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**PRIOR STATEMENTS OF TESTIFYING
WITNESSES: DRAFTING CHOICES
TO ELIMINATE OR LOOSEN THE STRICTURES
OF THE HEARSAY RULE**

*Daniel J. Capra**

One of the panels at the Symposium on Hearsay Reform—sponsored by the Judicial Conference Advisory Committee on Evidence Rules—considered whether the federal hearsay regime should be changed to provide for greater admissibility of prior statements of testifying witnesses. This Article is intended to provide some background to the questions addressed by the panel and to consider how the Advisory Committee on Federal Rules of Evidence (“the Advisory Committee” or “the Committee”) might best implement an expansion of admissibility of prior witness statements should it decide that such an expansion is warranted.

Before deciding on an amendment, the Committee will need to work through several important substantive decisions. Among those decisions are:

- (1) Should prior statements of testifying witnesses be placed outside the hearsay definition—or should an exception be established—given the fact that the declarant is subject to cross-examination about the statement?
- (2) Assuming that prior witness statements remain subject to the hearsay rule, should the current exemption in Rule 801(d)(1)(A) be expanded to allow for substantive admissibility of all (or more, if not all) prior inconsistent statements? Currently, substantive admissibility is extremely limited, applying only to those statements that were made under oath at a formal proceeding.¹
- (3) Assuming that prior statements of testifying witnesses remain subject to the hearsay rule, is there any reason to expand the exemption for prior consistent statements—Rule 801(d)(1)(B)—given the recent expansion that became effective in 2014? The 2014 amendment provides that if a prior consistent statement is

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1. FED. R. EVID. 801(d)(1)(A).

properly admitted under Rule 403² to rehabilitate a witness whose credibility has been attacked,³ it is also admissible as substantive evidence—i.e., as proof that the content in the statement is true.⁴

- (4) Assuming that prior statements of testifying witnesses remain subject to the hearsay rule, is there any reason to alter the existing exemption in Rule 801(d)(1)(C) for statements of identification?⁵

This Article is divided into five parts. Part I discusses the arguments for and against classifying prior statements of testifying witnesses as hearsay. Part II discusses the history behind the Federal Rules' treatment of prior inconsistent statements, as well as the different approaches taken in some of the states. Part III provides the history of the Federal Rules' treatment of prior consistent statements, including the 2014 amendment, and discusses the possibility of further expansion of admissibility of such statements. Part IV briefly discusses prior statements of identification and considers whether any changes to the existing exemption would be useful. Part V provides preliminary drafting alternatives.

I. SHOULD PRIOR STATEMENTS OF TESTIFYING WITNESSES BE TREATED AS HEARSAY?

This part considers whether, as a matter of hearsay theory and understandable trial practice, it makes sense to treat prior statements of testifying witnesses as hearsay. If the problem of hearsay is solved by cross-examination, why should the hearsay rule apply when the statement is made by a witness who can be cross-examined?

A. *Arguments in Favor of Admitting Prior Statements of Witnesses As Substantive Evidence*

Federal Rule of Evidence 801(c) defines hearsay as a statement that “the declarant does not make while testifying at the current trial or hearing.”⁶ Thus, a prior statement of a testifying witness, when offered for its truth, is hearsay. So when the witness says, “I told my cousin that I saw the defendant texting while driving and then he ran over the plaintiff,” that is not admissible to prove the facts asserted in the statement to the cousin.⁷

2. Federal Rule of Evidence 403 provides that evidence may be admitted unless its probative value is substantially outweighed by the risk of unfair prejudice, confusion, or delay. *Id.* 403.

3. *See id.* 801(d)(1)(B) advisory committee's note to the 2014 amendment (noting that “to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403”).

4. *Id.* 801(d)(1)(B).

5. Rule 801(d)(1)(C) provides that a declarant's statement of identification is substantively admissible if the declarant testifies at trial subject to cross-examination. *Id.* 801(d)(1)(C).

6. *Id.* 801(c)(1).

7. Of course, the witness could also testify to what he saw at the time of the accident, and that would not be hearsay. Under the Federal Rule, though, the witness's statement

Many scholars have argued that prior statements of testifying witnesses should not be classified as hearsay. The leading proponent for placing prior statements of testifying witnesses outside the hearsay rule was probably Professor Edmund Morgan.⁸ Morgan's basic argument is that the rule against hearsay stems from a concern that the out-of-court declarant's credibility cannot be assessed by the traditional methods of oath, cross-examination, and view of demeanor.⁹ But when the declarant *is* the witness at trial, she *will* be under oath and subject to cross-examination and review of demeanor. Morgan makes this point in his famous article, *Hearsay Dangers and the Application of the Hearsay Concept*:

When the Declarant is also a witness, it is difficult to justify classifying as hearsay evidence of his own prior statements. . . . The courts declare the prior statement to be hearsay because it was not made under oath, subject to the penalty for perjury or to the test of cross-examination. To which the answer might well be: "The declarant as a witness is now under oath and now purports to remember and narrate accurately. The adversary can now expose every element that may carry a danger of misleading the trier of fact both in the previous statement and in the present testimony, and the trier can judge whether both the previous declaration and the present testimony are reliable in whole or in part."¹⁰

Morgan realizes, of course, that at the time the witness made the prior statement she was not subjected to cross-examination, oath, or a review of demeanor. But he argues that the existence of these protections at the time of trial should suffice. Morgan observes that if the prior statement is consistent with the in-court testimony, it is being affirmed by the witness "under oath subject to all sanctions and to cross-examination in the presence of the trier who is to value it."¹¹ As Morgan notes, a prior consistent statement might be excluded on the grounds that it is cumulative, "but surely the rejection should not be on the ground that the statement involves any danger inherent in hearsay."¹²

about the prior event is treated no differently than any other declarant's statement about the event. If it is offered for truth, it is hearsay.

One might ask why a party would want to admit a witness's prior statement about an event when the witness can simply testify about the event itself. The answer is that in many cases the in-court testimony of the event has a different evidentiary significance than the statement made earlier and closer in time to the event. Moreover, if the witness has now changed his story about the event, the prior (inconsistent) statement obviously has a different effect than the in-court testimony.

8. Morgan drafted the Model Code of Evidence in 1942. THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 389 (Roger K. Newman ed., 2009). The Model Code contained a definition of hearsay that covered prior statements of testifying witnesses, but further provided that hearsay was admissible whenever the declarant either was "unavailable as a witness" or was "present and subject to cross-examination." MODEL CODE OF EVIDENCE r. 801(c) (AM. LAW INST. 1942). But the provision was not well received at the time. See David Sklansky, *Hearsay's Last Hurrah*, 2009 SUP. CT. REV. 1, 15–17.

9. See generally Edmund Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177 (1948).

10. *Id.* at 192–94.

11. *Id.* at 196.

12. *Id.*

But what if the witness denies having made any statement at all? That should not be a problem according to Morgan because the witness “will usually swear that he tried to tell the truth in anything that he may have said.”¹³ Thus, cross-examination on that averment will be sufficient to regulate any credibility questions as of the time the statement was made. If, on the other hand, the witness concedes that he made the statement but now swears that it was not true, the jury, viewing the testimony of the person who made both statements, is in a good position to assess which story represents the truth in light of all the facts. Morgan concludes:

In any of these situations Proponent is not asking Trier to rely upon the credibility of anyone who is not present and subject to all the conditions imposed upon a witness. Adversary has all the protection which oath and cross-examination can give him. Trier is in a position to consider the evidence impartially and to give it no more than its reasonable persuasive effect. Consequently there is no real reason for classifying the evidence as hearsay.¹⁴

Two further points can be made in support of exempting prior statements of witnesses from the hearsay rule. First, the prior statement is by definition closer in time to the event described and so is less likely to be impaired by faulty memory or a litigation motive.¹⁵ Second, treating all prior statements of testifying witnesses as outside the hearsay rule would dispense with the need to give confusing limiting instructions as to those statements that would be admissible anyway for credibility purposes—for example, an instruction that “the prior inconsistent statement may not be considered as a proof of any fact, but only for its bearing on the credibility of the witness.”¹⁶ Indeed the interest in avoiding difficult-to-follow instructions was the animating reason behind the 2014 amendment to Rule 801(d)(1)(B) that eliminated the distinction between substantive and rehabilitative uses for prior consistent statements.

13. *Id.*

14. *Id.*

15. See *Federal Rules of Evidence: Hearing on H.R. 5463 Before the S. Comm. on the Judiciary*, 93d Cong. 65 (1974) (statement of the Standing Comm. on Rules of Practice and Procedure and the Advisory Comm. on Rules of Evidence of the Judicial Conf. of the U. S.) (“The prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play.”).

16. See Morgan, *supra* note 9, at 193 (“Furthermore, it must be remembered that the trier of fact is often permitted to hear these prior statements to impeach or rehabilitate the declarant-witness. In such event, of course, the trier will be told that he must not treat the statement as evidence of the truth of the matter stated. But to what practical effect? . . . Do the judges deceive themselves or do they realize that they are indulging in a pious fraud?”); see also Steven DeBraccio, *That’s (Not) What She Said: The Case for Expanding Admission of Prior Inconsistent Statements in New York Criminal Trials*, 78 ALB. L. REV. 269, 297 (2014) (“[I]t would be more beneficial to our trial process to simply allow the jurors to consider the evidence as truth and avoid the never-ending discussion on the usefulness of limiting instructions.”).

*B. Arguments in Favor of Treating Prior Statements
of Witnesses As Hearsay*

The classic argument for treating prior statements of witnesses as hearsay was set forth by Justice Royal A. Stone of the Minnesota Supreme Court in *State v. Saporen*.¹⁷ He contended that delayed cross-examination of a statement at trial is simply not the same as cross-examination at the time the statement is made:

The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot. False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.¹⁸

The *Saporen* court's view of cross-examination at trial as "[striking] while the iron is hot" is surely overstated.¹⁹ It is not as if an adversary's witness is speaking extemporaneously and off-the-cuff during direct testimony. Trial testimony is usually prepared in advance and elicited in a formal question-and-answer format. For the cross-examiner of a witness at trial, the iron is not truly hot. Put another way, the asserted gap in effectiveness between cross-examination about a prior statement and cross-examination of trial testimony is surely not as wide as the *Saporen* court suggests.

That said, there is certainly dispute in the profession about the comparative effectiveness of delayed cross-examination and cross-examination of trial testimony. At the symposium, Professor Saltzburg made a strong argument that delayed cross-examination is particularly ineffective when the witness denies ever having made a statement. It must be said, however, that the implausibility of such a denial in many circumstances—such as when the prior statement was recorded—should cut in favor of admissibility of the prior statement because in such cases the witness can be cross-examined about that discrepancy. Moreover, a witness should not be allowed to bar admissibility of his prior statement simply by declaring falsely that he never made it. Finally, a witness who denies he made a statement is really no different from a witness to an *event* who testifies and denies seeing the event—and yet such a witness's statement about the event is routinely admitted subject to cross-examination.

Besides the alleged infirmity of delayed cross-examination, there are two other arguments that have been put forth in favor of treating prior statements of witnesses as hearsay. The first is illustrated by *United States v. Check*,²⁰ a case decided in the early days of the Federal Rules, in which

17. 285 N.W. 898 (Minn. 1939).

18. *Id.* at 901.

19. *Id.*

20. 582 F.2d 668 (2d Cir. 1978).

the prosecution and the trial judge were apparently under the misimpression that prior statements of testifying witnesses were not hearsay. A government agent testified to a conversation he had with Check's accomplice. The testimony was carefully crafted to refer only to what the agent had said and not to what the accomplice had said—because that would be hearsay. Here is an example of the agent's trial testimony:

I told William Cali at the time I didn't particularly care whether or not the cocaine which I was supposed to get was 70 percent pure, nor the fact that it was supposed to come from a captain of detectives[, i.e., Check].²¹

The government took the position that the agent's testimony was not hearsay because it referred only to his own prior statements. So it can be argued that if the rule actually were that prior statements of witnesses are not hearsay, cases like *Check* would arise and parties would offer one side of a conversation pretextually to prove the other side—that is, not treating prior statements of witnesses as hearsay would result in those statements serving as conduits and would lead to abuse of the hearsay rule.

Check demonstrates, however, that this concern is overwrought. The Second Circuit reversed the conviction for two reasons. First, the trial court and the prosecution were wrong to believe that the agent's own statements could not be hearsay just because the agent was testifying. But even if they were right, the agent's statements should not have been admitted because “notwithstanding the artful phrasing . . . [the agent] was on numerous occasions throughout his testimony in essence conveying to the jury the precise substance of the out-of-court statements Cali made to him.”²² The court concluded that “in substance, significant portions of Spinelli's testimony regarding his conversations with Cali were indeed hearsay, for that testimony was a transparent attempt to incorporate into the officer's testimony information supplied by the informant who did not testify at trial.”²³ In other words, even if the hearsay rule is changed to allow admission of prior statements of witnesses for their truth, those statements would still be excluded if they were being used to carry in hearsay statements of other declarants.²⁴

The other argument in favor of excluding prior witness statements as hearsay focuses on prior *consistent* statements. If all prior statements could be admitted for their truth, there would be an incentive for parties to have their witnesses generate consistent statements before trial. Then the witness could be asked on direct examination about all the previous statements that he made—to his grandmother, to the church congregation, to the bus driver

21. *Id.* at 671.

22. *Id.* at 675.

23. *Id.* at 679.

24. *See United States v. Meises*, 645 F.3d 5, 22 (1st Cir. 2011) (holding that the government violated the hearsay rule even though it did not seek to introduce the hearsay statements directly; because the statements were effectively before the jury in the context of the trial, “any other conclusion would permit the government to evade the limitations of the Sixth Amendment and the Rules of Evidence by weaving an unavailable declarant's statements into another witness's testimony by implication”).

on the way to testify, et cetera. The focus would then be shifted, problematically, to the prior statements as opposed to the in-court testimony.²⁵

There are several counterarguments responding to the concern about manufactured consistent statements. First, you do not need an overbroad hearsay rule to regulate that problem because litigation-generated extrinsic statements can be excluded under Rule 403 as cumulative and unduly prejudicial.²⁶ Second, the witness can be cross-examined about the context and generation of the consistent statements.²⁷ Third, this concern about overuse of consistent statements, even if valid, should not lead to a rule that *all* prior statements are hearsay; there is no risk of witnesses manufacturing *inconsistent* statements, for example, and so the concern about generating evidence is localized and should be addressed to prior consistent statements only.

There is a fourth argument against admitting prior witness statements in criminal cases that can be dismissed: admitting a prior statement of a witness against a criminal defendant violates his right to confrontation. The Supreme Court has rejected that argument in at least three cases, finding that an opportunity to cross-examine the witness about his prior statement satisfies the Confrontation Clause.²⁸

In sum, there is much to be said for a rule that exempts prior witness statements from the hearsay rule. At the very least, there is a strong case for broader admissibility of prior inconsistent statements. It is notable that such a broader approach has been taken in a number of states. A few jurisdictions admit *all* prior statements of witnesses for their truth. For example, Kansas states its hearsay rule and then provides an exception for all prior statements of testifying witnesses:

60-460. *Hearsay evidence excluded; exceptions.* Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated, is hearsay evidence and inadmissible except:

- a. *Previous statements of persons present.* A statement previously made by a person who is present at the hearing and available for

25. See *State v. Saporen*, 285 N.W. 898, 901 (Minn. 1939) (noting that the “practical reason” for treating prior witness statements as hearsay is that it would create temptation and opportunity to manufacture evidence).

26. The corresponding response to the Rule 403 argument is that the rule is highly discretionary and only operates to exclude evidence where its probative value is *substantially* outweighed by the risk of prejudice, confusion, and delay.

27. The response here is, once again, that cross-examination must strike while the iron is hot.

28. See *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (“Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.”); *United States v. Owens*, 484 U.S. 554 (1988) (finding no confrontation violation where witness was subject to cross-examination about his prior statement of identification, even though he had no memory about why he made the identification); *California v. Green*, 399 U.S. 149 (1970) (rejecting confrontation claim where the defendant had an opportunity to cross-examine a prosecution witness about the witness’s prior statement).

cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness.²⁹

Similarly, Puerto Rico provides in a hearsay exception for substantive admissibility for *all* prior statements of testifying witnesses:

Rule 63. Prior statement by witness. As an exception to the hearsay rule, a prior statement made by a witness who appears at a trial or hearing and who is subject to cross-examination as to the prior statement is admissible, provided that such statement is admissible if made by the declarant appearing as witness.³⁰

Similarly, the Delaware Code provides that any voluntary prior statement of a testifying witness “may be used as affirmative evidence with substantive independent testimonial value” and the party need not show surprise.³¹

There is nothing to indicate that the sky has fallen or that advocacy has been impaired as a result of more liberal admissibility in these jurisdictions.

II. PRIOR INCONSISTENT STATEMENTS

This part evaluates the tortured history of the current Federal Rule on prior inconsistent statements under the hearsay rule. We will see that while the Advisory Committee’s proposal was a correct application of hearsay theory, Congress had the last word.

A. *How Did We Get Here?: The History of Federal Rule 801(d)(1)(A)*

The common law approach to prior inconsistent statements was that they were hearsay and were admissible only to impeach the declarant-witness. The original Advisory Committee thought that the common law rule, distinguishing between impeachment and substantive use of prior inconsistent statements, was “troublesome.”³² It noted that the major concern of the hearsay rule is that an out-of-court statement could not be tested for reliability because the person who made the statement could not be cross-examined about it. But with prior inconsistent statements, “[t]he declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter.”³³ And the Committee thought that it had never been “satisfactorily explained why cross-examination [could not] be conducted subsequently with success.”³⁴ Moreover, “The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency.”³⁵

29. KAN. STAT. ANN. § 60-460 (2015).

30. P.R. LANS. ANN. tit. 32, Ap. N (2015).

31. DEL. CODE. ANN. tit. 11, § 3507 (2015).

32. FED. R. EVID. 801(d)(2)(A) advisory committee’s note.

33. *Id.*

34. *Id.*

35. *Id.*

Finally, “the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation.”³⁶

For all these reasons, the Advisory Committee’s proposed Rule 801(d)(1)(A) would have exempted all prior inconsistent statements of testifying witnesses from the hearsay rule. The Advisory Committee’s note to the proposal makes this clear: “Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence.”³⁷

Congress, however, cut back significantly on the Advisory Committee proposal. In the form ultimately adopted, Rule 801(d)(1)(A) states that only those prior inconsistent statements “given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition” are admissible as substantive evidence.³⁸ The rationales for this limitation, as expressed by the House Committee on the Judiciary, are that: 1) if the statement was given under oath at a formal proceeding, “there can be no dispute as to whether the prior statement was made”; and 2) the requirements of oath and formality of proceeding “provide firm additional assurances of the reliability of the prior statement.”³⁹

There are problems with the rationales for Congress’s tightening of the hearsay exception for prior inconsistent statements. The first congressional concern—that the statement may never have been made—is not a hearsay concern. Whether the statement was made (as distinguished from whether it is true) is a question ordinarily addressed by in-court regulators—the in-court witness to the statement testifies and is cross-examined, or other admissible evidence is presented that the statement was or was not made; this becomes a jury question.⁴⁰ Really, Congress’s argument proves too much, because admitting *any* out-of-court statement raises the question of whether it was ever made. Why do we find the in-court witness’s testimony that the statement was made in all other situations sufficient, but question the in-court testimony with respect to prior inconsistent statements?⁴¹ Second, the requirements of oath and formality surely do add reliable circumstances, and thus these requirements do respond to a hearsay concern. But the fact is that the witness is now under oath at trial, subject to cross-examination. That should be a sufficient guarantee of reliability, and adding the oath and formality requirements raise the admissibility

36. *Id.*

37. *Id.*

38. *Id.* 801(d)(1)(A).

39. H.R. REP. NO. 93-650, at 13 (1973), as reprinted in 1974 U.S.C.C.A.N. 7051, 7087.

40. Of course, the inconsistent statement could be proven up through hearsay subject to an exception, such as a business record, FED R. EVID. 803(6), or public record, *id.* 803(8). The point is that concerns about whether the statement was ever made are not a reason, under the hearsay rule, to exclude the statement itself.

41. Even if the concern about manufactured prior statements were legitimate, it would not need to be regulated by the requirements of oath at a formal proceeding. A less onerous requirement, such as that the statement was recorded, should surely suffice.

hurdle for prior inconsistent statements much higher than for most of the other hearsay exceptions.

The end result of this congressional intervention is to render the hearsay exception for prior inconsistent statements relatively useless. It goes without saying that the vast majority of prior inconsistent statements are not made under oath at a formal proceeding. Essentially, the only function for Rule 801(d)(1)(A) is to protect the proponent (usually the government) from having its substantive case sapped by turncoat witnesses. Congress's rationales for adding the oath and formality requirements are simply not strong enough to justify gutting the exception proposed by the Advisory Committee. This is especially so because the limitation comes with significant negative consequences, including the following:

- (1) Excluding testimony as hearsay even though the declarant can be cross-examined;
- (2) Requiring a difficult-to-follow jury instruction, specifically, that the statement can be used only to impeach the witness but not for its truth—even though in many cases its impeachment value is dependent on it being true;
- (3) Raising the possibility that parties will seek to evade the rule by calling witnesses to “impeach” them with prior inconsistent statements with the hope that the jury will use the statements as proof of the matter asserted. That will require the courts to investigate and determine the motivation of the proponent for calling the witness (motivation that would be irrelevant if the prior statement were substantively admissible);⁴² and
- (4) Raising the possibility that prior inconsistent statements not admissible for truth under Rule 801(d)(1)(A) will still be found admissible for truth under the residual exception (Rule 807) anyway. Federal Rule 807 provides that a hearsay statement not admissible under any other exception might nonetheless be admitted if it is trustworthy and if other stated admissibility requirements are met.⁴³ As applied to Rule 801(d)(1)(A), a proponent might argue that a prior inconsistent statement is admissible for its truth because it is reliable, even if it was not made under oath at a formal proceeding—and the reliability

42. *See, e.g.,* United States v. Ince, 21 F.3d 576, 578 (4th Cir. 1994) (finding government's impeachment of its witness with a prior inconsistent statement was improper where “the only apparent purpose” for the impeachment “was to circumvent the hearsay rule and to expose the jury to otherwise inadmissible evidence”); *cf.* United States v. Kane, 944 F.2d 1406, 1412 (7th Cir. 1991) (ruling impeachment with a prior inconsistent statement was improper where the prosecution had no reason to think that the witness would be hostile or would create the need to impeach her); *see also* People v. Fitzpatrick, 40 N.Y.2d 44, 49, 50 n.1 (1976) (noting the concern that “the prosecution might misuse impeachment techniques to get before a jury material which could not otherwise be put in evidence because of its extrajudicial nature”; also noting that “a number of authorities have pointed out that the potential for prejudice in the out-of-court statements may be exaggerated in cases where the person making the statement is in court and available for cross-examination”).

43. FED. R. EVID. 807.

would be, ironically, that the declarant was subject to cross-examination about the prior statement.⁴⁴

B. State Variations

In deciding whether to expand the admissibility of prior inconsistent statements, there are many reference points provided in the state rules of evidence. It is particularly notable that a large number of states have rejected the congressional limitation on substantive admissibility of prior inconsistent statements—the state deviation is far greater than that with respect to most of the other Federal Rules of Evidence.

1. Rejection of Congressional Limitation in Rule 801(d)(1)(B)

Many of the states did not adopt the congressional limitation on substantive admissibility of prior inconsistent statements. In the following states, prior inconsistent statements are admissible for their truth:

Alaska⁴⁵
 Arizona⁴⁶
 California⁴⁷
 Colorado⁴⁸
 Delaware⁴⁹
 Georgia⁵⁰
 Montana⁵¹
 Nevada⁵²
 Rhode Island⁵³
 South Carolina⁵⁴
 Wisconsin⁵⁵

44. *See, e.g.*, *United States v. Valdez-Soto*, 31 F.3d 1467, 1472 (9th Cir. 1994) (finding a prior inconsistent statement not under oath to be properly admitted as substantive evidence under the residual exception and noting that “the degree of reliability necessary for admission is greatly reduced where, as here, the declarant is testifying and is available for cross-examination, thereby satisfying the central concern of the hearsay rule” (quoting *United States v. McPartlin*, 595 F.2d 1321, 1350–51 (7th Cir. 1979))).

45. ALASKA R. EVID. 801(d)(1)(A).

46. ARIZ. R. EVID. 801(d)(1)(a).

47. CAL. EV. CODE § 1235.

48. COLO. R. EVID. 801(d)(1)(A).

49. DEL. R. EVID. 801(d)(1)(A).

50. GA. R. EVID. 801(d)(1)(A).

51. MONT. R. EVID. 801(d)(1)(A).

52. 4 NEV. STAT. § 51.035(2)(A).

53. R.I. R. EVID. 801(d)(1)(A).

54. S.C. R. EVID. 801(d)(1)(A).

55. WIS. R. EVID. 801(d)(1)(A).

2. Variations Short of Outright Rejection of the Congressional Limitation

Other states provide less onerous alternatives to the congressional restriction on substantive admissibility of prior inconsistent statements. For example, Arkansas requires prior oath at a formal proceeding for civil cases only.⁵⁶ Connecticut addresses the concern about whether the statement was ever made with a narrower limitation. The exception covers

[a] prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise recorded by audiotape, videotape, or some other equally reliable medium, (B) the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement.⁵⁷

Requirements (B) and (C) are surplusage because they are covered by other rules (authentication by Rule 901 and personal knowledge by Rule 602). But the Connecticut version does suggest a compromise approach that might be employed—which would expand the exception so long as there is assurance that the prior inconsistent statement was actually made. Again, whether it was made is not a hearsay problem, but a provision requiring that the statement be recorded, signed, et cetera would satisfy those whose concern is about witnesses (such as police officers) cooking up prior inconsistent statements of other witnesses.

Hawaii similarly expands the exception beyond the congressional limitation, while still addressing concerns that the statement was never made. Besides statements under oath at a prior proceeding, Hawaii provides substantive admissibility for prior inconsistent statements when they are “reduced to writing and signed or otherwise adopted or approved by the declarant” and also when they are “recorded in substantially verbatim fashion by stenographic, mechanical, electrical, or other means contemporaneously with the making of the statement.”⁵⁸

Illinois, similar to Connecticut, addresses the concern that the statement was never made. Prior inconsistent statements are admissible substantively if properly recorded, but Illinois also includes as a ground for admissibility that “the declarant acknowledged under oath the making of the statement either in the declarant’s testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought or at a trial, hearing, or other proceeding, or in a deposition.”⁵⁹ Illinois thus adds an interesting addition—the statement does not need to be recorded if the declarant acknowledges making the statement while testifying at trial. That is a completely justifiable proposition because there should be no doubt about the prior statement if the declarant actually acknowledges making it.

56. ARK. R. EVID. 801(d)(1)(i).

57. CONN. CODE EVID. R. 8-5.

58. HAWAII R. EVID. 802.1(1)(B)–(C).

59. ILL. R. EVID. 801(d)(1)(A).

Louisiana does not permit substantive use of prior inconsistent statements in a civil cases.⁶⁰ Prior inconsistent statements are admissible substantively in a criminal case, “provided that the proponent has first fairly directed the witness’[s] attention to the statement and the witness has been given the opportunity to admit the fact and where there exists any additional evidence to corroborate the matter asserted by the prior inconsistent statement.”⁶¹

Maryland has a provision similar to Connecticut, allowing substantive use of a prior inconsistent statement if there is assurance that it was actually made. Such statements are admissible if they have been “reduced to writing and . . . signed by the declarant” or “recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement.”⁶²

New Jersey provides for substantive admissibility of all prior inconsistent statements of a witness called by an opposing party. However, if the witness is called by the proponent, safeguards must be met. The proponent must show that the statement “(A) is contained in a sound recording or in a writing made or signed by the witness in circumstances establishing its reliability or (B) was given under oath subject to the penalty of perjury at a trial or other judicial, quasi-judicial, legislative, administrative or grand jury proceeding, or in a deposition.”⁶³ Assuming there are risks of reliability and questions about whether the statement was ever made, it is unclear why those risks are only raised when the proponent calls the witness.

North Dakota applies the congressional limitation in Rule 801(d)(1)(A) in criminal cases only.⁶⁴

Pennsylvania, like Connecticut, expands beyond the congressional limitation but requires a showing that the prior inconsistent statement was actually made:

(1) *Prior Inconsistent Statement of Declarant-Witness.* A prior statement by a declarant-witness that is inconsistent with the declarant-witness’s testimony and:

- (A) was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;
- (B) is a writing signed and adopted by the declarant; or
- (C) is a verbatim contemporaneous electronic, audiotaped, or videotaped recording of an oral statement.⁶⁵

Utah rejects the congressional limitation and also treats prior statements as not hearsay when the witness denies or has forgotten the statement. So there appears to be no concern at all in Utah about whether the prior inconsistent statement was ever made:

(d) *Statements That Are Not Hearsay.* A statement that meets the following conditions is not hearsay:

60. LA. CODE EVID. 801(d)(1)(A).

61. *Id.*

62. MD. R. EVID. 5-802.1.

63. N.J. R. EVID. 803(a)(1).

64. N.D. R. EVID. 801(d)(1)(A).

65. PA. R. EVID. 803.1.

- (1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
- (A) is inconsistent with the declarant's testimony or the declarant denies having made the statement or has forgotten . . .⁶⁶

Wyoming applies the congressional limitation only in criminal cases.⁶⁷

III. PRIOR CONSISTENT STATEMENTS

This part considers whether the current treatment of prior consistent statements in the hearsay rule needs to be revisited. As we will see, any attempt to change the existing Rule would run into some very recent history.

A. A Short History of Rule 801(d)(1)(B), Ending with the 2014 Amendment

The original Advisory Committee's proposed rule creating a hearsay exemption for certain prior consistent statements turned out to be far less controversial in Congress than the Committee's proposal to admit all prior inconsistent statements. Part of the reason for the different treatment is that the substantive use of prior consistent statements is simply less important. Treating inconsistent statements as substantive evidence can provide enough for the party with the burden of proof to withstand motions to dismiss for lack of evidence. In contrast, the difference between substantive and credibility-based use of prior consistent statements is evanescent—the witness has already testified, thus providing substantive evidence; the additional fact that the witness made a prior consistent statement will usually make little or no substantive difference. So there was not much to get worked up about when it came to consistent statements. As Judge Friendly stated: “It is not entirely clear why the Advisory Committee felt it necessary to provide for admissibility of certain prior consistent statements as affirmative evidence” because the difference between substantive and rehabilitative use is ephemeral.⁶⁸

But the Advisory Committee did carve out certain consistent statements for substantive use. The Committee Note explaining the provision is terse: “The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence [by attacking the credibility of the witness-declarant], no sound reason is apparent why it should not be received generally.”⁶⁹

The problem with the original Rule 801(d)(1)(B) was that it provided for substantive admissibility of only some, and not all, consistent statements that are properly admitted to rehabilitate a witness. The original rule

66. UTAH R. EVID. 801(d).

67. WYO. R. EVID. 801(d)(1)(A).

68. *United States v. Rubin*, 609 F.2d 51, 70 n.4 (2d Cir. 1979) (Friendly, J., concurring).

69. FED. R. EVID. 801(d)(1)(B) advisory committee's note.

provided for substantive admissibility only when the witness was attacked for having a bad motive or for recent fabrication—and then only when the statement predated the existence of the motive or the interest to fabricate.⁷⁰ Other consistent statements can rehabilitate, and the same justification for substantive admissibility can be made: the party has opened the door by attacking the witness, and the consistent statement rebuts the attack. The Advisory Committee Note to the 2014 amendment explains the problem of the too-narrow focus of the original rule, as well as the solution that the current Advisory Committee provided. The Committee Note explains as follows:

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

...

The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness—such as the charges of inconsistency or faulty memory.⁷¹

The Advisory Committee Note makes a point of emphasizing the limited scope of the amendment. It does not provide for admission of more prior consistent statements. It simply makes all prior consistent statements that are traditionally admissible for rehabilitation purposes also admissible for the truth of the matter asserted.

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the fact finder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the fact finder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must also satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible

70. *Tome v. United States*, 513 U.S. 150 (1995).

71. FED. R. EVID. 801(d)(1)(B) advisory committee's note to 2014 amendment.

previously—the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

So, Rule 801(d)(1)(B), as amended in 2014, provides as follows:

(d) *Statements That Are Not Hearsay.* A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness'[s] Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

...

- (B) is consistent with the declarant's testimony and is offered:
 - (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying;
 - or*
 - (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground⁷²

The intended effect of the amendment is to do away with the need to provide an unhelpful limiting instruction for all prior consistent statements that are admissible to rehabilitate the witness's credibility. No longer need an instruction—for example, that “the statement that the witness made can be used only insofar as it explains his inconsistent statement and not for the truth of any assertion in the consistent statement”—be given. These limiting instructions were considered not worth the candle due to their inherent difficulty and the lack of a practical distinction between substantive and credibility use of prior consistent statements.

The recency of the amendment to Rule 801(d)(1)(B) necessarily has an effect on what the Advisory Committee should do with respect to admissibility of prior consistent statements. Certainly any *limiting* of the scope of substantive admissibility under Rule 801(d)(1)(B) should not be undertaken in light of a so-recent *expansion*. But it would seem at least possible to consider further *expanding* the admissibility of prior consistent statements in ways that are different from the path chosen by the Advisory Committee in the 2014 amendment.

One possibility would be to untether substantive admissibility from admissibility to rehabilitate. That would be the upshot of an amendment that would treat all prior witness statements as exempt from the hearsay rule. But tying admissibility of prior consistent statements to rehabilitation of credibility has the virtue of avoiding the problem of parties trying to manufacture consistent statements for trial. (That would be “impermissible bolstering” in lawyer-speak.) And the current tie to rehabilitation has the further virtue of being grounded in the policy of “opening the door”—admissibility is dependent on an attack on the witness's credibility. If substantive admissibility were untethered from rehabilitation, then the opponent would lose the control over admissibility that the original Advisory Committee found to be important. For these reasons and others

72. *Id.* 801(d)(1)(B) (emphasis added).

articulately raised by Professor Liesa Richter at the symposium, prior consistent statements are better left where they are—the 2014 amendment has done good work, and there is no sufficient reason to provide for greater admissibility of prior consistent statements.

IV. PRIOR STATEMENTS OF IDENTIFICATION

The Advisory Committee Note to Rule 801(d)(1)(C) explains the reason for carving out an exception for prior statements of identification: the prior identification is more reliable than the in-court identification because it was made “at an earlier time under less suggestive conditions.”⁷³ This explanation is further supported by the fact that the identifying witness must be subject to cross-examination and that cross-examination in this particular circumstance can be quite useful because the witness can be asked not only about the process of identification, but also about the basis that the witness had for making the identification in the first place (how far away he was from the robbery, whether he was wearing his glasses, etc.).

Interestingly, the Senate initially rejected the proposed Rule 801(d)(1)(C); the House acquiesced to that rejection in order to ensure passage of the Rules of Evidence.⁷⁴ The Senate had deleted the provision because of strenuous objection by Senator Sam Ervin. He was concerned that a conviction could be based solely on an unsworn hearsay statement in which the declarant identified the defendant.⁷⁵

But Congress then amended Rule 801(d)(1) in 1975 to add back the Advisory Committee’s proposal.⁷⁶ The report from the Senate Judiciary Committee found that Senator Ervin’s concerns were “misdirected.”⁷⁷ The report makes four points: 1) the rule is addressed to admissibility, not sufficiency; 2) most of the hearsay exceptions allow statements into evidence that were not made under oath; 3) the declarant is testifying subject to cross-examination, assuring that “if any discrepancy occurs between the witness’[s] in-court and out-of-court testimony, the opportunity is available to probe, with the witness under oath, the reasons for that discrepancy so that the trier of fact might determine which statement is to be believed”; and 4) the identification must pass constitutional muster under the Supreme Court cases regulating identifications, et cetera, thus guaranteeing some reliability.⁷⁸

In practice, Rule 801(d)(1)(C) has proved relatively uncontroversial. Perhaps the most contested point was resolved by the Supreme Court in *United States v. Owens*,⁷⁹ which allowed admission of a prior identification

73. *Id.* 801(d)(1)(C) advisory committee’s note.

74. CONG. REC. 9653 (Oct. 6, 1975) (statement of Rep. Hungate).

75. CONG. REC. 9654 (Oct. 6, 1975) (statement of Rep. Wiggins).

76. Pub. L. No. 94-113, 89 Stat. 576 (1975).

77. S. REP. NO. 94-199, at 2 (1975).

78. *Id.* For treatment of the Supreme Court cases on the process of eyewitness identification, see Chapter 4 of STEPHEN A. SALTZBURG AND DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY* (10th ed. 2014).

79. 484 U.S. 554 (1988).

even though the witness had no memory about the reasons for making that identification. The witness without memory was found “subject to cross-examination” within the meaning of the Rule.⁸⁰ There appears to be no groundswell for reconsidering *Owens* by way of amendment to the Evidence Rules. Nor should there be, as a faulty memory can well be the target for effective cross-examination, and it would be difficult if not impossible to craft a rule that would set forth criteria for when an attack on faulty memory will or will not be productive in an individual case.

Insofar as prior statements of identification are concerned, the only possibility of amendment that would appear to be on the table would be the broad approach, discussed above, of making *all* prior statements of testifying witnesses substantively admissible. Short of that, it would appear that the existing Rule 801(d)(1)(C) is working well and should be retained.

V. DRAFTING ALTERNATIVES

There are essentially three ways to expand the substantive admissibility of prior statements of witnesses (assuming, of course, that the Advisory Committee agrees that some kind of expansion of admissibility is justified). The first is the broad approach that would lift the hearsay ban from all prior statements of witnesses—which, as noted above, may be too extreme a remedy, as it would expand admission of prior consistent statements, a move that does not seem supportable at this time. The second is to lift the congressional bar on substantive use of most prior inconsistent statements, set forth in Rule 801(d)(1)(A)—this is a more targeted attack, directed to the misguided limitations imposed by Congress on the substantive admissibility of prior inconsistent statements. And the third is to narrow the ban in Rule 801(d)(1)(A) to situations in which there is some guarantee provided (short of oath at a formal proceeding) that the inconsistent statement was actually made. This part provides drafting alternatives for each of these approaches.⁸¹

A. *Lifting the Hearsay Ban on Prior Statements of Witnesses*

There appear to be two possible ways to lift the hearsay ban on prior statements of witnesses. The first is to change the hearsay definition; the second is to provide an exception.

1. Changing the Hearsay Definition

Changing the hearsay definition might be tricky, but something like this may work:

Rule 801. *Definitions That Apply to This Article; Exclusions from Hearsay.*

80. *Id.* at 561.

81. Additions to the current Rule are denoted in bold typeface; deletions are stricken out.

- (a) *Statement*. “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
- (b) *Declarant*. “Declarant” means the person who made the statement.
- (c) *Hearsay*. “Hearsay” means a statement that:
 - (1) the declarant does not make while testifying—**unless subject to cross-examination about it**—at the current trial or hearing; and
 - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.
- (d) *Statements That Are Not Hearsay*. A statement that meets the following conditions is not hearsay:
 - (1) **[Now covered in Rule 801(c)(1)]** ~~*A Declarant-Witness’s Prior Statement*. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:~~
 - ~~(A) is inconsistent with the declarant’s testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;~~
 - ~~(B) is consistent with the declarant’s testimony and is offered:~~
 - ~~(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or~~
 - ~~(ii) to rehabilitate the declarant’s credibility as a witness when attacked on another ground; or~~
 - ~~(C) identifies a person as someone the declarant perceived earlier.~~
 - (2) *An Opposing Party’s Statement*. The statement is offered against an opposing party and:
 - (A) was made by the party in an individual or representative capacity;
 - (B) is one the party manifested that it adopted or believed to be true;
 - (C) was made by a person whom the party authorized to make a statement on the subject;
 - (D) was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed; or
 - (E) was made by the party’s coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant’s authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Reporter’s Observations:

- (1) If you agree with Morgan’s arguments, then taking prior witness statements out of the definition of hearsay is analytically correct. It

is not hearsay because the solution to hearsay is cross-examination and the declarant here is subject to cross-examination (albeit delayed) about their own statement. On the other hand, a prior statement of a testifying witness, when offered for its truth, *does* fit the classic definition of hearsay: it is a statement made out of court that is offered for its truth. Further, the fix of adding the language in the middle of the hearsay rule seems awkward; it is like dropping a rock into an otherwise quiet pool. So perhaps it is better to think about a hearsay *exception* for prior witness statements, as the jurisdictions that admit all prior witness statements substantively have done—for example, the Kansas and Puerto Rico exceptions.⁸²

- (2) The other problem with changing the definition and not making an exception is that the change would create a gaping hole where Rule 801(d)(1) used to be. This is not fatal, but it does look a bit odd. And it poses a challenge for electronic searches of case law involving prior witness statements—the case law essentially shifts midstream from Rule 801(d)(1) to Rule 801(c).
- (3) If Rule 801(d)(1) *is* abrogated, this does not mean that Rule 801(d)(2) should be moved up. That would create even more havoc for electronic searches and settled expectations. The protocol for evidence rulemaking is that if a rule is abrogated or moved, the former number is left open, with an instruction as to where the rule went. For instance, see the gap between Rule 804(b)(4) and 804(b)(6), which was caused when Rule 804(b)(5) was moved to Rule 807 as part of a combined residual exception.⁸³

2. A Hearsay Exception for All Prior Witness Statements

A hearsay exception for prior witness statements is probably best placed in Rule 801(d) itself; that is certainly the least disruptive fix:

Rule 801. *Definitions That Apply to This Article; Exclusions from Hearsay.*

- (a) *Statement.* “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
- (b) *Declarant.* “Declarant” means the person who made the statement.
- (c) *Hearsay.* “Hearsay” means a statement that:
 - (1) the declarant does not make while testifying at the current trial or hearing; and
 - (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

82. See *supra* notes 29–30 and accompanying text.

83. The instruction now seen under Rule 804(b)(5) states: “Transferred to Rule 807.” That language will not work if prior statements of witnesses are now placed outside hearsay proscription by a change to Rule 801(c). That is because Rule 801(d)(1) would not be “transferred” lock, stock, and barrel in the way that Rule 804(b)(5) was. That is why the bracketed material reads, “Now covered in Rule 801(c)(1).”

(d) *Statements That Are Not Hearsay.* A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a the prior statement, **provided the statement would be admissible if made by the declarant while testifying as a witness,** and the statement:

~~(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;~~

~~(B) is consistent with the declarant's testimony and is offered:~~

~~(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or~~

~~(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or~~

~~(C) identifies a person as someone the declarant perceived earlier.~~

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Reporter's Observations:

(1) It is possible that the proviso—that the statement would be admissible if the declarant were to make the same statement at trial—is surplusage. If the declarant would not be allowed to make the statement while testifying—for example, if the declarant lacked personal knowledge, or it was unduly prejudicial, or privileged—then it should be excluded for independent reasons. The other sources of exclusion are fully applicable to hearsay admitted under an exception. But in order to avoid unanticipated problems, the

language cannot hurt. Similar language is used in both the Kansas and Puerto Rico rules.⁸⁴

- (2) Some might object that amending Rule 801(d)(1) would be unsatisfactory because it would continue the pernicious category of “not hearsay” hearsay. Rule 801(d)(1) categorizes prior witness statements, confoundingly, as “not hearsay” even though they clearly fit the definition of hearsay in Rule 801(c). In reality, Rule 801(d)(1) provides an *exemption* from the hearsay rule for these statements. If you are going to make it an exception, it is conceptually better to call it an exception to the hearsay rule rather than to call something “not hearsay” when it actually fits the definition of hearsay.⁸⁵ In 2010, the Advisory Committee considered a proposal from a law professor to move the Rule 801(d) “not hearsay” categories into real hearsay exceptions.⁸⁶ The Advisory Committee rejected the proposal on several grounds: 1) lawyers and courts have become familiar with “not hearsay” hearsay; 2) the question is one of nomenclature only, as there is no practical difference between hearsay admissible for its truth as “not hearsay” and hearsay admissible for its truth as “hearsay subject to an exception”; 3) moving the categories out of Rule 801(d) would impose costs of upsetting electronic searches and settled expectations with no corresponding practical benefit. For all these reasons, any broadened hearsay exception for prior statements of witnesses should be placed in Rule 801(d)(1), as it is the least intrusive alternative and there is no good reason (other than a theoretical one) to change the category from “not hearsay” to a hearsay exception.⁸⁷

B. Lifting the Congressional Limitation on Substantive Admissibility of Prior Inconsistent Statements

That would be easy rulemaking:

Rule 801. *Definitions That Apply to This Article; Exclusions from Hearsay.*

...

- (d) *Statements That Are Not Hearsay.* A statement that meets the following conditions is not hearsay:

84. See *supra* notes 29–30 and accompanying text.

85. See Stephen A. Saltzburg, *Restyling Choices and a Mistake*, 53 WM. & MARY L. REV. 1517, 1523 (2012) (referring to the categories of statements covered by Rules 801(d)(1) and (2) as “nonhearsay hearsay”).

86. See Sam Stonefield, *Rule 801(d)’s Oxymoronic “Not Hearsay” Classification: The Untold Backstory and a Suggested Amendment*, 5 FED. CTS. L. REV. 1 (2011).

87. See Daniel J. Capra, *Appendix B: The Restyled Rules of Federal Evidence*, 53 WM. & MARY L. REV. 1528 (2011) for the Reporter’s memo on the proposed redesignation and realignment of prior witness statements. The Advisory Committee’s rejection of the proposal is found in the minutes of the Advisory Committee meeting of October 12, 2010, on file with the author and available at www.uscourts.gov/rules-policies/records-and-archives-rules-committees/meeting-minutes.

- (1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
 - (A) is inconsistent with the declarant's testimony ~~and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;~~
 - (B) is consistent with the declarant's testimony and is offered:
 - (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
 - (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
 - (C) identifies a person as someone the declarant perceived earlier.

* * *

C. Narrowing the Limitation on Prior Inconsistent Statements to Address Concerns About Whether the Statement Was Ever Made

This drafting alternative borrows from the states that already have such a provision.

Rule 801. *Definitions That Apply to This Article; Exclusions from Hearsay.*

...

- (d) *Statements That Are Not Hearsay.* A statement that meets the following conditions is not hearsay:
 - (1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
 - (A) is inconsistent with the declarant's testimony and **the declarant acknowledges under oath the making of the statement, or the statement** was:
 - (i) given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
 - (ii) **written, adopted, or prepared electronically by the declarant; or**
 - (iii) **a verbatim contemporaneous stenographic or electronic recording of the declarant's oral statement; or**
 - (B) is consistent with the declarant's testimony and is offered:
 - (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

- (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
- (C) identifies a person as someone the declarant perceived earlier.

Reporter's Observations:

- (1) It would be possible to craft language that would delete the congressional limitation and yet address its concerns by describing all the conditions in which there would be sufficient assurance that the statement was made. But the congressional language has been in place for forty years and there is case law on it. The better approach seems to be to retain the language as *one means* of satisfying the concern over whether a statement was made and then to provide additional grounds that justify a conclusion that the statement was made. That process is similar to the one chosen in the 2014 amendment to Rule 801(d)(1)(B): the original language was retained and new grounds for admissibility were added.
- (2) The draft adds a provision that the statement is substantively admissible if the witness concedes at trial that he made the statement. That should surely be enough to allay any concern that the statement was never made. Under current law, even if the witness admits making the statement, it is not substantively admissible unless it was made under oath at a formal proceeding. This example shows that the congressional limitation is overkill in addressing the concern that a prior inconsistent statement was never made.
- (3) The draft specifically addresses Professor Saltzburg's point, made at the symposium, that prior inconsistent statements are difficult to cross-examine when the witness denies making them. Under the draft, if the witness denies making the statement, it is not be substantively admissible unless there is proof that the declarant in fact made the statement. Under that circumstance, cross-examination can address why the witness is lying about not making the prior statement—a topic that may well be productive for the cross-examiner even if the witness adheres to his story. After all, the opportunity to cross-examine does not have to be perfect to satisfy the concerns of the hearsay rule; it just has to be adequate.⁸⁸ Moreover, it is simply bad policy to allow a witness to veto the substantive admissibility of his prior inconsistent statement, simply by denying having made it when the evidence indicates to the contrary.

CONCLUSION

Theoretically, the rationales behind the hearsay rule—a concern over the inability to cross-examine the hearsay declarant and a preference for live

88. See generally *United States v. Owens*, 484 U.S. 554 (1988).

testimony—have no applicability to prior statements of testifying witnesses. It should follow that Federal Rule 801(c) should be amended so that prior witness statements would not be covered by the definition of hearsay.⁸⁹ Yet that route is not chosen even by the systems that exempt prior witness statements from the coverage of the hearsay rule; and under the Federal Rules, such a change would result in an unnecessary disruption, given forty years of practice in which prior witness statements have been evaluated as hearsay, subject to an exemption for certain such statements. Expansion of admissibility of prior witness statements is thus best accomplished by expanding the current hearsay exemption provided by Rule 801(d)(1).

The question, then, is the scope of the expansion. While theoretically the hearsay rule should not apply at all to prior witness statements, functionally there is a fair reason for maintaining the current limits on prior consistent statements. The current rule—which ties hearsay proscription to rehabilitation—operates to limit strategic creation of prior consistent statements. And while that goal is conceptually not a match with the hearsay rule, it is consistent with the Advisory Committee’s original conception for providing substantive admissibility of consistent statements. So any expansion should probably be focused on greater admissibility of prior inconsistent statements.

There is much to be said for allowing substantive admissibility of all prior inconsistent statements, as many of the states have done. But the concern over whether the statement was ever made, while not a hearsay concern, is one that has been invoked by lawyers and commentators for many years and is difficult to ignore. The congressional limitation on substantive admissibility of prior inconsistent statements is, however, a patently overbroad and draconian solution to that concern. Narrower protections employed by a number of states—allowing for substantive admissibility of prior inconsistent statements if admitted by the witness or if recorded—appropriately allow for greater substantive admissibility of prior inconsistent statements, while effectively addressing concerns about whether the statement was ever made.

89. Technically, such statements are called “not hearsay” under Rule 801(d)(1), but as discussed above, this designation operates as a hearsay exemption or exception—nonhearsay hearsay—because prior witness statements definitely fit within the definition of hearsay under Rule 801(c).