Changes to Federal Rules of Evidence

Effective December 1, 2026

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

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

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

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

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

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

[1] Matter to be omitted is lined through.

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

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

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

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Committee Note

The amendment provides that a prior inconsistent statement by a witness subject to cross-examination is admissible over a hearsay objection, even where the prior statement was not given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition. The Committee has determined, as have a number of states, that delayed cross-examination under oath is sufficient to allay the concerns addressed by the hearsay rule. As the original

Advisory Committee noted, the dangers of hearsay are "largely nonexistent" because the declarant is in court and can be cross-examined about the prior statement and the underlying subject matter, and the trier of fact "has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency." Adv. Comm. Note to Rule 801(d)(1)(A) (quoting California Law Revision Commission). A major advantage of the amendment is that it avoids the need to give a confusing jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements. The amendment also eliminates the distinction that currently exists between prior inconsistent and prior consistent statements. For both types of statements, if they are admissible for purposes of assessing the witness's credibility, they are admissible as substantive proof.

The original rule, requiring that the prior statement be made under oath at a formal hearing, is unduly narrow and has generally been of use only to prosecutors, where witnesses testify at the grand jury and then testify inconsistently at trial. The original rule was based on three premises. The first was that a prior statement under oath is more reliable than a prior statement that is not. While this is probably so, the ground of substantive admissibility is that the prior statement was made by the very person who is produced at trial and subject to cross examination about it, under oath. Thus any concerns about reliability are well addressed by cross-examination and the factfinder's ability to view the demeanor of the person who made the statement. The second premise was a concern that statements not made at formal proceedings could be difficult to prove. But there is no reason to think that an unrecorded prior inconsistent statement is any more difficult to prove than any other unrecorded fact. And any difficulties in proof can be taken into account by the court under Rule 403. See the Committee

Note to the 2023 amendment to Rule 106. The third premise was that if a witness denies making the prior statement, then cross-examination becomes difficult. But there is effective cross-examination in the very denial. *See* Nelson v. O'Neil, 402 U.S. 622, 629 (1971) (noting that the declarant's denial of the prior statement "was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had [the declarant] affirmed the statement as his").

Nothing in the amendment mandates that a prior inconsistent statement is sufficient evidence of a claim or defense. The rule governs admissibility, not sufficiency.

The amendment does not change the Rule 613(b) requirements for introducing extrinsic evidence of a prior inconsistent statement.