

It's Not as Devastating
as You Might Think

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**An original
study challenges
conventional wisdom
regarding testimony.**

Impeaching with Prior Inconsistent Statements

We've all been there. You are preparing for the trial cross-examination of the other side's key witness or perhaps even the opposing party him- or herself. You previously have deposed the witness. Your trial outline

is based on and keyed to the deposition transcript. Each question in your outline contains a reference to the corresponding page of the transcript where the witness was asked the same question. If he or she tries to wriggle free of prior testimony, you are prepared to confront the witness with his or her prior inconsistent statement.

When the big day arrives, you ask the witness to identify the color of the car that ran the red light and he or she says "black." Adrenaline courses through your veins as you retrieve the page of the deposition transcript where the witness was asked the same question and said "white." When you confront the witness with the inconsistency, he or she either has no explanation at all or stumbles all over him or herself trying to concoct one.

As your cross-examination continues, you catch the witness in additional inconsistencies. Some concern relatively trivial matters, but others involve big points in the case. By the end of the day, you are convinced that you have thoroughly destroyed the witness's credibility.

Supremely satisfied with what you have accomplished, you return to the office and take account of the day's developments on your trial strategy. You conclude that your attack on the opposing party or his or her key witness was so effective that you do not need to do as much as you planned to do when the case began. You slash your remaining cross-examination outlines. You strike names from your own witness list. You might even decide not to present your own case after your opponent rests.

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You convince yourself that this show of bravado will ingratiate you with the jurors because it will enable them to get back to their lives sooner.

That's how lawyers—including one of the authors of this article—traditionally have looked upon impeachment by prior inconsistent statement. This article addresses whether the self-satisfaction that lawyers feel when they catch witnesses in inconsistencies is warranted. The answer may surprise you.

This project had its genesis in post-verdict juror interviews that the authors have conducted. In many cases, trial counsel established that his or her opponent and/or opponent's key witnesses testified inconsistently on key points. Counsel was convinced that the cross-examination not only carried the day on the points as to which the witness had testified inconsistently, but also on that witness's entire testimony and, indeed, on the entire case. Impeachment by prior inconsistent statement, counsel concluded, showed that neither the witness nor the party that had proffered him or her could be trusted and that the opposing side's case was a "pack of lies."

What we found in the juror debriefings, however, was that counsel over-valued the impact of his or her cross-examination, sometimes massively so. Jurors, by and large, are much more tolerant and forgiving of inconsistencies than lawyers are. They believe that witnesses are generally truthful. When witnesses testify inconsistently, jurors are more likely to conclude that the witness made an honest mistake than they are to believe that the witness was lying.

Although our post-trial interviews suggested that impeachment with prior inconsistent statements was over-valued, we recognized that our experience was limited. We searched the literature to determine if others had examined this issue, but we were unable to find anything on point. We then considered whether there was some way to test our hypothesis experimentally. That inquiry led to the study that is the subject of this article.

While we neither believe nor claim that this study definitively answers the question presented, we think that it is a useful first step in exploring an issue that has gone largely unexamined. Lawyers are making strategic decisions on the basis of

an assumption that may well not be accurate. Consistency of the data with our own experiences increases our confidence in the study's reliability.

Methodology

The primary goal of this research project was to collect and analyze mock jurors' opinions and attitudes about inconsistencies in witness testimony. Data were collected from a total of 810 respondents from a variety of states around the country, including California, Florida, Georgia, Illinois, Iowa, Michigan, Minnesota, Nevada, New Jersey, New York, Pennsylvania, Tennessee and Texas. Mock jurors were given a six-item pencil-and-paper questionnaire. Analyses of juror responses were conducted to determine jurors' overall opinions and whether demographic characteristics (e.g., gender, race, age, education level, marital status, employment status or income level) were associated with responses to the proposed questions. This article discusses the general trends and statistically significant findings. The complete questionnaire is provided on page 20.

Discussion and Analysis

Recognizing the complexity of the issue, we decided to take a multi-tiered approach to the problem. *First*, we seek to establish a baseline by inquiring about juror expectations as to witness truthfulness. Do jurors come into the courtroom expecting that witnesses will tell the truth or do they believe that witnesses will say whatever they believe is in their best interest?

Second, we explore how jurors react when they are confronted with inconsistencies in a witness's testimony. Do they believe that the witness is lying or do they believe that he or she simply made an honest mistake?

Third, we examine how the jurors process inconsistencies. Do they believe what the witness said earlier? Do they believe what he or she is saying on the stand? Or, do they disbelieve both of the witness's statements?

Fourth, we explore the jurors' receptivity to proffered excuses for the inconsistency. There are, of course, many reasons for a witness to testify inconsistently other than a desire to improve the record. Here, we focus on what are probably the most common "innocent" explanations—forgetful-

ness occasioned by the passage of time and the stress of being in the courtroom.

Finally, we probe the impact of the inconsistency. Does the inconsistency cause the jurors to question only the point on which the witness has testified inconsistently or does it have a spillover effect on the rest of his or her testimony?

We looked at juror responses to the ques-

Jurors are more likely to conclude that the witness made an honest mistake than they are to believe that the witness was lying.

tions presented, not only from the test population as a whole, but also from various subgroups divided by gender, age, marital status, race, employment status and income. As discussed below, there were demographic differences in the responses to particular questions, although these differences were not consistent across questions.

Juror Expectations of Witness Truthfulness

Our study suggests that jurors go into a trial with a generally positive attitude about witnesses. The vast majority of them—72 percent—believe that witnesses will be as honest as possible while testifying under oath in a civil trial, as opposed to saying whatever it takes to keep themselves out of trouble. *See* Table 1. Their expectation is that witnesses take seriously their oath to tell the truth.

There are, however, significant demographic differences in juror expectations of witness truthfulness. For example, younger jurors are much more likely than older jurors to believe that a witness will say anything to keep him- or herself out of trouble. *See* Table 2. Indeed, more than half of the jurors in their early 20s hold that view (*Id.*). These data stand in sharp contrast to the data from respondents as a whole, nearly three-quarters of whom believe that witnesses will try to be honest. Similarly, single jurors are almost twice as likely as

Table 1: “In general, while testifying under oath in a civil trial, most people:”

| | | Will say anything to keep themselves out of trouble | Will be as honest as possible |
|---------------|-----------|---|-------------------------------|
| Overall Total | (n = 806) | 28% | 72% |

Table 2: “In general, while testifying under oath in a civil trial, most people:”

| Age | (n = 802) | Will say anything to keep themselves out of trouble | Will be as honest as possible |
|--------------|-----------|---|-------------------------------|
| 20–24 | (n = 81) | 54% | 46% |
| 25–34 | (n = 143) | 43% | 57% |
| 35–44 | (n = 190) | 32% | 68% |
| 45–54 | (n = 183) | 17% | 83% |
| 55–64 | (n = 116) | 11% | 89% |
| 65 and older | (n = 89) | 12% | 88% |

Crosstab analysis significant at $p < .001$

Table 3: “In general, while testifying under oath in a civil trial, most people:”

| Marital Status | (n = 806) | Will say anything to keep themselves out of trouble | Will be as honest as possible |
|--------------------------|-----------|---|-------------------------------|
| Single/Never Married | (n = 287) | 40% | 60% |
| Married/Domestic Partner | (n = 358) | 21% | 79% |
| Divorced/Separated | (n = 136) | 21% | 79% |
| Widowed | (n = 25) | 28% | 80% |

Crosstab analysis significant at $p < .001$

Table 4: “In general, while testifying under oath in a civil trial, most people:”

| Race | (n = 804) | Will say anything to keep themselves out of trouble | Will be as honest as possible |
|------------------------|-----------|---|-------------------------------|
| Caucasian/White | (n = 461) | 22% | 78% |
| African-American/Black | (n = 164) | 32% | 68% |
| Hispanic | (n = 109) | 42% | 58% |
| Asian/Pacific Islander | (n = 40) | 30% | 70% |
| Other | (n = 10) | 40% | 60% |
| Multiracial | (n = 20) | 45% | 55% |

Crosstab analysis significant at $p < .001$

Table 5: “In general, while testifying under oath in a civil trial, most people:”

| Income | (n = 798) | Will say anything to keep themselves out of trouble | Will be as honest as possible |
|--------------------|-----------|---|-------------------------------|
| Under \$20,000 | (n = 112) | 36% | 64% |
| \$20,000–\$34,999 | (n = 138) | 36% | 64% |
| \$35,000–\$49,999 | (n = 121) | 28% | 72% |
| \$50,000–\$64,999 | (n = 112) | 22% | 78% |
| \$65,000–\$84,999 | (n = 83) | 19% | 81% |
| \$85,000–\$99,999 | (n = 42) | 24% | 76% |
| \$100,000 and over | (n = 59) | 23% | 77% |

Crosstab analysis significant at $p < .05$

married or divorced/separated jurors to believe that a witness will say anything he or she needs to say to stay out of trouble. See Table 3. People of color are substantially more skeptical of witnesses than white jurors, see Table 4, as are jurors in the lowest income brackets. See Table 5.

In sum, most jurors begin hearing testimony with the assumption that the witness will try to be honest. That assumption is, however, less prevalent among certain subgroups, and in one subgroup (persons age 20–24), the predominant assumption is just the opposite.

Reaction to Inconsistencies

While a witness gets the benefit of a doubt when he or she begins testifying, the situation changes quickly if he or she is confronted with an inconsistency in her testimony. A majority—60 percent—of respondents in our study indicated that, if a witness’s statements on the stand do not match previously made statements, they are more inclined to believe that he or she is lying than to believe that he or she is making an honest mistake. See Table 6.

Differences in this view did not emerge in terms of gender, level of education, income level or race. There were, however, demographic differences based on age, employment status and marital status. Specifically, younger jurors (*i.e.*, 35 and under) were substantially more likely to think that a witness was purposely lying on the stand, while older jurors (*i.e.*, 55 and older) were more inclined to believe that the witness was making an honest mistake. See Table 7. Single jurors were more skeptical than any other marital status category, see Table 8, while part time workers were more likely to believe that a witness was purposely lying on the stand than a juror who was working full-time or a juror who was unemployed. See Table 9.

We were curious about why jurors who came to the proceedings believing that witnesses are generally inclined to tell the truth were so quick to conclude that those witnesses were lying when their testimony was shown to be inconsistent with prior statements. The study does not address that question. Our suspicion, however, is those jurors afford witnesses something akin to a “rebuttable presumption” of honesty when they begin testifying. If oppos-

ing counsel demonstrates that the witness's in-court testimony clashes with prior testimony, the presumption is deemed rebutted. Certain subgroups of the population— younger jurors, single jurors, and jurors who are working part time—are particularly likely to find a breach of faith when the witness is impeached with a prior inconsistent statement.

How Jurors Process Inconsistencies

Perhaps the most interesting findings were in the responses to the question about how jurors process a showing that a witness has testified inconsistently. Given a range of possible answers, only 20 percent of the jurors said that an inconsistency would lead them to disregard *everything* the witness said. See Table 10. The remaining jurors focused on the particular point as to which the witness had testified inconsistently.

Very few jurors indicated that, without knowing more, they would believe either what the witness said previously or what the witness was saying on the stand. Instead, the jurors overwhelmingly indicated that, if a witness's testimony on the stand conflicted with prior statements, they would focus on the witness's *behavior* instead of immediately jumping to conclusions about the witness's credibility. Stated otherwise, jurors will look for behavioral clues—*e.g.*, the witness's body language—in order to decide whether to believe him or her.

The study uncovered no demographic differences in juror processing of a showing that the witness had testified inconsistently with prior statements. In other words, jurors of all demographic categories were similarly prone to focus on behavioral cues to determine whether or not to believe a witness who made an inconsistent statement.

Receptivity to Excuses

While a lawyer who has impeached an opposing witness with a prior inconsistent statement will argue that the inconsistency proves the witness is a liar, there are many other possible explanations. Rightly or wrongly, some lawyers do not prepare their witnesses as thoroughly for a deposition as they do for trial. Without having spent time checking his or her calendar and reviewing key documents, a witness's recollection of what transpired might well be

fuzzy. Sometimes the witness gives his or her best understanding at her deposition, only to learn later that he or she did not have all of the facts or got some of the facts wrong. It is also possible that, when the witness was deposed, he or she did not understand the question or was just not thinking clearly that day.

Exploring all possible alternative explanations for inconsistent statements was beyond the scope of this study. We did, however, focus on a couple of possible excuses: (1) the stress occasioned by testifying in a courtroom before a judge and jury and possibly an audience; and (2) the natural human tendency to forget, particularly as the time between the event and testimony lengthens.

Although jurors who were shown that a witness had testified inconsistently were initially inclined to believe that he or she was purposely lying on the stand, they tended to cut the witness a little slack when it was suggested that the inconsistency might be the product of the stressful situation that a courtroom creates. Over half of the jurors agreed that the stress of testifying likely causes witnesses to make honest mistakes. See Table 11. Moreover, jurors who believe that stress could lead to honest mistakes in testimony were much more likely than other jurors to focus on the witness's behavior on the stand in determining whether or not to believe him or her. See Table 12. Only a quarter of the respondents in our study rejected courtroom stress as an excuse for inconsistent testimony.

People who were divorced or separated were more likely than people in other categories to have clear opinions on whether stress is an excuse for inconsistent statements. They were above average *both* in agreeing that the stress could be an excuse *and* in disagreeing with that same proposition. See Table 13.

The jurors were slightly less receptive to the suggestion that an inconsistency was the product of forgetfulness. Nearly half of the jurors disagreed with the statement that events resulting in litigation are so remarkable that witnesses are not likely to forget them no matter how much time had passed—*i.e.*, they were willing to accept forgetfulness as an excuse. See Table 14. A little more than a third of the survey population was less under-

standing. *Id.* It should be noted, however, that most jurors were tempered in their assessment of forgetfulness as an excuse. Relatively few of them *strongly* agreed or *strongly* disagreed with the proposition presented to them; most responses were in the mid-range: disagree, completely uncertain or agree. *Id.* There were not significant demographic differences in juror responses to this question.

It goes without saying that the jury's assessment of a witness's claim that he or she forgot details would turn, at least in part, on the nature of the lawsuit and the witness's role in the underlying facts. Assessing those variables was beyond the scope of this study.

Overall Impact of Inconsistency

The cross-examining attorney and opposing counsel will be interested in knowing the extent of the damage from an impeachment with prior inconsistent statements. More specifically, the issue presented is whether the inconsistency tarnishes all of the witness's testimony or is more circumscribed.

Opinions in our study varied significantly on this issue. For about a third of the jurors, the inconsistency caused them to conclude that *none* of the witness's testimony could be believed. See Table 15. A larger percentage of the jurors, however, did not believe that an inconsistency completely destroyed the witness's credibility. There was, moreover, a substantial group of jurors who were undecided. They, understandably, wanted to reserve judgment until they knew more about the situation.

Again, there were some demographic differences in the responses. Jurors who were employed—either full-time or part-time—were more lenient in evaluating an inconsistency. In contrast, those who were unemployed tended to be less forgiving. See Table 16.

The lesson for lawyers here is that they should not be so quick to assume that catching a witness in an inconsistency destroys his or her credibility. Jurors will look at how the witness comports him- or herself on the stand in determining how much weight to ascribe to the inconsistency. Chances are better than not that, even if the inconsistency causes the witness to lose that point, he or she can still carry the day on other issues.

Caveats and Qualifications

While we believe that our study provides a valuable window into understanding what

are likely attitudes toward witness testimony in courtroom settings, we also advise caution in applying the results of this study.

Table 6: “If a witness in a trial says something in court that is different from what was said in earlier statements that witness is more likely:”

| | | Purposely lying on the stand | Making an honest mistake | Other |
|---------------|-----------|------------------------------|--------------------------|-------|
| Overall Total | (n = 802) | 60% | 40% | <1% |

Table 7: “If a witness in a trial says something in court that is different from what was said in earlier statements that witness is more likely:”

| Age | (n = 798) | Purposely lying on the stand | Making an honest mistake | Other |
|--------------|-----------|------------------------------|--------------------------|-------|
| 20–24 | (n = 83) | 74% | 26% | 0% |
| 25–34 | (n = 141) | 71% | 29% | 0% |
| 35–44 | (n = 188) | 61% | 39% | 0% |
| 45–54 | (n = 182) | 60% | 40% | <1% |
| 55–64 | (n = 116) | 44% | 56% | 0% |
| 65 and older | (n = 88) | 46% | 53% | 1% |

Crosstab analysis significant at p < .05

Table 8: “If a witness in a trial says something in court that is different from what was said in earlier statements that witness is more likely:”

| Marital Status | (n = 802) | Purposely lying on the stand | Making an honest mistake | Other |
|--------------------------|-----------|------------------------------|--------------------------|-------|
| Single/Never Married | (n = 286) | 68% | 32% | 0% |
| Married/Domestic Partner | (n = 355) | 54% | 45% | 1% |
| Divorced/Separated | (n = 136) | 60% | 40% | 0% |
| Widowed | (n = 25) | 44% | 56% | 0% |

Crosstab analysis significant at p < .05

Table 9: “If a witness in a trial says something in court that is different from what was said in earlier statements that witness is more likely:”

| Employment | (n = 797) | Purposely lying on the stand | Making an honest mistake | Other |
|------------|-----------|------------------------------|--------------------------|-------|
| Full Time | (n = 418) | 59% | 41% | 0% |
| Part Time | (n = 165) | 70% | 30% | 1% |
| No | (n = 214) | 53% | 47% | 0% |

Crosstab analysis significant at p < .05

Table 10: “If a witness’s testimony on the stand conflicts with his/her previous statement I would most likely:”

| | Believe what the witness said in a previous statement | Believe what the witness is saying on the stand | Focus on how the witness behaves... | Disregard everything that witness says |
|-------------------------|---|---|-------------------------------------|--|
| Overall Total (n = 808) | 10% | 6% | 64% | 20% |

Set forth below is our analysis of some of this study’s principal limitations.

Abstract vs. Real World

Some—perhaps most—lawyers who read this article will dismiss our conclusions out of hand because they were not derived in “real world” conditions. It is one thing, they would say, to ask a juror, without providing any context, how he or she would react to a showing that a witness had testified inconsistently. It is quite another matter, they would argue, to gauge how jurors react as they sit in a courtroom watching cross-examining counsel force a witness to eat his or her own words.

We cannot completely discount this criticism. Our study was conducted in a sterile environment, without contextual cues that may impact juror interpretation of a witness’s testimony. That environment was quite different from a courtroom in which the jurors watch the witness sweating profusely and squirming in his or her chair as he or she seeks to reconcile diametrically opposed accounts of what transpired. At the same time, we believe that, on balance, our study understates, rather than overstates, jurors’ tendency to discount impeachment by prior inconsistent statement.

Impeachment is, at some level, like an elaborate Kabuki dance. The procedure is governed by arcane rules, not consistently applied from courtroom to courtroom. Some lawyers understand the rules; others don’t. If a lawyer does not follow the right protocol in impeaching a witness, a judge will force him or her to start over and the impact of the impeachment will be diminished. Even if counsel does everything the right way, opposing counsel will throw obstacles in the witness’s path. Shrewd lawyers will claim that they “cannot find” the earlier transcript or the page and line numbers from which cross-examining counsel is quoting. They will suggest that the attempted impeachment is improper because there really isn’t an inconsistency or that the inconsistency was resolved at another place in the deposition transcript. Even if the judge ultimately rejects all of those challenges, the jurors’ heads are spinning and they are not sure what to make of the attempted impeachment.

There is, moreover, the problem of how

clear the inconsistency is. In the hypothetical posited at the beginning of this article, there was no doubt that the witness had testified inconsistently—she said “white” at the time of her deposition and “black” at trial. As often as not, however, the inconsistencies are not that clear. For example, in a case in which a smoker sues to recover for developing lung cancer, he or she might testify during deposition that he or she smoked “about a pack or so” a day, but then state at trial that he or she was smoking “one and a half to two packs per day.” If you bring out those differences at trial, will the jury believe that you are showing that the witness testified inconsistently or will the jury believe that you are just nit-picking?

In short, while there are factors that suggest the jurors in our study may have been more inclined to discount impeachment with prior inconsistent statements than real-world jurors, our study also eliminates problems that impeaching counsel will encounter at trial. Based on our findings, we maintain that these factors tend to cancel each other and render the study a reliable predictor of juror responses to prior inconsistent statements.

Frequency, Importance, and Witness Characteristics

Jurors in our study were not told *how many times* the witness had testified inconsistently. A fair reading of the questions presented was that the witness had testified inconsistently on only a single point. Although we have not studied the issue, our experience is that witnesses who testify inconsistently generally do so on multiple points. Our expectation is that a *pattern* of inconsistent testimony would have more of an impact on juror assessment of witness credibility than an isolated inconsistency.

Similarly, the *importance* of the point on which the juror testified inconsistently matters. If the inconsistency goes to a key issue in the case, the jurors are more likely to punish the witness for the discrepancy. If, on the other hand, the witness testifies inconsistently regarding peripheral details, the impact is likely to be less pronounced.

Our study did not ask the participants to make any assumptions about either the frequency or the importance of the inconsistencies. We believe that lawyers reading this article should assume that jurors will

be harsher with witnesses who are inconsistent repeatedly about key points and more forgiving with witnesses who are inconsistent only about collateral facts and only in a limited number of instances.

Differing expectations of witnesses, depending on the witness’s role in the litigation, his or her occupation and perceived power are also an important factor to consider. Will jurors be more likely to “forgive” an inconsistent statement made by an individual plaintiff with whom they may identify as opposed to, say, an oil tycoon? Those considerations are beyond the scope of this preliminary study.

Impact of Videotaping

There is another recent development for which our study did not account. That is the increased use of videotaping for

depositions. In the old days, videotaping was employed—if at all—only for a witness who would not appear live at trial. More recently, however, videotaping has become common practice even for what some practitioners refer to as “discovery” depositions.

Our study did not consider and we know of no other data that address the relative “potency” of impeachment by videotaped deposition versus impeachment by written transcript. Our sense, however, is that impeachment by videotape is likely to pack more of a wallop than impeachment by written transcript. It is one thing for jurors to watch as a witness is confronted by a reading from a deposition transcript. At least some of the jurors will not even understand what the earlier transcript is. It is quite another matter for the jurors to see,

Table 11: “The stress of giving testimony in a legal proceeding likely causes witnesses to make honest mistakes in their testimony.”

| | | Strongly Disagree | Disagree | Completely Uncertain | Agree | Strongly Agree |
|---------------|-----------|-------------------|----------|----------------------|-------|----------------|
| Overall Total | (n = 810) | 7% | 18% | 16% | 53% | 6% |

Table 12: The first column represents the results of the survey question: “The stress of giving testimony in a legal proceeding likely causes witnesses to make honest mistakes in their testimony.” The next four columns show the results of the survey question: “If a witness’s testimony on the stand conflicts with his/her previous statement I would most likely...,” with the results being broken down based on the respondents’ answers to the first question.

| The stress of giving testimony... | Believe what the witness said in a previous statement | Believe what the witness is saying on the stand | Focus on how the witness behaves... | Disregard everything that witness says |
|-----------------------------------|---|---|-------------------------------------|--|
| Disagree (n = 80) | 14% | 9% | 49% | 28% |
| Completely Uncertain (n = 80) | 10% | 6% | 58% | 26% |
| Agree (n = 162) | 5% | 5% | 72% | 15% |

Crosstab analysis significant at $p < .001$

Table 13: “The stress of giving testimony in a legal proceeding likely causes witnesses to make honest mistakes in their testimony.”

| Marital Status | (n = 810) | Disagree | Uncertain | Agree |
|--------------------------|-----------|----------|-----------|-------|
| Single/Never Married | (n = 289) | 23% | 21% | 56% |
| Married/Domestic Partner | (n = 360) | 25% | 16% | 59% |
| Divorced/Separated | (n = 136) | 32% | 7% | 62% |
| Widowed | (n = 25) | 25% | 16% | 59% |

Crosstab analysis significant at $p < .05$; Due to rounding, some percentages add up to more than 100%.

Exhibit A: Questionnaire Administered to Mock Jurors

Please answer the following questions considering witness testimony in a civil trial (when one party sues another party seeking money in damages), and *not* a criminal trial (when the government brings charges against an individual for alleged criminal misconduct).

1. If a witness in a trial says something in court that is different from what was said in earlier statements that witness is more likely:
 1. Purposely lying on the stand
 2. Making an honest mistake
2. If a witness's testimony on the stand conflicts with his/her previous statement I would most likely:
 1. Believe what the witness said in the previous statement
 2. Believe what the witness is saying on the stand
 3. Focus on how the witness behaves (body language, etc.) to determine whether or not he is telling the truth on the stand
 4. Disregard everything that witness has said
3. The stress of giving testimony in a legal proceeding likely causes witnesses to make honest mistakes in their testimony.
 1. Strongly Disagree
 2. Somewhat Disagree
 3. Completely Uncertain
 4. Somewhat Agree
 5. Strongly Agree
4. Events that lead to a lawsuit are so remarkable I have a hard time believing that witnesses would forget them, no matter how much time had passed.
 1. Strongly Disagree
 2. Somewhat Disagree
 3. Completely Uncertain
 4. Somewhat Agree
 5. Strongly Agree
5. In general, while testifying under oath in a civil trial, most people:
 1. Will say anything to keep themselves out of trouble
 2. Will be as honest as possible
6. If a witness says something on the stand that is inconsistent with his/her previous statements, none of that witness' testimony can be believed, regardless of the circumstances.
 1. Strongly Disagree
 2. Somewhat Disagree
 3. Completely Uncertain
 4. Somewhat Agree
 5. Strongly Agree

with their own eyes, the witness answering the same question differently.

Demographic Profile

It occurs to us that there might be circumstances in which counsel would want to take account of this study in picking a jury. Most of the time, we suspect, inconsistencies are unanticipated. Neither the lawyer offering the witness, nor opposing counsel expect that the witness will testify differently than he or she did at her deposition. In some cases, however, one or both sides may know in advance that a witness will

be changing his or her story. When that occurs, counsel may want to consider the data that we have collected as part of the jury selection process.

While we would like to be able to say that counsel should look for jurors with certain demographic characteristics, the data do not permit us to do so. There are, to be sure, demographic differences in the responses to particular questions. Those differences are not, however, consistent across questions. Thus, we cannot advise a lawyer who knows that his or her witness will be contradicting earlier deposition tes-

timony to pick jurors of a certain gender, age, race, marital status, employment status or income level.

While the data do not permit us to make firm recommendations on which jurors are best and worst in processing prior inconsistent statements, there are a few trends in the data worth noting. Generally speaking, a lawyer who believes that he or she will be able to impeach the other side's witness with prior inconsistent statements should be looking for young, single or divorced, low-earning people of color. In contrast, lawyers stuck with a witness likely to be impeached should be seeking jurors who are older, married or widowed, with higher incomes. (We note these trends, however, with great trepidation. Clearly, *voir dire* questions exploring the attitudes addressed in our study will be more reliable predictors of juror orientation toward prior inconsistent statements than any demographic characteristic.)

We considered why certain subgroups are more likely than others to discredit a witness who has testified inconsistently. It appears that jurors who will take a witness to task for an inconsistency are typically people who, in the larger picture, have less stability and power in their lives (*i.e.*, young, unmarried, un- or underemployed, minority and low income people). Because of their lot in life, these jurors tend to hold a skeptical view, especially toward people they perceive as having the authority or power they lack. Looking for malfeasance, these jurors may find it by interpreting inconsistent statements as lying.

Conclusion

We expect that our conclusions will encounter resistance in the legal community. This expectation is particularly so among lawyers who are convinced that impeachment with prior inconsistent statement is a powerful—and, perhaps, the most powerful—weapon in their arsenal. To them, any suggestion that cross-examinations are not as powerful as they believe cuts to the very core of their being as attorneys.

We do not contend that our data show that impeachment by prior inconsistent statement doesn't matter. Clearly, it does. Our post-verdict interviewing experiences suggest, however, that inconsistencies are not as debilitating as lawyers generally as-

sume, and the data generated in this study are consistent with those observations.

The data also show that jurors use other factors to interpret inconsistencies. Believing at baseline that most people will try to be as honest as possible, jurors confronted with inconsistent statements tend to observe the witness's performance on the stand. Does the witness seem confident or are there communicative or behavioral cues that shed light on whether the witness is lying? When these peripheral cues connote honesty rather than deceit, jurors may be willing to reconsider the witness's testimony and determine other reasons for the inconsistency (*i.e.*, the stress of the legal proceeding).


As noted at the outset, there have been no reported efforts to study this issue—*i.e.*, to determine whether the prevailing assumption about the impact of impeachment by prior inconsistent statements is valid. Our hope is that this article—and the study on which it is based—will begin a dialogue on that question. 

Table 14: “Events that lead to a lawsuit are so remarkable I have a hard time believing that witnesses would forget them, no matter how much time had passed.”

| | | Strongly Disagree | Disagree | Completely Uncertain | Agree | Strongly Agree |
|---------------|-----------|-------------------|----------|----------------------|-------|----------------|
| Overall Total | (n = 809) | 10% | 36% | 17% | 29% | 8% |

Table 15: “If a witness says something on the stand that is inconsistent with his or her previous statements, none of that witness's testimony can be believed, regardless of the circumstances.”

| | | Strongly Disagree | Disagree | Completely Uncertain | Agree | Strongly Agree |
|---------------|-----------|-------------------|----------|----------------------|-------|----------------|
| Overall Total | (n = 807) | 10% | 36% | 21% | 27% | 6% |

Table 16: “If a witness says something on the stand that is inconsistent with his or her previous statements, none of that witness's testimony can be believed, regardless of the circumstances.”

| Employment | (n = 802) | Disagree | Uncertain | Agree |
|------------|-----------|----------|-----------|-------|
| Full Time | (n = 418) | 48% | 22% | 30% |
| Part Time | (n = 168) | 53% | 14% | 33% |
| No | (n = 216) | 40% | 24% | 37% |

Crosstab analysis significant at $p < .05$