

## Thinking about using prior inconsistent statements

Dear Trial Team Friends:

Here are some thoughts about prior inconsistent statements.

1. Think about the “why” of PIS.
  - a. Don’t use a catch-all phrase like “credibility.” That’s not telling a story.
  - b. Instead, is it ‘weak memory’ [therefore jury can’t really trust the witness’ current version]
  - c. Or, is it “confusion, because they never got a good look at the time of the event”
  - d. Or “unreliable, they say one thing one day and something else another day”
  - e. Or, is it “they are lying now, at this trial.” **This last one works only if we can link it to some pressure put on the witness, a motive, etc.**
2. Then think about the “how” for PIS
  - a. We don’t want to repeat what people said on direct – if it hurts, why let the jury hear it again; and if it helps why give them a chance to walk it back or qualify it somehow. But with PIS, we have to repeat the statement to set up the contrast.
  - b. After we repeat it, our next step is to explain the circumstances of the prior statement.
    - i. Was it closer to the event (fresh memory)?
    - ii. Said to a person of authority?
    - iii. Read back to them?
    - iv. Under oath?
    - v. Signed by them?
    - vi. In circumstances where the speaker knew it was important to be accurate?  
**Don’t do 20 such questions, but 4-6.**
  - c. Finale – show it, read it aloud **verbatim**, confirm it was read accurately, and then **STOP. Never ask why the versions have changed – people can always come up with a justification.**
  - d. Finally, think about what we do with this.
    - i. All prior inconsistent statements are admissible as a way to ask the jury to disbelieve what was said in court. If the witness testifies in court that the robber was 6 feet tall, and you impeach with a description given to police the day of the crime that “the robber was tiny, barely 5 feet” you may argue “how can anyone be sure that the robber was 6 feet tall when the initial description was ‘barely 5 feet’”
    - ii. You may NOT additionally argue that “in fact, the robber was ‘barely 5 feet’” unless the inconsistent statement is admissible separately under the hearsay rules. **Don’t stress over this – we’ll learn when you may get double use of the PIS. For now, get the rationale, the 3 stage process, and what we always may do with it.**

The rest is practice *and visualization*. Think about what was going on at the time of the PIS being made. Then paint the picture.

Examples: **Note – don't memorize these, as every situation will be different. But we can visualize that something like this was going on.**

1. Police interview
  - a. You stayed at the accident/crime scene
  - b. To help
  - c. And to give police the information they needed
  - d. So they would know what happened
  - e. So they could find who was responsible
  - f. And you did your best
2. Diary entry
  - a. You keep a diary
  - b. To record memories
  - c. Like "who was there" or "what people did"
  - d. And you would write in your diary the day of those events
  - e. Or the day after
3. Text message
  - a. After the accident you texted your mom
  - b. Because they knew you had been on that bus
  - c. They might be worried
  - d. You wanted to let them know you were OK
  - e. And what happened
  - f. And you sent that text at 5:40, an hour after the accident
  - g. Once you were safe
  - h. Once you could focus on your mom
4. Deposition
  - a. 6 months after the [name of event] you were asked to come to a deposition
  - b. That's a process where you were asked questions
  - c. Under oath
  - d. With a court reporter typing down your answers
  - e. And you were allowed to read it over afterwards to make sure it was accurate
  - f. And to make changes if there were any errors
  - g. And you were told – if you don't understand a question, please say so

The rest is practice. Please try this more than once with simple scenarios.