

FROM MY SIDE OF THE BENCH

Impeaching With a Prior Deposition

BY HON. RANDY WILSON

STANDING BEFORE ME IS A LAWYER COMPLETELY AT SEA. He has no clue what he did wrong, and even less of an idea how to fix it. It started this way in cross examination:

Q: Was the light red?

A: No, it was green.

Q: Let me show you your deposition where you said that the light was red.

Other Attorney: Objection, improper impeachment and lack of foundation.

Court: Sustained.

You can tell what the poor attorney is thinking. Racing through his mind are such thoughts as: "What on earth was wrong with that? Where do I go from here? The judge is a moron."

Unfortunately, this is scenario is far more common than I would like to admit. Many lawyers appearing before me have no idea how to impeach a witness correctly. If the other side and the judge decide to become sticklers on the rules, the questioning attorney is left bewildered and looking foolish.

Rule 613(a) of the Texas Rules of Evidence clearly spells out the proper procedure for impeaching a witness with a prior statement, which includes a deposition:

Examining Witness Concerning Prior Inconsistent Statement. In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of, such statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny

such statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2).

See Downen v. Texas Gulf Shrimp Co., 846 S.W.2d 506, 512 (Tex. App.—Corpus Christi 1983, writ denied) ("In order to impeach a witness with a prior statement, a proper foundation must be established. A proper foundation includes establishing where, when, and to whom the statement was made. Additionally, the party seeking to impeach the witness must allow the witness to admit or deny making the prior statement").

Thus, you've got to ask the question, ask if the witness has testified differently, and then and only then can you rub the witness' nose in his prior deposition. To avoid a problem, the cross should go something like this:

Q: Was the light red?

A: No, it was green.

Q: Have you ever testified differently?

A: No.

Q: Do you recall giving a sworn deposition in my office in 2003 where you swore under oath that the light was red?

A: No, I do not.

Now the witness is set up. Now you can cram the deposition down him. But remember one caveat. If the witness admits that he previously testified differently, you can't read the prior

deposition. You can still ask him about it, but it clearly takes some of the sting out of the cross.

Three final suggestions. First, choose your fights carefully. Don't impeach with trivial inconsistencies. If the witness testifies at trial that he was going 35-40 miles per hour and said in his deposition that he was going 40 miles per hour, big deal. If you impeach on such trivialities, you will lose all credibility with the jury.

Second, don't even attempt to impeach with a prior deposition if the witness is testifying through an interpreter. It just doesn't work. I've seen many try and no one has succeeded. Simply ask permission from the judge to read the prior testimony.

Finally, if you do impeach a witness with a prior deposition, don't just read it to him. Show it to the jury! Put it on the document camera or transparency or whatever document display system you are using. When the jury sees the actual transcript, it takes on an air of authority and legal significance. The effectiveness of the impeachment, and the sting of the prior inconsistent statement, is exponentially magnified.

Judge Randy Wilson is judge of the 157th District Court in Harris County, Texas. Judge Wilson tried cases at Susman Godfrey for 27 years and taught young lawyers at that firm before joining the bench. He now offers his suggestions of how lawyers can improve now that he has moved to a different perspective. ★