

## Proposed Amendments to Federal Rule of Evidence 801(d)(1)(A) – Prior Inconsistent Statements

*Important Information on Proposed Rule & Instructions for Testifying and Filing Comments*

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***Formal Comment Period Now Open!***

**Comments MUST be submitted by February 17 at 11:59 p.m. EST**

The Committee on Rules of Practice and Procedure (“Standing Committee”) has published [proposed amendments](#) to the Federal Rules of Evidence hearsay exemptions to provide broader admissibility of a testifying witness’s prior inconsistent statements.

The amendment would significantly expand the current rule, eliminating language that restricts the hearsay exemption to statements previously made under oath at a formal proceeding. The proposal echoes a 2014 change to Rule 801(d)(1)(B) providing that all prior consistent statements are admissible as substantive evidence, as well as to rehabilitate the testifying declarant, subject to the constraints of Rule 403. A detailed Committee Note accompanies the rule text and provides context for implementing the rule.

AAJ encourages members with experience using prior inconsistent statements during to review the proposed amendments and submit a comment on [firm letterhead](#) by February 17, 2025. Comments can be of any length, but please identify yourself as a plaintiff-side practitioner.

### **Guidelines for Drafting Your Comment**

- Build in time to review the rule fully and write your comment in advance of the deadline.
- The public comment period is the time to suggest improvements to the proposed rule text and committee note.
- It is helpful to use examples from your practice to illustrate your points.
- Your comment can reference other public comments that you agree or disagree with, but please *write your own* comment.
- DO NOT submit anonymous comments.

## **Public Comment Period**

Comments **must be submitted electronically by February 17, 2025, at 11:59 p.m. EDT** through [regulations.gov](https://www.regulations.gov) and should be addressed to:

Committee on Rules of Practice and Procedure  
Administrative Office of the United States Courts  
One Columbus Circle, NE  
Washington, DC 20544

The U.S. Courts website is not the easiest to navigate for first-time users and it's important to remember that the rule docket runs on the *Eastern* time zone. Here are some helpful instructions:

1. On the landing page on [regulations.gov](https://www.regulations.gov) for filing on proposed amendments in this comment period, there are two tabs. Click on the "Browse Documents" Tab.
2. Locate the box that says, "Preliminary Draft of Proposed Amendments to the Federal Rules of Evidence" and then click on the tab marked "Comment."
3. The "Comment" page will allow you to upload your comment directly. We strongly urge you to write your comment out first and put on letterhead to upload. (There is also an option to write your comment directly on the page, but it's much easier to write your comment first, edit it and then upload it when it's complete).
4. After uploading, you will be asked to choose how you are filing: are you an individual, an organization, or anonymous. You are going to file either using your individual name or your law firm name (under the organization tab).
5. The rules staff will review each comment to ensure that it's appropriate, and then it will be officially posted on the website.

## **Public Hearings**

There are no public hearings scheduled for the proposed amendment.

## **AAJ-Identified Issues for Comments**

- General comments on whether the proposed rule text and Committee Note provide clear instructions to parties and judges.
  - *If there are instances of confusion, or the amendments miss the mark, what are the issues and is there better language to address these concerns?*
- General comments on the admissibility of prior inconsistent statements.
  - *Is there a meaningful difference between prior inconsistent statements and prior consistent statements in your practice such that presumptive admissibility of unsworn inconsistent statements as substantive evidence would affect your clients' interests?*
  - *Is cross-examination sufficient to mitigate concerns about the authenticity of the statement or credibility of the declarant-witness?*

- Comments on the efficacy of jury instructions on the proper use of prior inconsistent statements. The drafters of the proposed amendment contend that permitting the substantive admissibility of all prior statements of testifying witnesses would eliminate the need for confusing and complicated limiting instructions.
  - *Do you agree or disagree that jury instructions limiting the use of a prior inconsistent statement only to its bearing on the credibility of the declarant-witness are unreasonably confusing?*
  - *What, if any, opinion do you have on the efficacy of such limiting instructions? Do you believe juries generally apply the limitation correctly? Or do you agree with the proposal's drafters that the average juror ignores or misunderstands the instruction, confusing witness impeachment with substantive evidence?*

**Proposed rule text and Committee Note on next page.**

**NOTE:** Proposed additions are underlined in red. Proposed deletions to the rule text are struck through. The draft Committee Note is the explanation of the textual changes. Comments may address on the proposed amendments to the rule text, the Committee Note, or both.

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## **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:

**(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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### **DRAFT COMMITTEE NOTE**

The amendment provides for substantive admissibility of inconsistent statements of a testifying witness. 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 jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements.

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 is one of admissibility, not sufficiency.

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