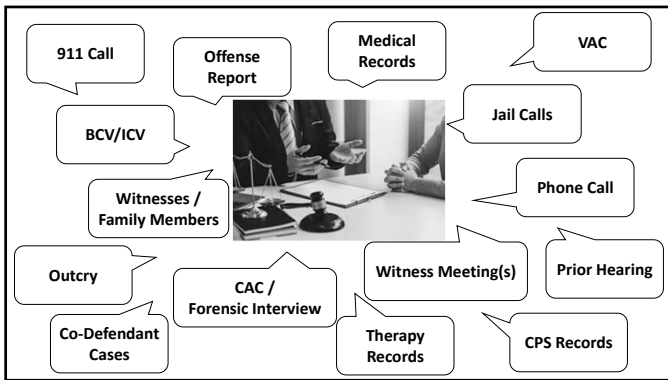


Identifying and Using Prior Statements



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	Witness Statements
	Weighing their Credibility
	Preparing for Use in Trial
	Using Prior Statements in Trial

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Witness Statements

TRE 615(f): Producing a Witness's Statement

"Statement" Defined. As used in this rule, a witness's "statement" means:

- 1) A written statement that the witness makes and signs, or otherwise adopts or approves;
- 2) A substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or
- 3) The witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.


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Witness Statements: CCP 39.14(a)

...as soon as practicable after receiving a timely request from the defendant the state shall produce...any offense reports, any designated documents, papers, *written or recorded statements of the defendant or a witness*, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report...

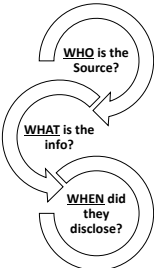
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Weighing Statement Credibility



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Weighing Statement Credibility



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Weighing Statement Credibility: VICTIM

← Trauma

EVENT

→ No Trauma

- Amygdala ("primitive brain")
- Focuses on danger/threat
- Primitive response: fight, flight, freeze
- Memory: fragmented and illogical



- Cerebral Cortex ("rational brain")
- Takes sensory information, organizes and stores it
- Memory: orderly and chronological

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Weighing Statement Credibility

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Weighing Statement Credibility: Recantation

1. I don't want to testify.
2. He didn't do it.
3. The officer lied.
4. I was too drunk to remember.
5. I started it.
6. He's never done this before.
7. I don't want him to lose his job.
8. It wasn't that bad, I just overreacted.

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Weighing Statement Credibility: Recantation

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Weighing Statement Credibility: Investigations

- **Primary Investigation: Scene**
 - Demeanor(s)
 - Photograph people AND the scene
 - Independent witnesses
 - Surveillance footage
- **Secondary Investigations:**
 - Prior hearings (protective orders, divorce, bond conditions)
 - Medical records
 - CPS records
 - Prior arrests
 - Social media
 - Jail Calls



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Preparing for Use in Trial



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Preparing for Trial: Cooperative Witness

- Review the statements first
- Let them discuss the attack in whatever order they choose
- Ask about sensations during attack
- Review evidence with them they will sponsor
- Ask for additional evidence (texts, progression photos, torn clothes, broken items, medical records)
- Ask what the defense will say their motive is
- Discuss difficult issues ("inconsistent")
- Cross-examine your witness

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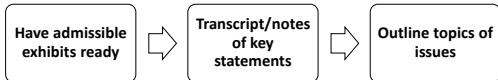
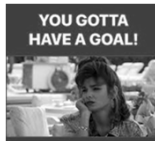
Preparing for Trial

- Document what the witness says.
- Have another person with you (VAC, investigator, ADA).
- Determine whether/how the statement changed from the original.
- Alcohol/Memory:
 - Lay foundation for refreshing memory
- "Something escalated that night to the level that the police needed to be called. Let's try and identify that issue so the police don't have to be called again."
- Do NOT try to litigate the case with them.

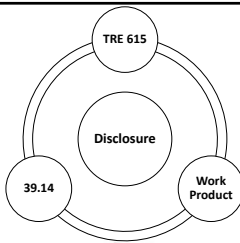
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Preparing for Trial... or Not!

- Crossing the defendant
- Crossing defense witnesses
- Uncooperative victim



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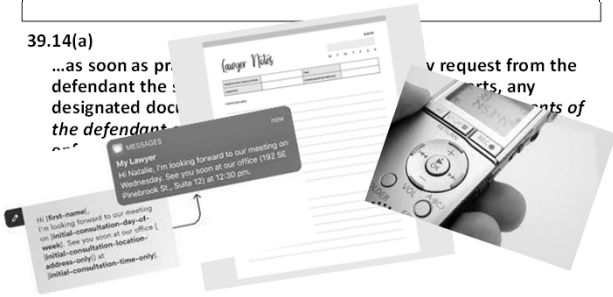


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Preparing for Trial: Discoverable?

39.14(a)

...as soon as practicable after the request from the defendant the designated documents, any parts, any contents of



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Preparing for Trial: Discoverable?

- “Gaskin Rule” – governed prior to TRE becoming effective in 1986
 - State was required to produce a witness’s written statement to the defense at the conclusion of the witness’s direct testimony
- Previously R.614 → Now R.615 (codifies and expands *Gaskin* rule)



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Preparing for Trial: Discoverable?

Balance “Gaskin Rule” and Work Product Doctrine:

We are cognizant as the State has pointed out that not every tape-recorded interview will be in such a form that it consists solely of a witness relating the events of the crime with no questions from the prosecutor. **DISCOVERABLE**

At the other extreme, if the recording obviously consists of the work product of the prosecutor, such as comments by the prosecutor on this trial strategy and his opinions of the strengths and weaknesses of the case, the recording will not be obtainable under *Gaskin*. **WORK PRODUCT**

If a recording falls in between the two extremes, the defendant will have the duty to review the recording in camera and make a determination of what portions of the recording are discoverable under *Gaskin*. Following such a review, the defendant is entitled to receive under *Gaskin*. **IN CAMERA REVIEW**

discoverable portions excised from the recording, and, if available, a transcript of the portion of the recording which falls within the *Gaskin* rule should be furnished to the defendant.

Obviously a determination of the application of the *Gaskin* rule will have to be made on a case by case basis....

Cullen v. State, 719 S.W.2D 195 (Tex.Crim.App.1986)

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Preparing for Trial: Discoverable?

- ADA notes
 - Made by the witness?
 - Signed, adopted or approved by the witness?
 - Are the notes a "substantially verbatim recital" of witness's oral statement?
 - Written interpretations?
 - Prosecutor's own summary of conversation?
- ADA recordings
 - 615(f)(2) unless work product (mental impressions, trial strategy, etc.)
- Abuse of discretion standard



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Preparing for Trial: Discoverable?

- BEWARE OF BRADY
- BEWARE of court discovery order
 - *Deamus v. State*, No. 05-15-01182-CR (Tex.App.—Dallas Aug. 22, 2017, no pet.)(not for pub.)
 - Discovery: ORs produced; in reports, no witnesses actually saw who fired the shots.
 - An eyewitness testified about seeing a shooting in a capital murder trial. After this W testified, D/C questioned him outside presence of the jury to discredit the W's claim he told police he was an eyewitness to the shooting. W maintained he told the police what he'd seen. W couldn't explain why none of the reports reflected W had seen the shooting.
 - Court Discovery Order: required the State to produce "[a]ny statements by any party or witness to [the] alleged offense in the State's possession or within its knowledge, including any law enforcement agency, whether such statements were written or oral, which might in any manner be material to either Defendant's guilt or innocence or punishment, if any."

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Preparing for Trial: Discoverable?

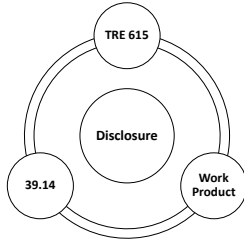
- BEWARE of court discovery order
 - *Deamus v. State*, No. 05-15-01182-CR (Tex.App.—Dallas Aug. 22, 2017, no pet.)(not for pub.)
 - D complained State violated discovery order when State didn't give notice a witness would provide eyewitness testimony nor give a rendition of his eyewitness account.
 - ADA said the W statement was given to the ADA during a witness interview → Work Product
 - D/C Motion for New Trial: Exclusionary Rule when ADA willfully withholds evidence in violation of discovery order
 - Notes are not R. 615. BUT discovery order "unambiguously required the State to produce oral statements made by any part or witness to the offense."
 - Defense was "ambushed at trial" and "unable to prepare a proper defense" because he was "totally unaware of the eyewitness statement that had been made to the prosecutor."

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Preparing for Trial: Discoverable?

Disclosure:

- Produce written notes?
- Email?
- Memo?
- File with court?



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Using Prior Statements in Trial



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Using Prior Statements in Trial

- 615: Producing a Witness's Statement in Criminal Cases
- 613(a): Witness's Prior Inconsistent Statement
- 613(b): Witness's Bias or Interest
- 613 (c): Witness's Prior Consistent Statement
- 801: Not Hearsay
- 803: Hearsay Exceptions (Regardless of Declarant Availability)
- 804: Hearsay Exceptions (Declarant Unavailable)

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Using Prior Statements in Trial: TRE 615

TRE 615 – Producing a Witness’s Statement in Criminal Case

(a) **Motion to Produce.** After a witness other than the defendant testifies on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the state or the defendant and the defendant’s attorney to produce, for the examination and use of the moving party, any statement of the witness that:

- 1) Is in their possession;
- 2) Relates to the subject matter of the witness’s testimony; and
- 3) Has not previously been produced

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Using Prior Statements in Trial: TRE 615

TRE 615

(b) **Entire Statement:**

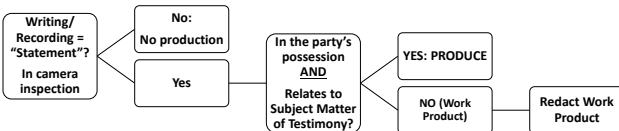
- Must produce entire statement if it relates to the subject matter of the witness’s testimony

(c) **Redacted Statement:**

- If person who called the witness says the statement contains information NOT related to the subject matter of the testimony, court does in camera inspection.
- Redact any unrelated portions.
- If a party objects to the redaction, court must preserve the entire statement, under seal, as part of the record

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Preparing for Trial: Discoverable? TRE 615



**ATTORNEY CLIENT
PRIVILEGE**

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Using Prior Statements in Trial: TRE 615

- 39.14: doesn't extend equivalent discovery rights to prosecutors
- ADAs can use TRE 615 to obtain defense witness statements (but not Defendant's)

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Using Prior Statements in Trial: TRE 613

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**Using Prior Statements in Trial: TRE 613(a)
Witness's Prior Inconsistent Statement**

- **Foundation:** when examining a witness about a prior inconsistent statement – whether oral or written – a party must first tell the witness:
 - The contents of the statement
 - The time and place of the statement; and
 - The person to whom the witness made the statement
- Give W opportunity to explain (admit) or deny the prior inconsistent statement
- W unequivocally admits to having made statement → **NO** extrinsic evidence
 - **Note:** if W admits to portions but denies portions, can only admit the portion that contradicts the witness for impeachment

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**Using Prior Statements in Trial: 801(e)(1)(A)
Prior Inconsistent Statement**

- 801(e)(1)(A):
 1. The declarant testifies and is subject to cross-examination and
 2. The statement is inconsistent with the declarant's testimony and
 3. Was given under penalty of perjury at a trial, hearing, or other proceeding — except a grand jury proceeding — or in a deposition
- NOT HEARSAY and admissible to prove the truth of the matter asserted
- EX: protective order hearing, re-trials
 - If prior statement NOT given under oath or was given during grand jury, then Rule 613 only applies if prior statement is inconsistent w/trial testimony

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**Using Prior Statements in Trial:
Inconsistent Statement**

- TRE 611(c)(2): Request to treat the victim as a hostile witness to allow leading questions
 - 1) Party has called a witness to testify
 - 2) Witness's testimony has surprised the sponsoring party;
 - 3) The testimony is otherwise injurious to the sponsoring party's cause
- Identify weaknesses in their newly rehearsed story



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**Using Prior Statements in Trial: TRE 613(b)
Witness's Bias or Interest**

- Foundation: when examining a witness about the witness's bias or interest, a party must first tell the witness the circumstance or statements that tend to show the bias/interest:
 - A. The contents of the statement
 - B. The time and place of the statement; and
 - C. The person to whom the statement was made
- Give W opportunity to explain (admit) or deny the circumstances or statements that tend to show the witness's bias/interest
- W unequivocally admits to the bias/interest → NO extrinsic evidence



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**Using Prior Statements in Trial: TRE 613(b)
Witness's Bias or Interest**

- **Examples:**
 - Co-D testifies
 - W is on probation
 - W has unrelated charges
 - Child abuse witness/victim motives
 - *Billodeau v. State*, 277 SW3D 34 (Tex.Crim.App.2009)
- **404(b)** commonly used by State to present evidence of other crimes, wrongs or acts to prove D's motive in current charge
- **607, 608, 609** = general witness impeachment
- **613(b)** gives opportunity to impeach witness with extrinsic evidence for witness motive/bias

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Using Prior Statements in Trial

- Understand why the victim is recanting/testifying inconsistently
- You cannot call a witness just to impeach them – call them for independent reasons
- Impeach by prior inconsistent statement OR by showing their bias
- Maintain your jury's sympathy towards victim

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**Using Prior Statements in Trial: TRE 613(c)
Prior Consistent Statement**

- NOT admissible if offered solely to enhance the witness's credibility
- **801(e)(1)(B):**
 1. The declarant testifies and is subject to cross-examination when
 2. An express/implied charge of recent fabrication, improper influence, or motive is lodged by opponent, leading declarant's side to
 3. Offer a prior consistent statement that
 4. Was made before any motive to testify falsely arose
- General challenge to memory/credibility (cross examination) v. suggestion of fabrication
 - Common: suggestion victim lying on the stand; implication that a witness's testimony was coached or coerced by the other side
 - *Klein v. State*, 273 SW3D 297, 312 (Tex.Crim.App.2008) – conflicts in evidence can trigger use of prior consistent statements when the inconsistencies are the result of cross-examination
- **801(e)(1)(B) = NOT HEARSAY**
- Abuse of discretion standard

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Using Prior Statements in Trial: NOT Hearsay

- TRE 801 – declarant TESTIFIES and subject to cross-examination
- NOT Hearsay – substantive evidence

TRE	Summary	Examples	See Also:
801(e)(1)(A)	Prior inconsistent statement + Prior statement given under penalty of perjury at a trial, hearing, or other proceeding (except grand jury) or in a deposition	Protective Order Hearing; Re-trial	TRE 613(a) (for impeachment)
801(e)(1)(B)	Prior consistent statement + Offered to rebut express/implied charge of recent fabrication	Police interviews	TRE 613(c)
801(e)(2)	Opposing Party's Statement	Witnesses; Police Interview; D's grand jury testimony	

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Using Prior Statements in Trial: Grand Jury

- CCP 20A.201 Recording of Accused or Suspected Person's Testimony; Retention of Records
 - SHALL be recorded
- CCP 20A.205: Petition for Disclosure by Defendant
 - The court may order disclosure of the information if the defendant shows a particularized need
- Grand Jury Testimony
 - Witnesses:
 - Impeachment: Prior Inconsistent Statement (613(a))
 - Hearsay Exception: Recorded Recollection: (803(5))
 - Defendant: Statement by Party Opponent (801(e)(2))

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Using Prior Statements in Trial

- TRE 803: Hearsay Exceptions Regardless of Declarant Availability
- BEWARE: Confrontation Clause / "Crawford"

TRE	RULE	EXAMPLES
803(1)/(2)	Present Sense Impression / Excited Utterance	911 Calls
803(3)	Then-Existing Mental, Emotional, or Physical Condition	CW statement about bodily condition after being attacked
803(4)	Medical Diagnosis/Treatment	EMS, hospital, counselors, social works, etc.
803(5)	Recorded Recollection	Grand jury testimony, probation records
803(6)	Business Records	911 calls, medical records, jail records
803(22)	Judgment of a Previous Conviction	Judgment (including uncertified federal judgment)

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**Using Prior Statements in Trial:
Declarant Unavailable**

- 804(b): Hearsay Exceptions with Declarant Unavailable:**
- Exempt b/c court ruled a privilege applies
 - Refuses to testify (despite court order)
 - Testifies to "not remembering"
 - Death or then-existing infirmity, physical/mental illness
 - Absent from trial/hearing and proponent of statement unable, by process or other reasonable means, to procure attendance or testimony

DOES NOT apply if Defendant engaged in Forfeiture by Wrongdoing

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**Using Prior Statements in Trial:
Declarant Unavailable**

TRE	RULE	EXAMPLES
804(b)(1)	Former testimony <ul style="list-style-type: none"> • Unavailability – good faith effort to secure witness • Similar motivation/opportunity to cross-examine the prior testimony 	Retrials; protective order hearings; Defendant's prior testimony if refuses to testify in retrial
804(b)(2)	Dying Declarations (direct or circumstantial evidence) <ul style="list-style-type: none"> • Declarant conscious of approaching death "and had no hope of recovery" <ul style="list-style-type: none"> • NOTE: focus on state of mind at the time statement made, not on eventual outcome • Voluntarily • W/O persuasion or influence from leading questions; AND • Declarant was of sound mind 	911 call; witness statement; victim statement to police
804(b)(3)	Statement of Personal or Family History	W (friend) statements about ages, relationship, living arrangements

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**Using Prior Statements in Trial:
Proving the Elements without a Victim**

Date/Location	ID D	Relationship	Bodily Injury
<ul style="list-style-type: none"> • 911 Call • Responding Officers • 3rd Party W • D's statement 	<ul style="list-style-type: none"> • 911 Call • EMS Records • 3rd Party W • D's statement • Medical Records • Jail Calls/Mail • Children 	<ul style="list-style-type: none"> • 911 Call • 3rd P W (friend, family, neighbor) • D's statement • Jail calls/Mail • Photographs of couple 	<ul style="list-style-type: none"> • Officer Observations • Photographs • Body Camera (MUTE unless hearsay exception) • Medical Records • 3d Party W • Hearsay exception to 3rd Party (excited utterance) • Hearsay exception to law enforcement (present sense impression)

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