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## Virginia Statute Prevents Admission into Evidence of Some Written or Recorded Statements Taken by Insurance Adjusters

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Virginia civil law can be odd in a number of ways, not the least of which is the intent and effect of Virginia Code Ann. § 8.01-404 concerning prior written or recorded statements by witnesses. This statute, which contradicts the majority evidence rule that permit a defense attorney to use a prior written statement to cross-examine a witness, states that "(I)n an action to recover for personal injury or death by wrongful act or neglect, no ex parte affidavit or statement in writing, other than a deposition, of a witness and no extrajudicial recording made at any time other than simultaneously with the wrongful act or negligence at issue….shall be used to contradict him as a witness in the case." Thus, if an adjuster, attorney, or investigator obtains a statement from a plaintiff or other witness, if written or recorded on tape, that statement cannot be used at trial to contradict that witness when he inevitably changes his story two years later.

In *Harris v. Harrington*, 180 Va. 520, 534, 25 S.E.2d 352, 358 (1940), the Supreme Court of Virginia explained the reason for the passage of this statute:

The purpose of the addition to the statute was to correct an unfair practice which had developed, by which claim adjusters would hasten to the scene of an accident and obtain written statements from all eye-witnesses. Frequently, these statements were neither full nor correct and were signed by persons who had not fully recovered from shock and hence were not in full possession of their faculties. Later, such persons, when testifying as witnesses, would be confronted with their signed statements, and, after admitting their signatures, these statements would be introduced in evidence as impeachment of their testimony given on the witness stand.

Although the Virginia Supreme Court seemed shocked by this, that is exactly what the majority of courts and published rules routinely provide for in other states and jurisdictions. For example, Federal Rule of Evidence 613 specifically permits examination of a witness using a prior written statement, whether or not you show that statement to the witness first, and Fed.R.Evid. 804(b)(3) notes that a prior "statement against interest" is an exception to the hearsay rule, and permits such statements to be introduced.

Regardless of the majority rule, Virginia's statute at best places strict limits on the use of such recorded or written statements, and at worst, forbids their use completely. However, there is sometimes a way around this rule. For instance, the statute specifically notes that such statements cannot be used "to contradict him as a witness in the case." If, during pre-trial depositions or via requests for admission, the attorney can confront the witness about the content of the statement, and then get that witness to either adopt it as truthful, or testify substantially in accordance with the statement, then you can clearly argue that the statement is not being used for *contradiction* of the witness's trial testimony, but simply as a prior consistent statement. Even if the witness testifies consistently with that statement, you can sometimes successfully use that statement to impeach that witness's statements in pleadings or in interrogatory answers, since the statute arguably only disallows contradiction of trial testimony.

For instance, in *Gray v. Rhoads*, 268 Va. 81, 86, 597 S.E.2d 93, 96 (2004), the Supreme Court of Virginia re-examined this statute and its effect in civil cases, and refused to apply the statute to prevent the use of a statement at trial against a police-officer defendant, holding that if the statute's language is "clear and unambiguous", then the courts must assume that the state legislature knew what it was doing and enforce the statute exactly as it is written. Thus, if the statement is not being used to "contradict" that witness, the statute's plain meaning cannot be thwarted to exclude the statement anyway. The Court in *Gray v. Rhoads* also noted the statute should only apply to prior statements used to impeach a witness's credibility, and "by contrast" statements deemed "extra judicial admissions" or statements directly against a party's interest are usually always admissible against that party. *Id*.

The lesson from this, is that Virginia's evidence law is definitely odd, and may indeed prohibit the use of a written or recorded statement taken by an insurance adjuster or attorney. However, lawyers and insurance professionals should not over-react to the statute and fail to try to get such evidence admitted based on folk-lore and misconceptions (sometimes even misconceptions by the trial judge) about what the statute actually does and does not regulate. At the least, a creative defense lawyer may be able to obtain factual concessions from the plaintiff or witness in a deposition or via requests for admission, based on what was said in the statement, and then simply use the deposition testimony or admissions instead of the written statement and thus avoid the rule entirely.