A View from the Bench

Using a Witness's Prior Statements and Testimony at Trial

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Introduction

A crucial component of trial preparation is reviewing witnesses' prior statements and planning to use those statements, if necessary, during trial. Most witnesses make multiple written and oral statements prior to trial to investigators, counsel, or other third parties. Many witnesses also provide prior testimony at Article 32 investigations or depositions. Counsel must know the evidentiary rules governing the use of prior statements for both impeachment and to enhance a witness's trial testimony. Counsel must also know the foundations for admissibility and the limits on the purpose for which the prior statements may be used. This note discusses the use of prior statements made by witnesses other than the accused and offers some practical tips to aid counsel in mastering this important skill.

Prior Statements and the Issue of Hearsay

The Supreme Court has made it clear that using out-of-court statements to prove facts will always raise 6th Amendment Confrontation Clause issues.[1] However, witnesses' pre-trial statements can be offered as evidence to impeach or to rehabilitate a witness once attacked.[2] The contents of prior statements used to confront a witness may be admitted either for the limited purpose of impeachment, under Military Rule of Evidence (MRE) 613(b), or as substantive evidence of fact if the requirements of MRE 801(d)(1) are met.[3] A key element in using prior statements is having a clear understanding of whether they are offered as substantive evidence (that is, for the truth of the matter asserted) or for the limited purpose of impacting witness credibility. This in turn will determine whether and how extrinsic evidence of the prior statement will be admitted.

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[1] Crawford v. Washington, 541 U.S. 36 (2004).

[2] *See, e.g.*, MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 613(b) and 801(d)(1) (2005) [hereinafter MCM].

[3] Military Rule of Evidence 613(b) requires that if extrinsic evidence of a witness's prior statement is offered to impeach, the witness must be afforded an opportunity to explain the inconsistency and be examined by opposing counsel on the statement. Under very limited circumstances, prior statements can be offered under MRE 613 "in the interests of justice." *See infra* note 14 and accompanying text. Military Rule of Evidence 801(d)(1) permits substantive use of a witness's prior testimony, made under oath at a prior proceeding, which is inconsistent with the witness's in-court testimony, or consistent and used to rebut allegations of recent fabrication. In either instance, under the 801(d)(1) exception, the witness must have testified and been subject to cross-examination before a party can seek to admit the prior statements. MCM, *supra* note 2, MIL. R. EVID. 613(b) and 801(d)(1).

If members are involved, counsel should anticipate what kind of limiting instruction the judge will provide,[4] and how counsel may use the prior statements in argument.[5]

Military Rule of Evidence 613

Military Rule of Evidence 613 deals only with prior statements used to impeach a witness's credibility although the title in the *Manual for Courts-Martial*, "Prior statements of witnesses," suggests a comprehensive rule.[6] Statements offered under MRE 613 are not substantive evidence.[7] Further, extrinsic evidence of these prior statements need not be offered, but may form the basis for questioning the witness.[8] Counsel might simply use intrinsic means by asking the witness whether they made a prior statement. For example, if a witness testifies in court that the accused forced open a door as part of a housebreaking, opposing counsel may pose the following question in examination: "In your 11 April statement to the Military Police you wrote that you opened the door for the accused, is that correct?"

If the witness admits the inconsistency, counsel may not seek to offer extrinsic evidence of the inconsistency since it would be cumulative of the intrinsic admission.[9] If the witness denies the inconsistency, counsel may seek to offer extrinsic evidence of the inconsistency. However, MRE 613(b) has essential foundational requirements to admit extrinsic evidence of inconsistency. It requires both that the witness be given an opportunity to explain and that the witness be examined by opposing counsel on the inconsistent statement.[10] Simply asking a witness if he made a prior inconsistent statement and receiving a denial is not evidence of the inconsistency. That is, a counsel's question is not evidence unless adopted by the witness. So, in addition to the earlier example, it would not be evidence of an inconsistency if counsel received a denial to the question, "Didn't you tell me in an interview earlier in my office that you opened the door for the accused?" Counsel must provide evidence of the inconsistency through either the witness's admission or through other competent evidence.

Provided MRE 613(b) requirements are met, there are several ways that the inconsistent statement might be offered as extrinsic evidence. After proper foundation, counsel may seek to have a cooperative witness read the inconsistent portion of statement verbatim. Or, counsel may have an investigator or another person, who witnessed the statement, testify as to the

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[4] Military Rule of Evidence 105 requires the military judge to give a proper limiting instruction. *Id.* MIL. R. EVID. 105. An unpublished interim change to *Department of Army Pamphlet 27-9*, *Military Judge's Benchbook,* further clarifies this issue. U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGE'S BENCHBOOK para. 7-11-1 (Sept. 2002). The revision, reprinted below, seeks to make unambiguous the distinction being discussed.

> **7-11-1. PRIOR INCONSISTENT STATEMENT**
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> **NOTE 1: Using this instruction. When evidence that a witness made a prior statement that is or may be inconsistent with the witness's testimony at trial is admitted and the prior statement is admitted only for the purposes of impeachment, the following limiting instruction should be given:**
>
> You have heard evidence that before this trial (state the name of the witness(es)) made (a) statement(s) that may be inconsistent with (his/her) (their) testimony here in court.
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> If you believe that (an) inconsistent statement(s) (was) (were) made, you may consider the inconsistency in deciding whether to believe that witness's in-court testimony.
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> You may not consider the earlier statement(s) as evidence of the truth of the matters contained in the prior statement(s). In other words, you may only use (it) (them) as one way of evaluating the witness's testimony here in court. You cannot use (it) (them) as proof of anything else.
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> (For example, if a witness testifies in court that the traffic light was green, and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider that prior statement in evaluating the truth of the in-court testimony. You may not, however, use the prior statement as proof that the light was red.)

[5] Counsel may only argue matters in evidence. U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS app. A, R. 3.3 (1 May 1992). Notwithstanding paragraph 7-11-1 note 2 (5) of the current *Military Judges' Benchbook* (*see infra* note 28), it is most prudent, especially for trial counsel, not to argue prior inconsistent statements that are not clearly admissible as substantive evidence, as evidence of fact, even if not objected to.

[6] The rule against attempting to use a witnesses' prior consistent statements to bolster credibility before it has been attacked is both implicit and explicit in MRE 608(a), 801(d)(1)(B) and 403. MCM, *supra* note 2, MIL. R. EVID. 608(a), 801(d)(B) and 403.

[7] United States v. Jackson, 12 M.J. 163 (C.M.A. 1981) (holding that inconsistencies, other than those that meet the criteria of 801(d)(1) are not substantive evidence).

[8] MCM, *supra* note 2, MIL. R. EVID. 613(a). The sole requirement is that the statement must be disclosed to opposing counsel when requested.

[9] United States v. Gibson, 39 M.J. 319, 324 (C.M.A. 1994); *see also* United States v. Button, 34 M.J. 139 (C.M.A. 1992).

[10] The requirement does not need to be fulfilled before the statement is offered. *See infra* note 15 and accompanying text.

specific inconsistency. If, during an interview, the witness provided a supplemental written or oral statement, counsel can seek to admit the content of that statement.[11] However, written statements themselves are not given to members as tangible evidence of the inconsistent statement.[12] Typically, a statement offered to impeach a witness is simply read or testified to. In a members' case, relevant portions of an inconsistent statement may be published and retrieved, but will not go with the members as a tangible exhibit during deliberations pursuant to RCM 921(b).[13] Additionally, one or two inconsistencies in a larger statement do not necessarily permit extrinsic evidence of the entire statement, unless required in the interests of justice.[14] Some redactions will normally be appropriate.

How counsel use inconsistencies is a significant tactical decision. Simply asking a witness in good faith whether they made a specific, relevant prior inconsistent statement creates an impression with a fact-finder. This is true whether or not counsel then offers extrinsic evidence of the inconsistency. Being able to concisely specify the inconsistency in detail enormously improves advocacy. For example, saying, "In your 11 April written statement to Agent Smart on page 2, line 11 you stated . . ." is far more compelling than, "Didn't you say previously that . . . ?" Although MRE 613(a) does not require you to show the witness their written statement before using it to impeach, doing so is often effective in advocacy.

The following steps are excellent foundations for impeachment by inconsistency: providing a witness with their statement (after ensuring it has been properly marked for identification) and having them identify the statement and their signature in the affidavit portion; having the witness agree that they had an opportunity to review and correct the statement prior to signing it; and having the witness acknowledge the significance of making a statement to an official concerning a criminal investigation. These steps are also foundational to admitting prior statements as extrinsic evidence. By the same token, as a matter of timing, you are not obligated to confront the witness with the inconsistency before seeking to admit it as extrinsic evidence through a third party witness, so long as the impeached witness remains available to testify. Military Rule of Evidence 613(b) merely requires that a witness be given an opportunity to explain or deny the statement and to be examined by the opposing party. That may occur after it is offered as impeachment.[15] Often that may be the best practice when dealing with oral inconsistent statements. With either written or oral inconsistent statements, it may be tactically advantageous to let opposing counsel recall the witness to explain or affirmatively decline the opportunity to explain the inconsistency.

Most importantly, inconsistencies must relate to relevant and material issues that go to credibility whether or not you seek to offer extrinsic evidence. For example, whether a witness denies wearing sneakers when the accused allegedly committed the act of housebreaking might have theoretical relevance, but it is not likely to have significant impact on witness credibility. Focusing on collateral inconsistencies and minor points (or failing to demonstrate logical relevance) and then seeking to admit extrinsic evidence on such matters may not survive a MRE 403 challenge and will affect your credibility as an advocate. Equally important, the prior inconsistent statement rules cannot be used to bring in evidence counsel knows would be otherwise inadmissible, such as bad acts of a witness that do not relate directly to credibility.[16] Similarly, putting on a witness who recanted an allegation and admits to the inconsistency, solely to admit the prior inconsistent statement, which can only be used in impeachment, is improper.[17]

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[11] Any statements of witnesses that counsel obtain that relate to the testimony of the witness must be disclosed per the motion by opposing counsel once the witness has testified. *See* MCM, *supra* note 2, R.C.M. 914. Rule for Courts-Martial 701(a)(1)(C) and (b)(1)(A) requires both trial and defense counsel respectively to disclose witness's pretrial signed or sworn statements. Practically speaking, this should be done before trial, to avoid the inevitable delay such last minute disclosures will entail.

[12] United States v. Ureta, 44 M.J. 290, 299 (1996); *see also* United States v. Austin, 35 M.J. 271, 276 (C.M.A. 1992).

[13] *Ureta*, 44 M.J. at 298-9; United States v. Cannon, 33 M.J. 376 (C.M.A. 1991).

[14] Military Rule of Evidence 613(b) also authorizes extrinsic evidence of prior inconsistent statements if "the interests of justice otherwise require." MCM, *supra* note 2, MIL. R. EVID. 613(b). While not further defined or elaborated on, this provision might be applicable where the exact content of the prior statement has not been clearly articulated, is subject to multiple interpretations, is in response to a compound or confusing leading question, was taken out of context, or is not obviously inconsistent. The entire statement might also be admitted on opposing parties' motion under the so-called "rule of completeness" under MRE 106. However, counsel should be wary of this rule if the statement contains otherwise inadmissible evidence. *See Cannon*, 33 M.J. 376.

[15] United States v. Callara, 21 M.J. 259, 265 (C.M.A. 1986).

[16] United States v. Pollard, 38 M.J. 41 (C.M.A. 1993).

[17] United States v. Button, 34 M.J. 139, 140 (C.M.A. 1992).

An effective tool is to map out specific essential points of witnesses prior statements before trial so that they can quickly be compared with trial testimony.[18] A simple table, such as the one below, can be prepared by counsel or a sharp paralegal.

Essential Fact	*Military Police Statement (dated)*	*Art 32 Testimony (dated)*	*Trial Testimony*
Lawfulness of Entry	Witness opened door for accused. Page 2, line 5	Accused pushed open closed door. Page 17, line 9	

Not only will this method provide counsel significant preparation for examination of the witness, it will ensure that counsel is able to articulate proper grounds for admissibility of the statement.[19] This method will also prepare counsel to request the military judge provide specific instructions on prior statements in members' cases, both when introduced, and at the close of evidence. In requesting closing instructions, counsel may include his contentions as to specific inconsistencies for the judge to articulate.[20] Such instructions can be crucial, since members intuitively, if improperly, tend to view statements attributed to witnesses as fact, which is why the requirement for a limiting instruction in MRE 105 exists. Such instructions will also clearly define for counsel whether the prior statements may be admitted and argued as substantive evidence of fact, to which we now turn.

Military Rule of Evidence 801(d)(1) and Prior Statements as Evidence of Fact

Other major rules governing prior witness statements are found in MRE 801(d)(1) which outlines three types of prior witness statements admissible as non-hearsay, that is, as substantive evidence of fact. Military Rule of Evidence 801(d)(1) applies once a witness has testified and been subject to cross-examination[21] thereby apparently satisfying the Confrontation Clause. Under MRE 801(d)(1)(A), prior testimony under oath at an earlier proceeding or deposition may be admitted. A prior consistent statement under MRE 801(d)(1)(B), whether or not under oath, may be admitted to rebut alleged recent fabrication or motive to fabricate. Finally, under MRE 801(d)(1)(C), statements of a prior identification of a person (typically, physical or photo lineups) may be admitted.

Prior Inconsistent Testimony

Prior inconsistent testimony may be admitted under MRE 801(d)(1)(A) if the following three foundational elements are met: (1) inconsistent with the witness's trial testimony, (2) made under oath, and (3) done so in another "proceeding" or "deposition."[22] Failure to satisfy these requirements prohibits use of the prior inconsistent statement as substantive evidence, though it may still be offered as impeachment under MRE 613.[23] The rule does not require that the prior proceeding pertain to the accused or that the prior testimony included the right of cross-examination.[24] Prior written statements "adopted" by a

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[18] *See* Lieutenant Colonel Stephen Henley, The Art of Trial Advocacy, *Impeachment by Prior Inconsistent Statement*, ARMY LAW., Feb. 1998, at 35 (providing an excellent discussion of how to effectively prepare for and use inconsistent statements).

[19] United States v. Palmer, 55 M.J. 205 (2001). In this case, a defense counsel sought to offer a prior inconsistent statement of a witness as a then-existing mental state under MRE 803(3). The court found that though the statement may have been admissible under MRE 613(b), failure to articulate such grounds resulted in a deferential abuse of discretion review on the basis of the hearsay exception only. *Id.* at 207.

[20] Although the current instruction 7-11-1 in the *Benchbook* does not explicitly provide for it, counsel may request the judge to articulate the contentions of the parties regarding specific inconsistencies. However, counsel should not expect the judge to do that sua sponte. Being able to point to concise and specific inconsistencies—and better providing written contentions as a proposed instruction—may be enough to persuade a judge to summarize your view of the evidence as part of the judge's instructions.

[21] United States v. Owens, 484 U.S. 554 (1988).

[22] United States v. LeMere, 22 M.J. 61, 67 (C.M.A. 1986).

[23] United States v. Jackson, 12 M.J. 163, 164 (C.M.A. 1981).

[24] This leaves open the question of whether confrontation as to the prior testimony has been satisfied. Federal courts have rejected attacks on those grounds. *See* SALTZBURG, SCHINASI, SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL n.10, at 8-9 (5th ed. 2003) [hereinafter MRE MANUAL].

witness under oath at a prior hearing can fall within the scope of MRE 801(d)(1)(A).[25] However, the prior testimony itself must show that the witness specifically adopted the prior written statement as part of his testimony.[26]

Witnesses can also lay the three-part foundation for admission of prior inconsistent testimony. However, be aware that witnesses may decide not to cooperate in affirming prior testimony or its inconsistency with their current in-court testimony. Witnesses may also deny or claim a lack of knowledge that a prior statement was made under oath. Furthermore, Article 32 transcripts are not normally reviewed or signed by witnesses unlike typical witness statements made on a DA Form 2823,[27] Sworn Statement,. Furthermore, in most cases Article 32 testimony is summarized, not verbatim. It is best to have witnesses review and authenticate by signing and swearing to their Article 32 testimony prior to trial.[28] Alternately, if you expect prior inconsistent testimony to play a significant part in your case, and you do not have an admissible deposition or verbatim Article 32 transcript, you should be prepared to call the Article 32 investigating officer or hearing recorder to lay the foundation regarding the prior inconsistent testimony. This is best for uncooperative or hostile witnesses.

Once you have met the three foundational requirements, the prior inconsistent testimony of the witness is admissible as substantive evidence. In member cases, the military judge will instruct the members that the prior testimony is substantive evidence which may be used in their fact finding.[29] However, as with prior inconsistent statements, transcripts or copies of the prior testimony do not go with members as evidence for use as part of their deliberations pursuant to Rule for Court Martial 921(b).[30] Depositions are played or read to the court-martial members for their consideration in deliberations.[31]

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[25] United States v. Gibson, 39 M.J. 319 (C.M.A. 1994).

[26] United States v. Tiller, 41 M.J. 823 (N-M. Ct. Crim. App. 1995).

[27] U.S. Dep't of Army, DA Form 2823, Sworn Statement (Dec. 1998).

[28] *Department of the Army Pamphlet 27-17, Procedural Guide for Article 32(b) Investigating Officers* actually directs Article 32 investigating officers to have witnesses review, sign and swear to the summary of their Article 32 testimony if the transcript is not verbatim, "unless it would unduly delay" the report. In practice, this is rarely, if ever, done. U.S. DEP'T OF ARMY, PAM. 27-17, PROCEDURAL GUIDE FOR ARTICLE 32(B) INVESTIGATING OFFICERS para. 4-1 (16 Sept. 1990). If, as counsel, you have a witness authenticate and swear to the accuracy of Article 32 testimony, be aware of your discovery obligations discussed in note 14, *supra*.

[29] *See supra* note 4 and accompanying text. An interim change to *Department of Army Pamphlet 27-9, Military Judge's Benchbook*, para. 7-11-1 note 2, reprinted below, is intended to advise members regarding use of prior inconsistent statements which may be considered as substantive evidence.

> **7-11-1 PRIOR INCONSISTENT STATEMENT**
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> **NOTE 2: Inconsistent statement as substantive evidence. If an inconsistent statement is admitted as substantive evidence; as when (1) it is evidence of a voluntary confession of a witness who is the accused, (2) it is a statement of the witness which is not hearsay such as a prior statement made by the witness under oath subject to perjury at a trial, hearing, or other proceeding, or in a deposition, (3) it is a statement of the witness otherwise admissible as an exception to the hearsay rule, (4) the witness testifies that his inconsistent statement is true and thus adopts it as part of his testimony, or (5) it is admitted without objection and therefore may be considered for any relevant purpose; the judge should replace the preceding parenthetical with an explanation that the prior inconsistent statement may also be used for that additional purpose.**
>
> You have heard evidence that before this trial (state the name of the witness(es)) made (a) statement(s) that may be inconsistent with (his/her) (their) testimony here in court. I have admitted into evidence (testimony concerning) the prior statements(s) of (state the name of the witness(es)). You may consider (that statement) (these statements in deciding whether to believe (that witness's) (these witnesses') in-court testimony.
>
> You may also consider (that statement) (these statements) along with all the other evidence in this case.
>
> (For example if a witness testified in court that the traffic light was green and you heard evidence that the witness made a prior statement that the traffic light was red, you may consider the prior statement as evidence that the light was, in fact, red., as well as to determine what weight to give the witness's in-court testimony.)

DA PAM. 27-9, *supra* note 4, para. 7-11 n.2.

[30] United States v. Ureta, 44 M.J. 290, 299 (1996). While the Court of Appeals for the Armed Forces made this holding, they also held providing the transcript to the members was harmless error, since counsel did not object and significant other evidence substantiated the accused's guilt. *Id.*

[31] MCM, *supra* note 2, R.C.M. 702(g)(3).

Prior Consistent Statements as Rebuttal

When a witness testifies and is subject to cross-examination,[32] MRE 801(d)(1)(B) is designed to rehabilitate that witness's credibility if it has been attacked.[33] Evidence of a witness's prior consistent statements is permitted under MRE 801(d)(1)(B) to rebut an express or implied charge of recent fabrication or improper motive. Like prior inconsistent testimony, if the requirements of the rule are met, evidence of prior consistent statements under these circumstances is categorized as non-hearsay and is admissible as substantive evidence.[34] The military judge will instruct members on the use of prior consistent statements as substantive evidence.[35] Unlike prior testimony admissible under MRE 801(d)(1)(A), the statement need not be made under oath or at a prior proceeding. However, the prior statement consistent with the in-court testimony must have been made before the alleged fabrication, motive or influence arose.[36] This significant requirement is not stated in the rule.

Interpretive case law is used with MRE 801(d)(1)(B) to establish four foundational requirements to admit the prior statement as substantive evidence: (1) the witness must testify at trial and willingly answer questions; (2) the witness's credibility must be attacked, directly or by inference;[37] (3) the witness must have made a prior statement which is consistent with his in-court testimony and therefore rebuts alleged recent fabrication or motive; and (4) the prior statement must have been made before a bias or motive to fabricate existed.[38]

The presentation of evidence as a predicate to determining admissibility is required under MRE 801(d)(1)(B) because of its unique factual foundation. Evidence on the record needs to establish that the prior statement is consistent and that the statement was made prior to potential influence or motive to fabricate used to attack the witness.[39] Logically, that includes articulating what that motive or influence is. Where multiple motives or influence are involved, only the one to be rebutted has to come after the prior consistent statement.[40] Obviously, in a members' case this will likely require an Article 39(a) session to establish a foundation for admissibility before being offered as substantive evidence.

Even if the foundational requirements are met, prior consistent statements are not automatically admitted for the truth of the matter asserted. The scope of prior consistent statements is so broad, encompassing virtually any kind of statement—oral and written statements made to police, conversations with friends and family, prior testimony, diary entries—the balancing test of MRE 403 is mandated as part of the overall analysis.[41] If the prior consistent statement is ultimately admitted, it can be read, played, testified to, or published and collected. However, it should not go with the members as an exhibit during deliberations under RCM 921(b).[42]

Counsel should also be aware that a prior consistent statement that does not meet the foundational requirements of MRE 801(d)(1)(B) (or is found to be substantially more prejudicial as substantive evidence) may still be used legitimately to support the credibility of a witness who has been attacked.[43] However, it will not be substantive evidence, and a proper

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[32] United States v. Owens, 484 U.S. 554 (1988) (defining "subject to cross-examination" for purposes of the parallel Federal Rule of Evidence (FRE) 801(d)(1)(B) as willingly responding to questions).

[33] *Id.*

[34] United States v. Taylor, 44 M.J. 475 (1996).

[35] DA PAM. 27-9, *supra* note 4, para. 7-11-2.

[36] United States v. McCaskey, 30 M.J. 188 (C.M.A. 1990); *see also* Tome v. United States, 513 U.S. 150 (1995) (establishing the timing requirement of the statement for FRE 808(d)(1)(B)).

[37] *See, e.g.*, United States v. Browder, 19 M.J. 988 (A.F.C.M.R. 1985); United States v. Waldrup, 30 M.J. 1126 (N.M.C.M.R. 1989). Both *Browder* and *Waldrup* were reversed due to lack of evidence demonstrating a charge of bias or motive to fabricate.

[38] United States v. Toro, 37 M.J. 313 (C.M.A. 1993).

[39] *Taylor*, 44 M.J. at 480. In *Taylor,* the issue of the timing of the statement in relation was not established. Because it was not raised until appeal, the court found waiver under MRE 920(f), where defense agreed to the admission of the statement at trial and only objected to the instruction on its use. *See also McCaskey*, 30 M.J. 188.

[40] United States v. Allison, 49 M.J. 54 (1998).

[41] *Toro*, 37 M.J. 313.

[42] *See supra* note 13 and accompanying text.

[43] *See* MRE MANUAL, *supra* note 24, at 8-12, discussion.

limiting instruction under MRE 105 would be required in a members' case. Military Rule of Evidence 608(b) may also limit extrinsic evidence of the statement to be admitted, since its relevance outside MRE 801(d)(1)(B) would be limited to credibility.

Prior Identification of a Person

The last provision of MRE 801(d)(1), sub-paragraph (C), permits statements of a witness's prior identification of a person as substantive evidence,[44] provided the witness first testifies and is subject to cross-examination. This provision cannot be used to bolster a witness whose identification has not been attacked, but it may be used when a witness can no longer identify a witness or refuses to do so.[45] Although not explicitly stated in MRE 801(d)(1)(C), at least one court restricts admission of this specific form of statement to identifications made as part of investigative lineup, show-up, or photographic identification procedures, rather than simply identifying a person by name as part of a statement.[46] If the foundational requirements are met, and the witness is attacked on an identification, a prior identification may also separately qualify as a prior consistent statement.[47]

Writings Used to Refresh Memory and Past Recollection Recorded

Finally, two other forms of prior statements merit brief mention. The first is a writing used to refresh recollection, addressed in MRE 612. The text of the rule contemplates that, if unable to independently recall facts, witnesses may use writings or other recorded sources to refresh their memory while testifying. Military Rule of Evidence 612 applies to any material used to refresh a witness's recollection and need not be a prior statement of the witness. It does not require the witness have made the statement or record.[48] A typical example would be an investigator using a report, summary of investigative activity, or even another witness's statement to refresh his memory as a witness while testifying. The document may not be admitted by the party whose witness uses the writing. Very importantly, MRE 612 does not otherwise permit a witness to testify as to matters which the witness does not have personal knowledge, as required by MRE 602 (except in the case of experts under MRE 703). The witness's lack of personal knowledge may be very effectively established by cross-examination using the document.

The text of MRE 612 provides the opposing party the right to production of the document, to cross-examine the witness on the document, and to introduce into evidence those portions which relate to the witness's testimony. However, documents sought to be admitted under MRE 612 should not be considered by a factfinder as substantive evidence unless they are admissible for the truth of the matter asserted on independent grounds. Unless independent grounds exist, the document will not be usable as an exhibit during deliberations.[49] In member cases, an appropriate limiting instruction by the judge under MRE 105 would be appropriate.

Past Recollection Recorded

An independent, though sometimes related rule, is found in MRE 803(5). If the witness is unable to recall facts while testifying, even after reviewing a record, MRE 803(5) permits admission of that record of the event. Unlike MRE 612, the record must reflect the witness's knowledge of an event made or adopted by the witness when the matter was fresh in the witness's memory. Also unlike MRE 612, the record involved must be written, not oral or some other form of record.[50] Obviously, if the record is a witness's prior written statement, and review does refresh the witness's recollection in order to testify, the requirements of MRE 612 apply.

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[44] United States v. Owens, 484 U.S. 554 (1988).

[45] United States v. Jones, 26 M.J. 197 (C.M.A. 1988).

[46] United States v. Thomas, 41 M.J. 732 (N-M. Ct. Crim. App. 1994).

[47] *Jones*, 26 M.J. at 200.

[48] MRE MANUAL, *supra* note 24, at 140.

[49] *See supra* notes 12 and 13 and accompanying text.

[50] MRE MANUAL, *supra* note 24, at 8-71.

There are four foundational requirements under MRE 803(5). One, the witness must be unable to recall, even after reviewing the record. Two, the record must have been made or adopted by the witness. Three, the record must have been made when the facts were fresh in the witness's mind. And four, the record must correctly reflect the witness's knowledge at the time it was made.[51] Other than the inability to recall, the foundational requirements may be made either by the witness who is unable to recall or another witness.[52] Once properly admitted, the record may be considered as substantive evidence.[53] The text of the rule makes clear that the prior statement is only read into evidence, unless offered by opposing counsel as an exhibit.

Conclusion

Prior witness statements and testimony are components of virtually every court-martial and are the building blocks of every case. Counsel need to understand the rules governing use of these statements at trial, when they can be offered as evidence, the foundations for offering these statements, and whether the statements constitute substantive evidence or are admissible only for impeachment or other limited purposes.

[51] United States v. Gans, 32 M.J. 412 (C.M.A. 1991).

[52] *Id.* at 416-7.

[53] *Id*. at 417.