The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U. S Army

Timing is Everything: Identifying Prior Consistent Statements

Introduction

You are sitting in the courtroom watching a fairly routine drug distribution case. One of the government's main witnesses, Private First Class (PFC) Jordan, is testifying. Th direct examination seems uneventful, but towards the end of PFC Jordan's testimony you observe the following:

Q: PFC Jordan, where did you obtain the hit of LSD?

A: From Staff Sergeant (SSG) Lacey.

Q: Do you see the person who gave you the hit of LSD in the courtroom?

A: Yes, sir.

Q: Please point to him. [pause]

TC: The witness pointed at the accused, SSG Lacey. No further questions, your honor.

Cross Examination by the Defense Counsel

Q: PFC Jordan, isn't it true that SSG Lacey is your squad leader?

A: Yes, sir.

Q: And he was your squad leader on 15 July 1999?

A: Yes, sir.

Q: Isn't it true that you expected to be promoted to E4 on 1 August 1999?

A: Yes, sir.

Q: But you weren't promoted, were you?

A: No, sir.

Q: In early July, SSG Lacey recommended you for promotion, didn't he?

A: Yes, sir.

Q: On 15 July, he changed his recommendation?

A: Yes, sir.

Q: And he told you that he was going to change his recommendation to the First Sergeant, didn't he?

A: Yes, sir.

Q: He changed his recommendation because you showed up to work drunk on 14 July?

A: Yes, sir.

Q: You were mad at SSG Lacey, weren't you?

A: Yes, sir.

Q: Now, on 15 August 1999, you submitted a urine sample?

A: Yes, sir.

Q: It was part of a company-wide urinalysis test?

A: Yes, sir.

Q: And your urine sample tested positive for LSD?

A: Yes, sir.

Q: On 21 September you spoke with Special Agent (SA) Corn?

A: Yes, sir.

Q: SA Corn is on the drug suppression team?

A: Yes, sir.

Q: SA Corn asked you where you got the LSD, didn't he?

A: Yes, sir.

Q: He tried to get you to cooperate, didn't he?

A: Yes, sir.

Q: He told you that he wasn't interested in seeing a drug *user* fry, right?

A: Yes, sir.

Q: He told you he wanted to bust the drug *dealer*?

A: Yes, sir.

Q: He told you that you were in a lot of trouble, didn't he?

A: Yes, sir, he did.

Q: But he told you that the dealer would be in even more trouble?

A: Yes, sir.

Q: He told you that if you would tell hi where you got the LSD, he would tell your commander that you cooperated with him?

A: Yes, sir.

Q: And he told you that, in the past, commanders were lenient on soldiers who had cooperated with the drug suppression team, didn't he?

A: Yes, sir.

DC: No further questions, your honor.

Redirect Examination by the Trial counsel

Q: When did you submit the urine sample that came up positive for LSD?

A: On 15 August 1999, sir.

Q: On which day did you actually use LSD?

A: 14 August 1999, sir.

Q: Did you use LSD with anyone else on 14 August?

A: Yes, sir.

Q: Who?

A: PFC Smidt, sir.

TC: No further questions, your honor.

Next, the government calls PFC Smidt. At an Article 39(a)[1] session, the defense objects to PFC Smidt's testimony. The defense asserts PFC Smidt has no relevant or competent evidence to offer .The military judge asks the trial counsel for an offer of proof .The trial counsel proffers that PFC Smidt will testify that he used LSD with PFC Jordan on 14 August 1999; that prior to ingesting the drug PFC Smidt asked PFC Jordan where PFC Jordan got the LSD; and that PFC Jordan stated he obtained the LSD from SSG Lacey . T he trial counsel adds that PFC Jordan's statement is not hearsay because it is a prior consistent statement.[2] The defense contends PFC Jordan's statement is not a prior consistent statement because the statement was made after PFC Jordan's improper motive for fabrication arose. Who's right?

The Law of Prior Consistent Statements

This example demonstrates the importance of timing when rehabilitating a witness using a prior consistent statement. Prior consistent statements are specifically excluded from the definition of hearsay.[3] However, not all prior statements by a witness that are consistent with the witness's in-court testimony are "prior consistent statements" within the meaning of Military Rule of Evidence (MRE) 801(d).[4] Only prior statements that rebut a charge of recent fabrication, improper motive, or improper influence are prior consistent statements.[5] This limitation is important.

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1. Article 39(a) authorizes the military judge to call the court into session without the presence of the members to rule on motions or objections. UCMJ art. 39(a) (LEXIS 2000).

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 801(d) (1998) [hereinafter MCM].

3. Military Rule of Evidence (MRE) 802 generally prohibits the introduction of hearsay. *Id.* MIL. R. EVID. 802. Military Rule of Evidence 801(c) defines hearsay as "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 ."Military Rule of Evidence 801(d) describes eight categories of statements that are not hearsay. Under MRE 801(d)(1)(B), a prior consistent st atement of a witness is not hearsay when offered to rebut an express or implied charge of recent fabrication or improper influence or motive. *Id.* MIL. R. EVID. 801.

4. *See infra* note 7 and accompanying text.

5. This article will refer to "a charge of recent fabrication, improper motive, or improper influence" as "a charge of recent fabrication" or "motive to fabricate."

In *United States v. McCaske*,[6] the Court of Military Appeals (forerunner of the Court of Appeals for the Armed Forces (CAAF)) held that the timing of a prior consistent statement affects the statement's admissibility.

> [T]o be logically relevant to rebut such a charge, the prior statement typically must have been made *before* the point at which the story was fabricated or the improper influence or motive arose. Otherwise, the prior statement normally is mere repetition which, if made while still under the improper influence or after the urge to lie has reared its ugly head, does nothing to 'rebut' the charge [of recent fabrication]. Mere repeated telling of the same story is not relevant to whether that story, when told at trial, is true.[7]

In the example above, suppose PFC Jordan returned and made a statement to SA Corn on 1 October 1999. In this statement PFC Jordan identified SSG Lacey as the person fro whom PFC Jordan received LSD on 14 August. To determine if this statement is a prior consistent statement the proponent must determine when the motive to fabricate arose.[8] The defense counsel charged PFC Jordan with two improper motives: bias against SSG Lacey beginning on 15 July, and improper influence beginning on 21 September. Therefore, the prior statement made on 1 October is not a prior consistent statement because the statement was made after the motives to fabricate arose.

What about PFC Jordan's statement to PFC Smidt? The defense counsel charged PFC Jordan with improper influences beginning on 15 July and 21 Sept ember.Private First Class Jordan made this statement to PFC Smidt before 21 September (the offer of leniency by SA Corn), but after 15 July (PFC Jordan's bias against SSG Lacey).

The CAAF recently decided a prior consistent statement case involving multiple assertions of improper influence, improper motive, and recent fabrication. In *United States v. Allison*,[9] the CAAF noted a prior consistent statement under MRE 801(d) must precede the motive to fabricate or improper influence that the statement is offered to rebut. However "[w]here multiple motives to fabricate or multiple improper influences are asserted, the statement need not precede all such motives or inferences, but only the one it is offered to rebut."[10]

Returning to our example, PFC Jordan's 14 August statement to PFC Smidt is not admissible to rebut the charge of bias that arose on 15 July. However, the statement is admissible to rebut the charge of improper influence that arose on 21 September.

Tactical Considerations

This example illustrates how the law of prior consistent statements can impact on tactical decisions. Counsel must know of all prior statements made by all witnesses who testify in the case.[11] When preparing a witness to testify, counsel must prepare the witness for cross-examination. This will cause counsel to anticipate likely attacks on the witness. If the opponent is likely to attack the witness based on a motive to fabricate, determine the point in time this motive arose. Compare this point in time with the witness's prior statements.[12] If the opponent is likely to raise more than one motive to fabricate, compare each prior statement against each motive to fabricate. If the attacked witness (the declarant) made a consistent statement prior to the time any of the motives to fabricate arose, the proponent should have the appropriate document or witness ready to rehabilitate the declarant.

In our example, the trial counsel chose to prove the prior consistent statement by calling the person who heard the statement, PFC Smidt. The trial counsel could have used the declarant, PFC Jordan, to prove the prior consistent statement

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6. 30 M.J. 188 (C.M.A. 1990).

7. *Id.* at 192. *See* Tome v. United States, 513 U.S. 150 (1995) (holding that Federal Rule of Evidence 801(d)(1)(B) requires a prior consistent statement be made before the motive to fabricate arose); *See also* United States v. Cardreon, 52 M.J. 213 (1999).

8. The foundation for a prior consistent statement has four parts. The proponent of the statement must establish: (1) the witnessis on the stand and is subject to cross examination; (2) the testifying witness has been impeached through evidence of an express or implied charge of recent fabricatio n or improper influence or motive; (3) the witness made a prior consistent statement; (4) and the prior consistent statement was made before the alleged fabricatio n, influence, or motive arose. DAVID A. SCHLUETER ET AL., MILITARY EVIDENTIARY FOUNDATIONS 283 (1994).

9. 49 M.J. 54 (1998). *See* United States v. Faison, 49 M.J. 59 (1998); United States v. Hood, 48 M.J. 928 (Army Ct. Crim. App. 1998).

10. *Allison*, 49 M.J. at 57.

11. The Rules for Courts-Martial require the trial counsel to provide to the defense all sworn or signed statements relating to an offense charged in the case which is in the possession of the trial counsel. MCM, *supra* note 2, R.C.M. 701(a)(1)(C). The Rules also require defense counsel to provide to the trial counsel all sworn or signed statements by defense witnesses which are known by the defense and relate to the case. *Id.* R.C.M. 701(b)(1)(A). Note that a prior consistent statement can be oral or written, and need not have been made under oath. SCHLUETER ET AL., *supra* note 8, at 283. Counsel can do several things to discover prior statements by witnesses, including scrubbing police reports and asking each witness about his or her prior statements during witness interview s.

12. A timeline is a simple way to visualize the temporal relationships between a witness's prior statements and motives to fabricate your opponent may raise.

during his redirect examination. In this case, PFC Jordan's prior statement was not written. In cases where the prior consistent statement is in writing, the proponent could prove the prior consistent statement by offering the document.[13]

Each method has advantages. Proving the prior consistent statement using the declarant rehabilitates the witness while the attack on the declarant is fresh in the fact-finder's mind. Proving the prior consistent statement with another witness can bolster the declarant's credibility. This is especially important if the opponent has significantly damaged the declarant's credibility. A badly wounded witness may have a hard time rehabilitating himself. Proving the prior consistent statement with a document eliminates questions about exactly what the declarant said. The circumstances surrounding the making statement may increase the rehabilitative effect (for example, if the document was made under oath to a commander). Chose the method that helps your case the most. Anticipate and prepare your witness so your trial presentation is smooth.

When preparing to cross-examine the opponent's witnesses, anticipate how the opponent is likely to react if you attack the witness's credibility. If you plan to attack a witness's credibility with a charge of recent fabrication, determine the point in time the motive to fabricate arose. The cross-examining counsel will attempt to frame the charge of recent fabrication as arising as early as possible to increase the likelihood that the witness's prior statements were made after the motive to fabricate arose. Next, check to see if the witness made a consistent statement prior to the motive to fabricate arose. If the witness has made a prior consistent statement, reconsider your cross-examination.[14]

In cases with multiple possible charges of recent fabrication, analyze each prior statement to see if it rebuts any of the motives to fabricate. If, for example, a prior statement rebuts (that is, was made before) two of three possible charges of recent fabrication, consider cross-examining the witness only about the earliest motive. This will prevent the opponent fro successfully offering the prior consistent statement. In our example, if the defense counsel asked PFC Jordan about his bias against SSG Lacey but not the offer of leniency made by SA Corn, PFC Jordan's statement to PFC Smidt would not be a prior consistent statement.

Conclusion

Case preparation is essential to success as an advocate. Discovering prior statements by witnesses is an important part of case preparation. Introducing a prior consistent statement is a powerful way to rehabilitate a witness and to neutralize an otherwise effective cross-examination. Denying your opponent the opportunity to introduce a prior consistent statement is equally important. Major O'Brien.

13. The proponent must be sure to satisfy all of the foundational requirements for the document. The acronym BARPH may help. BARP stands for Best Evidence, Authentication, Relevance, Privilege, Hearsay. *See* Major Grammel, *The Art of Trial of Advocacy: Worried About Objecting to a Document? Just BARPH*, ARMY LAW., Feb. 2000, at 28. In this situation, the document is not hearsay because it is a prior consistent statement.

14. "Ignoring bad facts or hoping that the members will be asleep when the damaging evidence comes out are not approaches grounded in reality." Lieutenant Colonel James L. Pohl, *Trial Plan: From the Rear . . . March!*, ARMY LAW., June 1998, at 21.