420 IMPEACHMENT OF WITNESSES: PRIOR INCONSISTENT OR CONTRADICTORY STATEMENTS

COMMENT

In the past edition, Wis JI-Civil 420 instructed that prior inconsistent statements of a witness could not be considered by the jury as substantive evidence. The Committee withdrew this instruction in 1980 due to changes in statutory and case law as explained below.

Based on Wis. Stat. § 908.01(4)(a)1 and the decision of the Wisconsin Supreme Court in Vogel v. State, 96 Wis.2d 372, 291 N.W.2d 838 (1980), a prior inconsistent statement may be considered by the jury as substantive evidence when:

1. The statement in question is inconsistent with the declarant's testimony at trial, and

2. The declarant is available for cross-examination concerning the statement.

The evidentiary rule governing the use of prior inconsistent statements at trial has undergone a marked change since the court's 1956 decision in State v. Major, 274 Wis. 110, 79 N.W.2d 75 (1956). In Major, the court adhered to the long-standing rule that previous inconsistent statements of a witness could not be accorded any value as substantive evidence. Instead, such statements could only be used at trial for the limited purpose of impeachment.

In 1969, the court modified this general rule by holding that under certain conditions, a witness' prior inconsistent statement could be regarded as substantive evidence. Gelhaar v. State, 41 Wis.2d 230, 163 N.W.2d 609 (1969). Following the Gelhaar decision, the Committee's comment to Wis JI-Civil 420 set forth the following conditions under which prior statements could be considered by the jury as substantive evidence:

(1) When the witness acknowledges making the statement, or the statement is proved to have been written or signed by him, or given by him as testimony in a former judicial or official hearing, and

(2) When the witness has testified to the same events in a contrary manner at the present proceedings, and

(3) When the party against whom the statement is offered is afforded an opportunity to cross-examine the witness.

The modified rule in Gelhaar admitting certain extrajudicial statements as substantive evidence did not, however, include prior consistent statements, nor did it apply to the prior inconsistent statements of a party's own witness, even if hostile. The limitations on the use of prior inconsistent statements which were retained in Gelhaar were reaffirmed in Irby v. State, 60 Wis.2d 311, 315, 210 N.W.2d 755 (1973).

Under the Wisconsin Rules of Evidence, adopted after the Irby decision, inconsistent statements are not hearsay when the declarant testifies at trial and is subject to cross-examination concerning the statement. Wis. Stat. § 908.01(4)(a)1 states in pertinent part:

908.01 Definitions. The following definitions apply under this chapter:
. . . .

(4) Statements which are not hearsay. A statement is not hearsay if:
(a) 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:
1. Inconsistent with his testimony, ...

In Vogel v. State, supra, the supreme court concluded that this new rule of evidence eliminated all impediments to the substantive use of the prior inconsistent statements of a witness:

> We therefore conclude that the court of appeals was correct in its holding that Lindsey's prior inconsistent statement was properly admissible under the Wisconsin Rules of Evidence as substantive evidence against the defendant. The statement in question was inconsistent with Lindsey's testimony at trial and he was available for cross-examination concerning it. Under sec. 908.01(4)(a)1, no more is required. 96 Wis.2d at 386.

See also State v. Lederer, 99 Wis.2d 430, 299 N.W.2d 457 (Ct. App. 1980), in which the court of appeals cited State v. Vogel to support the use of prior inconsistent statements as substantive evidence.