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The Prior Inconsistent Statement: The Illinois Law and The Art

LEROY J. TORNQUIST*

INTRODUCTION

If cross examination is an important part of trial advocacy, the use of the prior inconsistent statment is at the heart of the American trial. The prior inconsistent statement is possibly the most effective tool for impeaching the credibility of a witness, and therefore, a trial lawyer must be skilled in both using, and in protecting his witness from the misuse of, such statements.

This article suggests a procedure for use of the Illinois law of evidence relating to prior inconsistent statements.[1] Since the proposed Illinois Rules of Evidence have not been adopted as of this writing, they along with the Federal Rules of Evidence are analyzed as alternatives to the current state of the law.[2] Because the proposed rules trace the Federal Rules of Evidence, federal decisions interpreting the Rules are discussed when appropriate.

The foundation required for the introduction of a prior inconsistent statement is examined first, along with the rules prohibiting both impeachement of one's own witness and substantive use of prior inconsistent statements. The article proceeds to a consideration of the procedural and evidentiary tactics available to an attorney in protecting a witness from abuse of the prior inconsistent statement. The focus is upon situations in which it is improper to impeach with a prior inconsistent statement and the objections available in those situations. Finally, the art of using the prior inconsistent statement is discussed with particular attention directed towards the factors underlying the attorney's decisions of whether and when to use the statement.

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1. For a similar article based on the California practice, *see* Tornquist, *Use and Opposition to the Use of the Prior Inconsistent Statement in California*, 10 PAC. L. REV. ____ (1979).

2. At the time of this writing the Illinois Supreme Court has not adopted the proposed Illinois Rules of Evidence. Throughout this article "Rule" will refer to both the Federal and Proposed Illinois Rules.

THE USE OF THE PRIOR INCONSISTENT STATEMENT IN ILLINOIS

Prior inconsistent statements are an effective and frequently employed avenue of impeachment[3] in Illinois.[4] This efficacy is understandable since the contradiction comes from the mouth of the witness, and the effect on credibility is easily understood by the trier of fact. Two contradictory statements cannot both be true, and the inconsistency impugns the reliability of the witness. In my opinion, therefore, a trial lawyer must master the law and the art applicable to prior inconsistent statements.

The power of the impeachment, some lawyers believe, is based on the maxim "Falsus in uno, falsus in omnibus."[5] He who speaks falsely on one point will speak falsely upon all. This maxim overstates the case. The discrediting effect of a prior self-contradiction is independent of whether or not the jury believes it to involve a conscious lie. The cause may be a disposition to lie, a partisan bias, faulty observation, or defective recollection. No specific cause is necessarily implied. At the minimum, however, the jury is justified in believing the witness capable of erring on a material point.

Jurors are impressed by inconsistent statements. A survey was conducted in Oregon to determine what jurors liked most about trials. Opening statements, closing arguments, demonstrative aids and even expert witnesses failed to capture the interest of jurors to the same extent as impeachment with a prior inconsistent statement. However, a sufficient foundation must be laid before the trial lawyer can use the prior inconsistent statement effectively.[6]

Foundation

Foundational requirements pervade the law of evidence, and prior inconsistent statements are no exception. The "foundation" refers to the evidence which must be introduced before the prior inconsistent statement can be used.

Assume, an eyewitness testifies that the defendant went through a stop sign at an intersetion. The testimony, if believed, is crucial to the outcome of the case. Defendant's attorney fortunately, has the witness's written statement that defendant stopped at the stop

3. E. CLEARY *et. al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 33, at 66 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)].

4. People v. Williams, 22 Ill. 2d 498, 177 N.E.2d 100 (1961), *cert. denied*, 369 U.S. 806 (1962).

5. 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1008, at 981 (Chadbourn rev. 1970) [hereinafter cited as WIGMORE (Chadbourn rev.)].

6. McElhaney, *Foundations*, 4 LITIGATION 3, 62 (1968).

sign. He has one hurdle before he can use the statement. He must lay a foundation.

There are two possibliities that counsel must consider in laying a foundation. First, the witness may admit making the inconsistent statement. This is "intrinsic evidence" of the statement. Second, the witness may deny the prior statement and then it must be introduced through another witness or documentary evidence. This is "extrinsic evidence." Foundation requirements for intrinsic and extrinsic impeachment differ, and therefore merit separate consideration.

Foundation for Intrinsic Impeachment

The following cross examination would be objectionable.

> Q: Isn't it a fact you made a previous statement in which you indicated that the defendant stopped at the stop sign?
> Objection: No foundation-the witness must be asked about the time, place and persons present at the conversation. Furthermore, the witness must be shown the statement.
> Court: Objection sustained.

In laying the essential foundation for introduction of intrinsic evidence the witness must be asked whether he made the alleged statement, giving its substance, and naming the time, place, and person to whom it was made.[7] The purpose of the foundation requirement is to protect the witness against unfair surprise and to permit an explanation of the inconsistency.[8] Illinois courts wisely look to the intent of the rule and have been flexible in its application. For example, questioning adequate to apprise the witnesses of inconsistencies meets the purpose underlying the foundation requirement.[9] Therefore, exact precision is not required[10] and a court has held it sufficient to name the month and the given year.[11] A single, ambiguous reference to the statement, however, is not enough to warn the witness.[12]

Another, more troublesome, foundation requirement is that a written statement must be read or shown to the witness. This rule

7. People v. Perri, 381 Ill. 244, 44 N.E.2d 857 (1942).

8. People v. Henry, 47 Ill. 2d 312, 265 N.E.2d 876 (1970); People v. Harbin, 31 Ill. App. 3d 485, 490-01, 334 N.E.2d 379, 383 (1975).

9. People v. Henry, 47 Ill. 2d 312, 265 N.E.2d 876 (1970); People v. Harbin, 31 Ill. App. 3d 485, 490-91, 334 N.E.2d 379, 383 (1975).

10. People v. Henry, 47 Ill. 2d 312, 265 N.E.2d 876 (1970); People v. Harbin, 31 Ill. App. 3d 485, 490-91, 334 N.E.2d 379, 383 (1975).

11. Mayer v. Appel, 13 Ill. App. 87 (1883).

12. People v. Brown, 6 Ill. App. 3d 500, 285 N.E.2d 515 (1972).

originated in an 1820 English decision referred to as *Queen Caroline's Case.*[13] The opinion by Lord Chief Justice Abbott held that a witness could not be cross examined about statements contained in a letter unless the letter was first shown to the witness and the witness then asked whether he had written such a letter.[14] The rule of the Queen's Case was subsequently adopted by several states including Illinois.[15] In *Conrad v. Griffey,* the United States Supreme Court concurred in its adoption, stating, "This rule was founded upon common sense, and it is essential to protect the character of a witness."[16] Thereafter, if the declaration was in writing, questions as to its contents were inadmissible unless the witness was first shown the writing and his memory so refreshed by the necessary inquiries as to enable him to admit, deny or explain the prior statement.[17]

The rule based on Queen Caroline's case was abrogated in 1854 by Parliament,[18] and it has been vigorously attacked as being erroneously based upon the best evidence rule.[19] In impeachment the contents of the writing are not being proved as is the case when the best evidence rule is properly applied. Furthermore, the best evidence rule requires production of the document for the judge and jury, not the witness.[20]

Rule 613(a) provides that the statement need not be shown nor its contents disclosed to the witness during examination.[21] The writing must be shown to opposing counsel, if he so requests,[22] to protect against misuse of the statement.

A witness who admits the truth of the prior inconsistent statement, is impeached by that admission. No further evidence is necessary; but in Illinois a party is not foreclosed from making further proof to emphasize the inconsistency.[24] The wisdom of allowing fur-

13. 129 Eng. Rep. 976 (H.L. 1820).

14. *Id.*; McCormick (2d ed.), *supra* note 3, § 28 at 56 n.97.

15. Illinois Cent. R.R. v. Wade, 206 Ill. 523, 69 N.E. 565 (1903); Babington v. Bogdanovic, 7 Ill. App. 3d 593, 288 N.E.2d 40 (1972); Reilly Fox & Chemical Corp. v. Lewis, 326 Ill. App. 84, 61 N.E.2d 290 (1942); Helgensen v. Chicago Suburban Water & Light Co., 156 Ill. App. 541 (1910). *See* cases collected in McCormick (2d ed.), *supra* note 3, § 28 at 56 n.98.

16. 57 U.S. 38, 46 (1853).

17. *Id.*

18. McCormick, (2d ed.), *supra* note 3, § 28 at 56.

19. *Id.*

20. *Id.*; Wigmore (Chadbourn rev.) *supra* note 5 § 1260, at 613.

21. Fed. R. Evid. 613(a); Proposed Ill. R. Evid. 613(a) (Final Draft).

22. Fed. R. Evid. 613(a); Proposed Ill. R. Evid. 613(a) (Final Draft).

23. Sellers v. Hendricksen, 46 Ill. App. 3d 549, 360 N.E.2d 1235 (1977).

24. People v. Dixon, 28 Ill. 2d 122, 190 N.E.2d 793 (1963); People v. Williams, 22 Ill. 2d 498, 177 N.E.2d 100 (1961), *cert. denied,* 369 U.S. 806 (1962); Esderts v. Chicago, R.I. & Pac.

ther proof when the witness admits the truth of the statement is debatable because trial time is consumed for the presentation of unnecessary and cumulative evidence.

A Foundation for Extrinsic Impeachment

If the witness denies or is evasive about having made the statement, it must be proved through another witness or documentary evidence.[25] Before extrinsic evidence of an inconsistent statement is admissible, however, the witness must first be confronted with the statement by directing his attention to the time, place, and persons present,[26] and he must be asked if he made the statement.[27] Basic fairness requires that the witness be given an opportunity to explain or deny the alleged inconsistent statement.[28] Furthermore, trial time is saved if the witness admits the statement during cross examination since extrinsic evidence is then unnecessary. If this foundation is not laid first, extrinsic evidence is prohibited.[29]

There are exceptions to the Illinois rule that a foundation must be laid before extrinsic evidence is admissible. First, extrinsic evidence of a statement by a party-opponent does not require any foundation,[30] since the statement is not considered hearsay[31] and a party will, of course, have an opportunity to take the stand and explain the inconsistency. The advantage of introducing the statement as an admission of a party opponent is that no foundation is required and the statement will constitute relevant evidence on fact issues.

Second, if counsel neglected to lay a proper foundation, the court has discretion to permit the witness to be recalled for that purpose.[32]

R.R., 76 Ill. App. 2d 210, 222 N.E.2d 117 (1966), *cert. denied*, 386 U.S. 993 (1967); People v. Jarrett, 57 Ill. App. 2d 169, 206 N.E.2d 835 (1965). *But see* Illinois Cent. R.R. v. Wade, 206 Ill. 523, 532-33, 69 N.E. 565, 567 (1903). *See also* People v. Hahn, 90 Ill. App. 2d 367, 375, 234 N.E. 2d 142, 149 (1967). In the dissenting opinion of Burke, J., two lines of decisions are discussed. *See also* Atchison T. & S. F. R.R. v. Feehan, 149 Ill. 202, 36 N.E. 1036 (1893), once the witness admitted making the prior contrary statement, no further proof was necessary and the defendant was not prejudiced by exclusion of the witness's testimony.

25. Chicago City Ry. v. Matthieson, 212 Ill. 292, 72 N.E. 443 (1904); Sellers v. Hendrickson, 46 Ill. App. 3d 549, 360 N.E.2d 1235 (1977); Rigor v. Howard Liquors, Inc., 10 Ill. App. 3d 1004, 295 N.E.2d 491 (1973).

26. People v. Henry, 47 Ill. 2d 312, 265 N.E.2d 876 (1970).

27. People v. Irish, 77 Ill. App. 2d 67, 222 N.E.2d 114 (1966).

28. People v. Henry, 47 Ill. 2d 312, 265 N.E.2d 876 (1970).

29. People v. Rodgers, 53 Ill. 2d 207, 290 N.E.2d 251 (1972).

30. Brown v. Calument River Ry. Co., 125 Ill. 600, 18 N.E. 283 (1888); Johnson v. Peterson, 166 Ill. App. 404 (1911).

31. Brown v. Calument River Ry. Co., 125 Ill. 600, 18 N.E. 283 (1888); Johnson v. Peterson, 166 Ill. App. 404 (1911).

32. People v. Henry, 47 Ill. 2d 312, 265 N.E.2d 876 (1970); Aneals v. People, 134 Ill. 401,

In those limited circumstances where the witness is not subject to recall the court should have discretion to allow extrinsic evidence if the interests of justice so require.[33] This result would occur infrequently, and, in my view, only if the court finds:

1) The witness is unavailable;
2) The testimony of the witness is important and accordingly the credibility of the witness is important;
3) The statement is inconsistent with relevant testimony;
4) The examiner was unaware of the statement at the time of the testimony; and
5) The examiner could not in the exercise of reasonable diligence have discovered the statement prior to the testimony.

Third, if a witness, not subject to recall, makes a subsequent statement inconsistent with his testimony the foundation requirement should be waived. This information sheds light on the credibility of the witness and to insist upon a foundation would place an impossible task upon the impeaching party since the statement did not exist when the witness was examined at trial. Many jurisdictions prohibit the impeachment for lack of a foundation.[34]

Under proposed Rule 613(b), "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible *until* the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, *unless* the interests of justice otherwise require . . . ."[35] Proposed Rule 613(b) is similar to present Illinois practice except no foundation is required where "the interests of justice otherwise require."[36] The "interest of justice" exception is new, but this phrase is also included in the corresponding federal rule.[37] The advisory committee's note to Rule 613 of the Federal Rules of Evidence recognize that, occasionally situations may arise where the interests of justice will warrant dispensing entirely with the opportunity to explain or deny. Thus, if a witness becomes unavailable through absence or death, the judge ought to have discretion to allow the impeaching statement. The proposed rule and the federal rule differ in their

25 N.E. 1022 (1890).

33. McCormick (2d ed.), *supra* note 3, § 37 at 74.

34. *See* Mattox v. United States, 156 U.S. 237 (1895); Nagi v. Detroit United Ry., 231 Mich. 452, 204 N.W. 126 (1925). *But see* People v. Collup, 27 Cal. 2d 829, 167 P.2d 714 (1946).

35. Proposed Ill. R. Evid. 613(b) (Final Draft).

36. *Id.*

37. Proposed Ill. R. Evid. 613(b) (Final Draft) and Fed. R. Evid. 613(b); *see also* Cal. Evid. Code § 770(b) (West 1968).

approach as to when the foundation for extrinsic evidence must be laid.

Under Federal Rule 613(b) extrinsic evidence of the prior statement is not admissible *unless* a witness is afforded an opportunity to explain, admit, or deny the statement. Under proposed Rule 613(b), however, extrinsic evidence is not admissable *until* the witness is afforded an opportunity to explain, admit, or deny the statement. The substitution of the word until for the word unless is significant. Under the federal rule the traditional insistence that the attention of the witness be directed to the statement in cross examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine the statement, with no specification of any particular time or sequence. Among other possibilities, Federal Rule 613(b) permits several collusive witnesses to be examined before disclosure of a joint prior inconsistent statement.[38] An example of Rule 613(b) is illustrated in *United States v. Barrett*.[39] There the defendants sought to introduce extrinsic evidence of a statement by a government witness who had not been confronted with the statement during cross examination. The government argued that the defendant had not afforded the witness an opportunity to explain, admit or deny the statement before extrinsic evidence of the statements was introduced. The Circuit Court of Appeals held there was no record that the witness was unavailable for recall, and therefore, it was error to exclude the impeachment testimony.[40] This result would not be possible under proposed Rule 613(b) because extrinsic evidence is prohibited until the witness first has an opportunity to explain or deny the making of the prior inconsistent statement.

The law of evidence should, among other purposes, serve as an aid to the trier of fact in assessing a witness's credibility. The honest witness should be protected from false appearances, while the dishonest or inaccurate witness should be exposed. In drafting a code of evidence, it is difficult to balance these occasionally conflicting objectives. Permitting a witness to explain or deny an alleged inconsistent statement is desirable, but if the procedure is required before any extrinsic evidence of the statement is allowed it makes it difficult to expose the untruthful witness by forewarning him and providing the opportunity for him to reshape his testimony in conformity with the prior statement. On the other hand, if extrinsic evidence is presented before the witness is given the opportunity to explain,

38. FED. R. EVID. 613(b), Advisory Comm. Notes.
39. 539 F.2d 244 (1st Cir. 1976).
40. *Id.*

the jury may crystalize a distrust for the witness during the gap of time between the presentation of extrinsic evidence of the statement and an explanation during rebuttal. Furthermore, the jury may distrust the explanation because they know the witness had the opportunity to confer with counsel before the explanation.

The Foundation for a Hearsay Declarant

Assume a witness testified at a preliminary hearing, but is unavailable at the time of the trial. The transcript of the preliminary hearing testimony is admitted into evidence as an exception to the hearsay rule. The cross-examiner has in his files an inconsistent statement of the hearsay declarant. In such a situation, the majority of jurisdictions allow impeachment of a hearsay declarant by extrinsic evidence of prior inconsistent statements despite the fact that the declarant has never been on the stand and is unavailable to deny or explain the inconsistency.[41]

Illinois, however, would appear to be in the minority.[42] In *Craig v. Wismar,*[43] the Illinois Supreme Court held that the prior statements of an attesting witness to a will, which were inconsistent with the attestation clause, were inadmissible because the declarant was not given an opportunity to explain such statements. Arguably, the *Craig* decision is limited to hearsay statements contained in attestation clauses since they are given almost conclusive effect. Such a limitation is needed if the credibility of an unavailable hearsay declarant is to be adequately tested. After all, the declarant of a hearsay statement, introduced into evidence, is in effect a witness and his credibility should in fairness be subject to impeachment.[44] The party electing to use hearsay should have the burden of calling the declarant to explain any inconsistencies.[45]

Rule 806 provides that the credibility of a hearsay declarant may be attacked by extrinsic evidence of a prior inconsistent statement even though the declarant was not given the opportunity to deny or explain. Furthermore, if the party against whom a hearsay statement has been admitted calls the declarant as a witness, he is entitled to examine the witness on the statement as if under cross examination.[46] Rule 806, therefore, wisely waives the foundation require-

41. McCormick (2d ed.), *supra* note 3, § 37 at 74.

42. R. Hunter, Trial Handbook for Illinois Lawyers § 65:6 (1972) [hereinafter cited as R. Hunter].

43. 310 Ill. 262, 141 N.E. 766 (1923).

44. There is no reason to treat a declarant witness differently than a witness who testifies at trial.

45. R. Hunter, *supra* note 42, at §65:6.

46. Proposed Ill. R. Evid. 806 (Final Draft); Fed. R. Evid. 806.

ment for impeachment of hearsay declarants. That, of course, allows the opponent of the hearsay already denied cross examination of the declarant to use a prior or subsequent statement to impeach the credibility of the declarant without first confronting the declarant with the statement.

LIMITATIONS ON THE USE

Right to Impeach One's Own Witness

Many jurisdictions have eliminated the ban against impeaching one's own witness.[47] The prior rule was based on the premise that a party vouches for the credibility of each of his witnesses[48] and therefore, should not be allowed to attack their credibility.

A party, however, does not select the eyewitnesses to an occurrence and in many instances must call an eyewitness or lose the case.[49] For example, assume the only eyewitness to an accident gave a statement that defendant's automobile crossed the center line. Plaintiff must call that witness to prove defendant's negligence. Prohibiting the impeachment of such an eyewitness unreasonably restricts the party, leaving him at the mercy of the witness and his adversary.[50]

Illinois has retained the traditional rule,[51] but, fortunately, several exceptions have been created. Adverse parties, hostile witnesses, and occurrence witnesses may be impeached under limited circumstances, by the party calling them. The reason for the rule seems inapplicable to these categories of witnesses.

Section 60 of the Illinois Civil Practice Act grants a party the right to call and cross examine an adverse party.[52] This, of course, means the examiner may impeach the adverse party with a prior inconsistent statement. Section 60, however, limits "adverse parties" to persons with an interest in the action, and officers, directors, managing agents or foremen of any party.[53]

Illinois Supreme Court Rule 238 provides another exception.[54] If the court determines that the witness is hostile, he may be cross examined.[55] Generally courts find a witness to be hostile if he gives

47. FED. R. EVID. 607; CAL. EVID. CODE §785 (West 1968); *see also* FED. R. EVID. 607, Advisory Comm. Notes.
48. People v. Wesley, 18 Ill. 2d 138, 163 N.E.2d 500 (1960).
49. *Id.*; *see also* MCCORMICK (2d ed.), *supra* note 3, §38, at 75.
50. FED. R. EVID. 607, Advisory Comm. Notes.
51. People v. Wesley, 18 Ill. 2d 138, 163 N.E.2d 500 (1960).
52. *See* ILL. REV. STAT. ch.110, §60 (1977).
53. *Id.*
54. ILL. REV. STAT. ch. 110A, § 238 (1977).
55. *Id.*

damaging answers or is evasive or reluctant in his replies.[56] At least one court has found the requisite hostility on the part of a witness who was the brother of the adverse party.[57]

Rule 238 allows a party calling an occurence witness, upon the showing that he called the witness in good faith and is surprised by his testimony, to introduce evidence of prior inconsistent statements.[58] It is unnecessary to show hostility,[59] but if the witness denies the inconsistent statement, the purpose of which is to show that the witness in fact made the statement, extrinsic evidence is prohibited.[60] This limitation on extrinsic evidence would appear to be an anachronism based on deference to the rule prohibiting impeachment of one's own witness. Nevertheless, it exists and consequently, the use of the statement against an occurence witness demands skill and persistence.

A witness declared to be the "court's witness" may be cross examined and impeached by either side.[61] The purpose of the rule is to insure that crucial testimony is not lost because a party is unwilling to vouch for the credibility of a witness.[62] Therefore, a party must show that he cannot vouch for the witness's credibility, that the witness's testimony will relate to relevant issues, and that the testimony is needed to prevent a miscarriage of justice.[63] Apparently, the requirements of surprise and affirmative damage are not applicable to witnesses called pursuant to the court witness doctrine.[64]

A party prevented from impeaching his own witness may attempt to get the contents of the prior inconsistent statement before the jury by refreshing the recollection of the witness.[65] If the statement

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56. McCormick (2d ed.), *supra* note 3, §38, at 75.

57. Sellers v. Hendrickson, 46 Ill. App. 3d 549, 360 N.E.2d 1235 (1977).

58. Ill. Rev. Stat. ch. 110A, § 238 (1977).

59. O'Boyle v. Greco Excavating Co., 9 Ill. App. 3d 234, 292 N.E.2d 90 (1972).

60. People v. Michaels, 335 Ill. 590, 167 N.E. 857 (1929); People v. Mager, 35 Ill. App. 3d 306, 341 N.E.2d 389 (1976).

61. Carle v. People, 200 Ill. 494, 66 N.E. 32 (1902). The court's witness doctrine is generally held not to apply in civil cases. Kubisz v. Johnson, 29 Ill. App. 3d 381, 329 N.E.2d 815 (1975); *cf.* Martin v. Brennan, 54 Ill. App. 3d 421, 369 N.E.2d 601 (1977) (court should exercise discretion to call witness in civil trial only where such action will further ends of justice); Crespo v. John Hancock Mut. Life Ins. Co., 41 Ill. App. 3d 506, 518, 354 N.E.2d 381, 390 (1976) (court has power to call the witness as the court's witness in civil proceeding but that power should be sparingly used).

62. People v. Johnson, 333 Ill. 469, 165 N.E. 235 (1929); Carle v. People, 200 Ill. 494, 66 N.E. 32 (1902).

63. People v. Chitwood, 36 Ill. App. 3d 1017, 1023-24, 344 N.E.2d 611, 617 (1976); *see* People v. Marino, 44 Ill. 2d 562, 256 N.E.2d 770 (1970).

64. *See* People v. Bailey, 60 Ill. 2d 37, 322 N.E.2d 804 (1975); People v. McKee, 39 Ill. 2d 265, 235 N.E.2d 625 (1968).

65. People v. Wesley, 18 Ill. 2d 138, 163 N.E.2d 500 (1959), *cert. denied*, 364 U.S. 845

is in writing and merely shown to the witness without the jury learning of the contents it would appear to be proper. However, if the party reads the prior statement in the presence of the jury, it may be argued that counsel is attempting to get before the jury information otherwise inadmissible.[66] That practice is objectionable.[67] The court in this instance should exercise its discretion to prevent abuse of the right to refresh the recollection of one's witness.

As a matter of strategy, a party would in most cases opt to refresh the recollection of his own witness because he wants the witness to be believed. The danger of impeachment is that the credibility of the witness will be destroyed. Proposed Rule 607 would change the existing law as follows:

> The credibility of a witness may be attacked by any party, except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage. The foregoing exception does not apply to impeachment by means of a prior inconsistent statement admitted pursuant to Rule 801(d)(1)(A), 801(d)(2), or 803.[68]

Significantly, proposed Rule 607 rejected the premise of the voucher rule by providing that the credibility of a witness may be attacked by any party. Unlike the corresponding federal rule, however, utilization of prior inconsistent statements would be limited to cases where the party can show surprise and affirmative damage. The purpose of the restriction on the use of prior statements against a party's own witness is to prevent the party from calling a witness known to be unfavorable simply to introduce a prior statement under the guise of impeachment.[69] A limiting instruction might not prevent the jury from considering the statement as substantive evidence.[70]

Since the surprise and damage exception to the rule prohibiting impeachment of one's own witness was the settled law in federal

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(1960); People v. Michaels, 335 Ill. 590, 167 N.E. 857 (1929).

66. Goings v. United States, 377 F.2d 753 (8th Cir. 1967).

67. Owen v. Willet Truck Leasing Corp., 61 Ill. App. 2d 395, 209 N.E.2d 838 (1965).

68. PROPOSED ILL. R. EVID. 607 (Final Draft).

69. Proposed Ill. R. Evid. 607, Committee Comments (Final Draft). *See* People v. Grant, 38 Ill. App. 3d 62, 347 N.E.2d 244 (1976). Where the state witness gives surprise testimony during cross examination by the accused, the state may be permitted to examine the witness and call his attention to the former statements for the purpose of refreshing his memory, and this does not amount to impeachment by the state of its own witness. *Id.* at 66, 344 N.E.2d at 248.

70. *See* Graham, *The Relationship Among Federal Rules of Evidence 607, 801(d)(1)(A), and 403: A Reply to Weinstein's Evidence*, 55 TEXAS L. REV. 573 (1977).

criminal cases before the adoption of the federal rules of evidence, federal case law may be looked to as a guide to the definition of surprise and damage.[71]

If a party cannot show that he expected the witness to testify as to a specific fact or if the witness made a pretrial repudiation of his prior statement, a party will not be successful in claiming surprise. Therefore, a party should be prepared to show that he has a prior statement, or that he knows the contents of the statement if it is oral and that there has been no repudiation.[72]

Damage is shown by testimony to the existence or nonexistence of a material fact harmful to the calling party's case.[73] If the witness testifies to lack of knowledge, for example, the calling party has not been sufficiently damaged to justify impeachment.[74]

The requirement of surprise and affirmative damage provides a refuge for perjurers. A witness that has a change of heart toward the defendant through bribery, intimidation, or other cause merely has to repudiate the statement prior to trial or conviently forget the facts while he is testifying. Under proposed Rule 607 the prosecutor would not call the witness because he could not show "surprise" and, therefore, the prior statement would be inadmissible.[75] In addition, there would be no "affirmative damage" since the witness in question allegedly can not remember the events.

The purpose of requiring surprise and affirmative damage before a party could use a prior inconsistent statement against his own witness is to prevent the introduction of inadmissible hearsay. Therefore, if the statement is not hearsay or falls within certain exceptions to the hearsay rule it may be admitted without a showing of surprise or affirmative damage. For example, if the prior inconsistent statement was made at a deposition it may be admitted without a showing of surprise and affirmative damage since the statement is excluded from the definition of hearsay under Rule 801 (d)(1)(a). Furthermore, the statement may then be considered as substantive evidence.[76]

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71. United States v. Johnson, 427 F.2d 957 (5th Cir. 1970).

72. *See* Graham, *Examination of a Party's Own Witness Under the Federal Rules of Evidence: A Promise Unfulfilled*, 54 TEXAS L. REV. 917 (1976) [hereinafter cited as Graham].

73. United States v. Milos, 413 F.2d 34, 37-38 (3d Cir. 1969). *But see* United States v. Rogers, 549 F.2d 490, 503 (8th Cir., 1976).

74. United States v. Milos, 413 F.2d 34, 37-38 (3d Cir. 1969). The converse would not be true. If a witness gave a pretrial statement denying knowledge of the facts, he could be impeached if he gave subsequent testimony regarding the facts.

75. PROPOSED ILL. R. EVID. 607 (Final Draft).

76. FED. R. EVID. 801 (d)(1)(A); PROPOSED ILL. R. EVID. 801(d)(1)(A), Committee Comments (Final Draft).

Rule 611(c), it should be noted, allows interrogation by leading questions of a hostile witness, an adverse party or a witness identified with an adverse party. That would be consistent with present Illinois law.

The Prior Inconsistent Statement May Not Be Used as Substantive Evidence

At common law prior statements of witnesses are hearsay and inadmissible as substantive evidence unless they fall within an exception to the hearsay rule. If the witness admits having made the prior statement and adopts it as his own there is no hearsay problem. The hearsay problem arises when the witness denies having made the statement or admits having made it but denies its truth.

In Illinois extrinsic evidence of the statement is admissible for impeachment, but the statement may not be used as evidence of the facts asserted.[77]

The Nullification Rule

The nullification rule limits the use of inconsistent statements in criminal cases. The prosecution is prohibited from using a prior inconsistent statement if the content of the statement bears directly on the issue of the defendant's guilt. The rule makes sense in cases where the trial judge failed to give a jury instruction limiting the use of the impeaching statement to mere impeachment purposes, or where undue repetition of the inconsistency makes the limiting instruction of little value. The rule, however, is not limited to these situations.

In *People v. Tunstall,*[78] the Illinois Supreme Court first stated the nullification principle. Although the trial judge failed to give any instruction prohibiting the substantive use of the impeaching statements, the court went beyond the absence of any jury instructions by stating that statements bearing directly upon the defendant's guilt are likely to have a highly prejudicial effect on the minds of the jury.

The nullification rule, however, suffered an apparent setback in *People v. Tate.*[79] There the court held that failure to give limiting jury instructions regarding the impeaching statements was prejudicial error. Those same statements, the court opined, could directly bear on the issue of the defendant's guilt without creating prejudi-

77. People v. Morgan, 28 Ill. 2d 55, 190 N.E.2d 755 (1963).
78. 17 Ill. 2d 160, 161 N.E.2d 300 (1959).
79. 30 Ill. 2d 400, 197 N.E.2d 26 (1964).

cial error. The court promptly ignored *Tate* in *People v. McKee*[80] by holding that either the lack of limiting jury instructions, or the fact that the impeaching statements directly bore on the issue of the defendant's guilt, could overturn any conviction.

In *People v. Bailey*,[81] the Illinois Supreme Court had an opportunity to clarify the rule. It held, however, that when a "court's witness" is impeached by a prior inconsistent statement the jury is likely to give the statement substantive effect. Significantly, the nullification rule was not used by the supreme court except in Justice Underwood's dissent. He expressly repudiated the nullification rule.

The viability of the rule is therefore in question. Of course, if a limiting instruction is not given or if the impeachment is unduly repetitious, it will constitute reversible error.

People v. Lucas[82] held that a criminal conviction based solely upon unsworn statements being introduced for impeaching purposes that obtain substantive value in the minds of the jurors cannot stand. The court based its decision on the fact that the impeachment of the defense witness was unduly repetitious and that a proper limiting instruction was not given.

Some courts continue, however, to articulate the broad *Tunstall* rule, but find reasons to distinguish the case. In *People v. Strubberg*[83] the appellate court stated that "it constitutes error when a prosecutor presents evidence of a prior statement of a witness implicating a defendant in the crime being tried for the purpose of having the trier of fact consider such statement as substantive evidence rather than merely for . . . impeachment."[84] The court held, however, that the improper testimony was cumulative and thus its admission did not constitute reversible error.[85]

Rule 801(d)(1)(a) of the Proposed Rules would embody a substantial change in Illinois law.[86] In effect, prior inconsistent statements are admissible as substantive evidence if the witness testifies at the trial and is subject to cross examination concerning the statement and the statement was made under oath, subject to the penalty of perjury and subject to cross examination by the party against

80. 39 Ill. 2d 265, 235 N.E.2d 625 (1968).
81. 60 Ill. 2d 37, 322 N.E.2d 804 (1975).
82. 58 Ill. App. 3d 541, 374 N.E.2d 884 (1978).
83. 61 Ill. App. 3d 521, 378 N.E.2d 191 (1978).
84. *Id.* at 527, 378 N.E.2d at 196.
85. *Id.* at 527-28, 378 N.E.2d at 196. To the same effect, *see* People v. Rudolph, 50 Ill. App. 3d 559, 365 N.E.2d 930 (1977).
86. PROPOSED ILL. R. EVID. 801(d)(1)(A), Committee Comments (Final Draft).

whom the statement is offered.[87]

If the statement is used to impeach but does not meet the conditions set forth in 801(d)(1)(a) the court will have to instruct the jury that they may not consider the statement as substantive proof. The effectiveness of this instruction is questionable because the jury will have to distinguish between 801(d)(1)(a) statements and others.

There is a significant difference between proposed rule 801(d)(1)(a) and the corresponding federal rule that can be illustrated by a simple hypothetical. Assume that the only witness testified before a grand jury that the defendant committed the crime. At the trial the witness testified that defendant did not commit the crime. The witness is impeached by prior grand jury testimony, but it is also used substantively to convict the defendant. On appeal there would be a different result under the proposed rule and the federal rule.

Under Federal Rule 801(a)(1)(a) the grand jury testimony is not hearsay because the statement is inconsistent with his testimony and was given under oath subject to the penalty of perjury.[88] Under proposed Rule 801(d)(1)(a) the grand jury testimony is hearsay and can not be used substantively because the statement was not subject to cross examination by the defendant against whom the statement is offered.

Proponents of the proposed Illinois rule argue that adequate safeguards of reliability exist only if the right of contemporaneous cross-examination of the prior statement was available,[89] and that our criminal system should not condone a rule that would theoretically allow the conviction of a defendant without a single witness testifying against the defendant. The only evidence in support of the hypothetical conviction is that the witness said something else at some other time which he now says is not the truth.

Opponents of the contemporaneous cross examination requirement argue that adequate safeguards exist without it. The testimony is under oath before 16 to 23 citizens at a formal grand jury proceeding, and the witness may be cross examined at trial. Furthermore, the grand jury testimony is more likely to be true since it was made closer to the real event, and experience has shown that a witness's willingness to implicate a friend or relative diminishes with the passage of time.[90] Other causes of a change in testimony

87. PROPOSED ILL. R. EVID. 801(d)(1)(A) (Final Draft).

88. United States v. Marchand, 564 F.2d 983 (2d Cir. 1977), *cert. denied*, 434 U.S. 1015 (1978).

89. *See* cases collected in Graham, *supra* note 72, 54 TEX. L. REV. 917, 927.

90. PROPOSED ILL. R. EVID. 801, Minority Discussion (Final Draft).

such as bribery or intimidation may be defeated if the grand jury testimony can be used substantively.

A significant question is raised, however, whether substantive use of the prior inconsistent statement against a criminal defendant violates the defendants Sixth Amendment right to confront adverse witnesses.

The use of a prior statement as substantive evidence under 801(d)(1)(a) of the proposed rules does not violate the defendant's sixth amendment right to confront adverse witnesses. In *California v. Green*[91] the prosecutor's witness told police that defendant had given him a shopping bag of marijuana, and he repeated the statement at a preliminary hearing. At trial he admitted having the bag of marijuana, but he could not recall how he got it. The trial court allowed defendant to be impeached by the prior testimony and based, at least in part, upon the prior statement, the defendant was convicted. The United States Supreme Court agreed with the trial court and held:

> [O]bjections occasioned by this [historical denial of confrontation] appear primarily to have been aimed at the failure to call the witness to confront personally the defendant at his trial. So far as appears, in claiming confrontation rights no objection was made against receiving a witness's out-of-court depositions or statements, so long as the witness was present at trial to repeat his story and to explain or repudiate any conflicting prior stories before the trier of fact.[92]

Of course, a party that wishes to use a prior inconsistent statement substantively is not limited to Rule 801(d)(1)(a). The prior statement may be within any of the exceptions to the hearsay rule listed in Rule 803. If all else fails Rule 803 (24), which provides an exception for statements that have guarantees of trustworthiness equivalent to other hearsay exceptions, should not be overlooked.

Another constitutional issue regarding the use of prior inconsistent statements is whether a criminal defendant's statement, obtained in violation of the Miranda rule, may be used substantively or to impeach the defendant's credibility. The United States Supreme Court, in *Harris v. New York*,[93] held that statements inadmissible as affirmative evidence because of a failure to comply with *Miranda*[94] could nevertheless be used to attack the defendant's cred-

91. California v. Green, 399 U.S. 149 (1970).
92. *Id.* at 157.
93. 401 U.S. 222 (1971).
94. Miranda v. Arizona, 384 U.S. 436 (1966).

ibility. A defendant who perjures himself should face the risk of confrontation with his prior inconsistent statement despite the violation of *Miranda*.[95] Of course, a statement that was "coerced" can not be used to impeach the defendant.[96] An involuntary statement should not be used to inhibit a defendant's testimony.

The Illinois Supreme Court has accepted the *Harris* rule.[97] A lower court need not inquire into the adequacy of warnings given a defendant if his voluntary statement is to be used solely for impeachment.[98] Of course, the statement may not be used substantively because that would violate the *Miranda* principle.[99] Arguably, the Illinois Supreme Court was not bound by *Harris* since each state has power to impose higher standards governing police practices than those required by the Federal Constitution.[100] The California Supreme Court has imposed such higher standards.[101]

Opposing Use of a Prior Inconsistent Statement

Impeachment evidence is designed to persuade the jury to disregard the testimony of that witness. The interrogating attorney is familiar with both the rules of evidence and the courtroom environment, but the witness is not and thus is at a definite disadvantage. Furthermore, if the testimony had been crucial the attempted impeachment is an important part of the trial and the opposing attorney must consider every possible objection to protect his witness from improper impeachment. The first procedural step is to request an opportunity to review the statement prior to the examination of the witness on the contents.

There is a question whether opposing counsel has the right to see the statement prior to its use in cross examination. It is clear, however, that a written statement must be read or shown to a witness,[102] and opposing counsel is entitled to inspect the statement if the witness views it.[103] Opposing counsel in fairness needs to be in-

95. Harris v. New York, 401 U.S. 222, 226 (1971).

96. *Id.*

97. People v. Moore, 54 Ill. 2d 33, 294 N.E.2d 297, *cert. denied*, 412 U.S. 943 (1973); People v. Byers, 50 Ill. 2d 210, 278 N.E.2d 65 (1972).

98. People v. Moore, 54 Ill. 2d 33, 37, 294 N.E.2d 297, 299 (1973).

99. *Id.*

100. Cooper v. California, 386 U.S. 58 (1967); People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

101. People v. Disbrow, 16 Cal. 3d 101; 545 P.2d 272, 127 Cal. Rptr. 360 (1976).

102. People v. Brown, 6 Ill. App. 3d 500, 504, 285 N.E.2d 515, 517 (1972); Reilly Tar & Chem. Corp. v. Lewis, 326 Ill. App. 84, 61 N.E.2d 290 (1942).

103. People v. Borella, 362 Ill. 218, 222, 199 N.E. 113, 116 (1935); People v. Sanders, 38 Ill. App. 3d 473, 481, 348 N.E.2d 229, 236 (1976); Ryan v. Monson, 33 Ill. App. 2d 406, 417, 179 N.E.2d 449, 455 (1961); Cohen v. Weinstein, 231 Ill. App. 84 (1923).

formed about the questioning between his witness and opposing counsel. Although counsel will be able to object if the proposed statement is taken out of context or contains prejudicial matter, the prejudicial impact may be such that the error can only be cured by declaring a mistrial.[104] If he cannot see the document or does not have a copy of it he would be unable to protect his witness by a timely objection. Disclosure of the statement also protects against an insinuation that an inconsistent statement has been made when the fact is to the contrary.[105]

If the document containing the statement includes privileged information, however, an examining attorney may refuse to disclose the entire document to opposing counsel.[106] For example, a memorandum, which contained an investigator's recollection of questions and answers given in the interview of a passenger does not have to be disclosed to opposing counsel if its only purpose is to assist counsel in laying a foundation for the investigator's testimony regarding prior oral conversations.[107] Arguably, the investigator's memorandum is work product and, therefore, not discoverable before a trial or at trial. The court if requested, however, should have been able to excise any privileged matter or work product and disclose the rest to opposing counsel. In this case the memorandum was not a statement of the witness but only the recollection of the investigator concerning the witness's statements.

Rule 213 of the Illinois Supreme Court Rules allows a witness or a party to obtain a copy of any statements previously made and in the possesion of opposing counsel. Needless to say this provision should be relied upon well before trial to allow the witness to properly prepare for his testimony.[108]

Rule 613(a) would require that the contents of statements be shown or disclosed to opposing counsel upon request.[109]

Counsel should ask the court for sufficient time to carefully review the statement and prepare to make an objection if: (A) it is misquoted; (B) it is not impeaching; (C) it is collateral; or (D) it is taken out of context. These four objections, along with three others to be discussed separately, form the basic limitations upon the use of the prior inconsistent statement.

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104. McKenna v. Chicago City Ry., 296 Ill. 314, 129 N.E. 814 (1921).
105. FED. R. EVID. 613(a), Advisory Committee Notes.
106. People *ex rel.* Morgan v. Mulliken, 41 Ill. App. 2d 282, 190 N.E.2d 502 (1963).
107. *Id.*
108. ILL. REV. STAT. ch. 110A, §213 (1977).
109. FED. R. EVID. 613(a); PROPOSED ILL. R. EVID. 613(a) (Final Draft).

An Examining Attorney May Not Misquote the Prior Statement

Counsel must protect the witness against inadvertent or intentional misquotation of the prior statement.[110] If the inconsistent statement is contained in the transcript of a deposition or former testimony, the exact question and answer should be read.[111] The dangers of inadvertent or intentional misrepresentation render paraphrasing unacceptable, unless the statement is oral, thereby precluding precise language. If counsel does not have a transcript of the prior testimony,[112] it will be treated as a prior oral statement which the court reporter may be called to substantiate.[113]

Human memory is fleeting, and most witnesses will have difficulty remembering exactly what they said several months or years before. At trial a witness will not know if opposing counsel is misquoting the prior statement. Therefore, counsel should assure his witness that he will protect against misquotation, and that if there is no objection, the witness may assume the transcript includes the statement exactly as read. This protection allows the witness to be at ease, and he will not have to search his memory to determine if that is exactly what he said.

Each witness should review all prior written statements before testifying. Any errors in the transcription of a deposition should be noted before the deposition is signed. If the signature is waived, any error should be discovered when the witness reviews the deposition prior to testifying.

One caveat to the witness's review of documents is that opposing counsel may request production of any document used before trial to refresh a witness's memory.[114] Thus, the witness should be advised not to make personal notes on the document since they could prove to be embarrassing during cross examination.

The Prior Statement Is Not Inconsistent with Testimony at Trial

An obvious requirement is that the statement must be inconsistent with the testimony.[115] This is a crucial objection, which must be made to prevent a false impression that the wtiness has been impeached.

110. *See* People v. Dixon, 28 Ill. 2d 122, 190 N.E.2d 793 (1963); People v. Williams, 22 Ill. 2d 498, 177 N.E.2d 100 (1961).

111. People v. Dixon, 28 Ill. 2d 122, 124, 190 N.E.2d 793, 794 (1963).

112. *Id.*; People v. Pruitt, 16 Ill. App. 3d 930, 307 N.E.2d 142 (1974).

113. People v. Dixon, 28 Ill. 2d 122, 124, 190 N.E.2d 793, 794 (1963).

114. People v. Scott, 29 Ill. 2d 97, 193 N.E.2d 814 (1963). *See also* PROPOSED ILL. R. EVID. 612 (Final Draft).

115. People v. Morgan, 28 Ill. 2d 55, 190 N.E.2d 755 (1963).

In most instances the express words demonstrate that the prior statement and the testimony are inconsistent—they can not both be true. If there is any material variance between the statement and the testimony the impeachment should be allowed and its effect upon the credibility of the witness should be left to the jury.[116] *Express* inconsistency between the prior statement and the testimony, however, is not required.[117] An inferred inconsistency, which reasonably tends to discredit the testimony, is sufficient.[118]

Three issues concerning inferred inconsistencies deserve further discussion. When will the court infer an inconsistency? May prior silence be used to impeach testimony at trial? May a witness who forgets the facts be impeached by his prior statement relating the facts?

Inferring Inconsistencies

The court must analyze the inferences that can be drawn from the statements.[119] Inconsistency in effect rather than express contradiction is the test.[120] An inconsistency between the various inferences that can be drawn from the prior statement and the testimony at the trial will suffice.[121] The trial court is present when the testimony is given and, therefore, should be given broad discretion in making that judgment.[122] Some examples of inferred inconsistencies were given in *People v. Sumner.*[123] "The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."[124] In *People v. Rainford,*[125] the court allowed a prior statement concerning an unrelated event that was so similar to the testimony given that it aroused suspicion of fabrication.

A statement of opinion or a conclusion is not expressly inconsistent with a statement of fact,[126] but the inferences drawn from the

116. *See* Morgan v. Washington Trust Co., 105 R.I. 13, 249 A.2d 48 (1969); McCormick (2d ed.), *supra* note 3, § 34, at 68-69.
117. People v. Sumner, 72 Ill. App. 2d 258, 218 N.E.2d 236 (1966).
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 265, 218 N.E.2d at 239.
124. *Id., quoting* Jencks v. United States, 353 U.S. 657, 667 (1957).
125. 58 Ill. App. 2d 312, 208 N.E.2d 314 (1958).
126. *See* Grady, *The Admissibility of a Prior Statement of Opinion for Purposes of Impeachment,* 41 Cornell L.Q. 224 (1956) [hereinafter cited as Grady].

opinion may be inconsistent with the testimony. If a lay witness testifies as to specific facts, some courts prohibit impeachment by prior opinion,[127] because the contradiction should be limited to matters in issue,[128] and opinions of lay witnesses are generally disallowed.[129] Illinois, however, allows the use of prior opinion to impeach the witness if the opinion contains an implied assertion of fact inconsistent with the other assertion made on the stand.[130] This is consistent with the modern trend.[131]

Silence as an Assertion

"A failure to assert a fact, when it would have been normal to assert it, amounts, in effect, to an assertion of its nonexistence."[132] In *Carroll v. Krause*,[133] the court allowed the impeachment stating:

> The rule is that the omission of a witness to state a particular fact under circumstances rendering it incumbent upon him to, or likely that he would, state such fact, if true, may be shown to discredit his testimony as to such fact.[134]

The principle of impeachment by silence is applicable to written statements. Cross examination could proceed as follows:

> Q: Isn't it a fact that you prepared a written statement at my request which covered the facts surrounding the accident?
> A: Yes.
> Q: You signed the statement, didn't you?
> A: Yes.
> Q: It was full and complete when you signed it, wasn't it?
> A: Yes.
> Q: You included all important facts in the statement, didn't you?
> A: Yes.

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127. *Id.*

128. *See* Elton v. Larkins, 172 Eng. Rep. 1020, 1021 (1832).

129. Grady, *supra* note 126, at 225-26.

130. Pienta v. Chicago City Ry., 384 Ill. 246, 120 N.E. 1 (1918); Kimes v. Burhart, 2 Ill. App. 2d 190, 116 N.E.2d 201 (1953).

131. McCormick (2d ed.), *supra* note 3, §35 at 70.

132. People v. Henry, 47 Ill. 2d 312, 321, 265 N.E.2d 876, 882 (1970), *citing* J. Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law, §1042 (3d ed. 1940). *See* People v. Owens, 65 Ill. 2d 83, 357 N.E.2d 465 (1976) (error held harmless); People v. Harbin, 31 Ill. App. 3d 485, 490-91, 334 N.E.2d 379, 383 (1975) (error to admit testimony of the officer as to the defendant's prior inconsistent statement where there was no proper foundation under *Henry* and *Powell*. The error is not fatal if the reasons for the rule, i.e., to protect the witness from unfair surprise and assure an opportunity to deny or explain, were satisfied). *See also* People v. Brown, 6 Ill. App. 3d 500, 285 N.E.2d 515 (1972).

133. 295 Ill. App. 552, 15 N.E.2d 323 (1938) (cited with approval in People v. Henry, 47 Ill. 2d 312, 320-21, 265 N.E.2d 876, 882 (1970)).

134. *Id.* at 562, 15 N.E.2d at 328.

Q: Is this the statement you signed as a complete description of all important facts surrounding the accident?
A: Yes.
Q: Show the court and jury where in that statement you mentioned plaintiffs auto had only one headlight. Take all the time you need.
A: It is not in there.

In the following three situations failure to assert a fact does not amount, in effect, to an assertion of the nonexistence of the fact. First, under certain circumstances where the incomplete statement was made at a prior trial or hearing, second, where a criminal defendant has been given his Miranda warnings and remained silent, and third, where the statement given was detailed and failure to mention a specific fact is understandable. The foregoing exceptions involve situations where it is not "normal" to make the statement in question.[135] The trier of fact, therefore, may not assume that the failure to assert facts is evidence that they do not exist.

Testimony at trial consists of questions by the lawyer and answers by the witness. The answer must respond to the question. Therefore, it may be argued, failure to assert a fact at a previous trial is not an assertion that the fact does not exist unless the answer should have included the fact. That is usually the case if the identical question was asked both times. For example, it is common in discovery depositions to ask the plaintiff to list any physical limitations that he did not have before the accident. If the witness lists three items but testifies to a fourth item, at the trial he can then be impeached with the failure to assert the fact at the deposition. Silence at the deposition, regarding the fourth item, allows the trier of fact to infer that it does not exist.

In *United States v. Hale,*[136] the United States Supreme Court held that a criminal defendant's credibility cannot be affected by reliance on the right to remain silent after he was given the *Miranda* warnings. Of course, that rule applies in Illinois.[137] In *People v. Allen,*[138] however, the defendant made statements to the police before his arrest and receipt of the *Miranda* warnings. The court distinguished the *Hale* case and its Illinois progeny, and allowed im-

135. People v. Henry, 47 Ill. 2d 312, 320-21, 265 N.E.2d 876, 883 (1970).

136. 422 U.S. 171 (1975). *See also* United States v. Henderson, 565 F.2d 900, 903 (5th Cir. 1978); Leon v. Kuhlmann, 443 F. Supp. 50 (S.D.N.Y. 1977).

137. People v. Lewerenz, 24 Ill. 2d 295, 181 N.E.2d 99 (1962); People v. Wright, 32 Ill. App. 3d 736, 336 N.E.2d 18 (1975). *See also* People v. Monaghan, 40 Ill. App. 3d 322, 352 N.E.2d 295 (1976).

138. 37 Ill. App. 3d 619, 346 N.E.2d 486 (1975).

peachment on the basis of the variance between the defendant's pretrial and trial statements. Interestingly, the impeachment centered on failure to mention a significant fact in the statement made prior to arrest.[139]

Failure to state specific facts in a detailed written report *may* not be significant. In *People v. Hampton*,[140] a police report indicated that officers had met with an informer who told them he had just bought narcotics from defendant. The court, while recognizing impeachment by omission, held there was enough pertinent information in the report so that failure to state other specific facts was not significant.[141]

The Forgetful Witness

Assume an occurence witness signed a statement that defendant stopped at a stop sign. At trial the witness testified, "I don't remember whether the defendant stopped at the stop sign." The majority rule is that a witness who does not remember the facts may not be impeached by showing that he did remember on a prior occasion.[142] An "I don't remember" answer is neither damaging to the examiner nor factually inconsistent with a previous answer. Therefore, impeachment would serve no purpose except to introduce hearsay evidence of the prior statement. There has been significant erosion of the majority rule in recent years,[143] because it protects a hostile witness from the requirement of full disclosure. A defective memory can serve as a sanctuary for the perjurer. Furthermore, the jury is deprived of evidence relevant to credibility.[144]

People v. Green[145] illustrates the erosion of the rule in California. The prosecutor's principle witness to police defendant had given him a shopping bag of marijuana. He repeated the statement at the preliminary hearing. At trial he admitted having the bag of marijuana but could not recall how he got it. The trial court allowed

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139. *Id.* at 623, 346 N.E.2d at 489.

140. 14 Ill. App. 3d 427, 302 N.E.2d 691 (1973).

141. *Id.* at 436, 302 N.E.2d at 699.

142. *See* Ladd, *Some Observations of Credibility: Impeachment of Witnesses*, 52 CORNELL L.Q. 239 (1967).

143. *See, e.g.*, People v. Green, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971).

144. WIGMORE (Chadbourne rev.), *supra* note 5, §1043 at 1061.

145. 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969), *vacated and remanded*, 399 U.S. 149 (1970), *aff'd on remand*, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971); People v. Hathcock, 504 P.2d 476, 105 Cal. Rptr. 540 (1973). According to *Hathcock*, *Green* held that the confrontation clause does not require the court to exclude from evidence the prior statement of a witness who concedes making the statement and who may be asked to defend or explain the inconsistency between the prior and present version of the events.

impeachment of the "I don't remember" answer by the previous statements. Defendant was convicted. The California Supreme Court initially held that the admission of the statement violated the defendant's sixth amendment rights.[146] The United States Supreme Court disagreed and vacated.[147] On remand the California Supreme Court stated:

> In normal circumstances, the testimony of a witness that he does not remember an event is not "inconsistent" with a prior statement by him describing that event . . . . But justice will not be promoted by a ritualistic invocation of this rule of evidence. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement . . ., and the same principal governs the case of the forgetful witness.[148]

The minority rule, which allows impeachment, is followed in Illinois. In *People v. Bush,*[149] the Illinois Supreme Court held that defendant's statements to police concerning the event were inconsistent with his testimony that he remembered nothing after a blow on the back of his neck and were, therefore, properly admitted. The court also held that if a witness is asked whether he made a statement and indicates he does not remember it is proper to prove that the statements were made.[150] Of course, if the witness stated prior to trial that he had no knowledge of facts now testified to that should be provable.[151]

The proposed Illinois Rules are silent on the subject, but the federal courts have struggled with the problem.

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146. People v. Green, 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969).

147. California v. Green, 399 U.S. 149 (1970).

148. People v. Green, 3 Cal. 3d 981, 988, 479 P.2d 998, 1002, 92 Cal. Rptr. 494, 498 (1971). In United States v. Shoupe, 548 F.2d 636 (6th Cir. 1977), the court cited a line of cases commencing with *California v. Green* and said that even though they were not controlling there, they indicated that there is no intrinsic constitutional impediment to impeachment of a witness based on a prior inconsistent statement which he claims not to remember. 548 F.2d at 642-43. *But see* United States v. Rogers, 549 F.2d 490 (8th Cir. 1976). In Phillips v. Wyrick, 558 F.2d 489 (8th Cir. 1977), the court pointed out that consistent with *California v. Green,* once the prosecution has made a good faith effort to introduce evidence through a witness, whether the witness testifies in a manner inconsistant or consistent with the testimony at a preliminary hearing, claims loss of memory, claims privilege against compulsory self-incrimination, or simply refuses to answer, nothing in the confrontation clause prohibits the prosecution from also relying on the prior testimony of the witness to prove its case. 558 F.2d at 494.

149. People v. Bush, 29 Ill. 2d 367, 194 N.E.2d 308 (1963).

150. *Id.* at 372, 194 N.E.2d at 312; People v. Preston, 341 Ill. 407, 173 N.E. 383 (1930); People v. Luna, 69 Ill. App. 2d 291, 216 N.E.2d 473 (1966).

151. *See* McCormick (2d ed.), *supra* note 3, §34 at 68 n.17, for cases supporting the position and cases against the position.

The approach taken by the federal courts under Rule 607 is a compromise between that of complete exclusion and total admission. The result is that the trial judge must determine if the witness is acting in good faith when he says he cannot remember. If he is in good faith, the prior statement is excluded, but if the witness falsifies a lack of memory, the trial judge may admit the prior statement for purposes of impeachment.[152]

Perhaps the best illustration of this broad discretionary approach is found in *United States v. Rogers*.[153] In *Rogers*, the Court held that a statement's inconsistency may be determined from surrounding circumstances and is not limited to diametrically opposite assertions. Specifically, a change in position by failure of the witness's memory may or may not be inconsistent with that witness's prior statement on the matter. The trial judge, therefore, has considerable discretion in determining whether the loss of memory is intentionally evasive. The trial judge in *Rogers* concluded that the witness's prior statement actually was inconsistent with his loss of memory and the Fourth Circuit upheld the trial judge's ruling. Even if the prior statement is not admissible to impeach the forgetful witness counsel should consider hearsay exceptions which will allow the prior statement into evidence.[154]

First, if the witness is an opposing party, the statement is an admission of a party opponent under 801(d)(2).

Second, the statement may be admissible under the former testimony exception. Rule 804(b)(1) provides as follows:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> (1) . . .Testimony given as a witness at another hearing of the same or different proceeding, or in an evidence deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The additional requirement that the witness be unavailable to testify is satisfied by his lack of memory of the subject matter of his statement under Rule 804(a)(3).

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152. United States v. Insana, 423 F.2d 1165 (2d Cir. 1970). *See also* United States v. Hankish, 502 F.2d 71 (4th Cir. 1974); United States v. Allsup, 485 F.2d 287 (8th Cir. 1973); McDonnell v. United States, 472 F.2d 1153 (8th Cir. 1973).

153. 549 F.2d 490 (8th Cir. 1976).

154. PROPOSED ILL. R. EVID. 607 (Final Draft), for example, requires a showing of affirmative damage before a prior statement may be used to impeach a party's own witness.

Third, although unlikely, the statements may qualify as past recollection recorded under Rule 803(5). The difficulty is to find a witness who can testify that the writing was accurate when it was made. The witness has denied memory of the statement or the contents of the statement.

Fourth, if the prior statement is against the pecuniary or proprietary interest of the witness it is admissible under rule 804(b)(3). Statements that would expose the witness to civil or criminal liability are within the definition of a declaration against interest.

If these exceptions are kept in mind, many statements may be admissible even if the witness forgets the subject matter of the statement while testifying and the court rules that the prior statement is not admissible on the basis of its inconsistency.

Impeachment on a Collateral Matter

Q: Isn't it a fact that you obtained your first driver's license at the age of 30?
A: No.
(At this point preliminary questions concerning whether the witness was present at the deposition should be asked.)
Q: Did I ask you this question and did you give this answer:
Q: When did you get your first driver's license?
A: At the age of 30.
OBJECTION: The attempted impeachment is on a collateral matter.
Response: It is not collateral. Furthermore, even if it is collateral, we have the right to confront the witness with the statement as an aid to the jury in determining the credibility of the witness.
Court: Objection overruled.

At common law, extrinsic evidence of a prior statement was inadmissible if collateral.[155] The interrogator could prove the inconsistency by the admission of the witness during cross examination. If the witness denied the prior inconsistent statement, however, the interrogator had to "take the answer."[156] He could not introduce extrinsic evidence.[157]

Defining "collateral matters" is a difficult task. To avoid being collateral the statement must include facts admissible indepen-

155. People v. Strause, 290 Ill. 259, 125 N.E. 339 (1919); McCormick (2d ed.), *supra* note 3, §36 at 70; Wigmore (Chadbourne rev.), *supra* note 5, §1001 *et seq.*

156. People v. Persinger, 49 Ill. App. 3d 116, 363 N.E.2d 897 (1977); Tellefsen v. Key Sys. Transit Lines, 158 Cal. App. 2d 243, 322 P.2d 469 (1958); McCormick (2d ed.), *supra* note 3, §36 at 70.

157. People v. Pfanschmidt, 262 Ill. 411, 104 N.E. 804 (1914).

dently of the self-contradiction.[158] This would include two classes of fact: (1) facts relevant to an issue framed by the pleadings and (2) facts admissible to discredit the witness by showing bias, corruption, interest or the like.[159] The admissibility of evidence relating to the age at which a party obtained his driver's license is very likely irrelelvant and therefore collateral. The examiner would be stuck with the answer.

The admissibility of a prior statement to show corruption, bias, or interest depends upon the scope of the rules governing such impeachment. For example, if the witness denied that he previously stated he hated the defendant, defendant's counsel should be permitted to introduce extrinsic evidence of the statement. The statement contains facts that would have been independently admissible to discredit the witness.[160]

The prohibition of impeachment on a collateral matter is to prevent confusion of the issues,[161] to prevent undue consumption of time,[162] and to prevent unfair surprise to the witness.[163] Undoubtedly, every inconsistency is relevant to the credibility of a witness, but extrinsic evidence on collateral matters, will present facts that are not relevant to the factual issues. The jury may confuse the purpose of impeachment with the purpose of presentation of evidence, and the consumption of time necessary to produce extrinsic evidence is not worth the gain in evaluating credibility. After all, the contradiction is not necessarily based on deliberate falsehood. The same measure of testimonial accuracy cannot be expected with regard to facts insignificant to the issues.

A trial attorney should object if the facts contained in the prior statement do not seem "important" to the issues in the case or the credibility of the witness. I suggest the "important" fact test be-

158. McCormick (2d ed.), *supra* ntoe 3, §36 at 70.

159. People v. Clark, 55 Ill. App. 3d 379, 370 N.E.2d 1111 (1977); People v. Persinger, 49 Ill. App. 3d 116, 363 N.E.2d 897 (1977); People v. Watkins, 23 Ill. App. 3d 1054, 320 N.E.2d 59 (1974); Wigmore (Chadbourne rev.), *supra* note 5, §§1004-05, §1021; McCormick (2d ed.), *supra* note 3, §36 at 70.

160. People v. Watkins, 23 Ill. App. 3d 1054, 320 N.E.2d 59 (1974).

161. People v. Lechner, 60 Ill. App. 2d 472, 280 N.E.2d 898 (1965).

162. Cal. Evid. Code §780, Comment (West 1968); Wigmore (Chadbourne rev.), *supra* note 5, §1002, at 961.

163. People v. Hicks, 28 Ill. 2d 457, 192 N.E.2d 891 (1963); People v. Gray, 47 Ill. App. 3d 1026, 365 N.E.2d 501 (1977). *See also* E. Cleary, Handbook of Illinois Evidence, § 6.17 at 97 (2d ed. 1963) and McCormick (2d ed.) *supra* note 3, §47; People v. Allen, 36 Ill. App. 3d 821, 344 N.E.2d 825 (1976); People v. Watkins, 23 Ill. App. 3d 1054, 320 N.E.2d 59 (1974) Kenilworth Insurance Co. v. McDougal, 20 Ill. App. 3d 615, 313 N.E.2d 673, (1974); Redding v. Schroeder, 54 Ill. App. 2d 306, 203 N.E.2d 616 (1964); Goertz v. Chicago & N.W. Ry., 19 Ill. App. 2d 261, 153 N.E.2d 486 (1958).

cause of its simplicity. A trial lawyer will not be able to go through all the tests for collateral matter in the split second allowed to make an objection, and if he did, his opponent may well have completed the impeachment and be on a new subject by the time an objection is made. After an objection is made, however, argument may proceed at a more deliberate pace.

The proposed Illinois Rules are silent with regard to impeachment on collateral matters, but proposed Rule 403 gives the trial court broad power to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or the needless presentation of cumulative evidence. In other words, if the extrinsic evidence will help the jury assess the witness's credibility, but may also confuse the jury or take a great deal of time, the trial court is able to balance the conflicting factors and make a decision.[164] For example, if the party falsely stated a fact on direct, the trial court may be more likely to allow extrinsic evidence than if the fact was extracted on cross examination. The argument is that a party "should not be allowed to profit by a gratuitously offered misstatement."[165] The trial judge is best able to determine the significance of the witness's testimony and the importance of his credibility in determining the material issues in the case.

Unfortunately, many federal courts have applied Rule 607 rather than 403 to solve the problem.

Federal Rule 607 provides that the credibility of a witness may be attacked by any party including the party calling him. The federal decisions interpreting Rule 607 are similar to the Illinois law previously described. The problem with the Rule 607 approach is that most courts do not analyze the evidence, they sanction the results. There is no examination of probative or prejudicial strength.[166] Many legal scholars, therefore, advocate a change to the Rule 403-type test which is already the standard in Rule 20 of the Uniform Rules of Evidence.[167]

The Statement Is Taken Out of Context

As a general rule an attorney may not take a statement out of context, but if he does, an objection should be made or in the alter-

164. Wigmore and McCormick agree. 3 WIGMORE (Chadbourne rev.), *supra* note 5, at 659-60. This approach was followed in Travis v. United States, 269 F.2d 928, 940 (10th Cir. 1959); MCCORMICK (2d ed.), *supra* note 3, §47.

165. *See* Walder v. United States 347 U.S. 62, 65 (1954).

166. United States v. Herzberg, 558 F.2d 1219, 1223 (5th Cir. 1977).

167. Uniform R. Evid. 20.

native the statement should be brought into context during re-direct examination. The rationale behind the rule is to protect the honest witness and to prevent the false appearance of contradiction.

If a witness has been impeached by a statement that is part of a longer writing, declaration or conversation, any other parts necessary to make it understood may be used to qualify or explain the statement.[168] Therefore, a witness impeached by a prior inconsistent statement should be afforded an opportunity to explain the statement[169] or to introduce other portions of the statement necessary to qualify or explain the inconsistency.[170]

This rule must be distinguished from the prohibition against rehabilitation with a prior consistent statement other than to rebut an inference of recent fabrication or other motivation towards perjury.[171] It is permissible to explain or qualify the impeaching statement from the *same* document by showing that the statement was taken out of context or so isolated as to be misleading.[172] Other statements, by definition, however, are not admissible for this purpose.[173]

Of course, there are limits on the right to use the entire prior statement to qualify or explain the inconsistency. In *People v. Allen,*[174] the court disallowed the state's "thinly disguised" effort to introduce an incriminating statement under the guise of attempted rehabilitation, because nothing in the statement either qualified or explained the inconsistency.[175]

If the rest of the statement is not relevant to the portion used in cross examination it should be excluded. For example, if counsel wanted an entire deposition read to place into context the specific question and answer used during cross examination, he would have the burden of showing the relevance of the entire deposition to the particular subject matter and its necessity to a complete understanding.[176]

Rule 106, frequently called the "Rule of Completeness," would

168. People v. Hicks, 28 Ill. 2d 457, 463, 192 N.E.2d 891, 894 (1963).

169. *Id.* at 463, 192 N.E.2d at 894.

170. *Id.*

171. Stolp v. Blair, 68 Ill. 541, 543-44 (1873); Kenilworth Ins. Co. v. McDougal, 20 Ill. App. 3d 615, 313 N.E.2d 673 (1974); Biela v. Messner, 18 Ill. App. 2d 236, 244, 151 N.E.2d 406 (1958); *see also* People v. Gray, 47 Ill. App. 3d 1026, 365 N.E.2d 501 (1977).

172. Kenilworth Ins. Co. v. McDougal, 20 Ill. App. 3d 615, 313 N.E.2d 673 (1974).

173. People v. Gray, 47 Ill. App. 3d 1026, 365 N.E.2d 501 (1977).

174. 36 Ill. App. 3d 821, 344 N.E.2d 825 (1976).

175. *Id.* at 825, 344 N.E.2d at 828.

176. *See* People v. Perry, 7 Cal. 3d 756, 499 P.2d 129, 103 Cal. Rptr. 161 (1972). The court interpreted Section 356 of the California Rules and disallowed use of the entire deposition.

regulate the order of proof as opposed to admissibility. It provides that when any part of a written statement is introduced the adverse party may require the introduction of any other part or any other written statement, which ought in fairness to be considered contemporaenously.[177] The effect of this rule is the same as Illinois Supreme Court Rule 212(c) which is limited to depositions.

The goal of Rule 106 is to eliminate the misleading impression that can be created when matters are taken out of context, and to allow immediate rehabilitation and prevent the difficulties incurred if rehabilitation evidence is delayed to a point later in the trial.[178] The danger that is avoided is not the admission of too much evidence but the admission of too little.[179] For these reasons Rule 106 does not operate for the proponent of the evidence, but operates for the protection of the adversary.[180]

Since the wording of Rule 106 is both general and vague, the trial judge must decide whether the remainder of a written or recorded statement should be admitted "in fairness" to the opposing party.[181] The proponent may only be entitled to introduce a portion of the written or recorded statement, and the remaining portions can only be admitted by the adversary under the authority of Rule 106.[182] However, the adversary is never forced into a contemporaneous admission of the remainder of the written or recorded statement. He still retains the right to develop the matter as part of his own case.[183]

Despite the "fairness" accorded by Rule 106, the rights of an adversary to admit further portions of the written or recorded statement, or any other written or recorded statement, is restricted to those portions which bear directly on what the proponent has already introduced. The general principles of relevancy, therefore, apply.[184] Yet if the remainder of a written or recorded statement is relevant, it will not be excluded under any other principle of evidence such as hearsay.[185]

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177. FED. R. EVID. 106; PROPOSED ILL. R. EVID. 106 (Final Draft).

178. United States v. Jamar, 561 F.2d 1103, 1109 (1977); FED. R. EVID. 106, Advisory Comm. Notes; WEINSTEIN, WEINSTEIN'S EVIDENCE, United States Rules 101-403, ¶ 106 (02) (1978).

179. WEINSTEIN, WEINSTEIN'S EVIDENCE, United States Rules ¶ 106(02), 106-13 (1978).

180. D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 49 (1977).

181. *Id.*; United States v. Greene, 497 F.2d 1068, 1082 (7th Cir. 1974).

182. *See* York v. United States, 241 F. 656, 658 (9th Cir. 1916).

183. FED. R. EVID. 106, Advisory Comm. Notes.

184. United States v. Littwin, 338 F.2d 141, 145-46 (6th Cir. 1964); Camps v. N.Y. City Transit Authority, 261 F.2d 320, 322 (2d Cir. 1958).

185. United States v. Appuzzo, 245 F.2d 416, 421-22 (2d Cir.), *cert. denied*, 355 U.S. 831 (1957); United States v. Columbia Pictures Corp., 25 F.R.D. 497, 499 (S.D.N.Y. 1960); *The Reform of Federal Criminal Evidence*, 32 F.R.D. 121, 151-52 (1963).

Under Federal Rule of Evidence 403, the trial judge may exclude the remainder of a writing or recorded statement that would have been admissible under Rule 106, if its prejudicial effect outweighs its probative value.[186] Likewise, Rule 105 also limits the use of Rule 106 in cases where the remainder of the writing or recorded statement is introduced for the specific purpose of completing a proper context and the opposing party requests that the substance of this remainder be limited to that purpose and that purpose only.[187]

Good Faith Requirement

A party must act in good faith and not imply that the witness has previously contradicted his testimony, if he has not in fact done so.[188] A question is not in good faith if counsel knows the witness will deny it and counsel cannot follow the denial with direct proof.[189] If, under the guise of laying a foundation for impeachment, a lawyer could confront witnesses with nonexistent statements, the only limit to the prejudice he could create would be his own imagination.

Good faith, however, is not enough if the impeachment is not completed. For example, in *Danzico v. Kelly*,[190] the plaintiff was asked on cross examination whether he had told his chiropractor that he had a back problem for 12 years prior to the accident. The witness answered no. Defense counsel failed to call the chiropractor. It was defense counsel's contention that he was in good faith because an entry in the chiropractor's file provided: "lower lumbar - * * * sciatic, dur. chronic, 12 yrs. dur., acute 5 years." The chiropractor was allegedly in New York and, therefore, immune from service of subpoena. The appellate court held that once defense counsel lays the foundation for impeachment, he is under an obligation to produce the impeaching witness.[191] If he fails to meet this obligation, the trial court must strike the cross-examination and instruct the jury to disregard it, or, at the insistence of the plaintiff, declare a mistrial.[192] The holding is understandable since plaintiff had no opportunity to cross examine the chiropractor, and the pre-

186. D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE §49 (1977).

187. Newman v. United States, 331 F.2d 968, 970-71 (8th Cir. 1964); Short v. United States, 271 F.2d 73, 78 (9th Cir. 1959), *cert. denied*, 361 U.S. 948 (1960).

188. People v. Burbank, 53 Ill. 2d 261, 270, 291 N.E.2d 161, 166 (1972); Potter v. Ace Auto Parts and Wreckers, Inc., 49 Ill. App. 2d 354, 199 N.E.2d 618 (1964).

189. People v. Irish, 77 Ill. App. 2d 67, 222 N.E.2d 114 (1966); People v. Sanders, 357 Ill. 610, 192 N.E. 697 (1934); *see* People v. Payton, 82 Ill. App. 2d 51, 227 N.E.2d 87 (1967).

190. 112 Ill. App. 2d 14, 250 N.E.2d 801 (1969).

191. *Id.* at 25, 250 N.E.2d at 808.

192. *Id.* at 25-26, 250 N.E.2d at 808.

judicial effect of this type of question cannot always be overcome.[193]

If the witness denies the prior statement,[194] or gives an equivocal answer,[195] an attorney must complete the impeachment unless there is only a slight inconsistency.[196] The fact that counsel was in good faith does not eliminate the prejudicial effect of failure to complete the impeachment.[197] If counsel fails to complete the impeachment or is in bad faith, a record should be made in the trial court[198] and a request should be made to strike the testimony and instruct the jury to disregard the testimony.[199] In lieu of or in addition to this procedure, a motion for mistrial may be made.[200] This procedure preserves the misconduct for review and requests remedial action by the court. The motion for mistrial is addressed to the sound discretion of the trial court and his judgment will not be reversed except for clear abuse of that discretion.[201] The abuse of discretion must affirmatively appear in the record.[202]

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193. *But see* People v. Strubberg, 61 Ill. App. 3d 521, 378 N.E.2d 191 (1978).

> We agree with the defendant that if cross-examiner lays a foundation for impeachment of a witness in a manner which insinuates that the witness made prior inconsistent statements, and does not subsequently present evidence that those statements were actually made, error has been committed, and that general rule is applicable here. However, the fact that error has occurred in this regard does not alone carry the import that it is prejudicial and requires reversal.

Id. at 525, 378 N.E.2d at 195.

194. Miller v. Chicago Transit Authority, 3 Ill. App. 2d 223, 121 N.E.2d 348 (1954).

195. Rigor v. Howard Liquors, Inc., 10 Ill. App. 3d 1004, 295 N.E.2d 491 (1973).

196. Schoolfield v. Witkowski, 54 Ill. App. 2d 111, 203 N.E.2d 460 (1964); Goldstein v. Hertz Corp., 16 Ill. App. 3d 89, 305 N.E.2d 617 (1973). In Clamage v. Shapiro, 48 Ill. App. 3d 90, 365 N.E.2d 471 (1977), the court cited Rigor v. Howard Liquors Inc., 10 Ill. App. 3d 1004, 295 N.E.2d 491 (1973), and *Schoolfield* as authority that: "The rule in Illinois regarding impeachment by a prior inconsistent statement is that, once counsel has laid a foundation for impeachment, he is required to offer proof of the allegedly impeaching statement." *Id.* at 96, 365 N.E. 2d at 475.

197. Danzico v. Kelly, 112 Ill. App. 2d 14, 250 N.E.2d 801 (1969); Ramseyer v. Illinois Cent. R. R. Co., 110 Ill. App. 2d 95, 249 N.E.2d 120 (1969).

198. Blake v. Delhotel, 39 Ill. App. 3d 725, 728, 350 N.E.2d 880, 882 (1976).

199. The court may also admonish counsel. *See* Sesemann v. Ellington, 51 Ill. App. 3d 790, 367 N.E.2d 219 (1977); People v. Payton, 82 Ill. App. 2d 51, 227 N.E.2d 87 (1967).

200. Sesemann v. Ellington, 51 Ill. App. 3d 790, 367 N.E.2d 219 (1977); People v. Irish, 77 Ill. App. 2d 67, 222 N.E.2d 114 (1966).

201. Blake v. Delhotel, 39 Ill. App. 3d 725, 350 N.E.2d 880 (1976); Reese v. Crain, 98 Ill. App. 2d 380, 383, 240 N.E.2d 358, 359 (1968).

202. Reese v. Crain, 98 Ill. App. 2d 380, 240 N.E.2d 358 (1968); Potter v. Ace Auto Parts & Wreckers, Inc. 49 Ill. App. 2d 354, 199 N.E.2d 618 (1964). In Stringer v. McHugh, 31 Ill. App. 3d 720, 334 N.E.2d 311 (1975), the court indicated that according to *Potter*, "if the trial court sustains the verdict, the reviewing court may disturb this ruling only where it is against the manifest weight of the evidence; apparently, if the trial court sets aside the verdict, a reviewing court can overrule that decision where a clear abuse of discretion appears of record." *Id.* at 722, 344 N.E.2d at 312. The *Stringer* court said this test gives the trial court too much discretion to substitute its opinion of the evidence for that of the jury. The court cited

The failure to complete the impeachment does not constitute reversible error[203] if there is other evidence of the impeaching facts and the subject matter of the impeachment is of minimal importance.[204]

Some trial attorneys refer to a document while cross examining to frighten the witness or convey the impression to the jury that the document contains statements implied by the questions. This conduct is arguably unethical. The American Bar Association Code of Professional Responsibility provides in relevant part that " . . . a lawyer shall not . . . ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person."[205]

If this procedure is used by an opponent, counsel should ask to see the document and expose to the court and jury the use of any document unrelated to the cross examination.[206] The proposed Illinois rule would require examining counsel to show the statement to opposing counsel upon request.[207]

Rule 611(a)(3) would allow the court to exercise reasonable control over the mode of interrogating witnesses so as to "protect witnesses from harassment or undue embarrassment."[208] Certainly questions in bad faith having no basis in fact would not be relevant to credibility and could confuse the jury. The trial court under Rule 611(a)(3) would have the power to prevent this type of cross examination.

Foundation for Extrinsic Evidence

In Illinois, as previously stated, a foundation is required prior to the introduction of any extrinsic evidence of a prior inconsistent statement.

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several cases holding that the jury's verdict should not be disturbed unless it is "unreasonable, arbitrary, and unsupported by the evidence," citing Scoggins v. Village of Hartford, 128 Ill. App. 2d 228, 262 N.E.2d 97 (1970); Buer v. Hamilton, 48 Ill. App. 2d 171, 199 N.E.2d 256 (1964). The *Stringer* court opted for this test because it "affords the jury verdict the greater respect and consideration that it is due." *Id.* at 723, 334 N.E.2d at 313.

203. People v. Sanders, 357 Ill. 610, 192 N.E. 697 (1934); People v. Williams, 105 Ill. App. 2d 25, 245 N.E.2d 17 (1969).

204. People v. Williams, 105 Ill. App. 2d 25, 34, 245 N.E.2d 17, 21 (1969).

205. ABA Code of Professional Responsibility DR 7-106(c)(2).

206. People v. Borella, 362 Ill. 218, 199 N.E. 113 (1935); People v. Sanders, 28 Ill. App. 3d 473, 348 N.E.2d 229 (1976) held that it was error, though harmless, for the trial court to deny the defendant's motion to require the State's Attorney to produce the entire written statement of an alibi witness.

207. PROPOSED ILL. R. EVID. 613 (a) (Final Draft).

208. PROPOSED ILL. R. EVID. 611 (a)(3) (Final Draft); FED. R. EVID. 611(a)(3).

Impeachment of a Party's Own Witness

An objection should be made if a party attempts to impeach his own witness by use of a prior inconsistent statement, unless the party first shows surprise and affirmative damage.

THE ART OF USING THE PRIOR INCONSISTENT STATEMENT

There is an art in "using" the principles of law previously discussed. To know how to impeach a witness is knowledge; to know when and if to impeach is judgment. This portion of the article will discuss the judgment factors in the use of the prior inconsistent statement.

Commit the Witness to the Inconsistent Testimony

The jury evaluates the credibility of a witness. In doing so they may consider his manner and demeanor on the stand. Therefore, commit the witness to the inconsistent testimony before confrontation with the prior statement. Wellman, in his classic book "The Art of Cross Examination,"[209] stated:

> You should never hazard the important question until you have laid the foundation for it in such a way that, when confronted with the fact, the witness can neither deny or explain it. The correct method of using such a letter is to lead the witness quietly into repeating the statement he has made in his direct testimony, and which his letter contradicts . . . . Then let your whole manner toward him suddenly change and spring the letter upon him.[210]

Another eminent trial lawyer also emphasized commitment to the inconsistency before impeachment.[211]

> There is an art in introducing the letter contradicting the witness' testimony. The novice will rush in. He will obtain the false statement and then quickly hurl the letter in the face of the witness. The witness, faced with it, very likely will seek to retrace his steps, and sometimes do it skillfully, and the effect is lost.
>
> The mature trial counsel will utilize the letter for all it is worth. Having obtained the denial which he wishes, he will, perhaps, pretend that he is disappointed. He will ask that same question a few moments later, and again get a denial. And he will then phrase - and this requires preparation - he will then phrase a whole series of questions not directed at that particular point, but in which is incorporated the very fact which he is ready to contradict - each

209. F. WALLMAN, THE ART OF CROSS EXAMINATION (3rd ed. 1923).
210. *Id.* at 115.
211. Nizer, *The Art of Jury Trial*, 32 L.Q. 59, 68 (1946).

> time getting closer and closer to the language in the written document which he possesses, until he had induced the witness to assert not once, but many times, the very fact from which ordinarily he might withdraw by saying it was a slip of the tongue. Each time he draws closer to the precise language which will contradict the witness, without making the witness aware of it, until finally, when the letter is sprung, the effect as compared with the other method is that, let us say, of atomic energy against a firecracker.[212]

The principal difficulty with this technique is the rule in *Queen Caroline's Case.*[213] As the reader will remember, that rule prohibits the cross examiner from asking the witness about any statements made by the witness in writing without first showing the witness the writing and allowing him to read it. Of course, while reading the letter the witness will be warned and will attempt to avoid an effective impeachment.

Under the Federal Rules and the Illinois Proposed Rules, however, Queen Caroline's Rule is in effect abolished. Counsel is only required to show opposing counsel a copy of the writing.[214] Therefore, effective impeachment is possible.

Underscore the Impeachment

Use questions that underscore the importance of the impeachment. For example, assume the witness testified on direct that the defendant did not stop at the stop sign, and had made a contrary statement in his discovery deposition. The following line of questioning may be helpful in emphasizing the contradiction:

> Q: Were you in my office on September 1, 1978 for the purpose of giving a deposition? (The date indicates the deposition was closer to the event or occurrence than the testimony at trial)
> A: Yes.
> Q: Was a court reporter present?
> A: Yes.
> Q: Was your attorney present? (Or — was the attorney for the plaintiff present? This indicates that an attorney was present to protect the witness from improper questioning.)
> A: Yes.
> Q: Did I ask you certain questions and did you give certain answers?
> A: Yes.

212. *Id.* at 68.

213. 129 Eng. Rep. 976 (1820).

214. PROPOSED ILL. R. EVID. 613(a)(Final Draft); MCCORMICK (2d ed.), *supra* note 3, at 57; FED. R. EVID. 613(a).

Q: Were you under oath to tell the truth? (Indicates that prior testimony was also under oath.)
A: Yes.
Q: Did you tell the truth?
A: (Any answer to this question will be favorable to your impeachment.)
Q: Did I ask you this question and did you give this answer:
"Q: Did the defendant stop at the stop sign? A: Yes.

One method of emphasizing the important part of the impeachment is through voice inflections or pauses. In speaking, unlike writing, we cannot underline or italicize important words. To make sure the jury understands the important part of the question an attorney may use non-verbal methods of communication. For example, he can raise or lower his voice, use movement, or pause to capture the jury's attention.

The Best Time to Use the Prior Inconsistent Statement

Constant debate occurs over when the inconsistent statement should be used. The two most popular theories seem to be: (1) at the beginning of cross-examination[215] and (2) after obtaining favorable admissions from the witness.[216]

Because the jury is keyed for the first question on cross examination, the first few questions may be the best time to confront the witness with the inconsistency. Effectively attacking the witness's credibility, at the outset, should make a lasting impression upon the jury. In addition, the witness fearing that you can impeach all his answers, may be truthful on subjects upon which you are not prepared to impeach.

On the other hand, it is arguable that you should first obtain admissions before impeachment. The primary purpose of cross examination is to obtain admissions favorable to your side of the case. If enough favorable admissions are obtained there may be no need to use an inconsistent statement. There is no need to destroy the credibility of one who has testified in your favor. The best approach depends on the circumstances of the particular case.

Don't Belabor the Point

Once the witness admits the inconsistent statement, it is tempting to ask additional questions to highlight the impeachment. "Were you lying then or are you lying now?" This question is al-

215. F. WELLMAN, THE ART OF CROSS EXAMINATION 107 (3d ed. 1923).
216. I. GOLDSTEIN & F. LANE, 3 GOLDSTEIN TRIAL TECHNIQUE §§20.61, 20.62 (2d ed. 1969).

lowed in Illinois,[217] but courts have indicated that the cross examination is harsh.[218] In Illinois it is permissible to ask the witness on which occasion he was telling the truth, and after he answers, to ask why he didn't tell the truth on the other occasion.[219]

There are several reasons for not asking these additional questions. First, jurors identify with the witness, not with the lawyer. They resent an unjust and overly aggressive attack on the witness, and may react by sympathizing with the witness and searching for arguments reconciling the two statements. The jurors should come to the realization by themselves that the witness is not worthy of belief.

McCormick's cardinal rule of impeachment should not be overlooked:

> Never launch an attack which implies that a witness has lied deliberately, unless you are convinced that the attack is justifiable and essential to your case. An assault which fails often produces in the jury's mind an indignant sympathy for the intended victim.[220]

Second, the significance of inconsistent statements can be explained in detail during closing argument. At that time it is too late for the witness to attempt an explanation. If additional highlight questions are asked, your opponent may be forced to seek an explanation during re-direct examination.

Third, the question itself may be objectionable on the grounds that it is argumentative, and the court may protect the witness from undue harassment or embarrassment.[221]

The Mechanics of Extrinsic Impeachment

Assume that the witness, after being confronted, is evasive or denies the prior inconsistent statement, and that the examiner has a transcript of a deposition to the contrary. What procedure should you use to complete the impeachment? It is obvious that the prior inconsistent statement must be proved by another witness or documentary evidence.

Before introducing extrinsic evidence the accuracy of the deposition containing the prior statement should be highlighted. If the witness to be impeached signed the deposition or waived signature,

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217. Davidson v. Meier, 60 Ill. App. 3d 386, 376 N.E.2d 799 (1978).
218. *Id.*
219. People v. Klotz, 333 Ill. 583, 165 N.E.155 (1929).
220. McCormick (2d ed.), *supra* note 3, § 33 at 67.
221. People v. Southack, 39 Cal. 2d 578, 586-90, 248 P.2d 12, 18-19 (1952).

that fact should be brought out during cross-examination, through questions such as:

Q: You reviewed the deposition before your signed it, didn't you? *or*
Q: You knew you had the right to make any changes in it, didn't you? *or*
Q: You didn't make any changes, did you? *or*
Q: You reviewed it recently before testifying, didn't you? (It would be unusual if the witness didn't read it before testifying.)

If the witness had the opportunity to review the deposition but waived the right, that fact should be elicited. Waiver of the right to sign the deposition will usually occur during the course of deposition. Therefore, the witness could be impeached if he stated that he did not knowingly waive signature.

Once the accuracy of the deposition has been established, the court reporter should be called and requested to bring his or her original notes. After properly qualifying the reporter/witness as an expert, the shorthand or machine notes should be marked for identification and the reporter should be referred to the contradictory testimony. After establishing that the witness whom you are attempting to impeach was under oath at the deposition, the reporter/witness should be asked whether the deponent was asked the following question: (in line with our earlier stop sign illustration) and gave the following answer:

Q: Did the defendant stop at the stop sign?
A: Yes.

If the reporter/witness answers in the affirmative, impeachment is complete.

If the court reporter/witness is not available, the prior inconsistent statement may be proved by any person who heard it at the deposition. While this type of impeachment is less satisfactory, it should be kept in mind in case of an emergency.

Obviously, the testimony of an impartial witness such as a court reporter is effective in showing that the witness is not worthy of belief — not only did the witness make inconsistent statements, but he denied under oath that he made the prior statement. An independent witness, the court reporter, testified to the contrary.

Ask Leading Questions

Principles applicable to cross examination in general are also applicable to impeachment by contradiction. For example, leading questions are permissible. Indeed every question should be leading.

During an effective impeachment every answer should be a simple "yes." Surprisingly, many inexperienced lawyers fail to lead during this type of impeachment. Obviously, this reduces its effectiveness, as the following examples illustrate:

Non-leading question:
Q: What question, if any, did I ask you about the color of the traffic light?
A: I don't remember.
Leading question:
Q: Did I ask you this question, and did you give this answer:
"Q: What color was the light? A: Red."
A: Yes.

A non-leading question can often confuse the witness and the jury, whereas the leading question directs the witness to the specific source of impeachment while the cross examiner maintains control.

Listen to the Answer

Another general principle of cross examination that should not be ignored is — listen to the answer. Many lawyers are so wrapped up in their next question that they do not listen to the answer. The cross examiner must analyze each answer. If it is evasive, the witness must be required to take a definite position. An evasive answer usually occurs where the material is favorable to the cross-examiner. A definite answer produces such testimony and reveals the attempt to conceal relevant facts. This principle is particularly crucial where the question is important such as the last question in impeachment by prior inconsistent statement:

Q: Did I ask this question and did you give this answer:
"Q: What color was the light? A: Red."
A: I may have. *or*
A: I forget. *or*
A: If that's what it says, I must have.

Such answers are evasive and cry out for further questioning or extrinsic evidence to complete the impeachment. Yet many lawyers do not follow up, because they were not listening to the answer.

Don't Allow an Explanation

Another principle is — do not permit the witness to explain the inconsistency. If the witness attempts to explain the inconsistency, an objection should be made to the non-responsive answer. The court should grant the request if the question was leading and called for a limited answer.

To avoid the appearance of being unduly harsh, the cross examiner could state that this is his time to conduct examination and he would like his questions answered — the witness's counsel will be able to ask further questions during re-direct. In my opinion, it is a mistake to ask a non-leading question which allows the witness to explain. For example,

> Q: Why did you make two different statements on the same subject?

Such a question violates the rule against asking a "why" question during cross examination and can only hurt your case. If the witness is able to dream up a satisfactory answer, the impeachment is destroyed. If the witness does not answer, you have gained little because the impeachment had already implied that there is no satisfactory answer.

Ask Only Questions to Which you Know the Answer.

An adverse witness may give an undesirable answer. If he does, you must be able to impeach or the question should not have been asked. Without the use of statements made before trial, this would be extremely difficult.

For example, in civil litigation it is common to take the deposition of every important witness for your opponent and then order a transcript of the depositions. Before trial and in preparation for cross examination, every statement made by the witness is examined for possible use at trial. Every fact favorable to the examiner's case can then be elicited during cross examination. If the witness changes his testimony, he should be impeached by the prior statements.

Organization of Prior Statements

There is, however, a practical problem with such impeachment. How do you find the prior inconsistent statement in a mass of material? For effective use of the prior inconsistent statement, you must be able to find it or at least remember where to find it. To do that, the file must be organized so that you know the location of all prior statements made by the witness. Unless effort is spent in the organization of the documents prior to trial, it will be difficult to find the impeaching statement when it is needed.

The jury and trial judge are not going to be impressed by the lawyer who wastes time fumbling through his file looking for a particular comment. Furthermore, while he is shuffling through the papers, the witness has time to think about his answer, and to anticipate the crucial impeaching questions.

It takes extensive pre-trial preparation, reading and cataloging every document, to be able to recall and use every inconsistent statement made by a particular witness, and if there is more than one witness, as is usual, the problem is even greater. Yet this penchant for thorough preparation, in my opinion, is what separates competent trial lawyer from the average lawyer.

There are many systems used by experienced trial lawyers to organize the file. The important thing is to develop a system of organization which is comfortable to you.

Conclusion

Prior inconsistent statements are an effective tool for impeaching the credibility of a witness since the two statements cannot both be true. A witness who has uttered both statements is unreliable and unworthy of belief.

A foundation must be laid before the prior inconsistent statement can be used in which the witness must be asked whether he made the alleged statement, giving its substance, the time and place of its making and the person to whom it was made. Written statements must be read or shown to the witness. If the witness admits that he made the prior statement the impeachment is complete.

Denial of the statement necessitates use of another witness or documentary evidence to prove that the statement was made. Extrinsic evidence may not be introduced, however, if the witness was not first afforded an opportunity to explain, admit or deny the statement. Rules 613(a) and (b) are similar to the existing Illinois decisions regarding the necessary foundation.

In Illinois a party may not generally impeach his own witnesses. There are several exceptions to the rule prohibiting impeachment of one's own witness, including adverse parties, hostile witnesses, and occurrence witnesses. The proposed Illinois Rules would allow the credibility of one's own witnesses to be attacked by means of a prior inconsistent statement if there is a showing of surprise and affirmative damage. The requirements of surprise and affirmative damage do not apply to a prior inconsistent statement that is not hearsay or that falls within any hearsay exception set forth in Rule 803.

A prior inconsistent statement may not be used as substantive evidence in Illinois, but the proposed rules of evidence allow substantive use if the witness testifies at trial and if the prior statement was under oath subject to cross examination by the party against whom the statement is offered. The existing lw prohibits substantive use if the criminal defendant was not given his *Miranda* warn-

ings, but the statement may be used to impeach the credibility of the defendant if he takes the stand to testify.

An attorney opposing the use of a prior inconsistent statement should ask the court for permission to see the statement prior to the examination of his witness on its contents.

Proposed Rules More Restrictive Than Federal Rules

The proposed Illinois Rules are less restrictive in allowing the use of prior inconsistent statments than existing law but more restrictive than the Federal Rules of Evidence. At least so far as inconsistent statements are concerned the proposed rules favor the witness over the examiner while the federal rules favor the examiner over the witness. This can be illustrated by the manner in which each set of rules deals with the concepts of foundation, impeaching one's own witness, and substantive use of evidence.

Proposed Rule 613(b) prohibits extrinsic evidence of a prior inconsistent statement *until* the witness has an opportunity to explain or deny the statement. In other words the foundation must be laid first. Federal Rule 613(b) allows extrinsic evidence to be introduced first as long as the witness subsequently is given an opportunity to explain or deny the statement. The federal rule allows more effective impeachment of several collusive witnesses.

Proposed Rule 607 prohibits impeachment of a party's own witness by a prior inconsistent statement unless the party can show surprise and affirmative damage. Federal Rule 607 allows the credibility of a witness to be attacked by any party and does not require surprise and affirmative damage before prior statments may be used to impeach one's own witness.

Proposed Rule 801(d)(1)(a) prohibits use of a prior inconsistent statement as substantive evidence unless certain procedural requirements are met. One of the requirements is that the prior statement must have been subject to cross examination by the party against whom the statement is offered. Federal Rule 801(d)(1)(a) does not require contemporaneous cross examination before the statement may be used substantively.

Thus, a comparison of proposed Rules 613(b), 607, and 801(d)(1)(a) with the federal counterpart clearly shows that if the rules are adopted it will be more difficult to impeach with a prior inconsistent statement in Illinois than in federal courts.

There are at least seven possible objections available to the opponent of a prior inconsistent statement:

(1) The statement is misquoted.
(2) The statement is not impeaching.

(3) The statement is collateral.
(4) The statement is taken out of context.
(5) The statement is used in bad faith.
(6) No foundation has been laid for extrinsic evidence of the statement.
(7) A party may not impeach his own witness.

Each of these objections should be used when necessary to protect the witness from improper impeachment.

There are two critical factors in the art of using the prior inconsistent statement. First, the witness must be committed to the present testimony. Second, he must then be confronted with the prior inconsistent statement. Attorneys differ as to whether the impeachment should be used first or last during cross examination. If used first, the impression on the jury will be greater and the witness is likely to answer other questions accurately for fear of further impeachment. If used last, favorable admissions can be obtained before the impeachment.

The impeachment must be underscored but not be belabored. In addition, an attorney must be able to find the prior inconsistent statement when it is needed. With the current discovery explosion, this warning is easier to express than to implement. A system of retrieval must be devised to allow easy access at trial, particularly in the big cases.

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