Trial Judiciary Note

A View from the Bench: The Proper Use of Prior Statements

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Introduction

When a witness testifies at trial and has made a statement prior to trial, two Military Rules of Evidence (MRE)—MRE 801 and MRE 613—intersect to determine when and how the prior statement may be used to impeach. Together, these rules also tell us when a prior statement may be used as substantive evidence—that is, as proof of the matter asserted. Trial attorneys must also consider the law regarding when a prior statement is inconsistent or consistent so that they know when to request appropriate instructions be given the members.[1] Many interrelated considerations determine the proper use of prior statements. This article seeks to assist military justice practitioners in making proper use of prior statements.

The framework within the rules is fairly compact. Under MRE 801(d), certain prior statements are *excluded* from the hearsay definition in MRE 801(c). These statements are: admissions by a party-opponent[2] and certain prior statements by a witness.[3] There are two types of prior statements: prior consistent statements[4] and prior inconsistent statements.[5] Military Rule of Evidence 613 details the rules for examining a witness on a prior statement and when extrinsic evidence of a prior inconsistent statement may be admitted. Military Rule of Evidence 801(d)(1) and MRE 613(b) control the use of prior consistent and inconsistent statements as substantive evidence. Let's look first at admissions by a party-opponent.

Admissions by a Party-Opponent

Under MRE 801(d)(2), a statement offered *against* the party who made it is not hearsay and admissible for any purpose as long as it is relevant and properly obtained.[6] Admissions covered by this rule include: the party's own statement in either an individual or representative capacity, a statement adopted by a party, a statement by a person authorized by the party to make the statement, a statement by a party's agent made within the scope of agency,[7] and a statement made by a co-conspirator during the course and in furtherance of the conspiracy.[8] The two admissions most frequently encountered are a party's own statement and a statement by a co-conspirator.

These statements are not hearsay and are admissible as long as not otherwise excluded by some other rule. Thus, for example, if the statement is written, authenticity must be established before it can be admitted.[9] If the statement is that of the accused, trial and defense counsel, in addition to the military judge, should consider whether to redact irrelevant or substantially prejudicial evidence, such as uncharged misconduct.[10]

If the statement is that of a co-conspirator, there are a number of additional requirements to consider before the statement may be admitted. First, the statement must have been made while the conspiracy existed or made in the establishment of the conspiracy.[11] Second, the person who made the statement must be part of the conspiracy at the time the statement was made.[12] Third, the accused must be part of the conspiracy at the time the statement is made or thereafter.[13] Finally, the statement must be made in

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[1] *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK paras. 7-11-1 and 7-11-2 (1 Jan. 2010) [hereinafter BENCHBOOK].

[2] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 801(d)(2) (2008) [hereinafter MCM].

[3] *Id*. MIL. R. EVID. 801(d)(1).

[4] *Id*. MIL. R. EVID. 801(d)(1)(B).

[5] *Id*. MIL. R. EVID. 801(d)(1)(A).

[6] Remember, "Section III" disclosure requirements mandate that all statements by the accused in possession of the government must be provided to the defense prior to arraignment. *Id*. MIL. R. EVID. 304(d)(1) (emphasis added).

[7] Defense counsel is such an agent. *But see id*. MIL. R. EVID. 410.

[8] *Id*. MIL. R. EVID. 801(d)(2).

[9] *See id*. MIL. R. EVID. 901.

[10] *See id*. MIL. R. EVID. 404(b).

[11] United States v. Evans, 31 M.J. 927, 934 (A.C.M.R. 1990) (citing United States v. Herrero, 893 F.2d 1521, 1527 (7th Cir.1990)). So, for example, if Private Brown says to Private Green, "Do you want to rob the property book office and take some of those new computers that just arrived?" and Private Green agrees to the robbery, then the statement(s) by Private Green agreeing to the conspiracy would be admissible against Private Brown in his trial for robbery. *Id.* (citing United States v. Overshon, 494 F.2d 894, 899 (8th Cir), *cert. denied*, 419 U.S. 853 (1974)).

[12] Bourjaily v. United States, 483 U.S. 171 (1987).

[13] *Id*. Although the accused must be a part of the conspiracy, he need not be charged with conspiracy for the statements to be admissible against him at trial.

furtherance of the conspiracy.[14] Statements made by one party to a conspiracy after the criminal enterprise has ended are not admissible against co-conspirators, but only against the declarant.[15]

Use of prior statements under MRE 801(d)(2) most often comes in the form of seeking admission of the accused's "confession" to Criminal Investigation Division (CID). Since this is an out-of-court statement offered for the truth of the matter asserted, it meets the definition of hearsay in MRE 401. However, because it is the statement of the accused (a party-opponent), under MRE 801(d)(2), it is excluded from the hearsay rule when the statement is offered against the accused. The practical effect of this exclusion from the hearsay rule is that only the trial counsel can admit the accused's confession. When the trial counsel, for tactical reasons, does not seek to admit the accused's confession, the defense counsel cannot then offer the accused's statement into evidence. It is a common mistake for defense counsel to attempt to admit the accused's statement because it supports their theory of the case and they would like the members to hear or read it. When the inevitable hearsay objection is raised by the government, the defense counsel often claims the statement is that of a party-opponent excluded from the hearsay rule and, thus, should be admitted. This mistake results from misunderstanding that the opposing party must be opposed to the party offering the statement. Since the accused is not opposed to himself, his statement to CID is not that of a "party-opponent."

Prior Statements by a Witness

We will now examine the different considerations governing the use of prior statements by a witness who is not a party-opponent. Such statements fall into two categories—prior consistent statements and prior inconsistent statements. Let us begin with prior consistent statements.

Prior Consistent Statements—MRE 801(d)(1)

At first blush, admitting a witness's prior consistent statement just sounds wrong. It feels like hearsay; however, it is proper to offer such statements when the opposing side has tried to make the witness's in-court testimony seem like a recent fabrication, or the product of improper influence or improper motive.[16] This is how this rule works: first, the witness testifies and is subject to cross-examination.[17] Usually, during the cross-examination, the opposing side will expressly, or by implication, submit that the witness is not telling the truth and that her story in-court has been recently fabricated, or that her testimony has been improperly influenced (like by a bribe), or that she has an improper motive to testify in a certain way (like to keep herself or someone close to her out of trouble). If the witness made a statement prior to the time that the alleged motive to fabricate arose,[18] then that statement is excluded from the hearsay prohibition. In other words, it is hearsay but it is admissible as substantive evidence. Additionally, the statement does not have to have been made under oath and subject to penalty of perjury[19]—even prior consistent statements made to law enforcement officers can be admissible under MRE 801(d)(1)(B).[20]

Remember, the prior statement must be consistent with the in-court testimony; the alleged motive to lie must have been formed after the prior consistent statement was made; and, the opposing side must have made at least an implied charge of recent fabrication, or improper influence or motive.[21] It is insufficient if the other side merely contradicts a witness's in-court testimony with testimony from another witness or other evidence; there must be at least an implication raised that the witness to whom the prior consistent statement belongs recently fabricated her in-court testimony or was subject to improper inducement or motive.[22]

An interesting twist to this rule occurs when the witness is charged with multiple motives to fabricate or multiple improper influences are asserted and the prior consistent statement occurred before one, but not all, of those motives or influences. In such a circumstance, it is sufficient that the prior consistent statement precede the motive or influence it is designed to rebut. It is not necessary that it precede all such motives or influences.[23] Judges should carefully tailor their instructions to ensure the members know for which motive or influence they may consider the prior consistent statement.

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[14] *See generally Evans*, 31 M.J. at 934.

[15] United States v. Stroup, 29 M.J. 224 (C.M.A. 1989).

[16] MCM, *supra* note 2, MIL. R. EVID. 801(d)(1)(B).

[17] *Id.* MIL. R. EVID. 801(d)(1).

[18] Tome v. United States, 513 U.S. 150 (1995); United States v. Faison, 49 M.J. 59 (C.A.A.F. 1998).

[19] *See infra* note 22. Prior *inconsistent* statements must have been made under oath and the declarant subject to penalty of perjury to be admissible as substantive evidence.

[20] *See, e.g.*, United States v. Morgan, 31 M.J. 43 (C.M.A. 1990) (holding that the videotaped interview of a child sexual assault victim made to a child psychologist was admitted under MRE 801(d)(1)(B)).

[21] United States v. Hughes, 48 M.J. 700 (A.F. Ct. Crim. App. 1998), *aff'd on other grounds*, 52 M.J. 278 (C.A.A.F. 2000); United States v. Jones, 26 M.J. 197 (C.M.A. 1988) (Retarded victim of child sexual abuse extensively cross-examined about her lack of memory and inability to identify the accused. Prior consistent statement to social worker properly admitted as substantive evidence.); United States. v. Meyers, 18 M.J. 347 (C.M.A. 1986).

[22] United States v. Browder, 19 M.J. 988 (A.F.C.M.R. 1985).

[23] United States v. Allison, 49 M.J. 54 (C.A.A.F. 1998).

Prior Inconsistent Statements—MRE 801(d)(1)

Broadly stated, prior inconsistent statements are those made by a witness prior to trial which are inconsistent with their testimony at trial.[24] Sometimes prior inconsistent statements may be used as substantive evidence. Other times, they may be used only to impeach the witness's credibility. If the prior inconsistent statement was made while the witness was under oath and subject to the penalty of perjury at a trial, hearing, or deposition, then the prior statement is not hearsay.[25] This means that the inconsistent statement is admissible as substantive evidence on the merits, as well as to impeach. Even though admitted substantively, the statement should be read to the members, not given to them in written form.[26] If the prior inconsistent statement was not made while the witness was under oath and subject to the penalty of perjury, then the statement may not be admitted as substantive evidence. This type of prior inconsistent statement may only be used to impeach the witness.

The effect of MRE 801(d)(1) at trial depends on the type of statement offered. For example, assuming they are inconsistent, statements made at an Article 32, UCMJ, hearing usually can qualify under this rule for admission on the merits.[27] Statements made to police, even when sworn to by the witness, do not qualify for this exemption from the hearsay rule.[28] However, when statements made to police are adopted by the witness at a subsequent Article 32, UCMJ hearing under oath and subject to perjury, they are admissible on the merits.[29] Thus, when the victim of an assault testifies at trial and says the accused was wearing a red baseball cap on the night in question but had previously testified under oath at an Article 32 hearing that the assailant was not wearing any kind[30] of hat when he assaulted her, the victim's Article 32 testimony is admissible not only to impeach, but also as substantive evidence.[31] If she adopted her statements to CID in that Article 32 testimony, those also are admissible. Once again though, the Article 32 testimony should be read to the members, but not given to them to take back with them for their consideration during deliberations.[32]

The question of whether a prior statement is inconsistent often becomes hotly contested at trial. It is a rare circumstance that a witness's in-court testimony directly contradicts a prior statement, for example by testifying that the light was red when they said in their prior statement that it was green. Usually there is some form of explanation or equivocation. The law does not require that the prior statement be diametrically opposed to the testimony at trial; inconsistency may be established by the witness's inability to recall or equivocation.[33]

Prior Statements of Witnesses—MRE 613

Military Rule of Evidence 613 is a rule of procedure controlling the method for using prior statements. Military Rule of Evidence 613(a) applies to statements used to impeach as well as those that come in substantively under MRE 801.[34] Military Rule of Evidence 613(b) applies to prior statements used for impeachment only, since MRE 801(d) already requires that there be an opportunity to cross-examine the witness if the prior inconsistent statement is used as substantive evidence. Statements by a party-opponent are specifically excluded from MRE 613's procedural rules.

Military Rule of Evidence 613(a) provides that counsel need not show nor disclose the contents of a prior statement to a witness prior to examining the witness about the prior statement. For example, counsel may ask, without showing the statement to the witness, "You just testified that the light was green, but on 1 May 2009, when you were interviewed by CID about this matter, didn't you tell them that the light was red?" This method allows opposing counsel to more effectively set up the inconsistency and potentially get extrinsic evidence admitted on the matter. While it is true that, when dealing with a statement offered only to impeach, MRE 613(b) requires that the witness be given an opportunity to explain the inconsistency and be examined by sponsoring counsel about the prior statement before it can be admitted, opposing counsel need not give the witness that opportunity themselves. Military Rule of Evidence 613(a)

[24] The rule states that the witness must be "subject to cross examination." This is usually not an issue. If the witness is testifying and there is an effort to use a prior inconsistent statement for either substantive evidence or to impeach, one cannot imagine a scenario where that effort is not being made on cross-examination.

[25] MCM, *supra* note 2, MIL. R. EVID. 801(d)(1).

[26] United States v. Austin, 35 M.J. 271 (C.M.A. 1992).

[27] *Id.*

[28] United States v. Powell, 17 M.J. 975 (A.C.M.R. 1984).

[29] United States v. Rudolph, 35 M.J. 622 (A.C.M.R. 1992).

[30] This example assumes that the perpetrators dress was important to determining identity and not simply a collateral matter.

[31] Difficulties with admitting Article 32 testimony are frequently encountered by counsel because the Article 32 transcript is rarely verbatim nor do many Article 32 IOs require witnesses to read, sign and swear to their summarized testimony. *See* U.S. DEP'T OF ARMY, PAM. 27-17, PROCEDURAL GUIDE FOR ARTICLE 32(B) INVESTIGATING OFFICERS (16 Sept. 1990). When there is no verbatim record nor sworn signed summarized testimony, counsel will need to call the Article 32 investigating officer or the recorder in order to lay the proper foundation. *See* Colonel David L. Conn, A View from the Bench, *Using a Witness's Prior Statements and Testimony at Trial*, ARMY LAW., Mar. 2007, at 39.

[32] *See supra* note 23.

[33] United States v. Harrow, 65 M.J. 190, 199–200 (2007).

[34] *See* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL, editorial cmt., at 6-148 to -149 (6th ed. 2006).

allows them to control the timing of that opportunity to some extent.[35]

Military Rule of Evidence 613(b) controls the use of extrinsic evidence of a prior inconsistent statement. This rule provides that extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is given an opportunity to explain or deny and opposing counsel is given an opportunity to question the witness about the prior statement. [36] The cold language of the rule, however, does not tell the whole story. Case law fills in the detail—extrinsic evidence of a prior inconsistent statement is not admissible when: "(1) the declarant is available and testifies; (2) the declarant admits making the prior statement; and (3) the declarant acknowledges the specific inconsistencies between the prior statement and his or her in-court testimony."[37] It is critical to the proper use of prior inconsistent statements not to confuse this procedural rule in MRE 613(b) regarding extrinsic evidence with the rules in MRE 801(d) regarding admission of statements as substantive evidence. The use, under the limited circumstances described above, of extrinsic evidence to prove a prior inconsistent statement, is allowed only to establish impeachment. Such extrinsic evidence is not admitted as substantive evidence.

Remember, if the witness does not deny the prior statement or acknowledges the specific inconsistencies, extrinsic evidence is not allowed. When, however, opposing counsel confronts the witness with his prior statement and the witness either says he did not make the statement or denies that the prior statement was inconsistent with his in-court testimony, counsel may then offer extrinsic evidence of the prior statement by admitting the statement or calling a witness who can testify about the prior statement. Once again, the evidence, if it is a document, is published to the members by reading it to them but does not go back with the members when they deliberate.[38] It is only admitted to attack the witness's credibility.

A confusing, seemingly anomalous, situation can occur when the extrinsic evidence is an Article 32 transcript and the witness admits the inconsistency of the prior statement. Under MRE 613, extrinsic evidence does not come in to impeach because there is no need. The witness has already self-impeached. However, under MRE 801(d)(1)(A), because the witness was under oath and subject to penalty of perjury and the statement was, in fact, inconsistent (remember, the witness has admitted it was), then the statement comes in as substantive evidence. Nevertheless, it still may not go back with the members in deliberation.[39] Counsel frequently confuse these circumstances and either try to admit evidence when they should not, or fail to admit substantive evidence when they could.

Another important thing to remember about the use of prior inconsistent statements, whether offered as substantive evidence or as extrinsic evidence for impeachment purposes, is that the inconsistency must be relevant and material.[40] Furthermore, if the inconsistency concerns a collateral or minor point, opposing counsel may successfully object under MRE 403.[41] Finally, counsel should not use these rules to smuggle in evidence that would be inadmissible under other rules.[42]

Instructions

Given the different uses of prior statements, it is not surprising that there are different instructions depending on what type of statement was admitted and for what purpose.[43] The prior consistent statement instruction is given when a prior consistent statement is admitted to refute the implied or express charge of recent fabrication or improper influence or motive.[44] The members are instructed that they may consider this evidence in deciding whether there was a recent fabrication or improper influence or motive and that they may consider it as substantive evidence.

With respect to prior inconsistent statements, when the witness denies his prior statement and/or the inconsistency and extrinsic evidence is admitted to impeach, the members should be instructed that they may only consider such evidence for the purpose of deciding whether to believe the witness. They are specifically instructed that they may not consider the evidence for the truth of the matter(s) contained therein.

On the other hand, when the evidence is admitted substantively, as when the requirements of MRE 801 are met or the statement was a voluntary admission by the accused offered by the government against the accused, the members

[35] Some military judges require the counsel proffering the extrinsic evidence to have confronted the witness with the statement before they left the stand initially. Although seemingly contrary to Rule for Court-Martial 613, Schinasi et al. support the military judge's authority to do so. *See id.* editorial cmt. at 6-148 to 6-152.

[36] Military Rule of Evidence 613(b) also allows the impeaching party to offer the extrinsic evidence after the witness has left the stand so that sponsoring counsel must recall the witness at a later time in order to give the witness the opportunity to talk about and explain the prior statement. *See id.* editorial cmt. at 6-150 to -151.

[37] United States v. Button, 34 M.J. 139 (C.M.A. 1992); United States v. Gibson, 39 M.J. 319, 324 (C.M.A. 1994); United States v. Ureta, 44 M.J. 290, 298 (1996).

[38] *See* United States v. Austin, 35 M.J. 271, 276 (C.M.A. 1992).

[39] United States v. Ureta, 44 M.J. 290, 298 (C.A.A.F. 1996).

[40] Conn, *supra* note 31, at 39.

[41] *Id.*

[42] *Id*.

[43] BENCHBOOK, *supra* note 1, para. 7-11-1.

[44] *Id.* para. 7-11-2.

receive a different instruction. They are instructed that not only may they consider the evidence in deciding whether to believe the witness,[45] but also that they may consider it as substantive evidence—for the truth of the matter(s) asserted in the statement.

Conclusion

The interplay between MRE 801 and MRE 613 is often confusing and can lead to errors at trial. If all parties thoroughly understand both rules, they will be less likely to make such errors. Remember, there are three types of prior statements—prior statements of a party-opponent, prior consistent statements, and prior inconsistent statements. Prior statements of a party-opponent (usually the accused when offered by the government) are not hearsay and are admissible as substantive evidence. Prior consistent statements are also not hearsay and come in as substantive evidence when offered to refute a charge of recent fabrication or improper influence or motive. Prior inconsistent statements are not hearsay and come in substantively when made under oath at a prior trail or similar proceeding. When the requirements of MRE 801(d)(1)(A) are not met, the prior statement may still be proved, either through cross-examination of the witness, or by extrinsic evidence (MRE 613(b)) if the witness does not admit making the statement or the inconsistency. Such extrinsic evidence does not come in substantively. MRE 613(a) controls when a witness must be shown a prior statement. Finally, even when a written or taped prior statement is admitted substantively as evidence under any rule, it does not go back with the members.

[45] This is not likely to apply to the accused unless he testifies and has made a statement prior to trial that is inconsistent with his in-court testimony.