BY ARLO WALSMAN

The Incomplete Impeachment Conundrum

A guide to impeaching witnesses with prior inconsistent statements.

NO LAWYER WANTS HIS CLIENT OR WITNESS IMPEACHED ON THE STAND.

One of the most well-known and effective ways of impeaching witnesses is to confront them with a prior statement that is inconsistent with their trial testimony. However, practitioners must be wary of engaging in incomplete impeachment, which occurs when: 1) a party asks a witness about an alleged prior inconsistent statement; 2) the witness denies making the statement; and 3) the party fails to prove up the impeachment by introducing evidence that the statement was in fact made.[1] This is because a long line of Illinois cases holds that it can be reversible error for a trial court to allow incomplete impeachment.[2]

However, the prospect of avoiding incomplete impeachment poses a conundrum for trial lawyers, because it is often unknown whether a witness will admit or deny making a prior inconsistent statement. Thus, it can be unclear exactly what evidence, if any, will be needed to prove the witness made the statement and complete the desired impeachment.

This article examines the existing law surrounding incomplete impeachment and provides practical tips for lawyers to consider when confronting witnesses with their prior inconsistent statements. Knowing this law will help attorneys prevent favorable judgments from being reversed on appeal.

Existing law regarding incomplete impeachment

Confronting a witness with a prior statement that is inconsistent with his trial testimony is an "appropriate method" of testing a witness's credibility.[3] To be used for impeachment, the prior statement must be materially inconsistent with the witness's trial testimony. To be considered materially inconsistent, the statement does not need to directly contradict the trial testimony, but it must have a reasonable tendency to discredit the testimony. Where the prior statement does not contradict or discredit the witness's in-court testimony, it is not error to bar the opposing party from attempting impeachment with the prior statement.

For example, in *Tenenbaum v. City of Chicago*, the Illinois Supreme Court held that where the plaintiff testified at trial that he had tripped over a ladder before falling and injuring himself, the trial court erred in barring

1. *Hackett v. Equipment Specialists, Inc.*, 201 Ill. App. 3d 186, 197 (1st Dist. 1990).
2. See, *e.g.*, *Morris v. Milby*, 301 Ill. App. 3d 224, 231 (4th Dist. 1998).
3. *Sommese v. Maling Brothers, Inc.*, 36 Ill. 2d 263, 268–69 (1966).

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ISBA RESOURCES >>

- Ed Finkel, *8 Things Every Trial Lawyer Should Know*, 109 Ill. B.J. 20 (Apr. 2021), law.isba.org/3f7ycr5.
- George Bellas & Svetlana Meltser, *"I Didn't Mean It!": Changing Deposition Testimony With Errata Sheets*, Trial Briefs (June 2019), law.isba.org/3iFgX13.
- Patrick M. Kinnally, *Witnesses, Statements, and Depositions: A Few New Thoughts*, Trial Briefs (Aug. 2016), law.isba.org/37nF11v.

the defendant from attempting to impeach the plaintiff with his deposition testimony that he felt no obstruction prior to his fall.[4] Further, in *Thompson v. Abbott Laboratories*, the Second District of the Illinois Appellate Court held that when the plaintiff testified at trial that the defendant fired her for refusing to settle a workers' compensation case, the trial court did not err in allowing the defendant to admit evidence of the plaintiff's prior complaints before the Equal Employment Opportunity Commission in which she complained of racial discrimination rather than anything relating to her workers' compensation case.[5]

Conversely, in *O'Brien v. Walker*, a case involving a car accident, the First District held that the trial court did not err in barring the plaintiff from cross-examining a witness with his prior deposition testimony.[6] Even though the witness's deposition testimony was inconsistent with his trial testimony regarding whether he crossed the street prior to witnessing the collision, the court held that this discrepancy was immaterial because in both statements he stated he was standing in front of his house when he witnessed the collision.

Before a statement may be admitted as a prior inconsistent statement, the moving party must lay a proper foundation. Prior to the Illinois Supreme Court's adoption of the Illinois Rules of Evidence, the Court had ruled that a proper foundation was laid by showing the witness his prior statement and allowing him to inspect it and read it.[7] Subsequent Illinois Appellate Court decisions also held that a proper foundation could be laid by "directing the witness's attention to the time, place and circumstances of the statement and its substance, or in the case of a written instrument, by identifying the signature."[8] The rationale behind this method of foundation was to alert the witness of the prior statement to avoid unfair surprise and to give the witness a chance to "deny, correct, or explain the statement."[9]

However, Illinois Rule of Evidence 613, originally adopted in 2011, now provides in part:

> a) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
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> b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is first afforded an opportunity to explain or deny the same and the opposing party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to statements of a party-opponent as defined in Rule 801(d)(2).[10]

After the adoption of Rule 613, Illinois courts have held that a proper foundation for impeaching a witness with a prior inconsistent statement is laid simply by giving the witness an opportunity to explain any inconsistency before introducing the statement into evidence.[11]

Whether to allow evidence to be admitted

4. *Tenenbaum v. City of Chicago*, 60 Ill. 2d 363, 375 (1975).
5. *Thompson v. Abbott Laboratories*, 193 Ill. App. 3d 188, 205 (2d Dist. 1990).
6. *O'Brien v. Walker*, 49 Ill. App. 3d 940, 951 (1st Dist. 1977).
7. *Illinois Central Railroad v. Wade*, 206 Ill. 523, 530 (1903).
8. *Iaccino v. Anderson*, 406 Ill. App. 3d 397, 402.
9. *Id.*
10. Ill. R. Evid. 613.
11. *People v. Evans*, 2016 IL App (3d) 140120, ¶ 32.

TAKEAWAYS >>

- When trial courts allow incomplete impeachment, reversable error may, but will not necessarily, follow.
- The impeachment of a witness with a prior inconsistent statement will be completed if the witness admits making the prior statement.
- When impeaching a witness with a prior inconsistent statement, be prepared to: 1) demonstrate the inconsistency and materiality of the statement; and 2) offer proof that the witness did in fact make the prior statement.

WHETHER TO ALLOW EVIDENCE TO BE ADMITTED FOR IMPEACHMENT IS WITHIN THE TRIAL COURT'S DISCRETION, AND A REVIEWING COURT WILL NOT DISTURB A TRIAL COURT'S DECISION ABSENT AN ABUSE OF THAT DISCRETION.

for impeachment is within the trial court's discretion, and a reviewing court will not disturb a trial court's decision absent an abuse of that discretion.

Examples of incomplete impeachment. A common example of incomplete impeachment has been when a defendant in a personal injury case questions a plaintiff about statements allegedly made to a medical provider, without later introducing the relevant medical records into evidence or calling the medical provider as a witness to prove that the plaintiff did in fact make such a statement.

In *Morris v. Milby*, the defendant questioned the plaintiff about whether, prior to the accident at issue in the case, she had complained of head and neck pain to her family physician.[12] The plaintiff responded that she had reported chest pain to her physician prior to the accident, but not head or neck pain. Due to this answer, the court held that the defendant was obligated to complete the impeachment by attempting to introduce the medical records into evidence. Similarly, in *Danzico v. Kelly*, the defendant asked the plaintiff three questions about whether he had told his chiropractor that he had back problems for 12 years prior to the accident, and each time the plaintiff answered that he had not made such a statement.[13] After the plaintiff's denials, the defendant did not call the chiropractor to testify. Because the defendant failed to prove up the impeachment, the court held that the trial court erred in failing to grant the plaintiff's motion to strike the testimony and instruct the jury to disregard it.

Another similar example came in *Green v. Cook County Hospital*, a medical malpractice case, where the plaintiff alleged that he suffered severe brain damage that impaired his coordination in all his extremities after doctors surgically removed a tumor in his pituitary gland.[14] At trial, the defendant questioned the plaintiff's expert about whether he would be surprised if the plaintiff could stand, cross his legs, and walk a short distance without crutches. Further, the defendant asked the expert if he would be surprised if someone said they saw the plaintiff pick up a bottle of baby oil and squirt it on hands and rub it on himself. However, the defendant never completed the impeachment by producing any evidence to corroborate or support the impeachment. Because of this incomplete impeachment, the court reversed the judgment for the defendant and remanded for a new trial.

In *Bradford v. City of Chicago*, the plaintiff, a city bus driver, brought suit alleging that he was injured when the right front wheel of a bus he was driving went into a pothole causing him to bounce off his seat and fall onto the floor of the bus.[15] At trial, the plaintiff testified that he laid on the floor of the bus for 15 minutes after the fall. On cross-examination, the defendant confronted the plaintiff with a "trip sheet" that the plaintiff had allegedly filled out indicating that his bus had arrived at each location along his route on schedule (and not 15 minutes late), but the plaintiff denied that the handwriting on the sheet was his and suggested that a coworker may have written it. After the plaintiff's denials, the defendant failed to call any witnesses to authenticate the document and complete the impeachment. Because of this, the court reversed the verdict for the defendant and remanded for a new trial.

Finally, the case of *Edward Don Co. v. Industrial Commission* provides a good example of a party being barred from attempting to impeach a witness with a prior inconsistent statement when the party was not prepared to complete the impeachment.[16] In that case, an injured worker filed an application for adjustment of a claim for workers' compensation benefits after being injured unloading boxes at a hospital. At the arbitration, his employer attempted to cross-examine him with statements that he allegedly made at a different arbitration before a paralegal in a civil suit against the hospital where he fell. However, the claimant's attorney objected to such questioning because there was no court reporter present at the prior arbitration, and the objection was sustained. On appeal, the court held that the arbitrator had not erred in sustaining the objection and barring the employer from asking questions about his alleged prior statements, because the employer was not prepared to complete the impeachment by calling the paralegal to testify.

Examples of properly completed impeachment. The impeachment of a witness with a prior inconsistent statement can be completed if the witness admits making the prior statement. For example, courts have held such impeachment to be proper when the prior inconsistent statements consisted of sworn interrogatory answers,[17] deposition testimony,[18] and Facebook posts when the witness admitted that the posts came from her account.[19] However, as discussed above, if a witness denies making an alleged prior inconsistent statement, then a party must be prepared to introduce evidence that the statement was in fact made.

Distinguishing between prejudicial and nonprejudicial errors. A trial court's error in allowing incomplete impeachment of a witness does not always constitute

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12. *Morris v. Milby*, 301 Ill. App. 3d 224, 231 (4th Dist. 1998).
13. *Danzico v. Kelly*, 112 Ill. App. 2d 14, 21 (1st Dist. 1969).
14. *Green v. Cook County Hospital*, 156 Ill. App. 3d 826, 827 (1st Dist. 1987).
15. *Bradford v. City of Chicago*, 132 Ill. App. 3d 317, 318 (1st Dist. 1985).
16. *Edward Don Co. v. Industrial Comm'n*, 344 Ill. App. 3d 643 (1st Dist. 2003).
17. *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n.*, 387 Ill. App. 3d 244, 260–61 (1st Dist. 2008).
18. *Sellers v. Hendrickson*, 46 Ill. App. 3d 549, 554–55 (3d Dist. 1977).
19. *In re Marriage of Miller*, 2015 IL App (2d) 140530, ¶ 37.

reversible error.[20] Generally, reversal is required only where there has been prejudice to a party or where the incomplete impeachment materially affected the outcome of the trial.[21] Errors in allowing incomplete impeachment have been held not to be prejudicial when the impeachment concerns an issue of minimal importance and not a "fundamental question" of the case,[22] or when a witness does not directly answer a question posed regarding an alleged prior inconsistent statement and it is apparent from the record that the trier of fact did not give any consideration to the answer.[23]

Practical tips

Be prepared to demonstrate inconsistency and materiality. As an initial matter, a trial lawyer wishing to impeach a witness with a prior inconsistent statement should always be ready to demonstrate: 1) how the statement is inconsistent with or serves to discredit the witness's trial testimony; and 2) why that inconsistency is relevant to the case. Failing to do so could result in a trial court barring the attorney from attempting the impeachment.

Be prepared to complete the impeachment. A trial lawyer must be aware of every prior statement that witnesses make, and what evidence will be needed to complete the impeachment if a witness denies making a prior statement inconsistent with his or her trial testimony. For example, if a defense attorney in a personal injury case wishes to impeach a plaintiff with a statement the plaintiff allegedly made to a treating physician, the defense attorney must be prepared, in the event the plaintiff denies making the statement, to call that treating physician as a witness to prove up the impeachment. If the defense is not prepared to complete the impeachment in this fashion, then: 1) a trial court may bar the defense from asking questions to attempt the impeachment;[24] or 2) an appellate court may reverse a favorable judgment.[25]

Therefore, it is incumbent on an attorney who anticipates impeaching a witness with a prior inconsistent statement to subpoena all witnesses necessary to prove up the impeachment. Because of the necessity of completing impeachment, it is also a good idea when deposing witnesses before trial to ask them whether they admit or deny making any relevant prior statements. If the witness denies making a prior statement, the lawyer can then determine what evidence will be necessary to prove up the impeachment at trial.

Objections and preserving the record. "A party who claims to be prejudiced when a prior inconsistent statement is introduced but never authenticated must object at the time the statement is introduced and then preserve the objection by making a timely motion to strike when the opposing party fails to offer extrinsic evidence of the statement."[26] In the face of incomplete impeachment, an opposing party may also preserve the record by asking the court to instruct the jury to disregard certain testimony or moving for a mistrial and sanctions.[27] However, if incomplete impeachment deprives a party of its right to a fair trial, an appellate court may consider the error even when an objection was never raised.[28]

Offers of proof. Prior to trial, attorneys who are concerned that a client or witness may be impeached on the stand may make a motion *in limine* for the opposing party to make an offer of proof concerning what statements it may seek to use for impeachment purposes and ask the court to bar any attempted impeachment if the opposing party is not prepared to call the appropriate witnesses to prove up the impeachment.

During trial, if a party is barred by the trial court from attempting any impeachment, the party should also

A TRIAL LAWYER MUST BE AWARE OF EVERY PRIOR STATEMENT THAT WITNESSES MAKE, AND WHAT EVIDENCE WILL BE NEEDED TO COMPLETE THE IMPEACHMENT IF A WITNESS DENIES MAKING A PRIOR STATEMENT INCONSISTENT WITH HIS OR HER TRIAL TESTIMONY.

be prepared to make an offer of proof concerning what questions he seeks to ask, what responses he expects to elicit from the witness, and why the expected responses would be relevant to the case.[29] This is because failing to do so may result in waiving any claim that evidence was improperly excluded.[30]

Conclusion

Confronting a witness with a prior inconsistent statement remains an effective method of impeachment. However, trial lawyers must be aware of the rules surrounding incomplete impeachment so that they do not risk having favorable judgments reversed on appeal. IBJ

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20. *Oak Lawn Trust Savings Bank v. City of Palos Heights*, 115 Ill. App. 3d 887, 897 (1st Dist. 1983).
21. See, *e.g.*, *Danzico v. Kelly*, 112 Ill. App. 2d 14, 27 (1st Dist. 1969).
22. See, *e.g.*, *Walker v. Maxwell City, Inc.*, 117 Ill. App. 3d 571, 581 (1st Dist. 1983).
23. See, *e.g.*, *Central Steel & Wire Co. v. Coating Research Corp.*, 53 Ill. App. 3d 943, 946 (1st Dist. 1977).
24. See, *e.g.*, *Edward Don Co. v. Industrial Comm'n*, 344 Ill. App. 3d 643, 753 (1st Dist. 2003).
25. See, *e.g.*, *Morris v. Milby*, 301 Ill. App. 3d 224, 231 (4th Dist. 1998).
26. *Id.* at 231–32.
27. *Green v. Cook County Hospital*, 156 Ill. App. 3d 826, 833–34 (1st Dist. 1987).
28. *Bradford v. City of Chicago*, 132 Ill. App. 3d 317, 323 (1st Dist. 1985).
29. *Edward Don Co.*, 344 Ill. App. 3d at 652–53.
30. *Id.*

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