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Untangling the Web of Prior Witness Statements

Tim Gresback

Prior statements of witnesses are often admissible, but for different reasons and under different conditions. I forget the distinctions in the heat of trial, so I have made the attached chart for quick reference.

Rule 613 impeachment, however, only proves the witness is not worthy of belief; it cannot be offered for the truth of the matter; the inconsistency cannot be offered as substantive evidence.

Impeachment: Not for truth

When a witness says something at trial inconsistent with an out-of-court statement, the witness can be impeached under Rule 613. Extrinsic evidence can be offered to prove the inconsistency. In other words, if the witness denies having told a police officer after a crash that the light was red, the lawyer can call the officer under Rule 613 and prove the inconsistency.

Rule 613 impeachment, however, only proves the witness is not worthy of belief; it cannot be offered for the truth of the matter; the inconsistency cannot be offered as substantive evidence. If a party needs to establish that the light was red to prove negligence — and the inconsistent statement is the only evidence of the light's color — the prima facie case of the cause of action is not established and dismissal will follow as a matter of law.

Inconsistent prior testimony: Non-hearsay

Sometimes a witness provides testimony before trial that was not subject to cross-examination. Under Rule 801(d)(1)(A), the testimony can be admitted, provided the witness is available now for trial and subject to cross-examination. Although the prior testimony can be substantively admitted to prove the truth of matters asserted — and the prior testimony sounds like classic hearsay — the rules quirkily define this type of prior statement testimony as "non-hearsay." A prime example of an 801(d)(1)(A) prior statement is grand jury testimony.

Former testimony: Hearsay exception

A third example of a witness' prior statement is former testimony under Rule 804(b)(1). As a hearsay exception, former testimony can be offered substantively for the truth of matters asserted.

Former testimony is only admissible, however, if the witness is unavailable: absent from the jurisdiction; deceased; has no memory of events; or asserts a privilege. In addition, the witness must have been subject to cross during the prior proceeding. Good examples of former testimony admissible under 804(b)(1) include a preliminary hearing or deposition.

Recorded recollection: Hearsay exception

Recorded recollection is a fourth common avenue that allows the admission of a witness' prior statement. Under Rule 803(5) a statement can be offered substantively for truth as a hearsay exception. Rule 803(5) also has some proscriptions: the witness must testify that although the details were once known to the witness, they cannot now be recalled. In addition, the witness must vouch for the accuracy of the earlier statement — even though memory of the events is now gone.

When 803(5) recorded recollection is admitted, the statement is read to the jury and can only be offered as an exhibit by an adverse party. One example of recorded recollection is a written witness statement provided to police after a stabbing or car crash.

Refreshing memory: Not admissible

A final evidentiary rule sometimes comes into play when evaluating the use of prior witness statements. Under Rule 612 a witness's memory can be refreshed by a writing, including one the witness wrote previously.

However, the writing is not admissible simply because it refreshes the memory of the witness. Instead, the in-court examination of the writing must cause the witness to think: "Now I remember." The witness then testifies from the refreshed memory, not the written statement. The written statement does not become admissible under 612. Also, the adverse party has a right to see the writing and cross-examine the witness about it.

I hope the chart on page 47 will assist you in keeping prior statements straight.

Endnotes

1. I do not discuss all hearsay exceptions or rules relating to witness statements. For a scholarly and much more exhaustive treatment of witness statements, *see* D. Craig Lewis, *Idaho Trial Handbook* (2d ed. 2005) (2012-2013 Supp.).

2. The Federal and Idaho Rules of Evidence are referred to interchangeably, as they are essentially identical regarding witness statements. The Federal Rules of Evidence (FRE) were first enacted by Congress in 1975. The Idaho Rules of Evidence (IRE), based substantially on the FRE, were enacted by the Idaho Supreme Court in 1985. The look of the FRE changed in 2011, when the rules were "re-styled." The numerous changes were intended to apply uniform conventions of style and usage throughout the FRE; the revisions were not intended to make any substantive changes to evidence principles. Idaho has not yet made these stylistic changes.

3. Rule 613 and 608 are distinct impeachment mechanisms. A 613 impeachment — through a prior inconsistent statement — says: "You are lying today." A 608 character impeachment of a witness' credibility — through opinion or reputation testimony — says: "You are always a liar." Under 613 extrinsic evidence can be used to prove the inconsistent statement; under 608 extrinsic evidence cannot be used to establish a witness' character for truthfulness — it can only be proven by opinion or reputation testimony.

4. A party's own statement, only when offered by an opponent, is defined as non-hearsay under 801(d)(1)(2).

5. Similarly, a witness can be rehabilitated with a prior consistent statement at trial with prior testimony under 801(d)(1)(B).

6. Idaho, however, has a specific statute regarding the use of preliminary hearing testimony. *See* I.C. § 9-336.

7. Other hearsay exceptions may also apply. For example, if the declarant is available under 803: present sense impression; excited utterance; existing mental and emotional condition; and statements made for medical diagnosis. If the declarant is unavailable under 804, a dying declaration or statement against interest can also be admissible.

About the Author

Tim Gresback *is a Moscow attorney serves on the Idaho Evidence Rules Committee. He has taught Trial Advocacy and Evidence at the University of Idaho College of Law. Tim is an ITLA Certified Criminal and Civil Trial Specialist. He is also an Idaho State Bar Commissioner.*

Untangling the Web of

PRIOR STATEMENTS

613 INCONSISTENT PRIOR STATEMENT IMPEACHMENT	801(d)(1)(A) DECLARANT-WITNESS' PRIOR INCONSISTENT STATEMENT	804(b)(1) FORMER TESTIMONY	803(5) RECORDED RECOLLECTION	612 REFRESHED MEMORY
• Hearsay? No, not offered for truth • Not substantive evidence: impeachment only; not evidence of an essential element • Declarant must have opportunity now to explain prior statement • Statement need not be under oath • "You're lying" 613 impeachment, not 608 "you're a liar" character evidence. Thus extrinsic evidence OK • Adverse lawyer need not show prior statement to witness, but most provide to lawyer, if asked • Example: oral statement to police that ends up in officer's narrative	• Hearsay? No, defined as non-hearsay • Admitted for truth: substantive • Declarant must testify now and is therefore "available" for cross-examination • Prior statement must have been given under oath, cross not necessary • Example: grand jury testimony	• Hearsay? Yes, but falls within this exception • Admitted for truth: substantive • Witness must be unavailable (absent/privilege/no memory/dead) • Prior statement under oath subject to prior cross • Examples: testimony from preliminary hearing or deposition	• Hearsay? Yes, but falls within this exception • Admitted for truth: substantive • Witness once knew details well, but now at trial cannot recall • Statement made when memory fresh • At trial, witness must vouch for statement's accuracy • If admitted, read to jury but only an exhibit for adverse party • Example: written witness account provided to police after stabbing or crash	• Hearsay? No, not admissible as evidence • Witness must not have a present memory of the subject • A writing, shown to the witness on the stand, must trigger present memory • The prior statement, once read on the stand, causes the witness to think: "Now I remember." • The witness then testifies from the refreshed memory; the writing is not admissible or read into evidence • The adverse party can see the writing and cross-examine the witness about it