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How to handle the recalcitrant witness

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LITIGATION ROUNDUP

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Any seasoned trial attorney understands that during a trial, one should expect the unexpected.

A party's own witness who testifies in contrast to a prior sworn statement certainly qualifies as a trial surprise — a surprise that will typically require one to treat his or her own witness as an adversary.

In New York, the common law tradition of prohibiting impeachment of a party's own witness has been modified by two statutes: Criminal Procedure Law §60.35 and Rule 4514 of the Civil Practice Law and Rules.

In the criminal arena, CPL § 60.35 specifically deals with this impeachment issue, and three perquisites must be met in order to utilize a witness's prior inconsistent statement.

First, no statement is eligible for introduction unless it meets the statutory requirement of being either in writing signed by the witness, or orally made under oath. Notably, the statute was drafted prior to the electronic era and has not been amended to permit an unsworn statement recorded on video to be admitted.

Second, evidence concerning the prior contradictory statement may only be received for the purposes of impeaching the witness's credibility and shall not constitute evidence in chief. The trial court must instruct the jury on this point.

Third, and most importantly, the contradictory trial testimony must deal with a material issue of the case and needs to disprove the position of the party who called the witness. If the contradictory testimony does not disprove the position of the party calling the witness, and is inadmissible under the rule, prior statements may not be used for refreshing the recollection of the witness in a manner that discloses its contents to the trier of fact.

Presumably, this was intended to prohibit the skillful trial attorney from attempting to disclose the contents of a prior contradictory statement (that does not satisfy the statutory requirements) by reading it aloud to the witness, in the presence of the jury, under the auspices of attempting to refresh the witness's recollection. One could imagine the attorney may, however, refresh the witness's recollection during a trial break or have the witness, in the jury's presence, read the statement silently to determine whether it refreshes his or her memory.

The real issue is determining when the trial testimony tends to disprove the position of the party who called the witness. There is a clear distinction between unhelpful or disappointing testimony and testimony that directly injures the proponent's case. For example, testimony of an accomplice called by the people that completely exonerates the defendant, after the accomplice fully implicated the defendant before a Grand Jury, certainly qualifies.

What happens if a witness conveniently forgets to recall a fact from a prior statement? This may devastate the party's ability to present proof of an essential point, but does not affirmatively damage the party's case, see *People v. Fitzpatrick*, 40 NY2d 44, 51 (1976). Even if a witness specifically denies a fact from a prior statement, if that fact is not required to be proved or material in the trial's context, the strength of the case may be weakened but there is no affirmative damage permitting impeachment, see, e.g., *People v. Saez*, 69 NY2d 802, 804 (1987).

This situation can be contrasted with one in which a witness who observed a crime testifies before the Grand Jury that the defendant was present during the crime, but later testifies the defendant was not present. This testimony affirmatively damages the people's case, thus satisfying the requirements of CPL § 60.35, see *People v. Magee*, 128 AD2d 811 (Second Dept. 1987), appeal denied, 70 NY2d 650 (1987).

In the civil context, CPLR 4514 permits any party to introduce proof that a witness made a prior statement inconsistent with his or her testimony, if the prior inconsistent statement was in a writing subscribed to by the witness or made under oath, for example in sworn deposition testimony. The prior inconsistency does not need to address a material issue of the case, which tends to disprove the position of the party calling the witness.

The court may find a prior inconsistent statement, especially if made in writing and signed by the witness or made under oath, is admissible for its truth and not merely to affect credibility, see *Letendre v. Hartford Accident & Indemnity Co.*, 21 NY2d 51 (1968).

As with any rule, there are certain situations in which the

Continued ...

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Continued ...

facts of the case do not fit neatly within the statute. In *Rodriquez v. N.Y. City Housing Auth.*, 215 AD2d 362, 363 (Second Dept. 1995), the plaintiff who could not speak English and did not understand the Notice of Claim she filed, which listed a different accident address from that claimed at trial, was admissible as a prior inconsistent statement to impeach the plaintiff's credibility. The plaintiff's argument to the contrary went only to the weight, rather than to the admissibility of the prior statement.

Of course, a recalcitrant witness generally is not anticipated. Therefore, it is wise to keep the appropriate statute, with accompanying case law, readily available during a trial in the event one's own witness surprisingly contradicts a previously sworn statement.

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