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Rule 801(d)(1): Prior Statement by Witness

RULE 801(d)(1): PRIOR STATEMENT BY WITNESS

Federal Rule of Evidence 801(d)(1) states:

> (d) Statements which are not hearsay. A statement is not hearsay if-
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> (1) Prior statement by a witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person. . . . [1]

Federal Rule 801(d)(1) provides for three situations where out-of-court statements by a witness are excluded from the hearsay rule. Such out-of-court statements include prior inconsistent statements, prior consistent statements and statements identifying a person.[2] The drafters of Federal Rule 801(d)(1) determined that it was essential that the witness be present to testify at trial and available for cross-examination regarding his or her out-of-court statement.[3] The underlying rationale behind this rule is that prior statements of a witness may be admitted into evidence in those situations in which there is a guarantee of reliability.[4]

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1. FED. R. EVID. 801(d)(1).
2. *Id.*
3. GLEN WEISSENBERGER, WEISSENBERGER'S FEDERAL EVIDENCE § 801.13 at 408 (2d ed. 1995).
4. *Id.*

801(d)(1)(A): Inconsistent Statements

Under Federal Rule 801(d)(1)(A), prior inconsistent statements may be used for impeachment purposes, as well as substantive evidence, as long as the requirements of the rule have been satisfied: the statement was inconsistent with declarant's testimony and the statement was given under oath. However, even if a prior inconsistent statement does not satisfy Rule 801(d)(1)(A), the statement may still be available for impeachment purposes, provided the jury is instructed as to the limited nature of the prior statement.[5] Nevertheless, if the prior inconsistent statements comply with the language of the rule, then the statements may be used for impeachment purposes as well as substantive evidence, and no limiting jury instruction is necessary.[6]

In *United States v. Marchand*,[7] for example, the witness's grand jury testimony, which indicated that the defendant was a marijuana supplier, was admissible at trial as substantive evidence after the witness claimed that he could not identify the defendant as the supplier.[8] The court explained that "if a witness has testified to such facts before a grand jury and forgets or denies them at trial, his grand jury testimony or any fair representation of it falls squarely within Rule 801(d)(1)(A)."[9]

New York's approach to the admissibility of prior inconsistent statements is different from the Federal Rule. New York Criminal Procedure Law [hereinafter C.P.L.] section 60.35[10] and

5. *Id.* at 409; *see also* FED. R. EVID. 613.

6. *See* WEISSENBERGER, *supra* note 3, § 801.14, at 409-10; FED. R. EVID. 105.

7. 564 F.2d 983 (2d Cir.), *cert. denied*, 434 U.S. 1015 (1977).

8. *Id.* at 998.

9. *Id.* at 999.

10. N.Y. CRIM. PROC. LAW § 60.35 (McKinney 1992). The statute provides in pertinent part:

> 1. When, upon examination by the party who called him, a witness in a criminal proceeding gives testimony upon a material issue of the case which tends to disprove the position of such party, such party may introduce evidence that such witness has previously made

New York Civil Practice Law and Rules section 4514,[11] permit the introduction of prior inconsistent statements for impeachment purposes, but not as substantive evidence. In civil cases, New York has, however, distinguished between the admissibility of prior inconsistent statements as substantive evidence when the witness is not present, as opposed to when the witness is present.

In *People v. Welch*,[12] the court addressed the admissibility of prior inconsistent statements in criminal cases. The court noted that while section 8-a of the Code of Criminal Procedure, the predecessor to C.P.L. 60.35, "enlarge[s] the field in which impeachment of a witness by proof of prior inconsistent statements is permitted . . . the statute does not in express terms or by fair implication provide that such proof may be introduced for purposes other than impeachment of a witness."[13]

Further, in *Roge v. Valentine*,[14] the New York Court of Appeals addressed this issue in the context of civil cases when the witness was not present. In *Roge*, the court stated: "'[i]t is universally maintained by the courts that prior self-contradictions are not to be treated as having any substantive or independent

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either a written statement signed by him or an oral statement under oath contradictory to such testimony.

2. Evidence concerning a prior contradictory statement introduced pursuant to subdivision one may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. Upon receiving such evidence at a jury trial, the court must so instruct the jury.

Id.

11. N.Y. CIV. PRAC. L. & R. 4514 (McKinney 1992). Section 4514 provides: "In addition to impeachment in the manner permitted by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in a writing subscribed by him or was made under oath." *Id.*

12. 16 A.D.2d 554, 229 N.Y.S.2d 909 (4th Dep't 1962).

13. *Id.* at 558, 229 N.Y.S.2d at 913. *See also* People v. Ward, 160 A.D.2d 473, 474, 554 N.Y.S.2d 32, 33 (1st Dep't 1990) (affirming trial court's refusal to allow tape of complainant's 911 phone calls where tape would only serve impeachment purposes and the complainant did not testify).

14. 280 N.Y. 268, 20 N.E.2d 751 (1939).

testimonial value.'"[15] The court explained that prior oral or written contradictory statements made under oath inside or outside of court may be introduced to impeach the credibility of the witness, but will not "constitute affirmative evidence or 'evidence in chief' of the facts stated."[16]

In *Letendre v. Hartford Accident Indemnity Co.*,[17] the court of appeals held that, although the witness's prior statements were hearsay, the statements were properly admitted as substantive evidence to be evaluated by the jury.[18] The court based its decision on the fact that the "[d]eclarant himself was present in court, [and] subject to the oath and safeguard of cross-examination."[19] Hence, in New York, the trend is to allow the admission of prior statements as substantive evidence in civil cases when the declarant is present in court, under oath and subject to cross-examination.[20]

Thus, while the Federal Rules of Evidence allow prior inconsistent statements, made at a hearing under oath, of testifying witnesses to be admitted at trial as substantive evidence and for impeachment purposes, the New York evidentiary

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15. *Id.* at 277, 20 N.E.2d at 754 (citations omitted).

16. *Id.* at 276, 20 N.E.2d at 754.

17. 21 N.Y.2d 518, 524, 236 N.E.2d 467, 470, 289 N.Y.S.2d 183, 188 (1968).

18. *Id.*

19. *Id.*

20. *Id. See* People v. Arnold, 34 N.Y.2d 548, 550, 309 N.E.2d 875, 354 N.Y.S.2d 106, 107 (1974) (stating that "the hearsay doctrine has been too restrictively applied to exclude otherwise reliable evidence from the jury"); Campbell v. Elmira, 198 A.D.2d 736, 738, 604 N.Y.S.2d 609, 611 (3d Dep't 1993) (holding that, in a civil action, "inconsistent prior sworn testimony could be considered by the jury as evidence-in-chief"); Cohen v. St. Regis Paper Co., 99 A.D.2d 659, 661, 471 N.Y.S.2d 926, 929 (4th Dep't 1984) (acknowledging the New York trend to "relax the strict requirements of the hearsay rule"); Whitman Delicatessen, Inc. v. State Liquor Auth., 83 A.D.2d 963, 964, 443 N.Y.S.2d 14, 16 (2d Dep't 1981) (finding, in a civil action, authority for the admissibility of prior inconsistent statements as evidence-in-chief); Vincent v. Thompson, 50 A.D.2d 211, 224, 377 N.Y.S.2d 118, 130 (2d Dep't 1975) (noting that the court of appeals had recently found the application of the hearsay doctrine too restrictive in *Arnold* and *Letendre*).

scheme remains opposed to such an approach other than in civil cases where the declarant meets the criteria set forth in *Letendre*.

801(d)(1)(B): Consistent Statements

Under Federal Rule 801(d)(1)(B), prior consistent statements of a witness may only be used to rehabilitate the credibility of a witness. This hearsay exemption applies where the statement is "offered to rebut an express or implied charge of recent fabrication or improper influence or motive."[21] In such instances, the prior consistent statements are introduced to support the credibility of the witness and counter the attempted impeachment. The witness must be subject to cross-examination at the proceeding, although the actual oath or cross-examination is not absolutely necessary.[22]

In *United States v. Quinto*,[23] the Second Circuit stated that the proponent of evidence of a prior consistent statement must demonstrate three things: (1) the prior consistent statement sought to be admitted is consistent with the witness' in-court testimony; (2) "the prior consistent statement . . . is being 'offered to rebut an express or implied charge against [the witness] of recent fabrication or improper influence or motive;'"[24] and (3) the prior consistent statement "was made prior to the time that the supposed motive to falsify arose."[25] Federal Rule 801(d)(1)(B), however, is silent as to this third condition.

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21. FED. R. EVID. 801(d)(1)(B).

22. *See* WEISSENBERGER, *supra*, note 3, § 801.14, at 410 ("[T]he witness must be subject to cross-examination at the proceeding at which the prior consistent statement is offered regarding both his trial testimony and the earlier statement."); *see also* FED. R. EVID. 801(d)(1)(B) Report of Senate Committee on the Judiciary. ("The requirement that the statement be under oath also appears unnecessary. Notwithstanding the absence of an oath contemporaneous with the statement, the witness, when on the stand, qualifying or denying the prior statement, is under oath.").

23. 582 F.2d 224 (2d Cir. 1978).

24. *Id.* at 234 (citations omitted).

25. *Id.* (citations omitted).

In *Tome v. United States*,[26] the United States Supreme Court recently addressed the question of whether a prior consistent statement must be made before an alleged fabrication, influence or motive has arisen.[27] Resolving a split in the circuits, the Court held that a prior consistent statement may be admitted into evidence only if the statement was made before a motive to fabricate or influence originated.[28] In reaching its decision, the Court relied on the Advisory Committee's Note.[29] The Court stated that "it [was] difficult to imagine that the drafters, who noted the new substantive use of prior consistent statements, would have remained silent if they intended to modify the premotive requirement."[30]

New York's approach to the admissibility of prior consistent statements for substantive purposes closely parallels the federal premotive rule. In *People v. Davis*,[31] the New York Court of Appeals stated that "[i]t is now firmly settled in this State that an impeached witness cannot be rehabilitated by his antecedent consistent statements unless the cross-examiner has created the inference of, or directly characterized the testimony as, a recent fabrication."[32] The court explained that "prior consistent statements made at a time when there was no motive to falsify are

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26. 115 S. Ct. 696 (1995). In *Tome*, the government attempted to introduce prior consistent statements by defendant's daughter of alleged sexual abuse. *Id.* at 699-70. The defendant asserted that the statements were inadmissible under Federal Rule 801(d)(1), since they were made *after* her alleged improper motive to fabricate such statements arose. *Id.*

27. *Id.* at 699.

28. *Id.* at 700.

29. *Id.* at 702.

30. *Id.* at 703.

31. 44 N.Y.2d 269, 376 N.E.2d 901, 405 N.Y.S.2d 428 (1978). In *Davis*, a police report was offered by the prosecution to rehabilitate an undercover police officer's testimony with respect to events that transpired during a drug buy operation. *Id.* at 277, 376 N.E.2d at 905, 405 N.Y.S.2d at 432. The court held that the prior consistent statement was inadmissible under the hearsay rule because the report was not shown by the prosecution to have been made prior to the time that a motive to fabricate such information would have arisen. *Id.* at 278, 376 N.E.2d at 905, 405 N.Y.S.2d at 433.

32. *Id.* at 277, 376 N.E.2d at 905, 405 N.Y.S.2d at 432 (citations omitted).

admissible to repel the implication or charge."[33] Hence, New York requires a similar premotive limitation.

801(d)(1)(C): Identification

Under Federal Rule 801(d)(1)(C), a witness' out-of-court statements of identification are exempted from the hearsay definition. A witness' out-of-court statement of identification may be used as substantive evidence provided that the declarant testifies at the trial and is subject to cross-examination concerning the identification.[34] The rationale behind the rule is that identifications made prior to trial may be more trustworthy than identification made during trial.[35] The Advisory Committee's Note stated that the exemption hinges on the "unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions."[36]

In *United States v. Owens*,[37] the United States Supreme Court held that prior statements of identification may be introduced into evidence even if the witness claims a lack of memory concerning the prior identification. The Court explained that the rule was satisfied by the opportunity to cross-examine the witness about his memory loss.[38] The Court stated that the adoption of the Federal Rule was, in part, meant to deal with situations in which "memory loss . . . makes it impossible for the witness to provide

33. *Id.* (citations omitted).

34. *See* WEISSENBERGER, *supra* note 3, § 801.13, at 408.

35. *Id.* at 412.

36. FED. R. EVID. 801(d)(1)(C) advisory committee's note.

37. 484 U.S. 554 (1988). In *Owens*, a prior out-of-court identification by the declarant identified the defendant as his attacker, but due to severe memory loss caused by the attack, the declarant was unable to remember the events following the attack. *Id.* at 556. The Court, in applying the hearsay exemption of Federal Rule 801(d)(1)(C), found the admission of the identification to be proper. *Id.* at 564.

38. *Id.* at 563-64.

an in-court identification or testify about details of the events underlying an earlier identification."[39]

In the criminal context, New York's approach to the admissibility of prior out-of-court identifications is codified in C.P.L. section 60.25[40] and section 60.30.[41] In *People v. Nival*,[42]

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39. *Id.* at 563.

40. N.Y. CRIM. PROC. LAW § 60.25 (McKinney 1992). This provision states:

> 1. In any criminal proceeding in which the defendant's commission of an offense is in issue, testimony as provided in subdivision two may be given by a witness when:
> (a) Such witness testifies that:
> (i) He observed the person claimed by the people to be the defendant either at the time and place of the commission of the offense or upon some other occasion relevant to the case; and
> (ii) On a subsequent occasion he observed, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, a person whom he recognized as the same person whom he had observed on the first or incriminating occasion; and
> (iii) He is unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question; and
> (b) It is established that the defendant is in fact the person whom the witness observed and recognized on the second occasion. Such fact may be established by testimony of another person or persons to whom the witness promptly declared his recognition on such occasion.
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> 2. Under circumstances prescribed in subdivision one, such witness may testify at the criminal proceeding that the person whom he observed and recognized on the second occasion is the same person whom he observed on the first or incriminating occasion. Such testimony, together with the evidence that the defendant is in fact the person whom the witness observed and recognized on the second occasion, constitutes evidence in chief.

Id.

41. N.Y. CRIM. PROC. LAW § 60.30 (McKinney 1992). The provision states:

> In any criminal proceeding in which the defendant's commission of an offense is in issue, a witness who testifies that (a) he observed the person claimed by the people to be the defendant either at the time and

the New York Court of Appeals explained and distinguished the application of these statutes.[43] C.P.L. section 60.30 allows as "evidence in chief" or substantive evidence, testimony from a previous extra-judicial identification by a witness who has made an identification at trial.[44]

In contrast, C.P.L. section 60.25 provides for the admissibility of a prior identification as substantive evidence "where the witness, due to lapse of time or change in appearance of the defendant, cannot make an in-court identification, but has on a previous occasion identified the defendant."[45] In this limited situation, "any other witness may then establish that the defendant in court is the same person that the eyewitness identified on the previous occasion."[46] The New York Court of Appeals noted that while the prior identification made by the eyewitness to the third party is admitted for its substantive value, the testimony provided by the third party is actually not hearsay

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place of the commission of the offense or upon some other occasion relevant to the case, and (b) on the basis of present recollection, the defendant is the person in question and (c) on a subsequent occasion he observed the defendant, under circumstances consistent with such rights as an accused person may derive under the constitution of this state or of the United States, and then also recognized him as the same person whom he had observed on the first or incriminating occasion, may, in addition to making an identification of the defendant at the criminal proceeding on the basis of present recollection as the person whom he observed on the first or incriminating occasion, also describe his previous recognition of the defendant and testify that the person whom he observed on such second occasion is the same person whom he had observed on the first or incriminating occasion. Such testimony constitutes evidence in chief.

Id.

42. 33 N.Y.2d 391, 396-97, 308 N.E.2d 883, 886, 353 N.Y.S.2d 409, 413 (1974) (holding that a detective was allowed to testify that the victim had identified the defendant, since the victim could not identify the defendant at trial).

43. *Id.* at 395, 308 N.E.2d at 885, 353 N.Y.S.2d at 411-12.

44. *Id.*

45. *Id.*

46. *Id.*

because such third party testimony is offered to prove only that the prior identification was made.[47]

It is apparent that the New York rule substantially comports with the federal rule on the admissibility of prior out-of-court identifications by witnesses testifying at trial. While Federal Rule 801(d)(1)(C) does not expressly provide for third party testimony, both rules support the admissibility of prior identifications.

47. *Id.* at 396 n.4, 308 N.E.2d at 885 n.4, 353 N.Y.S.2d at 412 n.4.