

**PRESENTED AT**

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## **Character Evidence and Evidence of Previous Crimes**

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## CHARACTER EVIDENCE AND EVIDENCE OR PREVIOUS CRIMES

Quentin Brogdon

### I. INTRODUCTION

The most common rationale for the admissibility of a witness' prior conduct is to impeach the witness. Depending on the circumstances, a witness may be impeached with the following types of prior conduct: 1) prior inconsistent statements, 2) character for untruthfulness, 3) criminal conduct, and 4) evidence of other wrongs or acts.

The purpose for which the evidence is offered is critical in the court's determination about whether the evidence is admitted. The impact of the evidence, however, often is the same in the eyes of the jury, regardless of the specific purpose for which the judge allows the evidence to be admitted and regardless of whether the judge gives the jury a limiting instruction.

### II. WHO MAY IMPEACH A WITNESS

Any party, including the party calling the witness, may impeach a witness. *See* Tex. R. Evid. 607; *Corning Fiberglass Corp. v. Malone*, 916 S.W.2d 551, 567 (Tex. App.—Houston[1st Dist.] 1996).

### III. ADMISSIBILITY OF PRIOR INCONSISTENT STATEMENTS

The Texas Supreme Court recently approved amendments to the Texas Rules of Evidence, effective April 1, 2015. The primary stated purpose of the amendments is to restyle the rules to make them more easily understood and to make style and terminology consistent throughout.

Rule 613, governing the impeachment of witnesses with prior statements, is one of only two rules to be substantively amended.

As amended, rule 613 relaxes the foundational predicate for impeaching a witness with a prior statement and moves the practice in Texas closer to the practice in federal court. Significant differences remain, however between the practice in Texas and federal courts. *See* Q. Brogdon, "New Approach to Prior Inconsistent Statements," *Texas Lawyer*, September 14, 2015.

In its amended form, rule 613 now provides:

*Rule 613. Witness's Prior Statement and Bias or Interest*

*(a) Witness's Prior Inconsistent Statement.*

*(1) Foundation Requirement. When examining a witness about the witness's prior inconsistent statement—whether oral or written—a party must first tell the witness:*

*(A) the contents of the statement;*

*(B) the time and place of the statement; and*

*(C) the person to whom the witness made the statement.*

*(2) Need Not Show Written Statement. If the witness's prior inconsistent statement is written, a party need not show it to the witness before inquiring about it, but must, upon request, show it to opposing counsel.*

*(3) Opportunity to Explain or Deny. A witness must be given the opportunity to explain or deny the prior inconsistent statement.*

*(4) Extrinsic Evidence. Extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is first examined about the statement and fails to unequivocally admit making the statement.*

**(5) Opposing Party's Statement.** This subdivision (a) does not apply to an opposing party's statement under Rule 801(e)(2).

**(b) Witness's Bias or Interest.**

**(1) Foundation Requirement.** When examining a witness about the witness's bias or interest, a party must first tell the witness the circumstances or statements that tend to show the witness's bias or interest. If examining a witness about a statement— whether oral or written—to prove the witness's bias or interest, a party must tell the witness:

(A) the contents of the statement;

(B) the time and place of the statement; and

(C) the person to whom the statement was made.

**(2) Need Not Show Written Statement.** If a party uses a written statement to prove the witness's bias or interest, a party need not show the statement to the witness before inquiring about it, but must, upon request, show it to opposing counsel.

**(3) Opportunity to Explain or Deny.** A witness must be given the opportunity to explain or deny the circumstances or statements that tend to show the witness's bias or interest. And the witness's proponent may present evidence to rebut the charge of bias or interest.

**(4) Extrinsic Evidence.** Extrinsic evidence of a witness's bias or interest is not admissible unless the witness is first examined about the bias or interest and fails to unequivocally admit it.

**(c) Witness's Prior Consistent Statement.**

Unless Rule 801(e)(1)(B) provides otherwise, a witness's prior consistent statement is not admissible if offered solely to enhance the witness's credibility.

**Comment to 2015 Restyling:** The amended rule retains the requirement that a witness be given an opportunity to explain or deny (a) a prior inconsistent statement or (b) the circumstances or a statement showing the witness's bias or interest, but this requirement is not imposed on the examining attorney. A witness may have to wait until redirect examination to explain a prior inconsistent statement or the circumstances or a statement that shows bias. But the impeaching attorney still is not permitted to introduce extrinsic evidence of the witness's prior inconsistent statement or bias unless the witness has

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