“Are You Lying Now or Were You Lying Then?"
The Nuts and Bolts of Impeaching Non-Party Witnesses with Prior Inconsistent Statements

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I. Introduction

“I’m Not Upset That You Lied To Me, I’m Upset That From Now On I Can’t Believe You.”1

Every good lawyer knows the facts. Knowing the facts generally starts with an early and thorough boots-on-the-ground investigation. Depositions will not always present the best method for nailing down the potential trial testimony of the plaintiff’s witnesses. Sometimes a witness’s prior unsworn statement, uncovered through the investigative process, provides the sole basis for cross examining the witness. What should you do, then, if the witness conveniently forgets making the statement or outright denies ever making the statement? Destroy the witness’s credibility by impeaching him with his prior statement, of course.

When utilized correctly, impeachment will undermine the credibility of the witness and diminish the effectiveness of the witness’s testimony. Although impeachment through prior inconsistent statement is a technique most often used in criminal cases, this technique is an equally valuable weapon in civil litigation.

Mississippi’s prior inconsistent statement rule is found in Mississippi Rule of Evidence 613. Rule 613 provides:

Rule 613. Prior statements of witnesses.

(a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him, whether written or not, the statement need not be shown nor its contents disclosed to him at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).2

Miss. R. Evid. Rule 613.

This succinct rule globally governs the substantive and procedural requirements of impeachment vis-à-vis a prior inconsistent and unsworn statement. Used effectively, impeachment by prior inconsistent statements will plant the seed of distrust in the mind of the fact finder. The impeached witness will either be viewed as a person with a frail memory or as one who has trouble telling the truth. Of course, this outcome requires the attorney to properly use the impeachment procedure. If used improperly, the attorney – instead of the witness – will lose credibility with the jury. This article will provide an explanation of Mississippi’s rule for impeachment of non-party witnesses with their prior inconsistent statement and will also explain the guidelines for using the rule properly.

II. Prerequisites to the Rule’s Application

“It is fundamental that before there can be impeachment, there must be testimony which is impeachable.”3

Impeachment tests the believability of a witness on any subject.4 Mississippi follows the federal evidentiary rules and permits a party to impeach any witness, even the party’s own witness.5 Accordingly, Rule 613 permits an attorney to confront a witness, including a witness called by that attorney, with the witness’s prior inconsistent statements to demonstrate to the jury that the witness is untrustworthy. Impeachment by prior inconsistent statement starts with the examining attorney’s good faith belief that the witness has made an out of court statement that varies substantially and materially from the testimony that the witness offered in court. The “good faith” requirement demands that the examining attorney have some legitimate reason to believe that the prior statement was, in fact, made by the testifying witness before the attorney asks questions about the statement.6

An attorney who, without a good faith basis, asks questions in open court to insinuate that the witness’s trial testimony is a recent fabrication acts in bad faith and plays a hazardous game. Courts do not take such stratagem lightly. Mistrial and reversal on appeal are two harsh consequences that could result from an attorney’s bad faith use of such impeachment efforts. Bad faith in any legal proceeding is also an affront to the judicial process and, according to the Mississippi Supreme Court, prejudicial error is the natural result of a bad faith impeachment. A bad faith impeachment also “leaves false and inadmissible ideas in the minds of the jurors that cannot be adequately rebutted by the testimony of witnesses or instructions from the court.”7 This intentional tainting of the facts would subject the attorney to personal discipline or sanctions.8

1 Quote from Friedrich Nietzsche.
2 This article will not explore impeachment of a party opponent with his prior inconsistent statement.
4 Id. at 750.
5 Miss. R. Evid. 607.
8 See Miss. R. PROF. CONDUCT RULE 3.1 and Litigation Accountability Act, MISS. CODE ANN. §11-55-1 et seq.
Likewise, counsel may not use the impeachment process solely to introduce evidence that is otherwise inadmissible. Under proper circumstances, settlement negotiations, or evidence of subsequent remedial measures could be introduced to impeach a witness. Attorneys must act in good faith and resist the temptation to use impeachment as a subterfuge to admit evidence that ordinarily would never reach a jury. To comply with the good faith requirement of Rule 613, counsel must possess admissible proof of the witness’s prior inconsistent statement and such proof should be available before the attorney challenges a witness or otherwise implies that the witness’s testimony is inconsistent with his pre-trial statements.

In addition to good faith, the impeachment process is also limited by the relevancy requirement. Attorneys may impeach a witness regarding any prior statement “so long as the statement made in court is one relevant to the issue in the case and therefore not collateral.” This is a logical and practical rule. While the issue of a witness’s credibility is always relevant, counsel cannot cross examine a witness with irrelevant questions. Counsel cannot, in violation of Rule 402, ask a series of irrelevant questions merely because the answers to these irrelevant questions will reveal a prior inconsistent statement by the witness. In application, when faced with an impeachment through the witness’s prior statements, the trial court is tasked with discerning whether the impeachment concerns facts relevant to the trial at hand. The Heflin case is instructive on this point.

In Heflin, the Mississippi Supreme Court held that the trial court correctly prevented a defendant from cross examining a rape victim about her prior inconsistent statements concerning the victim’s virginity. The trial court reasoned and the Supreme Court agreed that questions concerning the victim’s virginity were irrelevant to the question of whether the victim had been raped. Consequently, even if the victim had made inconsistent statements about her virginity, such statements could not be used to lay the foundation for an impeachment, because a proper foundation could not be laid without asking the victim a series of irrelevant questions.

Another limitation on the impeachment rule prohibits counsel from calling a witness to testify for the sole purpose of impeaching him during his direct examination. If the legitimate purpose of impeachment is to cast doubt in the jury’s mind about the truthfulness of the witness’s testimony, it makes little sense to call a witness to testify at trial, immediately impeach the witness, and then tender the witness. For example, consider a premises liability case where an apartment tenant claims that she suffered a brutal attack in the common area of her apartment. The tenant’s mother is on record stating that the tenant needed financial assistance from her family before the attack. Through the discovery process and fact investigation, counsel for the apartment learns that if called, the tenant’s mother is likely to testify that the tenant was financially independent prior to the attack. The mother, however, cannot offer any other relevant testimony in this premises liability action. If the issue of the tenant’s financial stability is relevant, what is to be gained by calling the tenant’s mother to the stand to reveal the fact that the mother has two stories about the tenant’s financial condition? Why should the jury care that the mother is a liar when the mother offers no substantive testimony in the case? The answer, of course, is that the jury should not care and this illustrates why a witnesses cannot be called to the stand during a party’s case in chief solely for purposes of impeachment. In sharp contrast, impeachment can be the sole objective during cross examination because the witness has already offered direct testimony, the truth of which can be tested in the crucible of cross examination.

The final prerequisite to impeachment by prior inconsistent statement is a showing that the witness’s out of court statement is truly inconsistent with her trial testimony. Mississippi courts have not definitively determined the degree of “inconsistency” needed before counsel can commence the impeachment process. Courts have held, however, that a prior statement is “inconsistent” with trial testimony if the jury would draw two different conclusions after hearing and contrasting the witness’s in court and out of court statements. Also, “[p]rior inconsistent statements are not limited to those which are directly contradictory; it is sufficient if the inconsistency has a reasonable tendency to discredit the testimony of the witness.” Impeachment is also available when the witness cannot recall making the prior statement or otherwise “fails in any manner to acknowledge the making of [the prior] statement. . . .” From these guiding principles, it appears that the term “inconsistent” will be broadly construed to encompass “any material variance” between the witness’s trial testimony and his previous out of court statement.

III. The Mechanics of Rule 613

“You can tell whether a man is clever by his answers. You can tell whether a man is wise by his questions.”

An attorney must lay the proper foundation before impeaching a witness with his prior inconsistent statements. The process requires the witness be asked whether or not on a specific date, at a specific place, and in the presence of specific persons, the witness made a particular statement.” The impeaching attorney is not required to disclose the statement to the witness during the predicate questioning stage, nor is the witness entitled to have his memory refreshed with a copy of his
Under the common law, as pronounced the common law rule. Under the common law, as pronounced in the Queen Caroline’s Case, counsel must show the witness his prior statement before confronting the witness with the prior statement. The authors of Rule 613 recognize that disclosing the prior statement to the witness at this stage of the impeachment would only provide a “crutch” to the witness that hinders counsel’s ability to effectively test the witness’s credibility.

The predicate questions are mandatory because the witness is entitled to an opportunity to explain or deny making the inconsistent statement. If the witness admits to making the statement, the impeachment is complete; the facts discrediting the witness were elicited from the witness during questioning. If, however, the witness denies the statement or otherwise fails to acknowledge the statement, then the prior statement must be “proven up” by offering extrinsic evidence of the statement. The prior inconsistent statement must also be disclosed to opposing counsel, upon request, before the impeachment process begins. Thus, a proper impeachment should follow these guidelines:

At trial, the witness gives direct testimony that contradicts his prior out-of-court statement. Counsel is certain that she will impeach the witness with his prior inconsistent statement. Counsel requests a recess and informs the judge and opposing counsel that extrinsic evidence exists that demonstrates that the witness has testified inconsistently with his prior statements regarding the subject of his testimony. Upon opposing counsel’s request, the extrinsic evidence must be disclosed to counsel opposite. By this process, the attorney tenders the inconsistent statement to the opposing counsel before the cross examination. This tendering allows counsel opposite to determine if the prior statement is truly inconsistent with the trial testimony. If there are no objections to the impeachment, then the cross examining attorney must begin questioning the witness to lay the predicate necessary to impeach him with his prior statements. When the witness denies making the statement, the impeaching counsel must then offer up a copy of the prior statement or call to the stand the person (or persons) present when the prior inconsistent statement was made. “The Mississippi Rules of Evidence allow for the limited rehabilitation of a witness’s testimony once that testimony has been subject to impeachment by cross-examination.” Therefore, the proponent of the impeached witness will then be given an opportunity after the impeachment to challenge the circumstances that resulted in the prior inconsistent and to rehabilitate the witness’s credibility.

IV. Use and Limitations of Extrinsic Evidence

Extrinsic evidence must be offered when the facts discrediting the non-party witness come from sources other than the witness. The extrinsic evidence may be in the form of an audio or video tape that captured the prior statement. Extrinsic evidence may also consist of a prior written statement or other unsworn writing that was authored or signed by the witness. Finally, counsel can call another witness to testify that she was present when the prior inconsistent statement was made. Under Rule 613, such “[h]earsay testimony of a prior inconsistent statement is admissible into evidence only if a foundation is laid in which the witness is given an opportunity to explain or deny the statement.” Double hearsay, by contrast, cannot be offered for impeachment purposes. For example, counsel cannot impeach a non-party witness with testimony from person A who states that person B told person A that person B was present when the witness made the prior inconsistent statement.

No matter the form, extrinsic evidence of a witness’s inconsistent statement is not admissible as substantive evidence in the case. In other words, “the impeaching testimony does not establish or in any way tend to establish the truth of the matters contained in the out-of-court contradictory statements.” The substance of the impeachment evidence may not be commented on during closing argument nor taken into the jury room during deliberations. The inconsistent statement cannot be used to prove or disprove any element of the case. Rather, after an effective impeachment of a non-party witness, the impeaching attorney may only refer to the impeachment and the inconsistent statement during closing arguments to show that an inconsistency existed and that, because of the inconsistency, the jury has ample reason to doubt the truthfulness of the impeached witness’s testimony.

V. Conclusion

In order to effectively represent our clients, we must know what weapons are available for use at trial. Rule 613 of the Mississippi Rules of Evidence clearly establishes a party’s right to impeach a witness (including the party’s own witness) with the witness’s prior inconsistent statement. While there are several methods for impeachment available under Mississippi Rules of Evidence, impeachment by prior inconsistent statement has been called “one of the most legitimate and valuable weapons in cross-examining counsel’s arsenal.” The effectiveness of this weapon can be diminished or invalidated if counsel fails to follow the procedure mandated by the impeachment rule. Therefore, when your pre-trial investigation uncovers a non-party witness’s prior statement, be prepared to properly impeach the witness at trial. Prepare an impeachment folder for the witness and subpoena all persons who may be called to offer extrinsic testimony in furtherance of the impeachment. And, of course, study Mississippi’s impeachment rule. If you do so, you will make good use of the impeachment weapon and secure a victory at the battle we call trial.

26 Williams v. State, 595 So. 2d 1299, 1308 (Miss. 1992).
28 Williams, 595 So. 2d at 1307-08.
29 Everett v. State, 835 So. 2d 118, 123 (Miss. 2005).
31 595 So. 2d at 1307-08.
32 Everett v. State, 835 So. 2d 118, 123 (Miss. 2005).
33 See Bailey v. State, 952 So. 2d 225, 238 (Miss. Ct. App. 2006) (criminal conviction remanded where, during closing arguments, prosecution quoted from and referenced the conversations in an audio tape that was admitted into evidence for the singular purpose of impeaching a non-party witness; it was also error for the jury to possess the audio tape in the jury room during deliberations).
34 Williams v. State, 595 So. 2d 1299, 1307 (Miss. 1998).