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IMPEACHMENT OF WITNESSES: PART I

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This is the first of two articles on the impeachment of witnesses.

CREDIBILITY

Credibility involves a witness' worthiness of belief. In a bench trial the court determines credibility. See *In re Disbarment of Lieberman*, 163 Ohio St. 35, 125 N.E.2d 328 (1955). In a jury trial, passing upon the credibility of a witness is a jury function. See *State v. Williams*, 23 Ohio St. 3d 16, 21, 23 O.B.R. 13, 490 N.E.2d 906 (1986), cert. denied, 107 S.Ct 1385 (1987) ("It is well-established that the witnesses' credibility is for the trier of fact to judge."); *State v. Walker*, 55 Ohio St. 2d 208, 213, 378 N.E.2d 1049, (1978), cert. denied, 441 U.S. 924 (1979) ("It is the function of the jury to resolve the facts of the case and determine the credibility of the witnesses before it."); *State v. DeHass*, 10 Ohio St. 2d 230, 227 N.E.2d 212 (1967) (syllabus, para. 1) ("Credibility of the witnesses [is] primarily for the trier of the facts."); *Kornreich v. Industrial Fire Insurance Co*, 132 Ohio St. 78, 5 N.E.2d 153 (1936) (syllabus, para. 1) ("[C]redibility must be determined by the jury."); RC 2945.11 ("[T]he jury is the exclusive judge of all questions of fact."); Ohio Jury Instructions § 5.30 and 405.20.

In a jury trial the court may not instruct the jury to disregard the testimony of a witness who has been impeached. See *Sharp v. State*, 16 Ohio St. 218 (1865); *Smiley v. Dewey*, 17 Ohio 156 (1848). Nor may the court instruct the jurors that if they find that a witness has testified falsely on one matter they must reject all the testimony of that witness. See *Mead v. McGraw*, 19 Ohio St. 55 (1869); *Brown v. State*, 18 Ohio St. 496 (1869).

In determining the credibility of witnesses the jury may consider a multitude of factors, including the appearance of each witness upon the stand; his manner of testifying; the reasonableness of the testimony; the opportunity he had to see, hear and know the things concerning which he testified; his accuracy of memory; frankness or lack of it; intelligence, interest and bias, if any; together with all the facts and circumstances surrounding the testimony. Ohio Jury Instructions § 5.30.

See also *In re Estate of Soeder*, 7 Ohio App. 2d 271, 310,

220 N.E.2d 547 (Cuyahoga 1966) ("Credibility, intelligence, freedom from bias or prejudice, opportunity to be informed, the disposition to tell the truth or otherwise, and the probability or improbability of the statements made, are all tests of testimonial value."); *Whitcomb v. State*, 14 Ohio 282, 284 (1846) ("This was a question for the jury, to say whether she was to be believed. They saw her manner of giving testimony, which is sometimes of great importance in determining the credibility of a witness."); *Nicholson v. Malone*, 84 Abs. 206, 168 N.E.2d 155 (App. Cuyahoga 1960) (province of jury to observe the demeanor of witnesses).

Types of impeachment

Evidentiary issues concerning credibility most often arise in connection with impeachment, that is, attempts to diminish the credibility of a witness. Although numerous factors may be considered in evaluating credibility, "five main lines of attack upon the credibility of a witness" have been recognized. McCormick, *Evidence* § 33, at 72 (3d ed. 1984). The five are: bias, sensory-mental defects, prior inconsistent statements, contradiction, and untruthful character, which includes opinion, reputation, and prior conviction evidence.

The Ohio Rules of Evidence contain a number of rules on impeachment: Rule 608 governs the impeachment use of character evidence, *i.e.*, opinion, reputation, and specific instances of conduct; Rule 609 governs the impeachment use of prior convictions; Rule 610 regulates the use of religious belief as a method of impeachment; Rule 613 covers prior inconsistent statements of a witness. Although there are a number of provisions dealing with impeachment, the Rules of Evidence do not treat the subject in a comprehensive fashion. For example, there is no rule on impeachment by bias.

IMPEACHMENT OF OWN WITNESS

Rule 607 permits a party to impeach his own witness. The right to impeach one's own witness is not unlimited, however; the party calling a witness may not impeach by means of a prior inconsistent statement unless there is a showing of surprise and affirmative damage.

Rule 607 abolishes the "voucher rule," which prohibited a party from impeaching his own witnesses. See *State v. Adams*, 62 Ohio St. 2d 151, 157, 404 N.E.2d 144 (1980). The voucher rule was "based on the theory that when a party produces a witness he vouches for his veracity; that he cannot hold him out as worthy of belief when his testimony is favorable and impeach his credibility when his testimony is adverse." *State v. Duffy*, 134 Ohio St. 16, 21, 15 N.E.2d 535 (1938). *Accord*, *Thompson v. Kerr*, 39 Abs. 113, 120, 51 N.E.2d 742 (App. Allen 1942).

This rationale was never persuasive because "except in a few instances such as character witnesses or expert witnesses, the party has little or no choice of witnesses. The party calls only those who happen to have observed the particular facts in controversy." McCormick, *Evidence* § 38, at 82 (3d ed. 1984). Moreover, the continued validity of the voucher rule as applied in criminal cases became suspect after *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). In *Chambers* the United States Supreme Court held that the combined effect of Mississippi's voucher rule and hearsay rule precluded the admission of critical and reliable defense evidence and thus violated due process. "The 'voucher' rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges." *Id.* at 298.

Prior inconsistent statements

Unlike Federal Rule 607, the Ohio rule imposes a limitation on the impeachment of a party's own witness by means of a prior inconsistent statement. In such a case, impeachment is permitted only upon a showing of surprise and affirmative damage. This limitation was intended to prevent the circumvention of the hearsay rule. Except as provided in Rule 801(D)(1)(a), prior inconsistent statements constitute hearsay evidence, and thus are admissible only for the purpose of impeachment. Without the surprise and affirmative damage requirements, a party could call a witness for the sole purpose of disclosing the prior inconsistent statement (hearsay) to the jury. An instruction limiting the use of the statement to impeachment would likely be ineffective. See Staff Note ("Otherwise, the party would be entitled to call a known adverse witness simply for the purpose of getting a prior inconsistent statement into evidence by way of impeachment, thus doing indirectly what he could not have done directly."). See generally Note, *Impeaching One's Own Witness with a Prior Inconsistent Statement: Ohio and Federal Rules 607 and Hearsay Considerations*, 50 Cin. L. Rev. 100 (1981).

The Ohio rule was taken verbatim from an article by Professor Michael Graham, *Employing Inconsistent Statements for Impeachment and as Substantive Evidence: A Critical Review and Proposed Amendments of Federal Rules of Evidence 801(d)(1)(A), 613, and 607*, 75 Mich. L. Rev. 1565, 1617 (1977). This article provides guidance on how Rule 607 should be applied. In particular, Professor Graham notes: "The requirement of surprise may be inappropriate in criminal cases where impeachment is by the criminal defendant: it could impede the defendant's right to confront the witnesses, to present a defense, and to produce witnesses on his own behalf." *Id.* at 1617. See also Graham, *The Relationship Among Federal Rules of Evidence 607, 801(d)(1)(A),*

and 403: A Reply to Weinstein's Evidence, 55 Tex. L. Rev. 573 (1977); Graham, *Examination of a Party's Own Witness Under the Federal Rules of Evidence: A Promise Unfulfilled*, 54 Tex. L. Rev. 917 (1976).

See also *State v. Dacons*, 5 Ohio App. 3d 112, 5 O.B.R. 227, 449 N.E.2d 507 (Franklin 1982)(Evid. R. 607 not violated where witness is called by the court and is impeached with a prior inconsistent statement); *State v. Apanovitch*, 33 Ohio St. 3d 19, 22, 514 N.E.2d 394 (1987).

Affirmative damage

The Staff Note provides the following explanation of the affirmative damage requirement: "Requiring a showing of affirmative damage is intended to eliminate an 'I don't remember' answer or a neutral answer by the witness as a basis for impeachment by a prior inconsistent statement." One court has written: "The party's own witness must testify to facts that contradict, deny, or harm that party's trial position before the calling party can use the witness' prior inconsistent statement to impeach." *State v. Stearns*, 7 Ohio App. 3d 11, 15, 7 O.B.R. 12, 454 N.E.2d 139 (Cuyahoga 1982). *Accord*, *State v. Blair*, 34 Ohio App. 3d 6, 516 N.E.2d 240 (Cuyahoga 1986).

The rationale for this requirement is as follows: "If the witness does not give affirmatively damaging testimony, the [party] simply does not need to attack his credibility." Graham, *Examination of a Party's Own Witness Under the Federal Rules of Evidence: A Promise Unfulfilled*, 54 Tex. L. Rev. 917, 979 (1976).

Surprise

Prior to the adoption of the Rules of Evidence, the Ohio cases permitted a party, who was "surprised" by the testimony of his own witness, to question the witness about a prior inconsistent statement in an effort to refresh the witness' recollection. See *State v. Diehl*, 67 Ohio St. 2d 389, 423 N.E.2d 1112 (1981); *State v. Reed*, 65 Ohio St. 2d 117, 418 N.E.2d 1359 (1981); *State v. Dick*, 27 Ohio St. 2d 162, 271 N.E.2d 797 (1971); *State v. Minneker*, 27 Ohio St. 2d 155, 271 N.E.2d 821 (1971); *State v. Springer*, 165 Ohio St. 182, 134 N.E.2d 150 (1956); *State v. Duffy*, 134 Ohio St. 16, 15 N.E.2d 535 (1938); *Hurley v. State*, 46 Ohio St. 320, 21 N.E. 645 (1888); *State v. Johnson*, 112 App. 124, 165 N.E.2d 814 (Cuyahoga 1960); *Prok v. Cleveland*, 60 Ohio Abs. 515, 522, 102 N.E.2d 253, (App. Cuyahoga 1951).

Although these cases limited the use of the prior statement to refreshing recollection, they also recognized the incidental impeachment effect of the evidence. See *State v. Duffy*, 134 Ohio St. 16, 15 N.E.2d 535 (1938); *Hurley v. State*, 46 Ohio St. 320, 21 N.E. 645 (1888). However, in the absence of surprise and affirmative damage, permitting a party to "refresh" a witness' recollection by reading a prior statement in the presence of the jury would defeat the policy underlying Rule 607. See also *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965) (reading witness' statement in presence of jury violated right of confrontation).

In *State v. Holmes*, 30 Ohio St. 3d 20, 30 O.B.R. 27, 506 N.E.2d 204 (1987), the Supreme Court wrote: "Surprise can be shown if the testimony is materially inconsistent with the prior written or oral statements and counsel did not have reason to believe that the witness would recant

when called to testify." *Id.* at 23. The Court, however, went on to find that the prosecution knew several days before trial that the witness would deny making the statement. See also *State v. Stearns*, 7 Ohio App. 3d 11, 15, 7 O.B.R. 12, 454 N.E.2d 139 (Cuyahoga 1982) ("In this case, the trial judge was justified in concluding that the prosecutor was surprised by testimony significantly varying from the witnesses' prior written statements.')

BIAS, INTEREST, OR MOTIVE

Neither the Ohio nor the Federal Rules of Evidence contain a rule governing impeachment by means of bias or interest. In *United States v. Abel*, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984), the United States Supreme Court held that impeachment of a witness for bias was proper. According to the Court, "the lesson to be drawn . . . is that it is permissible to impeach a witness by showing his bias under the Federal Rules of Evidence just as it was permissible to do so before their adoption." *Id.* at 51. The Court went on to state that "[p]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *Id.* at 52.

Moreover, RC 2945.42 provides: "No person is disqualified as a witness in a criminal prosecution by reason of his interest in the prosecution as a party or otherwise. . . . Such interest . . . may be shown for the purpose of affecting the credibility of such witness." See also *State v. Ferguson*, 5 Ohio St. 3d 160, 165, 5 O.B.R. 380, 450 N.E.2d 265 (1983) ("It is beyond question that a witness' bias and prejudice by virtue of pecuniary interest in the outcome of the proceeding is a matter affecting credibility under Evid. R. 611(B)."); *Calderon v. Sharkey*, 70 Ohio St. 2d 218, 223-24, 436 N.E.2d 1008 (1982) ("Evidence of bias and pecuniary interest is a legitimate subject of inquiry of all expert witnesses. . . ."); *Keveney v. State*, 109 Ohio St. 64, 65-66, 141 N.E. 845 (1923) ("The interest of witnesses in the result of the case is always one of the biggest factors in weighing their evidence, in determining its credibility.').

Moreover, curtailment of a criminal defendant's efforts to establish bias on the part of prosecution witnesses is unconstitutional. In *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the defense attempted to show that a key prosecution witness was a juvenile probationer and therefore had a motive—retention of his probationary status—to testify in a way favorable to the prosecution. The trial court, based on a statute, excluded this evidence. The United States Supreme Court reversed, finding a violation of the defendant's right of confrontation: "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross examination for bias of an adverse witness." *Id.* at 320. See also *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *Smith v. Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968); *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931).

Types of bias

There are two broad categories of bias. First, a rela-

tionship between a witness and one of the parties is evidence of bias. The relationship may be a favorable one, such as familial, employment, business, or sexual relationship, or it may be a hostile relationship, caused by prior fights and quarrels. See *Taylor v. Schlichter*, 118 Ohio St. 131, 136-37, 160 N.E. 610 (1928) (hatred and revenge); *Gladman v. Carns*, 9 Ohio App. 2d 135, 137, 223 N.E.2d 378 (1964) (wife's interest affects credibility).

Second, a relationship between a witness and the litigation also is evidence of bias. See *State v. Ferguson*, 5 Ohio St. 3d 160, 165, 5 O.B.R. 380, 450 N.E.2d 265 (1983) (interest in related civil case); *Calderon v. Sharkey*, 70 Ohio St. 2d 218, 223, 436 N.E.2d 1008 (1982) (expert's interest in related cases); *Powell v. Powell*, 78 Ohio St. 331, 85 N.E. 541 (1908) (financial interest in case); *Zink v. Contris*, 116 App. 95, 186 N.E.2d 865 (Hancock 1961) (interest in related litigation).

One of the most common examples of interest in the litigation arises in cases in which a prosecution witness is offered immunity or a reduced charge in exchange for testifying against the defendant. Such arrangements, as well as the pendency of criminal charges, are always admissible to show bias. See *State v. Wolery*, 46 Ohio St. 2d 316, 348 N.E.2d 351 (1976), cert. denied, 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed.2d 301 (1976); *State v. Hector*, 19 Ohio St. 2d 167, 249 N.E.2d 912 (1969); *Allen v. State*, 10 Ohio St. 287 (1859). See also *Keveney v. State*, 109 Ohio St. 64, 141 N.E. 845 (1922); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). In *State v. Gavin*, 51 Ohio App. 2d 49, 365 N.E.2d 1263 (Cuyahoga 1977), the court commented:

In a criminal case the spectre of bias materializes anytime the evidence indicates that the witness has potential trading assets to barter with the State. For instance, the potential is suggested whenever the witness is: (1) a co-defendant, an accomplice or a suspect susceptible to charge in the case on trial or (2) under pending indictment in another case or a suspect susceptible to charge in another case or (3) serving time subject to executive commutation, pardon or parole. *Id.* at 53.

Foundational requirements; extrinsic evidence

Most jurisdictions require as a prerequisite that a foundation be laid for the introduction of extrinsic evidence of bias. Thus, the examiner must raise the question of bias during the examination of the witness or be foreclosed from presenting the testimony of other witnesses on the issue. McCormick, *Evidence* § 40 (3d ed. 1984). Ohio, however, apparently follows the minority view; no foundation is required. In *State v. Kehn*, 50 Ohio St. 2d 11, 361 N.E.2d 1330 (1977), cert. denied, 434 U.S. 858, 98 S.Ct. 180, 54 L.Ed.2d 130 (1977), the Court stated: "[I]mpeachment of a witness by showing bias or prejudice does not require the foundation necessary for impeaching a prior inconsistent statement." *Id.* at 19. Accord, *State v. Carlson*, 31 Ohio App. 3d 72, 31 O.B.R. 112, 508 N.E.2d 999 (Cuyahoga 1986).

In addition, bias is not considered a "collateral matter," and thus extrinsic evidence of bias is always admissible; the impeaching party is not limited to attempting to elicit the evidence during the examination of the witness. "[W]here the cross-examination is . . . with the view of

showing the feeling, bias or interest of the witness with respect to the parties or either of them, the party cross-examining may, in a proper case, call witnesses to contradict the testimony so elicited on cross-examination." *Kent v. State*, 42 Ohio St. 426 (1884) (syllabus, para. 1). See also *Harper v. State*, 106 Ohio St. 481, 485, 140 N.E. 364, 365 (1922) ("Evidence relevant upon the question of credibility, especially of an interested witness, is in no sense collateral.").

See generally 3A Wigmore, *Evidence* § § 943-69 (Chadbourn rev. 1970); 3 Weinstein & Berger, *Weinstein's Evidence* § 607[03] (1987); 3 Louisell & Mueller, *Federal Evidence* § 341 (1979).

SENSORY OR MENTAL DEFECT

Any sensory or mental defect that might affect a witness' capacity to observe, recall, and relate the events about which the witness has testified is admissible to impeach that witness' credibility. Evidence that the witness was under the influence of alcohol or drugs at the time of the event or the time of trial falls within this category. See generally McCormick, *Evidence* § 45 (3d ed. 1984); 3A Wigmore, *Evidence* § § 931-35, 989-95 (Chadbourn rev. 1970); 3 Weinstein & Berger, *Weinstein's Evidence* ¶607[04] (1987); 3 Louisell & Mueller, *Federal Evidence* § 342 (1979). No provision of the Rules of Evidence governs this type of impeachment.

The Ohio cases on this subject include: *State v. Auerbach*, 108 Ohio St. 96, 98, 140 N.E. 507 (1923) (witness' "means of observation" subject to cross-examination); *Morgan v. State*, 48 Ohio St. 371, 373-74, 27 N.E. 710 (1891) (right to cross-examine witnesses on their opportunity to observe); *Village of Shelby v. Clagett*, 46 Ohio St. 549, 552-53, 22 N.E. 407 (1889) ("intelligence, fairness, opportunities to observe, and other circumstances affecting the credibility of the witness, can be called out by a cross-examination . . ."); *Lee v. State*, 21 Ohio St. 151, 154 (1871) (proper to test witness' recollection); *Bell v. Rinner*, 16 Ohio St. 45, 48 (1864) (evidence that witness was "drunk, paralyzed, deaf" proper; but extrinsic evidence of lack of ordinary intelligence inadmissible); *Stewart v. State*, 19 Ohio 302, 304 (1850) (proper to cross-examine witness on opportunity to observe and remember); *Johnson v. Knipp*, 36 Ohio App. 2d 218, 221, 304 N.E.2d 914 (Summit 1973) (intoxication of witness at time of event relevant to credibility); *McAllister v. State*, 13 Ohio Abs. 360, 362 (App. Madison 1932) (mental condition of witness affects credibility); *State v. Webb*, 72 Abs 306, 308, 131 N.E.2d 273 (C.P. Butler 1955) (mental condition of witness affects credibility).

These cases do not indicate whether extrinsic evidence of sensory or mental defects may be introduced. There is probably no hard and fast rule. Sensory and mental defects often can be effectively disclosed through cross-examination, in which case the admissibility of extrinsic evidence would be regulated by the trial court pursuant to Rules 403 and 611(A).

SPECIFIC CONTRADICTION

There are two distinct methods of impeachment by contradiction. First, self-contradiction involves the use of a witness' own prior inconsistent statements to contradict his present testimony. Second, contradiction may involve

the testimony of one witness that conflicts with the testimony of another witness. For example, witness A may testify that he saw the defendant shoot the victim, but witness B, who was also present, may testify that he saw a different person shoot the victim. It is this latter type of contradiction that is discussed in this section.

Under what circumstances a party may introduce extrinsic evidence of contradiction is unclear. No provision of the Rules of Evidence governs this issue. Contradiction on so-called "collateral matters" is prohibited. "It is elementary that a witness may not be impeached by evidence that merely contradicts his testimony on a matter that is collateral." *Byomin v. Alvis*, 169 Ohio St. 395, 396, 159 N.E.2d 897 (1959). See also *State v. Cochrane*, 151 Ohio St. 128, 135, 84 N.E.2d 742 (1949) ("The cross-examiner is not permitted to introduce rebuttal evidence to contradict the witness on collateral matters."); *State v. Hickman*, 77 App. 479, 486-87, 67 N.E.2d 815 (Montgomery 1945). The policy underlying this rule is stated in *State v. Kehn*, 50 Ohio St. 2d 11, 17, 361 N.E.2d 1330 (1977), cert. denied, 434 U.S. 858, 98 S.Ct. 180, 54 L. Ed.2d 130 (1977): "[T]he court, by excluding the testimony, avoided the dangers of surprise, jury confusion and wasted time which are the reasons for the rule against impeachment on collateral matters."

The problem in applying this rule is determining what constitutes a "collateral matter." The same issue is presented when a prior inconsistent statement is offered to impeach. Extrinsic evidence of prior inconsistent statements is not admissible on "collateral matters." Wigmore argued that extrinsic evidence of contradiction should be admitted if the evidence would be admissible "for any purpose independently of the contradiction." 3A Wigmore, *Evidence* § 1003, at 961 (Chadbourn rev. 1970). McCormick describes this test as follows:

The classical approach is that facts which would have been independently provable regardless of the contradiction are not "collateral." . . .

Two general kinds of facts meet the test. The first kind are facts that are relevant to the substantive issues in the case. . . .

The second kind of facts meeting the above mentioned test for facts that are not collateral includes facts which would be independently provable by extrinsic evidence, apart from the contradiction, to impeach or disqualify the witness. Among these are facts showing bias, interest, conviction of crime, and want of capacity or opportunity for knowledge.

McCormick, *Evidence* § 47, at 110-11 (3d ed. 1984). This approach was followed in *Kent v. State*, 42 Ohio St. 426 (1884), in which the Court held that extrinsic evidence was admissible when "the matter offered in contradiction is in any way relevant to the issue, or such as tends to show prejudice or interest." *Id.* at 431.

McCormick also argued that extrinsic evidence of contradiction should be admitted in situations in which such evidence is critical to determining the credibility of a witness' story. He refers to this as "linchpin" evidence. McCormick, *Evidence* § 47, at 112 (3d ed. 1984). This suggests that the trial court should have discretion on this matter pursuant to Rule 403. See 3 Weinstein & Berger, *Weinstein's Evidence* ¶607[05] (1987). Several Ohio cases seem to support this view. See *Mimms v.*

State, 16 Ohio St. 221, 233 (1865); State v. Patterson, 43 Ohio App. 2d 63, 69-71, 332 N.E.2d 770 (Hamilton 1974). See generally 3 Louisell & Mueller, *Federal Evidence* § 343 (1979).

PRIOR INCONSISTENT STATEMENTS

Ohio has followed the traditional practice of admitting prior inconsistent statements only for impeachment. Under this approach, the prior statement is offered to show the inconsistency between the witness' trial and pretrial statements, rather than to show the truth of the assertions contained in the pretrial statement. If offered for the latter purpose, the statement is hearsay. See *G. M. McKelvey Co v. General Casualty Co*, 166 Ohio St. 401, 405, 142 N.E.2d 854 (1957); *State v. Duffy*, 134 Ohio St. 16, 24, 15 N.E.2d 535 (1938); *State v. Wright*, 11 Ohio App. 2d 31, 33, 227 N.E.2d 650 (Cuyahoga 1967); *Columbus v. Freeze*, 100 App. 37, 135 N.E.2d 419 (Franklin 1955); *Kroger Grocery & Baking Co v. McCune*, 46 App. 291, 294-95, 188 N.E. 568 (Franklin 1933).

In general, the Rules of Evidence maintain this distinction. There are, however, a number of exceptions. For example, under Rule 801(D)(1)(a), prior inconsistent statements taken under oath, subject to cross-examination at the time made, and subject to penalty of perjury may be admitted as substantive evidence. Moreover, prior inconsistent statements that qualify as admissions of a party-opponent under Rule 801(D)(2) are also admissible as substantive evidence.

Foundational requirements

Rule 613(A) provides that a prior written statement need not be shown to a witness as a prerequisite to an examination on that statement. Thus, the rule abolishes the requirement imposed by *Queen Caroline's Case*, 2 Brod. & Bing. 284, 129 Eng. Rep. 976 (1820), and according to the Staff Note, "represents a departure from prior Ohio law." See Stern and Grosh, *A Visit With Queen Caroline: Her Trial and Its Rule*, 6 Capital L. Rev. 165 (1976). The rule does provide, however, that the opposing counsel has a right to inspect the statement upon request. "The provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary." Advisory Committee's Note, Fed. Evid. R. 613. See also *Bluestein v. Thompson*, 102 App. 157, 139 N.E.2d 668 (Hamilton 1957); *Walton v. Elftman*, 64 Ohio Misc. 45, 410 N.E.2d 1282 (C.P. Cuyahoga 1980).

Rule 613(B) requires that a witness be afforded an opportunity to explain or deny a prior inconsistent statement before extrinsic evidence of that statement is admissible. The rule follows prior Ohio law. In *King v. Wicks*, 20 Ohio 87 (1851), the Supreme Court held: "Before a witness can be contradicted by proving statements out of court at variance with his testimony, he must be first inquired of, upon cross-examination, as to such statements, and the time, place, and person involved in the supposed contradiction." *Id.* (syllabus). *Accord*, *State v. Osborne*, 50 Ohio St. 2d 211, 217-18, 364 N.E.2d 216 (1977), vacated on other grounds, 438 U.S. 911, 98 S.Ct. 3137, 57 L.Ed.2d 1157 (1978); *Radke v. State*, 107 Ohio St. 399, 140 N.E. 586 (1923); *Kent v. State*, 42 Ohio St. 426, 429 (1884); *Runyan v. Price*, 15 Ohio St. 1, 10 (1864);

Kunkel v. Cincinnati Street Railway Co, 82 App. 341, 80 N.E.2d 442 (Hamilton 1948); *Saunders v. Wiggins*, 48 App. 174, 192 N.E. 745 (Stark, 1934).

No foundation is required if the trial court finds that the "interests of justice" would be defeated by imposition of the foundational requirements. The Advisory Committee's Note to Federal Rule 613 provides the following explanation of this provision: "In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the judge." Thus, Ohio cases holding that a foundation is mandatory in all situations are no longer controlling. See *Runyan v. Price*, 15 Ohio St. 1 (1864) (syllabus, para. 2); *French Brothers-Bauer Co v. R & G Motor Car Co*, 19 Ohio App. 299 (Hamilton 1923); *Baird v. Detrick*, 8 Ohio App. 198 (Clark 1917).

Rule 613(B) differs from the federal rule. The addition of the word "prior" before the phrase "opportunity to explain or deny" conforms the Ohio rule to the traditional practice. This formulation of the rule is based on Minnesota Rule of Evidence 613(b). In contrast, Federal Rule 613(b) does not require that the witness be afforded an opportunity to explain or deny before extrinsic evidence is introduced, so long as the witness is afforded such an opportunity at some time during the trial. The purposes of requiring an opportunity to explain or deny prior to the admission of extrinsic evidence are: "(1) to avoid unfair surprise to the adversary, (2) to save time, as an admission by the witness may make the extrinsic proof unnecessary, and (3) to give the witness in fairness a chance to explain the discrepancy." McCormick, *Evidence* § 37, at 79 (3d ed. 1984).

Inconsistency requirement

To be admissible, a prior statement must be inconsistent with the witness' trial testimony. The Ohio cases have adopted a liberal view of the inconsistency requirement. *State v. Kline*, 11 Ohio App. 3d 208, 212, 11 O.B.R. 330, 464 N.E.2d 159 (Huron 1983) ("In Ohio, the rule is a liberal one with respect to establishing inconsistency."). If the prior statement can be interpreted in either of two ways, only one of which is inconsistent with the trial testimony, the statement is admissible: "[If the prior statement] is susceptible of different meanings, one of which would be inconsistent with the truth of such testimony, it is admissible in evidence, leaving the jury to determine which is the true meaning." *Dilcher v. State*, 39 Ohio St. 130 (1883) (syllabus, para. 4). See also McCormick, *Evidence* § 34 (3d ed. 1984).

If the witness' testimony includes material facts that were omitted in the prior statement, the statement is inconsistent. See *State v. Kline*, 11 Ohio App. 3d 208, 212, 11 O.B.R. 330, 464 N.E.2d 159 (Huron 1983); 3A Wigmore, *Evidence* § 1042 (Chadbourn rev. 1970). If the witness claims a lack of memory or lack of knowledge at trial, the prior statement may be inconsistent. See *State v. Osborne*, 50 Ohio St. 2d 211, 218, 364 N.E.2d 216 (1977), vacated on other grounds, 438 U.S. 911, 98 S.Ct. 3137, 57 L.Ed.2d 1157 (1978); *Blackford v. Kaplan*, 135 Ohio St. 268, 270, 20 N.E.2d 522 (1939) (exclusion of prior statement when witness testified "I don't know," "I don't remember," or "I don't believe so" is erroneous). In *State v. Doherty*, 56 Ohio App. 2d 112, 381 N.E.2d 960 (Hamilton

1978), the court commented:

We would not say that every statement by a witness that he cannot recall an event is inconsistent with a statement in regard to the event made at a previous time. However, where as here, the events occurred only ninety days before and were of a type and under circumstances which an individual would remember quite vividly, we are of the opinion that the trial judge did not abuse his discretion in determining that [the witness'] assertion of lack of memory was untrue and, in effect, was a repudiation of his prior statements. *Id.* at 114.

Statements in opinion form

The Ohio cases have followed the minority view and excluded prior inconsistent statements in opinion form. In *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 167 N.E. 158 (1929), the Supreme Court held: "A witness who testifies as to facts cannot be discredited by evidence of the expression of an opinion relative to the merits of the case." *Id.* (syllabus, para. 3). *Accord*, *Miller v. Lint*, 62 Ohio St. 2d 209, 404 N.E.2d 752 (1980); *Cottom v. Klein*, 123 Ohio St. 440, 175 N.E. 689 (1931); *Dorsten v. Lawrence*, 20 Ohio App. 2d 297, 253 N.E.2d 804 (Lucas 1969). See also Comment, *The Use of Prior Inconsistent Statements of Opinion to Impeach: Ohio's Position*, 13 Akron L. Rev. 86 (1979).

The rule precluding the use of prior statements in opinion form is difficult to justify. For example, in *Miller v. Lint*, 62 Ohio St. 2d 209, 404 N.E.2d 752 (1980), the only eyewitness to an accident testified on behalf of the plaintiff. On appeal, the Supreme Court held that it was error to permit the impeachment of the witness with a prior statement to the effect that the defendant could not have avoided the accident. This statement was made to a police officer at the scene of the accident. The statement was obviously inconsistent with the witness' trial testimony and cast doubt on that testimony. As McCormick has commented:

[T]he principal practical value of the opinion rule is as a regulation of trial practice requiring the examining counsel to bring out his facts by more-specific questions if practicable, before resorting to more general ones. For this reason, it is a mistake of policy to apply it to any out-of-court statements whatsoever, since no such controls are possible. Moreover, when the out-of-court statement is not offered at all as evidence of the fact asserted, but only to show the asserter's inconsistency, the whole purpose of the opinion rule, to improve the objectivity and hence reliability of testimonial assertions, is quite inapplicable. McCormick, *Evidence* 76 (3d ed. 1984).

See also 3A Wigmore, *Evidence* § 1041 (Chadbourn rev. 1970).

It is uncertain whether the prior Ohio cases survive the adoption of the Rules of Evidence. Rule 701 governs the admissibility of lay opinion testimony. That provision adopts the modern view, which treats the opinion rule as a rule of preference. This view is inconsistent with the application of the rule to extrajudicial statements. Moreover, Rule 704 abolishes the ultimate fact prohibition, upon which *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 167 N.E. 158 (1929), and *Cottom v. Klein*, 123 Ohio St.

440, 175 N.E. 689 (1931), were based.

Extrinsic evidence

If the witness admits making the prior statement, it is not error for the trial court to refuse to admit the statement in evidence. See *Blackford v. Kaplan*, 135 Ohio St. 268, 270, 20 N.E.2d 522 (1939); *Babbitt v. Say*, 120 Ohio St. 177, 165 N.E. 721 (1929); *State v. Johnson*, 10 Ohio App. 3d 14, 17, 10 O.B.R. 20, 460 N.E.2d 625 (Franklin 1983); *Dietsch v. Mayberry*, 70 App. 527, 47 N.E.2d 404 (Williams 1942). A court's decision to admit the statement, however, is also probably not error. See *Bluestein v. Thompson*, 102 App. 157, 139 N.E.2d 668 (Hamilton 1957). In *Dorsten v. Lawrence*, 20 Ohio App. 2d 297, 253 N.E.2d 804 (Lucas 1969), the court held that "after a proper foundation for impeachment has been laid for the introduction of inconsistent statements of a witness, it becomes necessary to prove them." *Id.* at 305.

Collateral matters

Even if a proper foundation has been laid on cross-examination, extrinsic evidence of a prior statement is admissible only if it does not relate to a "collateral matter." *Byomin v. Alvis*, 169 Ohio St. 395, 159 N.E.2d 897 (1959); *Kent v. State*, 42 Ohio St. 426 (1884). The collateral matter rule applies only to extrinsic evidence; it does not preclude inquiry on cross-examination so long as the examination is relevant to impeachment.

As noted earlier in this article, the exact definition of what constitutes a collateral matter in Ohio is not clear. See also *State v. Riggins*, 35 Ohio App. 3d 1, 3, 519 N.E.2d 397 (Cuyahoga 1986) (admissibility of evidence on collateral matters is a matter within the discretion of the trial court); *Schwartz v. Wells*, 5 Ohio App. 3d 1, 3, 5 O.B.R. 1, 449 N.E.2d 9 (Warren 1982); McCormick, *Evidence* § 36 (3d ed. 1984); 3A Wigmore, *Evidence* § 1020 (Chadbourn rev. 1970); 3 Weinstein & Berger, *Weinstein's Evidence* ¶607[06] (1987).

Prior inconsistent conduct

Rule 613 does not govern impeachment by evidence of prior inconsistent conduct. See Advisory Committee's Note, Fed. Evid. R. 613 ("Under principles of *expression unius* the rule does not apply to impeachment by evidence of prior inconsistent conduct.").

Ohio cases, however, have recognized impeachment by prior inconsistent conduct. In *Dilcher v. State*, 39 Ohio St. 130 (1883), the Supreme Court commented: "Conduct inconsistent with the testimony of a witness, may be shown as well as former statements thus inconsistent." *Id.* at 136. *Accord*, *Westinghouse Electric Corp v. Dolly Madison Leasing & Furniture Corp*, 42 Ohio St. 2d 122, 132, 326 N.E.2d 651 (1975) ("inconsistency in behavior" admissible for impeachment). The Supreme Court in *Westinghouse Electric Corp* imposed the same foundational requirements for impeachment by prior inconsistent conduct as are required for impeachment by prior inconsistent statements.

Constitutional issues

In *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), the United States Supreme Court held that statements obtained in violation of the *Miranda*

requirements could be used for impeachment. See also *Oregon v. Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L. Ed.2d 570 (1975). Involuntary confessions, however, cannot be used for impeachment. See *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L. Ed.2d 290 (1978). Similarly, the Court has permitted the impeachment use of evidence seized in violation of the Fourth Amendment, at least under some circumstances. *United States v. Havens*, 446 U.S. 620, 100 S.Ct. 1912, 64 L. Ed.2d 559 (1980); *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354, 98 L. Ed. 503 (1954).

In *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L. Ed.2d 91 (1976), the United States Supreme Court held that the impeachment use of a defendant's silence after receiving *Miranda* warnings violated due process. According to the Court, "[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.* at 618.

In subsequent cases, the Court has clarified the limits of the *Doyle* decision. In *Jenkins v. Anderson*, 447 U.S. 231, 100 S.Ct. 2124, 65 L. Ed.2d 86 (1980), the Court held that a defendant's pre-arrest silence is admissible for impeachment purposes. According to the Court, "no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and given *Miranda* warnings. Consequently, the fundamental unfairness present in *Doyle* is not present in this case." *Id.* at 240.

Doyle, which governs post-*Miranda* silence, and *Jenkins*, which governs pre-arrest silence, left one issue undecided. *Miranda* requires warnings only if there is "custodial interrogation." An arrest satisfies the custody requirement, but if there is no interrogation, warnings are not required. Consequently, a suspect could be arrested,

remain silent, and never receive warnings. In *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L. Ed.2d 490 (1982), the Court considered whether such silence could be used to impeach a defendant. The Court held that pre-*Miranda* silence could be used to impeach: "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." *Id.* at 607.

The *Doyle* decision also does not apply if the defendant decides to make a statement after receiving *Miranda* warnings: "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all." *Anderson v. Charles*, 447 U.S. 404, 408, 100 S.Ct. 2180, 65 L. Ed.2d 222 (1980).

The Supreme Court considered a different *Doyle* issue in *Wainwright v. Greenfield*, 474 U.S. 284, 106 S.Ct. 634, 88 L. Ed.2d 623 (1986). In that case the prosecutor used the defendant's post-*Miranda* warnings silence as substantive evidence of the defendant's sanity. The Court found that *Doyle* controlled and reversed. The Court commented:

The point of the *Doyle* holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. *Id.* at 292.

A defendant may not be impeached by a prior statement given pursuant to a grant of immunity. See *New Jersey v. Portash*, 440 U.S. 450, 99 S.Ct. 1292, 59 L. Ed.2d 501 (1979).