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Rule 613: Prior Statements of Witnesses

RULE 613: PRIOR STATEMENTS OF WITNESSES

Federal Rule of Evidence 613 states:

> (a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
>
> (b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).[1]

Federal Rule of Evidence 613 governs "foundational requirements for the introduction of prior inconsistent statements, written or oral, made by witnesses who have testified before the court."[2] The rule is broken down into two sections. The first section, 613(a), explains the circumstances under which a prior statement must be disclosed.[3] Generally, disclosure of a prior statement must be made only upon the request of opposing counsel.[4] In addition, Rule 613(a) provides that a prior inconsistent statement may be used to impeach a witness' credibility regardless of whether it was written or oral, without the necessity that the witness know the contents of the statement

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1. FED. R. EVID. 613. *See also* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN ON EVIDENCE ¶ 613 [01]-[-4], at 1-33; MCCORMICK ON EVIDENCE §§ 36-38, at 47-52 (John William Strong ed., 4th ed. 1992).

2. WEINSTEIN & BERGER, *supra* note 1, ¶ 613[01], at 6.

3. FED. R. EVID. 613(a).

4. GLENN WEISSENBERGER, WEISSENBERGER'S FEDERAL EVIDENCE § 613.2, at 321-22 (2d ed. 1995) ("Rule 613(a) provides that on request the statement must be shown or disclosed to opposing counsel. Through this procedure, the party offering the witness may protect him from unfair insinuations or misleading questions by making appropriate objections.").

before testifying.[5] Under either circumstance, the statement may be the subject of cross-examination or may be corroborated by an additional witness after the witness sought to be impeached has testified.[6] The rationale behind this method, also referred to as the "self-contradiction"[7] method of impeachment, is to "demonstrate [to the trier of fact] that the witness is the type of person who makes conflicting statements regarding the same set of facts" and, thus, the testimony is inherently untrustworthy.[8]

In *United States v. Lawson*,[9] the government sought to impeach a defense alibi witness with inconsistent statements she had previously made to an FBI agent concerning the defendant's whereabouts when a robbery was committed.[10] After numerous requests for the prior statements were made by defense counsel and denied by the government, the court stated that the statements should have been disclosed.[11] The court reasoned that Rule 613(a) does not give the trial judge discretion to decide whether or not a party has the obligation to disclose or show the

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5. *See* WEISSENBERGER, *supra* note 4, § 613.2, at 321; *see, e.g.*, United States v. Marks, 816 F.2d 1207 (7th Cir. 1987) (acknowledging that a party is no longer required to disclose contents of a prior inconsistent statement to a witness); Wood v. Stibl Inc., 705 F.2d 1101, 1109 (9th Cir. 1983) (concluding that trial court erred in refusing to permit the defendant to question a witness about a prior statement until he questioned witness as to whether the prior statement was inconsistent with evidence presented at trial); United States v. Williams, 668 F.2d 1064 (9th Cir. 1981) (holding that the trial court committed error in denying admission of prior inconsistent statement into evidence).

6. *See* WEISSENBERGER, *supra* note 4, § 613.1, at 320.

7. *See Id.* (describing this impeachment device as a self-contradiction because a witness is questioned about a statement made prior to trial which is inconsistent with the trial testimony).

8. *Id.*; *see also* United States v. O'Connor, 750 F. Supp. 90, 92 (W.D.N.Y. 1990) (holding that testimony given before a grand jury may be used to impeach the defendant where such testimony was "material to the jury's evaluation of the credibility . . . of the defendant's denial").

9. 683 F.2d 688 (2d Cir. 1982). Defendant was convicted of bank robbery and "sentenced on three counts to concurrent prison term of 12 years, 10 years, and 12 years, respectively." *Id.* at 689.

10. *Id.* at 694.

11. *Id.*

opposing party the statement;[12] rather, it is an absolute obligation.[13]

The second section of Rule 613 governs the admissibility of extrinsic evidence to prove prior inconsistent statements of a witness.[14] Rule 613(b) provides that extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is given ample opportunity to explain or deny the statement.[15] Further, the rule provides that the opposing party be afforded an opportunity to question the witness about the statement, or do whatever is required in the interests of justice.[16]

In applying Rule 613(b), the Second Circuit has stated that when a witness denies making any prior inconsistent statement about relevant events, the opposing party is not required to lay a preliminary foundation in order to impeach the witness with a prior inconsistent statement.[17] In *United States v. Harvey*,[18] the

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12. *Id.*

13. *Id.* Rule 613 "flatly commands disclosure of a document such as this to opposing counsel." *Id.*

14. FED. R. EVID. 613(b). *See* WEISSENBERGER, *supra* note 4, § 613.3, at 322 ("[E]xtrinsic evidence may assume the form of testimony from another witness, or it may be a document containing the inconsistent statement. [It is] evidence introduced other than through the testimony of the witness who is the subject of the impeachment.").

15. FED. R. EVID. 613 (b).

16. *Id.* WEISSENBERGER, *supra* note 4, § 613.4, at 323 ("Rule 613 (b) affords the trial judge discretion to permit the introduction of extrinsic evidence in the absence of an opportunity for an explanation from the witness where 'the interests of justice . . . require.'"). Judges, in using their discretion, will admit or not admit evidence depending on the "practicability of recalling the witness, the materiality of the issue to which the statement relates, the probable impact on the trial by not allowing introduction of the statement, and the effectiveness of a jury instruction in restricting the consideration of the statement by the jury." WEISSENBERGER, *supra* note 4, § 613.4, at 323. *See, e.g.*, United States v. Int'l Business Machs. Corp., 432 F. Supp. 138 (S.D.N.Y. 1977); United States v. McKinney, 954 F.2d 471 (7th Cir.), *cert. denied*, 506 U.S. 1023 (1992).

17. Gray v. Busch Entertainment Corp., 886 F.2d 14, 16 (2d Cir. 1989). Plaintiff alleged that her injury on an amusement park train ride was sustained when she slipped on something before taking her seat on the train. *Id.* at 15. Although plaintiff's daughter denied making any statements about the accident,

court explained that this rule is a relaxation of traditional foundation requirements.[19] Traditionally, on cross-examination, a witness' attention was directed "to the time and place of the statement and to whom it was made."[20] After the enactment of the rule, the only requirement is that the witness "be provided an 'opportunity to explain or deny a prior inconsistent statement.'"[21]

Unlike the Federal Rules of Evidence, New York courts have followed a different approach. In *Loughlin v. Brassil*,[22] the New York Court of Appeals stated that a proper foundation must be laid before prior inconsistent statements will be admissible.[23] More recently, in *People v. Fiedorczyk*,[24] the Appellate Division

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the trial court correctly admitted a first aid report made by the daughter to the park nurse explaining that her mother injured herself after stepping back to take a picture. *Id.* at 15-16. The court explained that "[b]ecause . . . [she] had previously testified that she made no statement whatsoever concerning the accident, . . . the challenged portion of the report was admissible as a prior inconsistent statement." *Id.* at 16.

18. 547 F.2d 720 (2d Cir. 1976).

19. *Id.* at 722. Defendant was convicted on charges of bank robbery and larceny. *Id.* at 721. The Government had only one identification witness, Mrs. Martin. *Id.* While testifying, she admitted to knowing the defendant, but denied that she had prior arguments with him, or that she had previously accused him of fathering her child and failing to support the child. *Id.* at 722. The Second Circuit held that the trial court incorrectly omitted testimony from defendant's mother which would have shown Mrs. Martin's bias toward the defendant. *Id.*

20. *Id.* at 722.

21. *Id.* (citing FED. R. EVID. 613(b)).

22. 187 N.Y. 128, 79 N.E. 854 (1907). The plaintiff sustained injuries when his hand was caught in a press. *Id.* at 130, 79 N.E. at 855. Plaintiff alleged that the accident occurred as a result of a bolt that dropped out of place. *Id.* Another employee testified that on that morning he had tightened the nut that holds the bolt and that it was still in place after the accident. *Id.* at 133, 79 N.E. at 856. The court held that a proper foundation had not been laid when the plaintiff's mother offered testimony to contradict that of the employee's. *Id.* at 134, 79 N.E. at 855.

23. *Id.* at 133-34, 79 N.E. at 856.

24. 159 A.D.2d 585, 552 N.Y.S.2d 443 (2d Dep't), *appeal denied*, 76 N.Y.2d 788, 559 N.E.2d 687, 559 N.Y.S.2d 993 (1990). After being robbed, the complainant identified the defendant as two of the gang members who robbed him. *Id.* at 585, 552 N.Y.S.2d at 444. Defendant contended that the

noted that laying a foundation "prevent[s] surprise and give[s] the witness the first opportunity to explain any apparent inconsistency between his testimony at trial and his previous statements . . . ."[25] In laying a proper foundation, the witness must be "questioned as to the time, place and substance of the prior statement."[26]

New York law provides that a written inconsistent statement should be shown to the witness and the witness should be given the opportunity to deny writing or making the statement.[27] In *Larkin v. Nassau Electric Railroad Co.*,[28] the New York Court of Appeals explained that "[a]ny statement of a witness made out of court, orally or in writing, if contradictory of a material part of his testimony, may be, if properly proven, introduced in evidence, not as substantive proof of the truth of such statement, but as tending to discredit him."[29] The court also said that "[a]

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court erred by not allowing him to call two officers as witnesses in order to show that the complainant allegedly made contradictory statements to them. *Id.* at 586, 552 N.Y.S.2d at 444. The court held that the lower court's ruling was proper because the defendant was trying to impeach the complainant through the officer's testimony, without allowing the complainant to be cross examined. *Id.* at 587, 552 N.Y.S.2d at 445.

25. *Id.* at 586, 552 N.Y.S.2d at 445.

26. *Id.* at 586, 552 N.Y.S.2d at 445.

27. Romertze v. The East River Nat'l Bank, 49 N.Y. 577, 581-82 (1872).

28. 205 N.Y. 267, 98 N.E. 465 (1912). A witness for the plaintiff in an accident case gave favorable material testimony for the plaintiff. *Id.* at 268, 98 N.E. at 466. During cross-examination, the witness was shown a typewritten statement that he had signed which contained several inconsistencies. *Id.* His explanation for the inconsistencies was that he dictated the statement to someone, but had not personally checked the finished statement for errors before he signed it. *Id.* When the defendant offered the statement into evidence, the court sustained the plaintiff's objection to the statement as incompetent and excluded it. *Id.* The court held that once a contradictory statement has been shown to the witness, it may be "proven and introduced in evidence in the regular course of the trial." *Id.*

29. *Id.* at 268-69, 98 N.E. at 466 (1912). *See also* Matter of Roge v. Valentine, 280 N.Y. 268, 20 N.E.2d 751 (1939) (holding that "[t]he rule has long been established that prior contradictory statements, whether made in court under oath or outside of court orally or in writing, may in proper case be introduced to impeach the credibility of a witness . . ."). *Id.* at 276, 20 N.E.2d

witness cannot be impeached by statements alleged to have been made by him . . . until he has been adequately warned by the cross-examination that those statements will be later offered against him . . . ."[30] If the statement is oral, the witness must be asked whether he did or did not, at a given time and place, in the presence of or to anyone, make the alleged statements.[31] If the statement is in writing, the writing must be shown or read to the witness.[32] Once the witness is made aware of these statements, "they may be proven and introduced in evidence in the regular course of the trial."[33]

In addition, New York's impeachment rule is codified in New York Civil Practice Law and Rules section 4514 [hereinafter C.P.L.R.].[34] C.P.L.R. section 4514 provides that, in addition to the common law impeachment rules, any party may impeach a witness' testimony with a written statement or a statement made under oath.[35] When introducing these written documents or statements, the examiner must lay a proper foundation. In *People v. Welch*,[36] the court held that the prosecution's method of impeaching his own witness was improper when he introduced "in wholesale form" the contents of the witness' affidavits after

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at 754. *Roge* applied this rule to include check stubs and notations upon record cards, holding that in proper cases they might be introduced "to impeach a witness, or as admissions when made by a party to the action." *Id.* at 277, 20 N.E.2d at 754-55. *See also* JEROME PRINCE, RICHARDSON ON EVIDENCE § 501, at 486-88 (10th ed. 1973).

30. *Larkin*, 205 N.Y. at 269, 98 N.E. at 466.

31. *Id.*

32. *Id.*

33. *Id.*

34. N.Y. CIV. PRAC. L. & R. 4514 (McKinney 1992). Section 4514 states: "In addition to impeachment in the manner permitted by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in a writing subscribed by him or was made under oath." *Id.*

35. *Id. See also* Letendre v. Hartford Accident and Indem. Co., 21 N.Y.2d 523, 236 N.E.2d 467, 298 N.Y.S.2d 183 (1968) (holding that a former employee's written statements admitting that he stole from his employer were admissible to impeach his credibility).

36. 16 A.D.2d 554, 229 N.Y.S.2d 909 (4th Dep't 1962).

two unfavorable answers.[37] The court held that the prosecutor should have asked permission to ask leading questions "and then put to the witness relevant substantive questions."[38]

The differences between Rule 613 and New York's common law[39] approach to prior statements of witnesses are primarily procedural. The most significant difference is New York's requirement that a foundation be laid before the prior inconsistent statement is introduced. Under the federal rule, this requirement has been abolished. New York law, however, requires a specific foundation be laid prior to the admission of the prior statement. Such a foundation includes whether one made a statement, the time of the statement, the place where it was made, to whom it was made, and the substance of the statement.[40] Furthermore, New York imposes a requirement that a written statement be shown to the witness, and that the witness be given an opportunity to correct or explain the statement.[41] Conversely, Rule 613 specifically states that a statement need not be shown nor its substance revealed to the witness at the time of examination; however, it must be shown to opposing counsel upon request.[42]

37. *Id.* at 558, 229 N.Y.S.2d at 914.

38. *Id.* at 559, 229 N.Y.S.2d at 914.

39. The New York rule on prior inconsistent statements is governed by the common law and statutory codification of the common law with the additional provision that a party may introduce proof of a prior statement inconsistent with his testimony if the statement is in writing or under oath. *See* N.Y. CIV. PRAC. L. & R. 4514, *supra* note 34.

40. *See* PRINCE, *supra* note 29, § 502, at 488.

41. *See* PRINCE, *supra* note 29, § 502, at 488.

42. FED. R. EVID. 613(a).