



Admissibility of Prior Inconsistent Statements

Study Highlights

January 2018

SB 1445 was introduced by Senator Howell during the Regular Session of the 2017 General Assembly and was referred to the Crime Commission by the Senate Courts of Justice Committee.

This bill proposed amending the rules of evidence in Virginia to permit the admission of prior inconsistent statements as substantive evidence in criminal cases. Substantive evidence is used to support a fact in issue at the trial or hearing, as opposed to impeaching or corroborating the testimony of the witness.

Crime Commission members endorsed SB 1445 to amend Virginia's rules of evidence. SB135 and HB 841 were introduced during the 2018 Session of the General Assembly.

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What are the study findings?

Virginia's rules of evidence could be amended to allow for the admissibility of prior inconsistent statements as substantive evidence in criminal cases, provided that the witness who made the prior inconsistent statement testifies at the trial or hearing and is subject to cross-examination. A prior inconsistent statement is defined as any previous statement by a witness which has a reasonable tendency to discredit their direct testimony on a material matter. The statement can include evasive answers, silence, changes in position, claims of memory loss, or a denial of the previous statement.

No legal impediments exist to amending Virginia law to allow for the introduction of prior inconsistent statements as substantive evidence. The Confrontation Clause of the U.S. Constitution guarantees a defendant the right to confront witnesses against him in a criminal trial. The proposed legislation satisfies this standard by requiring that the witness who made the prior statement be present at trial and subject to cross-examination. Additionally, nearly all states have adopted some variation of this proposed rule of evidence.

By a majority vote, Crime Commission members endorsed SB 1445 as introduced during the Regular Session of the 2017 General Assembly to amend existing law to allow for the introduction of prior inconsistent statements as substantive evidence.

What rules govern the admissibility of prior statements?

Two competing rules exist regarding the admissibility of prior inconsistent statements: the common law rule and the modern rule. Under the common law rule, out-of-court statements are treated as hearsay and can only be used to *impeach* the credibility of a witness. These prior statements are not deemed sufficiently reliable to be introduced as substantive evidence because they were not under oath, before the trier of fact, or subject to cross-examination. Virginia and two other states currently follow this rule.

The modern rule allows for out-of-court statements to be admitted as *substantive* evidence in consideration of the defendant's guilt, provided that the witness who made such statements testifies at the proceeding and is subject to cross-examination. Under this rule, the trier of fact can consider all relevant evidence, observe the demeanor of the witness, and hear an explanation for any discrepancy between statements of the witness. This rule is observed in some form by 47 states, the District of Columbia, and the Federal Rules of Criminal Procedure. The degree to which prior inconsistent statements are admissible in these jurisdictions varies based upon the circumstances under which the prior inconsistent statement was made.