

## PRIOR INCONSISTENT STATEMENTS AND SUBSTANTIVE EVIDENCE

### FEDERAL RULE 801(D)(1)(A): THE COMPROMISE

*Stephen A. Saltzburg\**

#### INTRODUCTION

Federal Rule of Evidence 801(d)(1)(A) is a compromise. The Supreme Court's version of the Rule, which it submitted to Congress in 1972, would have made all prior inconsistent statements of a witness present in court for cross-examination admissible as substantive evidence. The Court's proposal was strongly favored by the Advisory Committee on the Federal Rules of Evidence (or "the Advisory Committee") members who drafted the Rule. They submitted it to the Court<sup>1</sup> knowing that it was consistent with the approach taken by some states<sup>2</sup> and favored by authorities like John Henry Wigmore,<sup>3</sup> Edmund Morgan,<sup>4</sup> and Charles McCormick.<sup>5</sup> But the Court's proposal was a departure from the common law approach, which treated all prior inconsistent statements as hearsay, admissible only for impeachment.<sup>6</sup> The compromise permits statements to be admitted

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\* Stephen A. Saltzburg is the Wallace and Beverley Woodbury University Professor at The George Washington University Law School. He served on the Advisory Committee on the Federal Rules of Evidence and is currently the liaison to the Committee from the ABA Criminal Justice Section. With Professors Michael M. Martin and Daniel J. Capra, he coauthors the Federal Rules of Evidence Manual.

1. See 4 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 801.04[1], at 801-304 (10th ed. 2011) [hereinafter EVIDENCE MANUAL].

2. The Advisory Committee cited the California Evidence Code section 1235 and the Comment thereto. *Id.*

3. 3A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1018, at 996 (James H. Chadbourne ed., rev. ed. 1970). Dean Wigmore earlier had a different view and supported the common law approach. See MCCORMICK ON EVIDENCE § 251, at 432 (Kenneth S. Broun ed., 6th ed. 2006) (noting that Wigmore "originally adhered to the traditional view").

4. Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 192-93 (1948).

5. MCCORMICK ON EVIDENCE, *supra* note 3, § 251, at 431-32.

6. The Report of the House Committee on the Judiciary on the Federal Rules of Evidence stated that "[p]resent Federal law, except in the Second Circuit, permits the use of prior inconsistent statements of a witness for impeachment only." EVIDENCE MANUAL, *supra* note 1, § 801.04[4], at 801-309. The Second Circuit approach in *United States v. De Sisto*, 329 F.2d 929, 933 (2d Cir. 1964), *cert. denied*, 377 U.S. 979 (1964), permitted statements made under oath to be admitted as substantive evidence "where the prior statements were

when the declarant is present in court for cross-examination and the prior statement “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.”<sup>7</sup>

### I. THE ARGUMENT FOR SUBSTANTIVE ADMISSIBILITY

The original Advisory Committee quoted the Comment to California Evidence Code section 1235 and endorsed its reasoning:

Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. . . . 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. . . . Moreover, [s]ection 1235 will provide a party with desirable protection against the “turncoat” witness who changes his story on the stand and deprives the party calling him of evidence essential to his case.<sup>8</sup>

The original Advisory Committee added its own thought that “the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.”<sup>9</sup>

One other argument made in favor of the California approach is that “[t]he prior statement is always nearer and usually very much nearer to the event than is the testimony.”<sup>10</sup> This argument strikes me as wrong on several levels. First, there is no empirical evidence as to when prior statements are made. When a crime is not solved for months or years, prior statements might well be made long after underlying events and not very long before trial. Second, we know that memory fades very quickly so that a few days after an event memory problems may arise.<sup>11</sup> Third, we have

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themselves testimony before a grand jury or at a former trial or were adopted by such testimony.” *Id.*

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

8. EVIDENCE MANUAL, *supra* note 1, § 801.04[1], at 801-304 (citing CAL. EVID. CODE § 1235 cmt.).

9. *Id.* at 801-304 to -305. Apparently this was a response to a concern that “a practice might develop among lawyers whereby a carefully prepared statement would be offered in lieu of testimony, merely tendering the witness for cross-examination on the statement.” MCCORMICK ON EVIDENCE, *supra* note 3, § 251, at 432.

10. MCCORMICK ON EVIDENCE, *supra* note 3, § 251, at 432; *see also* Report of the Senate Committee on the Judiciary, *reprinted in* EVIDENCE MANUAL, *supra* note 1, § 801.04[5], at 801-313 to -317.

11. 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE § 281, at 243 (5th ed. 1999) (noting that psychological research suggests “that a rapid *rate of memory loss* occurs within the first two or three days following the observation of an event” (emphasis added)); *see also How Quickly We Forget: The Transience of Memory*, PSYBLOG (Jan. 22, 2008), <http://www.spring.org.uk/2008/01/how-quickly-we-forget-transience-of.php> (“[W]e lose a lot of information soon after it goes in, then, over time, the rate of forgetting slows down.”) [perma.cc/G8SF-E64T].

hearsay exceptions for present sense impressions,<sup>12</sup> excited utterances,<sup>13</sup> and prior recollection recorded,<sup>14</sup> which deal with many “recent” statements.<sup>15</sup> Fourth, many witnesses review records and refresh recollection before trials so that their total recall of events might well exceed recall at the time that an informal statement is made.

## II. THE FEDERAL COMPROMISE

The coauthor of my treatise, Professor Daniel J. Capra, who is also the Reporter to the Advisory Committee on the Federal Rules of Evidence, criticized the compromise enacted by Congress in the following passage:

The requirements imposed by Congress in Rule 801(d)(1)(A) have little to do with the concerns that are at the heart of the hearsay rule. First, while the requirement of a formal proceeding tends to alleviate concern over whether the prior inconsistent statement was ever made, that concern has nothing to do with the hearsay rule. The making of the statement (as distinguished from its truth) is a question addressed by in-court testimony: the in-court witness testifies that the statement was or was not made, and this becomes a jury question. Second, the requirements of oath and formality do little to guarantee the reliability of the prior out-of-court statement. The whole basis for reliability of these statements is that the declarant is the same person as the witness who is testifying under oath at the time of trial, and can therefore be cross-examined about the prior statement. That reliability guarantee is not dependent on the circumstances under which the out-of-court statement was made. Thus, the limitations imposed by Congress do not seem to mesh very well with the concerns expressed.

However, while the Advisory Committee’s proposal has a stronger basis in the theory of the hearsay rule, the fact remains that it is not the law.<sup>16</sup>

I respectfully disagree and assert that the common law rule has a stronger basis in the theory of the hearsay rule than admitting all prior inconsistent statements for their truth. Indeed, I go further and maintain that there is only one situation in which prior inconsistent statements not made under oath in a proceeding should be admitted for their truth.

## III. THREE RATIONALES FOR HEARSAY EXCEPTIONS AND PRIOR INCONSISTENT STATEMENTS

My thesis, set forth in a separate Article in this issue,<sup>17</sup> is that there are three rationales for hearsay exceptions: reliability, necessity, and

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12. FED. R. EVID. 803(1).

13. *Id.* 803(2).

14. *Id.* 803(5).

15. These also raise questions, as my other Article in this issue discusses. See Stephen A. Saltzburg, *Rethinking the Rationale(s) for Hearsay Exceptions*, 84 *FORDHAM L. REV.* 1485 (2016).

16. Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification, 182 *F.R.D.* 268, 282 (1999), *reprinted in* EVIDENCE MANUAL, *supra* note 1, § 801.04[2], at 801-308 to -309 [hereinafter Capra Note].

substantial foundation. In that Article, I examine the federal hearsay exceptions and identify one or more rationales underlying each exception. I contend here that a proper application of these rationales supports the compromise approach found in Rule 801(d)(1)(A). But, before examining the compromise, I want to explain the rationale for the common law rule and why it remains persuasive in most scenarios.

*A. Starting Point: An Unreliable Witness*

A judge or jury called upon to assess the credibility of a witness should be able to consider the fact that the witness has made inconsistent statements in deciding whether trial testimony is false or mistaken. If the jury believes the trial testimony despite the fact that the witness might have contradicted herself, the contradiction is treated like any other mistake a witness might make—i.e., an imperfection that might be expected of ordinary people. But, when a judge or jury decides that it does not believe the witness's trial testimony, the decision is a judgment that the witness is unreliable or lacks credibility. In such a circumstance, the natural question to ask is: Why would we want the judge or jury to treat as true an out-of-court statement by the witness whose in-court testimony is not believable? My answer is that we wouldn't—except in the single situation that I discuss below. Before turning to that one, I want to discuss one scenario in which it does not matter whether a prior inconsistent statement is admitted as substantive evidence or solely for impeachment.

1. The Sole Goal Is Disbelief of the Trial Testimony

Suppose that the government charges a defendant with bank robbery and offers the testimony of Cooperating Witness. Cooperating Witness testifies, "I robbed the bank with the defendant" and proceeds to offer details about the planning and execution of the robbery. When first interviewed by the FBI, Cooperating Witness said, "I had nothing to do with the bank robbery." In such a case, either the witness's trial testimony or the prior statement must be true: the witness either participated in the bank robbery or he didn't. Whenever a witness testifies to a fact and a prior statement repudiates that very fact, the trier of fact must choose to believe or disbelieve the fact. If the trier of fact disbelieves the trial testimony, it believes the prior statement. If it disbelieves the witness about a fact, it concludes that the fact is untrue. It really does not matter whether the rejection of the testimony is attributable to a prior inconsistent statement or some other flaw in the testimony.

In this scenario, it actually makes no difference whether the prior inconsistent statement is admitted solely for impeachment or as substantive evidence. The reason is that the prosecution bears the burden of persuasion, and the defense wins the battle of the witness (and perhaps the case) by persuading the trier of fact to reject the witness's testimony. Because the

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17. See Saltzburg, *supra* note 15.

defense bears no burden of persuasion, the prior inconsistent statement is not needed to make an affirmative case.

## 2. The One Example in Which Substantive Use Should Be Permissible

Imagine that the government calls a witness to testify in an antitrust price-fixing case brought against seven individual defendants. The witness is an administrative assistant to one of the defendants. During direct testimony, the witness states that all of the meetings among the defendants amounted to no more than social interactions, that there was never a meeting in which all seven defendants were present, and that at no time were prices discussed. The government has an FBI agent available to testify that in a lengthy interview the witness said that there were eight meetings in which prices were discussed and that four of the defendants were present at all the meetings, that the other three were present at seven of the eight meetings, and that all of them discussed prices. Imagine further that the following examination occurs as the prosecutor (P) asks the witness (W) questions:

P: Do you remember speaking with FBI Agent Jones about a year ago?

W: Yes, I do.

P: Would you agree that you spoke to her at some length?

W: I would.

P: Now, during that interview, did you tell the Agent that there were eight meetings in which prices were discussed?

W: I did.

P: Why, then, do you now claim that there were no such meetings?

W: The agent scared me. She showed me a list of meetings and said, "These were the meetings when prices were discussed, right?" I hesitated to answer, and she told me that it is a crime to lie to a federal agent. So I said "yes" about the meetings.

P: You now claim that what you said to the agent was untrue?

W: Yes, she scared me.

P: Did you tell the agent that four of the defendants were present at all of the meetings?

W: I just agreed with her statement that four were present at the meetings. I wasn't even sure that there were meetings on the days on her list.

P: Did you tell the agent that three defendants were present at seven of the eight meetings?

W: Same answer. I just agreed with what she said.

P: And did you tell the agent that they all discussed prices?

W: Yes. That was what she wanted to hear.

P: You could have told Agent Jones that you wanted to check your calendar before answering, right?

W: I could have, but she didn't seem too patient.

- P: Your testimony today is that you lied about these defendants just because you were scared?
- W: That's right.
- P: Didn't Agent Jones show you her notes before you left the interview?
- W: She did.
- P: Did she ask you whether she had accurately summarized what you said?
- W: She did.
- P: You still work for one of the defendants as an administrative assistant?
- W: Yes.
- P: A job you have had for twelve-and-a-half years?
- W: Yes.
- P: It's a job you don't want to lose?
- W: That's true.
- P: You don't want to do something that might put your job at risk?
- W: That's also true.

In this scenario, the witness admits to making prior statements, testifies as to why they were made, and repudiates them in trial testimony. The trier of fact should be as readily able to decide whether to believe the witness's explanation or to believe the prior statements as it is to assess the trial testimony. The trier would also be able to consider whether bias (the desire to keep a job) might affect the trial testimony. Thus, the one scenario in which prior inconsistent statements should be admissible as substantive evidence is this one. It is truly a case, in the words of the original Advisory Committee, where "[t]he declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter."<sup>18</sup>

I would say the same if the interview had been tape-recorded, or if a lengthy statement had been signed by the witness, because the trier of fact would have a substantial basis to evaluate the circumstances in which the statement was made—because the witness, the agent, or both would lay a sufficient foundation for such evaluation.

#### *B. A Twist: The Witness Denies Making a Statement*

An altogether different scenario is one in which a witness is called to testify that a defendant distributed an illegal narcotic to the witness, and the following testimony occurs on direct examination:

- P: Do you recall receiving methamphetamine from the defendant on three occasions?
- W: No, I never received methamphetamine from the defendant.
- P: Do you recall meeting with an FBI agent about a year ago?
- W: An agent came to see me. I wouldn't speak to her.

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18. See FED. R. EVID. 801(d)(1)(A) advisory committee's note to 1972 proposed rules.

P: You deny speaking to Agent Jones?

W: Yes.

P: You also deny telling her you received methamphetamine from the defendant on three occasions?

W: Yes, I most certainly do.

In this scenario, admitting Agent Jones's testimony about a prior statement by the witness as substantive evidence is unwarranted; it is not a case where "[t]he declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter."<sup>19</sup> There is nothing to cross-examine the declarant about from the defense point of view. No defense lawyer is going to ask the witness anything more than to repeat the denial of making a statement. There is no opportunity to examine the statement; the witness denies there was one.

The alleged statement is one made by a witness who, according to the government, is lying on the witness stand and thus lacks credibility, and there are insufficient circumstances surrounding the alleged statement to warrant treating it as substantive evidence.

The original Advisory Committee suggested that "[t]he 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."<sup>20</sup> But, the brief nature of the examination of the witness offers little opportunity for observing anything that would be useful in determining credibility.

### *C. Another Twist: "I Don't Remember"*

If the witness does not deny a prior statement but instead says he does not remember it, what then? The testimony goes like this:

P: Do you recall receiving methamphetamine from the defendant on three occasions?

W: No, I never received methamphetamine from the defendant.

P: Do you recall meeting with an FBI agent about a year ago?

W: I don't remember any such meeting.

P: You deny there was a meeting with Agent Jones?

W: I don't remember any such meeting.

P: Do you remember telling her you received methamphetamine from the defendant on three occasions?

W: I have no memory of meeting with Agent Jones or speaking with any agent.

What is the defendant supposed to do by way of cross-examination? The witness might be pretending not to remember, but there is nothing the defense can do about that. And there is nothing on which to cross-examine the witness. It is as bad from the defense perspective as when the witness simply denies making a prior inconsistent statement.

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19. *Id.*

20. *Id.*

*D. Rule 801(d)(1)(A)*

It is the rare witness who will deny making a statement when it was made under oath in a proceeding and there is a formal record of the statement. A denial might be prosecuted as perjury. Thus, the problem of denial is unlikely to occur. Instead, the witness usually will testify and offer a reason for the prior statement so that the trier of fact is well situated to evaluate the prior statement in light of the witness's explanation.

Even if the witness claims a memory problem, there will be substantial foundation as to the circumstances in which the prior inconsistent statement was made. If one believes that reliability is the only rationale for a hearsay exception or exemption, Professor Capra is correct in arguing that "[t]he requirements imposed by Congress in Rule 801(d)(1)(A) have little to do with the concerns that are at the heart of the hearsay rule."<sup>21</sup> But, if one accepts my thesis that we create hearsay exceptions pursuant to which the proponent of the hearsay must lay a sufficient foundation to enable a trier of fact to make an adequate assessment of its value, then Rule 801(d)(1)(A) is a reasonable, justifiable compromise.

IV. MISTAKES AND THE BALANCE OF ADVANTAGE

The argument has been made that a danger of admitting prior inconsistent statements as substantive evidence is that when witnesses are impeached by third party testimony as to their prior statements, the third parties might have misheard or misunderstood the prior statements.<sup>22</sup> This is not an argument that I make in favor of excluding prior inconsistent statements as substantive evidence. There is no a priori reason to believe that witnesses who hear things are more likely to mistake them than witnesses who see things, and there are good reasons to believe that witnesses will pay careful attention to what is said in many circumstances.

There is, however, a concern about who benefits from an approach that admits all prior inconsistent statements as substantive evidence. My belief is that the government will benefit more in criminal cases than will any other class of litigants. The reason is that law enforcement officers will typically testify to establish that prior inconsistent statements were in fact made after trial witnesses either deny or do not recall making them. Juries are likely in my experience to pay special attention to the testimony of law enforcement officers and are more likely to believe their testimony than they are to believe testimony of ordinary witnesses who claim to have heard prior inconsistent statements. Yet, the reality is that when impeached witnesses deny making prior inconsistent statements or claim not to remember them, defense counsel are effectively disabled from effective cross-examination, and there is no way for a jury to assess the reliability of the statements.

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21. See Capra Note, *supra* note 16.

22. This is well repudiated by Professor Capra. See Capra Note, *supra* note 16.



It is true, of course, that defendants in criminal cases and all civil litigants could offer prior inconsistent statements as substantive evidence if a California-type approach were adopted. But, I do not believe that prior inconsistent statements reported by typical third parties are likely to have the same effect as those reported by law enforcement officers testifying for the prosecution in criminal cases. The California approach is likely to tilt the balance of advantage in favor of the government, and I see no reason to do that.<sup>23</sup>

#### CONCLUSION

Rule 801(d)(1)(A) is a compromise that is consistent with the theory of hearsay. It admits prior inconsistent statements in circumstances in which a trial witness is unlikely to deny making a prior inconsistent statement, a jury is likely to understand the circumstances in which the prior statement was made, and there is reason to believe that the jury can fairly evaluate the reliability of the prior statement. There is a good case to be made for also admitting as substantive evidence prior inconsistent statements when a witness acknowledges making such statements and can be examined on the circumstances in which they were made.

The exclusion as substantive evidence of prior statements not made under oath in a proceeding is a recognition of the practical problems with cross-examining prior statements that witnesses either deny or claim not to remember. Those practical problems existed at common law, and they continue to exist today.

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23. There is some reason to believe that it is intended to do so. As the original Advisory Committee observed, "Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case." *See* FED. R. EVID. 801(d)(1)(A) advisory committee's note to 1972 proposed rules (citing CAL. EVID. CODE § 1235 cmt.). Although the observation could apply to all parties, it is a special concern of the government.