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PRIOR CONSISTENT STATEMENTS: TEMPORAL
ADMISSIBILITY STANDARD UNDER FEDERAL
RULE OF EVIDENCE 801(d)(1)(B)

INTRODUCTION

Federal Rule of Evidence (FRE) 801(d)(1)(B) allows a prior extrajudicial statement, consistent with a witness's in-court testimony, to be admitted to rebut an express or implied charge of recent fabrication or improper motive.\(^1\) This Rule specifies that such statements are not hearsay and allows them to be used for the truth of the matter asserted, thus giving substantive effect to statements that were admissible at common law only to rehabilitate the credibility of a witness who had been impeached.\(^2\)

Confusion over the standards of admissibility for prior consistent statements exists in three areas. The first area of confusion concerns prior consistent statements offered as substantive evidence under FRE 801(d)(1)(B) to rebut the implication that a motive to fabricate affected the veracity of the trial testimony.\(^3\) A controversy has arisen among the federal courts of appeals as to whether admissibility of such a prior consistent statement is contingent on its being made prior to the alleged fabrication or improper motive.\(^4\) The majority of courts that have addressed the issue find this temporal requirement implicit in FRE 801(d)(1)(B),\(^5\) in order to ensure the statement’s relevance.\(^6\) A minority,

\(^1\) Fed. R. Evid. 801(d)(1) provides in relevant part that a prior consistent statement is not hearsay if “[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.”

\(^2\) See Fed. R. Evid. 801(d)(1)(B) advisory committee’s note (“Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence.”); see also United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978) (intent of the drafters of FRE 801(d)(1)(B) was to permit substantive use of prior consistent statements that would have gained admission at common law to rehabilitate); 4 J. Weinstein & M. Berger, Weinstein’s Evidence § 801(d)(1)(B)[01], at 801-157 (1985) [hereinafter 4 Weinstein (FRE 801(d)(1)(B) should be interpreted narrowly to limit admission of prior consistent statements “to situations in which rehabilitation through consistency would formerly have been allowed”).

At common law, two types of prior consistent statements were admissible to rehabilitate the credibility of an impeached witness. The first type was prior statements offered to rebut the inference that an improper motive led to fabrication of a witness's in-court testimony, see infra notes 35-38 and accompanying text. The second type was statements offered to rebut a charge of recent fabrication by ensuring that impeaching statements were not taken out of context, thus comporting with the doctrine of completeness. See infra notes 39-42 and accompanying text.

\(^3\) See infra note 53 and accompanying text.


however, admit the statement regardless of its temporal relationship to the alleged fabrication or improper motive.\footnote{7} Under this view, the statement's timing is thought to affect its weight, rather than being dispositive of its admissibility.\footnote{8}

The second issue arises when courts have admitted prior consistent statements solely as rehabilitative evidence.\footnote{9} These cases demonstrate confusion as to whether the standards for substantive admission under FRE 801(d)(1)(B) also govern the admissibility of statements offered to rehabilitate an impeached witness's credibility.\footnote{10} Some cases hold that these standards must be the same\footnote{11} for the statement to rebut the impeachment, thus, a rehabilitative statement must antedate the motive to

\footnote{6}{See United States v. Bowman, 798 F.2d 333, 338 (8th Cir. 1986) (noting that statements made after motive to falsify are not relevant), \textit{cert. denied}, 107 S. Ct. 906 (1987); United States v. Feldman, 711 F.2d 758, 766 (7th Cir.) (prior consistent statement only relevant to rebut charge of recent fabrication if made "prior to the time the alleged motive to falsify arose"), \textit{cert. denied}, 464 U.S. 939 (1983); United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir.), \textit{cert. denied}, 444 U.S. 833 (1979); United States v. Quinto, 582 F.2d 224, 234 (2d Cir. 1978).

6. See United States v. Bowman, 798 F.2d 333, 338 (8th Cir. 1986) (noting that statements made after motive to falsify are not relevant), \textit{cert. denied}, 107 S. Ct. 906 (1987); United States v. Feldman, 711 F.2d 758, 766 (7th Cir.) (prior consistent statement only relevant to rebut charge of recent fabrication if made "prior to the time the alleged motive to falsify arose"), \textit{cert. denied}, 464 U.S. 939 (1983); United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir.) (prior consistent statement made where motive to falsify existed has no probative value to rebut charge), \textit{cert. denied}, 444 U.S. 833 (1979); United States v. Quinto, 582 F.2d 224, 233-34 (2d Cir. 1978) (prior consistent statement must antedate motive to fabricate to be relevant to rebut impeachment).


Although the confusion concerning the admissibility standards of prior consistent statements offered solely to rehabilitate exists among Second Circuit opinions, courts of appeals for other circuits have addressed the issue, recognized the opposing views, and reconciled them in favor of a lesser standard of admission for such statements. See United States v. Harris, 761 F.2d 394, 399 (7th Cir. 1985); United States v. Parodi, 703 F.2d 768, 784-85 (4th Cir. 1983).

11. See United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978) (standards for admission of prior consistent statements as substantive evidence are same as those for rehabilitative); United States v. Check, 582 F.2d 668, 681 n.40 (2d Cir. 1978) (prior consistent statements that do not satisfy FRE 801(d)(1)(B) standards are not admissible for substantive or rehabilitative use).
fabricate. Other courts, however, opting for a broader range of admissibility, do not impose such a requirement. The third area encompasses prior consistent statements offered for completeness purposes, rather than to rebut the inference that a motive to fabricate affected the trial testimony. Statements offered for completeness rebut a charge of recent fabrication, achieved through the introduction of a prior inconsistent statement, by placing the impeaching statement in its proper context or casting doubt on whether it truly was inconsistent with the in-court testimony. Prior consistent statements offered to explain the impeaching statement need not predate the alleged fabrication in order to rebut the impeachment. Statements offered to


13. See United States v. Harris, 761 F.2d 394, 399 (7th Cir. 1985) (substantive use of prior consistent statements is contingent on their being made before motive to falsify, but those offered to rehabilitate need not meet this stricter standard); United States v. Parodi, 703 F.2d 768, 784-85 (4th Cir. 1983) (prior consistent statements offered to rehabilitate need not meet substantive admission standards); United States v. Rubin, 609 F.2d 51, 68-70 (2d Cir. 1979) (Friendly, J., concurring) (prior consistent statements offered to rehabilitate are not governed by the more stringent standards required for statements offered substantively), aff'd on other grounds, 449 U.S. 424 (1981).

14. Impeachment of a witness by introduction of portions of a writing or recording inconsistent with his in-court testimony may be rebutted through the admission of the remainder of the statement, consistent with the witness's in-court testimony, to place the impeaching statement in its proper context. This use of prior consistent statements comport with the doctrine of completeness. See United States v. Andrade, 788 F.2d 521, 533 (8th Cir.) (admitting prior consistent statements to rebut inference of recent fabrication created by prior inconsistent statements), cert. denied, 107 S. Ct. 462 (1986); United States v. Rubin, 609 F.2d 51, 63 (2d Cir. 1979) (["W"]here substantial parts of a prior statement are used in cross-examination of a witness, fairness dictates that the balance be received so that the jury will not be misled ... "), aff'd on other grounds, 449 U.S. 424 (1981).

15. See United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986) (prior consistent statements can "cast doubt on whether ... the impeaching statement is really inconsistent with the trial testimony"); United States v. Harris, 761 F.2d 394, 400 (7th Cir. 1985) (remainder of report admitted as prior consistent statement to show "whether the impeaching statements ... were inconsistent within the context of the interview, and if so, to what extent"); United States v. Baron, 602 F.2d 1248, 1252 (7th Cir.) (prior consistent statements in memorandum admitted to show the extent to which impeaching statements in the memorandum were actually inconsistent), cert. denied, 444 U.S. 967 (1979).

16. See United States v. Shulman, 624 F.2d 384, 393 & n.21 (2d Cir. 1980) (prior consistent statements made subsequent to motive to fabricate admissible to place impeaching statements in context); United States v. Rubin, 609 F.2d 51, 63 (2d Cir. 1979) (prior consistent statements admissible to provide proper context for inconsistent statements regardless of statements' timing), aff'd on other grounds, 449 U.S. 424 (1981).

Prior consistent statements offered for completeness will be admitted only when relevant to rebut the impeaching statement by explaining or qualifying it. See United States v. Squires, 736 F.2d 87, 91 (3d Cir. 1984) (doctrine of completeness "does not require introduction of portions of a statement that are neither explanatory of nor relevant to the passages that have been admitted"), cert. denied, 469 U.S. 1161 (1985); United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982) (prior consistent statements should be admitted for purposes of completeness when "necessary to explain the admitted portion, to place it in context, or to avoid misleading the trier of fact").
place an impeaching statement in context must be distinguished from those statements offered to show that the alleged motive to fabricate did not affect the trial testimony, which are only responsive to the impeachment if made before the motive arose.

This Note examines the three uses of prior consistent statements and argues that the standards of admissibility for such statements must be determined by the purpose for which the statement is offered. Part I of this Note reviews the admissibility of prior consistent statements before the adoption of the Federal Rules of Evidence. It also discusses FRE 801(d)(1)(B) and the criteria for substantive admissibility contained therein.

Part II argues that only prior consistent statements that precede the motive to falsify are relevant to rebut the impeachment by showing that the in-court testimony was not affected by the motive, and thus are admissible for their truth. It also addresses the question of whether substantive admissibility standards govern rehabilitative use of prior consistent statements and concludes that the standards should be the same. Further, Part II elaborates upon the distinction between the two types of prior statements that may be given substantive effect under FRE 801(d)(1)(B): statements offered to rebut the inference that a motive to fabricate affected the veracity of a witness's in-court testimony, and statements offered to rebut impeachment through a prior inconsistent statement by placing that statement in its proper context and clarifying the extent to which it is actually inconsistent. Finally, Part II concludes that the standards these two types of statements must meet to serve their respective rebuttal purposes are also the standards that must be met to ensure substantive admission.

I. DEVELOPMENTS IN ADMISSIBILITY OF PRIOR CONSISTENT STATEMENTS

A. Admissibility of Prior Consistent Statements at Common Law

Courts at common law originally took a narrow view of the admissibility of prior consistent statements. When offered as substantive evidence, prior consistent statements were inadmissible because the

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17. See Martin, Prior Consistent Statements, 196 N.Y.L.J. 94 at 1, col. 1 (1986) (indicating that this distinction is important because it suggests different admissibility standards). But see United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986) (indicating that there is no difference between prior consistent statements offered to rehabilitate and those offered for completeness). See also infra notes 53-55 and accompanying text.

18. See supra note 6 and infra notes 64-67 & 75-76 and accompanying text.

19. Evidence offered substantively is introduced to prove the truth of the fact or facts asserted within the statement. See United States v. Sanders, 639 F.2d 268, 270 (5th Cir. Mar. 1981) (evidence offered to prove the substance of a statement is offered as proof of the facts asserted therein); C. McCormick, McCormick on Evidence § 251, at 744 (E. Cleary 3d ed. 1984) [hereinafter McCormick] (substantive evidence is offered to prove the truth of the matter asserted). Such evidence must be distinguished from evidence offered solely to prove the fact that the statement was made, to discredit a witness, or to rehabili-
statements were hearsay. In addition, prior consistent statements offered as corroborative evidence were excluded as being unnecessarily cumulative. Further, a prior consistent statement offered to rehabilitate one who had been impeached. See United States v. Sanders, 639 F.2d at 270 (statements offered substantively must be distinguished from statements that are offered only to prove that the statement was made). See generally M. Graham, Handbook of Federal Evidence § 801.5, at 695 (1986) [hereinafter Graham, Federal Evidence] (discussing substantive use of evidence under FRE 801); McCormick, supra, § 251, at 744 (discussing substantive use of prior consistent statements); Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 Yale L.J. 229, 231 (1922) (elaborating the distinction between statements offered substantively and those not offered for their truth). See also infra note 24 (discussing rehabilitative evidence).

20. See Townsend v. United States, 106 F.2d 273, 275 (3d Cir. 1939) (prior consistent statements were hearsay, and thus could be not be used in case-in-chief for their truth); 4 J. Wigmore, Evidence in Trials at Common Law § 1123, at 254 (J. Chadbourn rev. ed. 1972) [hereinafter Wigmore] (prior statements offered substantively were barred by hearsay rule); see also United States v. Quinto, 582 F.2d 224, 232 (2d Cir. 1978) (recognizing that prior consistent statements offered for their truth always were barred by hearsay rule).

The underlying reason for the exclusion of hearsay evidence was that statements made out of court were inherently unreliable. Since such statements are not made under oath, or at trial, the trier of fact is unable to observe the declarant's demeanor. Moreover, the declarant of the statement is not subject to the scrutiny of cross-examination. See McCormick, supra note 19, § 245, at 727-28; 5 Wigmore, supra, § 1362, at 3-10; Morgan, Hearsay and the Application of the Hearsay Concept, 62 Harv. L. Rev. 177, 182-85 (1948); Comment, Hearsay Under the Proposed Federal Rules: A Discretionary Approach, 15 Wayne L. Rev. 1079, 1106-07 (1969) [hereinafter Comment, Hearsay].

21. Corroborative evidence includes those statements offered during the presentation of the proponent's case-in-chief to bolster the in-court testimony of a witness by showing that a consistent statement was made previously, rather than to prove the truth of the statement. See Schoppel v. United States, 270 F.2d 413, 417 (4th Cir. 1959) (prior consistent statements offer impermissible "corroborative support of a witness by showing that after the event under inquiry and before the trial he made statements to the same effect"); see also 4 Wigmore, supra note 20, § 1123, at 254-55 (discussing admissibility of prior consistent statements as corroborative evidence-in-chief).

22. See Mellon v. United States, 170 F.2d 583, 585-86 (5th Cir. 1948) (holding that in-court testimony may not be corroborated by proof of prior consistent statements); Dowdy v. United States, 46 F.2d 417, 424 (4th Cir. 1931) (corroboratory by prior consistencies during proponent's case-in-chief is impermissible); United States v. Keller, 145 F. Supp. 692, 697 (D.N.J. 1956) (consistent statements are not allowed to bolster witness's testimony during case-in-chief).

23. See Graham, Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal, 30 Hastings L.J. 575, 581 (1979) ("Because . . . the corroborative effect upon the credibility of the witness is slight at best, the common law came to reject prior consistent statements offered upon direct examination as being too cumbersome for the trial process.") (footnote omitted).

The introduction of prior statements encumbers the trial court without aiding the truth seeking process, because the repetition of a previous statement bolsters the in-court testimony without making its truth more probable or the witness more trustworthy. See 4 Wigmore, supra note 20, § 1124, at 258 ("The idea that the mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth.") (quoting State v. Parish, 79 N.C. 610, 612-14 (1878)).

Prior consistent statements offered as corroborative evidence also were excluded because they reinforced the credibility of a witness who had not yet been impeached. See Coltrane v. United States, 418 F.2d 1131, 1140 (D.C. Cir. 1969) ("When a witness' testi-
tate the credibility of a witness whose testimony had been impeached was inadmissible because the statement was unreliable.

This restrictive view of the admission of prior consistent statements subsequently was liberalized. Later decisions admitted prior consistent statements to rehabilitate a witness whose credibility had been impeached by a charge that his testimony was the result of recent fabrication or improper motive. In the face of this type of impeachment, prior consistent statements were admitted because they aided the witness's credibility, thereby casting doubt on the witness's ability or willingness to tell the truth. See generally Graham, Federal Evidence, supra note 19, § 607.1, at 414-16 (discussing impeachment of a witness); McCormick, supra note 19, § 33, at 72-73 (same). After impeachment has occurred, the opponent may offer evidence to rebut the impeaching fact in an effort to restore the witness's diminished credibility. Such evidence thus acts to rehabilitate the witness. See generally 4 Jones on Evidence § 26:24, at 231 (1972) (discussing rehabilitation of a witness); McCormick, supra note 19, § 49, at 115-17 (same).

Originally, prior consistent statements offered to rehabilitate a witness were deemed unreliable because they were not made under oath. See Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1836); United States v. Sherman, 171 F.2d 619, 622 (2d Cir. 1948).

26. See Applebaum v. American Export Isbrandtsen Lines, 472 F.2d 56, 60 (2d Cir. 1972) (recognizing liberalization of general rule prohibiting use of prior consistent statements to rehabilitate); Affronti v. United States, 145 F.2d 3, 7 (8th Cir. 1944) (recognizing exceptions to general prohibition on admission of prior consistent statements); see also United States v. Quinto, 582 F.2d 224, 232 (2d Cir. 1978) (discussing admissibility standards before Federal Rules of Evidence).

27. See, e.g., United States v. Rodriguez, 452 F.2d 1146, 1148 (9th Cir. 1972) (admitting only those prior consistent statements made before declarant had motive to fabricate); Felice v. Long Island R.R., 426 F.2d 192, 197-98 (2d Cir.) (same), cert. denied, 400 U.S. 820 (1970); Ryan v. United Parcel Serv., 205 F.2d 362, 364 (2d Cir. 1953) (same); United States v. Corry, 183 F.2d 155, 157 (2d Cir. 1950) (same); Affronti v. United States, 145 F.2d 3, 7 (8th Cir. 1944) (same); see also United States v. Zito, 467 F.2d 1401, 1404 (2d Cir. 1972) (admitting prior consistent statement to rebut a charge of recent fabrication).

28. In-court testimony can be assailed as recent fabrication or the result of improper motive or bias in several ways. See 4 Wigmore, supra note 20, §§ 1126-29, at 258-76; Graham, supra note 23, at 583. The first type of impeachment is accomplished through the presentation of evidence indicating that the witness made a statement prior to trial that was inconsistent with his trial testimony. See 4 Wigmore, supra note 20, § 1126, at 258-67 (discussion of impeachment by prior inconsistent statements). Proof of such inconsistency gives rise to the inference that the in-court testimony is fabricated. See Applebaum v. American Export Isbrandtsen Lines, 472 F.2d 56, 60-61 (2d Cir. 1972) (proof of statement inconsistent with witness's in-court testimony "was tantamount to a charge of recent fabrication"); Affronti v. United States, 145 F.2d 3, 7-8 (8th Cir. 1944) (impeachment occurred through evidence of statements inconsistent with witness's trial testimony).

Impeachment also occurs through the introduction of evidence showing that the witness's in-court testimony was the result of improper motive or interest. See 4 Wigmore,
the trier of fact in determining the credibility of the witness. The trial judge had the discretion to determine whether a prior consistent statement was admissible to rebut the impeachment. Because of the questionable reliability of out-of-court statements, and the traditional prohibition against the use of any prior consistent statements, courts exercised this discretion with caution.

supra note 20, § 1128, at 268-70 (discussion of impeachment by bias, interest, or corruption). The most frequent example of such a motive is the witness's hope for leniency in return for inculpatory testimony. See United States v. Zito, 467 F.2d 1401, 1404 (2d Cir. 1972) (impeachment by implying that prosecution witness had contrived his story to avoid prosecution); United States v. Rodriguez, 452 F.2d 1146, 1148 (9th Cir. 1972) (impeachment implied fabrication on part of witness/alleged coconspirator as a result of an agreement with the prosecution in return for leniency).

A third form of impeachment is the presentation of witnesses whose testimony contradicts that of the witness being impeached; the preferred contradictions amount to a charge that the witness falsified his testimony. See Ryan v. United Parcel Serv., 205 F.2d 362, 364 (2d Cir. 1953) (police officer's testimony contradicted that of the defendant's employee, thus implying that the employee falsified his testimony); see also 4 Wigmore, supra note 20, § 1127, at 267 (discussion of impeachment by contradiction).

Last, impeachment can occur through evidence showing that the witness had previously failed to mention a fact to which he testified in court, at a time when it would have been natural for him to do so. See 4 Wigmore, supra note 20, § 1129, at 270-76 (discussion of impeachment through recent contrivance charge). Although the impeachment stems from the omission, as opposed to an affirmative contradiction or inconsistency, the testimony is no less subject to the implication that the witness's testimony was contrived. See Felice v. Long Island R.R., 426 F.2d 192, 197-98 (2d Cir.) (witness's failure to mention fact in accident report that he later testified to led to inference that in-court testimony was contrived), cert. denied, 400 U.S. 820 (1970).

29. See supra note 27.

30. See Coltrane v. United States, 418 F.2d 1131, 1140 (D.C. Cir. 1969) (prior consistent statements admitted when helpful in determining trustworthiness of testimony); Dowdy v. United States, 46 F.2d 417, 424 (4th Cir. 1931) (prior consistent statement must "contain[] such fact or facts pertinent to the issues involved as reasonably furnish to the jury some test of the witness' integrity"); see also McCormick, supra note 19, § 49, at 116 (restricts admission of prior consistent statements to situations where they are "logically relevant to explain the impeaching fact").

The customary proscription against prior statements was retained when they had no force to rebut or explain other types of impeachment. See McCormick, supra note 19, § 49, at 118. For instance, prior consistent statements are not responsive to impeachment charging a witness with bad character or reputation for untruthfulness, and are excluded as having no rehabilitative value. See United States v. Toner, 173 F.2d 140, 143 (3d Cir. 1949); see also McCormick, supra note 19, § 49, at 118 ("When the attack takes the form of impeachment of character, by showing misconduct, convictions or bad reputation, it is generally agreed that there is no color for sustaining by consistent statements."); 4 Wigmore, supra note 20, § 1125, at 258 (evidence of prior consistent statements is not responsive to character impeachment, "but evades it by retorting with the irrelevant fact that the witness has been consistent").


32. See supra note 20 and accompanying text.

33. See supra notes 20-25 and accompanying text.

34. See Affronti v. United States, 145 F.2d 3, 8 (8th Cir. 1944) ("Evidence of prior consistent statements should be received with great caution and only for the purpose of enabling the jury to make a correct appraisal of the credibility of the witness who has been impeached."); Dowdy v. United States, 46 F.2d 417, 424 (4th Cir. 1931) ("the court should be extremely guarded" and admit prior consistent statements only on the issue of
Generally, the courts required the proponent of a prior consistent statement to demonstrate that the statement was made prior to the time the alleged motive for fabrication or improper influence arose. A prior consistent statement antedating the motive to fabricate effectively rehabilitated the witness by showing that he had made the same statement independent of the discrediting influence, thereby rebutting the implication that the witness falsified his trial testimony as a result of an improper motive. A statement made while the motive to falsify already existed was excluded as being merely cumulative.

Common law courts also permitted the use of prior consistent statements under the doctrine of testimonial completeness. If one portion of

credibility, not for their truth); see also Coltrane v. United States, 418 F.2d 1131, 1140 (D.C. Cir. 1969) (prior consistent statements admitted to rehabilitate only when they are clearly helpful); Thomas, Rehabilitating the Impeached Witness with Consistent Statements, 32 Mo. L. Rev. 472, 472-74 (1967) (prior consistent statements admitted only as rehabilitative evidence).


36. See 4 Wigmore, supra note 20, § 1128, at 268 ("A consistent statement, at a time prior to the existence of a fact said to indicate bias, interest, or corruption, will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement . . . was independent of the discrediting influence.") (emphasis in original); see also United States v. Rodriguez, 452 F.2d 1146, 1148 (9th Cir. 1972) (prior consistent statements admitted because they "clearly antedated any motive [the witness] might have had to fabricate a story in order to obtain leniency from the prosecution."); United States v. Corry, 183 F.2d 155, 157 (2d Cir. 1950) (prior consistent statements admitted to rehabilitate if made before improper motivation to make such statements arose); Dowdy v. United States, 46 F.2d 417, 424 (4th Cir. 1931) (after witness had been impeached, proof of prior consistent statements are admissible to rehabilitate by showing that witness gave similar account when no motive to falsify existed).

37. See Thomas, supra note 34, at 475 (only a prior consistent statement made before to the alleged discrediting influence is relevant "to refute the claim that those [impeaching] facts had any effect on the testimony").

38. See Coltrane v. United States, 418 F.2d 1131, 1140 (D.C. Cir. 1969) ("[M]ere repetition does not imply veracity.").

A prior statement subject to the same improper influence as the already impeached trial testimony has no force to rebut the charge, and is mere repetition. See United States v. Corry, 183 F.2d 155, 157 (2d Cir. 1950) (prior consistent statements made at a time when the declarant had "inducement to make these statements because of pressure or personal interest" have no rehabilitative value); Comment, Hearsay, supra note 20, at 1092 ("A consistent statement made subsequent to the time any such influence or motive arose would not rebut the charge, but merely show that the witness responded in the same way when under the same pressures.").

39. See United States v. Lev, 276 F.2d 605, 608 (2d Cir.) (prior consistent statements "admitted solely to round out and complete" portions used on cross-examination), cert. denied, 363 U.S. 812 (1960); Affronti v. United States, 145 F.2d 3, 7 (8th Cir. 1944) (after impeachment by one portion of statement, other prior consistent portions may be admit-
a statement was used to impeach a witness, another portion of the statement, relating to the same subject matter,\textsuperscript{40} could be introduced to ensure that the trier of fact was not misled by statements taken out of context.\textsuperscript{41} Thus, these prior statements were admitted to explain or clarify a statement already used for impeachment.\textsuperscript{42}

**B. Admissibility under Federal Rule of Evidence 801(d)(1)(B)**

FRE 801 defines hearsay as an out-of-court statement offered at trial to prove the truth of the matter asserted within the statement.\textsuperscript{43} Such statements generally are inadmissible as unreliable evidence.\textsuperscript{44} The prohibition on the admission of hearsay, however, is not absolute.\textsuperscript{45} FRE

\textsuperscript{40} completeness purposes were served only when one part of a statement already had been introduced into evidence to impeach a witness. See United States v. Smith, 328 F.2d 848, 850 (6th Cir.) (the remainder of statement made by witness was admitted for completeness after portions of statement were used to impeach him) (citing Affronti v. United States, 145 F.2d 3, 7 (8th Cir. 1944)), cert. denied, 379 U.S. 936 (1964); United States v. Lev, 276 F.2d 605, 608 (2d Cir.) (portion of statement used to impeach witness), cert. denied, 363 U.S. 812 (1960).

The remainder of a statement was not admitted unless relevant to explain the impeaching statement. See United States v. Smith, 328 F.2d 848, 850 (6th Cir.), cert. denied, 379 U.S. 936 (1964); Cafasso v. Pennsylvania R.R., 169 F.2d 451, 453 (3d Cir. 1948) (citing Affronti v. United States, 145 F.2d 3, 7 (8th Cir. 1944)); see also United States v. Grunewald, 164 F. Supp. 644, 648 (S.D.N.Y. 1958) ("The remainder of the material that is put in must be relevant in order to make the portion which is originally introduced understood or to explain, clarify or qualify that which was originally put in.").

41. See United States v. Fayette, 388 F.2d 728, 735 (2d Cir. 1968) (holding that remainder of statement was needed to provide the "complete story"); United States v. Lev, 276 F.2d 605, 608 (2d Cir.) (admitting prior consistent statements to place impeaching statements in context and to clarify portions already introduced), cert. denied, 363 U.S. 812 (1960); see also Fed. R. Evid. 106 advisory committee's note (one purpose of rule of completeness is to prevent the "misleading impression created by taking matters out of context").

42. See United States v. Littwin, 338 F.2d 141, 145 (6th Cir. 1964) (admitting the remainder of a statement "to explain or rebut the adverse inferences which might arise from the incomplete character of the evidence introduced by [the] adversary"); cert. denied, 380 U.S. 911 (1965); Cafasso v. Pennsylvania R.R., 169 F.2d 451, 453 (3d Cir. 1948) (if one portion of statement used to impeach, the remainder of that statement relevant to the part already introduced is admissible to rehabilitate witness's credibility); Affronti v. United States, 145 F.2d 3, 8 (8th Cir. 1944) (same).

43. See Fed. R. Evid. 801(c).

44. See supra note 20. Hearsay statements are unreliable because they suffer from problems concerning the perception, memory, ambiguity, and sincerity of the out-of-court declarant. See Graham, Federal Evidence, supra note 19, § 801.1, at 681-83; 5 Wigmore, supra note 20, §§ 1361-62, at 2-3, 10; Morgan, supra note 20, at 185-88.

45. The Federal Rules of Evidence contain exceptions admitting otherwise inadmissible statements made under circumstances providing indicia of reliability, thereby lessening traditional hearsay dangers. See Fed. R. Evid. 803 (exceptions where availability of declarant is immaterial); Fed. R. Evid. 804 (exceptions contingent on unavailability of declarant). Although out-of-court statements that satisfy a hearsay exception are not admissible automatically, the hearsay rule is no longer a bar. See Fed. R. Evid. 803 advi-
801(d)(1) provides that certain extrajudicial statements are not hearsay if they meet the criteria set forth therein.\textsuperscript{46}

Prior consistent statements are admissible under FRE 801(d)(1)(B) when the declarant of the proffered statement testifies at trial and is subject to cross-examination.\textsuperscript{47} Admissibility of out-of-court statements under FRE 801(d)(1)(B) is limited to those statements that are consistent with the declarant’s in-court testimony\textsuperscript{48} and offered to rebut a charge that the in-court testimony was the result of recent fabrication or subject to improper influence.\textsuperscript{49} The term “recent” as used by FRE 801(d)(1)(B)

\textsuperscript{46} See Fed. R. Evid. 801(d)(1); see also Fed. R. Evid. 801(d)(1) advisory committee’s note (“The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.”).

\textsuperscript{47} See Fed. R. Evid. 801(d)(1). The requirement that the declarant testify is based on the rationale that he is now under oath, in the presence of the trier of fact, and subject to scrutiny by the opponent, see Fed. R. Evid. 801(d)(1) advisory committee’s note, thus avoiding some of the traditional objections to hearsay evidence. \textit{See supra} note 20 (discussing objections to hearsay).

There is some question as to whether a statement consistent with the declarant’s in-court testimony may be elicited only from the declarant himself, or whether it may be received from a non-declarant witness. \textit{See United States v. Maultasch, 596 F.2d 19, 24-25 (2d Cir. 1979).} At least one court has held that FRE 801(d)(1)(B) requires that only the declarant may testify to the making of a prior consistent statement. \textit{See United States v. West, 670 F.2d 675, 687 (7th Cir.), cert. denied, 457 U.S. 1124, 1139 (1982).} Under this view, the declarant must be subject to cross-examination specifically concerning the statement, as stated in the Rule, rather than to have been subject to cross-examination at some point during the trial. \textit{Id.} Conversely, several courts of appeals have permitted non-declarant witnesses to testify to the declarant’s prior consistent statement. Thus, they have declined to enforce the requirement that the declarant be subject to cross-examination concerning the statement. \textit{See, e.g., United States v. Provenzano, 620 F.2d 985, 1001-02 (3d Cir.), cert. denied, 449 U.S. 899 (1980); United States v. Lanier, 578 F.2d 1246, 1255-56 (8th Cir.), cert. denied, 439 U.S. 856 (1978); United States v. Zuniga-Lara, 570 F.2d 1286, 1287 (5th Cir.), cert. denied, 436 U.S. 961 (1978); United States v. McGrath, 558 F.2d 1102, 1107 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978).} Resolution of this conflict, however, is beyond the scope of this Note.

\textsuperscript{48} Fed. R. Evid. 801(d)(1)(B). Provided the prior statement is sufficiently similar to rebut the impeachment charge, the statement need not be an exact duplication of the in-court statement to satisfy the consistency requirement of FRE 801(d)(1)(B). \textit{See United States v. Lombardi, 550 F.2d 827, 828 (2d Cir. 1977) (per curiam) (prior statement omitting one detail, but otherwise consistent with trial testimony, admitted as prior consistent statement to rebut implication that witness falsified his testimony).}

\textsuperscript{49} Fed. R. Evid. 801(d)(1)(B).
indicates that the testimony was contrived at some point after the impeaching event, rather than proximate to its being given at trial.  

The Rule further provides that the attack on credibility may be implied as well as express. Thus, impeachment that elicits facts from which it may be inferred that the testimony was fabricated is as susceptible to rebuttal through the introduction of a prior consistent statement as impeachment that expressly states the charge.

A prior consistent statement offered under FRE 801(d)(1)(B) can rebut impeachment by a charge of recent fabrication in two ways. First, the statement can directly refute the charge of recent fabrication or improper influence by showing that the motive to fabricate did not affect the in-court testimony. Second, a prior consistent statement can be offered to rebut an impeaching inconsistent statement by placing the state-

50. See Graham, supra note 23, at 582 ("[A] 'fabrication' is 'recent' if the in-court testimony is expressly or impliedly charged to have been consciously fabricated at any time after the event."); see also United States v. Gwaltney, 790 F.2d 1378, 1384 (9th Cir. 1986) ("The fabrication of which the rule speaks is the alleged fabrication underlying the witness's trial testimony, not some fabrication resulting in a prior inconsistent out-of-court statement . . . ."); cert. denied, 107 S. Ct. 1337 (1987).


52. See United States v. Baron, 602 F.2d 1248, 1253 (7th Cir.) ("The fact that . . . counsel may not have intended to imply that [the witness's] story was fabricated . . . is irrelevant if that inference fairly arises from the line of questioning . . . pursued."); cert. denied, 444 U.S. 967 (1979); see also Graham, supra note 23, at 585-86 (implied charge occurs where cross-examiner elicits facts from which the jury may infer improper motivation; express charge occurs where cross-examiner directly asserts that the witness is subject to improper motivation).

53. See Graham, supra note 23, at 591 (prior consistent statement made before motive to falsify "does not attack the basic fact, that there is evidence that indicates [improper motive], only the propriety of drawing the inference' that motive affected the testimony); see also United States v. Feldman, 711 F.2d 758, 766 (7th Cir.) (consistent statement made to FBI before plea bargain was reached admitted to "rebut inferences of recent fabrication motivated by the agreement."); cert. denied, 464 U.S. 939 (1983); United States v. Guevara, 598 F.2d 1094, 1099-1100 (7th Cir. 1979) (when witness was impeached by evidence that he received money to inform, prior consistent statement made subsequent to alleged motive was inadmissible because it did not "remove the implication of improper motive from [witness's] prior testimony").
ment in its full context. It is necessary for courts to ascertain for which of these two purposes a prior consistent statement is being offered because the standards that govern admissibility are different for each purpose.

The drafters of the Federal Rules recognized that prior consistent statements were admissible at common law to rehabilitate a witness’s credibility when he had been charged with recent fabrication. Both uses of prior consistent statements were contemplated within the purview of the Rule. FRE 801(d)(1)(B), however, gives these extrajudicial statements substantive effect.

II. THE CONTROVERSY REGARDING THE TEMPORAL ADMISSIBILITY STANDARD

FRE 801(d)(1)(B) does not expressly state whether admissibility of a prior consistent statement is contingent on the statement antedating an impeaching fact or event that implies the existence of a motive to fabricate. The majority of the federal courts of appeals that have considered the issue hold that prior consistent statements are admissible under FRE 801(d)(1)(B) only if made before the alleged motive to fabricate.

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54. See Graham, supra note 23, at 591 (prior consistent statement may rebut the impeaching inference by showing that statement was taken out of context); see also United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986) (prior consistent statements could clarify prior inconsistent statements by showing that they were not really inconsistent); United States v. Harris, 761 F.2d 394, 400 (7th Cir. 1985) (prior consistent statements were admitted to place inconsistent statements in context and show whether they were truly inconsistent); United States v. Rubin, 609 F.2d 51, 63 (2d Cir. 1979) (prior consistent statements were admitted in rebuttal to ensure that jury was not misled by impeaching statements taken out of context), aff’d on other grounds, 449 U.S. 424 (1981).

55. See infra notes 141-45 and accompanying text.

56. See Fed. R. Evid. 801(d)(1)(B) advisory committee’s note; supra note 2 and accompanying text.

57. FRE 801(d)(1)(B) expressly requires that the prior consistent statement be offered to rebut the impeachment. Fed. R. Evid. 801(d)(1)(B). Such impeachment can be rebutted either by showing that the motive was not operative on the in-court testimony, see supra note 53 and accompanying text, or by explaining an impeaching inconsistent statement that may have been taken out of context, see supra note 54 and accompanying text.

In addition, FRE 801(d)(1)(B) was promulgated to give substantive effect to those prior consistent statements previously admissible at common law to rehabilitate a witness impeached by a charge of recent fabrication or improper influence. See Fed. R. Evid. 801(d)(1)(B) advisory committee’s note. Because both of these uses of prior consistent statements were allowed at common law, see supra notes 2 & 35-42 and accompanying text, they are within the scope of FRE 801(d)(1)(B).

58. See United States v. James, 609 F.2d 36, 49-50 (2d Cir. 1979), cert. denied, 445 U.S. 905 (1980); United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978); Fed. R. Evid. 801(d)(1)(B) advisory committee’s note.


60. See, e.g., United States v. Bowman, 798 F.2d 333, 338 (8th Cir. 1986), cert. de-
minority of courts, however, hold that the Rule does not require automatic exclusion of a prior consistent statement made subsequent to the alleged motive to fabricate.\textsuperscript{61}

A. Precedence to a Motive for Fabrication Ensures Relevancy in Rebuttal

Evidence is considered relevant\textsuperscript{62} when that evidence tends to make a matter at issue more or less probable than the matter would be absent the evidence.\textsuperscript{63} Although a prior consistent statement may be relevant to prove the facts asserted,\textsuperscript{64} FRE 801(d)(1)(B) conditions admissibility on the statement being offered to rebut a charge of recent fabrication or

\textsuperscript{61} See, e.g., United States v. Anderson, 782 F.2d 908, 915-16 (11th Cir. 1986); United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir.), cert. denied, 444 U.S. 833 (1979); United States v. Quinto, 582 F.2d 224, 233-34 (2d Cir. 1978).

\textsuperscript{62} Evidence must satisfy the standard of relevancy set forth in FRE 401 to be admissible at trial. See Fed. R. Evid. 401, which provides: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

This relevance standard does not require that the evidence be sufficient to prove a matter at trial, thus evidence that has even minimal probative value may be deemed relevant. See McCormick, supra note 19, § 185, at 541-43; 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 401[06], at 401-40 to 401-41 (1986) [hereinafter 1 Weinstein]. For a discussion of FRE 401 and the relevancy requirement under the Federal Rules of Evidence, see Graham, Federal Evidence, supra note 19, § 401.1, at 146-49; 1 D. Louisell & C. Mueller, Federal Evidence, §§ 91-94, at 638-80 (1977); McCormick, supra note 19, §§ 184-85, at 540-48; 1 Weinstein, supra, ¶ 401[06] to ¶ 401[08], at 401-33 to 401-57.

\textsuperscript{63} Since FRE 401 provides that evidence is relevant for trial purposes if it tends to make any fact more or less probable, it can be inferred that evidence that is offered for a specific purpose would be relevant to accomplish that purpose only if the evidence makes the issue it is offered to prove more or less probable. See Fed. R. Evid. 401. Thus, although a prior consistent statement may be considered relevant under FRE 401, see infra note 64, it is not relevant to rebut the impeachment unless it has some probative force to do so. See United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir.), cert. denied, 444 U.S. 833 (1979).

FRE 402 provides that "[a]ll relevant evidence is admissible, except as otherwise provided by . . . these rules." Thus, in order to be admissible, a prior consistent statement must be relevant, and must satisfy the standards provided in FRE 801(d)(1)(B), which exempts the statement from the hearsay rule. See United States v. Feldman, 711 F.2d 758, 766 (7th Cir.), cert. denied, 464 U.S. 939 (1983); Travers, Prior Consistent Statements, 57 Neb. L. Rev. 974, 976 (1978).

\textsuperscript{64} Since the statement, by definition, is consistent with in-court testimony, it would be relevant to prove its truth under FRE 401, as the in-court testimony has already been admitted and is necessarily relevant. See Graham, supra note 23, at 579 n.16 (recognizing the view that a prior consistent statement, no more probative than the in-court testimony, is irrelevant since "mere repetition does not make the existence of a fact more or less probable than without the evidence since the identical evidence has already been
proper motive. Prior consistent statements, therefore, should be admitted under FRE 801(d)(1)(B) only when relevant to rehabilitate. A prior consistent statement is relevant to rebut only if it is responsive to the impeachment charge.

A charge of recent fabrication or improper motive impeaches the veracity of the in-court testimony by intimating either that there exists an improper influence affecting the credibility of the declarant's testimony or that the declarant has consciously falsified his testimony. A state-

introduced," but asserting that the better view is to consider the prior statement without reference to the trial testimony).

Several courts that have considered the admissibility of prior consistent statements have equated relevance under FRE 402 with relevance to rebut an impeaching fact or statement. The court in United States v. Quinto, 582 F.2d 224, 233-34 (2d Cir. 1978), set forth three elements that the proponent of a prior consistent statement must prove to assure admissibility under FRE 801(d)(1)(B), as well as relevancy under FRE 402. First, the statement must be consistent with the witness's trial testimony. Id. at 234. Second, the statement must be offered to rebut an express or implied charge of recent fabrication or improper influence. Id. Finally, the statement must have been made before the alleged motive to fabricate arose to be relevant to rebut. Id. at 233-34; see also United States v. Harris, 761 F.2d 394, 399 (7th Cir. 1985) (prior consistent statement offered under FRE 801(d)(1)(B) may not be relevant under FRE 402 if it does not rebut the charge). There is a distinction, however, between the relevance standard under FRE 401 and relevance to rebut. Although a prior consistent statement is relevant to prove its truth under the broad standard of FRE 401, see supra note 63, and thus admissible under FRE 402, it also should be relevant to rebut the charge under FRE 801(d)(1)(B) to gain admission. See infra note 66.

66. See United States v. Bowman, 798 F.2d 333, 338 (8th Cir. 1986) (prior consistent statements must be relevant to rebut charge of recent fabrication), cert. denied, 107 S. Ct. 906 (1987); United States v. Feldman, 711 F.2d 758, 766 (7th Cir.) (in addition to satisfying express requirements in FRE 801(d)(1)(B), prior consistent statement must be relevant to rebut impeachment), cert. denied, 464 U.S. 939 (1983); United States v. Guevara, 598 F.2d 1094, 1100 (7th Cir. 1979) (excluding prior consistent statement that did not serve to rebut charge of improper motive); United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir.) ("Evidence offered under [FRE 801(d)(1)(B)] must have some probative value in rebutting the implied charge of recent fabrication or improper motive.") cert. denied, 444 U.S. 833 (1979); United States v. Quinto, 582 F.2d 224, 234-35 (2d Cir. 1978) (holding that prior consistent statements irrelevant to rebut impeachment were inadmissible under FRE 801(d)(1)(B)).
67. See supra note 66.
68. See United States v. Bowman, 798 F.2d 333, 337-38 (8th Cir. 1986) (impeachment charged that plea bargain was improper influence on witnesses' testimony), cert. denied, 107 S. Ct. 906 (1987); United States v. Guevara, 598 F.2d 1094, 1100 (7th Cir. 1979) (impeachment implied that witness had motive to fabricate because he was a paid informant); see also 4 D. Louisell & C. Mueller, Federal Evidence § 420, at 188 (1980) [hereinafter 4 Louisell & Mueller] (impeachment charging recent fabrication or improper motive arises by "evidence of bias or motive, or evidence (or even mere imputation) that the witness has made it all up") (footnote omitted); cf. Thomas, supra note 34, at 475-76 (discussing impeachment by charge of improper motive prior to the adoption of the Federal Rules of Evidence); Note, Recent Fabrication, supra note 49, at 203-04 (same).
69. See United States v. Feldman, 711 F.2d 758, 766 (7th Cir.) (impeachment implied recent fabrication by codefendant/witness who had entered into plea bargain with government), cert. denied, 464 U.S. 939 (1983); cf. Thomas, supra note 34, at 475-79 (discussing impeachment by charge of recent fabrication; written before the adoption of the Federal Rules of Evidence).
ment that antedates the fact or event giving rise to an improper motive to fabricate is sufficiently independent of the motive to aid the trier of fact in ascertaining the veracity of the in-court testimony. Since the witness made the statement before the motive to fabricate existed, the prior statement rehabilitates by showing that the improper motive had no effect on the testimony, thereby refuting the implication that the witness's testimony is contrived.

A prior consistent statement made while the impeaching fact is in existence, however, is subject to the same motive to falsify as the in-court testimony. The out-of-court statement is no more credible than the already impeached trial testimony and is mere repetition. The prior statement, therefore, should be excluded as having no probative value to rebut the impeachment. Admissibility of prior consistent statements under FRE 801(d)(1)(B) should be limited to those statements made prior to, and independent of, the discrediting influence, because only

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70. See United States v. Bowman, 798 F.2d 333, 338 (8th Cir. 1986), cert. denied, 107 S. Ct. 906 (1987); United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir.), cert. denied, 444 U.S. 833 (1979); see also United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978) (prior consistent statements must be relevant to the witness's credibility to aid the jury in determining the veracity of the in-court testimony).

71. See United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978) (prior consistent statements that predate a motive to fabricate are probative of the veracity of the in-court testimony since they show that the same statement was made at a time when the witness was free from improper influence); see also United States v. Feldman, 711 F.2d 758, 766 (7th Cir.) (prior consistent statement given to FBI prior to plea agreement was reached was "relevant to rebut inferences of recent fabrication motivated by the agreement"), cert. denied, 464 U.S. 939 (1983).

72. See United States v. Harris, 761 F.2d 394, 399 (7th Cir. 1985) ("declarant's motive in making both statements was the same"); United States v. McPartlin, 595 F.2d 1321, 1351-52 (7th Cir.) (prior consistent statements made after motive to falsify inadmissible because they were subject to the same motive as the in-court testimony), cert. denied, 444 U.S. 833 (1979); United States v. Quinto, 582 F.2d 224, 234 (2d Cir. 1978) (prior consistent statements inadmissible since alleged improper motive was as operative during pre-trial interview as at trial); see also 4 Wigmore, supra note 20, § 1128, at 268 (prior consistent statement made before alleged bias or interest is independent of influence).

73. That a statement has been repeated several times does not make it more trustworthy, see United States v. Bowman, 798 F.2d 333, 338 (8th Cir. 1986) ("mere repetition does not imply veracity") (quoting 4 J. Weinstein & M. Berger, Weinstein's Evidence *801(d)(1)(B) at 801-117-18 (1981)), cert. denied, 107 S. Ct. 906 (1987); United States v. Harris, 761 F.2d 394, 399 (7th Cir. 1985) (same) (quoting United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir.), cert. denied, 444 U.S. 833 (1979)), since a lie can be repeated as often as the truth. See United States v. Weil, 561 F.2d 1109, 1111 n.2 (4th Cir. 1977) ("repetition of a lie does not enhance its truthfulness"); 4 Wigmore, supra note 20, § 1124, at 255 (repetition of prior consistent statement does not make the statement more probable or veracious).


75. See United States v. Bowman, 798 F.2d 333, 338 (8th Cir. 1986) (prior consistent
then are they responsive to the impeachment. Because FRE 801(d)(1)(B) presumes that prior consistent statements will be responsive to the impeachment, it is implicit in the Rule that only those statements antedating the motive to fabricate will be admitted.

Courts rejecting the requirement that a prior consistent statement antedate the motive to fabricate contend that FRE 801(d)(1)(B) must be read and interpreted literally. Because the temporal requirement is not expressly mentioned in the Rule, these courts hold that a prior consistent statement is admissible regardless of when it was made.

Advocates of a literal interpretation, however, ignore that prior consistent statements are offered under FRE 801(d)(1)(B) to rebut a charge of recent fabrication, and must have some probative force to accomplish their intended purpose. Thus, the purpose for which the statements are offered requires that they antedate the discrediting influence, as it is only under those circumstances that they are relevant to rebut the impeachment.

A literal interpretation of FRE 801(d)(1)(B) is supported by the argument that had the drafters intended temporal limitations on admissibility, they would have expressly included them in the Rule. In

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76. See United States v. Feldman, 711 F.2d 758, 766 (7th Cir.), cert. denied, 464 U.S. 939 (1983); United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir.), cert. denied, 444 U.S. 833 (1979); United States v. Quinto, 582 F.2d 224, 233-34 (2d Cir. 1978) (prior consistent statements are only relevant to rebut when prior to, and thus independent of, alleged motive to fabricate).

77. See United States v. Parodi, 703 F.2d 768, 784 (4th Cir. 1983) (asserting that the Rule contains no reference to temporal requirement and should be read literally); United States v. Hamilton, 689 F.2d 1262, 1273 (6th Cir. 1982) (admitting consistent statement made subsequent to motive to fabricate because it "comports . . . with the literal terms of the Rule"), cert. denied, 459 U.S. 1117 (1983).

78. See supra note 59 and accompanying text.


81. See United States v. Feldman, 711 F.2d 758, 766 (7th Cir.) (prior consistent statements are relevant to rebut only if made before motive to fabricate), cert. denied, 464 U.S. 939 (1983); United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir.) (only prior consistent statements antedating motive to fabricate have probative value to rebut charge of recent fabrication or improper motive), cert. denied, 444 U.S. 833 (1979); United States v. Quinto, 582 F.2d 224, 235 (2d Cir. 1978) (prior consistent statements made prior to motive to fabricate are relevant on witness's credibility).


83. See United States v. Parodi, 703 F.2d 768, 784 (4th Cir. 1983).
promulgating FRE 801(d)(1)(B), however, the drafters intended to give substantive effect only to those prior consistent statements that would have been admissible at common law for rehabilitation. The purpose of the Rule was not to change common law standards of admissibility. Rather, its purpose was to provide an exception to the hearsay rule for those prior consistent statements that meet common law requirements of admissibility. Courts at common law required that the prior consistent statement be made before the motive to fabricate arose. Thus, restricting admissibility under the Rule to those statements made independent of the alleged motive to fabricate best comports with the intent of the drafters.

In *United States v. Hamilton*, the Court of Appeals for the Sixth Cir-

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84. See Fed. R. Evid. 801(d)(1)(B) advisory committee's note, which reads:

Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. 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, no sound reason is apparent why it should not be received generally.

Id.; see also United States v. James, 609 F.2d 36, 49-50 (2d Cir. 1979) (prior consistent statements could be used as affirmative evidence under FRE 801(d)(1)(B), rather than just as rehabilitative evidence as at common law), cert. denied, 445 U.S. 905 (1980); United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978) (drafters of FRE 801(d)(1)(B) intended to allow substantive use of only those statements that would have been admitted to rehabilitate at common law).

85. See United States v. Lopez, 584 F.2d 1175, 1183 (2d Cir. 1978) (Neaher, J., dissenting) (FRE 801(d)(1)(B) expands the use to be made of prior consistent statements once admitted, but admissibility standards remain the same as at common law); United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978) (FRE 801(d)(1)(B) has not changed common law standards of admissibility of prior consistent statements offered to rehabilitate); see also 4 Louisell & Mueller, *supra* note 68, § 420, at 194-95 (FRE 801(d)(1)(B) contemplated no change from common law standard of admission of prior consistent statements); Graham, *supra* note 23, at 587 n.42 ("No federal decision has since indicated that Rule 801(d)(1)(B) was meant to change the [common law] rule."). For a discussion of the common law admission standard, see *supra* notes 35-38.

86. See *supra* note 46 and accompanying text; see also United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978) ("Fed. R. Evid. 801(d)(1)(B) ... insure[s] that any prior consistent statement which satisfies its requirements will not be regarded as 'hearsay' ... ").

87. See Fed. R. Evid. 801(d)(1)(B) advisory committee's note (the Rule gives substantive effect to those prior consistent statements that would have been admissible to rehabilitate at common law); see also United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978) ("standards for determining whether prior consistent statements can now be admitted as substantive evidence are precisely the same as the traditional standards").

88. See Applebaum v. American Export Isbrandtsen Lines, 472 F.2d 56, 60 (2d Cir. 1972) (quoting United States v. Zito, 467 F.2d 1401, 1403 (2d Cir. 1972)); United States v. Rodriguez, 452 F.2d 1146, 1148 (9th Cir. 1972) (quoting Lindsey v. United States, 237 F.2d 893, 895 (9th Cir. 1956)); Affronti v. United States, 145 F.2d 3, 7 (8th Cir. 1944); Dowdy v. United States, 46 F.2d 417, 424 (4th Cir. 1931); *supra* notes 35-38 and accompanying text.

89. See United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978); see also Fed. R. Evid. 801(d)(1)(B) advisory committee's note (FRE 801(d)(1)(B) admits only those statements formerly admissible at common law).

cuit, advocating the minority position, asserted that a prior consistent statement made subsequent to a motive to fabricate is not automatically excludable under FRE 801(d)(1)(B). The Hamilton court admitted the prior consistent statement of a prosecution witness after the defense counsel impeached the witness by implying that his in-court testimony was influenced by a plea agreement. The court maintained that such a statement was admissible regardless of when made, as the statement’s timing only affected its materiality. Thus, the jury should be allowed to determine the weight to be accorded the statement.

This reading of FRE 801(d)(1)(B) presumes that FRE 403 will be used to exclude such evidence when its probative value is outweighed by unfair prejudice. FRE 403, however, also may be used to exclude evidence that violates trial considerations by causing undue delay, confusion

91. See id. at 1273 ("[A]lthough being prior in time to a motive to falsify may affect a statement’s materiality . . . it is not a hard and fast rule for admissibility under Rule 801(d)(1)(B).") (citation omitted) (emphasis in original).
92. See id.
93. See id. at 1273-74; see also United States v. Anderson, 782 F.2d 908, 915-16 (11th Cir. 1986) (prior consistent statement admissible under FRE 801(d)(1)(B) regardless of its timing); United States v. Parry, 649 F.2d 292, 296 (5th Cir. Unit B June 1981) (same); United States v. Rios, 611 F.2d 1335, 1349 (10th Cir. 1979) (same), cert. denied, 452 U.S. 918 (1981); supra note 79.
94. See United States v. Rios, 611 F.2d 1335, 1349 (10th Cir. 1979) (court held that it was proper to allow the jury to hear both the consistent and the impeaching statements to evaluate the witness’s credibility), cert. denied, 452 U.S. 918 (1981).
95. Fed. R. Evid. 403 provides: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Id.
96. See United States v. Hamilton, 689 F.2d 1262, 1273 (6th Cir. 1982) (dictum) (recognizing Seventh Circuit view that FRE 403 is available to exclude prejudicial statements), cert. denied, 459 U.S. 1117 (1983); see also United States v. Baron, 602 F.2d 1248, 1253 & n.9 (7th Cir.) (prior consistent statements admissible under FRE 801(d)(1)(B) since cross-examination implied that statements predated motive, although trial court would have discretion to exclude such statements under FRE 403 if probative value is outweighed by undue prejudice), cert. denied, 444 U.S. 967 (1979).

It is unlikely, however, that a prior consistent statement made subsequent to the motive to fabricate would be excluded as prejudicial under FRE 403. Although such a statement has only slight probative value, see infra note 101 and accompanying text, that probative value would not be substantially outweighed by the danger of unfair prejudice, since the same statement would already have been received at trial, and found not prejudicial. Nonetheless, prior consistent statements are subject to a balancing test to determine if their probative value is outweighed by the trial considerations enunciated in FRE 403, even if the evidence is not prejudicial. See United States v. Mock, 640 F.2d 629, 632 (5th Cir. Unit B Mar. 1981) (trial judge has discretion to exclude prior consistent statements under FRE 403 when their probativity is outweighed by their cumulativeness); cf. Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 935 (10th Cir.) (excluding evidence, the probative value of which was outweighed by “undue delay, waste of time, and needless presentation of cumulative evidence”), cert. denied, 469 U.S. 853 (1984); Czajka v. Hickman, 703 F.2d 317, 320 (8th Cir. 1983) (evidence was excluded under FRE 403, since probative value was outweighed by trial considerations, such as undue delay and unnecessary introduction of cumulative evidence).
of issues, or unnecessary presentation of cumulative evidence.97

Statements made subsequent to a motive to fabricate are merely cumulative because they are subject to the same improper influence or motive to fabricate as the witness's in-court testimony.98 In addition, the introduction of a prior consistent statement may unduly delay the trial process because it will be necessary to introduce further evidence concerning whether the statement was actually made and its surrounding circumstances.99

Admitting evidence of prior consistent statements made after a motive to falsify ultimately violates the trial considerations set forth in FRE 403.100 The statements' minimal probative worth101 should lead to their exclusion as cumulative and time wasting evidence. Only prior statements antedating the motive to fabricate are relevant to rebut the charge,102 and thus, have enough probative value to overcome the exclusionary factors in FRE 403.103

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97. See Fed. R. Evid. 403.
98. A prior consistent statement made subsequent to the alleged motive to falsify has no probative value to rebut the charge that the witness's trial testimony was fabricated. See United States v. Feldman, 711 F.2d 758, 766 (7th Cir.), cert. denied, 464 U.S. 939 (1983); United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir.), cert. denied, 444 U.S. 833 (1979); United States v. Quinto, 582 F.2d 224, 233-34 (2d Cir. 1978). Such statements are cumulative since they would be capable of showing only that the witness had made the same statement while under the same improper motivation, which in no way shows that the motive to fabricate did not affect the in-court testimony. See United States v. Harris, 761 F.2d 394, 399 (7th Cir. 1985); United States v. Feldman, 711 F.2d at 766; United States v. McPartlin, 595 F.2d at 1351; Graham, supra note 23, at 587. Thus, such statements add nothing to the fact finding process at trial. See United States v. Baron, 602 F.2d 1248, 1252 (7th Cir.), cert. denied, 444 U.S. 967 (1979).
99. See Graham, supra note 23, at 581 n.22; Martin, supra note 17, at 2, col. 4.
100. See Martin, supra note 17, at 2, col. 4 (“the evidence may take substantial time to present, cross-examine on, and argue about; there is also a substantial risk that the jury will overweight the probative value of repetition by itself”).
101. See id. (prior statements have slight probative value, as they are subject to the same improper motive as trial testimony and thus have no force to rehabilitate); supra note 98 and accompanying text; see also Graham, Federal Evidence, supra note 19, § 801.12, at 733-34 (prior consistent statements have inherently slight probative value when viewed in light of FRE 403 trial concerns).
103. See United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980) (“Admission under Rule 801(d)(1)(B) is limited to situations where the prior consistent statements have high probative value.”); United States v. McPartlin, 595 F.2d 1321, 1351 (7th Cir.) (only prior consistent statements made before the alleged motive to fabricate have sufficient probative value to rebut impeachment), cert. denied, 444 U.S. 833 (1979); see also 4 Weinstein, supra note 2, ¶ 801(d)(1)(B)[01], at 801-150 (“Substantive use under Rule 801(d)(1)(B) is limited to situations where high probative value is most likely.”).
B. Standards of Admissibility of Prior Consistent Statements as Rehabilitative Evidence

In addition to admitting prior consistent statements as substantive evidence under FRE 801(d)(1)(B), courts also recognize that prior consistent statements may be used for the more limited purpose of rehabilitating the credibility of a witness who has been impeached by a charge of recent fabrication or improper motive.

In United States v. Quinto, the court indicated that the standards of admission for substantive use of prior consistent statements also govern rehabilitation. In Quinto, a prosecution for tax evasion, the court excluded a memorandum, offered as a prior consistent statement, which had been prepared by IRS agents after a pre-trial interview with the defendant. The defense counsel impeached the testifying IRS agent by implying that the agent was ruthlessly seeking the defendant’s conviction, and thus, had an improper motive to falsify trial testimony. The court, however, held that since the memorandum had not been made before the improper motive arose, it was not relevant to rehabilitate the witness’s credibility, and thus, could not be used substantively under FRE 801(d)(1)(B).

Other courts hold that statements offered for the lesser purpose of rehabilitation do not have to meet the more stringent standards prescribed for substantive use. Under this latter view, a prior statement offered to rehabilitate need not be made prior to the motive for fabrication. This result, however, is contrary to the common law and the intent of the drafters of FRE 801(d)(1)(B).

104. See Fed. R. Evid. 801(d)(1)(B); Fed. R. Evid. 801(d)(1)(B) advisory committee’s note.
105. Prior consistent statements offered to rehabilitate are introduced solely to show that the witness actually made the consistent statement, and are not used as proof of the facts asserted in the statement. See Thomas, supra note 34, at 474. Statements offered for rehabilitation, thus, are used for a more limited purpose than statements offered substantively. See United States v. Rubin, 609 F.2d 51, 69 (2d Cir. 1979) (Friendly, J., concurring), aff’d on other grounds, 449 U.S. 424 (1981); United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978).
106. See United States v. Harris, 761 F.2d 394, 399-400 (7th Cir. 1985); United States v. Parodi, 703 F.2d 768, 784-85 (4th Cir. 1983); United States v. Rubin, 609 F.2d 51, 69-70 (2d Cir. 1979) (Friendly, J., concurring), aff’d on other grounds, 449 U.S. 424 (1981).
107. 582 F.2d 224 (2d Cir. 1978).
108. See id. at 233.
109. See id. at 229-32.
110. See id. at 234.
111. See id. at 235.
112. See United States v. Harris, 761 F.2d 394, 399 (7th Cir. 1985); United States v. Parodi, 703 F.2d 768, 785 (4th Cir. 1983); United States v. Rubin, 609 F.2d 51, 69-70 (2d Cir. 1979) (Friendly, J., concurring), aff’d on other grounds, 449 U.S. 424 (1981).
113. See supra note 37.
114. See Fed. R. Evid. 801(d)(1)(B) advisory committee’s note; supra note 84; see also United States v. Lopez, 584 F.2d 1175, 1183 (2d Cir. 1978) (Neather, J., dissenting) ("Although Rule 801 has . . . expanded the use to be made of such statements once properly admitted, nothing in the rule or in its history indicates that the traditional bases
Even when not intending substantive use, however, the proponent of a prior consistent statement offered to rehabilitate should be required to demonstrate the statement's probative value to gain its admission.\(^{115}\) This requirement is satisfied only if the statement antedated the motive to fabricate.\(^{116}\) Admission of a prior consistent statement made subsequent to the motive to fabricate or improper influence serves no purpose other than repetition.\(^{117}\) Thus, the same standards should govern rehabilitative and substantive use of prior consistent statements.\(^{118}\)

Further, regardless of whether the statement is offered for its truth or to rehabilitate, FRE 801(d)(1)(B) conditions admissibility of a prior consistent statement on its being offered to rebut a charge of recent fabrication or improper motive.\(^{119}\) A statement that is relevant to rebut the charge necessarily rehabilitates the witness's credibility.\(^{120}\) At least for the admission of prior consistent statements of a witness have been substantially relaxed or eliminated."; United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978) ("To the extent that a prior consistent statement is used for rehabilitative purposes, the Federal Rules of Evidence have apparently not altered prior law."); United States v. Check, 582 F.2d 668, 680 (2d Cir. 1978) (substantive use of prior consistent statements under FRE 801(d)(1)(B) is limited to those statements admissible to rehabilitate at common law).

115. See Thomas, supra note 34, at 474 ("The question is one of relevancy: in particular, it is whether the act of making a consistent statement is relevant to refute the impeaching fact.").

116. The nature of a prior consistent statement is such that it is offered in response to an attack on the witness's credibility from which the trier of fact may infer that the trial testimony was fabricated or was the result of an improper motive. See supra notes 27-30 & 57 and accompanying text. Whether a prior consistent statement is offered rehabilitatively or substantively, it must be relevant to rebut the impeachment to gain admission. See United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978); supra notes 65-76 and accompanying text.

117. See supra notes 73-74 and accompanying text. The court in United States v. Pierre, 781 F.2d 329 (2d Cir. 1986), seems to resolve the Second Circuit conflict over admission of rehabilitative prior consistent statements, see supra note 10, in favor of a lesser standard of admission for rehabilitative statements. Pierre, 781 F.2d at 333; accord United States v. Rubin, 609 F.2d 51, 69-70 (2d Cir. 1979) (Friendly, J., concurring), aff'd on other grounds, 449 U.S. 424 (1981). A closer reading of Pierre, however, shows that the focus of the opinion is on whether the prior consistent statement offered to rebut has some probative force beyond mere repetition. 781 F.2d at 331, 333. This view is in accord with that of United States v. Quinto, 582 F.2d 224 (2d Cir. 1978), which limits admissibility of rehabilitative and substantive prior consistent statements to those statements made before the alleged discrediting influence, to assure that the statements are relevant for rebuttal purposes and are not merely repetitious. See id. at 232-33.

In addition, the Pierre court specified three situations where a prior consistent statement has rebuttal force: if it casts doubt on whether a prior inconsistent statement was made; if it casts doubt on whether the impeaching statement is really inconsistent with trial testimony; and if it clarifies the allegedly inconsistent statement. Pierre, 781 F.2d at 333. These three situations are, however, more germane to a discussion of prior consistent statements offered for completeness, see infra Part II(C), which are distinguished from statements offered to rebut the inference that an improper motive led to fabrication of the in-court testimony.

118. See United States v. Quinto, 582 F.2d 224, 233 (2d Cir. 1978); United States v. Check, 582 F.2d 668, 681 n.40 (2d Cir. 1978).

119. See Fed. R. Evid. 801(d)(1)(B); supra notes 49 & 65.

120. See supra notes 68-71 and accompanying text.
one court and several commentators recognize that when prior consistent statements are admitted for rehabilitative purposes, the net effect of admission is that the statement is considered by the jury as both probative evidence of the facts asserted in the statement and evidence demonstrating the witness’s credibility.121 Because there is no practical difference between substantive and rehabilitative use of a prior consistent statement,122 a statement admitted to rehabilitate a witness’s credibility after a charge of recent fabrication or improper motive always should be available as substantive evidence under FRE 801(d)(1)(B).123 By permitting substantive use of evidence offered in rebuttal, FRE 801(d)(1)(B) does not recognize a distinction between substantive and rehabilitative use of prior consistent statements.

C. Prior Consistent Statements Offered for Completeness: Explaining the Impeachment

In addition to permitting rebuttal by prior consistent statements to show that a motive to fabricate did not affect the trial testimony,124 courts also recognize that prior consistent statements can rebut impeachment by prior inconsistent statements that imply recent fabrication125 by explaining or qualifying the impeaching statements.126 This latter rebuttal purpose is accomplished by placing the impeaching statement into

121. See United States v. Harris, 761 F.2d 394, 400 (7th Cir. 1985) (although holding that rehabilitative statements need not predate motive to fabricate, the court recognized that distinction between rehabilitative and substantive use is slight since jury is likely to use statement for both purposes once admitted); McCormick, supra note 19, § 251, at 747 ("No sound reason is apparent for denying substantive effect when the statement is otherwise admissible. . . . The giving of a limiting instruction is needless and useless."); 1 Weinstein, supra note 62, ¶ 105[03], at 105-15 (1985) (Advisory Committee provided for substantive use of a witness’s prior statements since the jury would not be likely to limit its use of the evidence without using it for its truth); Comment, Hearsay, supra note 20, at 1092-93 (no good reason for giving a limiting instruction "[s]ince the jury, in all probability, would not understand, or would ignore" such an instruction); see also Fed. R. Evid. 801(d)(1)(B) advisory committee’s note ("[I]f the opposite party wishes to open the door for [the statement’s] admission in evidence, no sound reason is apparent why it should not be received generally.").

122. See supra note 121 and accompanying text.

123. Since prior consistent statements offered both substantively and rehabilitatively are used to rebut the impeachment, see supra notes 27 & 49, and the statements should meet the same standards to gain admission, see supra notes 115-18, there is no reason for the proponent of a prior consistent statement to offer it merely for rehabilitative use.

124. See supra note 71 and accompanying text.

125. Impeachment by the introduction of prior inconsistent statements may amount to a charge of recent fabrication. See United States v. Andrade, 788 F.2d 521, 533 (8th Cir.), cert. denied, 107 S. Ct. 462 (1986); United States v. Baron, 602 F.2d 1248, 1252 (7th Cir.), cert. denied, 444 U.S. 967 (1979); supra note 49.

126. See United States v. Pierre, 781 F.2d 329, 331 (2d Cir. 1986) (prior consistent statement offered in response to impeaching inconsistent statement clarified impeaching statement under doctrine of completeness); Graham, supra note 23, at 595 (prior consistent statements could be used to support impeached witness’s explanation that impeaching statement, while admitted, is incorrect or misleading to the trier of fact); supra note 54.
its proper context or casting doubt on whether it actually is inconsistent.

Admitting a prior consistent statement for explanatory purposes accords with the common law doctrine of completeness, which provided a basis for the admission of prior consistent statements offered to rehabilitate a witness by preventing a misleading use of evidence. The drafters of the Federal Rules of Evidence incorporated the doctrine of completeness into FRE 106, which provides an order of proof for statements offered for completeness. FRE 106 does not, however, pro-

127. See United States v. Harris, 761 F.2d 394, 400 (7th Cir. 1985); United States v. Rubin, 609 F.2d 51, 63 (2d Cir. 1979), aff'd on other grounds, 449 U.S. 424 (1981); see also United States v. Shulman, 624 F.2d 384, 393 n.21 (2d Cir. 1980) (prior consistent statements were admissible to place impeaching statements in context even had they not predated motive to falsify).

128. See United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986) (recognizing that prior consistent statements would have rebuttal force to show that allegedly inconsistent statements were not actually inconsistent); United States v. Harris, 761 F.2d 394, 400 (7th Cir. 1985) (prior consistent statements contained in same report or interview with prior inconsistent statements are relevant to show extent to which impeaching statements were truly inconsistent); United States v. Baron, 602 F.2d 1248, 1252 (7th Cir.) (prior consistent statements in memoranda were admissible to show whether allegedly inconsistent statements in memoranda actually were inconsistent), cert. denied, 444 U.S. 967 (1979).

129. At common law, when one part of a statement, writing or recording was used on cross-examination to impeach a witness, other portions of the statement could be admitted to ensure that the trier of fact was not misled by portions taken out of context. Thus, the balance of the statement was received to prevent incomplete evidence. See Coltrane v. United States, 418 F.2d 1131, 1140 (D.C. Cir. 1969); United States v. Fayette, 388 F.2d 728, 735 (2d Cir. 1968); United States v. Corrigan, 168 F.2d 641, 645 (2d Cir. 1948); Affronti v. United States, 145 F.2d 3, 7 (8th Cir. 1944); supra note 39-42 and accompanying text.

130. See United States v. Fayette, 388 F.2d 728, 735 (2d Cir. 1968) (one part of statement was used to impeach witness; relevant remainder was admitted to ensure that jury could evaluate evidence as a whole, so as to prevent incorrect inferences); United States v. Lev, 276 F.2d 605, 608 (2d Cir.) (remainder of a statement was admitted on redirect "to round out and complete" statements used on cross-examination), cert. denied, 363 U.S. 812 (1960); United States v. Weinbren, 121 F.2d 826, 828-29 (2d Cir. 1941) (remainder of report was admitted to allow jury to examine it as a whole); see also Fed. R. Evid. 106 advisory committee's note (doctrine of completeness is based on "the misleading impression created by taking matters out of context").

131. FRE 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Fed. R. Evid. 106.

132. See United States v. Costner, 684 F.2d 370, 373 (6th Cir. 1982) (FRE 106 was not intended to ensure admission of statements otherwise inadmissible, merely to provide an order of proof for documents admitted into evidence); 1 Weinstein, supra note 62, at 106-13 ("Rule 106 does not directly involve a question of admissibility; rather it regulates the order of proof . . . ."); see also Fed. R. Evid. 106 advisory committee's note (recognizing that one reason for FRE 106 is "the inadequacy of repair work when delayed to a point later in the trial.").

Under this Rule, the adverse party may require that the remainder of an impeaching statement be admitted at the time of the first statement's admission, rather than at some point later in the trial. See Fed. R. Evid. 106; Fed. R. Evid. 106 advisory committee's note; see also United States v. Greene, 497 F.2d 1068, 1082 (7th Cir. 1974) (although
vide a basis for substantive admission of these statements.¹³³

To illustrate, in *United States v. Pierre*, a Drug Enforcement Ad-
ministration (DEA) agent was impeached by evidence indicating that
notes taken during a pre-trial interview with the defendant did not con-
tain a fact to which the agent testified at trial.¹³⁵ The agent then testified,
on redirect examination, that his formal interview report contained the
omitted fact, thus rebutting the implication that the informal notes were
inconsistent with the agent’s in-court testimony.¹³⁶ The *Pierre* court ad-
mitted the agent’s testimony as a prior consistent statement for purposes
of completeness,¹³⁷ but limited the use of the statement solely to rehabili-
tation.¹³⁸ In doing so, the *Pierre* court placed an unnecessary restriction
on the use of the prior consistent statement. Such a statement should
gain substantive admission under FRE 801(d)(1)(B) since it clarifies the
allegedly inconsistent statement, thus rebutting the implication that the
agent’s testimony was falsified.¹³⁹

Prior consistent statements offered for completeness are another type
of prior consistent statement which should gain substantive admission
under FRE 801(d)(1)(B).¹⁴⁰ Such statements rebut the charge of recent
fabrication by explaining the alleged inconsistency,¹⁴¹ rather than by
showing that the alleged motive did not affect the trial testimony.¹⁴²
Because of the distinction in the way these respective statements rebut, the
requirement that prior consistent statements must antedate the discrediting
influence to be relevant to rebut the charge¹⁴³ does not apply to state-
ments offered for completeness purposes.¹⁴⁴ A prior consistent statement

decided prior to adoption of the Federal Rules of Evidence, court recognized that com-
pleteness applied only to documents partially admitted into evidence), cert. denied, 420

¹³³. See *United States v. Terry*, 702 F.2d 299, 314 (2d Cir.) (FRE 106 does not allow
for admission of otherwise inadmissible evidence), cert. denied, 461 U.S. 931 (1983);
*United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982) (same); 1 Weinstein, supra
note 62, ¶ 106[01], at 106-10 (FRE 106 was not intended to allow introduction of evi-
dence by circumventing other exclusionary rules).

The statements, therefore, must satisfy one of the hearsay exceptions to be used sub-
stantively. See *United States v. Terry*, 702 F.2d 299, 314 (2d Cir.) (proffered statements
were inadmissible hearsay unless able to satisfy one of the hearsay exceptions), cert. de-

¹³⁴. 781 F.2d 329 (2d Cir. 1986).
¹³⁵. See id. at 330.
¹³⁶. See id. at 330, 334.
¹³⁷. See id. at 333.
¹³⁸. See id.
¹³⁹. See *infra* note 140.
¹⁴⁰. See Fed. R. Evid. 801(d)(1)(B). This Rule would exempt prior consistent state-
ments for completeness purposes from the hearsay rule, provided the statements were
offered to rebut an express or implied charge of recent fabrication arising from the intro-
duction of a prior inconsistent statement.

¹⁴¹. See supra notes 14-15 & 126-28 and accompanying text.
¹⁴². See supra notes 53-54 and accompanying text.
¹⁴³. See supra notes 75-76 and accompanying text.
¹⁴⁴. See *United States v. Shulman*, 624 F.2d 384, 393 n.21 (2d Cir. 1980) (dictum)
(even prior consistent statements made subsequent to the motive to fabricate would have
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offered for completeness is relevant to rebut the impeaching statement only when it has some probative force to explain the allegedly inconsistent statement. Courts admitting statements for completeness should do so only when the proffered statement is so proximate to the statement used to impeach as to be part of the same document, made contemporaneously with it, or another statement closely related to the impeaching statement. This limitation on admission ensures that the consistent statement truly qualifies the statement already admitted, regardless of whether it was made prior to any possible vacillation in the witness’s account.

CONCLUSION

FRE 801(d)(1)(B) provides criteria for determining the admissibility of been admissible to place the impeaching statements in context); United States v. Rubin, 609 F.2d 51, 63 (2d Cir. 1979) (admitting prior consistent statements to prevent prior inconsistent statements being taken out of context, regardless of whether consistent statements predated any motive to fabricate), aff’d on other grounds, 449 U.S. 424 (1981); Graham, supra note 23, at 595 (prior consistent statements that explain an alleged inconsistent statement are admissible regardless of their timing).

145. See United States v. Garrett, 716 F.2d 257, 272 (5th Cir. 1983) (admitting remainder of statement already introduced for completeness only when relevant to and explanatory of the admitted portion), cert. denied, 466 U.S. 937 (1984); United States v. Marin, 669 F.2d 73, 84 (2d Cir. 1982) (doctrine of completeness requires that remainder be introduced only when relevant to, and thus explanatory of, admitted passages); United States v. Littwin, 338 F.2d 141, 145 (6th Cir. 1964) (balance of a document may be introduced only to explain or rebut adverse inferences created by incomplete evidence), cert. denied, 380 U.S. 911 (1965); see also Graham, supra note 23, at 595 (prior consistent statement explanatory of impeaching statement “buttresses overall credibility of the witness through its ameliorating effect upon the impeachment”).

146. See Graham, supra note 23, at 595-96 (prior consistent statements need not predate inconsistent statements, however, proximity of statements, and time that has elapsed between their making, is to be considered when determining the probative value of prior consistent statements).

147. See United States v. Pierre, 781 F.2d 329, 334 (2d Cir. 1986) (evidence from agent’s formal report was admitted as prior consistent statement to rebut inference of fabrication created by agent’s informal report omitting fact to which agent testified at trial); United States v. Harris, 761 F.2d 394, 400 (7th Cir. 1985) (prior consistent statements were admitted as relevant, since consistent and allegedly inconsistent statements were part of interview report and were made contemporaneously); United States v. Rubin, 609 F.2d 51, 63 (2d Cir. 1979) (prior consistent statements contained in report used to impeach a witness with alleged inconsistencies contained therein were admitted to place impeaching statements in context and prevent misleading impression created on cross-examination), aff’d on other grounds, 449 U.S. 424 (1981); see also United States v. Jamar, 561 F.2d 1103, 1108-09 (4th Cir. 1977) (refusing to permit defendant’s daughter’s prior testimony to corroborate defendant’s prior testimony, as defendant’s testimony was received in complete form, and daughter’s statements were not necessary to place it in context).

148. See United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986) (prior consistent statements admitted to clarify prior inconsistent statements regardless of the consistent statements’ timing in relation to the impeaching statements); United States v. Rubin, 609 F.2d 51, 63 (2d Cir. 1979) (prior consistent statement admissible for completeness purposes “regardless of whether an improper motive existed at or after the prior statement”), aff’d on other grounds, 449 U.S. 424 (1981).
a prior consistent statement after a charge of recent fabrication or improper influence. Prior consistent statements must antedate the alleged discrediting influence to be relevant to rehabilitate, and thereby gain substantive admission under FRE 801(d)(1)(B). This temporal requirement also ensures that the prior statements will not be merely cumulative, and thus would have enough probative value to ensure that the exclusionary factors under FRE 403 do not outweigh the statement’s probative value.

In addition, prior consistent statements offered for the more limited purpose of rehabilitation must meet substantive admissibility standards to ensure that the statements are probative of the witness's credibility. Indeed, because FRE 801(d)(1)(B) conditions admission on whether the prior consistent statement rehabilitates the impeached witness, the Rule, in effect, has eliminated the distinction between substantive and rehabilitative use.

Although prior consistent statements offered under FRE 801(d)(1)(B) to rebut the alleged effect of a motive to fabricate on the trial testimony must be made prior to the motive to be relevant, statements offered to ensure completeness need not meet such a requirement. Rather, prior consistent statements offered to ensure completeness should gain substantive admission under FRE 801(d)(1)(B) if they are proximate to, and related to the subject matter of, the impeaching inconsistent statement so as to provide the trier of fact with an explanation or clarification of the statement already introduced.

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