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MODIFICATION OF THE FOUNDATIONAL REQUIREMENT FOR IMPEACHING WITNESSES: *CALIFORNIA EVIDENCE CODE SECTION 770*

Section 770 of the new California Evidence Code embodies a significantly modified foundational requirement for the impeachment of a witness by inconsistent statements.[1] Briefly stated, a foundation is no longer required for admission of extrinsic evidence of an inconsistent statement.[2] Instead, the foundation survives as an alternative procedure to be followed when the impeacher so elects. This note undertakes to examine this modified rule, its merits, and some of the potential problems that may arise in applying it.

The traditional rule for the impeachment of witnesses by prior inconsistent statements was stated in section 2052 of the California Code of Civil Procedure:

> A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them.

While for present purposes no detailed discussion of the judicial treatment of section 2052 is necessary,[3] a general understanding of the section is essential before one can fully appreciate the significance of the change which has been made.

Section 2052 authorizes the impeachment of a witness by proving that at some previous time he has made statements which were inconsistent with those made by him at the present trial. This type of impeachment is based on the theory that proof of the witness' self-contradiction demonstrates his capacity to err either through defective memory or lack of veracity and discredits his credibility before the jury.[4] But section 2052 establishes certain prerequisites that must be met before this mode of impeachment is permitted. The primary limitation requires that before extrinsic evidence of the prior inconsistent statement is admitted, a "foundation" or, as it is sometimes designated, the "preliminary question,"[5] must be laid. To establish the foundation the impeaching counsel must (1) inform the witness of the "times, places, and persons present" when he allegedly made the prior statements, (2) ask him if he made the alleged statements, and (3) if he admits having made the alleged statements, permit him to

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[1] Section 770 relates to the impeachment of a witness who testifies at a hearing. For impeachment of a hearsay declarant whose statement is introduced as evidence, see CAL. EVIDENCE CODE § 1202, which provides that the declarant may be impeached by evidence of prior inconsistent statements without a foundation having been laid.

[2] WITKIN, CALIFORNIA EVIDENCE, §§ 1250-51 (2d ed. 1966).

[3] See generally, MCBAINE, CALIFORNIA EVIDENCE MANUAL, §§ 428-33 (1960); WITKIN, CALIFORNIA EVIDENCE, §§ 661-71 (1st ed. 1958); Hale, *Prior Inconsistent Statements*, 10 So. CAL. L. REV. 135 (1937); 54 CAL. JUR. 2d, *Witnesses* §§ 163-82 (1960).

[4] 3 WIGMORE, EVIDENCE § 1017, at 684-85 (3d ed. 1940) [hereinafter cited as WIGMORE].

[5] MCCORMICK, EVIDENCE § 37, at 67 (1954) [hereinafter cited as MCCORMICK]; 3 Wigmore § 1025, at 702.

explain them.[6] Should the witness deny making the statement,[7] or answer evasively,[8] the impeacher has satisfied the requirement of section 2052 by providing the witness an opportunity to explain and may introduce extrinsic evidence of the prior statement at his next stage of presenting evidence.[9] Although there is some disagreement as to whether the impeacher should be permitted to introduce extrinsic evidence when the witness admits having made the prior statement,[10] California seems to hold that such extrinsic evidence must be excluded under those circumstances.[11]

It should be carefully noted that the foundational requirement, as set forth in section 2052, applies before the witness can be impeached, *i.e.* it must precede the admission of any extrinsic evidence of the prior inconsistent statement that the impeaching counsel might desire to introduce for impeachment purposes. The usual practice has been for the impeaching counsel to lay the foundation during his cross-examination of the witness,[12] but a few California cases have held it to be within the discretion of the trial court to permit the impeaching counsel to recall the witness and lay the foundation after completion of the cross-examination but prior to introduction of the impeaching evidence.[13]

The foundational requirement originated in *Queen Caroline's Case*,[14] an English case of 1820, where it was declared that when the witness' credibility was going to be challenged by proof of a prior inconsistent statement, the witness should be asked during his cross-examination whether he had made such a prior statement. The reasons most often advanced for requiring a foundation have been (1) to give the witness a fair opportunity to explain, (2) to avoid unfair surprise to the adversary, and (3) to save time, in that should the witness admit the prior statement introduction of the impeaching evidence would become unnecessary.[15]

Since its inception, the foundational rule has gradually gained almost total acceptance in this country.[16] While the rule has received the general approval of most evidence scholars, its rigid application by the courts has been severely criticized.[17] When applied too inflexibly by a court the rule may serve to deprive

[6] CAL. CODE CIV. PROC. § 2052; People v. Sweeney, 55 Cal. 2d 27, 37, 9 Cal. Rptr. 793, 798, 357 P.2d 1049, 1054 (1960).

[7] People v. Rushing, 130 Cal. 449, 453, 62 Pac. 742, 743 (1900).

[8] People v. Singh, 20 Cal. App. 146, 148, 128 Pac. 420, 421 (1912).

[9] See Keyes v. Geary St. R.R., 152 Cal. 437, 441, 93 Pac. 88, 89 (1907).

[10] *Compare* MCCORMICK § 37, at 68, *with* 3 WIGMORE § 1037, at 723.

[11] See People v. Sykes, 44 Cal. 2d 166, 172, 280 P.2d 769, 772, *cert. denied*, 349 U.S. 934 (1955).

[12] See, *e.g.*, People v. Singh, 20 Cal. App. 146, 149, 128 Pac. 420, 422 (1912).

[13] People v. Raven, 44 Cal. 2d 523, 526, 282 P.2d 866, 868 (1955); People v. Shaw, 111 Cal. 171, 177, 43 Pac. 593, 594 (1896); People v. Keith, 50 Cal. 137, 140 (1875).

[14] 2 Brod. & Bing. 284, 129 Eng. Rep. 976 (1820), quoted in 3 WIGMORE § 1025, at 702. This case also established the rule that writings alleged to contain prior inconsistent statements of a witness must be shown to the witness before cross-examining him concerning them. This rule has been embodied in the second sentence of CAL. CODE CIV. PROC. § 2052. Widely criticized as an obstacle to effective cross-examination, the rule has now been repealed by CAL. EVIDENCE CODE § 768.

[15] MCCORMICK § 37, at 67-68.

[16] 3 WIGMORE § 1028, at 705.

[17] It is always necessary when seeking to determine the attitude of scholars toward the foundational requirement to distinguish their criticism of the foundational rule for

an impeacher of the opportunity to introduce impeaching evidence although circumstances have rendered it impossible for him to comply with the foundational procedure. For example, until *People v. Collup*[18] was decided in 1946, several earlier California cases[19] had held that in the absence of a foundation, extrinsic evidence must be excluded even though the cross-examiner either was not aware of the inconsistent statement at the time he cross-examined the witness or the witness did not make the inconsistent statement until after having been cross-examined and excused. In expressly overturning these cases, the court in *Collup* held that since the purpose of the foundational rule is "to get all of the pertinent evidence before the court and to further test the credibility of the impeachment . . ." omission of the foundation should not require exclusion of the impeaching evidence "when it is impossible to lay the foundation."[20] By thus injecting an element of flexibility into the application of this rule, the California court corrected the rule's most oppressive and criticized feature.

Change Recommended by the Uniform Rules of Evidence

While California, through the *Collup* decision, had achieved some relaxation of the unduly rigid application of the foundational rule, the Commissioners on Uniform State Laws sought to achieve the same result by way of Uniform Rule of Evidence 22(b), which states:

> Extrinsic evidence of prior contradictory statements, whether oral or written, made by the witness, may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him opportunity to identify, explain, or deny the statement.

Thus, the uniform rule introduces the element of the "discretion of the judge." Except in rare instances such as the *Collup* decision, judges have usually felt bound to apply the foundational rule arbitrarily.[21] Specifically granting judges

written inconsistent statements or of the foundational rule when too rigidly applied from their approval of the foundational rule itself. By failing to make these distinctions, Witkin provides a somewhat misleading view of the attitude of scholars toward the foundational rule: "The foundational requirement was criticized as arbitrary and unrealistic, often working to the disadvantage of the cross-examiner and to the benefit of a dishonest witness." WITKIN, CALIFORNIA EVIDENCE, § 1251, at 1153 (2d ed. 1966). This statement is accurate as it applies to scholars' attitudes toward the rule for written statements and toward the tendency to apply the foundational rule too severely. But as to the principle of a foundation, Professor Wigmore, after noting the arguments against the rule, concludes that "in general the preliminary question should indeed be put, before producing the alleged contradiction . . . ." 3 WIGMORE § 1027, at 704. Likewise, as to the foundation principle, Professor McCormick concludes that "the preliminary question requirement when complied with conduces to fairness and economy of time." MCCORMICK § 37, at 70. Lastly, Professor Hale, whose excellent article provides perhaps the most thorough treatment of this subject, concludes that failure to require a foundation "is not to be commended." Hale, *Prior Inconsistent Statements*, 10 So. CAL. L. REV. 135-36 (1937).

[18] 27 Cal. 2d 829, 167 P.2d 714 (1946), 20 So. CAL. L. REV. 102.

[19] See, *e.g.*, People v. Compton, 132 Cal. 484, 64 Pac. 849 (1901); People v. Greenwell, 20 Cal. App. 2d 266, 66 P.2d 674 (1937), both cases *overruled* by People v. Collup, 27 Cal. 2d 829, 167 P.2d 714 (1946).

[20] 27 Cal. 2d 829, 837, 167 P.2d 714, 718 (1946).

[21] See, *e.g.*, Nagi v. Detroit United Ry., 231 Mich. 452, 204 N.W. 126 (1925).

this discretionary power, the uniform rule proceeded along the course most often recommended by evidence writers.[22]

Under the uniform rule the foundational requirement remains essentially intact, for in view of the prior general acceptance of the foundational requirement, there is little basis for concluding that judges in the exercise of their discretionary power would not continue to require a foundation in most impeachment situations.[23] For the impeacher intentionally to omit the foundation without some extenuating circumstance would certainly entail the risk that the judge might later exclude the impeaching evidence when it is offered.[24] On the other hand, the uniform rule clearly empowers the judge to admit the impeaching evidence in the absence of a foundation when he deems such admission to be fair. Discretionary admission might be allowed in those situations where it is obviously impossible for the impeacher to lay a foundation. Discretionary admission might also be extended to situations in which the impeacher simply overlooks the foundation but the judge is convinced that the value of the impeaching evidence outweighs any injustice that the opposing side will suffer through omission of the foundation.[25]

The Foundation Requirement as Modified by Section 770

Utilizing Uniform Rule of Evidence 22(b) as a starting point, the California Law Revision Commission eventually formulated the following rule which was enacted into law as Evidence Code section 770:

> 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.

Comparison of this text with that of the uniform rule reveals several highly significant changes.

Whereas the uniform rule had provided for discretionary exclusion of extrinsic

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The court here affirmed the lower court's denial of a motion by the defendant for a new trial, although one of the plaintiff's witnesses, before committing suicide, had written the defendant a letter in which he admitted that the plaintiff had paid him to testify falsely in the trial. In denying the motion, the lower court held that if a new trial were granted the letter would not be admissible to impeach the earlier testimony of the deceased witness because no foundation could possibly be laid.

[22] See McCormick § 37, at 70; 3 Wigmore § 1025, at 705; Hale, *Prior Inconsistent Statements*, 10 So. Cal. L. Rev. 135, 164 (1937).

[23] See Memorandum 63-43 of the California Law Revision Commission, August 16, 1963 (unpublished memorandum in the office of the California Law Revision Commission, School of Law, Stanford University.) This document describes Uniform Rule 22(b) as "in accord with the present mandatory foundation requirement . . . [but that it] transfers direction into discretion." See also De Parcq, *The Uniform Rules of Evidence: A Plaintiff's View*, 40 Minn. L. Rev. 301, 320-22 (1956); Holbrook, *Witnesses*, 2 U.C.L.A.L. Rev. 32, 40-41 (1954).

[24] Holbrook, *supra* note 22, at 41.

[25] McCormick § 37, at 70.

evidence if the foundational requirement had not been met before the impeaching evidence was introduced, section 770, except in the interests of justice, requires exclusion of the extrinsic evidence if the witness has neither (a) had the benefit of a foundation during his testimony, nor (b) been held to give further testimony in the action. This latter alternative is by far the most striking innovation presented by the new rule, for, unlike the uniform rule, which gave *the judge* discretionary power to require a foundation, the new California rule gives *the impeacher* the power to determine whether a foundation will or will not be laid. Insofar as an impeaching counsel elects to follow subsection (b), he may now ignore any foundation during his examination of the witness, excuse the witness subject to recall at a later time, and proceed to introduce his impeaching evidence before the witness has even been informed that an alleged inconsistency exists.

There are other differences between the Uniform Rule 22(b) and section 770. The phrase "oral or written" used to modify "statements" in the uniform rule was deleted in section 770, but "statement" is defined in the Evidence Code to include oral or written verbal expression.[26] Secondly, whereas the uniform rule referred to an "opportunity to identify, explain, or deny," subsection 770(a) omits the word "identify" and refers only to "explain or deny." This change was introduced after study failed to reveal any case in which merely permitting the witness to "identify" the previous inconsistent statement constituted a satisfactory foundation.[27]

Evaluation of the "Interests of Justice" Clause

The addition of the "interests of justice" clause, as explained in the comment to section 770, will permit admission of extrinsic evidence of an inconsistent statement even though the witness was not afforded an opportunity to explain the statement during his testimony and even though he has been excused from giving further testimony. Such a situation might occur when the cross-examiner, being unaware of a witness' prior inconsistent statement at the time of the cross-examination, fails either to lay a foundation or to request that the witness remain available for recall. When the cross-examiner later learns of the statement and desires to present extrinsic evidence of the statement for impeachment purposes, the judge may in the "interests of justice" admit the evidence although the requirements of neither subsection (a) nor (b) have been met. Similarly, if the witness had never made an inconsistent statement prior to the time of the cross-examination, but he does so subsequent to being cross-examined and excused from the trial, the judge may in the "interests of justice" permit the party against whom the witness was presented to introduce extrinsic evidence of the subsequent inconsistent statement when neither subsection (a) nor (b) has been followed. Since the *Collup* decision had already relaxed the foundational requirement "when it is impossible to lay the foundation," the "interests of justice" clause,

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[26] CAL. EVIDENCE CODE § 225: " 'Statement' means (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."

[27] Memorandum 64-81 of the California Law Revision Commission, October 27, 1964 (unpublished memorandum in the office of the California Law Revision Commission, School of Law, Stanford University.)

although broader in its potential application, would appear to represent no major change in the law.

The operative effect of the "interests of justice" clause could conceivably confuse some readers. Does the "interests of justice" clause operate only to qualify the rule of exclusion which immediately follows it, or does it also operate on subsections (a) and (b) to render inadmissible some extrinsic evidence which has qualified for admission through compliance with either of those subsections? Put another way, could there be situations in which a judge might in the "interests of justice" disallow extrinsic evidence which the impeacher had qualified for admission either by laying a proper foundation or by insuring that the witness remained available for recall?[28]

Support for the contention that the "interests of justice" clause applies to subsections (a) and (b) as well as to the rule of exclusion immediately following the clause might be derived from its position at the very outset of the section. This position coupled with the weight of the words "interests of justice," gives the impression that the clause qualifies all that follows it. On closer examination, however, it appears more probable that the "interests of justice" clause is intended to qualify only the exclusionary statement which immediately follows it. In the first place, the thrust of the Evidence Code is to make all relevant evidence admissible.[29] Secondly, the major defect of the foundational requirement has been that by applying it too rigidly courts have excluded evidence which erstwhile impeachers rightfully should have been allowed to introduce in the absence of a foundation.[30] To correct this defect, Uniform Rule 22(b) granted the judge discretionary power to waive the foundation.[31] Since the "interests of justice" clause is a standard substituted for the discretionary element of the uniform rule,[32] it may reasonably be concluded that the "interests of justice" clause was intended to continue the trend toward admissibility and was not intended to permit exclusion of evidence which had qualified for admission through compliance with subsections (a) or (b). This conclusion finds further support in the comment to section 770, which declares that "the court may permit extrinsic evidence of an inconsistent statement to be *admitted* even though the witness has been excused . . . ."[33] It seems highly probable that if the "interests of justice" clause had been intended to qualify subsections (a) and (b) by permitting *exclusion* of evidence that had qualified for admission through compliance with either of those subsections, the comment to section 770 would have noted this broader application.

If it is true that the "interests of justice" clause was designed to qualify only

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[28] An affirmative answer to this question might give rise to the possibility that the proponent of the witness would under some circumstances move to strike the extrinsic evidence in the "interests of justice." For a further discussion of this possibility see the text accompanying note 45 *infra*.

[29] See CAL. EVIDENCE CODE § 351.

[30] See, *e.g.*, MCCORMICK § 37, at 70; 3 WIGMORE § 1027, at 704-5; Hale, *Prior Inconsistent Statements*, 10 So. CAL. L. REV. 135, 164 (1937).

[31] WITKIN, CALIFORNIA EVIDENCE § 669, at 707 (1st ed. 1958).

[32] See Memoranda 64-45, July 20, 1964, and 64-54, August 7, 1964, of the California Law Revision Commission (unpublished memoranda in the office of the California Law Revision Commission, School of Law, Stanford University.)

[33] CAL. EVIDENCE CODE § 770, comment (Emphasis added.)

the rule of exclusion immediately following it, *i.e.* that it operates as a rule of admissibility to allow such evidence as would otherwise be excluded from a failure or inability to observe subsections (a) or (b), then the "interests of justice" clause stands on an equal footing with subsections (a) and (b) rather than in a position superior to them. Section 770 thus states three situations in which extrinsic evidence may be admitted: (1) where the witness has been permitted to explain or to deny the inconsistency at the time he testifies; (2) where the right to recall the witness later to give further testimony has been reserved; or (3) where the interests of justice require admission.

The foregoing analysis of the "interests of justice" clause suggests that the syntax of section 770 is not arranged to the best advantage of the reader. The "unless" clause at the outset, followed by a positive rule of exclusion, followed in turn by another "unless," requires a series of mental turnabouts that are not conducive to ease of comprehension. Since the "interests of justice" clause is only another qualification of the positive rule of exclusion, this clause ought to be simply a third subsection. Such a change would result in one positive rule of exclusion followed by three qualifying subsections. Still greater clarity would be achieved by having all subsections phrased positively, rather than the present mixture of the positive phrasing of subsection (a) and the negative phrasing of subsection (b). Under this recommendation, section 770, without any loss of content, would read as follows:

> 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 been only conditionally excused and remains subject to giving further testimony in the action; or
>
> (c) The interests of justice otherwise require admission of the extrinsic evidence.

Advantages of the Modified Rule

Most of the merits of the new rule are well summarized in the comment to section 770. First of all, it is suggested that it will prove equally advantageous to permit the witness to explain the inconsistent statement after it has been introduced into evidence. Secondly, when witnesses are suspected of acting collusively, it will be possible under the modified rule to cross-examine and impeach them by using the prior inconsistent statement of any one of them.[34] Under the mandatory foundational rule this tactic would not have been possible because disclosure of the inconsistent statement during the foundation would have forewarned the other collusive witnesses and enabled them to avoid inconsistency by testifying in conformity with the prior statement. A third advantage of the modified rule is that through the addition of the "interests of justice" clause, the new rule permits admission of extrinsic evidence where the witness has been excused without having had the opportunity to explain or deny the inconsistent statement.

Still another apparent advantage of the new rule that is not discussed in the comment to section 770 but seems to follow as a matter of course is that by elect-

[34] See Minutes of the California Law Revision Commission meeting, September 22-24, 1963, on file at the office of the California Law Revision Commission, School of Law, Stanford University.

ing to follow the new alternative, instead of laying a foundation, the impeaching counsel will avoid any risk that during the foundation the witness might admit the inconsistent statement and thereby deprive the impeacher of the opportunity to introduce extrinsic evidence of the statement. If the impeacher's extrinsic evidence is from an impressive source, he may much rather get this evidence before the jury than to gain a mere admission of inconsistency from the impeached witness.[35]

A further advantage to be noted is that when under subsection (a) a foundation is utilized in the future, there is no longer any prescribed formula equivalent to "times, places, and persons present" that must be related to the witness. It would now seem that a satisfactory foundation can be achieved by describing the occasion of the alleged prior statement to the witness in any manner that adequately serves to refresh his memory.

Criticism of the Modified Rule

Before proceeding with a discussion of the disadvantages of section 770, it should be emphasized that trials are conducted for the purpose of determining truth, and rules of evidence must be adopted that will contribute to the attainment of that objective. Since rules pertaining to impeachment are designed to expose untruthful witnesses, it is only when two or more alternative procedures are equally effective to expose false testimony that secondary considerations, such as saving the court's time or being fair to the witness, should carry any weight. But quite properly the common law has established limitations on this principle, for modern trials do not pursue a truth-at-any-cost approach. In other words, there would seem to come a point where secondary considerations may warrant the erection of obstacles in the path of a trial lawyer. Poised in terms of impeachment of witnesses by inconsistent statements, section 770 represents a determination by California legislators that an untruthful witness may be more effectively exposed by not requiring that he be informed of an alleged inconsistent statement in advance of its introduction in evidence. By contrast, the widespread acceptance of the traditional foundational requirement suggests that most authorities[36] have considered either that a foundation in no way hindered the exposure of false testimony, or, if there were any hindrance, that the advantages of the foundational requirement outweighed whatever obstacles were thereby presented to the impeacher. To what extent then are the advantages of the foundational requirement also present in the modified rule of section 770?

The foundational requirement has often been described as a time-saving device in that an admission by a witness of a prior inconsistent statement would obviate introduction of the extrinsic evidence.[37] Insofar as an impeacher elects under the new rule to dispense with the foundation and to present his extrinsic evidence directly, time will be lost both in the introduction of the extrinsic evidence and in recalling the impeached witness to hear his explanation. This argu-

[35] This possible advantage of the modified rule was suggested in an interview with Mr. Jon D. Smock, Attorney, California Judicial Council, in San Francisco, California, September 1966.

[36] See, *e.g.*, McCORMICK § 37, at 70; 3 WIGMORE § 1027, at 705; Hale, *Prior Inconsistent Statements*, 10 So. CAL. L. REV. 135 (1937).

[37] *E.g.*, McCORMICK § 37, at 67-68.

ment is of course based on the presupposition that the witness would have admitted the statement had a foundation been laid; otherwise, the criticism is inappropriate.

Another reason often given for the foundational requirement has been to prevent unfair surprise to one's adversary.[38] As explained by Professor Wigmore, there is no means by which the proponent of a witness can come to court prepared to refute a claim of self-contradiction that may be made against his witness. Advance warning is, however, provided him through the foundation procedure when the cross-examiner informs the witness of the times, places, and circumstances at which he allegedly made the prior inconsistent statements. Thus informed, the proponent of the witness can prepare to refute the claim of inconsistency.[39]

It is true that the new procedure enacted in section 770 will preserve some particle of the warning feature, for the action by the impeaching counsel in excusing the witness subject to recall should alert the proponent of the witness to the possibility of an impeachment attempt. But such a warning will be of questionable benefit because, unlike the foundational procedure, it will not reveal the precise circumstances in which the witness may have made the prior inconsistent statement. Forewarned only by the request of the cross-examiner to recall the witness at a later time, the best that the proponent of the witness will be able to accomplish by way of preparation is to encourage the witness to recollect when and where he may have uttered a prior inconsistent statement; otherwise, the proponent will have to wait patiently for the extrinsic evidence to be presented so that he may learn the circumstances of the alleged prior statement. Only then will he be sufficiently enlightened to begin preparing his refutation.

Probably the most common justification advanced for the existence of the foundational requirement has been fairness to the witness. As the matter was stated by one early writer:

> This course of proceeding is considered indispensable, from a sense of justice to the witness; for as the direct tendency of the evidence is to impeach his veracity, common justice requires that, by first calling his attention to the subject, he should have an opportunity to recollect the facts, and, if necessary, to correct the statement already given . . .[40]

The comment to section 770 challenges this proposition by the assertion that "there is no compelling reason to provide the opportunity for explanation before the inconsistent statement is introduced in evidence." While it is obviously true that fairness to the witness cannot be accorded the status of a "compelling reason," the fact remains that a vast majority of courts and writers have for generations considered it a highly persuasive reason.[41] Perhaps this conclusion was reached on the assumption that if the witness were not given an opportunity to

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[38] *E.g.*, People v. Collup, 27 Cal. 2d 829, 837, 167 P.2d 714, 718 (1946).

[39] 3 WIGMORE § 1019, at 690.

[40] 1 GREENLEAF, EVIDENCE § 462, at 592 (16th ed. 1899).

[41] See, *e.g.*, People v. Collup, 27 Cal. 2d 829, 837, 167 P.2d 714, 718 (1946); People v. Nonella, 99 Cal. 333, 335, 33 Pac. 1097, 1098 (1893); Rignell v. Font, 90 Cal. App. 730, 737, 266 Pac. 588, 591 (1928); People v. Singh, 20 Cal. App. 146, 148, 128 Pac. 420, 422 (1912); MCCORMICK § 37, at 70; 3 WIGMORE § 1027, at 704 and § 1028, at 705; Hale, *Prior Inconsistent Statements*, 10 SO. CAL. L. REV. 135-36 (1937).

explain during his cross-examination, or at some other point prior to introduction of the impeaching evidence, there would be a substantial risk that he might leave court and not be available for subsequent recall.[42] If this was the consideration that prompted the foundational requirement, section 770 provides that the witness may be excused subject to being recalled, and the charge of unfairness is thus rendered inapplicable. If, on the other hand, courts and writers have thought it more fair that a witness should *first* have the opportunity to explain his inconsistent remarks before they are presented to the jury in a manner clearly designed to disparage his credibility, then the new alternative of permitting the witness to explain later, after the impeaching evidence has been presented, is plainly less fair.[43]

Unfortunately, authorities writing on this subject have so often taken the foundational procedure as a basic proposition that they have neglected to discuss why it is necessarily more fair to allow the witness to explain before, rather than after, his alleged inconsistent statements are introduced in evidence. Professor Greenleaf, as quoted above, simply attributed the propriety of a foundation to "common justice."

It would appear in light of the foregoing discussion that whether it is equally fair to permit a witness to explain his inconsistent statement after extrinsic evidence of the statement has already been introduced, or whether this opportunity should precede introduction of the statement, is a question that must be answered subjectively. At least one factor to be considered in arriving at any conclusion is the ability of a witness against whom impeaching evidence has been introduced to reestablish himself in the eyes of the jurors.[44] 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. Conceivably, the jury may be even more prone to discount the belated explanation knowing that the witness has had the opportunity to confer with counsel after evidence of the inconsistent statement was presented.

Recalling the Impeached Witness

Until judges and lawyers become accustomed to the modified procedure of section 770, there may be some disagreement as to which party, if any, is under an obligation to recall an impeached witness for the purpose of providing him with an opportunity to explain an alleged inconsistent statement. For the purpose of discussion, let it be supposed that an attorney whose witness has been impeached takes the position that it is the impeacher who must return the impeached witness to the stand to permit him to explain his alleged inconsistent statement. Since under the traditional foundational requirement the impeacher carried the burden of permitting the witness to explain or deny his alleged prior

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[42] See, *e.g.*, Downer v. Dana, 19 Vt. 338, 345 (1847), quoted in 3 WIGMORE § 1027, at 704.

[43] See, *e.g.*, Rignell v. Font, 90 Cal. App. 730, 737, 266 Pac. 588, 591 (1928).

[44] This objection to the modified rule was expressed by Mr. Ingemar E. Hoberg, a San Francisco trial attorney in an interview conducted at his office in September 1966.

statement *before* extrinsic evidence of the statement could be admitted, why, under the modified rule, would not the impeacher carry a similar burden of recalling the witness to permit him to explain *after* extrinsic evidence of the inconsistent statement has been received? If the impeacher fails to so recall the witness, why might not the proponent of the witness, rather than himself attempting to rehabilitate the witness, move to strike the extrinsic evidence from the record on the ground that the "interests of justice" so require?[45]

The most obvious answer to this question of which side must recall the witness is that section 770 does not require either side to do so. It merely requires that the witness not have been excused from giving further testimony in the action. Therefore, when the impeacher excuses a witness subject to recall he has complied with subsection (b) and has qualified for admission whatever extrinsic evidence of the prior inconsistent statement he wishes to present. Thereafter, section 770 places no duty upon him with respect to the impeached witness. This circumstance suggests that if the impeached witness is to be recalled, it is the proponent of the witness who will usually have to undertake the recall,[46] for it is he who stands to benefit from the witness' rehabilitation and it is he who is in the best position to determine whether an effort at rehabilitation would be futile in the face of the impeaching evidence.[47] While the following remarks were made in a study of the Uniform Rule 22(b) rather than in reference to section 770, they describe a situation quite similar to that under discussion:

> If a person testifies as a witness at the hearing and if one of the parties proposes to prove a statement uttered by the witness on another occasion inconsistent with his testimony, it is, of course, possible to give the witness an 'opportunity to identify, explain or deny the statement,' in the language of Rule 22(b). Assuming the witness remains available throughout the hearing, he can be afforded such opportunity at some point prior to the conclusion of the hearing. Conceivably, the actual affording of such opportunity could be left up to the party supported by the witness. Conceivably, the party seeking to impeach could be permitted to introduce his evidence regarding an inconsistent statement without making any inquiries of the witness. The other party could then decide whether to *recall* the witness and give him opportunity to deny the pretrial statement or to admit it and explain it. Under this scheme, the party supported by the witness would, of course, run the risk that the witness may become unavailable for recall (because, for example, of death or disappearance).[48]

[45] This possible application of the modified rule was suggested by Messrs. Ingemar E. Hoberg and Marvin E. Lewis, both practicing trial attorneys in San Francisco, in interviews conducted at their offices in September 1966.

[46] This conclusion does not eliminate the possibility of the impeacher recalling the impeached witness if he chooses to do so; it is only suggested here that he would not be under any obligation to recall.

[47] This conclusion was stated by Professors J. Warren Madden and Judson F. Falknor of Hastings College of the Law in interviews conducted at their offices in October 1966; and was further stated by Mr. Jon D. Smock, Attorney, California Judicial Council, in an interview at his office in September 1966.

[48] Chadbourn, *A Study of the Witnesses Article of the Uniform Rule of Evidence*, 6 CAL. LAW REVISION COMM'N., REPORTS, RECOMMENDATIONS, & STUDIES 725, 750-51 (1964). As for the possibility of the proponent of an impeached witness arguing that the impeacher does have an obligation to recall the impeached witness to permit him

Conclusion

Thoughtful consideration of the modified foundational rule enacted in section 770 may lead to the conclusion that it will produce more ills than it will cure. Aside from the questions of draftsmanship and interpretation, there persists the more basic question as to the abandonment of the foundation as a *required* procedure. If there is any merit in the traditional justifications of that requirement—fairness to the witness, saving time, preventing unfair surprise to the adversary—is there greater merit in the advantages attributed to the new rule?

How demonstrably advantageous is the modified foundational rule? It is said that it is equally fair to permit the witness to explain his inconsistent statement after it has been introduced into evidence by the impeacher.[49] This proposition, against which the great weight of authority stands,[50] is neutral in character; it provides no positive argument for modifying the foundational requirement or for retaining it in its traditional form. It is further said that the modified rule, through the "interests of justice" clause, will permit admissibility of extrinsic evidence of an inconsistent statement when the witness has been excused and has had no opportunity to explain or to deny the statement.[51] While it is true that some flexibility of this nature is desirable, such relaxation of the foundational requirement had already been partially achieved in California through the *Collup* decision, and it was wholly attainable through adoption of the discretionary rule stated in Uniform Rule 22(b). Yet another possible advantage of the modified rule is that by not requiring a foundation there will no longer be any obstacle to prevent the impeacher from gaining introduction of extrinsic evidence of the inconsistent statement. But this development is only advantageous to the impeacher; it leaves unsettled the issue of whether he *should* be granted such an advantage in the absence of any similar concession to the party whose witness is being impeached. Lastly, it is stated that the modified rule will permit more effective impeachment of collusive witnesses.[52] Although this feature seems to be the most advantageous of all the reasons suggested, there is nothing to indicate that this objective was of such common occurrence or fundamental importance as to necessitate abandonment of the traditional rule, nor is it clear that this objective could not have been achieved by adoption of the discretionary Uniform Rule 22(b). It is submitted that California might have better protected the interests of all parties to a trial by adopting the discretionary Uniform Rule 22(b) for the admission of extrinsic evidence of an inconsistent statement.

*Gale C. Guthrie**

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to explain and that the court could in the "interests of justice" strike the impeaching evidence when the impeacher failed in this obligation, see note 29 *supra* and accompanying text, where the conclusion is reached that the "interests of justice" clause does not qualify subsections (a) and (b) so as to permit the exclusion of any evidence that has qualified for admission through compliance with either of those subsections.

[49] CAL. EVIDENCE CODE § 770, comment.

[50] See, *e.g.*, authorities cited note 41 *supra*.

[51] CAL. EVIDENCE CODE § 770, comment.

[52] *Ibid.*

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