

# PLANNING IMPEACHMENT

Be Ready to Accomplish More Than Just  
Catching a Witness in a Lie

JAMES W. MCELHANEY

**A**NGUS WAS ON A PANEL AT THE LAW school discussing Gunner "Quick Draw" McGraw's new book, *Rambo Cross-Examination*—the latest in McGraw's Shock and Awe Trial Series. Professor Vince Warbler, who teaches a seminar in corporate litigation but who has never actually tried a case, was moderating the panel.

Warbler started by saying, "I think we who have devoted our professional lives to fighting for truth and justice in the trenches of litigation are of one mind on the notion that great trial lawyers are born, not made; that the ability to effectively impeach a witness on cross-examination is a rare gift."

Angus looked over the top of his glasses at the professor, who said, "Angus, what's your take on this? Are we in agreement?"

"No," said Angus. "We are not. In my experience, careful preparation is the single most important ingredient of an effective impeachment."

Warbler turned to the other panelists and didn't call on Angus again for the entire program.

Afterwards, everyone, except Professor Warbler, gathered at the Brief Bag.

"What twaddle!" said Mike Pirelli. "I don't think Warbler read a single page of McGraw's book."

"What I want to know," said Sandy Garcia, "is how you plan an impeachment. To me, it always seems like I'm suddenly confronted with a situation I didn't anticipate, and all at once I have to do something about it."

Angus said, "You're talking about impeaching an opposing witness in a trial who, without any warning, has just 'improved' on the testimony he gave in his deposition."

"Exactly," said Sandy. "And you never know when it's going to happen."

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"You don't know when," said Angus, "but you know it probably will happen with most witnesses. That's because even scrupulously honest witnesses unconsciously 'improve' their stories over time. They tend to identify with the party that needs them and calls them to the witness stand.

"And you've got to prepare for this kind of 'creativity.' The way to do it is to go through each deposition, looking for everything the witness said that helps your case—or hurts your opponent—because those are the facts most likely to change at trial."

"But that's an immense amount of work," said Sandy.

"No, it's not," said Angus. "You read all the witnesses' depositions before trial, don't you?"

"Of course," said Sandy.

"And when you read those depositions, you probably take longhand notes on a legal pad, don't you?" said Angus.

"Yes."

"But those longhand notes are typically useless in helping you find anything in a deposition during trial. Which is why you frantically flip through the deposition, looking for what you need to impeach the witness."

"Exactly," said Sandy. "It seems like you never can find it."

"So stop preparing that way," said Angus. "Instead, dictate your notes on a little handheld tape recorder, making a list of important things the witness said in the deposition, citing to the page numbers. Like this: 'Admits light still yellow when Scott's car entered the intersection, page 22. Says black Hummer could have stopped, page 39.'

"Then have your secretary type up your lists with each statement starting on the left margin and the corresponding page number on the right margin. Make two copies of each list—one to put in your trial notebook, the other to staple on the cover of the deposition.

"Then, when the witness says the light was red when Scott entered the intersection, it takes only a few seconds to find the right page."

"That's wonderful," said Sandy.

"Best of all," said Angus, "your ability to find what you need right away helps create the impression that you know the witness's testimony better than he does. And if you're a better source of information than the witness, who do you think the jury is going to trust—you or him?"

## IT'S ALWAYS HUNTING SEASON

"BUT PRIOR INCONSISTENT STATEMENTS ARE JUST ONE kind of impeachment," said Mike Pirelli. "How do you plan the other ones?"

Angus smiled. "The hunt for impeaching material starts when the case walks in your door," he said. "It begins before you take your first deposition. One of the qualities that good trial lawyers try to develop is a keen nose for the scent of mendacity.

"Peter Baird of Phoenix was defending a large cell phone company being sued by a small, unknown company that claimed Peter's client had stolen its ingenious new system for billing its customers.

"But the case didn't smell right. Everything about it

seemed contrived, right down to the timing for asking a federal district court to issue a temporary restraining order that would have shut down Peter's client on the eve of its annual shareholder's meeting.

"And who were the people who had started this company, anyway? Peter had never heard of any of them. So he hired an investigator to look into their backgrounds. It turned out that the CEO of this new company had a conviction for being a member of a car-theft ring. It was his job to make the phony titles for the cars that came out of the gang's chop shop.

"The plaintiffs' lawyers had no idea who they really represented, and their case crashed dramatically once the CEO's background came out."

"I don't have any cases with big-time criminals on the other side," said Sandy Garcia, "but I have a bunch where the opponents are pretty nasty people. Too bad you can't impeach the other party for being a rotten person."

"But you can," said Angus. "While not technically impeachment, 'helping' the opponent show his bad side is one of the most powerful things you can do.

"When the late Bob Hanley was involved in a big anti-trust case, he heard that the opponent's CEO—a seemingly gracious Southern gentleman—actually had an uncontrollable temper and was given to breaking into tirades of yelling and screaming when his hot button was pushed.

"So when Hanley took the CEO's deposition, it included a serious hunt for the button. He found it.

"In trial, Hanley waited almost until the noon recess to push the CEO's button during his cross-examination.

"It worked. People watching the trial said the CEO went ballistic, yelling and screaming at Hanley for nearly 10 minutes. Then the jury had a two-hour lunch break to let the bad impression sink in before there was any redirect examination."

### DON'T LET MONGO LOOSE

"BUT I DON'T KNOW HOW TO MAKE PEOPLE yell and scream," said Sandy.

"You don't have to," said Angus. "All the witness has to do is be nasty, disdainful and evasive for the judge and the jury to decide they don't like him. Unless ..."

"Unless what?" said Sandy and Mike in unison.

"Unless you justify the witness's conduct by letting Mongo—your inner beast—join the fray. Then, no matter what the witness did to justify your behavior, the jury will blame you for starting it. Jurors don't identify with sneering, sarcastic lawyers. They side with the witness."

"So what do you do when the witness is evasive on cross?" said Sandy. "Be nice?"

"Exactly," said Angus. "When a witness dodges a question on cross-examination—particularly with an argumentative response—the jury typically has no idea they just heard a nonresponsive answer.

"How can you call attention to the evasion?" said Sandy. "Take the blame," said Angus. "Say, 'I'm sorry, but the question I meant to ask you was ...' and then repeat the very question the witness just dodged. It works. The jury understands that the witness deliberately evaded your question.

"When you do it that way, you impeach the witness with his own evasion," said Angus.

"Where I get the most witness evasion is in depositions," said Mike. "It drives me crazy. Whenever I ask a really important question, the witness claims he doesn't know or can't remember the answer. I know he's lying, but there's nothing I can do about it."

"You've got to put a stop to it," said Angus. "Every time you let a witness dodge a question in a deposition, you're giving him a license to lie in trial.

"When a witness says he doesn't know or can't remember something he ought to know, think of all the questions you could ask to track down the real answer:

"Did you once know the answer? If you don't know the answer, who would?"

"If you don't know the exact answer, what have you heard about it? Who did you hear it from? Who did you tell?"

"Could you have written a memo about it? Who would you have sent it to? Do you keep copies of your memos? Where are they? Who else might have this information?"

"If your life depended on getting the answer to this question by tomorrow morning, where would you look?"

"If your life depended on getting the answer to this question, who would you ask?"

"Do you understand that if you remember the answer to this question or discover what it is, you are under an obligation to bring this information to our attention?"

"Wow!" said Sandy. "Maybe careful preparation really is the key to impeachment." ■

