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Prior Statements in Montana: Part I

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Introduction and prior inconsistent statements

By Cynthia Ford

Wendy, the witness, testifies in court, recounting the assault. She claims that she was raped against her will; Dan, the defendant, insists that the intercourse was consensual. (This might sound a little familiar?) As the prosecutor, wouldn't you want to augment Wendy's in-court statement with all the other statements she made before trial, in which she said exactly the same thing to other people? If she said the same thing before to different people on different occasions, don't we think it's more likely that she is now telling the truth? And if you are the defense lawyer, shouldn't the jury know that Wendy described the event differently to someone else before trial from what she has just told the jury? In real life, isn't one important way to tell whether the person is telling the truth to find out if she said the same thing before?

Under the Montana Rules of Evidence, these two things—prior consistent statements and prior inconsistent statements—are treated very differently from each other, and in some respects, very differently from the Federal Rules of Evidence. The purpose of this article is to explore the Montana approach to prior inconsistent statements. Part II, to be published next issue, will deal with the treatment of prior consistent statements. (A discriminating reader has suggested that my previous Evidence Corner columns may be too long. I agree, and apologize. Henceforth, I will try to curb my enthusiasm and reserve some of the "how-to" material for the forthcoming "Montana Evidence Handbook.")

Introduction: Prior Statements and the Hearsay Rule

M.R.E. 802 is the hearsay rule: "Hearsay is not admissible except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state." M.R.E. 801 provides the definition of "hearsay," and thus governs what is prohibited and what is not under Rule 802. The general definition is in 801(c): "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

All prior statements, consistent and inconsistent, satisfy the first part of the hearsay definition: they are all necessarily out-of-court statements. The fact that the person who made the statements is now a witness in court does not change those earlier statements into in-court, non-hearsay statements. The rule against hearsay provides three things: the evidentiary statement is made under oath, the jury has the chance to observe the witness while she makes the statement to them, and cross-examination. The fact that the same person who spoke out of court earlier is now a witness in court does provide cross-examination, but cannot supply either oath or observation of the earlier statement at the time it was made.

A. If the out-of-court statement is offered to prove something other than the fact it asserts, such as for impeachment purposes, it is not hearsay, but then its use is limited to impeachment.

The second half of M.R.E. 801(c) confines hearsay treatment to those out-of-court statements which are not being offered in court to prove the fact that they assert. If the previous out-of-court statement is being offered for any other reason, it is not hearsay and is not barred by 802. The Montana Evidence Commission Comment to M.R.E. 801 observes:

> from the phrase " ... offered in evidence to prove the truth of the matter asserted," statements offered for purposes other than to prove the truth of their contents are not hearsay. …
>
> It is theoretically correct to say that statements not offered to prove the truth of their contents are not hearsay because their reliability is not in issue, only whether or not the statement was made. Hearsay statements are ordinarily not admitted because their reliability cannot be tested by oath, cross-examination, and the presence of the trier of fact, the three ideal conditions under which testimony is given by witnesses. *Advisory Committee's Note, 56 F.R.D. 183, 288 (1972).* When a statement is introduced for purposes other than proving the truth of its content, the witness testifying as to the making of the statement by the hearsay declarant is doing so under the three ideal conditions. Therefore, statements which are offered for purposes other than to prove the truth of their content are not hearsay under the definition.

Thus, a lawyer can always meet "Objection! Hearsay!" by responding "This is an out of court statement, Your Honor, but I am not using it to prove the truth of its content."

The technical judge should then ask: "Well, what are you using it for, if not the truth of the content?" You must satisfy the judge that you have some relevant reason for introducing the statement, other than to prove that what was said outside of court is true. One of the primary "purposes other than to prove the truth of their content" is to show the credibility or incredibility of the witness on the stand. You are not using the statement to prove the fact it asserts, but instead to show that the statement just made in court by the witness is false or true. This

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out-of-court statement (OCS) will support your closing that "witness X speaketh with forked tongue, so you can't believe what she said here in court." Therefore, you can skate by the hearsay objection and get the OCS in merely by saying "Your honor, I am introducing this OCS for impeachment purposes only." (M.R.E. 401[1] explicitly states that "Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.")

If the only permissible use of the OCS is impeachment or rehabilitation of an in-court witness, the fact-finder may not use the contents of the OCS in deciding the facts of the case. The only permissible use of the OCS is for the jury to consider it in deciding if the witness was truthful on the stand. If no other evidence of the fact asserted in the OCS is introduced, that fact is not proven. Under M.R.E. 105, the party opposing the OCS is entitled, upon request, to a limiting instruction on this point. (Lawyers, judges and commentators are divided on the efficacy of such an instruction.) If you are able to get an OCS in for a limited purpose, you must also introduce at least a scintilla (I call this a chinchilla) of other evidence on which a jury could find in your favor, or the favorable verdict may be reversed.

For example, imagine a debt collection case brought by an estate. The defendant's brother testifies as a witness at trial that their family has a strict policy of "neither a borrower or a lender be," so the defendant never would have borrowed any money from the decedent. On rebuttal, the plaintiff calls the brother's barber, who testifies that the brother told the barber that the brothers had borrowed money from Joe but would never have to pay it back because Joe was now dead. If this OCS is allowed in for impeachment only, the jury cannot use it to find that a loan occurred. At most, it can find that the brother lied on the stand, but this is cannot satisfy the plaintiff's burden of proof.

B. M.R.E. 801(d) magically transposes some out-of-court statements offered to prove their contents into non-hearsay, which are not affected by Rule 802, and can be admitted as substantive evidence.

Rule 801(d)(1) provides, outright, that three kinds of prior OCS by a person who testifies at trial are simply not hearsay, even if they are offered for the truth of the facts they assert. These types of statements are not exceptions to the hearsay rule; they are not hearsay at all. Therefore, they are not subject to Rule 802 and are admissible to prove the facts they assert. The exact text of the rule is:

> (d) Statements which are not hearsay. A statement is not hearsay if:
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> 1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is
>
> (A) inconsistent with the declarant's testimony, or
>
> (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of subsequent fabrication, improper influence or motive, or
>
> (C) one of identification of a person made after perceiving the person;

The Montana Evidence Commission Comment indicates that the Commission modeled 801(d) on the F.R.E. but modified two of the three federal subdivisions (which I will discuss in more detail below) for use in Montana:

> The effect of this rule is to place certain statements " ... which would otherwise literally fall within ... " the hearsay definition outside the hearsay rule.
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> Subdivision (d)(1) deals with certain prior statements of the witness who is now testifying and subject to ideal conditions of oath, cross-examination, and presence of the trier of fact. The Commission feels that the application of the conditions at the trial or hearing is sufficient to take these statements out of the hearsay rule, for requiring their application at the time the statement was made would have the effect of excluding almost all prior statements. Therefore, **these prior statements are admitted as substantive evidence.** It should also be noted that the subdivision limits the types of prior statements placed outside the hearsay rule to three: This is a compromise between allowing "general use of prior prepared statements as substantive evidence" which could lead to an abuse of preferring prepared statements to actual testimony, and allowing no prior statements to be admitted, which is not sensible, for " ... particular circumstances call for a contrary result. The judgment is one more for experience than logic". *Advisory Committee's Note, supra 56 F.R.D. at 295.* (Emphasis added).

1. Under M.R.E. 801(d)(1)(A), **all prior inconsistent statements are now admissible** as substantive evidence to prove the facts they assert.

If the witness testifies at trial, anything else she said on the same subject before trial which contradicts her testimony is admissible not just for impeachment of her in-court testimony, but to prove the fact that she stated earlier, out of court. The Commission noted that the existing Montana law on the use of prior inconsistent statements was quite confusing (see below) and that "the apparent practice in Montana is to give a cautionary instruction that prior inconsistent statements may be used only for impeachment purposes. Therefore, **this clause has the effect of clarifying as well as changing existing Montana law.**" The Commission cited two other rationales for this new treatment of prior inconsistent statements: that juries might not follow the standard cautionary instruction, and that "this

1 This phrase does not occur in the federal version of Rule 401, either as originally written or as amended in 2011, although there are many federal cases indicating that the credibility of a witness is relevant, at least on non-collateral matters.

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statement is always made closer in time to the event, free from any influences, and therefore has an assurance of trustworthiness like many hearsay exceptions."

In an attorney disbarment proceeding decided just after the adoption of the Montana Rules of Evidence, the defending attorney objected to admission of prior inconsistent statements to prove the facts they asserted. The Montana Supreme Court agreed that at least prior to a 1941 case, State v. Jolly, 112 Mont. 352, 116 P.2d 686, "previous inconsistent statements of a witness were admissible for impeachment purposes only and did not constitute substantive evidence," and that in the period of time after Jolly but before the M.R.E. were adopted, the law of Montana on the admission of prior inconsistent statements for substantive rather than impeachment purposes was "in flux." Matter of Goldman, 179 Mont. 526, 549, 588 P.2d 964, 977 (1978). The Court went on to observe that:

> With this background, the Commission on Rules of Evidence in proposing the new Rules of Evidence for this Court felt prior inconsistent statements were admissible as substantive evidence, and suggested for adoption, Rule 801(d)(1) (A), accordingly. This Court had approved those rules prior to the hearing hereunder, even though the effective date would not begin until July 1, 1977.
>
> The foregoing cases would indicate the law in Montana on this point was in flux, but the Court was moving toward a change in the rule of Wise v. Stagg, supra. The matter is now settled with the adoption of the Montana Rules of Evidence. **Such testimony is now clearly admissible for substantive purposes.** (Emphasis added)

Matter of Goldman, 179 Mont. at 550, 588 P.2d at 977 (1978).

The Montana prior inconsistent statement rule is much more inclusive than the federal version of 801(d)(1)(A). The federal rules allow use of only those prior statements which are inconsistent with the declarant/witness's trial testimony AND which were made "given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition." In Montana, **any prior inconsistent statement, made anywhere, anytime, is usable**. This means that a Montanan who spills her guts at the Stockmen's (Stockpersons'?) Bar and later tells a Montana state jury something quite different can expect to see the bartender take (I originally wrote "mount" but the visual was bad) the stand. If the same case were tried in the U.S. District Court for the District of Montana, her drunken rambling would be inadmissible except for its impeachment value. The Montana Commission explained its decision to broaden the prior inconsistent statement rule: "The clause deletes the oath requirement as unnecessary and harmful to the usefulness of the rule. The Commission believes that prior inconsistent statements should be admissible as substantive evidence."

The only requirement to admit a prior inconsistent statement is that the declarant must have testified at trial, and the prior statement is inconsistent with that testimony. If the witness testifies that the light was green, and somewhere else told someone that the light was red, there is a clear inconsistency and the earlier statement is admissible. Further, the Montana Supreme Court has held that even a minor inconsistency suffices under Rule 801(d)(1)(A). In State v. Herman, the defendant was accused of stabbing a man with whom the defendant and his father had had a bar fight. The night of the stabbing, the police interviewed the defendant's father on video (which the police lost, held to be harmless) and the father also wrote out a half page statement. "¶ 37 In his testimony at trial, Herman's father said he chatted with the bartender for a minute or two before going outside. In his written statement, he said he followed Herman outside. Thus, **there is inconsistency between his testimony and his statement, even though it is minor.** The District Court's admission of the statement into evidence was in accordance with M.R. Evid. 801(d)(1), which provides a prior oral or written statement inconsistent with the testimony of a trial witness is admissible." State v. Herman, 350 Mont. 109, 117, 204 P.3d 1254, 1260 (2009). (Again, this case earlier describes the use of the prior inconsistent statement as for "impeachment" but this restriction is unnecessary because the rule defines the prior inconsistent statement as non-hearsay, thus usable for substantive purposes).

Rule 801(d)(1)(A) also applies where the witness said something on the subject outside of court and now testifies that she does not remember anything about that subject, and/or that she does not remember giving an earlier statement.

Montana law used to be a mess, to say the least, on the issue of whether memory lapse is a form of "inconsistency" so as to invoke 801(d)(1)(A). When the Commission forwarded its version of the M.R.E. to the Supreme Court, its Comment to 801(d)(1)(A) included this language: "It is the intent of the Commission that a witness' failure to recollect at a trial or hearing is an inconsistency under **801**(**d**)(**1**)(**A**) when a witness has made a prior statement on the matter under inquiry." Despite this clear language in the Comment, after the M.R.E. were adopted, two different lines of decisions developed, one holding that a failure of memory is an inconsistent statement, and the other the opposite. The Court acknowledged and resolved this discrepancy in State v. Lawrence, 285 Mont. 140, 159, 948 P. 2nd 186, 198 (1997):

> "Given the weight of authority, we believe Devlin is the better reasoned opinion, and hold that a claimed lapse of memory is an inconsistency within the meaning of *Rule 801(d)(1)(A)*. To the extent that our prior decision in Goodwin is inconsistent with this holding, it is overruled." (Emphasis supplied).

In the Lawrence case, the witness Mary was diagnosed with dementia, possibly Alzheimer's. Prior to trial, she had given 5 statements to the police. At trial, she frequently said she couldn't remember certain facts, and also that she couldn't remember having given prior statements about them. The Court held that this testimony was inconsistent with her prior statements, and affirmed the judge's admission of them under M.R.E. 801(d)(1)

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(A). (This case is also very useful for reviewing HOW to admit prior inconsistent statements).

In State v. Howard, 362 Mont. 196, 204, 265 P.3d 606, 613 (2011), the Court reaffirmed its holding in Lawrence: "In that case, we also stated a claimed lapse of memory constitutes an inconsistent statement for the purposes of *M.R. Evid. 801(d)(1)(A). Lawrence, 285 Mont. at 159, 948 P.2d at 198.* We did not, however, hold claimed memory lapse was the only ground for application of Rule 80 1(d)(1)(A)." In Howard, the child victim/witness on the stand in a sexual abuse case recanted several previous statements and said she didn't remember others; the court allowed a DVD of the child's pretrial interviews into evidence. Both trial court decisions were affirmed on appeal.

Thus, prior inconsistent statements are clearly admissible in Montana state court trials. Once the witness has testified on the stand, anything else she has said on the same subject, anywhere, any time, to anyone, which outright contradicts her trial testimony, or serves to fill a memory lapse on the stand, is admissible, not just for impeachment but also to prove the fact she earlier asserted.

Coming next month: Part II, Prior Consistent Statements in Montana

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Editor's note and correction: *The February edition of this series, "A refresher: Montana evidence law sources and research," containted an incorrect reference referring to the "parol evidence rule" on page 41. The correct reference is as follows:*

28-2-905. When extrinsic evidence concerning a written agreement may be considered. (1) Whenever the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms. Therefore, there can be between the parties and their representatives or successors in interest no evidence of the terms of the agreement other than the contents of the writing except in the following cases:

(a) when a mistake or imperfection of the writing is put in issue by the pleadings;

(b) when the validity of the agreement is the fact in dispute.

(2) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as described in 1-4-102, or other evidence to explain an extrinsic ambiguity or to establish illegality or fraud.

(3) The term "agreement", for the purposes of this section, includes deeds and wills as well as contracts between parties.