

PRIOR INCONSISTENT STATEMENTS

Presented by:

HEATHER L. KING

Koons, Fuller, Vanden Eykel & Robertson

181 Grand Avenue, Suite 225

Southlake, Texas 76092

(817) 481-2710

(817) 481-2637 Fax

www.koonsfuller.com

heather@koonsfuller.com

Co-Authors:

REBECCA TILLERY

EMILY MISKEL

Koons, Fuller, Vanden Eykel & Robertson

181 Grand Avenue, Suite 225

Southlake, Texas 76092

(817) 481-2710

(817) 481-2637 Fax

www.koonsfuller.com

State Bar of Texas

ULTIMATE TRIAL NOTEBOOK: FAMILY LAW

December 3-4, 2009

San Antonio

CHAPTER 17

HEATHER L. KING
Koons, Fuller, Vanden Eykel & Robertson
181 Grand Avenue, Suite 225
Southlake, Texas 76092
(817) 481-2710 / 481-2637 fax
heather@koonsfuller.com

Education/License

B.A., Texas Christian University, 1987
J.D., Texas Tech University School of Law, 1995
Board Certified – Family Law, Texas Board of Legal Specialization, December of 2000
Re-Certified – Family Law, Texas Board of Legal Specialization, December of 2005

Professional Activities

President, Tarrant County Bar Association 2008-2009
President, Tarrant County Family Law Bar Association 2001-2002
Director/Officer/President, Tarrant County Bar Association 2003 to Present
Director/Officer/President, Tarrant County Family Law Bar Association, 1998 to 2003
Director & Officer, Texas Academy of Family Law Specialists, 2003 to Present
Member, College of the State Bar of Texas, 1999 to Present
Member, Tarrant County Young Lawyers Association, 1996 to 2002
Associate Member, Barrister & Officer, Eldon B. Mahon Inn of Court, 1997-98, 2001-2005, 2007-2008
Senior Counsel, American College of Barristers, 2001 to Present
Member/Chairperson, Fee Arbitration Committee, Tarrant County Bar Association, 2001 to 2005
Member, State Bar of Texas, Family Law Section Checklist Committee, 2002-2003, Amicus Committee, 2004-2008,
Parenting Plan Committee 2005-2006, Membership Committee 2005-2008.
Fellow, Texas Bar Foundation 2002 to Present
Fellow, Texas Family Law Bar Foundation 2004 to Present
Fellow, Tarrant County Bar Foundation 2004 to Present
Fellow, American Academy of Matrimonial Lawyers, 2005 to Present
Council Member, Family Law Council, State Bar of Texas, 2004 to Present

Awards/Recognition

Friend of the Inn for outstanding contributions to Eldon B. Mahon Inn of Court, 2002
President's Certification of Outstanding Achievement from Tarrant Co. Bar Assoc., 2003
Texas Super Lawyer, Texas Monthly Magazine 2003 to Present
Who's Who in Executives and Professionals 2003
Top Attorneys featured in *Fort Worth, Texas Magazine* 2003, 2004 & 2005
Top Fifty Female Attorneys in Texas, Texas Monthly Magazine 2004 to 2008
Top Fifty Female Super Lawyers, Texas Monthly Magazine 2006 to present
Top 100 Lawyers in Dallas Fort Worth, Texas Monthly Magazine 2006 to 2008
The Best Lawyers In America 2007 to present

Law Related Seminar Publications & Participation

Author, *An Attorney Ad Litem Is Really A Lawyer*, Attorney Ad Litem Training Seminar 1997.
Author, *Trial Preparation & Planning*, "Nuts & Bolts" Protective Order Seminar 1997.
Author, *Challenging Characterization Issues: Characterizing Trusts, Employee Stock Options, Workman's Compensation Claims, And Intellectual Property*, Advanced Family Law Course 1997.
Author, *Some Changes In The Texas Family Code*, Blackstone Seminar 1998.
Author/Speaker, *Uncontested Divorce Outline*, Pro Bono Family Law Seminar 1998.
Author, *Factors Affecting Property Division & Alimony*, Family Law Basics From the Bench, Tarrant County Bar Association Brown Bag Seminar 1998.
Speaker, *Practice Tips On Procedures At The Courthouse and Communicating With Court Personnel*, Advanced Family Law Trial Skills Seminar 1998.
Author, *The Potential Effect of The New Texas Family Law Legislation Regarding Proportional Ownership, Equitable*

Interests, Division Under Special Circumstances, & A Look At New Legislative Provisions For Transmutation Agreements, Advanced Family Law Course 1999.

Speaker, *Recent Cases in Child Support, Possession & Access*, 1999 Annual TADRO Conference 1999.

Speaker, *Filing Pleadings, Obtaining Settings, and Interacting With Court Coordinators and Clerks*, Family Law Trial Skills Seminar, West Texas Legal Services PAI Program, 1999.

Author, *Discovery In Property Cases Under The New Rules*, Advanced Family Law Course 1999.

Author/Speaker, *Drafting Family Law Pleadings: It's Almost All In The Manual*, "Nuts & Bolts" Family Law & Advanced Trial Law Trial Skills 2000.

Author, *Deciding When You Need A Jury & Conducting Voir Dire*, "Nuts & Bolts" Family Law & Advanced Trial Law Trial Skills 2000.

Author/Speaker, *Proper Drafting and Filing of Pleadings*, 26th Annual Advanced Family Law Course, Boot Camp 2000.

Author, *Discovery Gotta Haves: Essential Ideas for Discovery in Property and SAPCR's*, Marriage Dissolution Institute 2001.

Author, *Discovery*, Advanced Family Law Trial Skills, West Texas Legal Services PAI Program 2001.

Author/Trainer, "Proper Drafting and Filing of Pleadings", "Nuts & Bolts" Family Law Seminar, West Texas Legal Services PAI Program 2001.

Trainer, "Why Lawyers Lie", "Nuts & Bolts" Family Law Seminar, West Texas Legal Services PAI Program 2001.

Presenter, *Winning Trial Techniques in Property Cases*, Texas Academy of Family Law Specialists Annual Trial Institute 2002.

Author/Trainer, "Proper Drafting and Filing of Pleadings", 2002 Family Law Seminar, West Texas Legal Services PAI Program.

Trainer, "Why Lawyers Lie", 2002 Family Law Seminar, West Texas Legal Services PAI Program.

Author/Speaker, *Discovery & Mediation*, 28th Annual Advanced Family Law Course, Family Law Boot Camp 2002.

Panel Member, *Use and Abuse of Legal Assistants*, 28th Annual Advanced Family Law Course 2002.

Speaker, *Use and Abuse of Legal Assistants*, Panhandle Family Law Bar Association November Luncheon, 2002.

Author/Speaker, *Drafting Trial Documents With An Eye Toward Winning*, Advanced Family Law Drafting Course 2002.

Author/Speaker, *Discovery: Tools, Techniques & Timebombs*, Texas Academy of Family Law Specialists Annual Trial Institute 2003.

Author/Player, *Associate Judge Do's & Don't's*, Tarrant County Family Law Bar Association 2003.

Author/Speaker, *Evaluating A Custody Case*, 26th Annual Marriage Dissolution Institute 2003.

Co-Director, Family Law Boot Camp, 29th Annual Advanced Family Law Seminar 2003.

Author, *Discovery in Hard Places*, 29th Annual Advanced Family Law Seminar 2003.

Speaker, *Practicing Law For Fun & Profit*, 29th Annual Advanced Family Law Seminar 2003.

Author/Speaker, *Internet Searches for Financial & Personal Information Useful in Family Law Litigation*, Texas Academy of Family Law Specialists Annual Trial Institute 2004.

Moderator, *Effective Courtroom Advocacy*, Tarrant County Bench Bar Seminar 2004

Author/Speaker, *Internet Investigation of Personal Information & Assets*, Marriage Dissolution Institute 2004.

Director, Family Law Boot Camp, State Bar of Texas Annual Meeting 2004.

Author/Speaker, *Drafting 101, Basic Drafting of Pleadings*, Family Law Boot Camp, State Bar of Texas Annual Meeting 2004.

Author/Speaker, *Investigation of Personal Information & Assets*, Tarrant County Family Law Bar Association, Summer Bar Seminar 2004.

Author/Speaker, *Investigation of Personal Information & Assets*, State Bar College "Summer School" 2004.

Author, *The Life of a Grievance & The New Disciplinary Rules, What You Don't Know Can Hurt You*, 30th Annual Advanced Family Law Seminar 2004.

Director, Family Law Boot Camp, 30th Annual Advanced Family Law Seminar 2004.

Author/Speaker, *Drafting 101, Basic Drafting of Pleadings*, Family Law Boot Camp, 30th Annual Advanced Family Law Seminar 2004.

Author/Speaker, *Investigation of Personal Information & Assets*, Legal Assistant's University 2004

Author, *Advanced CYA For The Family Law Attorney*, Family Law Ultimate Trial Notebook 2004

Author/Speaker, *Divorce Planning*, Representing Small Business 2004

Assistant Director, Texas Academy of Family Law Specialists Annual Trial Institute 2005

Instructor, *Marital Property*, The People's Law School, Fort Worth 2005

Author/Speaker, *Marital Property 101*, State Bar of Texas Spring Training, Fort Worth 2005

Author/Speaker, *Effective Use of Psychologists and Psychiatrists*, 28th Annual Marriage Dissolution Institute 2005.

Panelist/Moderator, *Evidence and Discovery Workshop*, 30th Annual Advanced Family Law Seminar, Dallas 2005

Author/Speaker, *Internet Investigation of Personal Information and Assets*, Tarrant County Bar Association September 2005 Luncheon.

Director, Texas Academy of Family Law Specialists Trial Institute 2006, Reno, Nevada

Author/Speaker, *Avoiding Divorce Disasters*, Representing Small Businesses, Dallas March 23-24, 2006

Panelist/Author, 29th Annual Marriage Dissolution Institute Bootcamp – Practical Aspects of Enhancing Your Practice, *How To Lose A Paralegal In 10 Days, or Keep One for 10 Years*, April 19, 2006, Austin.

Moderator, 29th Annual Marriage Dissolution Institute, *Electronic Evidence*, April 20-21, 2006, Austin.

Speaker, *Being A Family Law Attorney*, Tarrant County Bench-Bar, April 27, 2006, The Woodlands.

Speaker, *Ethics: Evidence, Discovery and Witnesses*, Tarrant County Bar Association Brown Bag Luncheon, June 23, 2006, Fort Worth.

Author/Speaker, *21st Century Issues Dealing with Nontraditional Relationships*, 31st Annual Advanced Family Law Seminar, August 14-17, 2006, San Antonio.

Speaker, UTCLE Parenting Plan Conference, *Effective Strategies For Reaching Parenting Plan Agreements*, October 13, 2006.

Speaker, LexisNexis CLE, Learning to Make the Texas Family Code Work for You, *Navigating the Family Code*, October 20, 2006.

Speaker, LexisNexis CLE, Learning to Make the Texas Family Code Work for You, *Helpful Appellate References*, October 20, 2006.

Moderator, Texas Academy of Family Law Specialists Trial Institute 2007, Sante Fe, New Mexico, Electronic Evidence Panel.

Moderator, 30th Annual Marriage Dissolution Institute, *Electronic Evidence*, May 10-11, 2007, El Paso.

Co-Speaker, *Interesting Appellate Cases*, Tarrant County Family Law Bar Luncheon, May 22, 2007.

Speaker/Author, UTCLE Family Law on the Front Lines, *Appellate Tips for Family Law Attorneys*, Galveston, Texas June 28-29, 2007.

Speaker/Author, *Evidence, Keeping in In and Keeping it Out*, 32nd Annual Advanced Family Law Seminar, San Antonio.

Speaker, *Appellate Considerations*, Texas Academy of Family Law Specialists Trial Institute 2008, Sante Fe, New Mexico.

Speaker, UTCLE 8th Annual Family Law on the Front Lines, *Justice Behind Closed Doors: Protecting the Record, Your Client and Yourself In Chambers*, Galveston, Texas June 19-20, 2008.

Speaker/Author, SBOT Advanced Family Law Drafting, *Discovery*, Austin, Texas, December 3-4, 2008.

Speaker/Author, UTCLE Parent-Child Relationships: *Critical Thinking for Critical Issues, Discovery and Evidence, A Primer for Family Law Attorneys*, Austin, Texas, January 29-30, 2009.

Speaker/Author, SBOT Representing Small Business, *Protecting Business Before Divorce: What Every Business Lawyer Must Know About Family Law*, Dallas, Texas, March 26-27, 2009.

Speaker, UTCLE, 9th Annual Family Law on the Front Lines, *Electronic Evidence and Discovery*, San Antonio, June 18-19, 2009.

Director, 35th Annual Advanced Family Law Seminar, Dallas, Texas, August 3-7, 2009.

Law Related Periodical/Magazine Publications

Author, "Beating Out The Big Firms", *Texas Lawyer*, Vol. 18, No. 21, July 29, 2002.

Interviewed/Quoted "Divorce 101", *Fort Worth Magazine*, July 2003 edition.

Author, "Basic Internet Searches for Persons and Assets", *The College Bulletin, News for Members of the College of the State Bar of Texas*, Summer 2006

Law Related Books

Author, *Texas Family Law: Direct & Cross Examination, Suggested Questions, Ideas & Outlines*, Heather King, Bruce Beverly & Syd Beckman (Imprimatur Press 2000).

Author, *Texas Family Law: Direct & Cross Examination, Suggested Questions, Ideas & Outlines, A Focus on Children*, Heather King, Bruce Beverly & Syd Beckman (Imprimatur Press 2002).

Author, *Texas Family Law: Direct & Cross Examination, Suggested Questions, Ideas & Outlines, A Focus on Property*, Heather King, Bruce Beverly, Syd Beckman & Randal Wilhite (Imprimatur Press 2004).

Annotator for *Lexis Texas Annotated Family Code* 2007-Present.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. PRIOR INCONSISTENT STATEMENTS 1

 A. Admissible for Impeachment 1

 B. Admissible as Substantive Evidence..... 1

 1. Party admission..... 1

 2. Prior testimony under oath..... 1

 3. Impeachment of expert using prior testimony 1

 4. Deposition in the same proceeding 1

 5. Declarant unavailable..... 1

 C. Document Containing both Admissible and Inadmissible Evidence 2

 D. Confrontation Requirement..... 2

 1. Confrontation requirement does not apply to opposing party witness..... 2

 2. Procedure for objecting..... 2

 E. Extrinsic Evidence Admissible 2

 1. The extrinsic evidence must be relevant 3

 F. Prior Inconsistent Statements in Discovery Responses 3

III. PRIOR CONSISTENT STATEMENTS..... 4

IV. CONCLUSION..... 4

PRIOR INCONSISTENT STATEMENTS

I. INTRODUCTION

Prior statements can be useful in family law as a tool to impeach witnesses or to admit substantive evidence into the record. This paper will cover several ways to introduce prior testimony at trial.

II. PRIOR INCONSISTENT STATEMENTS

A. Admissible for Impeachment

Any witness may be impeached by showing that on a prior occasion he made a material statement inconsistent with his trial testimony. Such a statement can be taken from many sources, including prior testimony, affidavits, or discovery responses, or pleadings.

Substantive evidence is evidence which is probative and can support a judgment. *In re A.S.M.*, 172 S.W.3d 710, 713 (Tex.App.—Fort Worth 2005, no pet.). The purpose of impeachment evidence is to attack the credibility of a witness. Impeachment evidence is generally hearsay and does not have probative value. *Lewis v. Merrill*, 295 S.W.2d 920, 923 (Tex.Civ.App.1956). However, under certain circumstances, prior inconsistent testimony can be admitted as substantive evidence in the case.

B. Admissible as Substantive Evidence

Certain prior inconsistent statements may be admitted both for impeachment purposes and as substantive evidence. If it can be shown that the statement is non-hearsay or falls within a hearsay exception, the statement can be admissible as probative evidence. *See, Miranda v. State*, 813 S.W.2d 724, 735 (Tex.App.—San Antonio 1991, pet. ref'd).

1. Party admission

If the declarant of the prior inconsistent statement is an opposing party, then the statement is non-hearsay under Tex. R. Ev. 801(e)(2).

2. Prior testimony under oath

A witness's own prior inconsistent statement is admissible as non-hearsay if the statement was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. Tex. R. Evid. 801(e)(1). Since the rule refers to "a deposition" and is not limited to depositions in the same proceeding, any prior deposition testimony by the witness may be used.

Any deposition testimony by the witness is non-hearsay, whether or not it is from the same proceeding. (Compare to 4, below).

An attorney can also ask the court to take judicial notice of a witness's prior position if it is contained in

its own court records in a case involving the same subject matter between the same or practically the same parties. *Fajkus v. First Nat'l Bank*, 735 S.W.2d 882, 887 (Tex. App. – Austin 1987, writ denied).

3. Impeachment of expert using prior testimony

An expert witness may be impeached using her prior testimony in other trials. If an expert takes a position that is inconsistent with prior testimony or conclusions, that prior testimony is admissible to impeach the expert's credibility. Even if the expert did not take an inconsistent position in prior testimony, the testimony can be used to impeach the expert on grounds of bias or interest.

Example:

Sparks v. State, 943 S.W.2d 513 (Tex.App.—Fort Worth 1997, pet. ref'd):

Prosecution could impeach testimony of defendant's expert witness, that breathalyzer test results could be influenced by asthma inhalers and breath mints, by introducing evidence that expert had claimed other substances would influence test results when testifying in another case and that tests conducted in court showed no influence. Even though there was no inconsistency between position taken by expert in present case and prior case, prior statements were admissible to show that expert had bias or interest in maintaining negative position on reliability of tests.

4. Deposition in the same proceeding

Statements made in a deposition taken in the same proceeding are defined as non-hearsay by Tex. R. Ev. 801(e)(3). The testimony is admissible regardless of whether the deponent is unavailable. Since the rule defines all depositions taken in the same proceeding as non-hearsay, the testimony used to impeach a witness does not have to come from that witness's deposition.

Any deposition testimony from the same proceeding is non-hearsay, whether or not it is from that witness. (Compare to 2, above).

However, *see Pope v. Stephenson*, 774 S.W.2d 743, 745 (Tex.App.—El Paso 1989, writ denied):

A witness testified that a truck had been in the road five to ten minutes. The witness was impeached by a prior deposition in which he had stated that the truck remained there fifteen to twenty minutes, or more than ten minutes, at least. The court held that the inconsistent statement could only be considered for the purpose of impeachment, and not as substantive evidence of the truth of the matters stated.

5. Declarant unavailable

If the declarant of a statement is unavailable as defined by Tex. R. Ev. 804(a), then the declarant's former testimony can be admissible under an exception to the hearsay rule. Tex. R. Evid. 804(b)(1) states that:

similar interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination will not be excluded as hearsay.

As long as the party in the current proceeding had the opportunity and motive to confront the unavailable declarant in the prior hearing or deposition, the statement can be admissible as substantive evidence.

C. Document Containing both Admissible and Inadmissible Evidence

The document containing the prior inconsistent statement cannot also contain inadmissible evidence or the entire document may be excluded. In *Oveal v. State*, 164 S.W.3d 735, 742 (Tex.App.—Houston [14th Dist.] 2005, pet. ref'd), the complainant's handwritten document, in which she claimed that someone other than the defendant assaulted her but she identified defendant because the real assailant threatened her, was held to be inadmissible for impeachment purposes because it contained inadmissible threatening statements attributed to the alleged real assailant that made the entire document inadmissible.

D. Confrontation Requirement

Tex. R. Evid. 613(a) governs the use of prior inconsistent statements to impeach a witness:

In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of, such statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement.

In order to impeach a witness's credibility using a prior inconsistent statement, the attorney must lay the proper predicate. A witness must be confronted with his prior inconsistent statement while on the stand and be given an immediate opportunity to explain or deny the statement. The witness must be told the contents of the statement, the time, place and person to whom the statement was made, and must be given the opportunity to explain or deny the statement. *Ramsey v. Lucky Stores*, 853 S.W.2d 623, 637 (Tex.App.—Houston [1st Dist.] 1993, writ denied).

1. Confrontation requirement does not apply to opposing party witness

No confrontation is required, and no opportunity to explain need be given, if the witness being impeached is the opposing party: "This provision does not apply to admissions of a party-opponent." Tex. R. Evid. 613(a). Additionally, an opposing party's prior statement offered against him is admissible as substantive evidence, since it is non-hearsay under Rule 801(e)(2).

However, see *In re Z.A.T.*, 193 S.W.3d 197 (Tex.App.—Waco 2006, pet. denied):

In this family law case, Father argued on appeal that the trial court abused its discretion by refusing to permit him to impeach Mother with prior inconsistent statements. At trial, Father asked Mother whether she had testified in a prior hearing that she had provided certain information to him, and she testified that she had. Father did not ask Mother whether she had testified in the prior hearing that she had not provided the information to him. Instead, Father advised the court that he would "like to go over [Mother's] testimony regarding that matter." The court responded that a transcript of the prior hearing was not available and that Father did not "need to be going over things we've already gone over." Father replied that Mother was "now changing her testimony." Because Father never told Mother of the contents of her alleged prior inconsistent testimony and never afforded her an opportunity to explain or deny such testimony, Father did not lay a proper predicate to impeach Mother with her alleged prior inconsistent testimony. The court held that it was not an abuse of discretion to deny Father's request "to go over [Mother's] testimony regarding that matter."

2. Procedure for objecting

If a subsequent witness is called to testify about an inconsistent statement made by a previous witness who was not confronted with the evidence while on the stand, the opposing attorney should object and move to strike the testimony. The proper predicate was not laid to introduce impeaching evidence of prior inconsistent statements. Since the earlier witness was not confronted and given a chance to explain or deny the statement while on the stand, the inconsistent statement may not later be introduced to impeach the witness's credibility.

E. Extrinsic Evidence Admissible

The confrontation requirement also affects the admissibility of extrinsic evidence to prove the prior statement. "If the witness unequivocally admits having made such [inconsistent] statement, extrinsic evidence of same shall not be admitted." Tex. R. Evid. 613(a). However, that language implies that if the witness does not *unequivocally* admit to making the prior inconsistent statement, then extrinsic evidence is admissible to prove it. This requirement applies to statements offered for impeachment and those offered as substantive evidence.

Examples:

Ramsey v. Lucky Stores, Inc., 853 S.W.2d 623 (Tex. App.--Houston [1st Dist.] 1993, writ denied):

Evidence of witnesses' prior inconsistent statements was proper where the witnesses were told of the prior statements and given several opportunities to explain them, where one witness remembered speaking with an investigator but denied the specific assertions, stating he was unable to remember the substance of the statement even when reminded of it, and another witness remembered giving a statement, but did not recall the date, did not recognize his own voice on tape, and did not remember making the specific statements reflected on the tape.

Trans-State Pavers, Inc. v. Haynes, 808 S.W.2d 727, 733 (Tex. App.—Beaumont 1991, writ denied):

In a passenger's and driver's suit against a paver to recover for personal injuries arising out of an accident after their car struck a pothole, it was reversible error to exclude evidence of the driver's alcohol consumption, including an admission that the driver and passenger had each consumed at least two beers. Evidence of alcohol consumption was admissible for impeachment purposes because the driver had unequivocally denied being "on anything else" that would have affected his ability to drive safely.

In re A.B., 133 S.W.3d 869, 874 (Tex. App.-Dallas 2004, no pet.):

In this case, A.B. was adjudicated a delinquent child after the trial court found he had sexually assaulted his younger sister. The younger sister had given two drastically different stories, one when CPS had interviewed her, and a different story at trial. At trial, the trial court admitted a videotape offered by the State that contained the younger sister's different story. AB objected to the videotape on hearsay grounds. The state countered that the tape was admissible to impeach the younger sister's trial testimony that she had lied to her mother and everyone else about what her brother had done to her. The trial court let the videotape in. On appeal AB argued that the tape should not have been admitted because the state had not laid the proper predicate to impeach the sister with the videotape under Tex. R. Evid. 613. The Dallas Court of Appeals agreed with AB's argument but since he had not made that objection at trial, it was not preserved for appeal. The court noted:

While A.B.'s objection to the tape-recorded statements on the grounds of hearsay was sufficient at the point it was made, once the state countered the hearsay objection by

offering the statements for impeachment purposes only, this offer had the effect of putting the burden back on A.B. to make a specific objection to such impeachment testimony.

Downen v. Texas Gulf Shrimp Co., 846 S.W.2d 506, 512-13 (Tex. App.—Corpus Christi 1993, writ denied):
In a seaman's personal injury action, the vessel captain did not unequivocally admit to making prior statements in his deposition, and therefore, portions of his prior statement were admissible to impeach his testimony.

1. The extrinsic evidence must be relevant

Extrinsic evidence offered to contradict a witness on a collateral fact issue is not admissible. A fact is collateral if it has no significant relevance to the issues in the case or to the witness's credibility. Extrinsic evidence offered to impeach a witness must have relevance to a material fact. *See, e.g., E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995) (requirement of relevance for all evidence).

F. Prior Inconsistent Statements in Discovery Responses

Since Rule 613 applies to prior inconsistent statements, any statements in discovery responses or prior pleadings may be used to impeach a witness's credibility. To the extent that the statements are admissions by a party, they may also be admissible as substantive evidence.

Examples:

Westchester Fire Ins. Co. v. Lowe, 888 S.W.2d 243 (Tex.App.—Beaumont 1994, no pet.):

All allegations and statements made by party's authorized attorney are that party's statements, even pleadings of the party in other causes of action which contain statements inconsistent with same party's present position, and are admissible as admissions against interest.

Huff v. Harrell, 941 S.W.2d 230, 239 (Tex.App.—Corpus Christi 1996, writ denied):

Like any other utterance or statement, if the abandoned pleading is inconsistent with the party's present position at trial, then the abandoned pleading is admissible and receivable into evidence as an admission, and this rule is recognized even though the superseded pleading is not verified and bears no filemark.

Parkway Hospital, Inc. v. Lee, 946 S.W.2d 580, 587 (Tex. App.—Houston [14th Dist.] 1997, pet. denied):

Rule 613 permits a party to enhance the effect of an admission contained in answers to requests for admissions by eliciting controverting testimony from the party and then using the admission to impeach and embarrass the witness.

State Farm Fire & Cas. Co. v. Morua, 979 S.W.2d 616 (Tex. 1998):

Interrogatory answers may be used at trial against the party providing them. The verification requirement applies to both original and supplemental interrogatory answers, discourages pretrial gamesmanship, and helps facilitate a full examination at trial.

III. PRIOR CONSISTENT STATEMENTS

“Bolstering” a witness by attempting to introduce prior consistent statements is generally not permitted. Tex. R. Evid. 613(c) states that “[a] prior statement of a witness which is consistent with the testimony of the witness is inadmissible except as provided in Rule 801(e)(1)(B).” The exception relates to testimony “offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.” Tex. R. Evid. 801(e)(1)(B). While a witness’s prior consistent statements would normally be inadmissible hearsay, Rule 801(e) defines prior consistent statements offered to rebut charges of fabrication or improper influence or motive as non-hearsay.

This can be a useful tool in family law, since witnesses are often accused of recent fabrication or improper influence or motive. If even an implied charge is made against a witness, then prior consistent statements by the testifying witness are not hearsay, and are therefore admissible as substantive evidence to rebut the charges. However, the prior consistent statement would only be relevant evidence to rebut a charge of fabrication if the statement was made before the motive to fabricate arose.

IV. CONCLUSION

Detailed knowledge of the relevant rules of evidence will ensure that an attorney can obtain admittance of or successfully object to prior statements. Although certain cases cited in this paper have ruled in ways that are contrary to the relevant rule of evidence, it is likely because the rule was not correctly argued to the court. Knowledge of the rules relating to prior statements and hearsay ensures that an attorney can protect his or her client’s interests.