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Prior Inconsistent Statements

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by H. Patrick Furman

The testimony of witnesses usually makes or breaks a case. Impeaching a witness with a prior inconsistent statement can be an effective way to impeach the witness' credibility and turn a jury around. However, the use of a prior inconsistent statement has certain dangers (including that of rehabilitation of the witness with prior consistent statements) which must be evaluated before this type of impeachment is conducted. This article attempts to summarize the state court rules concerning the use of prior inconsistent statements.[1]

Methods of Use

The use of prior inconsistent statements is governed by one statute and two evidentiary rules. The statute, CRS § 16-10-201, enacted in 1972, establishes a method for admitting prior inconsistent statements as substantive evidence. C.R.E. 613 governs the use of prior inconsistent statements for impeachment purposes and C.R.E. 801(d)(1) eliminates, in certain situations, the possible hearsay objection to the use of either consistent or inconsistent prior statements. The method for admitting a prior inconsistent statement turns on the purpose for which the prior statement is being admitted.[2]

Impeachment Use

C.R.E. 613, adopted in 1980, retains the traditional common law foundational requirements.[3] To admit a statement for impeachment purposes under C.R.E. 613, the proponent of the statement must first confront the witness with the prior statement, and give the witness an opportunity to explain or deny the statement.[4] If the witness admits having made the statement, there is no need to introduce other evidence of the existence of the statement and, in fact, such extrinsic evidence is barred.[5]

If the witness denies having made the prior statement, then, of course, extrinsic evidence of the statement is necessary. C.R.E. 613 permits the introduction of such evidence, which can consist of the statement itself or the testimony of a witness who heard the prior statement.[6]

A prior inconsistent statement admitted under this method can only be used for impeachment purposes, and an appropriate limiting instruction should be given to the jury.[7]

Substantive Evidence Use

It is simpler to admit a prior inconsistent statement for the purpose of substantive evidence. In addition to the traditional method under C.R.E. 613, discussed above, CRS § 16-10-201 provides that the prior inconsistent statement can be admitted as substantive evidence any time the witness who purportedly made the statement is still available to testify.[8] This condition is met if the court simply tells the witness to remain available for recall to the stand.[9]

The statute does also require that the prior inconsistent statement purport to relate to a matter within the witness' own knowledge.[10] However, this condition rarely adds to the foundational requirements because a witness' testimony normally is limited to matters within his or her own knowledge.[11]

Once these foundational requirements are met, the prior inconsistent statement can be used by the jury as substantive evidence. Thus, a statement introduced through this procedure can be used for the truth of its contents as well as its impeachment value.[12]

Contrasting the Foundational Requirements

Because of the different procedures, it is easier to introduce a prior inconsistent statement as substantive evidence than it is to introduce it for the limited purpose of impeachment. However, the better practice would be to continue using the traditional approach of C.R.E. 613 regardless of the purpose for which admission of the statement is sought. There are four reasons for this conclusion.

1. From a theoretical point of view, it is appropriate to require stricter foundational requirements for substantive evidence than for impeachment evidence. In fact, this is generally the case.[13]

2. The traditional approach can conserve judicial resources. If a witness is first confronted with the prior inconsistent statement, the witness often admits having made the statement. If this admission is made, there is no need to consume time by introducing extrinsic evi-

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This newsletter is prepared by the Criminal Law Section of the Colorado Bar Association. This month's column was written by H. Patrick Furman, associate clinical professor with the Legal Aid & Defender Program, University of Colorado School of Law.

dence of the existence of that statement. Obviously, conserving judicial resources is not necessarily a client concern. However, the professional and concise presentation of the case is beneficial to the client. Factfinders, whether they are judges or juries, tend to look more favorably on counsel and counsel's case when evidence is presented in an efficient manner.

3. The traditional approach is also fairer to the witness. Seemingly, the logical place to start when dealing with a prior inconsistent statement is with the person who made the statement. Fairness suggests that a witness should be given the opportunity to deny a prior inconsistent statement or, on the other hand, to admit it and explain the reasons for the inconsistency. Both the Colorado Rules of Evidence[14] and the Colorado Code of Criminal Procedure[15] have fairness as one of their fundamental goals.

The vigorous representation of a client within the bounds of the law often seems at odds with the notion of 'fairness.' However, being fair is, in fact, usually helpful to the case. Juries are often wise enough to recognize when a witness is not being treated fairly by counsel, and may well discount the cross-examination and argument of counsel whom they perceive as being unfair.

4. On a more practical level, directly confronting the witness with the prior inconsistent statement is usually more effective. It is more persuasive to confront a witness directly with his or her prior inconsistent statement than it is to introduce that statement through another witness after the declarant has left the stand. If the witness has no explanation for the inconsistency, the jury sees and hears that fact.

On the other hand, if the witness has an explanation, opposing counsel will most likely introduce it. If the witness' explanation of the inconsistent statement eliminates the value of that statement, the inconsistency probably should not be introduced at all.

Hearsay Problems

C.R.E. 801(d)(1)(A) eliminates possible hearsay objections to the admission of a prior inconsistent statement to impeach a witness. A prior statement by a witness, because it is "a statement other than one made by the declarant while testifying at the trial or hearing,"[16] would fall under the definition of hearsay except for the terms of C.R.E. 801(d)(1)(A). That subsection excludes from the definition of hearsay those prior statements made by a witness which are inconsistent with his or her trial testimony, as long as the witness/declarant testified at the trial or hearing and is subject to cross-examination concerning the statement.

"The method for admitting a prior inconsistent statement turns on the purpose for which the prior statement is being admitted."

Other Considerations

Other considerations should be analyzed in connection with the use of prior inconsistent statements.[17] Counsel's questions to the witness must be carefully and precisely phrased to pinpoint the inconsistency without confusing the jury. Counsel must be prepared to confront the witness with the time, date and location of the statement, as well as the identity of the person to whom the statement was made. The statement itself must be in hand so that counsel can directly confront the witness with it if such a confrontation becomes necessary.

Of course, counsel must take care to ensure that the prior inconsistent statement is in fact "inconsistent." The Colorado Supreme Court has held that the prior statement need not be a "patent contradiction," but does require that there be a material variance or the omission of a significant detail which it would have been natural to mention in the prior statement.[18]

Counsel must also remember that a defendant who testifies is essentially subject to the same impeachment with a prior inconsistent statement as any other witness. All types of previous statements may be rendered admissible by this rule. The U.S. Supreme Court has held that a defendant who testifies may be impeached with a prior inconsistent statement obtained in violation of his or her constitutional rights, as long as that prior statement was not involuntary.[19] The Colorado Supreme Court has adopted this analysis.[20] Illegally seized physical evidence may also be used to impeach the testimony of a defendant, but the contradiction between such physical evidence and the defendant's trial testimony must be clear and direct.[21]

Similarly, statements made to a psychiatrist in the course of a court-ordered examination, inadmissible in the prosecution's case-in-chief, may be admissible for impeachment of the defendant.[22] The Colorado Supreme Court has also held that statements made by a defendant at the time he or she entered a plea, which was subsequently withdrawn, can be used to impeach the defendant's trial testimony, although the plea itself is inadmissible.[23]

However, the post-arrest silence of a defendant is not admissible to impeach trial testimony. This rule is based on constitutional considerations as well as on the ambiguity inherent in post-arrest silence.[24] In fact, the inherent ambiguity in post-arrest silence has led the Colorado Supreme Court to bar the impeachment of a testifying co-conspirator with his or her post-arrest silence.[25]

Counsel must also be aware that if the extrinsic evidence of the prior inconsistency comes from his or her investigation, the use of that inconsistency will open up to scrutiny that portion of the investigation. For example, if the extrinsic evidence needed to prove the inconsistency comes from a defense investigator, the report from that investigator must be turned over to the prosecutor. Neither the Sixth Amendment right to counsel nor the "work product" doctrine will protect these reports.[26]

Impeachment through prior inconsistent statements may yield itself to creative use of exhibits. A chart displaying the inconsistencies by time, date and place can make an indelible impression on a jury. Such a chart must be clear and concise, using only the key words or phrases in the inconsistent statements. A chart which goes into too much detail will only confuse a jury.

If counsel is unsuccessful in attempting to admit a prior inconsistent statement, he or she should make a complete offer of proof as to what the barred evidence would have revealed. A failure to do so can result in an appellate court ruling that there is no showing of prejudice as a result of the claimed error.[27]

Limits on Impeachment

Impeachment with prior inconsistent statements, as well as other types of impeachment, is allowed only on issues that are relevant to the case at hand and those which show the bias, interest or motive of the witness.[28] Impeachment on an immaterial matter that does not go to the credibility of the witness is not

allowed.[29] Even if relevant, this type of impeachment may be barred if the issue is collateral and the unfair prejudice of the impeachment outweighs the probative value.[30]

Rehabilitation

The use of prior inconsistent statements, whether for impeachment or as substantive evidence, opens the door to the use of prior consistent statements on redirect examination to rehabilitate the witness. These prior consistent statements are also excluded from the definition of hearsay in C.R.E. 801 and are admissible as long as the witness/declarant testified and the prior consistent statements are offered to rebut an express or implied charge of recent fabrication or improper influence or motive.[31]

Thus, for example, the opposing party may introduce other portions of the statement which yielded the inconsistency to show that it also contains consistencies.[32] But, the "rule of completeness" does not apply to rehabilitation with prior consistent statements.[33] Counsel who is rehabilitating a witness will not be able to introduce the entire prior consistent statement unless the entire statement is necessary for the rehabilitation. If the original inconsistency is minor, relates only to a collateral issue or is simply a small part of an otherwise consistent statement, counsel must decide if the use of the inconsistency does more harm than good.

Along these same lines, counsel must remember that the use of a prior inconsistent statement also opens the door to the use of prior consistent statements made at some other point in time.[34] A prior consistent statement admitted in this fashion then comes in to rebut the inconsistency and rehabilitate the witness.[35] This may counterbalance or even outweigh the benefit derived from the use of the prior inconsistent statement.

Furthermore, the prior consistent statement need not be entirely consistent. Some inconsistencies in the statement do not preclude the use of the statement as long as it is consistent in the overall sense.[36]

It should also be noted that this type of rehabilitation may be conducted even if the impeachment of the witness did not take the form of prior inconsistent statements. Other types of impeachment may suffice, as when a witness' credibility is attacked on the theory that the witness is trying to gain favors from the prosecutor. In this situation, the use of a prior consistent statement for rehabilitation has been allowed.[37]

Conclusion

The use of the traditional approach, with its stricter foundational requirements, ordinarily is the better practice from a theoretical, administrative, equitable and practical point of view. However, counsel may rely on the statutory procedure for admitting prior inconsistent statements when he or she deems necessary. Whichever approach is used, counsel must analyze all of the consequences, including the effect of rehabilitation with prior consistent statements, before using prior inconsistent statements.

NOTES

1. The federal rule, Fed.R.Evid. 613, is substantially different and is beyond the scope of this article.

2. *Montoya v. People*, 740 P.2d 992 (Colo. 1987); *People v. Madril*, 746 P.2d 1329 (Colo. 1987).

3. *McCormick on Evidence*, § 37, at 79 (E. Cleary, 3d ed. 1984).

4. Failure by the witness to recall a statement is deemed a denial; *People v. Baca*, 633 P.2d 528 (Colo.App. 1981).

5. *Montoya v. People, supra*, note 2.

6. For the statement itself to be admissible, it must have been recorded by the witness or by a court reporter. If someone other than the witness recorded the statement, it must be admitted through that other person.

7. C.R.E. 105; *Montoya v. People, supra*, note 2; COLJI - Crim. 4:02.

8. CRS § 16-10-201(1)(a).

9. *People v. Grant*, 40 Colo.App. 46, 571 P.2d 1111 (1977).

10. CRS § 16-10-201(1)(b).

11. C.R.E. 602.

12. *People v. Madril, supra*, note 2; *Montoya v. People, supra*, note 2.

13. *E.g.*, hearsay is generally admissible for impeachment purposes but not for substantive purposes.

14. C.R.E. 102.

15. CRS § 16-1-103.

16. C.R.E. 801(c).

17. Special rules may apply in cases of sexual assault on children. *People v. Hise*, 738 P.2d 13 (Colo.App. 1986). Space limitations preclude a discussion of these rules.

18. *Williams v. District Court*, 700 P.2d 549 (Colo. 1985).

19. *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Haas*, 420 U.S. 714 (1975).

20. *People v. Velarde*, 196 Colo. 254, 485 P.2d 6 (1978).

21. *LeMasters v. People*, 678 P.2d 538 (Colo. 1984).

22. *People v. Allen*, 193 Colo. 526, 568 P.2d 56 (1977); *People v. Pearson*, 190 Colo. 313, 546 P.2d 1259 (1976).

23. *People v. Cole*, 195 Colo. 483, 584 P.2d 71 (1978).
24. *United States v. Hale*, 422 U.S. 171 (1975); *Doyle v. Ohio*, 426 U.S. 610 (1976).
25. *People v. Cole*, *supra*, note 23.
26. *People v. Small* , 631 P.2d 148 (Colo. 1981).
27. *People v. Hise*, *supra*, note 17.
28. *Davis v. Alaska*, 415 U.S. 308 (1974); *Kreiser v. People*, 199 Colo. 20, 604 P.2d 27 (1979).
29. *People v. Crawford*, 191 Colo. 504, 553 P.2d 827 (1976).
30. *People v. Ashton*, 661 P.2d 291 (Colo.App. 1982).
31. C.R.E. 801(d)(1)(B).
32. *People v. Thompson*, 187 Colo. 257, 529 P.2d 1314 (1975).
33. *People v. DelGuidice*, 199 Colo. 41, 606 P.2d 840 (1980).
34. *People v. Graham*, 678 P.2d 1043 (Colo.App. 1983); U.S. cert den. 104 S.Ct. 2660.
35. *People v. DelGuidice*, *supra*, note 33.
36. *People v. Graham*, *supra*, note 34.
37. *People v. Small*, *supra*, note 26.