

6.15. Impeachment by Prior Inconsistent Statement

(1) A witness's credibility may be impeached by evidence that the witness has made a statement, whether written or not, inconsistent with the witness's present testimony.

(2) In examining a witness concerning a prior inconsistent statement, the examining party must first show the statement or disclose its contents to the witness before asking the witness to affirm or deny the statement.

(3) If the witness denies making the prior inconsistent statement or is unable to recall making the statement, extrinsic evidence of the statement is admissible. If the witness admits making the prior inconsistent statement, whether to admit extrinsic evidence of the statement is committed to the discretion of the court.

(4) A party may not impeach its own witness by evidence of the witness's prior inconsistent statement, except as follows:

(a) In a civil proceeding, any party may introduce proof that any witness has made a prior statement inconsistent with the witness's testimony if the statement was made in a writing signed by the witness or was made under oath.

(b) In a criminal proceeding, when a witness, upon examination by the party who called the witness, gives testimony upon a material issue of the case which tends to disprove the party's position, the party may introduce evidence that the witness has previously made either a written statement signed by the witness or an oral statement under oath contradictory to the witness's testimony.

(5) The credibility of a witness may be impeached by showing that the witness omitted to state a relevant fact or to state it more fully prior to testifying, at a time when the witness’s attention was called to the matter and the witness was specifically asked about the facts embraced in the question asked at a hearing or trial. Even though the matter was not called to the attention of the witness, the credibility of the witness may be impeached by showing that the circumstances surrounding the omission made it most unnatural for the witness to have omitted the information from what the witness said.

(6) Except in a civil case, as provided in rule 8.33 (1), an inconsistent statement is not admissible for the truth of the contents of the statement; rather, it is admissible solely for the purpose of determining the credibility of the witness.

Note

Subdivision (1). The rule set forth in subdivision (1) is derived from the seminal decision on the subject, *Larkin v Nassau Elec. R.R. Co.* (205 NY 267, 268-269 [1912]), wherein the Court of Appeals held:

“Any statement of a witness made out of court, orally or in writing, if contradictory of a material part of his testimony, may be, if properly proven, introduced in evidence, not as substantive proof of the truth of such statement, but as tending to discredit him. If it is sought to prove the expression of an opinion inconsistent with the testimony, it is enough if the opinion is so incompatible with the facts testified to by the witness that an honest mind knowing the facts would not be likely to entertain the opinion. Repugnant statements or contraries cannot be true and the fact that the witness has made them tends to show that he is untrustworthy through carelessness, an uncertain memory or dishonesty.” (*See also Sloan v New York Cent. R.R. Co.*, 45 NY 125, 127 [1871] [prior inconsistent statement “is competent, for the purpose of impeachment, to prove that a witness has made statements out of court in conflict with his evidence in court upon a material question in the case”].)

Those holdings are embedded in a statute governing a criminal case: “Evidence concerning a prior contradictory statement . . . may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. Upon receiving such evidence at a jury trial, the court must so instruct the jury.” (CPL 60.35 [2].)

Thus, as the relevance of the prior inconsistent statement is predicated upon the fact that it was made, and not for its truth, the hearsay rule does not bar the statement.

In the limited circumstance set forth in rule 8.33, however, decisional law permits a prior inconsistent statement to be admitted for its truth. (*See* rule 8.33 and the Note thereto.)

For a prior statement to be inconsistent for purposes of the rule, it is not necessary that “there be a direct and positive contradiction. It is enough that the testimony and the statements are inconsistent and tend to prove differing facts.” (*Larkin*, 205 NY at 269.) In *People v Wise* (46 NY2d 321, 327 [1978]), the Court of Appeals noted that where there is some doubt as to whether a statement is “inconsistent,” the “balance should be struck in favor of admissibility, leaving to the jury the function of determining what weight should be assigned the impeachment evidence. Applied in this fashion, the law of previous contradictory statements will advance rather than impede the truth-seeking process.”

Where a prior inconsistent statement of a defendant in a criminal proceeding is involved, a statement made in violation of the defendant’s federal or state right to counsel or the pre-interrogation warnings of *Miranda v Arizona* (384 US 436 [1966]) may, if otherwise voluntarily made, be used to impeach a defendant who testifies on his or her own behalf. (*People v Maerling*, 64 NY2d 134, 140 [1984]; *People v Wilson*, 28 NY3d 67 [2016]; *People v Harris*, 25 NY2d 175 [1969], *affd* 401 US 222 [1971].) It must be noted that the statement must be voluntary; an involuntary statement may never be used for impeachment. Similarly, evidence seized in violation of the Fourth Amendment may be used to impeach a defendant who testifies on his or her own behalf. (*United States v Havens*, 446 US 620 [1980]; *People v Maerling*, 64 NY2d 134 [1984].)

Subdivision (2). Subdivision (2) recites the foundation warning required for inquiring of a prior inconsistent statement, as derived from *Larkin v Nassau Elec. R.R. Co.* (205 NY 267, 269 [1912] [citations omitted]):

“In case the statements are oral, the warning is given by asking the witness, in substance and effect, if he did not at a given time and place in the presence of or to a person or persons specified make the alleged contradictory statements. In case the statements are in writing and unsubscribed, the paper must be shown or read to the

witness and marked for identification, and, if subscribed, the signature and in case he so demands the paper must be shown to him.” (*See also Wise*, 46 NY2d at 326 [“To set the stage for the prior inconsistency, the questioner must first inform the witness of the circumstances surrounding the making of the statement, and inquire of him whether he in fact made it”].)

The foundation requirement does not apply where the witness who made the prior statement is a party to the proceeding. (*Blossom v Barrett*, 37 NY 434, 438 [1868] [“The (foundation) rule insisted on does not apply when the admission sought to be proved is that of a party to the suit. The party’s confessions are competent without interrogating him at all in regard to it”].)

Subdivision (3). The rule set forth in subdivision (3) is also derived from *Larkin v Nassau Elec. R.R. Co.*:

“The attention of a witness having been thus called to the contradictory statements, they may be proven and introduced in evidence in the regular course of the trial. They may, of course, be proved by the admissions of the witness made at the time his attention was called to them. If he fully and clearly admits the making of them as provable by the impeaching party, further proof of them is unnecessary.” (205 NY at 269-270; *see also Hanlon v Ehrich*, 178 NY 474, 480 [1904] [“If . . . the witness denies having made the statement, or does not remember having made it, he may then be contradicted by any person who heard him make it (or documentary evidence”].)

Whether to admit the extrinsic evidence when the witness has admitted the inconsistency is committed to the sound discretion of the trial court. (*See People v Piazza*, 48 NY2d 151, 163-165 [1979]; *People v Schainuck*, 286 NY 161, 165 [1941].) In deciding on the admissibility of a prior inconsistent statement a court may consider whether the statement relates to a collateral matter and would not be admissible pursuant to rule 6.11 (Impeachment in General). (*Cf. People v Knight*, 80 NY2d 845, 847 [1992] [“the rule prohibiting the use of extrinsic evidence to impeach a witness on a matter that is merely collateral . . . has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the jury must decide”].)

Subdivision (4) (a) and (b) are taken virtually verbatim from CPLR 4514 and CPL 60.35, respectively. They were enacted “to correct the inequities occasioned by the fact that in many cases both sides were unfairly hampered by their inability to impeach unreliable witnesses upon whom they were compelled to rely.” (*People v McCormick*, 278 App Div 410, 413 [1st Dept 1951], *affd* 303 NY 403 [1952].)

Subdivision (5). This subdivision is derived from two Court of Appeals decisions that address whether an omission in a prior statement may render the statement inconsistent, *People v Bornholdt* (33 NY2d 75, 88 [1973]) and *People v Savage* (50 NY2d 673, 679 [1980]). The Court of Appeals has instructed that “a witness may not be impeached simply by showing that he omitted to state a fact, or to state it more fully at a prior time.” (*Bornholdt*, 33 NY2d at 88.) Impeachment by omission in a prior statement, however, is permissible where it is shown that “at the prior time the witness’ attention was called to the matter and that he was specifically asked about the facts embraced in the question propounded at trial.” (*Bornholdt*, 33 NY2d at 88.) This rule, the Court observed, “accords with human experience recognizing that unless asked directly about a matter a person may quite normally omit it from a narrative description.” (*Ibid.* at 89.) The Court has also held that impeachment by omission in a prior statement is permissible “when given circumstances make it most unnatural to omit certain information.” (*People v Savage*, 50 NY2d 673, 679 [1980]; see also *People v Chery*, 28 NY3d 139, 145 [2016] [where defendant testified at trial that the complainant assaulted him, his failure to relate an exculpatory fact in a statement to police at the time of his arrest in which he described the complainant’s conduct as relatively minor misconduct was an “unnatural omission”].) In such circumstances, the witness’s attention need not have been drawn to the matter at the time the statement was made. This rule, too, as the Court stated, “is firmly imbedded in behavioral expectations.” (*Savage*, 50 NY2d at 679.) As to the application of *Savage* and *Bornholdt* to grand jury testimony, see *People v Dismel* (16 Misc 3d 1120[A], 2007 NY Slip Op 51519[U] [Sup Ct, Kings County 2007]).

Subdivision (6). See the commentary for subdivision (1).