. You knew it was important to be as detailed as possible?
- Q Important to be as complete as possible?
- Q. You told him what the man looked like?
- Q. As you spoke to him, he was using his radio.
- Q. You could hear him to talking to other police officers in the area?
- Q You could hear him repeating the details of your description of the robber on the radio?
- Q.You thought they were looking for the man
- Q. trying to catch the person who took your chain?
- Q Officer Wesson was also taking notes while you spoke
- Q. You told him that the man was white? (*pick up the police report and hold it in your hand as you go through other details of the description*)

[CONFRONT]

- Q. You are 5' 7" tall?
- Q Now let's talk about what you told Officer Wesson when he asked you how tall the robber was?
- Q he asked if the robber was taller or shorter than you?

Q. On 1/1/97, minutes after the incident when the details were fresh in your mind, you told Officer Wesson robber was five feet five inches tall?

[Ms. Smith may agree that this is what she told Wesson. If so, you are finished. However, she may deny it. If she denies, it can be effective to "lock her in" by asking/stating to her "You are sure you didn't say the man was 5'5" ... There is no doubt in your mind about that". Whether or not Ms. Smith agrees that this is what she told Wesson, you will then, when Wesson testifies, elicit from him that she told him 5'5" and that he wrote it in his report].

In this scenario, you cannot use the report itself to impeach her because she did not write it or sign it. To finish the impeachment, you will need to call the Officer Wesson. However, you can hold the report in your hand while impeaching Mrs. Smith, not so that you can flash it to the jury, but to communicate that you have a source for saying that she told Wesson 5'5".

Practice tip: Be sure to summons the report writer to trial. DO NOT rely on the report writer's name on the witness list. Do not rely on the prosecutor's

promise to summons the police officer who wrote the report, because the judge may not be sympathetic to your client's need to call the witness for impeachment if the witness fails to show for trial and you did not summons the witness yourself.

B. IMPEACHMENT OF MS. SMITH USING PRIOR TESTIMONY

[RECOMMIT]

Q. (Same as in Example I, above)

[ACCREDIT]

- Q. Ms. Smith, this is not the first time you have testified about the robbery?
Q. You testified about the incident at a preliminary hearing in March of this year?
Q. It was March 15th?
Q. Just three months after the robbery?
Q. At that time, you knew you would be asked about what had happened to you when you were robbed?
Q. you knew you would be testifying against the man you identified ?
Q. You testified in a courtroom
Q. It was in this building
Q. similar to this room?
Q. you took an oath to tell the truth?

- Q Of course you did tell the truth?
Q. A judge was there?
Q. The prosecutor was there?
Q. She asked you questions about the robbery?
Q. I was there
Q and I asked you questions?
Q. You answered our questions?
Q. You knew that it was important to be accurate?
Q. to give complete answers
Q. You were asked about what the robber looked like.
Q You answered those questions?

[To the Judge: May I approach the witness? (Tell the prosecutor the page number where the inconsistent statement is located – e.g. “transcript of Mrs Smith’s testimony on March 15th, page 10, lines 12 - 14.”

Show the witness her the transcript, The cover page, and her testimony]

- Q. I am showing you a transcript...This is the transcript of the testimony you gave under oath at the preliminary hearing on X date? Please read along with me and let me know if I read it wrong . . .

(**Tip:** combine the specific question and answer into one question because the witness is unlikely to remember each and every specific question she was asked. This will help you keep a better flow, and will keep the jury’s attention on the point, which is what she said in answer to the question.)

[CONFRONT]

Q. You were asked the following question about the robber’s height and gave the following answer: ‘How tall was the robber? Answer. He was 5 feet 5 inches tall’

Q I read that correctly?

Q You testified on March 15th that the robber was 5’ 5” tall.

[If Ms. Smith agrees, you are all set; but you might want to follow it up by stating/asking: "so when you testified in March you said the man was 5'5" tall?"

If she claims she didn't say it ask the court for permission to read the prior inconsistent question and answer to the jury. Then you turn to the jury, inform them that you are reading from the official transcript of the hearing which occurred on x date, in x court, at which time Ms. Smith testified as a witness. She was asked "Question: How tall was the robber?" She replied "Answer: He was 5'5" tall".

Practice tip: always make sure that the prosecution will stipulate to the accuracy of the transcript if it was not prepared by an official court reporter; otherwise you may have to call the stenographer to prove that the transcript is what it purports to be and is accurate.

***Beware:** often judges have individual preferences about how impeachment and refreshing recollection should be done in "their" courtroom. Sometimes the method the judge wants used is technically incorrect. It is important to be flexible and persistent so that you can accommodate the judge's idiosyncrasies while accomplishing your goal of getting important information to the jury and successfully pressing your client's confrontation and due process rights.

C. IMPEACHMENT BY OMISSION OF OFFICER WESSON USING HIS POLICE REPORT

Note: When you are impeaching a police officer with his or her report (whether by omission or by inconsistency), it is important to keep your eye on the ball - the real information was recorded when the report was written. Do not create the impression that the officer just made a mistake in filling out the report. You want to be able to argue that the report is accurate. In our example below, we want to argue that the client never said anything about selling the chain for crack because if he had said it, it would have been in the report. That it isn't in the report shows that the client never said it – it just did not happen. The following example of impeachment of a police officer by omission uses the ARC approach.

[**ACCREDIT**]

- Q. You have been a police officer for five years?
- Q. You have investigated many crimes in those five years
- Q. Responded to many calls
- Q. Interviewed many witnesses
- Q. You have gained on the job experience in the past 5 years
- Q. You consider yourself to be a professional

- Q. Before you joined the police force, you attended the police academy
- Q. That is where you learned how to be police officer
- Q. how to investigate crimes
- Q. you learned about the importance of evidence

- Q about its value in an investigation
- Q you were trained to look for evidence
- Q collect evidence
- Q preserve evidence
- Q so that it can be used in the investigation
- Q so that it can be used in court

- Q. You were trained about how to write police reports
- Q that's where you collect and document the important facts in your investigation
- Q that's where you preserve your observations
- Q and the important information you learn
- Q. It is important to make the report Accurate?
- Q. And truthful?
- Q. To include the important details of the investigation?
- Q of course you follow that training on the job

- Q the police report is an official document?
- Q A copy goes to headquarters
- Q. Other people may rely on your report?
- Q. Detectives may need use your report for further investigation?
- Q. the prosecutor gets a copy?
- Q you know the prosecutor may rely on your report
- Q. The defense will get a copy of your report?
- Q. If anything were to happen to you so that you could not testify at trial, you know your report would be used by other officers to prepare the case?
- Q you know the judge may see your report

- Q. Your department has rules and procedures?
- Q they apply to every officer?
- Q. You are required to know them?
- Q you are required to maintain a copy?
- Q to keep your copy up to date at all times?
- Q Regulation # ___ applies to how you write police reports
- Q. Regulation # ___ requires that reports be truthful?
- Q. Regulation # ___ requires that reports be accurate?
- Q. You follow your department's rules?
- Q. It is part of your job?
- Q. You are required to write the report before the end of your shift?
- Q. On the same day when the incident happened?
- Q. When the details of the events are fresh in your mind?
- Q. You are required to sign it?
- Q. And date it?

Q. And write down the time on the report when you complete it?
Q. If you run out of space on the first page, you can continue on another page that is called a continuation sheet?
Q. You are required to have your shift supervisor sign it?
Q. You also have supplemental reports?
Q. If you learn information after you write the first report you use a supplemental report to document it?
Q. You have been on the force for 5 years?
Q. you have written many police reports
Q. made many arrests
Q. Sometimes months may pass before you are called to testify?
Q. You sometimes use your report to refresh your memory about the details of the case?

Q. You learned about proper police procedure at the academy?
Q. You were trained in how to investigate cases?
Q. Trained about how to properly interview witnesses?
Q. About how to look for evidence?
Q. About the importance of finding links between a crime and a person?
Q. Because often you have not seen the incident with your own eyes?
Q. So you look for clues that can tell you what happened?
Q. And who did it?
Q. you look for clues to provide a link between a person and a place

Q. physical evidence is a link?
Q. like a gun
Q. you collect so it
Q. you preserve it
Q. so that it can be tested
Q. so that it can used in court
Q. so the jurors can see it for themselves
Q. a link may be forensic trace evidence
Q. like fingerprints
Q. hair
Q. fibers
Q. it is important to collect that evidence
Q. to preserve it
Q. so that it can be used in court

Q. you are a trained witness interviewer
Q. the words of witnesses can be clues
Q. that's why you interview witnesses
Q. your write reports about your interviews
Q. to preserve the important information you learn?

Q sometimes the words of a suspect are evidence
Q if a suspect says he was with his girlfriend and you find out that is a lie, that would be a clue
Q It would be evidence that he did not tell you the truth
Q That evidence could show that he was trying to cover up his involvement in the crime
Q it would be important to preserve the evidence of the lie
Q so that it could be used in court
Q sometimes a suspect admits that he committed the crime
Q. You would agree that a confession from a suspect that he committed the crime is important evidence?

Q. In this case you were the officer who interviewed Ms. Smith?
Q. That was back on January 1st of this year?
Q. You wrote down what she told you in your report?
Q. You wrote down what she said had happened to her?
Q. You wrote down the description she gave you of the perpetrator in your report?
Q. You were also the officer who made the arrest?
Q. You included the details of the arrest and the identification in your report?
Q. You wrote your report about the arrest on the same day that all of this occurred?

[To the Judge: May I approach the witness?

Show her the police report,]

Q. I am showing you a document...This is the official police report you wrote in this case?

Q. This is your signature?
Q. This is the date {X} when you wrote the report?
Q. The report you wrote that night before the end of the shift?
Q. When the details were fresh in your mind?
Q. it is two pages long?
Q. There is no supplemental report?
Q. This is the **only** report you wrote in this case?
Q. That was six months ago?
Q. Since then you have worked full time?
Q. Made arrests?
Q. Written reports?
Q. Investigated crimes?
Q. Responded to calls
Q. Responded to car accidents
Q. made court appearances to testify
Q. and performed all the other duties you perform on a daily basis as a police officer

Now let's talk about what you wrote in your report back when the events were fresh in your mind...

Q. You wrote in your report that [client] is 6' tall?

Q. Because he is six feet tall?

Q. You wrote in your report that the arrest happened on Main Street?

Q. Because that is where you arrested [client]

Q. You wrote in your report the precise time of the arrest?

Q. You wrote that it was 11:37 pm because that was the time of arrest?

Q. You wrote in your report . . . *[ask about all the unimportant things that are in this officer's report. There is a tremendous amount of seemingly unimportant information that they have to put in the report because it is a standard form that they use in most kinds of incidents. When you bring out the fact that they wrote that the weather was cloudy, for instance, in a situation where the incident happened inside, it magnifies the importance of documenting relevant and important facts. The absence of facts that would be important if true creates a persuasive argument that the fact did not exist - it didn't happen. **Keep in mind that we do not want it to appear that the officer did a bad job on the report, just the opposite. It is a complete report that accurately reflects what the officer knew about the incident when she wrote the report.***

Q. You searched Mr. Client when you stopped him that night?

Q. you were looking for evidence?

Q. He did not have Mrs Smith's chain?

Q. you wrote that in your report"

[RECOMMIT]

Q. Officer Wesson, you just told this jury that [client] told you that he sold Ms. Smith's chain for crack, is that right?

Q. Your story today is that he basically admitted to you that he committed this crime?

[CONFRONT]

Q. Officer Wesson - Nowhere in the truthful and accurate police report you wrote within an hour of the arrest does it say anything about Mr. Client supposedly telling you that ever had Mrs Smith's chain

Q. Nowhere in your report did you write that he claimed to have sold Ms. Smith's chain

Q. Or that he sold it for crack?

Q. In fact there is not one word in the report that you wrote that night - the only report you wrote in this case - about a supposed confession

EXPERIENCED CROSS EXAMINERS may choose to confront as follows ...

- Q. Officer, please look at your report. Would you please raise your hand when you get to the part where you wrote in the accurate and truthful report that Mr. Client supposedly confessed to you that he sold Ms. Smith's chain for crack?
- Q. Officer Wesson, It is not there.

Note: This example could have been done using the RAC sequence. Which ever order you choose for the impeachment, remember that **confrontation is always the last step** in the impeachment.

Conclusion

Use the RAC and your ability to control even the toughest witness will vastly improve. Remember that you have control over the tone, timing, and manner of the impeachment. When you follow these steps, you will recover the witness's fumble and put yourself in position to run the ball back for a touchdown. Don't forget to tell the story of the trial in closing argument. You get to talk about what the impeachment means and to invoke the jurors' sense memory when you remind them about the witness's demeanor when the impeachment happened. It is a powerful moment in the trial that may just win the day for your client.