Impeachment By Inconsistent Statements: California Theory And Practice

I. INTRODUCTION

On April 19, 1971, after one of the longest and most publicized criminal trials in United States history, Los Angeles Superior Court Judge Charles H. Older sentenced Charles Manson, Susan Atkins, Patricia Krenwinkel, and Leslie Van Houten to death for the Tate-La-Bianca murders.[1] During the penalty phase of the bifurcated trial, defendant Susan Atkins took the stand for the first time. Although Charles Manson had already been found guilty during the first phase of the trial, she testified that he had not motivated or helped plan the murders. Instead, she stated that she and another Manson "family" member, Linda Kasabian, had conceived and planned the murders themselves.

> Q. So then Linda came up to you and said, "Let's go out and do some killings. . ."?
> A. Yes, it was Linda's idea as much as it was my idea. . .[2]

Had the jury believed this explanation, the prosecution's arguments for the death sentence for Manson would have been seriously undermined. In order to attack Susan Atkins' credibility, the prosecution introduced her prior testimony on the subject:

> Q. Basically at the Grand Jury, Los Angeles County Grand Jury, December 5th, 1969, you testified that it was Charles Manson who sent you, Tex, Katie and Linda out to commit the murders at the Tate residence. That is true, isn't it . . . this is what you testified to?
> A. That is what I testified to.
> Q. And you further testified that the very next night Charles Manson told you, Tex, Katie, Linda, Leslie and Clem that you were going to go out again and do the very same thing that you had

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[1] On August 9, 1969, police officers discovered the bodies of five murder victims, including actress Sharon Tate, in and around a rented house in the hills above Los Angeles. On August 10, 1969 two more victims, Leno and Rosemary La Bianca were discovered, murdered in their Los Angeles home. After an intensive investigation, Charles Manson and several members of his "family" were arrested and indicted. The trail began on June 15, 1970. For a complete account of the investigation and trial, *see* V. BUGLIOSI & C. GENTRY, HELTER SKELTER (1975).

[2] People v. Manson, No. 15872 (Sup. Ct. Los Angeles Cty., April 19, 1971) vol. 79 at 23,444-45.

done the first night. Is that correct? Is that what you testified to?

A. That is what I testified to.[3]

In *People v. Manson*, the prosecution used an inconsistent statement to show an intentional falsehood. Impeachment of a witness by his inconsistent statements also can be used to demonstrate to the jury that the witness is capable of making errors on relevant matters.[4] This capacity is shown by presenting the witness' conflicting statements on the same subject. Both statements cannot be true. Thus the jury can conclude that since the witness has "blown hot and cold" on this point, other aspects of his testimony are equally unreliable.[5]

California Evidence Code section 780 provides a variety of methods by which a witness' credibility can be attacked.[6] These include bias or interest, defective capacity, character, and contradiction or specific error as well as inconsistent statements.[7] The use of inconsistent statements, however, has significant advantages over these other methods. For example, impeachment based on character merely raises the inference that the witness is, in general, not the type of person who should be believed.[8] In most cases, this inference is less effective than a demonstration that the witness has made specific inconsistent statements on a matter relevant to the proceedings. In addition, an examiner who introduces evidence of a witness' bad character runs the risk of antagonizing the jury.[9] If the jury believes that the attacker is merely trying to harass or embarrass the

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[3] *Id.* at 23,490-95.

[4] E. CLEARY *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 34, at 68 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)].

[5] *Id.*

[6] CAL. EVID. CODE § 780 (West 1968):

> Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: . . .
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> (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies. . . .
>
> (e) His character for honesty or veracity or their opposites.
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> (f) The existence or nonexistence of a bias, interest, or other motive. . . .
>
> (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
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> (i) The existence or nonexistence of any fact testified to by him. . . .

[7] CAL. EVID. CODE § 780(i) does not use either the word "contradiction" or the term "specific error," but these terms are commonly employed by various authorities. *See* MCCORMICK (2d ed.), *supra* note 4, § 47 at 97; 3A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1000 at 957 (Chadbourn rev. 1970) [hereinafter cited as 3A WIGMORE].

[8] *See* Comment, *"Have You Heard?": Cross Examination of a Criminal Defendant's Good Character Witness*, this volume.

[9] *See* MCCORMICK (2d ed.), *supra* note 4, § 33 at 67.

witness personally, it may sympathize with the witness and give undue weight to his testimony.[10] The examiner who uses inconsistent statements tends to convey a more objective attitude. He is merely the vehicle for bringing the witness' own statements before the jury.

Impeachment by inconsistent statements is also a more effective tool for attacking credibility than is contradicting the witness' testimony with evidence from an independent source.[11] If one witness testifies that a traffic light was red, and another contradicts him by stating that it was green, the jury must decide which witness is more credible. The situation is different if a witness at the scene of an accident states that a traffic light was green but later in court testifies that the light was red. In this case, the jury does not have to believe one statement and reject the other. Instead, the probable effect is to cast doubt on the accuracy of the witness' entire testimony, including that which is not directly contradicted.

Over a period of years, the California Legislature and courts developed a complex system of statutory and common law rules to govern the use of impeaching inconsistent statements.[12] In many situations, rigid interpretation of these rules by the courts tended to unduly inhibit the process of testing witness credibility.[13] The California Legislature enacted sections 770 and 780(h) of the Evidence Code to resolve these difficulties.[14] Under these provisions, California courts allow impeachment of a witness by his inconsistent statements if:

(a) Both the in-court and extrajudicial communications qualify as statements;[15]

(b) the two statements are in fact inconsistent;[16]

(c) the subject matter of the impeachment is relevant and material to the proceedings;[17] and

(d) the "foundation" requirements are met.[18]

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[10] *See* 3 I. GOLDSTEIN & F. LAND, GOLDSTEIN TRIAL TECHNIQUE § 19.27 at 35 (2d ed. 1969) [hereinafter cited as GOLDSTEIN].

[11] For a detailed treatment of this rationale and procedures for contradiction, *see* 3A WIGMORE, *supra* note 7, §§ 1000-15 at 956-91; MCCORMICK (2d ed.), *supra* note 4, § 47 at 97-100.

[12] *See generally* Hale, *Impeachment of Witnesses by Prior Inconsistent Statements*, 10 So. CAL. L. REV. 135 (1937) and cases cited therein.

[13] Professor Hale suggested several farsighted remedies for these problems. *Id.* at 164-65. *See generally* 3A WIGMORE, *supra* note 7, § 1027 at 1023; MCCORMICK (2d ed.), *supra* note 4, § 34 at 67; Slough, *Impeachment of Witnesses, Common Law Principles and Modern Trends*, 34 INDIANA L. J. 1 (1958) and the cases cited therein.

[14] For the text of CAL. EVID. CODE § 780(h) *see supra* note 6. For the text of CAL. EVID. CODE § 770 *see* note 196 *infra*.

[15] *See* text accompanying notes 28 - 61 *infra*.

[16] *See* text accompanying notes 62 - 115 *infra*.

[17] *See* text accompanying notes 116 - 149 *infra*.

[18] *See* text accompanying notes 181 - 212 *infra*.

The California Legislature also adopted a hearsay exception allowing the substantive use of inconsistent statements.[19] This article, however, will discuss only the use of inconsistent statements for impeachment purposes.[20]

Ten years of experience[21] suggest that the impeachment provisions have overcome the problem of rigid interpretation. But, by allowing trial judges a wide latitude of discretion, the new rules have also created substantial problems for the practitioner. The lack of definitive guidelines for admissibility has proven to be the major difficulty. The courts have developed a complex process balancing a number of basically qualitative elements. An element which is considered significant by a court in one context may be ignored entirely by another court. And both decisions may be upheld on appeal.[22] Since precedent is of only limited value,[23] counsel should not rely heavily on specific factual analogies to decided cases. Instead, he should look to the rationale underlying each element to argue for or against admissibility of a statement under any given set of circumstances.

This article will discuss the major elements of impeachment by inconsistent statements. It will also cover the unique problems involved in impeachment of a hearsay declarant, a party's own witness, and a witness giving opinion testimony. The discussion will note the Federal Rules of Evidence[24] only where they differ significantly from the California provisions.[25] In such situations, the article will

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[19] CAL. EVID. CODE § 1235 (West 1968):

> Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

The Federal Rules of Evidence contain a similar provision. *See* 28 U.S.C. FED. R. EVID. 801(d)(1)(A) (1975).

[20] The requirements for admissibility under § 780(h) and § 1235 are similar. The characterization of an inconsistent statement as substantive evidence of the truth of the matter asserted does, however, involve special problems which are beyond the scope of this article. *See generally* 3A WIGMORE, *supra* note 7, § 1018 at 995-1007; McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573 (1947); MCCORMICK (2d ed.), *supra* note 4, § 39 at 78; B. WITKIN, CALIFORNIA EVIDENCE § 538 at 511 (2d ed. 1966) [hereinafter cited as WITKIN]; 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶¶ 801[01]-801 (d)(1)(A)[08] [hereinafter cited as WEINSTEIN].

[21] The Evidence Code was enacted in 1965 as CAL. STAT. 1965, Ch. 299. However, Section 12 deferred the effective date until January 1, 1967.

[22] *See e.g.*, WITKIN, *supra* note 20, § 1254 at 1156-58, and cases cited therein.

[23] *See* 3A WIGMORE, *supra* note 7, § 1040 at 1049, and cases cited therein.

[24] 28 U.S.C. FED. R. EVID. 101 *et seq.* (1975) [hereinafter cited as FED. R. EVID.].

[25] *See generally* 3 WEINSTEIN, *supra* note 20, ¶¶ 613[01]-[04]. The Federal Rules of Evidence do not contain a specific provision governing impeachment comparable to CAL. EVID. CODE § 780(h). The only relevant provisions are rule 613, which defines the foundation requirement, and rule 801(d)(1)(A), (*see* note 19 *supra*) which specifies the requirements for the use of inconsistent statements as substantive evidence. Instead, the treatment of inconsistent statements for

focus on Ninth Circuit Court of Appeals interpretations. The procedures in other states will be examined only in areas where the issues remain unresolved in California.

As the title of this article suggests, the effective use of inconsistent statements requires both a thorough understanding of the rationale of the California Evidence Code provisions and creative courtroom presentation. This article will focus on the technical applications and interpretations of the various rules. This focus is not intended to degrade the importance of actual trial presentation.[26] Rather, it is designed to provide counsel with an understanding of the basic use of inconsistent statements in the impeachment process. These elements can then be adapted to the facts of individual cases and variations in presentation style.

II. PROBLEMS IN ASCERTAINING ADMISSIBLE INCONSISTENT STATEMENTS

A. REQUIRED ELEMENTS

The initial problem facing the practitioner seeking to attack a witness' credibility by means of a self-contradiction is whether an "inconsistent statement" as described in Evidence Code section 780(h) exists.[27] Analytically, this determination can be divided into three separate elements: the existence of a "statement"; "inconsistency"; and subject matter limitations. The following sections will illustrate the basic guidelines involved in each element of this determination.

1. FORM AND SUBSTANCE OF A "STATEMENT"[28]

Evidence Code section 225 defines "statement" as an: ". . . (a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression."[29] California courts have found statements in a wide range of communications.[30] They have ruled that the form of the original statement is

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impeachment purposes is governed by the general relevancy provisions of rules 401 and 402 and the discretionary exclusion provisions of rule 403.

[26] *See* F. WELLMAN, THE ART OF CROSS EXAMINATION 131-33 (4th ed. 1936) [hereinafter cited as WELLMAN]. *See also* R. FIGG *et al.*, CIVIL TRIAL MANUAL 423-26 (1974); 3 F. BUSH, LAW AND TACTICS IN JURY TRIALS 730 (1960).

[27] For the text of CAL. EVID. CODE § 780(h) *see* note 6 *supra.*

[28] As used in this section, the word "statement" will be limited to expressions of a witness used to impeach his present testimony. The distinction between "statement" and "testimony" is significant because of the limited definition of "statement" contained in CAL. EVID. CODE § 225. *See* text accompanying note 29 *infra.*

[29] CAL. EVID. CODE § 225 (West 1968).

[30] Prior to the enactment of the Federal Rules of Evidence, the federal court treatment of permissible statements was consistent with California interpretations. *See e.g.*, United States v. Allied Stevedoring Corp., 241 F.2d 925, 932-33

immaterial, so long as it reflects the conduct, belief, or observation of a witness with respect to the question at issue.[31] Thus a verbal expression may be oral[32] or written,[33] sworn[34] or unsworn.[35] It may be a statement which would otherwise be inadmissible, such as a superseded pleading.[36] Similarly, the courts have held that the form of proof of the original statement is not material. The existence of the statement may be proved by an admission of the witness while he is testifying.[37] Alternatively, the impeaching party may prove the facts discrediting the testimony of the attacked witness by extrinsic evidence such as a second witness or documentary evidence.[38]

The original statement may be either express or inferred. Thus the witness at the scene of an accident may have told an investigating police officer that the northbound traffic light was red. Or, he may have told the officer that all of the northbound traffic was stopped at the intersection. In either case, the "statement" could be used to impeach his subsequent testimony that the northbound light was green.

In California, a witness' assertive conduct is a non-verbal statement, since by its definition it is intended as a substitute for oral or written verbal expression.[39] Thus if the witness nods or shakes his head in answer to a question or points to an object or person for identifica-

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(2d Cir.), *cert. denied*, 353 U.S. 984 (1957), to the effect that the form of the impeaching statement is immaterial. FED. R. EVID. 801 defines statement as: ". . . (a) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." Under this definition, the treatment of permissible forms of statements by the federal courts should remain substantially the same as noted for California.

[31] *See* People v. Bushton, 80 Cal. 160, 161, 22 P. 127, 128 (1889).

[32] People v. Vatek, 71 Cal. App. 453, 468, 236 P. 163, 169 (3d Dist. 1925) (oral statement to sheriff).

[33] Fibreboard Paper Prod. Corp. v. East Bay Union, 227 Cal. App. 2d 675, 700, 39 Cal. Rptr. 64, 79 (1st Dist. 1964) (letter).

[34] Bennett v. Superior Ct., 99 Cal. App. 2d 585, 593, 222 P.2d 276, 281 (4th Dist. 1950) (deposition).

[35] People v. Kidd, 56 Cal. 2d 759, 366 P.2d 49, 16 Cal. Rptr. 793 (1961) (oral statement to reporters).

[36] Meyer v. State Board of Equalization, 42 Cal. 2d 376, 385, 267 P.2d 257, 263 (1954); Cornwell v. Mulcahy, 62 Cal. App. 658, 661, 217 P. 568, 569 (3d Dist. 1923). Under federal constitutional law a confession obtained without duress in violation of *Miranda* rights is admissible for impeachment purposes. Oregon v. Haas, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971). Until very recently, this was the rule in California. People v. Nudd, 12 Cal. 3d 204, 207, 524 P.2d 844, 846, 115 Cal. Rptr. 372, 374 (1974). In People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976), the court overruled *Nudd*, and held that a prosecutor may not introduce into evidence inculpatory statements obtained in violation of a defendant's *Miranda* rights, even when they are only being introduced for impeachment purposes.

[37] *See* text accompanying note 125 *infra*.

[38] *See* WITKIN, *supra* note 20, § 1256 at 1160.

[39] For a discussion of this problem in the hearsay context, *see* MCCORMICK (2d ed.), *supra* note 4, § 250 at 596-601.

tion, the courts have had no difficulty in finding a statement.[40]

Under certain circumstances, California courts have ruled that silence can be treated as assertive conduct, and hence a statement for impeachment purposes.[41] When the witness is not a defendant in a criminal proceeding, the general rule is that a failure to assert a fact when it would have been "natural or normal" to do so constitutes an assertion of the nonexistence of that fact.[42] In defining "natural or normal," the courts have distinguished between silence in a previous judicial proceeding and silence outside the courtroom.

When the silence sought to be admitted as assertive conduct occurred while the witness was testifying in a prior judicial hearing, the California Supreme Court has held that:

> A witness may not be impeached by showing that he omitted to state a fact or stated it less fully at a prior proceeding unless his attention was called to the matter at that time and he was then asked to testify concerning the very facts embraced in the questions propounded at the trial.[43]

The courts have been more receptive to statements inferred from silence when the omission occurred outside the courtroom.[44] They have not required questioning on the specific point omitted as a prerequisite to admissibility.[45]

When the witness is also the defendant in a criminal proceeding, impeachment of his testimony by proving his previous reliance upon the fifth amendment privilege against compulsory self-incrimination arguably penalizes him for exercising his constitutional rights.[46] Prior to the enactment of the Evidence Code, the California Supreme Court condemned this type of impeachment without focusing on the

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[40] *See* WITKIN, *supra* note 20, § 460 at 423; MCCORMICK (2d ed.), *supra* note 4, at 596 n.34.

[41] CAL. EVID. CODE § 125 (West 1968): "'Conduct' includes all active and passive behavior, both verbal and nonverbal." Thus technically, to qualify as a "statement" the silence would have to be passive nonverbal behavior intended as a substitute for oral or written verbal expression. This definition is not limited to the impeachment context, but is also applicable to hearsay. *See*, Comment, *Hearsay: The Threshold Question*, this volume.

[42] *See* 3A WIGMORE, *supra* note 7, § 1042 at 1056-58; People v. Shaver, 120 Cal. 354, 52 P. 651 (1898) (trial testimony by witness of threat by defendant against victim impeached by evidence of witness' pretrial silence on matter); People v. Goldberg, 110 Cal. App. 2d 17, 26, 242 P.2d 116, 124, (1st Dist. 1952).

[43] Brooks v. E. J. Willig Truck Transp. Co., 40 Cal. 2d 669, 675, 255 P.2d 802, 806 (1953).

[44] People v. Brophy, 122 Cal. App. 2d 638, 649, 265 P.2d 593, 599 (2d Dist. 1954).

[45] In determining what is "natural or normal," some courts have focused on possible motives for omission and prejudice to the opposing party. *Id.*

[46] *Cf.* Griffin v. California, 380 U.S. 609, 612-15 (1965). *See also* Comment, *Courtroom Comment on An Accused's Reliance on the Privilege Against Self-Incrimination: California's Application of Griffin v. California*, this volume.

constitutional issues.[47] California Evidence Code section 913 now prohibits impeachment of a witness by evidence of his prior assertion of a privilege.[48]

In *Raffel v. United States* the United States Supreme Court held that the testimony of the defendant in a criminal action was inconsistent with his refusal to testify at a previous trial on the same charge.[49] The Court dealt with the fifth amendment issue by finding that by voluntarily taking the stand, the defendant completely waived any claim of privilege.[50] Thus his prior assertion of his fifth amendment rights could be used to impeach his present testimony. In its more recent decisions on this issue, the Court has not directly addressed the constitutional issues involved in this type of impeachment.[51] Instead, in exercising its supervisory powers over the lower federal courts, the Court has focused on the particular facts of the case in which the privilege was invoked to determine whether the evidentiary requirement of inconsistency was met.[52] Following this approach, the Court has ruled that when the privilege was invoked during grand jury testimony[53] or questioning following custodial arrest[54] the defendant's silence was not inconsistent with the fact that he testified at trial. Although both of the later cases distinguished *Raffel* on its facts,[55] its continued validity is open to question.[56]

Non-assertive conduct is an act by an individual which is not in-

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[47] People v. Sharer, 61 Cal. 2d 869, 877-78, 395 P.2d 899, 905, 40 Cal. Rptr. 851, 857 (1964). The defendant in a criminal proceeding testified at trial. Over objection, the prosecution was allowed to introduce evidence of the defendant's prior assertion of the privilege against self-incrimination during grand jury questioning. The court found that under CAL. PEN. CODE § 1323.5 (later superseded by CAL. EVID. CODE § 930) an accused who does not volunteer to testify before a grand jury is incompetent and his answers to questions directed to him under such circumstances may not be used in subsequent criminal trials. *See also* People v. Calhoun, 50 Cal. 2d 137, 323 P.2d 427 (1958).

[48] CAL. EVID. CODE § 913 (West 1968): "(a) If in the instant proceeding or on a prior occasion a privilege is or was exercised not to testify . . . the trier of fact may not draw any inference therefrom as to the credibility of the witness."

[49] 271 U.S. 494, 498 (1926); *cf.* Stewart v. United States, 366 U.S. 1 (1961) which apparently narrowed the scope of the *Raffel* holding.

[50] 271 U.S. 494, 499.

[51] In United States v. Hale, 422 U.S. 171, 181 (1975), the defendant was convicted of robbery in the U.S. District Court for the District of Columbia. Although the constitutional issue was argued, the Court limited its ruling to application of federal evidentiary law and concluded there was no inconsistency between pretrial silence and later exculpatory testimony by the witness.

[52] *Id.* at 178-79.

[53] United States v. Hale, 422 U.S. 171 (1975).

[54] Grunewald v. United States, 353 U.S. 391 (1957). Three members of the Court concurred in the result. They indicated that they could foresee ". . . no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it." *Id.* at 425.

[55] 422 U.S. at 175; 353 U.S. at 418.

[56] 353 U.S. at 426 (Black, J., concurring); 422 U.S. at 175 n.4 (1975).

tended by him to be a substitute for oral or written verbal expression. As such, it poses significantly different problems than those raised by assertive conduct. A witness may testify to a fact which is inconsistent with a logical inference which could be drawn from previous non-assertive conduct. For example, a defendant's flight from the scene of a crime is arguably inconsistent with his later testimony denying guilt. In California, extrinsic evidence of non-assertive conduct is not admissible if offered under Evidence Code section 780(h) to impeach the defendant's testimony because it does not qualify as a "statement."[57] A person who flees from the scene of a crime does not intend that his flight be a statement of his consciousness of responsibility. This does not mean that evidence of flight is inadmissible. An inference may permissibly be drawn from such conduct, and used as circumstantial evidence of the defendant's guilt, since such evidence is not considered hearsay in California.[58] Evidence of the defendant's conduct would also be admissible to attack his credibility as a "contradiction" under Evidence Code section 780(i).[59]

Although a number of jurisdictions allow evidence of non-assertive conduct to be introduced as an inconsistent statement,[60] there appears to be little basis for criticism of the California approach. In adopting a definition of "statement" which excluded non-assertive conduct, the California Legislature was primarily concerned with excepting such conduct from the restriction of the hearsay rule.[61] The definition serves a valid purpose and the evidence is equally discrediting whether it is labeled an impeaching inconsistent statement or relevant substantive circumstantial evidence.

2. *INCONSISTENCY*

Determining inconsistency requires a comparison of the witness' prior statement and his present testimony.[62] When such a compari-

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[57]". . . nonassertive conduct is not a 'statement' . . ." WITKIN, *supra* note 20, § 472 at 434; CAL. EVID. CODE § 225 (West, 1968); *see* text accompanying note 29 *supra*.

[58]*See* MCCORMICK (2d ed.), *supra* note 4, § 271 at 655-56, Comment, *Hearsay: The Threshold Question*, this volume, Comment, *State of Mind: The Elusive Exception*, this volume.

[59]*See e.g.*, Kovacs v. Sturgeon, 274 Cal. App. 2d 478, 486, 79 Cal. Rptr. 426, 432 (4th Dist. 1969) (drinking habits); People v. Schumacher, 256 Cal. App. 2d 858, 864, 64 Cal. Rptr. 494, 498 (2d Dist. 1967) (previous pruchase of drugs); Rousseau v. West Coast House Movers, 256 Cal. App. 2d 878, 886, 64 Cal. Rptr. 655, 661 (2d Dist. 1967) (previous drunken acts).

[60]*See* 3A WIGMORE, *supra* note 7, § 1040 at 1051 and cases cited therein: "The inconsistency may be found expressed, not in words, but in conduct indicating a differing belief."

[61]*See* CAL. EVID. CODE § 1200, Law Rev. Comm'n Comment (West 1968); WITKIN, *supra* note 20, § 472 at 434. The federal courts have followed a similar line of reasoning. *See* 4 WEINSTEIN, *supra* note 20, ¶ 801(a)[01] at 801-45.

[62]Under certain circumstances, a statement made subsequent to the witness'

son reveals a contradiction on the face of the two expressions alone, the courts have had little difficulty in finding inconsistency.[63] When the comparison requires the drawing of an inference from the prior statement, the present testimony, or both, the courts and the commentators have resorted to broad generalizations to delineate the permissible standards of admissibility.[64] Determining whether inferred statements are inconsistent is a necessarily subjective judgment; definitive rules are thus neither possible nor desirable.[65] The following sections will discuss some of the major problem areas with illustrations of the general approaches taken by the courts.

a. Inferred Inconsistencies

When the impeaching party is unable to elicit expressly inconsistent testimony, he may be forced to rely on inconsistencies between inferences drawn either from the substance of a witness' remarks on the stand or from his out of court expressions. For example, in *People v. Spencer*,[66] the defendant was charged with manslaughter. The prosecution contended that the defendant killed the victim during a fight ". . . upon a sudden quarrel or heat of passion."[67] The defendant claimed self-defense. A defense witness testified that a few minutes prior to the killing, she observed a struggle between the defendant and the victim. She stated that during this encounter, the defendant was losing and attempting to retreat. Defense counsel then asked:

> Q. Who asked for your assistance, Gerry [the defendant] or Emily [the deceased]?
> A. Gerry.
> Q. And what did Gerry say. . . ?
> A. She was just yelling, "Berta [the witness], help me. Help me, Berta."
> Q. Emily wasn't asking for any help?
> A. No.[68]

The prosecution, in an attempt to impeach this testimony later introduced statements the witness had made to a third party the day after the event. The third party testified that the defense witness had

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testimony may also be admissible for impeachment. *See* text accompanying note 177 *infra*.

[63] *See* B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK, § 10.1 at 134 (1972).

[64] ". . . a tendency to contradict or disprove the testimony of any inference to be deduced from it." Hanton v. Pac. Elec. Ry. Co., 178 Cal. 616, 619, 174 P. 61, 62 (1918); "Any material variance. . ." MCCORMICK (2d ed.), *supra* note 4, at 68; "It is not a mere difference that suffices; nor yet is an absolute oppositeness essential. . ." 3A WIGMORE, *supra* note 7, § 1040 at 1048.

[65] *See* 3A WIGMORE, *supra* note 7, § 1040 at 1048 n.2.

[66] 71 Cal. 2d 933, 458 P.2d 43, 80 Cal. Rptr. 99 (1969).

[67] CAL. PEN. CODE § 192(1) (West 1972).

[68] 71 Cal. 2d at 941, 458 P.2d at 49, 80 Cal. Rptr. at 105.

told her that immediately preceding the killing, "[defendant] picked up a bottle . . . and broke it on the edge of the bar and was going to come towards [the victim . . . telling the victim] that she was going to get it."[69]

Although a comparison of the two statements did not reveal an express inconsistency, the California Supreme Court found that the two statements were inconsistent "in effect."[70] In reaching this result, the court did not specify any definitive criteria for finding inconsistency. Instead, it resorted to the rhetoric of two early California cases.[71] An analysis of the opinion does, however, suggest two possible bases for the finding of inconsistency. First, the overall impressions given by the two expressions appear to have been produced by differing beliefs.[72] The testimony suggested the witness believed that the defendant was acting in self-defense. The prior statements suggested she believed that it was the victim who was attempting to defend herself. An alternate basis for finding inconsistency is that the reasonable inferences to be drawn from the two statements were materially different.[73] The inference to be drawn from the trial testimony was that the victim was the aggressor. The inference from the prior statement was that the defendant was the aggressor.

These tests are admittedly general. Any attempt, however, to define more distinctly the permissible bounds of inconsistency probably would unduly inhibit the discretion of trial judges on what is a basically subjective issue. Since he is present when the testimony is given, the judge can evaluate the testimony and the offered impeaching statements in context. This observation is essential to the process of determining inconsistency and cannot be duplicated by review of the trial transcript on appeal.[74]

b. Lack of Recollection as an Inconsistency

At the scene of an accident a witness tells an investigating officer

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[69] *Id.* at 938, 458 P.2d at 47, 80 Cal. Rptr. at 103.

[70] *Id.* at 941, 458 P.2d at 49, 80 Cal. Rptr. at 105. The defendant's conviction was reversed on other grounds.

[71] "It is only necessary in order to render it admissible that the statement should have a tendency to contradict or disprove the testimony or any inference to be deduced from it." *Id.* at 942, 458 P.2d at 50, 80 Cal. Rptr. at 106, citing Hanton v. Pac. Elec. Ry. Co., 178 Cal. 616, 174 P. 61 (1918) and Worley v. Spreckels Bros. Comm. Co., 163 Cal. 60, 124 P. 697 (1912).

[72] *See* Gregoriev v. Northwestern Pac. R.R. Co., 95 Cal. App. 428, 273 P. 76 (1st Dist. 1928); 3A WIGMORE, *supra* note 7, § 1040 at 1048.

[73] *See* Fibreboard Paper Prod. Corp. v. East Bay Union, 227 Cal. App. 2d 675, 39 Cal. Rptr. 64 (1st Dist. 1964). *See also* Froeming v. Stockton Elec. R.R. Co., 171 Cal. 401, 408, 153 P. 712, 715-16 (1915); MCCORMICK (2d ed.), *supra* note 4, § 34 at 67.

[74] *See e.g.*, People v. Spencer, 71 Cal. 2d 933, 938 n.4, 80 Cal. Rptr. 99, 103 n.4, 458 P.2d 43, 47 n.4 (1969) (court forced to infer facts from transcript which would have been obvious to trial judge).

that a stoplight was red. At a later trial, the witness states that he does not remember the color of the light. Should the court allow the admission of the prior statement for impeachment?[75] If the inference from the witness' lack of recollection is that the light was red, there is no inconsistency and thus no basis for impeachment. If the inference is that the light was green, impeachment should be allowed. Since a witness' present lack of recollection is arguably consistent with the realities of human memory, perhaps the most logical approach is that no inference with respect to the color of the light can be drawn from such a lack of recollection.

Adopting the last approach, a majority of jurisdictions adhere to the basic rule that lack of recollection testimony is not subject to impeachment.[76] The rationale for this rule is that an "I don't remember" answer is not factually inconsistent with a previous statement on the subject.[77] While generally accepting this basic rationale,[78] some California courts expressed dissatisfaction with the mechanical application of such a rule to all cases.[79] When the witness was obviously hostile or recalcitrant, these courts noted that the witness was being protected at the expense of complete disclosure of the facts.[80] In these circumstances, the courts often used strained reasoning to justify the admission of extrinsic impeaching evidence.[81] Wigmore also felt that the majority rule of exclusion was offensive to the principle of admissibility of all relevant evidence. He supported admission of prior statements based on implied inconsistency when the witness claimed a loss of recollection.[82]

In *People v. Green*,[83] the California Supreme Court adopted a discretionary version of Wigmore's view as a narrow exception to the general rule forbidding impeachment of lack of recollection testimony by prior statements on the subject. In that case, the principal witness for the prosecution was a minor to whom the defendant had allegedly furnished marijuana. When originally questioned by police officers he stated that the defendant had given him a shopping bag of

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[75] *See generally* Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 CORNELL L.Q. 239 (1967).

[76] *See* 3A WIGMORE, *supra* note 7, § 1043 at 1059 and cases cited therein.

[77] *Id.*

[78] People v. Dice, 120 Cal. 189, 201, 52 P. 477, 482 (1898); People v. Creeks, 141 Cal. 529, 532, 75 P. 101, 102 (1904); *see* Bollinger v. Bollinger, 154 Cal. 695, 705, 99 P. 196, 201 (1908); Sponduris v. Hasler, 246 Cal. App. 2d 207, 214, 54 Cal. Rptr. 552, 556 (4th Dist. 1966).

[79] *See, e.g.*, Estate of Johnson, 152 Cal. 778, 783, 93 P. 1015, 1017 (1908).

[80] People v. LeBeau, 39 Cal. 2d 146, 148, 145 P.2d 302, 303 (1952).

[81] *Id.* at 150, 245 P.2d at 305.

[82] "It ought to follow that, where the witness now claims to be unable to recollect a matter, a former affirmation of it should be admitted as a [self] contradiction." 3A WIGMORE, *supra* note 7, § 1043 at 1059.

[83] 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494 (1971).

marijuana for sale. He repeated essentially this same statement at the defendant's preliminary hearing. When called to testify at trial, the witness admitted that he knew the defendant and that the defendant had contacted him about selling some marijuana. At this point, the witness' recollection of events became vague. After admitting he had in his possession a shopping bag containing 29 "Baggies" of marijuana, he alleged that he could not recall ". . . how I actually did get them."[84] When asked if someone had told him where to find the shopping bag, he conceded: "I suppose someone did tell me . . ." but reiterated that ". . . I can't say absolutely . . ." who it was.[85] The trial court then allowed the prosecutor to impeach the witness' testimony with the statement made to the police and with the preliminary hearing testimony. On appeal, the California Supreme Court ruled that the admission violated the defendant's sixth amendment right to confrontation.[86] The United States Supreme Court disagreed and vacated.[87] On remand to the California Supreme Court for further proceedings, the judgment of conviction was affirmed. The California Supreme Court ruled that the admissibility of extrinsic evidence in such circumstances should be left to the discretion of the trial judge:

> In normal circumstances, the testimony of a witness that he does not remember an event is not "inconsistent" with a prior statement by him describing that event. But justice will not be promoted by a ritualistic invocation of this rule of evidence. Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement, and the same principle governs the case of the forgetful witness. [citations omitted][88]

Although the court focused primarily on the sixth amendment issues,[89] an analysis of the opinion suggests several factors which the court considered in reaching its finding of inconsistency in effect. These factors were:

(1) The likelihood that the witness would forget the particular

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[84] *Id.* at 987, 479 P.2d at 1001, 92 Cal. Rptr. at 497.

[85] *Id.*

[86] People v. Green, 70 Cal. 2d 654, 451 P.2d 422, 75 Cal. Rptr. 782 (1969). The court based its decision on the belief that ". . . cross-examination at trial on prior testimony together with cross-examination at the time of the statement before a different trier of fact, is not a valid substitute for constitutionally adequate confrontation." *Id.* at 665, 451 P.2d at 429, 75 Cal. Rptr. at 789.

[87] California v. Green, 399 U.S. 149 (1970). ". . . the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events . . ." *Id.* at 164.

[88] People v. Green, 3 Cal. 3d 981, 988, 479 P.2d 998, 1002, 92 Cal. Rptr. 494, 498 (1971). The California Supreme Court has recently accepted for hearing a civil case involving impeachment of a forgetful witness. Clifton v. Ulis, L.A. 30570 (2 Civ. 46001), unpublished opinion, *hearing granted* January 19, 1976.

[89] 3 Cal. 3d at 989, 479 P.2d at 1008, 92 Cal. Rptr. at 499.

fact. The court found it inherently improbable that any witness would forget a major element of a criminal act in which he had participated.[90]

(2) The period of time that had elapsed since the underlying event. Only two months had passed between the alleged transfer and the trial.[91]

(3) The extent to which the particular witness' credibility was crucial to the case. Here, the testimony of the witness was the major factor in the prosecution's case. The only other major prosecution witness was the officer who originally interviewed the forgetful witness.[92]

(4) The nature of the extrinsic evidence of the previous statement. The danger of faulty reproduction was minimal since the prior statements had been documented by the witness' sworn testimony at a preliminary hearing and the testimony of a trained observer, a police officer.[93]

(5) Any other facts which affected the probative value of the proffered inconsistent statement or increased the likelihood of confusing the issues or consuming an undue amount of time. In this case, the witness had not claimed a complete lack of recollection, but instead had suffered from "selective amnesia." He had given direct answers to some questions, had evaded direct answers to others and had claimed to have completely forgotten only part of the events.[94] In addition, the witness had been markedly reluctant to testify against the defendant.[95]

The fundamental difficulty that the court faced in determining inconsistency in *Green* was the conflict between two strong policies. On one side, the court was unwilling to allow the deliberate obstruction of justice by an evasive and uncooperative witness.[96] On the other side, there appears to be no rational basis for impeaching a genuinely forgetful witness.[97] In resolving this conflict, the court verbalized the "inconsistency in effect" test to rationalize the decision. The underlying basis of the ruling, however, appears to be somewhat less complex. The court simply concluded that there was an

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[90] *Id.* at 988, 479 P.2d at 1002, 92 Cal. Rptr. at 498.
[91] *Id.* at 988 n.6, 479 P.2d at 1002 n.6, 92 Cal. Rptr. at 498 n.6.
[92] *Id.* at 985, 479 P.2d at 1000, 92 Cal. Rptr. at 496.
[93] *Id.* at 989-90, 479 P.2d at 1003, 92 Cal. Rptr. at 499.
[94] *Id.* at 985, 989, 479 P.2d at 1000, 1002, 92 Cal. Rptr. at 496, 498.
[95] *Id.* at 988, 479 P.2d at 1002, 92 Cal. Rptr. at 498.
[96] *Id.* at 987, 479 P.2d at 1002, 92 Cal. Rptr. at 498.
[97] ". . . in the normal course of human experience one's memory fades with time, it does not improve. Thus whereas a prior lack of memory is indeed 'inconsistent' with a present recollection, a present failure of memory is quite consistent with prior knowledge." People v. Sam, 71 Cal. 2d 194, 210 n.6, 454 P.2d 700, 709 n.6, 77 Cal. Rptr. 804, 813 n.6 (1969).

adequate factual basis for finding that the witness was lying. It then rejected the idea of protecting the defendant by means of perjured testimony. The court reasoned that the witness' ". . . deliberate evasion . . . in his trial testimony must be deemed . . . an implied denial that defendant did in fact furnish him with the marijuana as charged."[98] In this context, "deliberate evasion" is simply a euphemism for lying.

The procedure of determining "deliberate evasion" places the trial judge in the difficult position of having to decide the ultimate issue of the witness' credibility in order to determine the admissibility of facts preliminary to the resolution of this same issue by the jury. The trial judge must conclude that the witness is lying before allowing admission of inconsistent statements from which the jury can draw the same conclusion. Obviously, the courts cannot expressly state this procedure, since the assessment of witness credibility is the exclusive province of the trier of fact. Perhaps for this reason, trial judges have been reluctant to exercise this discretion and allow impeachment of a forgetful witness except on facts as extreme as those in *Green*.[99]

In cases where the facts are only slightly less compelling than those in *Green*, the courts tend to rely on an earlier California Supreme Court decision on the same issue.[100] In *People v. Sam*,[101] a witness testified that because he was drunk at the time, he did not remember an alleged assault by the defendant. Neither did he remember having made a statement about the assault to a police officer. The trial court allowed the prosecution to impeach this lack of recollection testimony.[102] In reversing the California Supreme Court noted that the witness claimed a complete lack of recollection and that ". . . a two year interval and considerable liquor have intervened between incident and trial, . . ."[103] The court found no inconsistency between the present lack of recollection and the prior statement.[104] The only inconsistency was between the witness' testimony that he was drunk at the time and the officer's testimony that he was sober. The court viewed the introduction of the contents of the witness' statements to the officer as a thinly disguised attempt to "bootstrap"

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[98] 3 Cal. 3d at 989, 479 P.2d at 1003, 92 Cal. Rptr. at 499.

[99] *See e.g.*, People v. Peterson, 23 Cal. App. 3d 883, 100 Cal. Rptr. 590 (1st Dist. 1972) (witness evasive, claimed only partial lack of recollection, impeachment allowed); People v. Barranday, 20 Cal. App. 3d 16, 97 Cal. Rptr. 345 (2d Dist. 1971); People v. Jackson, 3 Cal. App. 3d 921, 83 Cal. Rptr. 829 (1st Dist. 1970); *See* People v. Wheeler, 23 Cal. App. 3d 290, 100 Cal. Rptr. 198 (2d Dist. 1971).

[100] *See* People v. Carter, 46 Cal. App. 3d 260, 120 Cal. Rptr. 181 (2d Dist. 1975) and cases cited therein.

[101] 71 Cal. 2d 194, 454 P.2d 700, 77 Cal. Rptr. 804 (1969).

[102] *Id.* at 201, 454 P.2d at 703, 77 Cal. Rptr. at 807.

[103] *Id* at 210 n.6, 454 P.2d at 709 n.6, 77 Cal. Rptr. at 813 n.6.

[104] *Id.*

otherwise inadmissible hearsay into evidence.[105]

Thus counsel seeking to introduce a witness' prior statement to impeach a claimed lack of recollection at trial must argue that the facts of his case bring the testimony within the narrow *Green* exception to the general rule that, ". . . the right of impeachment does not exist where the witness states he has no recollection of the fact concerning which he is examined."[106] He should emphasize those factors which suggest that the witness is being deliberately evasive or that the asserted lack of recollection is inherently improbable.[107] The attorney arguing against the admission of impeaching extrinsic evidence should distinguish *Green* by demonstrating the absence of factors supporting an implication of deliberate evasion. The "bootstrap" argument advanced in *People v. Sam* can be particularly effective.[108]

In the area of lack of recollection testimony, the major distinction between the Federal Rules of Evidence and the California Evidence Code is that the federal rules define "unavailability of a witness" to include situations in which the witness, ". . . testifies to a lack of memory of the subject matter of his statement."[109] This definition allows the attorney in federal court to use the unavailability hearsay exceptions such as former testimony[110] and declarations against interest[111] to admit the prior statements. These exceptions are not available in the California courts when the witness is present and testifying.[112] Thus had Green been tried under current federal law, the witness' preliminary hearing statements would have been admissible as former testimony and his statement to the police officer would have been admissible as a declaration against penal interest. When the witness claims a lack of recollection and his statement does not qualify under a hearsay exception, a federal district court may still admit the prior communication as an inconsistent statement when it disbelieves the witness' testimony as to his lack of memory.[113]

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[105] *Id.* at 209 n.5, 454 P.2d at 709 n.5, 77 Cal. Rptr. at 813 n.5. For a similar condemnation of such "bootstrap" efforts, *see* People v. Woodberry, 10 Cal. App. 3d 695, 706, 89 Cal. Rptr. 330, 337 (2d Dist. 1970).

[106] People v. Carter, 46 Cal. App. 3d 260, 264, 120 Cal. Rptr. 181, 184 (2d Dist. 1975); *accord,* People v. Shipe, 45 Cal. App. 3d 184, 119 Cal. Rptr. 663 (5th Dist. 1975).

[107] In People v. Parks, impeachment of lack of recollection testimony was not allowed because the prosecution failed to establish that the witness ". . . was deliberately evasive or that her asserted lapse of memory was untrue. . . ." 4 Cal. 3d 955, 960, 485 P.2d 257, 260, 95 Cal. Rptr. 193, 196 (1971).

[108] *See* text accompanying note 105 *supra.*

[109] FED. R. EVID. 804(a)(3) *supra* note 24.

[110] FED. R. EVID. 804(b)(1) *supra* note 24. *See* Comment, *Former Testimony: A Comparison of the California and Federal Rules of Evidence,* this volume.

[111] FED. R. EVID. 804(b)(3) *supra* note 24. *See* Comment, *Declarations Against Interest in California and Federal Courts,* this volume.

[112] CAL. EVID. CODE § 240 (West 1968).

[113] H. REPT. NO. 93-650, 15, *citing* United States v. Isana, 423 F.2d 1165, 1170

The concept of inconsistency is probably not subject to precise definitions. Verbal formulations by the California courts in their attempts to define "inconsistency" are analagous to the United States Supreme Court's attempts to define "obscenity."[114] Perhaps both are equally doomed to failure. Recent cases suggest that the appellate courts have recognized this fact in part and increasingly have left the issue to the trial court's discretion.[115] This is probably the only reasonable solution to the problem. For the practitioner, this trend increases the importance of effective courtroom presentation technique. For example, when a witness claims a lack of recollection, if the attacking party can convince the judge that the witness is "deliberately evasive," he will probably be allowed to impeach the witness' lack of recollection testimony. Although the ultimate weight to be given to this evidence remains with the trier of fact, the critical determination of admissibility is governed by the court's own assessment of the witness' credibility.

3. SUBJECT MATTER LIMITATIONS ON THE SCOPE OF IMPEACHMENT

In determining the subject matter limitations on the permissible scope of impeachment, a witness' testimony can be placed into one of three categories: (1) testimony directly relevant to the issues at trial; (2) testimony relevant to the witness' own bias, interest, corruption or lack of skill and knowledge; and (3) irrelevant testimony introduced without objection. Prior to the enactment of the Evidence Code, these categories assumed critical significance as a result of judicial application of the so-called "collateral rule."[116] Any offer of extrinsic impeaching evidence which fell into a category deemed by the court to be "collateral" was automatically rejected. The rule presented two major problems. First, although all courts agreed that evidence relevant to the issues at trial was non-collateral and that irrelevant evidence was collateral, there was disagreement with respect

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(2d Cir.), *cert. denied*, 400 U.S. 841 (1970) (recalcitrant witness, lack of recollection impeached by prior statements). *See also* Bowman v. Kaufman, 387 F.2d 582, 588-89 (2d Cir. 1967) (error to exclude statement when witness denied having any recollection). The Ninth Circuit Court of Appeals has taken an approach similar to the California Supreme Court in People v. Green. *See* United States v. Washabaugh, 442 F.2d 1127 (9th Cir. 1971); Benson v. United States, 402 F.2d 576 (9th Cir. 1968); Williamson v. United States, 310 F.2d 192, 199 (9th Cir. 1962); Bush v. United States, 267 F.2d 483, 489 (9th Cir. 1959).

[114] *Compare* Miller v. California, 413 U.S. 15, 30 (1973) *with* Roth v. United States, 354 U.S. 476, 488-89 (1957) *and* Jenkins v. Georgia, 418 U.S. 153, 160 (1974).

[115] *See e.g.*, People v. Allen, 41 Cal. App. 3d 196, 115 Cal. Rptr. 839 (1st Dist. 1974).

[116] *See generally* 3A WIGMORE, *supra* note 7, §§ 1020-23 at 1009-20; WITKIN, *supra* note 20, §§ 1259-69 at 1162-76; MCCORMICK (2d ed.) *supra* note 4, § 36 at 70-72.

to evidence relevant only to certain aspects of the witness' credibility. Second, with very few exceptions, the rule was mechanically applied without reference to the unique circumstances of a particular case. The Evidence Code replaced this inflexible rule of exclusion with a rule of discretion to be exercised by the trial judge.[117] The collateral rule retains significant vitality, however, since it still provides the basic framework within which discretionary rulings are made.[118] The courts have treated the discretionary provisions of the Evidence Code merely as giving license to find exceptions to the former mandatory rules of exclusion. This section will discuss the rationale and interpretation of the collateral rule and the current guidelines which define the limits of permissible subject matter for impeachment.

a. Pre-Code Rule of Mandatory Exclusion

Assume that a witness testifies that as he was leaving a church, he looked down the street and saw a friend drive his car through a red light. Assume further that the cross-examining party has discovered previous statements made by the witness that the light was green, that he hated the driver of the car and that he was leaving an "adult" bookstore and not a church just before the event.

Prior to enactment of the Evidence Code, California courts would not have had difficulty ruling on the statement concerning the color of the light. Impeachment would have been allowed, since the statement related to a fact at issue.[119] They also would have dealt summarily with the statement concerning the witness' whereabouts prior to the event. Had the witness said nothing on the subject, the opposing counsel would not have been allowed to even raise the issue. Since the testimony was irrelevant when given, courts would have ruled that it was "collateral" and therefore not impeachable.[120]

The remaining statement would have been dealt with according to the particular court's interpretation of the "collateral rule." Early courts construed the rule strictly, allowing impeachment only of testimony directly relevant to the issues raised by the pleadings.[121] These courts would not have allowed the admission of the statement of the witness' attitude toward the driver for impeachment purposes,

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[117] CAL. EVID. CODE § 780, Law Rev. Comm'n Comment (West 1968), cited with approval in People v. Eisenberg, 266 Cal. App. 2d 606, 615, 72 Cal. Rptr. 390, 296 (2d Dist. 1968).

[118] *See* WITKIN, *supra* note 20, § 1259 at 1163.

[119] *See* People v. Devine, 44 Cal. 452 (1872).

[120] A separate problem might have been raised with respect to the so-called "open the gate" argument. *See* text accompanying note 128 *infra*.

[121] People v. Devine, 44 Cal. 452, 458 (1872).

since it did not relate to the issue of the driver's negligence.[122] Later courts applied the rule less restrictively. They admitted facts which related to the witness' bias, interest, corruption, and lack of skill and knowledge, since such facts were independently admissible for impeachment without regard to their inconsistency with present testimony.[123] For example, the opposing party could have introduced the witness' statement that he hated the driver to show his bias, even if he had not later testified that the driver was his friend. Thus the statement that the witness hated the driver would not have been classified as collateral, and would have been admissible as a prior inconsistent statement.

In rigidly enforcing the collateral rule, the courts attempted to conserve time and to avoid confusing the jury[124] with the formation of a new issue which would then be the object of additional proof. The witness' testimony that he had just come out of a church illustrates this consideration. To allow impeachment of this testimony would have raised a new issue for jury determination: where was the witness before he observed the incident? Both the plaintiff and defendant might have wished to offer evidence on this issue. Testimony of each witness would have been subject to cross-examination and attacks could have been launched on these witnesses' credibility. Meanwhile, the jury might well have lost sight of the major issue: was the light red or green? In order to eliminate this potentially infinite expansion of trial testimony, the courts limited impeachment to matters which were relevant under the pleadings or which the party could have attacked even had the witness said nothing on the subject.

b. Exceptions to Pre-Code Rule of Mandatory Exclusion

In California, two exceptions to the collateral rule evolved. Once the statement had been classified as collateral, the rule was applied only when the attacking party sought to introduce extrinsic evidence to impeach a witness' testimony on the collateral matter. The cross-examiner was allowed to seek the witness' admission of inconsistency. He was, however, required to "take the answer."[125] Thus opposing counsel could have asked the witness if he told an investigat-

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[122] CAL. EVID. CODE § 210 (West 1968): "'Relevant evidence' means evidence, including evidence relevant to the credibility of the witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

[123] People v. Wells, 33 Cal. 2d 330, 340, 202 P.2d 53, 59 (1949), and cases cited therein.

[124] *See* 3A WIGMORE, *supra* note 7, § 1019 at 1007-09.

[125] *See* Trabing v. Cal. Navigation Co., 121 Cal. 137, 53 P. 644 (1898); Tellefsen v. Key System Transit Lines, 158 Cal. App. 2d 243, 322 P.2d 469 (1st Dist. 1958); MCCORMICK (2d ed.), *supra* note 4, § 36 at 70.

ing officer that he was leaving an "adult" bookstore and not a church. If the witness denied making the statement, the cross-examiner could not introduce the officer's testimony on this point. The rationale for this rule was that it eliminated the danger of undue consumption of time. Although less probative with respect to credibility than a showing of inconsistency on a relevant matter, an admission of the collateral inconsistency was also deemed to be of some value to the jury in its assessment of the witness' testimony.[126]

A second exception to the rule distinguished between collateral testimony raised on direct examination and collateral testimony elicited on cross-examination. When the cross-examiner raised the issue by his own questions, the collateral rule was applied rigidly. This was true even when the answer was highly damaging to his case. As one court noted, "A party cannot cross-examine his adversary's witness upon irrelevant matters for the purpose of eliciting something to be contradicted."[127] When the collateral testimony was given on direct examination, however, some courts recognized an extremely limited class of exceptions. The argument was advanced that by volunteering the collateral matter, the witness and the party calling him had "opened the gate." Since the proponent of the witness had raised the issue, the opposing party should have the opportunity to rebut the testimony, even though it was collateral.[128] The few cases in which the "open the gate" argument was accepted were those in which the irrelevant testimony volunteered on direct examination was so highly prejudicial to the opposing party that a mere objection or motion to strike would have been ineffectual.[129] In the majority of cases, the courts rejected the "open the gate" argument.[130] The party seeking to impeach could have "closed the gate" by objecting to the testimony when it was given. Failure to object to irrelevant testimony on direct examination did not justify eliciting further irrelevant testimony on cross-examination.[131]

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[126] *See* 3A WIGMORE, *supra* note 7, § 1023 at 1019.

[127] People v. Dye, 75 Cal. 108, 112, 16 P. 537, 539 (1888).

[128] *See* WITKIN, *supra* note 20, § 1267 and cases cited therein.

[129] *See generally* WITKIN, *supra* note 20, §§ 1267-69 at 1173-76. In most of the reported cases, the witness grossly overstated a proposition. *See e.g.*, People v. Westek, 31 Cal. 2d 469, 475, 190 P.2d 9, 13 (1948) (witness testified he had never committed certain sexual acts); People v. Lindsey, 90 Cal. App. 2d 558, 203 P.2d 572 (2d Dist. 1949) (witness stated that he had not been in city where crime committed for a long period of time). The extrinsic evidence offered in most of these cases was prior inconsistent non-assertive conduct. *See* text accompanying note 57 *supra*.

[130] *See* Dastagir v. Dastagir, 109 Cal. App. 2d 809, 815, 241 P.2d 656, 660 (2d Dist. 1952).

[131] People v. McDaniel, 59 Cal. App. 2d 672, 677, 140 P.2d 88, 90 (2d Dist. 1943). *See* People v. Gambos, 5 Cal. App. 3d 187, 192, 84 Cal. Rptr. 908, 911 (1st Dist. 1970) (so-called "open the gates" argument fallacious).

c. Post-Code Application of the Collateral Rule

The Evidence Code does not mention the collateral rule as a basis for exclusion. An attempt to impeach a witness on a collateral matter will therefore most often be met by an objection based on Evidence Code section 352.[132] This provision directs the trial courts to undertake a balancing process in determining admissibility. On one hand, courts must evaluate the probative value of the impeaching statement with respect to the witness' credibility. On the other hand, they must weigh the probability that admission will waste time, confuse the issues, or prejudice the parties. Theoretically, the objecting party has the burden of showing that the probative value of the proposed extrinsic impeaching evidence is outweighed by the other factors.[133] However, based on the limited number of cases on this point, it appears that once the objecting party has shown the issue to be collateral, the burden of argument is effectively shifted to the impeaching party.[134] This shift results from the continued acceptance by the California courts of the underlying rationale for the former exclusionary rule. Although not specifically stated, the logic of the courts appears to be that "collateral" evidence was formerly excluded because there was an irrebuttable presumption that it wasted time and confused the issues,[135] and that the only effect of the Evidence Code was to make this presumption rubuttable.[136] Post-Code California courts have uniformly rejected efforts to impeach on collateral matters in situations where the offered extrinsic evidence would have been excluded under the former rules.[137] Thus impeachment of testimony elicited on cross-examination has not been allowed when the contradiction has been of low probative value,[138] or when the intro-

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[132] CAL. EVID. CODE § 352 (West 1968):

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

A number of cases which have dealt with the issue have been concerned with collateral impeachment by means of contradiction or specific error. *See* text accompanying note 7 *supra*. But the underlying rationale is equally applicable to impeachment on collateral matters by means of prior inconsistent statements. For a general discussion of the approach of the courts *see* People v. Lavergne, 4 Cal. 3d 735, 94 Cal. Rptr. 405, 484 P.2d 77 (1971).

[133] *See* CAL. EVID. CODE § 353, Assem. Jud. Comm. Comment (West 1968); The requirement that the specific ground for the objection must be stated is implicit in the provisions of § 353.

[134] *See e.g.*, People v. Moses, 24 Cal. App. 3d 384, 390, 100 Cal. Rptr. 907, 910 (2d Dist. 1972).

[135] *Id.*

[136] *Id.* at 394, 100 Cal. Rptr. at 912.

[137] *See e.g.*, People v. Lavergne, 4 Cal. 3d 735, 94 Cal. Rptr. 405, 484 P.2d 77 (1971).

[138] *See e.g.*, May v. May, 275 Cal. App. 2d 264, 274, 79 Cal. Rptr. 622, 626 (2d

duction of extrinsic impeaching evidence would have confused the issues,[139] unduly consumed time,[140] or caused prejudice to the proponent of the witness.[141] Apparently, the only situation in which impeachment by inconsistent statements on a collateral matter has been allowed is where the witness volunteers testimony on direct examination which would have been highly prejudicial to the opposition if left unrebutted.[142]

The Federal Rules of Evidence relating to impeachment on collateral matters are largely consistent with the California approach. Rules 401, 402, and 403[143] give the federal district judge discretion with respect to the admission of evidence, including the introduction of inconsistent statements to impeach on collateral matters.[144] Although Weinstein criticizes some courts for an overly mechanical approach,[145] it appears that most circuits are flexible in their treatment of impeachment on collateral matters.[146] When the offered extrinsic evidence has a high probative value with respect to the witness' credibility and the probability of prejudice is slight, an attorney in federal court may be able to impeach on a collateral matter.[147]

Dist. 1969).

[139] *See e.g.*, People v. Moses, 24 Cal. App. 3d 384, 390, 100 Cal. Rptr. 907, 910 (2d Dist. 1972).

[140] *Id.*

[141] *See e.g.*, People v. Pierce, 269 Cal. App. 2d 193, 205, 75 Cal. Rptr. 257, 264 (3d Dist. 1969).

[142] *See* text accompanying note 129 *supra*.

[143] FED. R. EVID. 401 *supra* note 24: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 402 *supra* note 24: "All relevant evidence is admissible except as otherwise provided. . . . Evidence which is not relevant is not admissible." FED. R. EVID. 403 *supra* note 24: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[144] *See* 3 WEINSTEIN, *supra* note 20, ¶ 607[06] at 607-74:

> The approach most consonant with the federal rule's primary emphasis on truth finding would be to adopt the flexible approach suggested in United States v. Insana (423 F.2d 1165 (2d Cir. 1970)) and allow the court 'discretionary latitude' in the search for truth to assess the circumstances of the particular case, subject, of course, to any constitutional confrontation limitations that may exist in criminal cases.

[145] *See Id.* at 607-61 and cases cited therein. *See also* Agnellino v. State of New Jersey, 493 F.2d 714 (3d Cir. 1974) (three-judge panel presented nearly the entire spectrum of theories on the subject in separate opinions).

[146] *See* Arpan v. United States, 260 F.2d 649, 658, 659-61 (8th Cir. 1958) (discussion of the balance between probative value and possible prejudice).

[147] The Ninth Circuit Court of Appeals has developed a flexible approach in this area. *See* United States v. Pitman, 475 F.2d 1335 (9th Cir.), *cert. denied*, 414 U.S. 873 (1973); *cf.* Macklin v. United States, 410 F.2d 1046, 1048 (D.C. Cir. 1969): "It is difficult to attach impeaching quality to the evidence. Assuming,

In summary, the discretionary aspects of the exclusionary rules have made few changes in prior practice. Although no longer automatically rejected, impeachment on a collateral matter will be subject to close judicial scrutiny.[148] An inconsistent statement of low probative value with a potentially great prejudicial effect will still be excluded.[149]

B. SPECIAL APPLICATIONS

The previous sections have focused on impeachment during cross-examination of an opponent's witness concerning his testimony based on personal knowledge with respect to the facts at issue. The courts have traditionally given special treatment to impeachment of other types of testimony.[150] Although the Evidence Code to a great degree has dispensed with these formalized distinctions, some of the former rules remain in effect.

1. IMPEACHMENT OF OWN WITNESS

Evidence Code section 785 provides that a party may impeach his own witness.[151] Under the early common law, this procedure was strictly prohibited.[152] The former rule was rationalized on various grounds. First, the courts felt that by calling a witness, a party vouched for his trustworthiness.[153] Second, the courts generally mistrusted the practice of allowing a party to attack his own witness' credibility.[154] The courts noted that this type of impeachment was particularly subject to abuse. It was seen as a mere device to get otherwise inadmissible hearsay before the jury.[155]

The California Legislature, recognizing that in most cases a party has no real control over the selection of witnesses, enacted Code of Civil Procedure sections 2049 and 2051.[156] These sections permitted

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however, that it had some relevance in that regard, 'Whatever probative value this evidence had, it was outweighed by its prejudicial effect.' [citation omitted]"

[148] *See In re* Ferguson, 5 Cal. 3d 525, 487 P.2d 1234, 96 Cal. Rptr. 594 (1971); People v. Fusaro, 18 Cal. App. 3d 877, 96 Cal. Rptr. 368 (3d Dist. 1971).

[149] *See e.g.*, People v. Hopper, 268 Cal. App. 2d 774, 778 n.2, 75 Cal. Rptr. 253, 255 n.2 (3d Dist. 1969): "To all appearances, the prosecution was not interested in attacking the witness' admission of escape, but in merely inoculating the record with her extrajudicial statement for its own sake."

[150] *See generally*, 3A WIGMORE, *supra* note 7 § 1033 (hearsay) and § 1041 (opinion).

[151] CAL. EVID. CODE § 785 (West 1968): "The credibility of a witness may be attacked or supported by any party, including the party calling him."

[152] *See* MCCORMICK (2d ed.), *supra* note 4, § 38 at 75 and cases cited therein.

[153] *See* People v. Anderson, 26 Cal. 129, 134 (1864) (party calling witness endorses his credibility and is concluded by his statement).

[154] *See* People v. Creeks, 141 Cal. 529, 532, 75 P. 101, 103 (1904): "If such testimony were admissible, it would be easy to manufacture evidence of that kind."

[155] *See* People v. Williams, 104 Cal. App. 2d 323, 231 P.2d 554 (3d Dist. 1951); People v. Brown, 81 Cal. App. 226, 253 P. 735 (2d Dist. 1927).

[156] CAL. CODE CIV. P. §§ 2049, 2051 (1872), repealed by CAL. STAT. 1965,

impeachment of a party's own witness under certain limited circumstances. First, the party seeking to impeach was required to show that he was actually surprised by the testimony of the witness.[157] Second, the examiner could not impeach unless the "surprise" testimony caused actual damage to his case.[158] The courts rigidly construed these restrictions in an attempt to avoid admitting hearsay evidence. In particular, a party was prevented from proving prior inconsistent statements of his own witness when it appeared that the statements' only value was as substantive evidence of the facts asserted.[159]

Evidence Code section 1235[160] created a hearsay exception for inconsistent statements. Enactment of this provision eliminated the reason for the previous restrictions.[161] Currently, if the prior statement both is inconsistent and relates to an independently provable matter, the impeaching party can use it against his own witness.[162]

2. *IMPEACHMENT OF A HEARSAY DECLARANT*

Prior to the enactment of the Evidence Code, California courts distinguished between various types of hearsay statements for the purpose of impeachment. For example, the courts treated statements made before and after former testimony in different manners. Statements made after the former testimony could be used for impeachment; those made before could not.[163] Similar distinctions existed for statements covered by other hearsay exceptions.

Ch. 299, § 785.

[157]The attacking party could not merely allege surprise. He was required to show by affirmative evidence some basis for such a claim. *See* Estate of Relph, 192 Cal. 451, 221 P. 361 (1923) (no surprise when testimony was consistent with pretrial statements).

[158]"Where a witness called by a party has simply failed to testify to all that a party expected or desired, but has not given testimony against him, it is not permissible for the party calling him to prove that such witness had previously made statements which, if sworn to at trial would tend to make out his case." People v. Creeks, 141 Cal. 529, 532, 75 P. 101, 102 (1904); *accord* People v. Spinosa, 115 Cal. App. 2d 659, 252 P.2d 409 (1st Dist. 1953).

[159]*See* Anthony v. Hobbie, 85 Cal. App. 2d 798, 803, 193 P.2d 748, 751 (3d Dist. 1948) (obvious effort to introduce hearsay). Some courts added the requirements that the impeaching party show the necessity of the testimony of the witness and actual evasiveness or hostility. *See* People v. Flores, 37 Cal. App. 2d 282, 287, 99 P.2d 326, 329 (2d Dist. 1940).

[160]For text of CAL. EVID. CODE § 1235, *see* note 19 *supra.*

[161]*See* People v. Stanley, 67 Cal. 2d 812, 433 P.2d 913, 63 Cal. Rptr. 825 (1967) (former rule characterized as an anachronism); *See also* CAL. EVID. CODE § 785, Law Rev. Comm'n Comment (West 1968): "Expanded opportunity for testing credibility is in keeping with the interest of providing a forum for full and free disclosure."

[162]*See* People v. Chacon, 69 Cal. 2d 765, 779-80, 447 P.2d 106, 115, 73 Cal. Rptr. 10, 19 (1968).

[163]People v. Greenwell, 20 Cal. App. 2d 266, 66 P.2d 674 (2d Dist. 1937).

The Legislature attempted to simplify the conflicting common law positions regarding impeachment of various types of hearsay statements by enacting Evidence Code section 1202.[164] This section provides that the hearsay statements of a declarant which are admitted into evidence may be attacked by the use of inconsistent statements, even though the declarant has no opportunity to explain the inconsistency. Assume for example that a witness testified he saw the defendant in a criminal proceeding running out of a store immediately after a robbery, that the defendant's conviction was reversed on appeal, and that the witness died before a second trial could be held. The testimony of the witness at the first trial could be admitted at the second trial under the hearsay exception for former testimony.[165] Assume that the defense attorney discovers that the witness told a friend that he really couldn't identify the person running from the store. Despite the fact that the declarant is obviously not present to explain the inconsistency, this impeaching inconsistent statement would be admissible regardless of whether it was made before or after the first trial. The rationale for this provision is that the party against whom the evidence is admitted should not be deprived of both his right to cross-examine and his right to impeach.[166]

Three additional aspects of the provision are significant. First, impeachment of a hearsay declarant is subject to the same rules of admissibility which apply to impeachment of a witness who is testifying in court. The impeaching statement must be inconsistent, it must not be collateral,[167] and it is subject to an Evidence Code section 352 objection.[168] Second, a party may not impeach hearsay testimony which he has introduced.[169] Finally, the inconsistent statements of a hearsay declarant are not admissible as substantive evidence under Evidence Code section 1235.[170]

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[164] CAL. EVID. CODE § 1202 (West 1968):

> Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. . . .

[165] *See* CAL. EVID. CODE §§ 1290, 1291 and 1292 (West 1968) (former testimony hearsay exception).

[166] CAL. EVID. CODE § 1202, Law Rev. Comm'n Comment (West 1968).

[167] Am-Cal Inv. Co. v. Sharlyn Estates, 255 Cal. App. 2d 526, 63 Cal. Rptr. 518 (4th Dist. 1967) (trial judge erred twice — first in allowing inadmissible hearsay and second in refusing to admit impeaching inconsistent statement).

[168] *See* CAL. EVID. CODE § 1202, Law Rev. Comm'n Comment (West 1968).

[169] People v. Beyea, 38 Cal. App. 3d 176, 193, 113 Cal. Rptr. 254, 265 (1st Dist. 1974).

3. IMPEACHMENT BY MEANS OF PRIOR STATEMENTS OF OPINION

Impeachment of a witness' testimony by prior inconsistent statements of opinion presents unique problems. Traditionally, the courts have approached this issue initially by classifying the type of witness who is testifying.[171] The majority of courts, including those of California, hold that an expert witness' opinion can be impeached by the introduction of evidence of his inconsistent opinion on the same matter.[172] When a lay witness testifies to specific facts and impeachment is sought by means of his prior general opinion on the merits of the controversy, there is a greater diversity in the decisions. Some jurisdictions continue to adhere to a rule which excludes prior inconsistent impeaching opinions.[173] California and several other states endorse Wigmore's view that:

> . . . the only proper inquiry can be, is there within the broad statement of opinion on the general question some implied assertion of fact inconsistent with the other assertion made on the stand? If there is, it ought to be received, whether or not it is clothed in or associated with an expression of opinion.[174]

For example, in a personal injury action, a witness testified to specific facts which indicated that the plaintiff had time to board a train before it started. In a previous statement, the witness had expressed the opinion that the train had started before the plaintiff boarded. The California Supreme Court held that the opinion statement should have been admitted for impeachment.[175] Thus the problem is essentially one of finding an inconsistency.[176] When an inconsistency can be inferred, the impeaching statement should be admitted. Although there are no cases precisely on point, the same reasoning should apply when a lay witness is allowed to give opinion testimony and impeachment is sought by means of a prior inconsistent statement of fact or opinion.

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[170] CAL. EVID. CODE § 1202, Law Rev. Comm'n Comment (West 1968):

> If the declarant is not a witness and is not subject to cross examination upon the subject matter of his statements, there is no sufficient guarantee of the trustworthiness of the statements he has made out of court to warrant their reception as substantive evidence unless they fall within some recognized exception to the hearsay rule.

[171] *See* Grady, *The Admissibility of a Prior Statement of Opinion for Purposes of Impeachment*, 41 CORNELL L.Q. 224 (1956) [hereinafter cited as Grady].

[172] San Diego Land Co. v. Neale, 88 Cal. 50, 25 P. 977 (1891) (property value); State *ex rel.* State Public Works Board v. Stevenson, 5 Cal. App. 3d 60, 84 Cal. Rptr. 742 (3d Dist. 1970) (property value); *See* 3A WIGMORE, *supra* note 7, § 1041 and cases cited therein for holdings from other states.

[173] *See* Grady, *supra* note 171 at 230-39.

[174] 3A WIGMORE, *supra* note 7, § 1041 at 1052.

[175] Hanton v. Pac. Elec. Ry. Co., 178 Cal. 616, 619, 174 P. 61, 64 (1918).

[176] *See* text accompanying note 72 *infra*.

4. SUBSEQUENT STATEMENTS

Evidence Code section 780(h) does not require that the impeaching statement have been made prior to the testimony to be impeached.[177] Although the vast majority of cases involve prior inconsistent statements, subsequent inconsistent statements also may be admissible. Assume for example that a witness makes statements to the press which conflict with testimony that he previously gave at trial. Under the basic rationale for the inconsistent statement rule, there is no reason why these subsequent statements should be treated any differently than prior statements to attack the witness' credibility. The fact that the statement was made after and not before the witness' testimony is of no significance to the issue of the witness' capability for making errors.[178] The admission of such statements is still governed by the discretionary provisions of Evidence Code section 352.[179] On objection, the court will weigh the probative value of the subsequent inconsistent statement against its potential for confusing the jury and wasting time.[180]

III. THE FOUNDATION REQUIREMENT

Statements inconsistent on their face with trial testimony may not be inconsistent in fact if the witness whose credibility is being attacked explains or puts them in context.[181] To insure that all relevant testimony is before the trier of fact and that the attack on the witness is valid, the courts have said that the witness must be given the opportunity to explain any discrepancies between a prior statement and his testimony.[182] Traditionally, this opportunity was afforded by requiring the impeaching party to lay a "foundation" before offering extrinsic evidence of the inconsistency.[183] Besides accomplishing full disclosure of the relevant facts, this requirement helped prevent unfair surprise[184] and saved time.[185]

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[177] *See* WITKIN, *supra* note 20, § 1253 at 1156.

[178] *See, e.g.*, People v. Collup, 27 Cal. 2d 829, 167 P.2d 714 (1946).

[179] For text of CAL. EVID. CODE § 352 *see* note 132 *supra.*

[180] *See* People v. Redston, 139 Cal. App. 2d 485, 497, 293 P.2d 880, 887 (2d Dist. 1956).

[181] *See generally* MCCORMICK, *supra* note 4, § 37 at 72.

[182] Baker v. Joseph, 16 Cal. 173, 177 (1860) (principles of justice require that the witness have a fair opportunity to explain).

[183] A complete foundation was not required when the impeacher merely sought an admission of inconsistency from the witness. *See* text accompanying note 125 *supra.*

[184] People v. Collup, 27 Cal. 2d 836, 167 P.2d 714 (1946); Rignell v. Font, 90 Cal. App. 730, 266 P. 588 (1st Dist. 1928).

[185] People v. Kennedy, 21 Cal. App. 2d 185, 69 P.2d 224 (3d Dist. 1937) (when witness admits making statement, no need to introduce extrinsic evidence).

A. FORMER RULE

The "foundation rule" was codified in California in 1872.[186] It required that before extrinsic evidence of the inconsistent impeaching statement could be introduced, the witness: (1) had to be informed of the times, places, and persons present when he allegedly made the inconsistent statements; (2) had to be asked if he made the alleged statements; and (3) had to be allowed to explain the inconsistency if he admitted making the statements.[187] California courts strictly construed the foundation requirements.[188] The slightest deviation by the examiner from the statutory formula resulted in exclusion of any extrinsic evidence offered to impeach the present testimony.[189] In no case could the extrinsic impeaching evidence be introduced before the foundation was laid.[190]

While generally agreeing that the foundation rule served a valid function, commentators criticized two aspects of its application.[191] First, they noted that rigid adherence to the specific requirements by the courts tended to exalt form over substance.[192] Thus if the witness had been given adequate information to identify the prior statement, there was little justification for excluding impeaching extrinsic evidence merely because the cross-examiner had failed, for example, to give the correct date or to name all of the persons present.[193] Second, the authorities criticized the limitations which the warning function placed upon effective cross-examination.[194] The foundation questions alerted the witness and any collusive witnesses in the courtroom that the examiner had extrinsic evidence which he was going to use to impeach the witness.[195] The foundation requirement thus allowed hostile witnesses to fabricate explanations for the inconsis-

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[186] CAL. CODE CIV. P. § 2049 (1872), *repealed by* CAL. STAT. 1965, Ch. 299, § 770. *See generally* 3A WIGMORE, *supra* note 7, §§ 1025-29; MCCORMICK (2d ed.), *supra* note 4, § 37.

[187] CAL. CODE CIV. P. § 2049 (1872), *repealed by* CAL. STAT. 1965, Ch. 299, § 770. *See, e.g.*, People v. Raven, 44 Cal. 2d 523, 525, 282 P.2d 866, 867 (1955).

[188] For an excellent summary of the application of the former rules *see* J. MCBAINE, CALIFORNIA EVIDENCE MANUAL § 31 at 38 (1948).

[189] *See, e.g.*, People v. Compton, 132 Cal. 484, 64 P. 849 (1901) (failure to lay complete foundation not excused by extenuating circumstances); People v. Greenwell, 20 Cal. App. 2d 266, 66 P.2d 674 (2d Dist. 1937).

[190] *See* People v. Compton, 132 Cal. 484, 64 P. 849 (1901) (impeachment denied because of lack of foundation even though witness was unavailable).

[191] *See generally* Hale, *supra* note 12, at 136; MCCORMICK (2d ed.), *supra* note 4, § 37 at 73.

[192] "... the rule which requires no foundation is not to be commended. ... However, it doubtless is possible to follow this rule, calling for foundations too slavishly." Hale, *supra* note 12, at 136.

[193] *See, e.g.*, People v. Garnett, 29 Cal. 622 (1866); People v. Jenkins, 56 Cal. 4 (1880).

[194] *See* 3A WIGMORE, *supra* note 7, § 1027.

[195] CAL. EVID. CODE § 770, Law Rev. Comm'n Comment (West 1968).

tency and collusive witnesses to change their stories before testifying. Assume for example in a will contest that a beneficiary has bribed two individuals to witness a forged will. Assume further that before the beneficiary is called as the first witness, the opposing party has discovered a letter from the beneficiary to his two accomplices which states he will "reward" them after the trial. If the cross-examiner is forced to reveal his possession of the letter while questioning the beneficiary, there is a possibility that the beneficiary would be able to change his story to explain the letter. Further, the collusive witnesses would also be able to modify their testimony to back up the beneficiary's testimony. Evidence Code section 770 was an attempt to overcome the rigidity and warning problems while maintaining the benefits of the pre-Code foundation rule.

B. CURRENT FOUNDATION REQUIREMENTS

California Evidence Code section 770 provides that:

> Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:
>
> (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or
>
> (b) The witness has not been excused from giving further testimony in the action.[196]

Under this provision, a party seeking to introduce extrinsic impeaching evidence may fulfill the foundation requirement in one of two ways. First, under Evidence Code section 770(a), the impeaching party may use the traditional method of confronting the witness with a prior statement inconsistent with his testimony during cross-examination. The Evidence Code provision has a significant advantage over the former rules in that the absence of a prescribed format (time, place, persons present, etc.) allows the examiner greater latitude in fulfilling the requirement. Any reference which adequately refreshes the witness' memory of the circumstances and substance of the inconsistent statement will suffice.[197] Evidence Code section 770(a) has two major disadvantages. First, California and a minority of other states preclude the examiner from introducing extrinsic evidence if the witness admits making the inconsistent statement.[198] Use of extrinsic evidence may be more desirable than the witness' admission because of the dramatic effect of producing it in tangible

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[196] CAL. EVID. CODE § 770 (West 1968).

[197] People v. Strickland, 11 Cal. 3d 946, 523 P.2d 672, 114 Cal. Rptr. 632 (1974) (foundation requirement filled by general cross-examination of witness).

[198] People v. Sykes, 44 Cal. 2d 166, 172, 280 P.2d 769, 772, *cert. denied*, 349 U.S. 934 (1955): "Once the witness admitted the inconsistent statements, it would have been error to introduce other evidence of them." People v. Perez, 189 Cal. App. 2d 526, 536, 11 Cal. Rptr. 456, 461 (2d Dist. 1961) (exception to rule when opposing counsel stipulated statements).

documentary or testimonial form. The admission may diminish the impact of the inconsistency on the jury.[199] Second, the witness must be given the opportunity to explain the inconsistency during the examination. Thus the problems of altering the testimony of hostile and collusive witnesses and providing an opportunity for false explanations remains.

The second means of laying a foundation, Evidence Code section 770(b), was specifically designed to combat the collusive witness problem by permitting the cross-examiner to delay disclosing the inconsistencies until all such witnesses had been examined.[200] The procedure is relatively simple. Once a witness has completed his testimony, the examiner only has to request that the witness not be excused.[201] The examiner may at any time thereafter introduce statements inconsistent with the witness' testimony, since the witness is still available to explain or clarify them.

The major criticism of section 770(b) is that it eliminates the positive aspects of the former foundation rule.[202] Since use of the provision may lead to lengthy presentations of extrinisc evidence of inconsistent statements which the witness might otherwise have admitted, it totally negates the time conservation function. More importantly, section 770(b) may be basically unfair to the proponent of the impeached witness. The Evidence Code does not require that either side recall the witness to hear his explanation. Since the witness has not been excused from testifying, the party that originally called the witness may afford him an opportunity to explain after the impeaching statements have been admitted.[203] Presumably, the party will do so if the inconsistency is sufficiently prejudicial. At this point however, the witness' ability to reestablish his credibility, and the proponent's case to the extent that it depends on the witness' testimony, may have been irreparably undermined.[204]

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[199] *See generally*, GOLDSTEIN, *supra* note 10, § 20.26.

[200] CAL. EVID. CODE § 770, Law Rev. Comm'n Comment (West 1968). *See generally* Note, *Modification of the Foundation Requirement for Impeaching Witnesses: California Evidence Code Section 770*, 18 HAST. L.J. 210 (1966) [hereinafter cited as Note, *Foundation Requirement*].

[201] CAL. EVID. CODE § 774 (West 1968). The impeaching party need not confront the witness with any information concerning the inconsistent statement at this time. *See* CAL. EVID. CODE § 769.

[202] *See* text accompanying notes 181-85 *supra*.

[203] CAL. EVID. CODE § 774 (West 1968).

[204] While the effect of the extrinsic evidence on the jury may be highly speculative, it should be recognized that several days may elapse between the time the extrinsic evidence is introduced and the time when the impeached witness may be recalled for his explanation. Given such time to crystallize, it is questionable whether the jury's estimation of the witness can be restored to its former status by his belated explanation.
Note, *Foundation Requirement*, *supra* note 200, at 219.

In practice, the section 770(b) problems of unfairness to the proponent of the impeached witness and undue consumption of time may be more illusory than real. The impeaching party may, for example, be limited by the best evidence[205] and authentication[206] rules to the use of section 770(a). The authenticity or originality of the extrinsic evidence of the inconsistent statement may be difficult or impossible to establish without the witness' own testimony. In addition, the authority of the court to regulate the order of proof under Evidence Code section 320 gives the judge and not the impeaching party the power to determine whether section 770(a) or 770(b) will be used.[207] When the impeaching party seeks to have a witness remain subject to recall, the judge may require that this request be specifically justified. The court can then weigh such factors as hardship to the witness by remaining subject to recall, undue consumption of time and the potential lack of fair opportunity to explain against the possible dangers to the fact finding process posed by hostile or collusive witnesses. If the judge finds that the difficulties outweigh the advantages, he can indicate his intent to excuse the witness. The impeaching party will then be faced with the alternatives of proceeding with the impeachment by laying the foundation or foregoing it entirely. This decision will necessarily depend on tactical considerations such as the strength of the impeaching statement, the importance of the witness and the possibility of collusive witnesses.

The Evidence Code section 770 "interests of justice" clause provides an exception to the foundation requirement. It was designed to give the trial court the flexibility to admit extrinsic impeaching statements when the impeaching party is unable to comply with the provisions of sections 770(a) and 770(b).[208] For example, when the witness has been excused prior to the examiner's discovery to the inconsistent statement, the courts have been willing to admit inconsistent statements on material matters without a foundation.[209] The burden is on the party seeking to impeach to show the importance of the testimony, the probative value of the statement, and his lack of knowledge of the existence of the inconsistent statement at the time

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[205] CAL. EVID. CODE §§ 1500-10 (West 1968). *See* Comment, *The Best Evidence Rule: A Critical Appraisal of the Law in California*, this volume.

[206] CAL. EVID. CODE §§ 1400-54 (West 1968).

[207] Some observers believe to the contrary. *See* Note, *Foundation Requirement*, *supra* note 200, at 219.

[208] CAL. EVID. CODE § 770, Law Rev. Comm'n Comment (West 1968).

[209] *See, e.g.*, People v. Aeschlimann, 28 Cal. App. 3d 460, 104 Cal. Rptr. 689 (2d Dist. 1972). The Aeschlimann court undoubtedly would have admitted the impeaching statements presented in People v. Compton, 132 Cal. 484, 64 P. 849 (1901), where admission was denied under the former rules.

of the testimony.[210]

In summary, the current California foundation provision contains the elements essential to provide flexibility to the courts and fairness to the parties. The operation of the provision does, however, depend to a great extent on the responsible exercise of discretion by the courts and knowledgeable participation by counsel. Assume for example that after completing his cross-examination, opposing counsel requests that the witness not be excused from further testimony. If the courts routinely grant such requests without requiring specific justification and the party calling the witness makes no objection, the impeaching party has successfully met the requirements of section 770 without any consideration of the underlying reasons for the rule. Thus section 770(b) can become a "loophole" instead of a means of providing fairness to all parties.

Although worded somewhat differently, federal rule 613[211] has the same effect as California Evidence Code section 770. The witness ultimately must be given an opportunity to explain his testimony in relation to impeaching inconsistent statements. The rule does not specify when the witness must be afforded this opportunity. The requirements of rule 613 are met if the witness has this opportunity after the impeaching statements are made known to the jury.[212] Rule 613 also contains an "interests of justice" clause which the federal district court can use to allow admission of extrinsic evidence in circumstances where the impeaching party is unable to meet the other requirements.

IV. CONCLUSION

The California provisions for impeachment by means of inconsistent statements reflect a basic premise of Professor McCormick:

> . . . the elaborate system of rules regulating the practice and scope of impeachment which has been developed in the past should be applied in the future with less strictness and should be simplified by confiding the control less to rules and more to judicial discretion.[213]

The California Evidence Code provisions must be considered successful in the sense that the former complex system of rules has generally been replaced by provisions which allow an expanded degree of judicial discretion. The major difficulty with the discretionary aspects of the rules is the basic lack of predictability for the practitioner. Appellate decisions have only set the outer limits in most of the major areas of concern. In the resulting extensive grey areas, there are sim-

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[210] *Cf.* People v. Aeschlimann, 28 Cal. App. 3d 460, 465, 104 Cal. Rptr. 689, 693 (2d Dist. 1972) (flexible balancing formula impliedly used).

[211] *See* WEINSTEIN, *supra* note 20, ¶¶ 613[01]-[04].

[212] *Id.*

[213] MCCORMICK (2d ed.), *supra* note 4, § 33 at 67.

ply no definitive guidelines. Precedent is of only limited value, since even apparently minor variations in the facts of a case may prove to be crucial. In addition, the party on the losing side of a discretionary ruling has very limited recourse, since he must meet the difficult burden on appeal of showing an abuse of discretion by the trial judge.

Although this article sets forth the factors which appear to have influenced appellate courts in passing on impeachment questions, it does not address some of the more fundamental tactical considerations. For the attacking party, McCormick's cardinal rule of impeachment remains valid:

> Never launch an attack which implies that the witness has lied deliberately, unless you are convinced that the attack is justifiable and is essential to your case.[214]

Once the decision to impeach has been made, both parties should consider that during trial, evidentiary decisions are made by the court without the benefit of the detailed legal research and argument characteristic of appellate advocacy. The practitioner seeking to admit extrinsic impeaching evidence should emphasize the probative value, importance of credibility and specificity of inconsistency of his proposed testimony. The party opposing the admission should argue the negative aspects: confusion of issues, needless prejudice to the party, and unnecessary consumption of time.

James Robb Busselle

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[214] *Id.*