

### 8.33. Prior Inconsistent Statement

**(1) Civil Proceeding.** If a witness testifies at a proceeding and is subject to cross-examination concerning a statement made by the witness prior to the proceeding, the statement is admissible if the statement is inconsistent with the witness's testimony and the statement contains sufficient indicia of reliability justifying its admissibility.

**(2) Criminal Proceeding.** If a witness testifies at a proceeding and is subject to cross-examination concerning a statement made by the witness prior to the proceeding, the statement is admissible if the statement is inconsistent with the witness's testimony but solely for impeachment purposes.

#### Note

**Subdivision (1)** sets forth an exception for a prior inconsistent statement of a declarant where the declarant in a civil case testifies at the proceeding and is subject to cross-examination (*see Kaufman v Quickway, Inc.*, 14 NY3d 907, 908 [2010] [“hearsay exception for prior inconsistent statements”]). As derived from *Kaufman* (14 NY3d at 908), *Nucci v Proper* (95 NY2d 597, 602-603 [2001]), and *Letendre v Hartford Acc. & Indem. Co.* (21 NY2d 518, 524 [1968]), the statement must possess sufficient indicia of reliability to justify its admission. In *Kaufman*, the Court of Appeals found the statement in issue met that standard as it was in writing, made to a State Police trooper and signed under penalty of perjury (14 NY3d at 908); and in *Letendre*, the Court found the statement to be reliable since it was in writing and had the declarant been unavailable to testify at trial, the statement would have been admissible as a declaration against interest (21 NY2d at 524). However, in *Nucci*, the statements were found to possess no indicia of reliability, as under the circumstances “a significant probability exist[ed] that the statements may implicate the dangers of the declarant’s faulty memory or perception, insincerity, or ambiguity—traditional testimonial infirmities which the hearsay rule is designed to guard against” (95 NY2d at 604).

**Subdivision (2)** sets forth the view of the Court of Appeals that a prior inconsistent statement of an adverse witness is admissible in a criminal proceeding for impeachment purposes only (*see People v Freeman*, 9 NY2d 600, 605 [1961]).

[“ ‘(A) witness’ own prior statement in which he has given a contrary version’ . . . may not be introduced as affirmative evidence”]).

By statute, in a criminal proceeding a party may impeach *its own witness* when that witness “gives testimony upon a material issue of the case which tends to disprove the position” of the party who called the witness by introducing “evidence that such witness has previously made either a written statement signed by him or an oral statement under oath contradictory to such testimony” (CPL 60.35 [1]).