The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U.S. Army

Impeachment by Prior Inconsistent Statement[1]

A woman calls the military police (MPs) to report a rape. She identifies the alleged perpetrator as Private First Class B, a soldier assigned to Fort Swampy. The MPs notify the local Criminal Investigation Command (CID), and an agent interviews the victim and takes a sworn statement detailing the facts surrounding the alleged rape. The victim goes to the post hospital and undergoes a rape kit examination. Private First Class B's unit commander prefers a charge for rape, and, after an Article 32 investigation, the case ends up at a general court-martial. The trial counsel has just completed direct examination of the victim. The defense counsel stands to cross-examine the victim.[2]

When confronting a witness on cross-examination at trial, an attorney will often aim to show the court-martial that the witness' recitation of events is not worthy of belief. The witness may be lying or simply mistaken, but opposing counsel's mission is to attack the credibility of the testimony. One effective means of impeachment is to use a witness' prior inconsistent statement.

Whether the witness is untruthful or unable to recall accurately what occurred is generally less significant than the fact that the inconsistency exists. Having demonstrated an inconsistency, counsel can argue either lack of candor or lack of recall—or, better still, let the panel sort out the reason—to show that the court-martial should not believe the testimony of the witness. To make this attack successfully, counsel must know how to develop statements, to organize them for trial, and to confront the witness with her relevant[3] prior inconsistent statements. Counsel's task is to investigate fully all statements, to identify key facts in each, to index the relevant points, and to apply this template against the witness' testimony in the court-martial.

Where to Find Prior Inconsistent Statements

In the hypothetical above, the witness made a number of prior statements. Whether such statements are inconsistent will not be determined until the witness testifies at trial. How many times did the witness above say something about what happened on the night of the alleged rape? She made an initial report to the MPs and likely answered some follow-up questions to complete the report. She described the events, presumably in more detail, in a sworn statement to a CID agent. When she went to the hospital for a rape kit examination, she told the attending physician what happened. The victim consented to a pretrial interview as part of defense counsel's case investigation.[4] She testified under oath at the Article 32(b) investigation. In addition, she may have talked with friends or family about the alleged rape.

All of the foregoing statements, written and oral, are prior statements which may be used to impeach the witness at trial, depending on her direct testimony. Counsel should locate any record of a statement given, interview any witness to whom a statement was made, and interview the witness as a necessary part of the pretrial investigation.

Implicit in setting up impeachment by prior inconsistent statement is letting the witness talk, thus creating the opportunity for inconsistencies. There is little impeachment value in merely asking a witness at an Article 32 hearing, "Did you give this statement to CID on 10 July?"[5] Similarly, in setting up a potential inconsistent statement, the following exchange produces little useful information:

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1. *See generally* James Martin Davis, *Impeachment by Prior Inconsistent Statement*, Trial, Mar. 1989, at 64; Janeen Kerper, *Killing Him Softly with His Words: The Art and Ethics of Impeachment with Prior Statements*, 21 Am. J. Trial Advoc. 81 (1997).

2. This scenario depicts a defense counsel's use of a prior inconsistent statement to impeach a victim. Note, however, that this impeachment technique is available for use by either the trial or defense counsel against any witness who testifies at trial and who has made prior inconsistent statements.

3. By focusing on relevant points, counsel avoid allegations of unethical conduct in asking questions designed to embarrass or to harass a witness. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, app. A, para. 4.4 (1 May 1992).

4. An attorney who interviews a witness as part of counsel's own pretrial investigation has several options to memorialize the information provided by the witness, including: (1) having someone else present during the interview (often a colleague or legal clerk), (2) having the witness sign a statement—sworn or unsworn—at the conclusion of the interview, (3) having the witness initial notes taken by counsel to vouch for their accuracy, or (4) the attorney's own recollection. The first three options provide counsel additional evidence of the substance of the prior inconsistent statement, and the evidence can be offered at trial if, when confronted with the statement, the witness denies having made it. The last option, counsel's own recollection, is useful if it is more important to show that the witness is not credible than to offer the substantive testimony of the prior statement.

5. In a given case, this question might add value by showing that the witness vouched for or had an opportunity and failed to correct his earlier statement, but the question does not generally yield another potential inconsistent statement.

DC: What happened after you were drinking with the accused at the party?
W: He raped me.
DC: Did you go to the doctor?
W: Yes.
DC: And did you give a statement to CID?
W: Yes.

Conversely, ignoring the witness' earlier detailed sworn statement and asking the witness at the Article 32 investigation, "What happened?," sets up sworn testimony that may conflict with subsequent trial testimony. Counsel who are trying to set up impeachment by prior inconsistent statement must probe details and must make the witness do the talking—remember, it is impeachment by the *witness'* prior inconsistent statements, not affirmation or denial by the witness of *counsel's* statements. In the pretrial investigation, use open-ended, non-leading questions to make the witness give narrative responses. Consider some of the questions that counsel could ask in the above scenario:

> Who was with you? How much did you have to drink? Was the accused drinking? How much? Where did the alcohol come from? What time did you go to the barracks? How did you know the accused? Where was your friend when you say the rape occurred? Where were the other soldiers? How did you sit on the bed? Where did the accused sit? Who initiated any physical contact? How was contact initiated? What happened next?

Counsel should walk very slowly through the entire scenario, having the witness tell the story, to develop prior statements by the witness that might later be inconsistent with the witness' in-court testimony. An exhaustive, detailed examination risks reinforcing some negative testimony, but it also forces the witness to make statements that might later prove useful for impeachment.

Organization for Trial

All successful advocates have a system for organizing case materials, but it is important also to organize and to prepare to address prior inconsistent statements. Consider using a topical index of prior statements, as shown below:

Fact	Sworn Statement 10 Jul XX	Art. 32 testimony 29 Jul XX	Direct Examination
Consumption of Alcohol	"drinking a little" (line 9)	"had 10 beers" (p. 7/line 15)	
	"earlier at friend's house" (p. 11)	"shots of whiskey" (p. 7/line 18)	
Initiated Contact	"he threw me on the bed and raped me" (line 12)	"I kissed him a few times" (p. 9/line 7)	
	"we were sitting on the bed, hugging and kissing (line 12).		

Using this system of organization, counsel has identified relevant facts on which to impeach the witness at trial. Identifying these key facts prior to trial helps counsel to resist confronting the witness about every minor inconsistency that may arise, thereby diluting the key points of impeachment. Counsel has also identified each of the prior statements by type and date given. While counsel must have each of these statements or transcripts accessible in his case file, the relevant quotes set out on the chart help counsel identify whether trial testimony is inconsistent with the prior statement. Thus, counsel can move quickly and easily to set up confrontation with the prior inconsistent statement without shuffling various documents. Finally, by indicating page or line numbers on the chart, counsel can seize control of the courtroom by directing the witness or informing opposing counsel exactly where the relevant language appears. Such control minimizes objections from opposing counsel and demonstrates confidence and knowledge to the panel, thus enhancing the effect of the impeachment.

Impeachment by Prior Inconsistent Statements

Having identified prior inconsistent statements and having determined that the point is relevant to an issue at trial, counsel now impeaches the witness. A three-step process can be adapted to any of the types of prior statements made by the witness.

Reinforcement—Depending on the clarity of the witness' testimony, this step may not be necessary. On the other hand, counsel may want to lock in the witness' testimony on direct examination. For example, "Your testimony today is that you had only a couple of beers on 10 July?" Counsel should, however, be cautious not to overemphasize testimony which is damaging to the case. For example, "So your testimony today is that you were not drunk or kissing my client, and he threw you on the bed and raped you in the barracks on the night of 10 July?"

Foundation—Counsel establishes that the witness made a prior statement of a certain type at a given time and place. Validating the prior statement limits the witness' ability to dismiss it. In this step it is also useful to point out that the prior statement was made closer in time to the event and was intended to help the investigation. For example, counsel might ask the following questions: "You gave a statement to the CID agent? You reviewed the statement for corrections after it was typed? The CID agent swore you to the statement? You made this statement the night of the incident? You told the truth so that CID could arrest the accused?"

Confrontation—Here counsel asks if the witness made the prior statement, using the exact words and reading from the document. For example, "And you told the agent that Private First Class B initiated contact when 'he threw me on the bed and raped me,' is that right?" In confronting the witness with the prior statement, counsel enhances the accuracy of the prior statement by reading directly from the statement, transcript, or report.

If the witness denies having made the prior inconsistent statement, counsel may want to offer into evidence the document containing the prior statement. On the other hand, if counsel has laid a good foundation and read from the statement, transcript, or report, a denial by the witness sounds and looks like a lie. Whether counsel chooses to offer the prior statement depends in part on counsel's objective in the impeachment. If the purpose is to show that the witness is not credible, the mere denial looks less credible; if the objective is to use the prior statement for its substance (e.g., the witness was sitting on the bed kissing the accused), call the required witness(es) to testify to the prior inconsistent statement.

Nine DON'Ts! for Effective Impeachment

1. **Don't confront unless it is a true inconsistency.** Quibbling over a witness' choice of words sounds to a panel more like disingenuous fancy lawyering than substantive changes in a witness' recollection. A relevant point is either a main issue in the case or a point that reveals dishonesty in the witness' testimony.

2. **Don't be antagonistic toward the witness.** The foundation and confrontation flow more smoothly if questions are less accusatory and simply review facts. Thus, counsel appears more helpful to the panel and less rude to the witness.

3. **Don't abbreviate the foundation to get to confrontation.** A detailed foundation with visual images (e.g., "And you raised your right hand to take an oath?") lends credibility to the prior statement and is especially important if counsel wants the court-martial not only to disbelieve the witness' testimony in court, but also to believe the substance of the prior statement.

4. **Don't confront the witness by asking if he "*remembers* saying in a sworn statement . . . ."** This question misdirects the inquiry to whether the witness remembers and not whether he in fact made the prior statement. The witness can, in good faith, deny any memory and thus weaken the impeachment. Counsel should ask whether the witness *made* the statement.

5. **Don't summarize the prior statement.** Counsel must quote directly the particular words on the relevant point and show the panel by picking up the document and reading from it.

6. **Don't let the witness read from the document.** The witness may summarize, insert words, read another line, or stumble through the relevant line, any of which distract the court from the inconsistency counsel desires to show.[6]

7. **Don't let the witness explain the inconsistency.** Although Military Rule of Evidence 613(b)[7] requires that the witness be afforded an opportunity to explain or to deny the prior inconsistent statement, it is not an obligation of the counsel impeaching the witness. There is virtually no circumstance where counsel enhances the impeachment by asking, "How do you explain this inconsistency?" Leave it for opposing counsel's redirect examination.

8. **Don't engage the other side in protracted examination.** Once counsel establishes an inconsistency, the other side may use redirect to bring out an explanation for the inconsistency. Counsel impeaching the witness should save rebuttal for argument. Counsel can point out to the panel the other side's effort to explain away problems in their case, but highlight what the witness said closer in time to the event in question—a point at which he was only trying to provide helpful information.

9. **Don't call the witness a liar.** The lawyer gains no advantage or favor for himself or his case by making personal attacks against a witness. The important point is what the witness said

6. Some trial advocates prefer to have the witness read the prior inconsistent statement for some dramatic value. This technique is proper and valid, though counsel gives up some control of the courtroom when he gives the document to the witness.

7. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 613(b) (1995).

in the prior inconsistent statement, not whether he is lying, mistaken, or inaccurate now.

Sample impeachment

W (direct exam): We had been drinking a little before he threw me on the bed and raped me. I only had about two beers, and I only drank at the barracks. But I never led him on.

TC: No further questions.

DC: You only drank two beers on 10 July? [*Reinforcement*]

W: Yes.

DC: You testified previously at an Article 32 investigation about this matter, didn't you? [*Foundation*]

W: Yes.

DC: That was on 29 July, just a few weeks after the alleged rape?

W: That's right.

DC: And you took an oath at that hearing, raising your right hand and promising to tell the truth, as you did today?

W: Yes.

DC: You testified truthfully at that hearing because you wanted to catch the person who you say raped you?

W: Yes.

DC: At that hearing, when asked how much you had to drink that day, you said, on page 7, line 15, (counsel reading from transcript) "I had about ten beers," didn't you? [*Confrontation*]

W: Yes.

DC: Now, you also talked about this incident to a CID agent on 10 July, is that right? [*Foundation*]

W: Yes, when I reported it.

DC: And the agent took a sworn statement from you?

W: Yes.

DC: You told him what happened on the same day it occurred, didn't you?

W: Yes.

DC: You told the CID agent the truth so that CID could arrest someone?

W: Yes.

DC: When the statement was typed, you had a chance to review it and make corrections?

W: Yes.

DC: And then the agent had you swear that the statement was true, and you signed it?

W: Yes.

DC: (picking up sworn statement) And in that statement to CID on 10 July, you said, on the second page, fourteen lines down, "we were sitting on the bed hugging and kissing," didn't you? [*Confrontation*]

W: No.

DC: [*Admission*] (Note: If counsel wants to argue the substance of the prior inconsistent statement, then counsel next has the witness authenticate her signature on the statement and moves to admit the document into evidence.)

DC: No further questions.

In the above example, counsel *reinforced* the witness' testimony as to the quantity of alcohol consumed prior to impeaching the witness. On the second relevant fact, however, counsel skipped the *reinforcement* step to avoid having the witness repeat the damaging accusation that the accused "threw me on the bed and raped me." After reinforcing part of the testimony, counsel laid detailed *foundations* for the prior statements on both relevant facts, including questions which showed that such statements were made closer in time to the event (thus enhancing the likelihood of their accuracy) and for the purpose of helping the investigation with accurate information. When *confronting* the witness, counsel directed the witness to a specific place in the document which contained the prior inconsistent statement. Thus, counsel showed the panel that he was bringing out specific information to help the court, and not playing meaningless word games with the witness. When counsel got the witness to admit having made the prior inconsistent statement, he stopped his examination on that point, leaving any explanation to the other side.

The most important step in impeaching a witness with prior inconsistent statements is the diligent investigation and examination to locate and to develop prior statements. Once counsel has built an arsenal of prior statements through investigation and good pretrial questioning, counsel should organize to test the witness' testimony at trial against his prior statements. By exposing such inconsistencies and confronting the witness with them, counsel shows the court-martial that the witness' testimony in court is not worthy of belief, having changed on a relevant point. Major Allen.

Horse-shedding the Evidence[8] —Twenty Do's and Don'ts of Witness Preparation

Few witnesses in courts-martial are experienced players.[9] For most, the first time they hear the trial counsel mumble "Your honor, the government calls . . . " will probably be their last time inside a courtroom, and they will very likely feel uneasy. Therefore, they usually must be coached, coddled, and caressed, and they must be told what to wear, how to act, and when to respond—in other words, they must be prepared for the experience.[10] Yes, Virginia, sorry to burst your bubble, not only

8. The phrase "horse-shedding the witness" can be attributed to James Fenimore Cooper, who used it in referring to the practice of lawyers rehearsing the testimony of their witnesses in carriage sheds near the courthouse. JAMES W. MCELHANEY, MCELHANEY'S TRIAL NOTEBOOK 49 (3d ed. 1994).

9. LAWRENCE A. DUBIN & THOMAS F. GUERNSEY, TRIAL PRACTICE 51 (1991).

10. David H. Berg, *Preparing Witnesses*, 13 LITIG. 13, 14 (1987) (describing a failure to prepare witnesses prior to trial as a combination of strategic lunacy and gross negligence).

is there no Santa Claus,[11] but some witness preparation prior to giving opening statements is essential to fulfill the ultimate goal of any competent trial advocate—presenting a persuasive case to the fact-finder.

Counsel swear by a variety of different techniques.[12] Some prepare by going over the entire direct examination in question and answer format, working on each response as necessary, and then conducting a mock cross-examination. Others outline the general scope of the witness' testimony by summarizing the direct, anticipating the cross, and (re)familiarizing the witness with important documents or pieces of evidence.[13] A rare few concentrate on simply molding witness personality and courtroom demeanor. To some degree, all of these methods enable counsel to achieve the goal of presenting witnesses who are thoroughly familiar with the subject matter of their testimony and ready to say what they know in a clear, concise, confident, and convincing manner.[14] In most cases, a practice examination will be best because the perceived benefit from spontaneous responses achieved through unrehearsed testimony will more than be outweighed by the potential disasters awaiting you with the "surprises" guaranteed to come from the witness while on the stand.[15]

Whatever method you choose, preparing your witnesses is essential if you expect to effectively present their testimony at trial.[16] The Witness Preparation Checklist[17] provides several time-tested tips[18] to help you remember those seemingly minor, though still important, details about how witnesses should conduct themselves on the stand. Copy it,[19] make it part of your trial notebook,[20] and use it when preparing your witnesses for their day in court. Lieutenant Colonel Henley.

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11. It was one century ago, in December 1897, that the *New York Sun* printed the now famous response to eight-year old Virginia O'Hanlon's letter to the editor questioning the very existence of the man from the North Pole by stating definitively, "Yes, Virginia. There is a Santa Claus."

12. *See* John P. DiBlasi, *Preparing Your Witnesses For Trial*, N.Y ST. BAR J., Dec. 1993, at 48, 49-52.

13. *See* THOMAS A. MAUET, TRIAL TECHNIQUES 477 (4th ed. 1996) (explaining in greater detail both the question and answer and the witness summary methods).

14. Alternatively, two well-known commentators have listed 13 objectives for witness preparation:

> help the witness tell the truth; make sure the witness includes all the relevant facts and eliminates the irrelevant facts; organize the facts in a credible and understandable sequence; permit the attorney to compare the witness' story with the [victim's/accused's] story; introduce the witness to the legal process; instill the witness with self-confidence; establish a good working relationship with the witness; refresh, but not direct, the witness' memory; eliminate opinion and conjecture from the testimony; focus the witness' attention on the important areas of testimony; make the witness understand the importance of his or her testimony; teach the witness to fight anxiety; and show how to defend him or herself during cross-examination.

ROBERTO ARON & JONATHAN L. ROSNER, HOW TO PREPARE WITNESSES FOR TRIAL 82 (1985).

15. Of course, counsel should be prepared to adapt preparation style and technique to the witness' maturity, intelligence, and confidence level.

16. ARON & ROSNER, *supra* note 14, at 390-91 (asserting that witness preparation is the most important aspect of trial advocacy).

17. *See* Judy Clarke, *The Trial Notebook*, CHAMPION, June 1995, at 8 (detailing forms and lists for both pretrial and trial preparation, from which this checklist was developed).

18. *See* Douglas E. Acklin, *Witness Preparation: Beyond the Woodshed*, 27 A.F. L. REV. 21, 25 (1987) (suggesting several common sense tips for trial and defense counsel).

19. *See* UCMJ art. 108 (West 1995).

20. For a first-rate discussion on the proper assembly of a trial notebook, see *The Art of Trial Advocacy*, ARMY LAW., Nov. 1997, at 40.

_____1. Your appearance is almost as important as what you have to say. Make sure that you wear all authorized ribbons and that your uniform is pressed. Battle dress uniforms are not appropriate. Military witnesses should have a fresh haircut, hopefully not parted down the middle (the "probable cause haircut"). Women should keep make-up and jewelry to a minimum. Civilians should wear clean clothes, conservative dress.

_____2. Stand up straight when taking the oath and say "I do" in a loud, clear voice. Sit up straight in the witness chair; do not slouch or lean over the rail.

_____3. Avoid undignified behavior. When you are testifying, do not have anything in your mouth, such as gum, toothpicks, candy, or cigarettes. Resist the urge to chew your nails, crack your knuckles, or play with your glasses.

_____4. Don't mumble. Keep your voice up so that no one has to ask you to repeat your response. Keep your hands away from your mouth. Speak so that the farthest panel member can hear you without having to strain. Above all, use your own vocabulary not someone else's.

_____5. Testify in a confident, straightforward manner. This will give the panel more faith in what you are saying.

_____6. In order to make your testimony appear spontaneous, do not go home and memorize what you are going to say.

_____7. Take your role seriously. Avoid laughing and talking about the case in the hallways, bathrooms, post exchanges, dining facilities, the company area, or anywhere else. You never know who may be listening.

_____8. When answering the questions, look at the panel, if there is one. Make eye contact and speak like you are talking to your best friend or neighbor. This will help to communicate sincerity and to create an impression of candor and honesty.

_____9. Stick to the facts. You usually will not be able to testify as to what someone may have told you or what you heard someone else say. Do not testify as to what someone else told you, unless the military judge says it is okay.

_____10. On cross-examination, listen carefully to the questions asked of you and do not answer until the lawyer has had an opportunity to complete it. Answer directly and simply with a "yes" or "no," if possible, then stop. Do not volunteer anything.

____11. If your answer on cross-examination was wrong, correct it immediately. If it was not clear, clarify it. It is better for you to correct the mistake than to have the opposing lawyer discover it. If you think you answered incorrectly, simply say "Can I correct something I said earlier?" or "Something I said needs to be clarified."

_____12. If you do not understand the question, say so and ask that it be repeated.

_____13. Pause after each question before responding. Do not lose your temper when the opposing counsel examines you.

_____14. Your credibility will suffer if you become rude, angry, hostile, obnoxious, or arrogant. Always be polite to the lawyers who are asking the questions and to the military judge.

_____15. If the other lawyer asks you if you have talked to anyone about this case, answer yes. Tell him you reviewed your testimony with me before coming to court. There is generally nothing wrong with talking to people about the case. Just tell him, "yes I have talked to CPT Jones, the MPs, the company commander, the first sergeant, the accused," or whoever.

_____16. If I object to a question, do not answer until the judge rules on the objection. If he sustains the objection, that means you do not have to answer. If the judge overrules an objection, this means you must answer the question. If you have forgotten the question by that time, you can always ask that it be repeated. If the other lawyer objects, stop talking until told what to do.

_____17. Do not guess. If you do not know an answer to a question, do not make one up. Simply say, "I don't know."

_____18. Do not look to me or to the military judge for help while testifying on cross-examination. If I think the question is improper, I will object and take it up with the judge. Trust me to ask follow-up questions if it is important enough.

_____19. Always, always, always tell the truth.

_____20. When you leave the stand, look confident, not sad or dejected. You should go home or back to work. Avoid hanging around the courthouse so the panel doesn't think that you have an interest in the outcome of the case.