6.20 Impeachment by Recent Fabrication

(1) A claim of "recent fabrication" means that a party is charging a witness not with mistake or confusion, but with making up a false story to meet the exigencies of the case.

(2) Provided there is a good faith basis for introducing evidence of recent fabrication, a party may elicit the evidence from a witness on cross-examination, and present extrinsic proof tending to establish that the witness testified to a false story and the reason therefor.

(3) When a party creates the inference of, or directly characterizes the testimony of a witness as, a recent fabrication, a prior consistent statement of the witness, made at a time when there was no motive to fabricate, is admissible to aid in establishing the witness's credibility.

Note

Subdivision (1)'s definition of "recent fabrication" is drawn from *People v Singer* (300 NY 120, 124 [1949]):

> "[Recent fabrication means] that the defense is charging the witness not with mistake or confusion, but with making up a false story . . . 'Recently fabricated' means the same thing as fabricated to meet the exigencies of the case" (citation omitted; *see Nelson v Friends of Associated Beth Rivka Sch. for Girls*, 119 AD3d 536, 538 [2d Dept 2014] ["Here, the focus of the defense was not merely that the infant plaintiff was mistaken or that she was confused or could not recall her accident, but that she was coached to tell a 'false story well after the event' and, as such, it was a recent fabrication"; thus, the infant's prior statement in a medical record that was consistent with her testimony was admissible]).

"Recent fabrication" is not limited to fabrication of evidence after an event. In *People v Davis* (44 NY2d 269, 277-278 [1978]), for example, the Court noted that the "the only questions on cross-examination addressed to motive to fabricate related to a fabrication of the entire case from, and perhaps before, its very inception."

Subdivision (2) is derived from *People v Spencer* (20 NY3d 954 [2012]), and *People v Hudy* (73 NY2d 40 [1988], *abrogated on other grounds by Carmell v Texas*, 529 US 513 [2000]). Perhaps the most important aspect of the rule on "recent fabrication" evidence drawn from those cases is that evidence of recent fabrication is not collateral, because it may go to the heart of the truthfulness of a witness's testimony and the validity of a claim; as a result, regardless of whether a witness is cross-examined about a claim of "recent fabrication," competent and relevant extrinsic evidence of "recent fabrication" is admissible. (*See Spencer* at 956 [provided that counsel has a "good faith basis" for eliciting the evidence, "extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground"]; *Hudy* at 56 ["extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground"].)

The extrinsic evidence of "recent fabrication," as with any evidence, needs to be competent and relevant. (*Cf. People v Thomas*, 46 NY2d 100, 105 [1978] [evidence of hostility (which is also not collateral) was here properly excluded as "too remote"].) At the same time, "the trial court's discretion in this area is circumscribed by the defendant's constitutional rights to present a defense and confront his accusers." (*Hudy* at 57.)

Subdivision (3) is derived from *Davis* (44 NY2d at 277) which authorized the admission of a witness's "antecedent consistent statements" when the "cross-examiner has created the inference of, or directly characterized the testimony as, a recent fabrication." For further commentary, see the Note to subdivision (2) of Guide to New York Evidence rule 8.31 (Prior Consistent Statement).