

PRIOR INCONSISTENT STATEMENTS: THE SIMPLE VIRTUES OF THE ORIGINAL FEDERAL RULE

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INTRODUCTION

How well do hearsay rules function under the current Federal Rules of Evidence? One issue, dormant yet pulsating beneath the surface for decades, involves the admissibility of prior inconsistent statements by witnesses. The long-standing “orthodox” rule admitted the prior statement only to impeach the witness’s trial testimony; it could not be used as substantive evidence of the facts asserted. In 1972, the Advisory Committee on the Federal Rules of Evidence (“the Advisory Committee” or “the Committee”) proposed an innovative rule permitting all prior inconsistent statements to be used both for impeachment and as substantive evidence—a sea change in practice. Congress, however, torpedoed the proposal for reasons that rang hollow in the mid-1970s and which remain so today. Experience has proven the Committee’s wisdom.

One wondering how things might have been need only look to Wisconsin, which presciently adopted the original rule and has successfully applied it for over forty years. The state’s supreme court has aptly lauded the Rule as “simple, straightforward and workable,” high praise for any evidence rule.¹ The original rule avoids insipid limiting instructions, pointless squabbles over how the prior statement is “*really*” being used as evidence, and, most importantly, admits reliable evidence. The proposed rule was an excellent idea in 1972 and has proven itself in the laboratory of Wisconsin litigation. It substantiates Stephen Saltzburg’s observation that “[j]uries do a good job with hearsay.”² In this Article, I highlight some of the key features of the Wisconsin experience and the strengths of the original Federal Rule.³

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1. *State v. Beauchamp*, 2011 WI 27, ¶ 43, 333 Wis.2d 1, 36, 796 N.W.2d 780, 798.

2. *Symposium on Hearsay Reform*, 84 FORDHAM L. REV. 1323, 1380 (2016).

3. WIS. STAT. ANN. § 908.01(4)(a)1 (2015) states:

(4) STATEMENTS WHICH ARE NOT HEARSAY. A statement is not hearsay if:

(a) *Prior statement by witness*. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

1. Inconsistent with the declarant’s testimony.

I. THE ORIGINAL RULE PROPOSAL

Nearly all trials imaginable feature the use of prior inconsistent statements when challenging lay and expert witnesses. Prior statements assume protean forms: they may be oral statements uttered to a friend, written statements in an email, text, or printed report, or testimony given at a deposition or prior hearing. Indeed, depositions are often taken with one eye on “discovery” and the other on stockpiling a veritable arsenal of prior statements—lightning bolts ready to be hurled at a witness who deviates from her earlier recounting. Life experience teaches us that a person who tells more than one version of events may honestly be mistaken about events or lying about them; in either case, we question the witness’s credibility.

The impeaching use of inconsistent statements is straightforward: the “orthodox rule” decrees that such statements may be used to impeach the witness’s credibility at trial, yet are not admissible to prove the facts asserted in the prior statement.⁴ The mysterious distinction between impeaching use (proper) and substantive use (improper) necessitates ineffectual, nonsensical jury instructions that have been justly rebuked as “a mere verbal ritual” and “a futile gesture.”⁵ Essentially, juries have the common sense to do what the law forbids them to do: “decide which of the two stories is true.”⁶ The orthodox rule is restricted to nonparty witnesses; by convention, when a party opponent testifies, her own prior inconsistent statements, like any other party admission, are freely admissible for all relevant purposes, including the statements’ truth.⁷

In 1972, proposed Federal Rule of Evidence 801(d)(1)(A) boldly provided that any prior inconsistent statement by any witness (party or nonparty) “subject to cross-examination” was exempt from the hearsay rule.⁸ Thus, the statement could be used as substantive or impeaching evidence as the parties might elect. The requirement that the declarant testify as a witness meant that she was under oath and her demeanor was on display. Prior inconsistent statements are also more likely true, having been made closer in time to the event and “less likely to be influenced by the

The restyled version of current FED. R. EVID. 801(d)(1)(A) states:

(d) STATEMENTS THAT ARE NOT HEARSAY. A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness’s Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition.

4. MCCORMICK ON EVIDENCE §§ 251, 211 (Kenneth S. Broun et al. eds., 7th ed. 2013).

5. *Gelhaar v. State*, 41 Wis.2d 230, 240, 163 N.W.2d 609, 613 (1969) (emphasis omitted) (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 77 (1954)). The Advisory Committee politely described the distinction as “troublesome.” FED. R. EVID. 801(d)(1) advisory committee’s note.

6. *Gelhaar*, 163 N.W.2d at 613 (quoting MCCORMICK, *supra* note 5, at 77).

7. FED. R. EVID. 801(d)(2)(A).

8. FED. R. EVID. 801(d) advisory committee’s note.

controversy that gave rise to the litigation.”⁹ In short, the “troublesome” features of the orthodox rule did not justify its continued use.¹⁰

Congress was unpersuaded. The House Committee on the Judiciary, doubling down on the oath and cross-examination features, proposed that the prior inconsistent statements themselves had to be made under oath, subject to cross-examination.¹¹ The Advisory Committee trenchantly rebutted the House’s reasoning, which rested on misguided concerns over whether the prior statement was in fact made, the added value of the oath, and the utility of subsequent cross-examination.¹² Although the Senate leaned strongly toward the Advisory Committee’s position, Congress compromised, producing the current Federal Rule, which unfortunately preserves most of the maligned orthodox rule while accomplishing little else.¹³

Meanwhile, Wisconsin and a few other states had adopted the proposed federal rules even before Congress finished its revisions.¹⁴ In June 1973, the Wisconsin Supreme Court approved new evidence rules, effective in 1974, that adopted many of the proposed federal rules. The state’s review was both careful and eclectic. Although other federal rules were rejected or modified, Wisconsin embraced the original Federal Rule on prior inconsistent statements without reservation. The step was a relatively short one. In the late 1960s, Wisconsin had dramatically curtailed the orthodox rule through case law allowing the substantive use of recorded statements (written or signed) by an opposing party’s witness, who was subject to cross-examination.¹⁵ The current rule lifted the restrictions to recorded statements and opposing witnesses, thereby allowing all prior inconsistent statements, in any form, to be used as substantive evidence.¹⁶

II. THE RULE’S PERFORMANCE SINCE 1973

The sections below canvass the Rule’s performance since 1973. It is based on Wisconsin appellate case law as well as my many discussions with trial judges at judicial education sessions through the years.

A. *The Case Law Experience*

Evidence law is fundamentally a creature of the trial courts, but case law yields some measure of how well rules perform at trial. Despite the

9. *Id.*

10. *Id.*

11. *See infra* note 13.

12. REPORT OF THE COMM. ON RULES OF PRACTICE & PROCEDURE 40–41 (1974) [hereinafter REPORT OF THE COMM.].

13. For the history of the Federal Rule, see 4 STEPHAN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 801.02[3][b] (11th ed. 2015).

14. *See Order, In re Promulgation of Rules of Evidence for the State of Wisconsin*, 59 Wis.2d R1–R2 (1973).

15. *Gelhaar v. State*, 41 Wis.2d 230, 241, 163 N.W.2d 609, 614 (1969).

16. Judicial Council Committee’s Note, 59 Wis.2d R234 1973.

ubiquitous use of prior inconsistent statements at trial, there are only about forty Wisconsin appellate cases that address such statements generally and only twenty-four cases that invoke the Rule itself for any purpose.¹⁷ The count alone—less than one case per year since 1974—bespeaks a rule that functions well at trial and poses few headaches on appeal, unlike the morass of cases involving “other act” evidence or, more to the point, the battles over the current Federal Rule on prior inconsistent statements.

Another noteworthy yet inscrutable outcome is that nearly all cases are criminal. One explanation may be that in criminal cases, issues related to prior inconsistent statements may be raised in multiple settings, including through the confrontation right, ineffective assistance of counsel, and plain error. Moreover, the prosecution’s high burden of proof in criminal cases likely induces more such appellate challenges by defendants, unlike the preponderance burden in civil cases.

The striking absence of civil cases only underscores how well the Rule works at trial. Trial judges and lawyers have few problems in applying the Rule. Absent are unseemly quarrels over jury instructions that futilely distinguish between a prior statement’s use for impeachment and its substantive use, or trial counsel’s integrity in ostensibly offering the statement for a permissible purpose (credibility) while glibly disclaiming its use as substantive evidence—a distinction that is both intellectually untenable and (wisely) ignored by juries regardless.

B. Substantive Use As “Outcome Determinative”?

There are no signs that a broader use of prior inconsistent statements as substantive evidence affects litigation outcomes.¹⁸ To be sure, no claim can be made that fewer than forty cases broadly reflects litigation outcomes generally, yet it is noteworthy and unsurprising that there are no cases in which sufficiency of the evidence to support a judgment turns on the substantive use of a prior inconsistent statement.

Good trial lawyers understand that admissibility of evidence is overshadowed by concerns about probative value. While prior inconsistent statements may be helpful and even highly probative, most often they are buttressed by corroborating evidence. Apart from admissions by party-opponents, which are doctrinally distinct, it is hard to imagine a prior inconsistent statement by a nonparty witness as a linchpin. Thus, in one case where a defendant claimed that his conviction rested on the victim’s prior inconsistent statement, the court immediately pointed to abundant

17. Only about thirty-seven opinions, published and unpublished, by Wisconsin’s Court of Appeals and Supreme Court address “prior inconsistent statements.” Unpublished opinions are used for illustrative purposes, not as authority. The thirty-seven cases include challenges based on confrontation, sufficiency of evidence, or ineffective assistance of counsel. The group of twenty-four includes cases where the rule, section 908.01(4)(a)1, is cited, regardless of any admissibility issues. Space limits preclude any comprehensive assessment of the cases. The complete list is in the author’s possession.

18. See Memorandum from Ken Broun to Advisory Comm. on Evidence Rules 29 (Oct. 9, 2015) (on file with the *Fordham Law Review*).

corroboration in the form of physical evidence and other testimony.¹⁹ The only civil case in which a party complained about a prior inconsistent statement (uttered to an ER nurse by the plaintiff's friend, who had witnessed the accident!) involved an unsuccessful challenge to an arbitration panel's award, not a trial.²⁰

Trials aside, a not unreasonable concern is that a broader substantive use of prior inconsistent statements might be manipulated to defeat summary judgment by falsely generating a material issue of fact. Federal courts have readily coped with this problem in the so-called "sham affidavit" cases.²¹ Over forty years of experience yields no cases of similar (unprofessional) mischief.

C. Proof of Prior Inconsistent Statements

Critics of the proposed Federal Rule feared that parties and witnesses would succumb to the temptation to fabricate prior statements.²² Before adopting the original Federal Rule, Wisconsin too cautiously restricted the substantive use of prior inconsistent statements to an opposing party's witnesses, further requiring that they have been written or recorded in some manner.²³

Predictably, there has been no parade of perjury. Not a single case raised substantial concerns about whether the prior inconsistent statement had been made, whether it was oral or recorded in some form.

This paucity is readily explainable. First, lawyers must have a good faith basis for asking questions, which eliminates wholesale speculation when asking about a prior statement.²⁴ Second, Rule 613 both compels disclosure of the statement upon opposing counsel's request and requires that the witness be given an opportunity to explain or deny such statements before extrinsic evidence (i.e., another witness) may be used to prove up the prior statement. And if the case law is representative, it would seem that far more witnesses claim not to recall their prior statements than deny having made them in the first place.²⁵ Third, proof of a prior statement that is denied or "forgotten" presupposes some other witness who is willing to testify to its having been made; if fabrication is feared, such concerns further presuppose that this other witness is hearty enough to risk cross-examination and commit perjury. The danger is hardly epidemic. Fourth,

19. *State v. Lewallen*, 2007 WI App 230, ¶¶ 15–19, 306 Wis.2d 126, 740 N.W.2d 902 (a victim of a brutal beating and sexual assault recanted her allegations against the defendant, her boyfriend, but her prior incriminating statements to a nurse and testimony at a preliminary examination were abundantly corroborated by medical evidence and testimony by other witnesses).

20. *Miller v. State Farm Mut. Auto. Ins.*, 151 Wis.2d 784, 447 N.W.2d 394 (Wis. Ct. App. 1989).

21. *See, e.g., Cook v. O'Neill*, 803 F.3d 296, 298–99 (7th Cir. 2015).

22. *See* REPORT OF THE COMM., *supra* note 12, at 40.

23. *Gelhaar v. State*, 41 Wis.2d 230, 241, 163 N.W.2d 609, 614 (1969).

24. *See* MCCORMICK ON EVIDENCE, *supra* note 4, § 37.

25. *Id.*; *see, e.g., State v. Nelis*, 2007 WI 58, ¶ 11, 300 Wis.2d 415, 733 N.W.2d 619, 622.

fabrication is not a hearsay issue as such. Rather, it presents an issue of conditional admissibility: Is there sufficient proof from which a reasonable trier of fact could find that the statement was made?²⁶ Juries are well-suited to make this finding. Finally, the very same concern is nonetheless present even if the prior statement is used solely for impeachment.

D. The Measure of “Inconsistency”?

The stark simplicity of the original Federal Rule means that the only real issue of admissibility is whether the witness/declarant’s testimony is “inconsistent” with his or her prior statement. Moreover, the measure of inconsistency does not turn on the substantive or impeaching use of a prior statement; the test is the same.

Left undefined in the Rule’s text, “inconsistency” has come to mean any material variance between the testimony and the statement that is relevant to credibility.²⁷ The relevance may point to a lie—whether in the testimony or the prior statement—or to a mistake rooted in the witness’s fallible memory or careless use of language.

Essentially, the material variances involve three broad categories. First, significant differences between the content of the witness’s testimony and her prior statements (e.g., “he hit me” versus “I tripped and fell down”) raise credibility flags.²⁸ Second, there may be significant omissions between the statement and the testimony that trigger similar concerns.²⁹ For example, a witness at an accident scene provided a terse description to police yet testifies at trial in abundant detail—or just the opposite.

A third category, the forgetful witness, dominates the cases and reflects the Rule’s evolution over time. Early cases required the judge to find “reason to doubt the good faith” of a witness’s denial of a prior statement.³⁰ Later cases, however, quietly jettisoned the predicate of dubious good faith denials, allowing the use of prior inconsistencies without distinguishing between real or feigned memory lapses.³¹

The embrace of genuine memory loss along with suspiciously selective lapses is a welcome development. It is consistent with the broad material variance test as well as the approach taken under other hearsay rules and the

26. FED. R. EVID. 104(b).

27. See MCCORMICK ON EVIDENCE, *supra* note 4, § 34; see also *United States v. Williams*, 737 F.2d 594, 608 (7th Cir. 1984) (a broad approach to inconsistency is warranted “[a]s long as people speak in nonmathematical languages”).

28. See, e.g., *State v. Lewallen*, 2007 WI App 230, ¶ 15, 306 Wis.2d 126, 740 N.W.2d 902.

29. See, e.g., *State v. Robinson*, 102 Wis.2d 343, 349–51, 306 N.W.2d 668, 672–73 (1981) (describing a witness’s selective recall of only those facts helpful to the defendant, his friend).

30. *State v. Lenarchick*, 74 Wis.2d 425, 436, 247 N.W.2d 80, 87 (1976).

31. See, e.g., *State v. Harrell*, 2010 WI App 132, ¶ 21, 329 Wis.2d 480, 791 N.W.2d 677, 685; *State v. Rockette*, 2006 WI App 103, ¶¶ 26–27, 294 Wis.2d 611, 718 N.W.2d 269, 275 (focusing on confrontation).

confrontation right when dealing with forgetful witnesses.³² Genuine forgetfulness is as probative of credibility as selective recall. Although “forgetfulness” is a ready refuge for liars, it also bespeaks a loss of memory or carelessness with words, which is just as troubling. Moreover, juries are as skilled as judges in scrutinizing both lies and fallible memories. Finally, whether the witness’s lapsed memory is genuine or feigned has no bearing on whether the prior statement is used substantively or for credibility. The opportunity to cross-examine the witness/declarant insures sufficient reliability.

E. The Interplay of Rules 801(d)(1) and 613

The key to the original Federal Rule 801(d)(1) was its intended interplay with Rule 613, which Wisconsin also adopted in its (near) original form.³³ Rule 613’s safeguards contemplate that a prior inconsistent statement is admissible as substantive evidence, as originally provided by the proposed Federal Rule.³⁴ To that end, an opposing party can compel disclosure of the statement’s content when the witness is being examined, which guards against bad faith assertions while also juxtaposing the witness’s testimony with his earlier (differing) statements.³⁵ Extrinsic evidence of a witness’s prior statement is inadmissible unless the declarant/witness was given an opportunity to explain or deny it, except in cases where “justice so requires.”³⁶ Rule 613, then, builds on the “subject to” cross-examination element of section 908.01(4)(a), yet applies even when the prior statement is used only for impeachment. Properly applied, the two rules closely focus on the essence of any alleged “inconsistency,” that is, in what way, and why, does the witness’s testimony differ from his earlier statement?

Problems surface when Rule 613 is misapplied, especially when the witness is not examined about a prior statement before extrinsic evidence is offered. For example, in a sexual assault case, a witness, Stone, testified to a lack of memory about the alleged assault, including whether he had told police that the victim was crying and her face a “bloody mess.”³⁷ The prosecutor examined Stone about a signed statement he had given to one

32. MCCORMICK ON EVIDENCE, *supra* note 4, § 34. Some federal cases also support this view. *See, e.g.*, *United States v. Owens*, 484 U.S. 554, 560–62 (1988) (describing how a brain-damaged beating victim testified at trial but lacked memory of the attack or an earlier photo identification and holding that the victim’s testimony nonetheless satisfied the confrontation right and Rule 801(d)(1)(C) (prior statement of identification)); *Delaware v. Fensterer*, 474 U.S. 15, 21–22 (1985) (holding no denial of the confrontation right even though the prosecution’s witness forgot the bases for his expert opinion); *United States v. Gajo*, 290 F.3d 922, 931 (7th Cir. 2002).

33. *See* WIS. STAT. ANN. § 906.13 (2013); Judicial Council Committee’s Note, *supra* note 16, at R197–98.

34. MCCORMICK ON EVIDENCE, *supra* note 4, § 37. It is also predicated on a distressing fear of “widespread attorney incompetence,” which explains the many options the Rule provides trial judges when proper foundations are not followed. *Id.*

35. FED. R. EVID. 613(a); *see also* MCCORMICK ON EVIDENCE, *supra* note 4, § 37.

36. FED. R. EVID. 613(b) advisory committee’s note (charitably noting that “oversight” by counsel justifies some latitude); *see also* MCCORMICK ON EVIDENCE, *supra* note 4, § 37.

37. *State v. Nelis*, 2007 WI 58, ¶¶ 8–14, 300 Wis.2d 415, 421–23, 733 N.W.2d 619, 622.

officer but neglected to ask about a similar oral statement Stone had made to a second officer.³⁸ Both officers testified to Stone's statements.³⁹ The court found no error because the defendant had failed to object on Rule 613 grounds to testimony by the second officer about the oral statement.⁴⁰ A concurring opinion, more to the point, concluded that witness Stone should have been explicitly questioned about both sets of statements, but there was no error because an "evidentiary vacuum" suggested that Stone was available for recall.⁴¹

In sum, the problem was not hearsay, but rather the lawyers' mishandling of Rule 613. Although both parties flunked Rule 613, the prosecutor's failure was the more glaring one because it explains why the defense never demanded disclosure under Rule 613(a) or pursued its "opportunity" to examine under Rule 613(b) while Stone was on the stand.⁴²

Thus, Rule 613 ensures that parties have an opportunity, at some point, to ask a witness to explain or deny earlier statements that vary from his or her testimony in court, thereby effectively juxtaposing the divergent stories. Whatever the testimony today or a witness's earlier account, the jury is basing its credibility determination on what it sees and hears in the courtroom. The "opportunity," though, should not be left to chance. Especially when a prior inconsistent statement is used as substantive evidence, the witness should be explicitly examined about the statement so that opposing counsel can demand its disclosure and ask the witness to explain or deny it.⁴³ Moreover, if the prior statement is not important enough to inquire about when the witness is on the stand, it is also likely not worth the time proving it through a second witness (i.e., extrinsic evidence).

CONCLUSION

The Advisory Committee's proposal to permit the substantive use of prior inconsistent statements by witnesses was a wise decision in 1972 and remains so today. The current Federal Rule covers an unhelpfully small band of hearsay while permitting skilled trial lawyers to circumvent it with ease by offering the same statements for "impeachment" rather than for their truth. The outcome is silly, ineffectual limiting jury instructions that often mask the proponent's true designs for the evidence and which insult the trier of fact's common sense. The Committee's objections to the orthodox rule are as trenchant today as they were forty years ago. The current Federal Rule is inadequate.

38. *Id.* ¶¶ 8–23.

39. *Id.*

40. *Id.* ¶¶ 29–34.

41. *Id.* ¶ 63, ¶ 70 (Bradley, J., concurring). Likely, the court reasonably suspected that Stone's memory had "failed" as to both sets of statements.

42. See MCCORMICK ON EVIDENCE, *supra* note 4, § 37 (constructing a "strong case" for a predicate cross-examination before resorting to extrinsic evidence, especially when the statement is only used for impeachment).

43. *Id.*

By contrast, Wisconsin's experience working with the proposed rule since the early 1970s vindicates the Committee's sagacity. None of the problems provoked by the current Federal Rule are present in the cases. More important, those same cases have surfaced no new problems that bespeak unforeseen issues or failings that would suggest caution. Rather, the Rule has proven itself to be "simple, straightforward and workable," the essence of a good evidence rule.