University of Arkansas at Little Rock Law Review

Volume 1 | Issue 2 Article 1

1978

Impeachment of One's Own Witness by Prior Inconsistent Statements under the Federal and Arkansas Rules of Evidence

Samuel A. Perroni

UNIVERSITY OF ARKANSAS AT LITTLE ROCK
LAW JOURNAL

Member, National Conference of Law Reviews

VOLUME 1 1978 NUMBER 2

IMPEACHMENT OF ONE'S OWN WITNESS BY PRIOR INCONSISTENT STATEMENTS UNDER THE FEDERAL AND ARKANSAS RULES OF EVIDENCE

*Samuel A. Perroni**

The Rules of Evidence for United States Courts and Magistrates[1] (Federal Rules) and the Arkansas Uniform Rules of Evidence[2] (Arkansas Rules) have provided federal and state courts the opportunity to begin a new approach to the law of evidence. This approach is designed to improve the quality of justice dispensed in our courts through clarification and codification of generally accepted rules of law. The most desirable rules of law have been adopted where harmony among the courts did not exist, and trial courts have been vested with necessary discretion to determine, under the circumstances of each case, what evidence will assist the trier of fact in ascertaining the truth.[3]

The focus of this article is Rule 607[4] of the Federal and Arkansas Rules: its history and its application to the impeachment of one's own witness by the use of prior inconsistent statements. The article also discusses the requirements that restrict the substantive use of prior inconsistent statements under Federal Rule 801(d)(1)(A)[5] and

* Lecturer in Law, University of Arkansas at Little Rock; Assistant United States Attorney for the Eastern District of Arkansas; B.S., Illinois Wesleyan University, 1970; J.D., University of Arkansas School of Law, Little Rock Division, 1974. The views expressed herein are those of the author and should not be construed as official positions of the U.S. Attorney's Office.

1. Fed. R. Evid. (codified in 28 U.S.C. app. at 2312-74 (Supp. V 1975)).

2. Ark. Stat. Ann. § 28-1001 (Cum. Supp. 1977).

3. "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102; Ark. Uniform R. Evid. 102.

4. "The credibility of a witness may be attacked by any party, including the party calling him." Fed. R. Evid. 607; Ark. Uniform R. Evid. 607.

5. *Rule 801. Definitions.*
The following definitions apply under this article:

. . . .

Arkansas Rule 801(d)(1)(i).[6]

1. History and Purpose of the Rule Against Impeaching One's Own Witness

Professor Wigmore states that reliance by practitioners upon prior inconsistent statements is a form of "empiric impeachment" which has as its goal the identification of specific flaws in testimony involving self-contradiction.[7] This form of impeachment is "more sought after or more relied upon" during the ordinary course of trials than any other mode of impeachment, and its use is "purely empiric or inductive in form."[8] For example, if a witness to a homicide asserts at the scene of the murder that he saw the defendant near the victim with a pistol in his hand and then later testifies in court that he didn't see him at all, it could be inferred by the trier of fact that the witness is as likely to be wrong in the latter statement as in the former. It may also be inferred that the witness is not worthy of belief.[9]

The impeachment process therefore acts to "neutralize" the witness' trial testimony with the resultant credibility issue to be determined by the trier of fact.[10] However, until the Federal Rules and the Arkansas Uniform Rules were enacted into law, practitioners were saddled with an antiquated rule which generally prohibited impeachment of one's own witness by prior inconsistent statements.

Considering the length of the rule's existence,[11] the frequency

---

(d) Statements which are not hearsay. A statement is not hearsay if—

(1) 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 (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .

Fed. R. Evid. 801(d)(1)(A).

6. *Rule 801. Definitions.*—The following definitions apply under this Article:

. . . .

(d) Statements Which are Not Hearsay. A statement is not hearsay if:

(1) 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 (i) inconsistent with his testimony and, if offered in a criminal proceeding, was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a . . . [deposition] . . . .

Ark. Uniform R. Evid. 801(d)(1)(i).

7. 3A J. Wigmore, Evidence in Trials at Common Law § 874 (rev. ed. 1970).

8. *Id.*

9. *Id.* § 902 at 668. The question of whether the prior statement can be used to prove that the defendant was indeed at the scene with gun in hand is discussed in part 3 of this article.

10. *See* United States v. Michener, 152 F.2d 880, 885 n.5 (3d Cir. 1945).

11. Wigmore traces application of the rule back to the late 1600's in criminal trials and

of its use, and the importance of the rule to the judicial process, it is surprising to note that the history of the rule is obscure and is the subject of debate among legal scholars.[12] One treatise notes that the rule evolved from the earliest modes of trial where the defendant was required to bring a number of persons to swear on his behalf. These persons were not "witnesses" as we know them today, but were instead partisans who went to court literally to swear for their party by taking a properly formed oath.[13] This early notion of a "witness" continued as a custom far beyond the time when the witness' function ceased to be that of oath-taker and became one of testifier to fact.[14] As long as the partisan witness notion remained, it was inconceivable that a party would dispute what his own witness had to say.[15] Consequently, a rule of law began to develop in criminal trials that a witness could not be discredited by the party calling him.[16] The rule came to be received as a general proposition in civil cases shortly thereafter[17] and appears to have become firmly established in the common law near the end of the eighteenth century.[18]

There were three primary reasons behind the rule prohibiting the impeachment of one's own witness.[19] First, a "primitive notion" existed which provided that a party was morally bound by the testimony of his witness.[20] Second, a party calling a witness to the stand

---

early 1700's in civil cases. The rule became firmly established after its use in the noted trial of Warren Hastings. 3A J. Wigmore, *supra* note 7, § 896 at 659-60.

12. *Id.*; 3 J. Weinstein & M. Berger, Weinstein's Evidence § 607[01] n.13 (1977) [hereinafter cited as Weinstein's Evidence].

13. 3A J. Wigmore, *supra* note 7, § 896. For a more detailed account of "oath-takers," *see* 1 *id.* § 8; 2 *id.* § 575; 7 *id.* § 2032 (3rd ed. 1940).

14. 3A Wigmore, *supra* note 7, § 896 at 659.

15. *Id.*

16. 3A J. Wigmore, *supra* note 7, § 897 n.4 (citing Fitzharris' Trial, 8 How. St. Tr. 223, 369, 373 (1681); Colledge's Trial, 8 How. St. Tr. 549, 636 (1681)). Until the late 1600's a criminal defendant possessed no legal right to call witnesses; therefore, the prosecution was not restrained by any rule against impeachment. 3A J. Wigmore, *supra* note 7, § 896 at 660. Where the rule began to be enforced, the prosecution was still exempt. *See, e.g.*, Lord Mohun's Trial, 12 How. St. Tr. 949, 1007 (1692); Plunket's Trial, 8 How. St. Tr. 447, 470 (1681).

17. 3A J. Wigmore, *supra* note 7, § 896 at 660. (citing Adams v. Arnold, 12 Mod. 375 (K. B. 1700); Rice v. Oatfield, 2 Str. 1095 (K. B. 1738)).

18. *See* Warren Hastings' Trial, Lords' Journal, Feb. 9, April 10, 31 Parl. Hist. 369 (1788); Ladd, *Impeachment of One's Own Witness—New Developments*, 4 U. Chi. L. Rev. 69 (1936).

19. McCormick's Handbook of the Law of Evidence § 38 (2d ed. 1972) [hereinafter cited as McCormick]; 3 Weinstein's Evidence, *supra* note 12, § 607[01]; 3A J. Wigmore, *supra* note 7, §§ 897-99; Ladd, *supra* note 18, at 76.

20. 3A J. Wigmore, *supra* note 7, § 897. In the early 1800's, however, courts were observing the falsity of this notion. *Id.* (citing Whitaker v. Salisbury, 32 Mass. (15 Pick.) 534, 545 (1834); Brown v. Bellows, 21 Mass. (4 Pick.) 179, 194 (1826)).

was thought to guarantee or vouch for the witness' credibility.[21] Third, it was reasoned that a party ought not to have the ability to coerce his witness into testifying as desired.[22] These policy reasons produced corollary issues which were difficult to resolve in a manner that furthered the administration of justice.[23] Since the focus of the rule was primarily directed against character evidence, it appears that the real danger involved in impeaching one's own witness by prior inconsistent statements was that this type of impeaching evidence might be taken by the jury as substantive evidence.[24] In all likelihood it was this risk which perpetuated the use of the rule. Notwithstanding the foregoing policy considerations, several jurisdictions through statute[25] or court decision[26] began to develop independent attitudes toward impeachment through the use of prior

21. McCormick, *supra* note 19, § 38; 3A J. Wigmore, *supra* note 7, § 898 (citing Pollock v. Pollock, 71 N.Y. 137, 152 (1877); S. Greenleaf, Evidence § 442 (12th ed. 1866). Wigmore rejected this reason as unsound and stated that "[a] court which allows the party to disprove what his witness has said, and at the same time speaks of a guarantee of credibility as the reason for some other part of the rule [that one cannot impeach his own witness], refutes itself . . . ." 3A J. Wigmore, *supra* note 7, § 898. The "voucher rule," as it came to be known, was put to rest in Chambers v. Mississippi, 410 U.S. 284 (1973).

22. 3A J. Wigmore, *supra* note 7, § 899 at 663. This reason was classified by Wigmore as furnishing "the only shred of reason on which the rule [could] be supported." *Id.* at 664. *See also* McCormick, *supra* note 19, § 38.

23. Who is one's own witness? *See* 3A J. Wigmore, *supra* note 7, §§ 909-18. *See also* O'Neil v. Stratton, 64 F.2d 911, 912 (8th Cir. 1933); Fed. R. Civ. P. 26(f) (amended 1970); Ark. Stat. Ann. § 28-705 (Repl. 1962) (repealed 1976 and superseded by Ark. Uniform R. Evid. 611(c)).

24. McCormick, *supra* note 19, § 38; 3A J. Wigmore, *supra* note 7, § 903 at 672. The fear that impeachment testimony will be given substantive effect is pervasive in decisions surrounding the adoption of Rule 607. *See, e.g.*, United States v. Palacios, 556 F.2d 1359 (5th Cir. 1977); United States v. Rogers, 549 F.2d 490 (8th Cir. 1976) *cert. denied*, 431 U.S. 918 (1977); United States v. Sisto, 534 F.2d 616 (5th Cir. 1976); United States v. Morlang, 531 F.2d 183 (4th Cir. 1975).

25. Ark. Stat. Ann. § 28-706 (Repl. 1962) (repealed 1976 and superseded by Ark. Uniform R. Evid. 607); Haw. Rev. Stat. §§ 621-625 (Repl. 1976); Ind. Stat. Ann. §§ 2-1726, -1727 (Burns Repl. 1946); Vt. Stat. Ann. tit. 12, § 1642 (1973); Va. Code § 8.01-403 (1950). *See also* 3A J. Wigmore, *supra* note 7, § 905.

26. Campbell v. State, 23 Ala. 44 (1853) (excluded prior inconsistent statement if offered by extrinsic evidence, but allowed testimony if elicited from witness himself); Babcock v. People, 13 Colo. 515, 520, 22 P. 817, 818-19 (1889) (excluded all prior inconsistent statements as such but allowed witness to be questioned about former statement for purpose of stimulating the witness' recollection and inducing him to make a correction); Hull v. State, 93 Ind. 128, 134 (1883); Dunlap v. Richardson, 63 Miss. 447 (1886) (if party is deceived or misled); Dunn v. Dunnaker, 87 Mo. 597 (1885) (if party entrapped); Sturgis v. State, 2 Okla. Crim. 362, 390-92, 102 P. 57, 67-68 (1909) (surprise at and injury from testimony in the discretion of trial court); Langford v. Jones, 18 Or. 307, 327, 22 P. 1064, 1071 (1890) (certain class of prior inconsistent statement excluded on the ground that they were not truly contradictory, but instead served to introduce flagrant hearsay. For example, witness *X* testifies that he knows nothing of an assault, the rule would prohibit admission of the witness' former statement describing the assault in detail).

self-contradiction evidence.

In Arkansas a statute was enacted in 1947 which clearly permitted the party producing a witness to show that the witness had made prior inconsistent statements.[27] However, the Arkansas Supreme Court interjected limitations of surprise[28] and positive harm to the party's case[29] as conditions to impeachment. These limitations were consistent with prior judicial holdings[30] on the subject, but they were difficult to work with. For example, if an attorney interviewed a potentially recalcitrant witness in advance of trial and learned that the witness was not going to adhere to his original story, he could not in good faith represent to the trial court that he was "surprised" by the testimony[31] or state that the testimony "harmed" his case.[32] Furthermore, the rule could prevent a party from receiving the benefit of a witness' story on all points except those dealing with the contradiction.[33]

The federal system relaxed the orthodox rule by permitting impeachment of compulsory witnesses,[34] government agents called

---

27. The statute read as follows:

> *Impeaching own witness.*—The party producing a witness is not allowed to impeach his credit, by evidence of bad character, unless it is in a case in which it was indispensable that the party should produce him; but he *may* contradict him by other evidence, and by showing that he has made statements different from his present testimony.

Ark. Stat. Ann. § 28-706 (Repl. 1962)(repealed 1976 and superseded by Ark. Uniform R. Evid. 607) (emphasis added). The discretionary aspects of this statute explain the judicial limitations which followed.

28. Henderson v. State, 255 Ark. 870, 503 S.W.2d 889 (1974) (a statement by counsel that he was surprised seemed sufficient); Hill v. State, 253 Ark. 512, 487 S.W.2d 624 (1972); Nagel v. State, 179 Ark. 625, 17 S.W.2d 317 (1929).

29. Smith v. Thomason, 229 Ark. 889, 318 S.W.2d 814 (1958); Milum v. Clark, 225 Ark. 1040, 287 S.W.2d 460 (1956) (testimony must be damaging to party and failure to give helpful testimony which was expected is insufficient); Field, *A Code of Evidence for Arkansas?*, 29 Ark. L. Rev. 1, 26-27 (1975); *Special Evidence Edition—Witnesses*, 27 Ark. L. Rev. 229, 281 (1973).

30. Missouri Pac. R.R. v. Sullivan, 197 Ark. 360, 122 S.W.2d 947 (1938); Williams v. State, 184 Ark. 622, 43 S.W.2d 731 (1931); Garrison v. State, 148 Ark. 370, 230 S.W. 4 (1921); Doran v. State, 141 Ark. 442, 217 S.W. 485 (1920); Jonesboro, Lake City & E. R.R. Co. v. Gainer, 112 Ark. 477, 481, 166 S.W. 571, 573 (1914).

31. Nagel v. State, 179 Ark. 625, 629, 17 S.W.2d 317, 318 (1929).

32. Milum v. Clark, 225 Ark. 1040, 1042, 287 S.W.2d 460, 462 (1956); 3A J. Wigmore, *supra* note 7, § 904 at 674.

33. *See* McCormick, *supra* note 19, § 38, in which the authors stated prior to the enactment of Rule 607 that

> [w]hile the power to attack the character of one's own witness may be of little practical value to the attacker, and is of little moment to the administration of justice, a rule against the showing of the prior statements of one's own witness, to aid in evaluating his testimony, is a serious obstruction to the ascertainment of truth.

Id. at 77.

34. Stevens v. United States, 256 F.2d 619, 622-23 (9th Cir. 1958).

by defendants in criminal cases,[35] adverse parties in civil cases,[36] ordinary witnesses in civil cases based on their depositions,[37] witnesses called by the court,[38] and witnesses whose testimony surprised the calling party and caused injury to his case.[39] The rule was further circumvented in the federal system by permitting a party to bring out damaging matter about a witness on direct examination,[40] by allowing the accuracy of a witness' testimony to be contradicted by extrinsic evidence,[41] and by placing the impeaching evidence before the jury during the process of refreshing the witness' recollection.[42]

The variety of attitudes in different jurisdictions and the numerous attempts to skirt the rule tended to produce confusion and uncertainty. The logical remedy was to abolish the rule subject to limitations of prejudice and probative value. This result has been accomplished by the passage of Rule 607[43] which provides that a witness' credibility "may be attacked by any party, including the party calling him."

2. *Modern Application of Rule 607*

Both the Arkansas Rules and the Federal Rules expand the scope of admissibility in all phases of evidence and emphasize the need for relevant evidence that will elicit the true facts in a given proceeding.[44] Consequently, trial courts should discard all prior notions concerning impeachment of one's own witness by prior self-

35. United States v. Freeman, 302 F.2d 347, 351 (2d Cir. 1962), *cert. denied*, 375 U.S. 958 (1963). The Second Circuit appears to have been the only circuit following this rule.

36. Fed. R. Civ. P. 43(b).

37. Fed. R. Civ. P. 32(a)(1).

38. United States v. Browne, 313 F.2d 197, 199 (2d Cir. 1963), *cert. denied*, 374 U.S. 814 (1963).

39. Goings v. United States, 377 F.2d 753, 759 (8th Cir. 1967); London Guar. & Acc. Co. v. Woelfle, 83 F.2d 325, 334 (8th Cir. 1936).

40. United States v. Rothman, 463 F.2d 488, 490 (2d Cir. 1972), *cert. denied*, 409 U.S. 956 (1972).

41. United States v. Williamson, 424 F.2d 353, 355 (5th Cir. 1970); United States v. Freeman, 302 F.2d 347, 351 (2d Cir. 1962).

42. Lerma v. United States, 387 F.2d 187, 190 (8th Cir. 1968), *cert. denied*, 391 U.S. 907 (1968); Hickory v. United States, 151 U.S. 303 (1894). *See* McCormick, *supra* note 19, § 38 at 77. *But see* Goings v. United States, 377 F.2d 753 (8th Cir. 1967).

43. *See* note 4 *supra*.

44. *See* Fed. R. Evid. 102, 401, 402 (broad definition and general admissibility of relevant evidence), 607 (impeachment of any witness by any party), 701 (admissibility of lay witness opinion testimony expanded), 703, 705 (admissibility of expert opinion without need for hypothetical based upon facts in evidence), 801(d)(expanded area of nonhearsay), 803 (expanded scope of hearsay exceptions); Ark. Uniform R. Evid. 102, 401, 402, 405, 607, 701, 703, 705, 803.

contradiction and should approach the new rule in a way that will promote the discovery of whether a witness is telling the truth.[45]

Rules concerning the mechanics of impeaching a witness by prior inconsistent statements have been established.[46] Before extrinsic evidence is offered, the witness must be asked whether he made the statement and must be given an opportunity to explain or deny the contradiction.[47] In addition, the opposite party must be given the opportunity to interrogate the witness concerning the statement.[48] The examining attorney does not need to exhibit the statement or to disclose the statement's content to the witness at the time of examination, but upon request he must show or disclose the statement to opposing counsel.[49]

Evidence offered for purposes of impeachment should be considered by the trial judge in light of Rules 401[50] and 403[51] of the Federal and Arkansas Rules. The question should be whether the probative value of the prior inconsistent statement outweighs the danger of prejudice,[52] not whether the proponent of the witness was surprised and harmed by the testimony.[53] Such an approach is in

45. 3 Weinstein's Evidence, *supra* note 12, § 607[02] at 607-15. *But see* Graham, *Examination of a Party's Own Witness Under the Federal Rules of Evidence: A Promise Unfulfilled,* 54 Tex. L. Rev. 917 (1976) (the author suggests that common law restrictions of surprise and damage be applied to government impeachment of its own witness under Rule 607).

46. Fed. R. Evid. 613; Ark. Uniform R. Evid. 613; 3A J. Wigmore, *supra* note 7, § 906 at 693.

47. Fed. R. Evid. 613(b); Ark. Uniform R. Evid. 613(b). This requirement, however, does not apply to admissions of a party opponent as defined in Fed. R. Evid. 801(d)(2) and Ark. Uniform R. Evid. 801(d)(2).*See, e.g.,* Johnson v. Daniels, 221 Ark. 276, 254 S.W.2d 946 (1952). In spite of the rule's clarity, the court in United States v. Barrett, 539 F.2d 244, 255-56 (1st Cir. 1976) stated that the foundation requirements were "good practice . . . but not absolutely required." The defendant's conviction was vacated.

48. Fed. R. Evid. 613(b); Ark. Uniform R. Evid. 613(b).

49. Fed. R. Evid. 613(a); Ark. Uniform R. Evid. 613(a). This Rule abolished the rule in The Queen's Case, 2 Br & B. 284, 129 Eng. Rep. 976 (1820), which contained a requirement that before a cross-examiner could question a witness about a prior written statement, he must first show the statement to the witness. *See* Advisory Committee notes to Fed. R. Evid. 607, 28 U.S.C. app. (1970 & Supp. V 1975).

50. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401, Ark. Uniform R. Evid. 401.

51. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403; Ark. Uniform R. Evid. 403.

52. The Advisory Committee's notes to Rule 403 state that "'[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." 28 U.S.C. app. at 2322 (Supp. V 1975).

53. 3 Weinstein's Evidence, *supra* note 12, § 607[02]. In interpreting Rule 607, five

harmony with the expanded discretion objectives implicit in both sets of rules.[54] In addition, this approach would abrogate the "collateral matter" rule as it is mechanically applied and would significantly reduce the confusion created by many of the artificial rules and limitations heretofore applied in those situations involving impeachment by prior inconsistent statements.[55] One can only hope that state and federal courts will take advantage of the opportunity to develop a fresh approach to an area of law which has been filled with contradictions and confusion.

3. Prior Inconsistent Statements—Substantive Evidence of Facts Stated?

The traditional rule was that a prior inconsistent statement of a witness was hearsay[56] and inadmissible to prove the truth of the

---

United States Courts of Appeals have suggested or expressly held that a showing of surprise is unnecessary. United States v. Palacios, 556 F.2d 1359, 1363 (5th Cir. 1977); United States v. Rogers, 549 F.2d 490, 495 n.6 (8th Cir. 1976); United States v. Morlang, 531 F.2d 183, 189 n.14, 193 (4th Cir. 1975)(dissenting opinion)(*see* note 54 *infra*); United States v. Harris, 523 F.2d 172, 175 (6th Cir. 1975); United States v. Jordano, 521 F.2d 695, 697 (2d Cir. 1975)(court ruled, in a pre-Federal Rules case, that "[s]urprise, if a necessary element for impeachment, . . . was a very modest element . . . and was not to be construed as synonymous with amazement"). *See also* United States v. Shoupe, 548 F.2d 636 (6th Cir. 1977) (finding of hostility no longer a prerequisite for impeachment by a party of its own witness). *But see* United States v. Long Soldier, 562 F.2d 601, 605 n.3 (8th Cir. 1977)(court ruled that surprise was no longer a viable requirement for impeachment of one's own witness *but* a party offering grand jury testimony for purposes of impeachment must show that the trial testimony was inconsistent and "harmful" to his case).

54. Such an approach would have been helpful in United States v. Morlang, 531 F.2d 183 (4th Cir. 1975), because the court was concerned with the relevancy of the impeachment testimony, its prejudicial and confusing nature, and the fact that the testimony, as presented, was untrustworthy. The court stated that the opinion would be of "limited precedential value" since the case was tried after the Arkansas Uniform Rules of Evidence were adopted but before they were put into effect. The majority refused to apply the new rules in the case. *Id.* at 189 n.14. The best approach would seem to be accomplished by balancing the testimony's probative value with its prejudicial effect. The trial judge is in the best position to do so since it is he who sees the witness and hears the testimony. An analogous position has been adopted by the Eighth Circuit Court of Appeals in connection with the receipt of similar transaction evidence offered pursuant to Fed. R. Evid. 404(b). *See, e.g.*, United States v. Maestas, 554 F.2d 834 (8th Cir. 1977). Failure to use the balancing approach suggested by Rule 403 results in confusion. *See, e.g.*, United States v. Long Soldier, 562 F.2d 601, 605 n.3 (8th Cir. 1977); United States v. Davis, 551 F.2d 233 (8th Cir. 1977); United States v. Rogers, 549 F.2d 490, 502-06 (8th Cir. 1976)(dissenting opinion).

55. *See* 3 Weinstein's Evidence, *supra* note 12, § 607[02], which Judge Weinstein states that "[t]he main consequence of recasting credibility in terms of relevancy would probably be better analyses of the proffered evidence by both counsel and court." *See also* Matkin v. Jones, 260 Ark. 731, 543 S.W.2d 764 (1976)(defines "collateral matter"); 3 Weinstein's Evidence, *supra* note 12, §§ 607[05], [06] (discussion of "collateral matters").

56. 3 Weinstein's Evidence, *supra* note 12, § 607[06]; 3A J. Wigmore, *supra* note 7, § 1018 at 995-96; Beaver & Biggs, *Attending Witnesses Prior Declarations As Evidence: Theory v. Reality*, 3 Ind. Leg. Forum 309 (1970).

matter stated unless the prior statement fell within one of the exceptions to the hearsay rule.[57] Hence, the prior inconsistent statement was only admitted for purposes of attacking the credibility of the witness.[58] The orthodox view was based primarily upon the premise that the prior statement was untrustworthy because it rested upon the credit of a declarant who was not under oath when the statement was made.[59] However, as the law developed, cross-examination began to replace the oath as the principal safeguard of the trustworthiness of testimony.[60] Consequently, the legal scholars began to advocate the total elimination of the orthodox rule in cases involving prior inconsistent statements when it was the witness' own statement upon which he was being cross-examined.[61] Similarly, some courts began to shape a new view of the rule against substantive use of prior inconsistent statements.[62]

a. Federal Law

The United States Supreme Court proposed the codification of a rule[63] which would have permitted all prior inconsistent state-

57. McCormick, *supra* note 19, § 251 at 601. The Federal Rules list exceptions to the hearsay rule which have been interpreted by the courts. *See* United States v. Cline, 570 F.2d Adv. Sh. 731 (8th Cir. 1978) (prior inconsistent statement as substantive evidence under Rule 801(d)(2)(A) as an admission of a party-opponent); Joyner v. United States, 547 F.2d 1199 (4th Cir. 1977)(prior inconsistent statements as substantive evidence under Rule 801(d)(2)(E) because evidence showed a conspiracy (even though not charged), and the statements were made by co-conspirators pursuant to the conspiracy); United States v. Porter, 544 F.2d 936 (8th Cir. 1976); United States v. Leslie, 542 F.2d 285 (5th Cir. 1976)(prior inconsistent statements admitted as substantive evidence under Rule 803(24)). The court in *Leslie* cited as support for its position Judge Weinstein's opinion in United States v. Iaconetti, 540 F.2d 574 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), in which he discusses the application of Federal Rule 803(24) in detail. *Id.* at 290. *See also* Graham, *supra* note 45, at 966-72.

58. United States v. Tavares, 512 F.2d 872 (9th Cir. 1975); United States v. Bensinger, 430 F.2d 584, 595 (8th Cir. 1970); Thompson v. State, 207 Ark. 680, 182 S.W.2d 386 (1944).

59. McCormick, *supra* note 19, § 251 at 601. In addition to the absence of the oath, the declarant was not, at the time the statement was made, subject to cross-examination or in the presence of the trier of fact. *Id.*

60. *Id.* at 601-02.

61. *Id.* at 603-04; 3 Weinstein's Evidence, *supra* note 12, § 607[06] at 607-58 (agrees with Wigmore); 3A J. Wigmore, *supra* note 7, § 1018 at 996; McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 Tex. L. Rev. 573 (1947).

62. Jett v. Commonwealth, 436 S.W.2d 788 (Ky. 1969); *see* Taylor v. Baltimore & Ohio R.R., 344 F.2d 281, 283 (2d Cir. 1965), *cert. denied*, 382 U.S. 831 (1965); United States v. De Sisto, 329 F.2d 929, 933 (2d Cir. 1964), *cert. denied*, 377 U.S. 979 (1964). *De Sisto* and *Taylor* appear to have laid the foundation for Rule 801(d)(1)(A) of the Federal Rules. *See also* United States v. Lee, 540 F.2d 1205 (4th Cir. 1976); *cert. denied*, 429 U.S. 894 (1977).

63. Proposed Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 293 (1973). The proposed rule provided that "[a] statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with his testimony . . . ." The Supreme

ments to be admissible as substantive evidence.[64] After an attempt by the House Judiciary Committee to alter the rule drastically, Congress compromised[65] and adopted Rule 801(d)(1)(A) of the Federal Rules[66] which provides that

> [a] statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with his testimony, and given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

The Rule applies in both civil and criminal cases, but if the prior inconsistent statement does not meet certain requirements, it may not be admitted as substantive evidence.[67] It is difficult to prove that a specific sworn statement falls within the scope of Rule 801(d)(1)(A) and thus meets the requirements of inconsistency, relevancy, and constitutionality. Although these requirements were "founded in fundamental fairness,"[68] there are some problems that arise because of them. It is therefore necessary to discuss the specific requirements and limitations of the Rule.

(1) *Inconsistency*

Rule 801(d)(1)(A) requires first that the statements be incon-

---

Court Advisory Committee felt that the requirements of inconsistency and cross-examination would foreclose any general and indiscriminate use of previously prepared statements at trial.

64. The Supreme Court's proposed rule was held constitutional in California v. Greene, 399 U.S. 149 (1970).

65. The House Judiciary Committee altered proposed rule 801(d)(1)(A) by adding a requirement that the prior inconsistent statement must have been subject to cross-examination. H.R. Rep. No. 93-650, 93d Cong., 2d Sess., *reprinted in* [1973] U.S. Code Cong. & Ad. News 7086-87. However, the Senate Committee recommended reinstatement of the rule as proposed by the United States Supreme Court. S. Rep. No. 93-1277, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7062-63. In response to the difference of opinion the House Conference Committee adopted a compromise allowing prior inconsistent statements to be used as substantive evidence when the statement was given under oath subject to the penalty of perjury at a "proceeding" or in a deposition. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Cong. Code & Ad. News 7103-04. An in-depth discussion of the legislative history of Rule 801(d)(1)(A) can be found in 4 Weinstein's Evidence, *supra* note 12, at 801-4.7 to -27.

66. Fed. R. Evid. 801(d)(1)(A). Blakey, *Substantive Use of Prior Inconsistent Statements Under the Federal Rules of Evidence*, 64 Ky. L.J. 3 (1976).

67. United States v. Castro-Ayon, 537 F.2d 1055 (9th Cir. 1976), *cert. denied*, 429 U.S. 983 (1977); United States v. Morlang, 531 F.2d 183 (4th Cir. 1975)(witness' grand jury testimony could not be introduced as substantive evidence where trial testimony was not inconsistent; court observed that this ruling would have been the same had Rule 801(d)(1)(A) been applied). General Communications Eng'r, Inc. v. Motorola Communications and Elec., Inc., 421 F. Supp. 274 (N.D. Cal. 1976)(affidavit not under oath inadmissible as substantive evidence).

68. United States v. Rogers, 549 F.2d 490 (8th Cir. 1976).

sistent. In *United States v. Rogers*[69] the Eighth Circuit Court of Appeals, in a split decision,[70] ruled that "[a] statement's inconsistency may be determined from the circumstances and is not limited to cases in which diametrically opposite assertions have been made."[71] The court in *Rogers* stated further that "inconsistencies may be found in changes of position; they may be implied through silence; and they may also be found in denial of recollection."[72] Similarly, in *United States v. Cline*[73] the Eighth Circuit held that if a witness on cross-examination "denies making the statement, or has failed to remember it, the making of the statement may be proved by another witness."[74] One might ask whether an inconsistency exists when a witness has a slight loss of memory at the time of the trial on matters about which he formerly made a statement. According to *Cline,* the answer is yes.[75] If, however, a witness denies *all* recollection of the matter in question, a problem regarding the existence of an inconsistent statement arises. At common law the failure of recollection was not considered to be inconsistent with the prior statement, and the statement could not be used for purposes of impeachment.[76] Wigmore, however, rejected this common law rule of strict exclusion and suggested that the trial court should be

---

69. *Id.*

70. Judge Webster, who was appointed Director of the Federal Bureau of Investigation on February 24, 1978, wrote the majority opinion; Chief Judge Gibson concurred; Judge Lay dissented.

71. United States v. Rogers, 549 F.2d 490, 496 (8th Cir. 1976). Originally, two principal and conflicting tests were proposed. The first required the inconsistency to be apparent on the face of the two statements. The prior statement was excluded unless the only inference was one of inconsistency. The second test allowed the circumstances surrounding each statement to be taken into consideration and the prior statement received into evidence as long as inconsistency could be one of several possible inferences. 3 Weinstein's Evidence, *supra* note 12, § 607[06] (1976).

72. United States v. Rogers, 549 F.2d 490, 496 (8th Cir. 1976). *See also* United States v. Barrett, 539 F.2d 244 (1st Cir. 1976). In *Barrett* the court vacated defendant's conviction on the basis of the court's failure to permit defense impeachment of a key government witness. The court stated the following:

> [T]he contradiction need not be in plain terms [in order for it to be admitted as a prior inconsistent statement]. It is enough if the proffered testimony, taken as a whole, either by what it says or by what it omits to say, affords some indication that the fact was different from the testimony of the witness whom it is sought to contradict.

Id. at 254.

73. 570 F.2d Adv. Sh. 731 (8th Cir. 1978). Although *U.S. v. Cline* does not deal with impeaching one's own witness, it does address the problem of defining an inconsistency.

74. *Id.* at 735 (quoting McCormick, *supra* note 19, § 34).

75. *Id.*

76. California v. Greene, 399 U.S. 149 (1970).

given the discretion to permit impeachment if the situation called for it.[77]

Judge Weinstein states that the Federal Rules support Wigmore's approach[78] because Rule 401,[79] defining relevancy in broad terms, and Rule 403,[80] granting the judge discretion to exclude prejudicial relevant material, seem to undercut the application of the common law rule. It therefore seems that the Federal Rules give a judge the discretion to admit a former statement concerning an event about which the witness in court denies any recollection. Judge Weinstein further suggests that when the judge is deciding whether to admit the statement, he should consider (1) the availability of other evidence; (2) the extent to which the specific witness' credibility is critical to the case; (3) the length of time between the underlying event and the witness' testimony; (4) the type of extrinsic evidence required to prove the prior inconsistent statement; and (5) any other factors which may affect the probative value of the extrinsic evidence or relate to the dangers specified in Rule 403 (prejudice, confusion, and waste of time).[81] Additionally, the judge may be faced with constitutional considerations in criminal cases when impeachment evidence of this nature is offered because a defendant may be unable to cross-examine a witness who claims not to remember.[82]

If a witness claims that he is unable to remember, but does not deny that the previous statements were in fact made, the trial judge can infer that the claim of faulty memory is inconsistent with his prior statements.[83] Professor Wigmore points out that an "unwilling witness often takes refuge in a failure to remember, and the astute liar is sometimes impregnable unless his flank can be exposed to an attack of this sort."[84] It would therefore be prudent for the trial judge, in a situation involving a lack of memory, to make a determi-

77. 3A J. Wigmore, *supra* note 7, § 1043 at 1059-61. *See also* McCormick, *supra* note 19, § 251 at 604.

78. 3 Weinstein's Evidence, *supra* note 12, § 607[06] at 607-66 to -67. *See* United States v. Insana, 423 F.2d 1165 (2d Cir. 1970), *cert. denied*, 400 U.S. 841 (1970).

79. The relevant language is quoted in note 50 *supra*.

80. The relevant language is quoted in note 51 *supra*.

81. 3 Weinstein's Evidence, *supra* note 12, § 607[06] at 607-67 to -68.

82. California v. Greene, 399 U.S. 149 (1970). In *Greene* the Supreme Court suggested that the use of extrinsic evidence under circumstances of memory lapse may run afoul of the confrontation clause of the sixth amendment. *Id.* at 167-68.

83. United States v. Rogers, 549 F.2d 490, 496 (8th Cir. 1976); *see* United States v. Shoupe, 548 F.2d 636, 643 (6th Cir. 1977)(trial court could have found that witness' lack of memory was so selective as to be incredible; impeachment by prior oral statements would have been proper; conviction reversed on due process grounds).

84. 3A J. Wigmore, *supra* note 7, § 1043 at 1061.

nation for the record that he found, under the circumstances of the case, that the witness' failure to remember was not genuine.[85]

Judge Weinstein and Professor Berger support the view that a prior statement should be admitted "whenever a reasonable man could infer on comparing the whole effect of the two statements that they had been produced by inconsistent beliefs."[86] The trial judge who observes the witness and hears his testimony should therefore have broad discretion to determine whether the answers given are inconsistent with prior extrajudicial assertions.[87] Moreover, a case-by-case approach should be employed by a lower court when attempting to resolve the issue of inconsistency, and the appellate court should review the trial court's decision only on the basis of an abuse of discretion.[88]

(2) *"Collateral" Matters*

Implicit in Rule 801(d)(1)(A), as well as in Rule 607 is a second requirement that the prior inconsistent statement be related to a matter of such relevancy that the proponent's case will be harmed

85. United States v. Ragghianti, 560 F.2d 1376, 1380 n.3 (9th Cir. 1977) (conviction reversed, however, for failure on the part of the trial judge to instruct the jury adequately on the defense of alibi and the limited use of the impeaching testimony). *See also* United States v. Rogers, 549 F.2d. 490, 496 (8th Cir. 1976).

86. 4 Weinstein's Evidence, *supra* note 12, § 801(d)(1)(A)[01] at 801-76.

87. United States v. Morgan, 555 F.2d 238 (9th Cir. 1977). The court stated that "trial judges must retain a high degree of flexibility in deciding the exact point at which a prior statement is sufficiently inconsistent with a witness' trial testimony to permit its use in evidence." *Id.* at 242. *See also* United States v. Rogers, 549 F.2d 490, 496 (8th Cir. 1976). A lapse of memory is not the only inconsistency problem trial judges face. For example, when a witness testifies at trial to specific inculpatory facts about plaintiff but has previously made a broad assertion that plaintiff was not at fault, two issues surface as follows: (1) is the prior statement inconsistent for impeachment purposes, and (2) if the prior statement is inconsistent, is it an inadmissible opinion? The opinion rules would probably foreclose an opinion objection if the proper foundation were laid. *See* Fed. R. Evid. 701, 704. The inconsistency problem should be resolved in accordance with the provisions of Rule 401 (broad rule of relevancy) and Rule 403 (judicial discretion to balance probative value versus prejudicial effect) with a view toward admission if the statements were of value to the jury in evaluating the witness' testimony. *Cf.* Atlantic Greyhound Corp. v. Eddins, 177 F.2d 954, 958 (4th Cir. 1949)(expression of an opinion made when in possession of only part of the facts was not inconsistent with his testimony as to all of the facts). *See also* Grady, *The Admissibility of a Prior Statement of Opinion for Purposes of Impeachment,* 41 Cornell L.Q. 224 (1956). Another problem surfaces when a witness testifies to the existence of a particular fact after failing to assert a fact which would have been natural for him to affirm. Should the failure to make an assertion be admissible as a prior inconsistent statement? Pre-Federal Rules decisions indicated that it should be admitted unless the inference to be drawn relates to a defendant's failure to testify when it would have been natural to do so. *See, e.g.,* Griffin v. California, 380 U.S. 609 (1965); United States v. Cordova, 421 F.2d 471 (9th Cir. 1970), *cert. denied,* 398 U.S. 941 (1970); United States v. Standard Oil Co., 316 F.2d 884 (7th Cir. 1963).

88. United States v. Moss, 544 F.2d 954 (8th Cir. 1976), *cert. denied,* 429 U.S. 1077 (1977).

if the inconsistent testimony goes unimpeached.[89] Again, the trial judge must assess the prior inconsistent statement's admissibility in terms of Rule 401[90] (relevancy) and use the balancing approach embodied in Rule 403[91] (prejudicial v. probative).[92] In deciding whether the inconsistent statement should be admitted, the judge should consider (1) the significance of the witness' testimony; (2) the importance of the credibility issue; (3) the presence of other testimony on the same point; (4) the witness' relationship to the party; (5) the nature of the prior inconsistent statement and its potential effect on the jury;[93] and (6) any other factors which would aid him in his determination of whether the probative value of the impeaching testimony outweighs the dangers of prejudice.[94] The judge must disallow any extrajudicial statements that are offered to impeach testimony collateral to the issues in a case if related statements damaging to the defendant are brought before the jury in the process.[95]

(3) *"Under Oath Subject to the Penalty of Perjury at a Trial, Hearing, Other Proceeding, or in a Deposition"*

Another condition for admissibility under Rule 801(d)(1)(A) is that the prior statement be "given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition".[96]

A federal statute enacted in 1976 permits unsworn declarations made under the penalty of perjury to be used whenever the law requires any matter to be "supported, evidenced, established or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit in writing of the person making the same."[97] Nev-

89. United States v. Rogers, 549 F.2d 490, 496 (8th Cir. 1976).

90. The relevant language is quoted in note 50 *supra.*

91. The relevant language is quoted in note 51 *supra.*

92. 2 Weinstein's Evidence, *supra* note 12, § 607[06] at 607-71.

93. *Id.*

94. *See* United States v. Puco, 436 F.2d 761, 762 (2d Cir. 1971), *cert. denied,* 414 U.S. 844 (1973); Macklin v. United States, 410 F.2d 1046, 1048 (D.C. Cir. 1969).

95. United States v. Rogers, 549 F.2d 490, 496-97 (8th Cir. 1976); United States v. Coppola, 479 F.2d 1153, 1158 (10th Cir. 1973); Bushaw v. United States, 353 F.2d 477, 481 (9th Cir. 1965), *cert. denied,* 384 U.S. 921 (1966) (impeachment should not be used as a subterfuge to place otherwise inadmissible hearsay before the jury). The remedy for questioning a witness about an irrelevant (collateral) prior inconsistency is that the examiner must take the witness' answer and may not prove the making of the statement by extrinsic evidence. *See* Cwach v. United States, 212 F.2d 520 (8th Cir. 1954); Shanahan v. Southern Pac. Co., 188 F.2d 564 (9th Cir. 1951).

96. Fed. R. Evid. 801(d)(1)(A).

97. 28 U.S.C. § 1746 (1976).

ertheless, an unsworn assertion given under penalty of perjury may not be substituted for a deposition, a document required to be executed before a specific official other than a notary public, or an official oath.[98] Therefore, excluding these declarations, statements made under the penalty of perjury are synonymous with statements made under oath for the purposes of Rule 801(d)(1)(A).

At the present time, the federal perjury statute[99] deals with perjury in general before a court[100] and has been held to cover a witness' testimony before a grand jury.[101] Also, specific federal statutes prohibit the making of false declarations before a grand jury[102] and the making of any false statements in any matter within the jurisdiction of any department or agency of the United States.[103] Both false statement statutes are graded, as far as sentencing is concerned, in substantially the same fashion as the perjury statutes. The courts, however, have narrowly interpreted the latter to cover only incidents that occur within a department or agency of the United States.[104] This approach is based on the theory that a broad interpretation of the statute would lead to an obliteration of the

---

98. 4 Weinstein's Evidence, *supra* note 12, § 801(d)(1)(A)[01] at 801-73.

99. 18 U.S.C. § 1621 (1976).

100. The statute states the following:

Whoever—

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

Id.

101. United States v. Gross, 511 F.2d 910 (3d Cir. 1975), *cert. denied,* 423 U.S. 924 (1975).

102. 18 U.S.C. § 1623 (1976). *But see* United States v. Kahn, 472 F.2d 272 (2d Cir. 1973), *cert. denied,* 411 U.S. 982 (1973) (the legislative history of 18 U.S.C. §§ 1621 and 1623 is not clear on whether Congress intended to replace § 1621, as it relates to grand jury testimony, with § 1623).

103. 18 U.S.C. § 1001 (1976).

104. Friedman v. United States, 374 F.2d 363 (8th Cir. 1967)(knowingly false oral statements to F.B.I. agents not covered by § 1001). *See generally* Annot., 1 ALR Fed. 370 (1969). The proposed federal Criminal Code Reform Act, S. 1437, H.R. 2311, 95th Cong., 1st Sess. § 1343 (1977) would, however, make it a criminal offense to make a materially false statement to a law enforcement officer knowingly in a government matter where the statement is volunteered or made after the person has been advised that making such a statement is an offense.

distinction between false statements and perjury.[105]

The distinctions between perjury and false declarations are important, however, if the provisions of Rule 801(d)(1)(A) are to be interpreted literally. The House Subcommittee amended Rule 801(d)(1)(A) to require that the inconsistent prior statement be "given under oath and subject to the penalty of perjury at a trial or hearing or in a deposition or before a grand jury."[106] This amendment encompassed proceedings included within the provisions of the federal perjury statute.[107] The language of the amendment was more descriptive than restrictive because it related to the fact that the prior statement must have been subject to cross-examination unless made before a grand jury. The Rule, as adopted, however, dropped the requirement that the prior statement be subject to cross-examination but added a provision allowing prior inconsistent statements made under oath "subject to the penalty of perjury at a trial, hearing, or other proceeding" to fall within the Rule.[108] Since Rule 801(d)(1)(A) expressly exempts such statements from the definition of hearsay, these statements may be given substantive effect.

The courts have not had much trouble applying the Rule to testimony given at a preliminary hearing,[109] testimony given before a grand jury,[110] or testimony given at a prior trial.[111] Judge Weinstein takes the position that "[t]he phrase 'at a trial or hearing or in a deposition' in Rule 801(d)(1)(A) should be broadly interpreted to include situations which involve some kind of judicial or quasi-judicial proceeding."[112] He suggests that testimony given before an administrative board should be handled by the courts as a "hearing."[113] Furthermore, he maintains that administrative hear-

105. Friedman v. United States, 374 F.2d 363, 367 (8th Cir. 1967).

106. 4 Weinstein's Evidence, *supra* note 12, at 801-4.8.

107. 18 U.S.C. § 1621 (1976).

108. 4 Weinstein's Evidence, *supra* note 12, at 801-24 to -25 (1977).

109. United States v. Plum, 558 F.2d 568 (10th Cir. 1977).

110. United States v. Marchand, 564 F.2d 983 (2d Cir. 1977)(grand jury testimony of accomplice witness identifying defendant as marijuana supplier admissible as substantive evidence); United States v. Long Soldier, 562 F.2d 601, 605 n.3 (8th Cir. 1977); United States v. Mosley, 555 F.2d 191 (8th Cir. 1977), *cert. denied*, 98 S. Ct. Adv. Sh. 163 (1977); United States v. Morgan, 555 F.2d 238 (9th Cir. 1977); *See also* United States v. Champion Int'l Corp., 557 F.2d 1270 (9th Cir. 1977), *cert. denied*, 98 S. Ct. Adv. Sh. 428 (1977) (grand jury testimony admissible as substantive evidence even though some of the testimony has been elicited by means of leading questions); United States v. Lee, 540 F.2d 1205 (4th Cir. 1976)(court held that had Rule 801(d)(1)(A) been in effect at the time of trial, it would have clearly sanctioned use of grand jury testimony).

111. United States v. Librach, 536 F.2d 1228 (8th Cir. 1976), *cert. denied*, 429 U.S. 939 (1976).

112. 4 Weinstein's Evidence, *supra* note 12, § 801(d)(1)(A)[01].

113. *Id.*

ings and the like, although not classified as judicial proceedings,[114] are arguably covered by the phrase "other proceeding" depending upon their formality.[115] The question of whether the testimony given at a "hearing" or "other proceeding" qualifies for substantive effect depends on whether it was made "under oath and subject to the penalty of perjury."

The Ninth Circuit addressed the question of what constitutes an "other proceeding" in *United States v. Castro-Ayon.*[116] The court held that sworn tape recorded statements given by three aliens to a Border Patrol agent during an "immigration interrogation" could be given substantive value after the aliens testified inconsistently. The court reasoned that the "immigration interrogation" was an "other proceeding" within the meaning of the Rule since the interrogation was similar, in many respects, to a grand jury proceeding.[117] The holding in *Castro-Ayon,* however, ignores the "penalty of perjury" issue and turns upon the extreme reliability of the prior statements. This highlights the question of whether the courts will be persuaded to interpret "penalty of perjury" as including statements given under oath and subject to false declaration penalties.[118] If the courts refuse to use this interpretation, Federal Rule 803(24)[119] could be used to give substantive effect to highly reliable prior inconsistent statements. This course of action might be preferable to asking the court to overlook the plain language of Rule 801(d)(1)(A) in order to achieve a desired result.

Almost a year after *Castro-Ayon,* the Eighth Circuit in *United*

---

114. United States v. Castro-Ayon, 537 F.2d 1055, 1058 n.6 (9th Cir. 1976).

115. 4 Weinstein's Evidence, *supra* note 12, § 801(d)(1)(A)[01].

116. 537 F.2d 1055, 1057-58 (9th Cir. 1976).

117. United States v. Castro-Ayon, 537 F.2d 1055, 1057-58 (9th Cir. 1976). The court limited its holding, however, by stating that, "[w]e do not hold, as the question is not before us, that every sworn statement given during a police station interrogation would be admissible" as substantive evidence. *Id.* at 1058.

118. *See* United States v. Gross, 511 F.2d 910 (3d Cir. 1975), *cert. denied,* 423 U.S. 924 (1975), in which the court considered a similar issue.

119. Fed. R. Evid. 803(24) states that

> a statement would not be excluded by the hearsay rule if it were a statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

States v. Mosley[120] was asked to decide whether the court was correct in admitting as substantive evidence a sworn tape recorded statement made by a witness to a state prosecuting attorney. The recorded statement was admitted along with portions of the witness' grand jury testimony. The defense contended that the sworn statement was not covered by Rule 801(d)(1)(A) because under Arkansas law a false statement made under oath to a state prosecutor is not subject to the penalty of perjury but to the penalty of false swearing.[121] The Court of Appeals side-stepped the issue by holding that the statements were substantially the same as the witness' grand jury testimony which could have been admitted under Rule 801(d)(1)(A) as statements made at an "other proceeding."[122] The court stated that the statements were not so prejudicial as to mandate a new trial and therefore postponed deciding whether a sworn statement subject only to the penalty of false swearing should be treated as a sworn statement subjec to the penalty of perjury under Rule 801(d)(1)(A).[123]

(4). *Constitutional Impediments*

The fourth requirement of Rule 801(d)(1)(A) is that the declarant testify at the trial or hearing and be "subject to cross-examination." Most constitutional objections flowing from the use of prior inconsistent statements concern the claim that the defendant was denied his sixth amendment right of confrontation[124] and that the use of the prior statements in the presence of the jury violated the defendant's right to a fair trial.[125]

An inability to cross-examine can occur when the witness

120. 555 F.2d 191 (8th Cir. 1977).

121. *Id.* at 193. The *Mosley* case was tried in January 1977. The witness gave the statement to the state prosecutor on September 17, 1976, and should have been subject to the perjury provisions of the Arkansas Criminal Code, which became effective on January 1, 1976. *See* Ark. Stat. Ann. §§ 41-2601 (2) & (4), -2602 (Repl. 1977). *See also* Gill v. State, 242 Ark. 797, 416 S.W.2d 269 (1967) (prosecuting attorney is a quasi-judicial officer and takes the place of a grand jury in determining probable cause to proceed against an accused); Ark. Stat. Ann. § 43-801 (Repl. 1977)(giving authority to prosecuting attorneys to administer oath and take testimony of witnesses).

122. United States v. Mosley, 555 F.2d 191, 193 (8th Cir. 1977)(citing United States v. Castro-Ayon, 537 F.2d 1055, 1057 (9th Cir. 1976)).

123. United States v. Mosley, 555 F.2d 191, 193 (8th Cir. 1977).

124. U.S. Const. amend. VI. *See* California v. Greene, 399 U.S. 149 (1970). The fourteenth amendment of the United States Constitution makes the confrontation clause of the sixth amendment obligatory upon the states. *See* Pointer v. Texas, 380 U.S. 400 (1965); McCormick, *supra* note 19, § 252.

125. Dutton v. Evans, 400 U.S. 74 (1970).

refuses to testify[126] or invokes his privilege against self-incrimination.[127] This inability can deprive the defendant of his right of confrontation unless it was the result of "the suggestion, procurement or act of the accused."[128] However, the courts have uniformly held that the admission of extrinsic evidence under an exception to the hearsay rule does not violate a defendant's right of confrontation.[129]

The Eighth Circuit has taken the position that "[t]he relevant factual inquiry is whether, under the circumstances, the unavailability of the declarant for cross-examination deprived the jury of a satisfactory basis for evaluating the truth of the extrajudicial declaration."[130] The goal of the confrontation clause is to "advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' "[131] This has been construed by the Eighth Circuit as requiring a case-by-case analysis considering the "extent to which the declarant is available to testify and be subject to cross-examination" and the "degree of prejudice to the fact-finding process resulting from the declarant's partial availability [memory lapse] or nonavailability."[132] In determining the degree of prejudice, the court

> must consider, *inter alia,* whether the jury had an opportunity to weigh the credibility of the extrajudicial statement, whether the extrajudicial statement was crucial to the government's case, and, if the statement's use before the jury was limited by the trial judge, whether limiting instructions were given which were sufficient under all the circumstances to protect the defendant from impermissible reliance upon the statement by the jury.[133]

Once the proponent of the prior inconsistent statement overcomes the confrontation issue, he must face the question of whether

126. United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied,* 431 U.S. 914 (1977).

127. Bruton v. United States, 391 U.S. 123 (1968); Douglas v. Alabama, 380 U.S. 415 (1965).

128. Motes v. United States, 178 U.S. 458, 471 (1900); *See* United States v. Carlson, 547 F.2d 1346, 1353 (8th Cir. 1976)(grand jury testimony properly admitted as substantive evidence under Rule 804(b)(5) without sixth amendment infringements where defendant intimidated witness into refusing to testify).

129. United States v. Carlson, 547 F.2d 1346, 1356 (8th Cir. 1976); United States v. Kelly, 349 F.2d 720, 730 (2d Cir. 1965).

130. United States v. Rogers, 549 F.2d 490, 499 (8th Cir. 1976).

131. Dutton v. Evans, 400 U.S. 74, 89 (1970). *See* California v. Greene, 399 U.S. 149, 161 (1970).

132. United States v. Rogers, 549 F.2d 490, 500 (8th Cir. 1976).

133. *Id.*

the use of the statement will exceed permissible limits of fairness. If a prior inconsistent statement is used for impeachment purposes only, its use "must be balanced against the notions of fairness upon which our system is based."[134] Moreover, if the prior inconsistent statement is admitted as substantive evidence, due process requirements may prevent its use as the sole basis for a conviction.[135]

(5) *Limiting Instructions*

Federal Rule 105[136] provides that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly."

Rule 105 seems to require the court to give a limiting instruction upon request when a prior inconsistent statement is used for impeachment purposes.[137] The court may also be required to give a limiting instruction upon request when a prior statement is to be used as substantive evidence.[138] Sometimes the failure to give a limiting instruction in the absence of a request may be plain error.[139]

---

134. United States v. Shoupe, 548 F.2d 636, 643 (6th Cir. 1977) (recitation of the entire substance of a witness' disavowed, unsworn prior statement abridged defendant's right to a fair trial in violation of the due process clause of the fifth amendment).

135. California v. Greene, 399 U.S. 149, 163-64 n.15, 169 (1970). *See* 4 Weinstein's Evidence, *supra* note 12, § 801(d)(1)(A)[01].

136. Fed. R. Evid. 105.

137. United States v. Porter, 544 F.2d 936, 938-39 n.2 (8th Cir. 1976); Martin v. United States, 528 F.2d 1157 (4th Cir. 1975). *Cf.* United States v. Alvarez, 548 F.2d 542 (5th Cir. 1977)(limiting instruction clearly saved case from reversal).

138. United States v. Librach, 536 F.2d 1228, 1232 (8th Cir. 1976). *Cf.* United States v. Marchand, 564 F.2d 983 (2d Cir. 1977) (instruction given on substantive effect of prior inconsistent statement).

139. Upham v. United States, 328 F.2d 661 (5th Cir. 1964); *see* United States v. Lipscomb, 425 F.2d 226 (6th Cir. 1970)(failure to instruct the jury on the limiting effect of prior inconsistent statements held plain error where the government's evidence was weak and the statement was extremely damaging); United States v. De Sisto, 329 F.2d 939 (2d Cir. 1964)(failure to give limiting instruction plain error when prior inconsistent statement tied the defendant to the offense charged). *See also* Salde v. United States, 267 F.2d 834, 836 (5th Cir. 1959)(inadequate instruction, therefore plain error found). *But see* United States v. Alfonso, 552 F.2d 605 (5th Cir. 1977), *cert. denied,* 98 S. Ct. Adv. Sh. 179 (1977)(failure to instruct *sua sponte* not reversible error); United States v. Librach, 536 F.2d 1228, 1232 (8th Cir. 1976)(no request made and no plain error found). *Cf.* United States v. Ragghianti, 560 F.2d 1376 (9th Cir. 1977)(failure to give limiting instruction, although not requested, considered by court in reversing conviction). *See generally* Fed. R. Crim. P. 52(b)(plain error defined); United States v. Cole, 453 F.2d 902 (8th Cir. 1972), *cert. denied,* 406 U.S. 922 (1972)(limiting instruction not required unless specifically requested and failure to give same not grounds for reversal unless it constitutes plain error). The limiting instruction was held to be correct in Arkansas in the criminal case of Thompson v. State, 207 Ark. 680, 182 S.W.2d

The safest practice is to give the instruction, whether requested or not, in all cases where prior inconsistent statement testimony is received for purposes of impeachment to the detriment of an accused in a criminal case.

It is difficult to determine whether jurors can make the distinction between impeaching and substantive evidence. Furthermore, it is possible that a juror will choose to believe the prior inconsistent statement because it was made closer in time to the event in question than was the witness' testimony in court.[140] The limiting instruction attempts to give guidance to the jury in a spirit of due process and it should be modified to fit the particular circumstances of each case.[141] In order to avoid confusion,[142] the trial judge should give an instruction immediately after the witness' testimony, as well as at the end of the case.

b. Arkansas Law

Unlike the situation with respect to Rule 607, Arkansas Rule 801(d)(1)(i) differs significantly from its federal counterpart. Arkansas Rule 801(d)(1)(i) provides that

> [a] statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with his testimony and, if offered in a criminal proceeding, was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.[143]

Unlike the parallel Federal Rule, the Arkansas Rule requires that the prior inconsistent statement be given under oath subject to the penalty of perjury only if it is offered at a criminal proceeding. Consequently the "wide open" rule as proposed by the United

---

386 (1944), and in civil cases the Arkansas Supreme Court has stated that a limiting instruction on prior inconsistent statements is proper when requested. Matkin v. Jones, 260 Ark. 731, 543 S.W.2d 764 (1976)(case decided after the Arkansas Uniform Rules went into effect, but defendant was tried, according to appellant's counsel, on April 21, 1976). *See* Ark. Uniform R. Evid. 801(d)(1)(i) on the necessity for such an instruction in civil cases under existing law.

140. 3 Weinstein's Evidence, *supra* note 12, § 607[06]; 3A J. Wigmore, *supra* note 7, § 1018.

141. United States v. Rogers, 549 F.2d 490, 497-98 (8th Cir. 1976).

142. An example of the confusion that might arise is found in that situation in which two separate prior inconsistent statements are received; one to be used for impeachment and the second to be used as substantive evidence. *See* United States v. Jordano, 521 F.2d 695 (2d Cir. 1975).

143. Ark. Uniform R. Evid. 801(d)(1)(i).

States Supreme Court[144] is applicable to civil cases in Arkansas. It permits the introduction of any prior inconsistent statement as substantive evidence in a civil case. Limiting prior inconsistent testimony evidence for purposes of impeachment only is therefore unnecessary.[145]

There have been no Arkansas Supreme Court decisions interpreting Rule 607 or the evidentiary requirements of Rule 801(d)(1)(i). Similarly, no legislative history or special committee notes exist for the Arkansas Uniform Rules. However, according to a member of the National Conference of Commissioners on Uniform State Laws' Special Committee on Evidence, the committee has tried to reconcile Arkansas Rule 801(d)(1)(i) with Federal Rule 801(d)(1)(A) and, in the interest of protecting the rights of a defendant in a criminal case, adopted the interpretation of the Federal Rule as it applies to criminal cases.[146] In view of the identical application of the Arkansas Rule and the Federal Rule in criminal cases, it seems reasonable to apply the standards utilized by federal courts when assessing inconsistency, relevancy, reliability, and constitutionality. Arkansas Rules 401 (defining relevancy) and 403 (balancing probative value v. prejudicial impact) are likewise identical to their federal counterparts, and their application to the admissibility of prior inconsistent statements in Arkansas criminal cases should be the same.

The legal effects of the Rule in civil cases is quite evident. The Rule has the potential of saving an attorney from a directed verdict. The lack of judicial decisions on the subject is surprising, but it could be explained by the fact that years of custom and habit may be delaying an awareness of the Rule. Nevertheless, the Rule exists and can be used by the practitioner in a helpful manner.

The skeptics who believe that the Rule will open the door to abuse or fraud should be reassured by the fact that a prior inconsistent statement is not automatically admissible in court. In civil as well as criminal cases, Rules 401 and 403 give the trial court considerable discretion to balance all factors surrounding the making of the prior inconsistent statement in an attempt to ascertain whether the probative value of the evidence outweighs any danger of preju-

144. 56 F.R.D. 183, 293 (1973); *see* note 5 *supra; see also* 4 Weinstein's Evidence, *supra* note 12, § 801(d)(1)[01] (discussion of the uniform rule as it was originally drafted).

145. *See* Joint Bd. of Cloak, Skirt & Dressmakers Union v. Senco, Inc., 310 F. Supp. 539 (D. Mass. 1970).

146. Interview with Phillip Carroll, Attorney at Law, in Little Rock, Arkansas (February 13, 1978).

dice. The trial court's decision in this regard must stand unless it is found on appeal to be an abuse of this discretion.[147]

147. United States v. Moss, 544 F.2d 954, 961 (8th Cir. 1976).