

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF EVIDENCE<sup>1</sup>**

1 **Rule 613. Witness's Prior Statement**

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3 **(b) Extrinsic Evidence of a Prior Inconsistent**  
4 **Statement.** Unless the court orders otherwise,  
5 ~~E~~extrinsic evidence of a witness's prior inconsistent  
6 statement ~~is admissible only if~~ may not be admitted  
7 until after the witness is given an opportunity to  
8 explain or deny the statement and an adverse party is  
9 given an opportunity to examine the witness about it;  
10 ~~or if justice so requires.~~ This subdivision (b) does not  
11 apply to an opposing party's statement under  
12 Rule 801(d)(2).

**Committee Note**

Rule 613(b) has been amended to require that a witness receive an opportunity to explain or deny a prior inconsistent statement *prior* to the introduction of extrinsic evidence of the statement. This requirement of a prior

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<sup>1</sup> New material is underlined in red; matter to be omitted is lined through.

foundation is consistent with the common law approach to prior inconsistent statement impeachment. *See, e.g., Wammock v. Celotex Corp.*, 793 F.2d 1518, 1521 (11th Cir. 1986) (“Traditionally, prior inconsistent statements of a witness could not be proved by extrinsic evidence unless and until the witness was first confronted with the impeaching statement.”). The original rule imposed no timing preference or sequence, however, and permitted an impeaching party to introduce extrinsic evidence of a witness’s prior inconsistent statement before giving the witness the necessary opportunity to explain or deny it. This flexible timing can create problems concerning the witness’s availability to be recalled, and lead to disputes about which party bears responsibility for recalling the witness to afford the opportunity to explain or deny. Further, recalling a witness solely to afford the requisite opportunity to explain or deny a prior inconsistent statement may be inefficient. Finally, trial judges may find extrinsic evidence of a prior inconsistent statement unnecessary in some circumstances where a witness freely acknowledges the inconsistency when afforded an opportunity to explain or deny. Affording the witness an opportunity to explain or deny a prior inconsistent statement before introducing extrinsic evidence of the statement avoids these difficulties. The prior foundation requirement prevents unfair surprise; gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency; promotes judges’ efforts to conduct trials in an orderly manner; and conserves judicial resources.

The amendment preserves the trial court’s discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence in appropriate cases, or to dispense with the requirement altogether. A trial judge may decide to delay or even forgo a witness’s opportunity to explain or deny a prior inconsistent statement in certain

circumstances, such as when the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or when a prior opportunity was impossible because the witness's statement was not discovered until after the witness testified.