Survey of District Court Judges on a Proposed Amendment to Federal Rule of Evidence 801(d)(1)(B) Concerning Prior Consistent Statements

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Prior consistent statements are admissible to rehabilitate a witness's credibility if (1) they rebut evidence of fabrication because they occurred before the witness's motive to lie, (2) they rebut evidence of faulty recollection, or (3) they explain an inconsistent statement. According to the current version of Federal Rule of Evidence 801(d)(1)(B), prior consistent statements are admissible for their substance as well as for their rehabilitation only in the first circumstance—only if they rebut recent fabrication because they occurred before the fabrication motive.

If a prior consistent statement is admissible for credibility but not admissible for substance, the opposing party is entitled to a jury instruction. Because of perceived difficulties with such an instruction, an amendment to Rule 801(d)(1)(B) has been proposed to the Evidence Rules Advisory Committee.

In collaboration with the Committee's chair and reporter, the Federal Judicial Center developed an eight-question email questionnaire, which the Center sent to 961 federal district judges over the chair's signature on January 5, 2012.[1] As the suggested completion date of January 21 approached, the Center sent email reminders to judges who had not yet responded on January 18. The Center received responses from 506 judges (53%) by February 4, 2012.

Current Rule

(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:
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> . . .
>
> **(B)** is consistent with the declarant's testimony and is offered 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;
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> . . .

1. Two additional judges, one active and one senior, have not registered their email addresses. The text of the cover email is in the Appendix. The text of the questions is reproduced in the body of this report.

Proposed Rule

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

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

. . .

(B) is consistent with the declarant's testimony and ~~is offered 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~~ is otherwise admissible to rehabilitate the declarant's credibility as a witness;

. . .

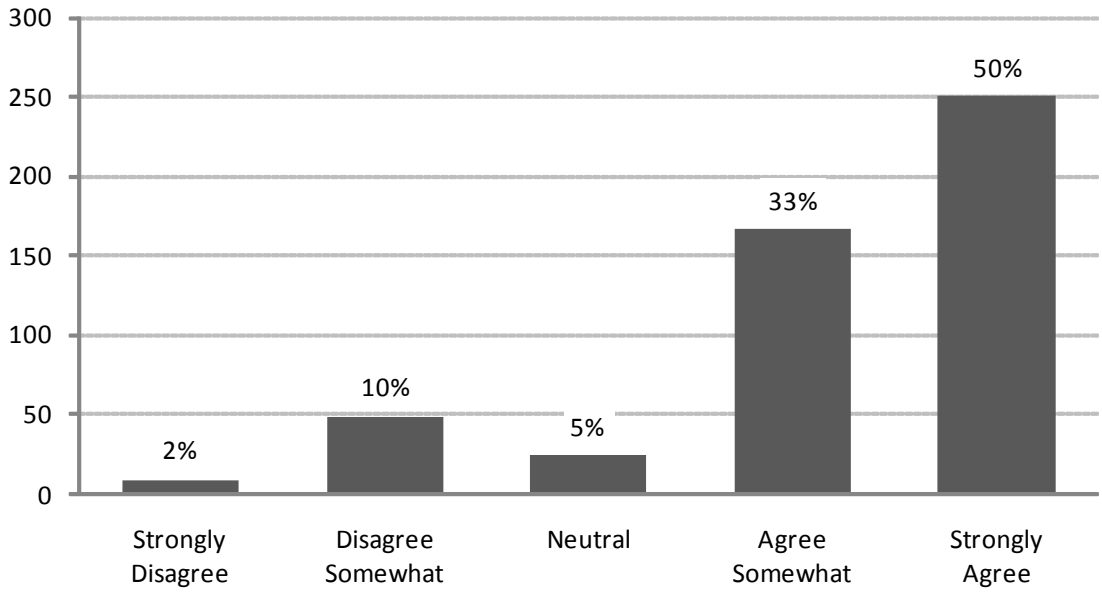
. . . . .

The perceived difficulties with jury instructions that prior consistent statements be used as evidence of credibility rehabilitation but not as substantive evidence are (1) jurors frequently do not understand the instruction, and (2) even if the instruction is understood it has no practical effect. The first two questions of the questionnaire ask judges to draw on their experience to assess the validity of these two perceived difficulties.

Question 1. Jury Comprehension

Question 1: It is difficult for jurors to understand the instruction that a prior consistent statement is admissible only to rehabilitate and not for the truth of the matter asserted in the statement. There was 84% agreement with this statement; 50% of responding judges agreed strongly.[2]

Question 1 Responses



2. Six judges who responded to the survey did not answer this question.

Question 1 Comments

From Judges Who Strongly Agree

- Do not believe that in the context of an entire case the average juror will remember to make the distinction and I am not sure that it makes a great deal of difference.
- If the jury determines the prior statement isn't substantively true, it couldn't possibly rehabilitate. So they will make a de facto determination about truth even if they are instructed only to consider the statement for rehabilitation purposes.
- In the jurors' minds, the question is whether or not the witness should be believed. That spells "truth" to those jurors. Technicalities don't count to them.
- The complexity of the required cautionary instruction unduly highlights the testimony which is the subject of the instruction.
- It is also difficult and challenging for the trial judge to explain this principle in lay terms.
- It is difficult because it is challenging for us judges to explain the distinctions in a brief and accurate manner when the evidence is admitted in an ongoing trial.
- My post-judgment interviews of jurors indicate that they do not understand the concept of evidence being admitted for a limited purpose, regardless of how many times it is explained during trial.
- I don't think lawyers understand the concept either.
- Many lawyers do not get it!
- It would be helpful to make the language of section 801(d)(1)(b) more plain spoken and less cumbersome.
- Some lawyers attempt to offer hearsay statements by saying, "Judge, I'm not offering this statement for the truth of the words, only that the words were spoken." Ruling: "Objection is sustained."
- I do not allow impeachment from reports made by investigators or FBI 302's because they are not taped or recorded or signed by the witness.
- Not frequently encountered in my experience, but certainly a difficult concept to explain.
- Hopeless rule.
- This issue has never come up in seventeen years on the federal bench.

From Judges Who Agree Somewhat

- It is always difficult for a jury to consider evidence for a limited purpose regardless of the limiting instruction we give.
- I think at least some jurors are able to understand such an instruction, but, in practice, it is too difficult to follow, with the result that they consider the statement for its truth.
- As I recall, in the half dozen times when I have had this come up at trial I can only recall once when I received a juror question that implicated the instruction. What that may mean I cannot be certain but I think if it was a thorny problem for jurors I would have received more questions.
- Understandable instructions can be given, however. This is the same as prior inconsistent statements which are admissible only for credibility purposes. Admittedly, many attorneys try to impeach with prior statements (usually deposition testimony) with the anticipation that the inconsistent statement is evidence of the fact asserted. This is a misunderstanding on their part and should be addressed with education on the issue.

- Without all of the background that lawyers and judges bring to this issue, it may be difficult for jurors to understand. I, however, believe that a very good jury instruction on this issue can cure the problem.
- Because the prior consistent statement is, by definition, consistent with admissible testimony, I do not know that this is much of a problem.
- To ensure that the jury will apply the rule correctly, it is incumbent upon the judge to give the appropriate instruction and provide an explanation that will make the application of the rule clear. Whenever possible, the judge should give a limiting instruction soon after the use of the prior consistent statement.
- Generally agree; but, juror's understanding of instructions depends upon many variables, including juror intellect and circumstances surrounding introduction of statement.
- However, I believe it is important for the jury to be allowed to consider relevant matters.

From Judges Who Are Neutral

- It depends on the way the instruction is worded.
- Depends on the facts of the case and the particular jury
- I think a properly worded instruction could make the distinction clear to the average juror.
- I believe the instruction can be adequately explained.
- I have never, in more than 11 years as a district judge, or the 10 years I served as a state trial judge, been asked to give such an instruction and cannot envision being asked to do so. If such an instruction is given, I have doubts that a juror would appreciate the distinction.
- I have never so instructed a jury; no party in any case has ever requested such an instruction.

From Judges Who Disagree Somewhat

- A good explanation of hearsay usually is quite helpful to a jury. For example, explaining to a jury that if my brother told me in a telephone conversation that it is raining in Topeka, if the purpose is to prove it was raining in Topeka at that time, it is hearsay. If, however, it is simply a recitation of the telephone conversation, and not to prove the truth of any of the matters discussed in the conversation, it is not. A bit of time explaining things to a jury eliminates significant amounts of confusion.
- I think jurors understand these distinctions so long as the instruction is clear. I see no difference here than in the instruction given to distinguish statements admitted under FRE 801(d)(1)(A)—prior inconsistent statements under oath, etc., admitted substantively—from inconsistent statements under FRE 613, admitted for credibility only.
- A good explanation from the trial judge makes this bare statement more understandable and believable to juries.
- Over the years jurors have, through post-trial comment, demonstrated to me that they very well understand such distinctions, and apply them.
- When carefully instructed, they seem to catch the nuance.
- This is no more difficult than many other limiting instructions.
- Jurors can follow proper instructions.
- Judge can explain to jury, no problem.
- It is hard to know what jurors think, but I routinely find them to be very conscientious and strive to follow my instructions.
- The quality of the limiting instruction is important.

- Jurors' reaction depends upon the actual statement and attendant circumstances. One cannot generalize.
- Often times, out-of-court statements are received in evidence for non-substantive purposes. Examples include notice, impeachment, and circumstantial evidence about a person's state of mind. It is no more difficult fashioning a limiting instruction for these statements than it would be for prior consistent statements offered for a non-hearsay purpose.
- Jurors would have witnessed the allegation that the statements are new and would understand that the prior consistent statement was admitted to counteract that allegation.
- I have had very few instances that I can recall where this rule was applicable. As this relates to the credibility determination of a witness by a jury, I cannot say that this rule and the jury instruction are more difficult for a juror to understand or apply than any other facet of credibility determinations by a juror. I would defer to other judges who have actually had instances where this has been a specific issue.
- I don't believe prior consistent statements are admissible except in accordance with the Rule admitting them to rebut charges of recent fabrication. When such a charge occurs the door is open to what would otherwise be hearsay. Admitting prior consistent statements in other circumstances is inconsistent with the hearsay rule.
- I always give the jury a copy of my charge and if this is an important issue I go over with them in lay language and point out the difference.
- The instruction would have to be very carefully worded for the average juror to understand it. If the statement is written, I suggest it not be included in the physical evidence given to jurors during deliberations. It is like self-serving testimony that the jury can continue to review.

From Judges Who Strongly Disagree

- If the judge uses plain language and bothers to explain the reasons for the hearsay rules to the jurors, and tells them the prior statement is only coming in so that they can decide whether or not they believe the testimony of the witness at trial, they get it. If the judge uses words like "rehabilitate" or "not for the truth of the matter asserted in the statement," they probably won't understand.
- The only reason I have found for juror confusion is the giving of the instruction "you may consider this statement only to rehabilitate the believability of the witness and not for the truth of what he or she said at the prior time." To get a jury to avoid considering evidence for its truth is to give examples tailored to the specific case e.g. when a statement comes in to explain someone else's conduct or reaction you can use the old example of someone rushing into a courtroom shouting "the courthouse is on fire" which explains why "all of you in the jury, the lawyers in the courtroom and I, the judge, left quickly and used the staircases to exit the courthouse even though there was no fire and the man who shouted there was a fire was either mistaken or a lunatic."
- If true, it argues for better instructions rather than lessening the rigor of admissible evidence.
- It is my understanding that since the statement is not hearsay it can be admitted for the truth so that no instruction is necessary.
- If it is not hearsay, why is a limiting instruction being given?

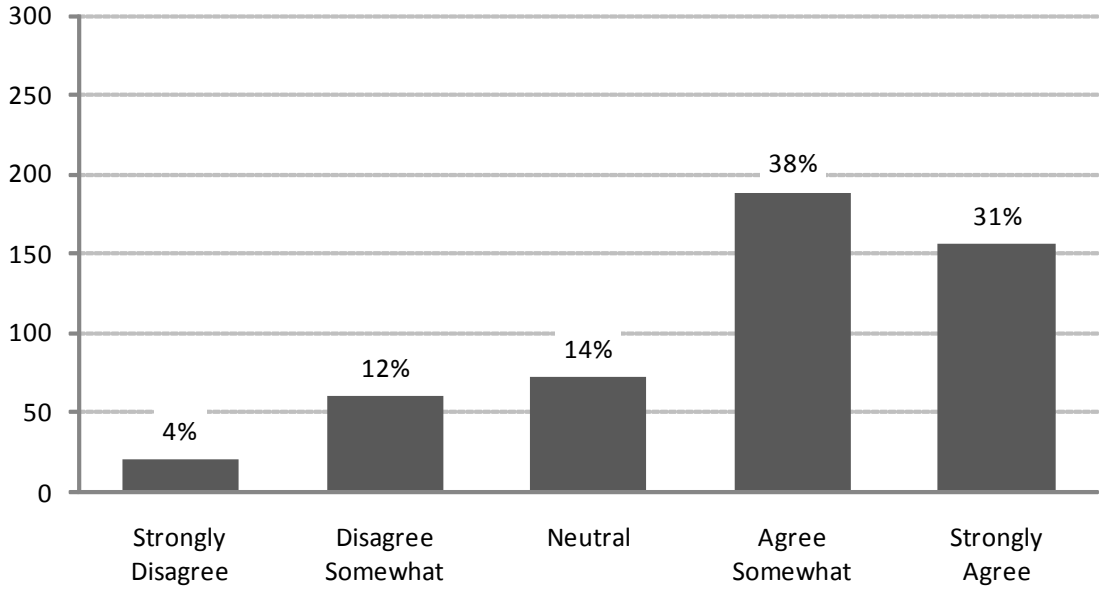
From a Judge Who Did Not Answer

- Don't know. Can't recall it coming up so no occasion to question jurors.

Question 2. Practical Effect

Question 2: Amending Rule 801(d)(1)(B) to state that a prior consistent statement is exempt from the hearsay rule whenever it would be otherwise admissible to rehabilitate a witness would have little practical effect on the outcome of jurors' deliberations. There was 69% agreement with this statement; 31% of responding judges agreed strongly.[3]

Question 2 Responses



Question 2 Comments

From Judges Who Strongly Agree

- When otherwise admissible, the statement is generally reliable and thus questionable why it should not be used substantively.
- Jurors are unlikely to apply the sophisticated distinction of admissibility for a limited purpose. It is likely evidence admitted at trial is weighed as being admitted for its truth even if a cautionary instruction is given. My view is that the Rule change will have no identifiable effect on deliberations.
- I think there are very few cases where this would be material.
- Because jurors don't appreciate the difference in the first place. Legal mumbo jumbo.

From Judges Who Agree Somewhat

- Trying to explain that a prior consistent statement is exempt from hearsay when used to rehabilitate a witness is gobbledygook even for a judge. It will make no sense to jurors.
- These finely parsed rules are not useful to people of ordinary experience and education. Because they are not useful, they are ignored.
- I truly believe that lawyers and judges think such an amendment would be helpful to *them*, but jurors have already amended the rule—every time they deal with the issue in a trial.

3. Nine judges who responded to the survey did not answer this question.

- But I also do not think the current rule has a big impact either.
- However, it could have significant practical impact on appeal. Georgia allows prior consistent and inconsistent statements to be admitted for substantive purposes.
- It's not just the instruction that affects the jury's deliberations. Probably more significant is the scope of permissible attorney argument.
- There may be tactical uses not foreseen or anticipated that might have more than minimal effect on the jurors' deliberations.

From Judges Who Are Neutral

- Jurors already treat the prior statements for the truth despite the instruction.
- Generally speaking, jurors will tend to view all admitted evidence for its truth or falsity.
- It would depend on the extent of rehabilitation needed, the nature of the prior statement and how strong a value it has in rehabilitating the witness.
- It depends on the centrality and importance of the statement.
- Really depends on case and facts and statement at issue. Hard question to answer in a vacuum.
- It depends on the case.
- Depends on the case.
- I tend to agree as written, but the amendment seems to relax the standard and could change the evidence that is actually admitted. If so, it could have a big impact depending on the circumstances.
- The bottom line is that the juror is assessing testimony of a witness at trial (witness under oath, subject to cross examination, demeanor, other testimony/evidence, etc.). That the witness had previously said something similar to his/her testimony at trial may or may not have some influence to the juror in determining how much, if any, of the witness' testimony the juror is going to believe. Unless this is the absolute key witness on a factual issue, and unless a prior statement is the absolute key to the credibility of the witness, I seriously question whether a rule change will have a practical effect on the outcome. Again, I defer to other judges who have specific examples of where the current rule has had a significant enough effect on the outcome of the deliberations to warrant a change in the rule.
- This is an ad hoc determination. Difficult to generalize.
- Too difficult to make this type of prediction since there are so many other factors that could affect jury deliberations given the unique nature of each trial.
- Can't speculate as to the effect of jury deliberations. Doubt that speculation should drive rule changes.
- This statement is still cumbersome. Maybe you could delete the language above, "whenever it would be otherwise admissible to" and instead just say, "if it rehabilitates a witness."
- I am not entirely clear how to interpret the "otherwise admissible" part of this question. Would that still require "offered to rebut a charge of recent fabrication?"
- I'm not sure I understand this one: if it means that a prior statement would be admissible for its truth, then I believe it would have a lot of effect.

From Judges Who Disagree Somewhat

- I think limiting instructions have significant effect, though not perfect effect.
- In general, jurors try really hard to follow our instructions. The current situation breeds more confusion than jury nullification of the charge. It also likely promotes lots of time-wasting objections and sidebars by counsel.

- I have not given this enough thought to have any strong feeling about it one way or another. It would seem, however, that reinforcement of testimony with a prior consistent statement would have some impact on deliberations.
- Depends on the particular case.
- How would we be in a position to know whether the statement would have any practical effect on the outcome of juror's deliberations?

From Judges Who Strongly Disagree

- Allowing such statements could substantially bolster the weak in-court testimony of a questionable witness. It effectively would allow another witness to recast the information in more favorable terms. Several examples come to mind from cases involving employment discrimination, sexual misconduct, and a variety of conspiracies.
- This rule change would encourage a calculating declarant to deliberately contrive to take advantage of the Rule in contemplation of litigation.
- To admit prior consistent statements to rehabilitate a witness seems to me (except in the rarest of cases) to ask a jury to find that the prior statements were true because if the jury does not find this to be the case then it does not rehabilitate the witness. I have permitted a lawyer to ask a witness whether the witness has ever given a different version of the event in words or in writing. I am reluctant now to allow even this. A lawyer is permitted to argue the absence of inconsistent statements and note that this is not rebutted. My basic point is that for a jury to decide whether a witness is rehabilitated by what a witness has said earlier (when not under oath or subject to cross), the jury must decide whether he told the truth and once they find that to be the case, it is hard to believe that they limit the use of these true statements to the limited purpose of rehabilitation.
- This would depend on the case, but changing the rule could have significant impact on the way the case is tried.
- I think it would be unduly confusing, since the Circuits are split as to when a PCS can be admitted solely to rehabilitate, and this would exacerbate the confusion.
- If a juror is led to believe that a witness has changed his testimony, the juror may strongly discount everything the witnesses has said. Permitting a prior consistent statement to be introduced very well could rehabilitate the witness so that the jury will weigh all of what the witness has testified about.
- I am opposed to the amendment.

From a Judge Who Did Not Answer

- It will depend on the content of the statement. It seems that if it is admissible for rehabilitation purposes a jury ought to be able to consider its content in the context of the witness's entire testimony.

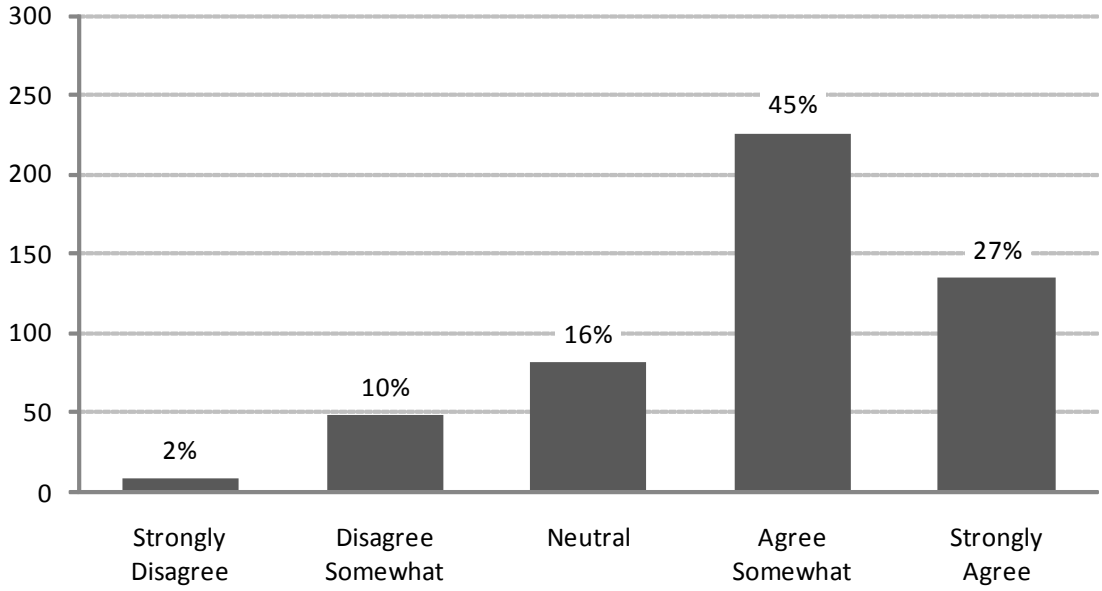
. . . . .

One concern regarding the proposed amendment is that it might appear to invite an increase in the admission of prior consistent statements, not just an expansion of use for prior consistent statements that would otherwise be admitted. The third question asked judges whether they expected this to occur.

Question 3. More Statements Admitted

Question 3: Amending Rule 801(d)(1)(B) to state that prior consistent statements are exempt from the hearsay rule whenever they are otherwise admissible to rehabilitate the witness's credibility would lead to more prior consistent statements being admitted. There was 72% agreement with this statement; 27% of responding judges agreed strongly.[4]

Question 3 Responses



Question 3 Comments

From Judges Who Strongly Agree

- Could lead to the admission of redundant and cumulative evidence and is arguably contrary to the instruction that the jury should not make a decision based upon how many witnesses are called to decide a fact. Encourages attorneys to use prior statements and jurors to make a decision based on the quantum of evidence (number of statements) presented rather than their assessment of the credibility of the testimony that they have seen and heard.
- I agree that the substantive/impeachment issue confuses juries, but I could see this opening up big issues at trial. The current language places a governor on admissibility and ties it in part to the timing of the statements—which is a check on reliability. Unless I am misreading this, the amendment ties admissibility to the need for rehabilitation, and almost all witnesses need that to some degree. The focus would then shift to 403, but that will raise some tricky issues about credibility and weighing the evidence.
- It would be harder to limit the number of prior consistent statements under Rule 403.
- I am concerned that the person who calls the witness will bring the prior statement up "preemptively" and then basically lead the witness through his or her prior statement. So, if you change the rule, make sure a prior consistent statement cannot be brought up unless the opposing party has opened the door to that statement.

4. Seven judges who responded to the survey did not answer this question.

- Very capable and skilled lawyers are likely to exploit any arguable attack on a witness's credibility as the basis for admitting any arguably consistent prior statement and to note its non-hearsay weight as significant to the case.
- Yes, which is why this is a bad idea. Parties could then parade a whole army of witnesses to testify that prior consistent statements were made prior to trial.
- That this is so is demonstrated by a recent trial of a former Governor who sought admission of hours worth of prior statements he made during FBI overhears to show his innocence. It is true that much of this was excluded on the ground that the non-criminal conduct was demonstrated on many days. This was excluded on the grounds that even competent proof of non-criminal conduct on some days has little relevance. A man who robs two banks on two separate days is not entitled to show that he did not rob a bank on any of the other 363 days of the year. Parenthetically I note that this defendant never offered the prior consistent statements on the grounds of rehabilitation largely because they would not want the jury to be instructed that evidence is offered for rehabilitation since the instruction implies that rehab is needed.
- And why is this a good idea? It's cumulative evidence and gives it more credence than it deserves.
- The amendment takes the evidence out of rehabilitating a witness into a new avenue of admissibility. This will be the practical effect.
- I don't think admitting such evidence would enhance the truth-seeking process.
- To the detriment of the rights of witnesses.

From Judges Who Agree Somewhat

- If it were my witness, I would seriously consider introducing a prior consistent statement even if opposing side did not claim recent fabrication. It could reinforce the credibility of the in-court statement.
- Absent the exact wording of the rule, I can't be sure. The current language that ties the admission to rebutting a charge of recent fabrication has proven to be quite a limiter. If that is removed, there will be many more statements.
- Lack of specificity generally allows for greater latitude in application.
- It would certainly lead attorneys to attempt to get more out-of-court statements into the trial.
- I wonder if it would lead to more prior consistent statements being made and therefore available for admission.
- I'm not sure that more statements would be admitted. More statements would be admitted without limiting instructions.
- I am assuming that these prior statements are oral.
- My experience does not reflect significant use of the rule, and my questions to counsel in the State have received a similar response.
- As previously stated, an infrequent occurrence in any event.
- It would increase the number of statements which technically could be admitted, although I anticipate the number admitted would be somewhat insignificant.
- If cross examination realistically raises the specter of recent fabrication, it would be proper for the judge to permit the use of the prior statement. The prior statement should, however, be one spoken or written when it is clear that at the time the witness had no reason to fabricate testimony in anticipation of the trial.
- Not a helpful directive to jurors.

From Judges Who Are Neutral

- It seems unlikely the rule change would affect a proper 403 analysis. So the same statements should be admissible before and after the change, just for an additional purpose. Even so, the practical effect could be an increase in admitted statements, because of the removal of the language on recent fabrication or motive. My guess is that that language sometimes drives the decision—even when, on a proper analysis, the statement is admissible on other grounds. Research might indicate whether district judges have gotten this wrong, though this is the kind of thing that rarely makes it into an appellate decision.
- There are so few statements of this type that have been offered that I can't remember a prior *consistent* statement ever being offered more than a few times in my nearly 10 years on the bench.
- I don't really have a feel for how often this would occur.

From Judges Who Disagree Somewhat

- They still would have to relate to recent fabrication.
- It is very easy to meet the threshold requirement that the statement is being offered to rebut an express or implied charge of recent fabrication. Therefore, the proposed change would not seem to significantly increase the number of prior statements that will be admitted.
- This does not come up often and I do not believe a change will materially increase the offering of such statements.
- It would make a difference to perhaps 5% of the criminal bar. (The *top* 5% who actually read and understand and apply the rules of evidence.)
- Judge should be able to limit statements used.

From a Judge Who Strongly Disagrees

- Even in its present form, I cannot see why a proponent attorney would not attempt to admit a prior consistent statement if it might benefit in any way the credibility of his/her witness.

From a Judge Who Did Not Answer

- Who knows?

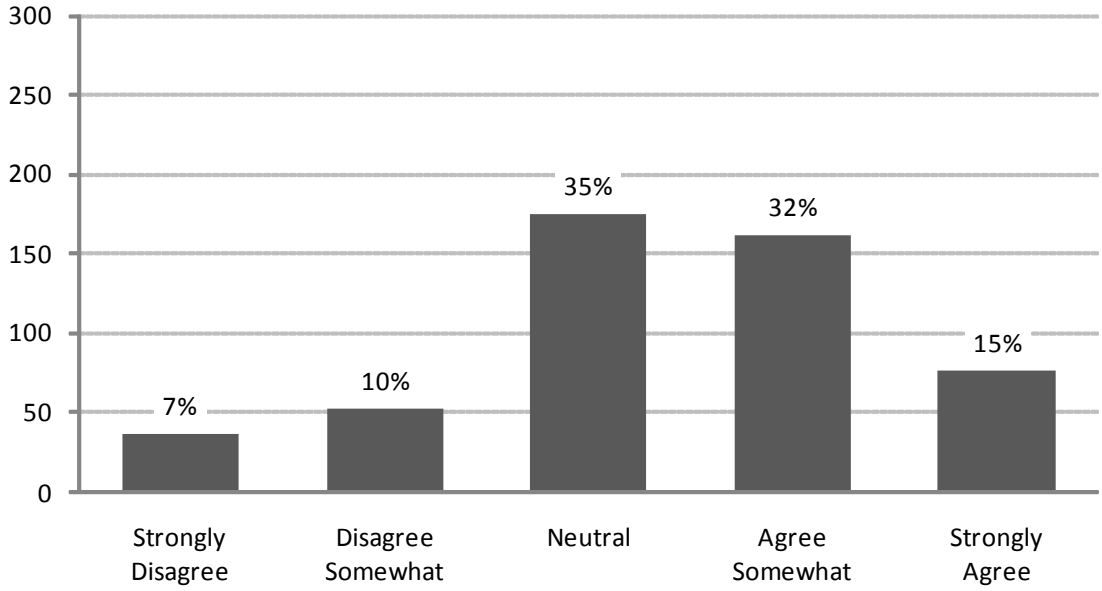
. . . . .

Two principal responses to this concern have been offered: (1) an increase in the admission of prior consistent statements would be a positive development, and (2) an increase would not, in fact, occur, because judges would use Rule 403 to keep the possible increase in check. The fourth question assesses each judge's policy agreement with the first response, and the fifth question asks for each judge's agreement with the second response's empirical prediction.

Question 4. More Statements Would Be Good

Question 4: If the proposed amendment to Rule 801(d)(1)(B) increased the frequency with which prior consistent statements were admitted into evidence, that would be a good result of the amendment. There was 48% agreement with this statement, including 15% strong agreement; 34% of responding judges were neutral, and 18% disagreed, 7% strongly.[5]

Question 4 Responses



Question 4 Comments

From Judges Who Strongly Agree

- Where the statement otherwise meets the requirements for admissibility and the declarant is subject to cross, I believe prior consistent statements are useful for the jurors' consideration.
- Our mission is to serve the platter of reasonable choices to the jury that allows them to reach the goal of truth.
- Juries have a remarkable capacity for sorting things out. I believe more mistakes occur from excluding matters from jury consideration than from admitting them.
- Good? I guess so, but I would think there should be a 403 analysis before the prior statement gets in.

From Judges Who Agree Somewhat

- Assuming some indicia of reliability, the result would be good.
- If the witness and his credibility are important to the resolution of the ultimate issue, admission of prior consistent statements assumes critical importance to the controversy. Again, the judge has discretion and can exercise when necessary (Rule 404).
- Extensive use of marginally rehabilitative prior consistent statements may cause some trial delay.

5. Five judges who responded to the survey did not answer this question.

- In some circumstances, it may assist in establishing a witness's credibility.

From Judges Who Are Neutral

- I have some concerns that it might create a trial within a trial. That said, at some point a cumulative objection can be made and sustained.
- This would greatly depend and be contingent upon the presiding judge, the rulings he or she makes, and the instructions given to the jury.
- I am not convinced that the proposed amendment would increase the frequency of use. By "good result" I assume this refers to its value as a truth-seeking mechanism, and we are all in favor of ascertaining the truth.
- I am not sure how I feel about this. It could invite a lot of bolstering.
- I don't think this is a relevant factor.
- Credibility is always for the jury to decide.
- Cooperating witnesses have often testified that initially they have made untruthful statements to law enforcement.

From Judges Who Disagree Somewhat

- I suspect lawyers will seek to put such statements into evidence much more frequently, potentially complicating the examinations.
- It will lengthen trials without improving them, especially if misused as stated above.
- Nothing that lengthens jury trials is a good result.
- The amended rule would, in my opinion, open the door to more statements, and without the safeguards that now exist in the rule, we will see a lot of self-serving prior statements of questionable reliability. That said, there are certainly cases where fairness demands admission—such as those circumstances that would currently satisfy the rule.
- This result would probably be good in that it avoids a perhaps troublesome instruction, but the practical effect might be a boot-strapping contest. In other words, the affected witnesses would be engaged somewhat in boot-strapping his or her own credibility and adding to the weight of the substantive evidence at the same time. I am not convinced that the jurors' deliberations would necessarily be made easier.
- I think it leads to admitting a lot of self-serving statements.
- Consistent statements that suffer from the same bias or motive as the testimony may be admitted.

From Judges Who Strongly Disagree

- I worry about whether relaxing the rule would encourage witnesses to make more statements to bolster credibility.
- Now we've gone from the importance of what the witness says on the witness stand to what the witness said on other occasions, perhaps many other occasions in the past outside of court, and perhaps at the request and direction of the lawyer calling the witness.
- If admitted for truth of statement, it is not subject to cross examination and should not get that status.
- In judging credibility, the demeanor of the declarant is extremely important. If the rule were amended to allow evidence of prior consistent statements without restrictions, criminal cases would be impacted the most. Frequently, defendants will have given some denial to police at the time of arrest. If this were admissible, the jury would have no way to gauge whether the de-

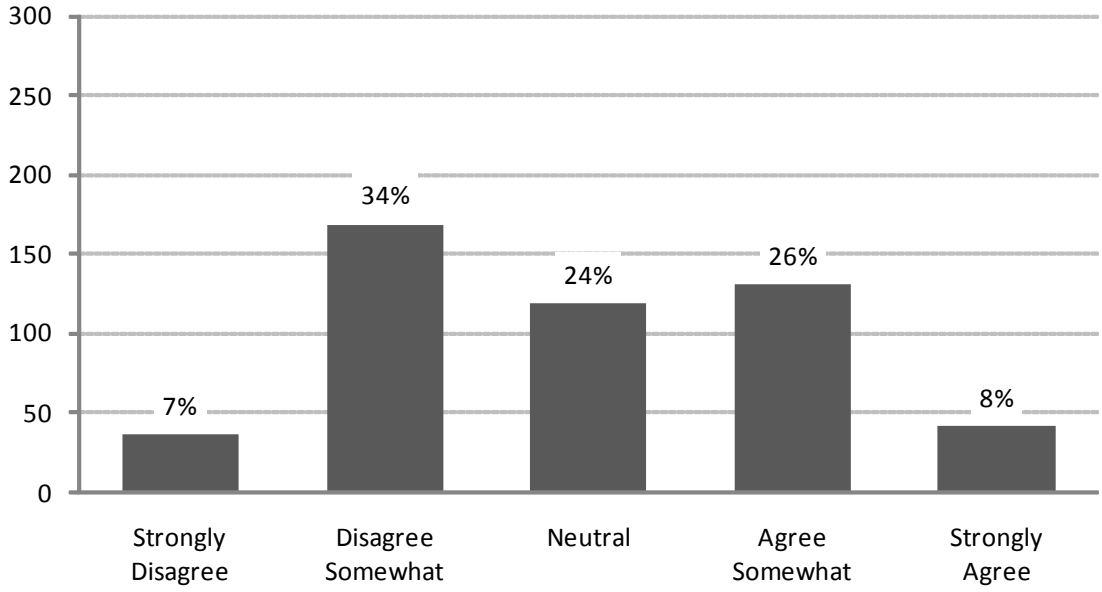
clarant was sweating, averting his gaze, hesitant in his statement, or other indices of untruthfulness. I encourage the committee to retain the current rule as it is now formulated.

- As I see it, the purpose is to let the statement be given whatever probative value the jury deems appropriate.

Question 5. Use of Rule 403

Question 5: Although the proposed amendment might result in litigants offering more prior consistent statements as evidence, because of Rule 403, trial judges are unlikely to actually allow substantially more prior consistent statements into evidence. There was 35% agreement with this statement, including 8% strong agreement; 24% of responding judges were neutral, and 41% disagreed, 7% strongly.[6]

Question 5 Responses



Question 5 Comments

From Judges Who Strongly Agree

- And, again, not a good thing.
- The judges have always exercised an important role in determining whether such statements should be admitted.
- Judicial discretion will continue to be ad hoc—as it should be.

From Judges Who Agree Somewhat

- Either Rule 403 or Rule 611 afford the court the requisite control.
- I'm sure the circumstances of the prior consistent statement would be scrutinized.
- This will cause judges to do increased 403 analysis as objections will increase.

6. Nine judges who responded to the survey did not answer this question.

From Judges Who Are Neutral

- I think 403 is the safeguard against abuse.
- Rule 403 will certainly become more important, but it will raise some very tricky issues. In many cases, fairness would dictate allowing admission, but the limits on admissibility have been removed, and some of the statements may seem self serving and unreliable. That said, credibility issues usually go to the jury, so Rule 403 may be of limited value.
- Again, this depends on the 403 findings of the judge and the specific facts of the case.
- Depends on the judge and the culture of the district.
- Rule 403 always depends upon the situation when it is invoked. Many considerations enter into a ruling on that basis. Not possible to predict the outcome.
- Depends on the judge, but runs counter to the case law in my circuit that 403 exclusion should not be routinely used.
- There will be more Rule 403 objections made for the court to consider and rule on.
- I am really not sure. My gut feeling is that more statements would be introduced into evidence.
- This will be hard to know until the question has already been asked, so the cat may be out of the bag in front of the jury.
- Hard to predict that more offers of such statements would be made and harder to predict whether "substantially more" are less likely to be granted.
- What 403 issues? Undue consumption of time? I don't recall any significant 403 issues relating to this rule. But again, I defer to other judges.

From Judges Who Disagree Somewhat

- Depends on the moderation of the use. I would not permit a parade of witnesses to testify as to prior consistent statement. It's a point of 403 judgment.
- The balancing test of Rule 403 is so fact-specific to the individual case, I doubt generalized predictions like 5) are accurate.
- The rules are rules of inclusion, not exclusion. The 403 exception would entail having to make many prejudice decisions without much guidance. The question is one of reliability more than the items set out in 403.
- I don't think most judges use 403 to move away from other legitimate rules of evidence.
- I can only speak for myself, and, as noted in the previous comment, I prefer to include rather than exclude.

From Judges Who Strongly Disagree

- If the statements would be admissible for substantive purposes, what would be the source of the unfair prejudice that would support a ruling to exclude the evidence under Rule 403?
- The probative value of substantive evidence is inherently greater than the probative value of a third prior statement offered only to rehabilitate.
- I don't think that many federal judges pay much attention to Rule 403. I'm an exception to that. When I first came on the bench, I asked our senior-most judge, with at least 20 years experience, how often he ruled out evidence under 403. He didn't even know what I was talking about. More important, if the rule is expanded many judges will logically assume that 403 is more limited in this context.
- Rule 403 requires substantial prejudice. This is rare.
- Rule 403, as interpreted by the Tenth Circuit, will not keep these statements out.

- Rule 403 is "an extraordinary remedy, and is applied infrequently." Also, it would mean tons of motions in limine about prior consistent statements.

From Judges Who Did Not Answer

- I don't think this would change much at all.
- I don't speak for other trial judges and I don't know what I would do until confronted with the question.

. . . . .

The final three questions asked judges' endorsements of three possible courses of action by the Committee: (1) amend as proposed, (2) amend some other way, or (3) do not amend.

Data for the individual questions follow, but they can be summarized by determining which of the three courses of action each judge appeared to prefer. Preference for one of the three courses of action could be inferred from the judge's agreeing, either strongly or somewhat, to the suggested course of action and not agreeing with either of the other two suggestions—either disagreeing, expressing neutrality, or not responding. A preference could also be inferred from disagreement with two courses of action and neutrality or no response for the impliedly preferred choice. A preference for one or another of the three courses of action was expressed in this way by 81% of the judges.

A majority of judges, 58%, expressed agreement with the proposed rule amendment; 6% supported an alternative amendment; and 17% endorsed leaving the rule as is. Several judges, 6%, answered "neutral" to all three questions.

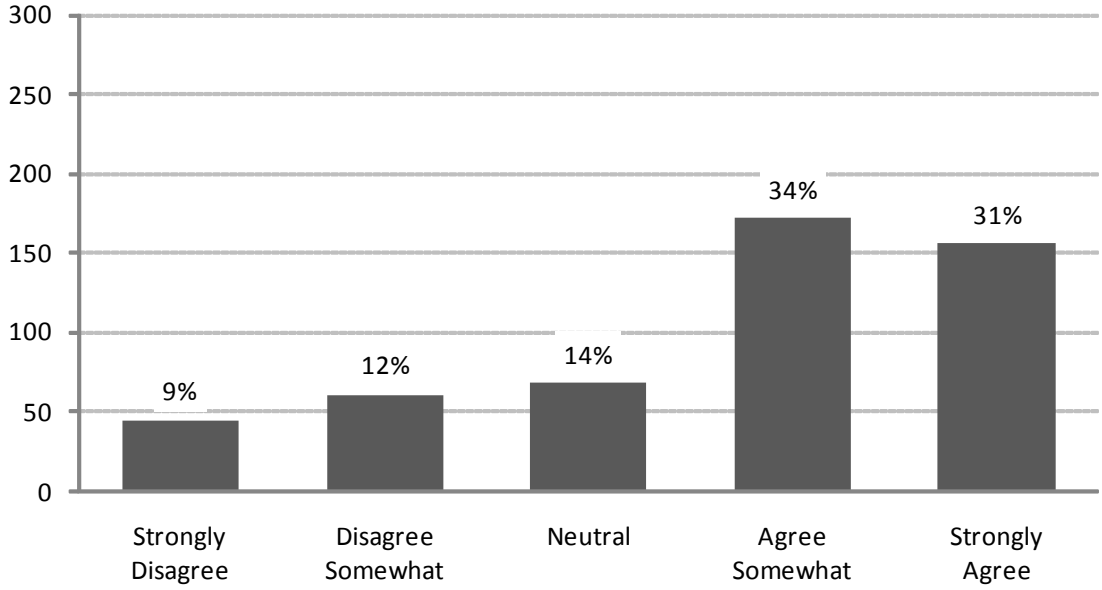
For 13% of the judges, the response patterns were more complicated. Agreement with both the proposed amendment and an alternative amendment was expressed by 6%; agreement with either the proposed amendment or an alternative amendment and with not amending the rule was expressed by another 6%. Four judges disagreed with all three courses of action; one judge only disagreed with adopting the proposed amendment, and one judge only disagreed with adopting an alternative amendment. One responding judge did not answer any of these three questions.[7]

7. This judge agreed with the first two questions, was neutral with respect to the next three, and did not answer the last three questions.

Question 6. Proposed Amendment

Question 6: Rule 801(d)(1)(B) should be amended to state something like [the proposed amendment recited above.] There was 65% agreement with this proposal; 31% of responding judges agreed strongly.[8]

Question 6 Responses



Question 6 Comments

From Judges Who Strongly Agree

- The key is that the witness's credibility has been assailed during cross. Once that happens and the prior statement was made when the witness had no reason to fabricate, the prior consistent statement should be eligible for use.
- This is an area where state courts may differ from federal court. There were no problems with this approach that I know of in California state court.
- This would be an excellent change.

From Judges Who Agree Somewhat

- I believe the amendment will help establish the credibility of some witnesses and aid in the search for truth.
- I tend to think that the existing language should be kept, and that the rule should add the phrase, "or is otherwise admissible . . . ."
- I do not believe that the "rehabilitate" is necessary—leave it as "is otherwise admissible."
- Add the following substitute ending to the sentence: ". . . is otherwise admissible in an effort to rehabilitate . . . ."

8. Four judges who responded to the survey did not answer this question.

- I think I might suggest that, because there are other reasons than rehabilitation of credibility for admitting such statements (i.e., to explain apparent inconsistencies), such other uses should be signaled in the revised text of the rule.
- I think there is potential for confusion. If it read, ". . . is consistent with the declarant's testimony and is otherwise admissible, to rehabilitate . . . ," would that change what you are trying to accomplish? I'm confused whether "is otherwise admissible to rehabilitate" is intended to be a phrase or whether there should be a comma in there.
- I don't know what "otherwise admissible" means. I think it might be clearer to say "(B) is consistent with the declarant's testimony and explains or rebuts impeachment resulting from cross-examination." That way we don't end up dealing with this on direct, where it has no place.
- It should say "has been subjected to cross-examination about a prior statement" to confirm that the prior consistent statement can only be used in rehabilitation, not in direct evidence.
- The statement should be limited to the fact of the prior consistent statement, but if a written statement that written statement, as opposed to testimony concerning it, should not be admitted as an exhibit, similar to Rule 803(18).
- I don't think that saying the statement is simply "not hearsay" makes it clear that the statement is substantively admissible.
- The proposed revision is insufficient to accomplish the intended result. It must also add language that the circumstances under which the consistent statement was made would reasonably be expected to have resulted in an honest verbal expression by the declarant. If the reason why prior inconsistent statements are admissible is generally that people do not generally go around incriminating themselves, merely allowing consistent statements has no other baseline rationale, unless the trial judge can determine, from all of the circumstances, that a prior consistent statement was made at a time and place where honesty was likely, or at least that dishonesty was unlikely. Examples: Prior coached consistent statements made for litigation purposes pose a particular problem. Also the prior denials of guilt in a criminal case would thus become potentially admissible. We all know, however, that early denials in a criminal case are often just for posturing and public relations. Admittedly, cross-examination is one tool to point out such problems but opening the floodgates to all sorts of prior consistencies without some gatekeeping function by the court seems to create more problems than a change in the rule would solve. If the rule is changed, perhaps some *Daubert*-style gatekeeping process can also be included setting forth the kinds and types of factual scenarios wherein consistent statements are allowable once credibility has been attacked.

From Judges Who Are Neutral

- I think the amendment makes sense from a policy point of view. I think, as a practical matter, it will have very little change in day-to-day trial practice. If a witness is actually on the stand, most prior statements of that witness are going to find some legitimate pathway to admission right now. When the witness who made the prior statement is actually on the stand testifying, everyone has a fair chance on direct or cross to deal with any prior statements of the witness. Furthermore, I don't think most jurors care about the finer points of using a prior statement for truth, or only for rehabilitation.
- Probably worth adding a line or commentary reinforcing that this provision is not intended to reduce the scrutiny given to such statements to ensure that they satisfy all the criteria of the rule and were not made in anticipation of litigation.
- Why not say the prior statement is admitted as an exception to the hearsay rule if it's just admitted to rehabilitate the witness? We are back with the question of telling the jury it's not for its truth but only to rehabilitate, which is where we started (I thought).

- Why not just put a period after the word "testimony"?
- Otherwise admissible to rehabilitate the declarant's credibility as a witness is very broad. Perhaps some parameters would be helpful to promote consistent application.
- The statement should have been made before the witness had a motive to fabricate (lie).
- Judicial discretion will continue to be ad hoc—as it should be.
- No real change that I can see. Rehabilitation is always a purpose.
- I have no comment regarding the exact wording of a proposed amendment. My concern would be the exact wording of a jury instruction.
- I have a hard enough time following the rules. I definitely am not the one to help write the rules.

From Judges Who Disagree Somewhat

- I am not convinced that present instructions are so difficult for jurors to understand that the proposed change is needed. The change has the potential of creating more evidentiary contests and challenges than simply reducing feared or perceived juror confusion.
- I do not think the present rule is problematic. The condition that the statement tend to rebut an express or implied charge of recent fabrication seems an appropriate one that simultaneously (1) permits rebuttal of the charge (2) without opening the door to prior consistent out-of-court statements more generally. In sum, I don't see the evil to be remedied.
- I believe the instruction provides too little guidance as to situations in which a statement should be admitted. The current rule appears to cover the most significant one.
- I do not believe this clarifies the rule; it opens the door to argument about when a witness's credibility has been challenged rather than specifying what type of challenge triggers the use of the prior statement.
- The proposed change might be tough to apply in practice. One could foresee frequent attempts to improperly use the amended rule to bolster a witness.
- The proposed rule is somewhat vague. Must there be a demonstrable need to rehabilitate the declarant shown before the statement is allowed in?
- In my twenty-plus years on the bench, I have not had a Rule 801(d)(1)(B) problem, so far as I can recall. I am satisfied with the rule as it now exists. I have a concern with the proposed amendment because I do not know what is meant by the words "otherwise admissible." Perhaps there is something in the case law that would explain the use of those words. I would better understand the proposed amendment if the words "otherwise admissible" were changed to "offered."
- This is very broad and also indefinite. What does "otherwise admissible" to rehabilitate mean?
- I don't understand what the language of "is otherwise admissible to rehabilitate . . . witness" refers to.
- What does "otherwise admissible" mean? Does this refer to some other rule or doctrine?
- I would not change the rule.
- I would leave the rule the way it is.
- Would the proposed rule change permit someone else testifying about a prior consistent statement? If so, it could lead to mischief.
- If the goal is to remove the substantive/impeachment problem, then the amendment could remove the "offered to rebut" language and clearly state that it comes in as substantive evidence.

It could then keep the restrictions regarding charges of recent fabrication. I am concerned that this amendment, as worded, will raise a number of unexpected evidentiary issues.

- OK, but you should change (1) to make sure the prior consistent statement cannot come in unless the declarant's credibility has been called into question during cross-examination. You should also require the party who wants to bring up the prior statement to get a ruling from the judge as to whether or not it is proper to do so before doing so.
- My tentative view on 15 seconds thought: it would be better to leave in the recent-fabrication-or-motive language and follow it with "or," followed by the new language, perhaps with a vertical separation. Judges and litigants know the recent fabrication or motive standard, and it is useful to have it in the rule. The "or" would make clear that there are other grounds for admitting the statement to rehabilitate.
- I would affirmatively state that the statement may be admitted as substantive evidence.

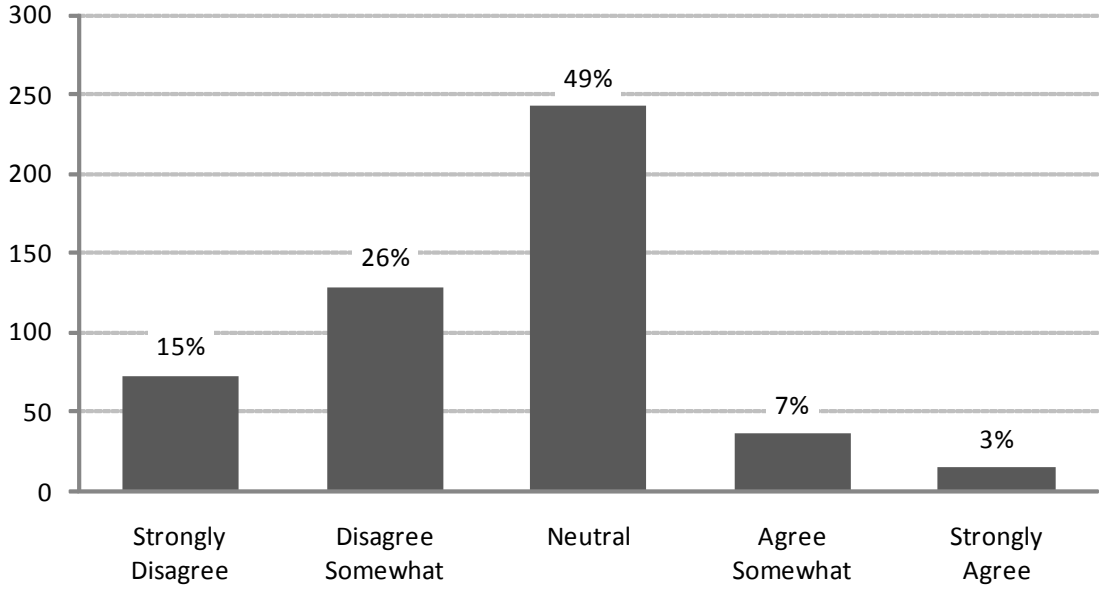
From Judges Who Strongly Disagree

- The current version is easily understood by judges and attorneys. I fail to appreciate the need to tinker with it.
- There was nothing wrong with the rule as it was stated. The problem was whether it was admitted for the truth of the words.
- If it ain't broke, don't fix it is a good rule and I think it applies here.
- Leave the rule as is.
- I see no need for the amendment.
- This is too vague a standard.
- This is amorphous and confusing—when would it be otherwise admissible? The entire purpose of the FRE 801(d)(1) non-hearsay classification is to admit out-of-court statements substantively that have some internal guaranty of trustworthiness and reliability (as the pre-motive requirement supplies in the case of a PCS). In the proposed amendment, what would provide the internal reliability?
- When would it be "otherwise admissible"? Doesn't this beg the question?
- The explanation is essential to admission of the prior consistent statement.
- The amendment as proposed will allow a witness to spread self-serving prior consistent statements before he or she were to testify.
- The windows this would open would be very great and the additional benefit to the jury would be minimal.
- Now it is offered for the truth of the statement but it is not subject to cross-examination and in criminal cases there is an *Anderson* problem of confrontation.

Question 7. Alternative Amendment

Question 7: Rule 801(d)(1)(B) should be amended, but in a way different from the proposal stated. There was 10% agreement with this statement, including 3% strong agreement; 49% of responding judges were neutral, and 41% disagreed, 15% strongly.[9]

Question 7 Responses



Question 7 Comments

From Judges Who Strongly Agree

- As an exception to the hearsay rule, but subject, of course, to cross-examination and 403.
- I think consistent statements that are made before bias or motive arises should be admissible for their truth irrespective of whether the witness testifies.
- Just drop the word "recent" before "fabrication" and otherwise leave it alone.

From Judges Who Agree Somewhat

- As an original matter, I would make the statement admissible as substantive evidence, but keep in the rule the language requiring a recent fabrication or motive. Whether the change is worth the cost of change is a closer question.
- Keep restrictions to ensure reliability but state that it may be used as substantive evidence.
- Since the amendment is to ease the jury's burden, the amendment should be simple, direct, and understandable to most jurors.
- Whether or not you tinker with Rule 801(d)(1)(B) to expand those statements made admissible, I would prefer seeing it moved to Rule 803 and made an exception to the hearsay rule, which would be cleaner, less confusing, and more in keeping with the treatment of similar statements Rule 803(1)-(6).
- But I don't have any suggestions off the top of my head.

9. Ten judges who responded to the survey did not answer this question.

- I am not sure an amendment is necessary. The proposed change might result in more bench conferences and prolong trials. The proposal might benefit from further study.

From Judges Who Are Neutral

- I am comfortable with the proposed change, but always willing to look at any reasoned alternative.
- Drafting can always be improved—but usually only after we are confronted by problems prompted by the initially chosen draft—so you have to do the best that smart minds can do when tackling the challenge.
- I'd have to see what the different way would be. The farther a rule departs from a simple declarative sentence, the less useful it becomes.
- Without knowing what the alternative version proposed, it is hard to evaluate what "different from" means.
- Without knowing what else would be proposed, I cannot comment
- I would need to see the alternative to take a position on this question.
- I would not amend at all.
- Poor survey question.

From Judges Who Disagree Somewhat

- The proposed amendment is okay subject to the caveat under (1) above ("The instruction would have to be very carefully worded for the average juror to understand it. If the statement is written, I suggest it not be included in the physical evidence given to jurors during deliberations. It is like self-serving testimony that the jury can continue to review.").[10]
- I have not spent time imagining the alternative language possibilities. The proposal appears workable to me.
- I would disagree with the need, but I would agree that if there is a need to amend it should be different from the proposal stated.
- If it ain't broke, don't fix it.
- I believe it is better as is.
- Without the benefit of knowing the "different way," I really am unable to respond.

From Judges Who Strongly Disagree

- I like the suggested new rule. It'll save a lot of needless objections, and jurors tend to take the statement for its truth regardless of a limiting instruction.
- Nothing wrong with the rule as it is. Do not know of other proposals for change, though.
- Leave it alone. It is fine as is.

From Judges Who Did Not Answer

- (B) is consistent with the declarant's testimony and was made under circumstances indicating reliability and if the interests of justice will best be served by admission of the statement into evidence.

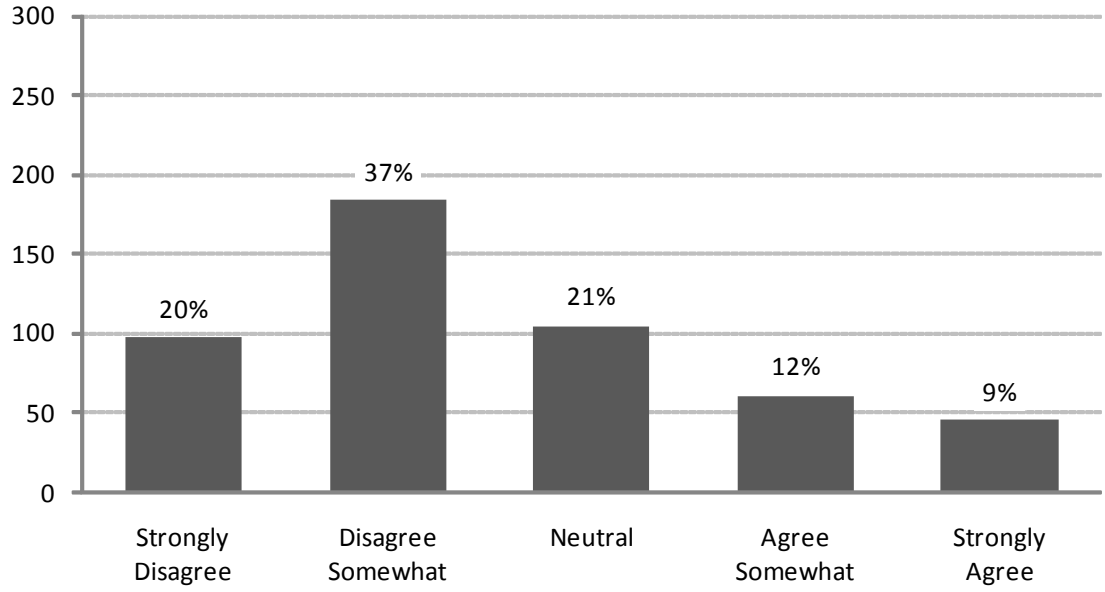
10. Other self-references to the judge's comments on other questions—in the nature of "see my response to Question X"—have been omitted, because the reader of this report has seen those other comments.

- See my prior comment concerning the fact that the rehabilitative use of a "statement" should be limited to testimony concerning the making of the prior consistent statement, but should not open the door to the introduction of a written statement as an exhibit.

Question 8. Do Not Amend

Question 8: Rule 801(d)(1)(B) should not be amended. There was 22% agreement with this statement, including 9% strong agreement; 21% of responding judges were neutral, and 57% disagreed, 20% strongly.[11]

Question 8 Responses



Question 8 Comments

From Judges Who Strongly Agree

- I frankly do not see the point of the proposed change. Under present law, the witness says, under oath, X. The adversary impeaches, suggesting recent fabrication. The proponent adduces a prior consistent statement to rehabilitate. The jury either will be persuaded by the witness's testimony under oath that X is so or it will not. In order for it to be persuaded, it will have to conclude that the charge of recent fabrication is unpersuasive, a point to which the prior consistent statement is directly pertinent. Whether the prior consistent statement is admitted also for its truth would make absolutely no difference whatever to the outcome of the case. The only differences it possibly could make would be to motivate counsel to offer more prior consistent statements than they otherwise would offer and to lead to pointless appeals if the trial judge excludes them as cumulative or for other reasons. With great respect to all concerned, this proposal seems to me to be a solution in search of a problem.
- Unnecessary tinkering which has confrontation problems and underrates the abilities of the jury.

11. Twelve judges who responded to the survey did not answer this question.

- The current rule is concise and has a specific purpose that is important. The amendment strikes me as being at best naive and at worst essentially doing away with the current rule, not just amending it. It won't take long for lawyers to recognize this amendment as a way to build a case with out-of-court statements. You are simply trading one problem for a greater problem: that a jury cannot follow an instruction about restricting the use of certain testimony v. understanding the difference between in-court testimony and out-of-court statements not subject to cross-examination, etc.
- This is an education issue—prior statements (consistent or inconsistent) should not be admitted for the truth of the matter asserted (they are hearsay by definition), but the statement may be relevant as to credibility of in-court testimony
- In my experience, prior consistent statements rarely come up, and when they do it is to address the items covered in the rule.
- This seems largely an academic debate. I have been a trial judge for more than 20 years, have taught Evidence for more than 20 years, and co-authored an Evidence book. I don't think I've had any problems teaching, or instructing jurors, on the different uses of different types of PCSs (or, for that matter, different types of PISs). I'd be happy to discuss this with anyone. Jerry Rosen

From Judges Who Agree Somewhat

- I think it is a good, long-standing rule.
- Sometimes witnesses are cross-examined and the jury is led to believe that the witness is lying. Permitting the witness to clear this up is a good thing. It is helpful to the jury.
- The rule seems clear on its face the way it stands now; however to the extent it fails to provide or authorize additional authority to use prior consistent statements to rebut implications of motive to fabricate, the rule as set forth in question 6 [*comment not completed*].
- It is better to do nothing than to change the rule as drastically as proposed in question 6.
- This looks like a solution searching for a problem.

From Judges Who Are Neutral

- I can't imagine that there isn't some way to improve the rule, but I'm not sure making it easier to have prior consistent statements admitted is appropriate. Some of the witnesses are defendants seeking substantial assistance, and this might encourage them to make "consistent" statements. I think some people repeat a story in hopes that eventually they will believe the story too.
- If there is enough information from other judges (or attorneys) who have faced this issue, and there is sufficient merit, then I have no opposition. I have not had any significant issues with this rule that would cause me to advocate for a change in the rule. But I believe that I can work with the current rule or any amendment to the rule.
- I don't think it will have much impact on proceedings and what was or is not admitted either way.
- As I said before, I don't think the amendment will make much practical difference.
- In my 21 years on the bench I don't think I have had to make a decision under this rule. In my experience, it's a non-issue.
- I reiterate that this issue has never been a problem, and a dispute over prior consistent statements is such a rare event it is not worth an amendment.
- In 25 years, I do not remember this problem ever arising. If it ain't broke, why fix it?

- I do not believe that this is an issue of significance, and there is an argument that no rule should be changed unless there is an important need for the change.

From Judges Who Disagree Somewhat

- Life will go on without this amendment, because the situation comes up so infrequently, but if there is a perceived need to change it, this revision is a good one.
- If we have come to the point of realizing that fairness dictates bringing the rule into conformance with truth finding and what jurors already do, then amend it.
- If Rule 801(d)(1)(B) is not amended, we judges will continue to do our best to explain the distinctions the amendment will eliminate.
- Clarity in rules is the paramount consideration and this rule needs more clarity for jurors' sake.
- Although I have not given the matter much thought before, my guess is that this is a little trickier than it appears at first blush.
- The substantive/impeachment issue should be addressed.

From Judges Who Strongly Disagree

- Prior consistent statements should have a larger place in trials than they do at present.
- It is hard for the court and lawyers to apply, let alone a jury.

Conclusion

This survey of district judges showed substantial support for the proposed amendment to Rule 801(d)(1)(B). The survey also showed support for the empirical prediction that the amendment would lead to an increase in prior consistent statements coming into evidence. The two suggested rebuttals to this concern received only modest support.

Appendix. Text of Survey Invitation Email

Dear Judge ___:

The Advisory Committee on the Federal Rules of Evidence is considering an amendment to Federal Rule of Evidence 801(d)(1)(B), which concerns prior consistent statements. The input we receive from judges is an important aspect of our work. We would appreciate a few minutes of your time to answer 8 survey questions. Unless you choose to be identified, your answers are confidential and will be reported only in the aggregate.

Rule 801(d)(1)(B) provides that certain prior consistent statements are admissible not only to rehabilitate a witness but also substantively, for their truth—specifically, statements that rebut a charge of recent fabrication or recent improper influence or motive and that predate the alleged motive to falsify. In contrast, federal cases provide that other consistent statements can be admissible to rehabilitate a witness but not for their truth—for example, statements that explain an inconsistency or rebut a claim of faulty recollection.

Some have suggested that it is difficult to explain to jurors the difference between consistent statements that are admissible only to rehabilitate but not for their truth. And it has also been suggested that there is no practical difference between rehabilitation and substantive use of prior consistent statements.

In response to these suggestions, we are considering an amendment to Rule 801(d)(1)(B) that would allow prior consistent statements to be admitted for their truth (thereby exempting them from the hearsay exclusion) when they are otherwise admissible to rehabilitate a witness's credibility.

Please click on the following link to complete the survey. We would be especially grateful to receive your response by January 21, 2012. Your views are very important to our committee.

http://vovici.com/l.dll/JGsB6C8E8B5A5lsDq9U5J.htm

Very truly yours,
Sidney A. Fitzwater
Chief Judge, U.S. District Court for the Northern District of Texas
Chair, Advisory Committee on the Federal Rules of Evidence

Technical questions about this survey may be directed to Dr. Margaret Williams at the Federal Judicial Center, (202) 502-4080, mwilliams@fjc.gov.