COMMENTS FROM THE AUGUST 2024 PUBLICATION
OF PROPOSED AMENDMENTS TO FEDERAL RULES & FORMS

To view the proposed amendments for the **evidence rules** that were published for this comment period, please visit the Forms & Rules page of the judiciary's website at https://www.uscourts.gov/ to download the 2024 preliminary draft of proposed amendments.

Comments were submitted through the regulations.gov portal under the following docket number: https://www.regulations.gov/document/USC-RULES-EV-2024-0003-0001.

The comment period started August 15, 2024 and closed February 17, 2025.

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Comment from Ravnitzky, Michael

Posted by the **United States Courts** on Nov 7, 2024

Docket (/docket/USC-RULES-EV-2024-0003)
/ Document (USC-RULES-EV-2024-0003-0001) (/document/USC-RULES-EV-2024-0003-0001) / Comment

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Attachments 1

Rules of Evidence

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Comment ID

USC-RULES-EV-2024-0003-0003

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m37-eefn-rtqc

Comment Details **Submitter Info**

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Comments on Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Evidence

Amendments to Fed. R. Appellate Procedure 29 Regarding Amicus Curiae Briefs

I am writing to express my strong support for the proposed enhanced disclosure requirements for amicus curiae briefs in Federal Rule of Appellate Procedure 29.

Support for Enhanced Disclosure Requirements

I strongly support the proposed changes to enhance disclosure requirements for amicus curiae briefs under Federal Rule of Appellate Procedure 29. Transparency is fundamental to maintaining trust in the judicial process. Sen. Whitehouse and Rep. Johnson (in their comments dated September 12, 2024) have articulated the importance of revealing connections among amici and major donors, arguing that this transparency will prevent undue influence and enhance the integrity of the judicial system. They provide historical context, referencing the efforts to influence courts through coordinated campaigns, and emphasize the necessity of shedding light on these practices.

Disclosure is vital because it ensures that all parties, the courts, and the public are aware of the true interests behind amicus briefs. Secretly funded amicus briefs can undermine the integrity of the judicial process by allowing hidden influences to shape legal outcomes without accountability. Historically, there have been instances where undisclosed funding and coordination among amici have led to biased representations and decisions that favor powerful interests over justice.

Assertions that increased disclosure will lead to harassment are largely a strawman argument. The idea that transparency will result in widespread harassment is disingenuous and distracts from the true purpose of disclosure, which is to hinder corruption, puppeteering, and undue influence by big money in our legal system. Our country has long recognized the value of financial disclosure across various sectors. Campaign contributions and expenditures are disclosed to prevent election corruption; public servants disclose their financial interests to ensure ethical conduct; judges disclose their financial holdings to avoid

conflicts of interest. These practices safeguard our democracy and legal system by ensuring that decisions are made based on merit, not hidden agendas.

In line with these established norms, the proposed disclosure requirements for amicus briefs will enhance transparency and accountability. Requiring amici to disclose their financial backers ensures that the court and the public can evaluate the impartiality of the arguments presented. Additionally, requiring amici to disclose connections among themselves and major donors will further strengthen these safeguards, preventing coordinated efforts to unduly influence court decisions.

While Sen. McConnell, Cornyn, and Thune have raised strong objections regarding potential First Amendment infringements and harassment in their comments dated September 10, 2024, as did the Washington Legal Foundation's August 19, 2024 comments, these concerns are exaggerated and fail to recognize the well-documented extensive and covert activities of wealthy interests that have striven to shape legal outcomes from behind the scenes. Of course, it's important to acknowledge the legitimate First Amendment interests at stake. However, the proposed disclosure requirements are carefully crafted to balance these interests with the need for transparency, and without imposing undue burdens or risks on amici.

Connections Among Amici:

I support the disclosure of connections among amici, particularly focusing on major donors funding multiple amici. I also support the disclosure of connections between amici and nonparties. This will provide a clearer picture of the financial interests behind coordinated amicus campaigns. The $100 threshold helps reduce the burden on smaller organizations, or organizations receiving smaller donations.

Relationships With Major Donors:

I support the required disclosure of major donors who contribute a significant portion of an amicus's funding is essential for transparency. This aligns with existing practices in campaign finance and public servant disclosures.

Preventing Identity Laundering:

Preventing intermediary groups from hiding the true donors is crucial for maintaining transparency. This recommendation aims to ensure that the financial interests behind

amicus briefs are fully transparent. While this could add complexity to the reporting process, clear guidelines and support for amici in conducting due diligence can help mitigate the burden.

Support for Retention of the Consent Requirement for Filing Amicus Briefs

I also support the decision to retain the consent requirement for filing amicus briefs. The current requirement for obtaining consent ensures that only those briefs with substantial contributions are filed, thereby maintaining the efficiency and effectiveness of the judicial process. This mechanism allows parties to the case to filter out briefs that do not add meaningful insights or perspectives, helping to prevent the submission of frivolous or redundant briefs. This quality control mechanism is crucial for preserving the integrity of the amicus process.

From a policy perspective, maintaining the consent requirement also supports the principle of party autonomy. Parties should have the right to "own" their own cases. Allowing parties to the case to have a say in which amicus briefs are accepted helps ensure that the amicus process is aligned with the interests and needs of the actual litigants. This is particularly important in complex cases where the parties have a deep understanding of the issues at hand and can better assess which submissions would be most valuable.

Conclusion

In conclusion, the proposed changes to the amicus curiae rules represent a significant step towards enhancing transparency, efficiency, and fairness in the judicial process. Amicus briefs play a vital role in our appellate system, and these proposed changes will help ensure that they continue to serve their purpose effectively.

Changes to Appellate Form 4

I support the proposed changes to Appellate Form 4 related to in forma pauperis (IFP) applications. The revisions to this form are a positive step towards simplifying and streamlining the process for waiving fees and costs in appellate cases.

The updated form reduces the burden on applicants by focusing on the most relevant financial information, making it easier for individuals with limited financial means to access the appellate system. By ensuring that the form is clear and straightforward, the proposed changes will help applicants complete their submissions accurately and efficiently.

I appreciate the effort to make this important aspect of the legal process more accessible and user-friendly. The changes to Appellate Form 4 are a significant improvement and will contribute to ensuring fairness and equity in our judicial system.

Amendment to Fed. R. Evidence 801

The proposed change involves striking out the words "and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition," thereby broadening the admissibility of prior inconsistent statements made by a testifying witness.

The amendment has the potential to significantly impact the reliability and fairness of trial outcomes by allowing a wider array of prior inconsistent statements to be considered. While the Committee argues that the dangers of hearsay are mitigated because the declarant is available for cross-examination, I believe that an additional safeguard is warranted to prevent potential misuse.

It is essential that prior inconsistent statements be considered in their entirety and in the context in which they were made. This approach would help prevent statements from being taken out of context and used to unfairly prejudice the witness. It may be beneficial for the Committee to further consider the risks associated with taking statements out of context, as this could potentially undermine the fairness of the process. As a result, I recommend the following addition to the proposed rule:

"(1) The declarant testifies and is subject to cross-examination about a prior statement, and the statement: (A) is inconsistent with the declarant's testimony; is considered in its entirety, and is considered in the context in which it was made; (...)"

The proposed amendment to Evidence Rule 801(d)(1)(A) aims to streamline the use of prior inconsistent statements and eliminate confusing jury instructions. However, to ensure the amendment enhances the fairness and reliability of the judicial process, it is crucial to incorporate safeguards that require considering prior inconsistent statements in their entirety and context. Doing so will help prevent potential misuse and protect the rights of witnesses.

===

Thank you for considering my comments on the proposed rule changes.

Michael Ravnitzky
Silver Spring, Maryland

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Comment from Federal Magistrate Judges Association

Posted by the **United States Courts** on Dec 2, 2024

Docket (/docket/USC-RULES-EV-2024-0003)
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See attached comments from the Federal Magistrate Judges Association

Attachments 1

FMJA Comment 801d1A (002)

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Comment ID

USC-RULES-EV-2024-0003-0004

Tracking Number

m3q-8q6q-7sdc

Comment Details **Submitter Info**

FEDERAL MAGISTRATE JUDGES ASSOCIATION

COMMENTS ON THE PROPOSED AMENDMENT TO FEDERAL RULE OF EVIDENCE 801 SET FORTH IN THE PRELIMINARY DRAFT DATED AUGUST 2024

The Administrative Office of the United States Courts published an invitation for comment on proposed rule changes. The proposed change to Rule 801(d)(1) is of interest to the Federal Magistrate Judges Association ("FMJA") because it addresses a rule that comes up frequently in matters before Magistrate Judges. Accordingly, the FMJA Rules Committee has considered this proposed rule change and, with the full support of the FMJA board, provides the following comments for consideration.

PROPOSED REVISION OF FEDERAL RULE OF EVIDENCE 801(d)(1)(A) (HEARSAY)

The proposed amendment to Rule 801(d)(1)(A) eliminates the requirement that a testifying witness's prior inconsistent statement be made under oath at a formal proceeding. Under the current rule, if a prior inconsistent statement was not made under oath, it may be admitted for impeachment purposes, but not as substantive evidence. Under the proposed revision, all prior inconsistent statements may be admitted as substantive evidence, subject to Rule 403.

FMJA Rules Committee members agree with the proposed change. First, the change would make Rule 801(d)(1)(A) consistent with Rule 801(d)(1)(B), which was similarly amended in 2014. Second, this change will helpfully eliminate the need for what is often a confusing limiting jury instruction related to the prior statement's use in jury deliberations.

The FMJA Rules Committee members also note that, with the advent and advancement of artificial intelligence, courts must be vigilant as to the authenticity and veracity of prior statements and their origins, and courts should be cognizant of such issues in evaluating a witness's prior statement at trial. However, because the risks associated with artificial intelligence impact the application of many rules, the FMJA Rules Committee does not believe any modification of the proposed rule is required to address this risk.

THE FMJA

The Federal Magistrate Judges Association is a voluntary association comprised of active, full-time, part-time, recalled, and retired federal magistrate judges. These comments were prepared by the FMJA Rules Committee, which consists of twenty-six active magistrate judges from districts of all sizes across the country. The comments were approved by the FMJA Board of Directors.

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Comment from American College of Trial Lawyers

Posted by the **United States Courts** on Jan 28, 2025

Docket (/docket/USC-RULES-EV-2024-0003)
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Attachments 1

2025.01.24 Comment by the American College of Trial Lawyers regarding Proposed Amendment to FRE 801(d)(1)

Download (https://downloads.regulations.gov/USC-RULES-EV-2024-0003-0007/attachment_1.pdf)

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Comment ID

USC-RULES-EV-2024-0003-0007

Tracking Number

m6a-xevy-v5ud

Comment Details **Submitter Info**

AMERICAN COLLEGE OF TRIAL LAWYERS

Henry D. Fellows, Jr.
Federal Rules of Evidence Committee Chair
hfellows@fellab.com

January 24, 2025

By Federal Express

The Honorable Patrick J. Schiltz, Chair of the
Advisory Committee on Evidence Rules
U.S. Judicial Conference Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
1 Columbus Circle, NE
Washington, D.C. 20002

Re: Federal Rules of Evidence Committee of the American College of Trial Lawyers (the "College") Comment on Proposed Amendment to Rule 801(d)(1) of the Federal Rules of Evidence

Dear Judge Schiltz:

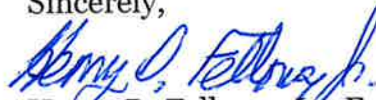
This letter states the comment of the Federal Rules of Evidence Committee of the American College of Trial Lawyers (the "College") pertaining to the proposed Amendment to Federal Rule of Evidence 801(d)(1)(A). The College is dedicated to maintaining and improving the standards of trial practice, the administration of justice, and the ethics and professionalism of the legal profession. The Committee is charged by the College with monitoring the operation of the Federal Rules of Evidence generally, to determine the adequacy of the operation of the Rules in federal cases, and to evaluate proposed changes to the Rules. We submit these comments with the hope that they may prove useful to the Advisory Committee on Evidence Rules in the rulemaking process.

Our Committee has reviewed and assessed your Memorandum dated May 15, 2024, entitled Report of the Advisory Committee on Evidence Rules. In consultation with the leadership of the College, we are authorized to state on behalf of the College that for the reasons stated in your Memorandum, the College is in favor of the proposed Amendment to Federal Rule of Evidence ("FRE") 801(d)(1)(A).

As Your Honor notes in your Memorandum, the proposed Amendment will revise FRE 801(d)(1)(A) so that it is consistent with FRE 801(d)(1)(B), which was similarly amended in 2014. Also, the College agrees that it will be beneficial to synthesize the substantive and credibility uses of prior inconsistent statements to dispense with the need for confusing limiting jury instructions regarding prior statements of a testifying witness.

The College is pleased to have this opportunity to comment on the proposed Amendment to FRE 801(d)(1)(A) and appreciates the efforts undertaken by the Advisory Committee on Evidence Rules to amend the Rule.

Sincerely,



Henry D. Fellows, Jr., Esq.
Chair of the Federal Rules of Evidence
Committee of the American College of Trial
Lawyers

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Comment from Graham, Michael

Posted by the **United States Courts** on Feb 10, 2025

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m6w-mexh-cvn4

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hi

First, really appreciate that you took time to reply!!!

So, after looking at the 1974 congressional action on 801d1A, the article i wrote in 1977, the 1984 Illinois statute i drafted with a local judge, and recognizing that when we were charged by the Illinois cSupreme Court to craft an evidence rule set we were told not to conflict with existing statutes, i asked myself what is different today than in 1975 and 1984 that supports simply having all prior inconsistent statements admitted as substantive evidence.

Think answer is clear.
Oral prior unrecorded statements offered by the prosecution before the tech revolution was extremely common. .Will not burden you with long discussion of the fall of the process of police in UK making up oral statements called verballing .Now with cell phones, body cams, recorded witness interviews etc. , the incidents where a statement to be offered has not been memorialized are few. Moreover any trier of fact will certainly be more skeptical in assessing trustworthiness than in 1975. If a witness makes a statement that is not simultaneously recorded, just have the statement repeated with recording ASAP tp preserve for whatever purpose it may turn out to be relevant.

So today, particularly with the set of disputes in federal court, I can see that having all prior inconsistent staements substantive evidence makes sense. Also not carving out the small impact uninverse of oral nonrecorded statements permits a resolution on the Rule 607 impeachment of own witness with nonsubstantive statement issue--a major step forward.

Thanks again for getting back to me.
Stay safe!!!!

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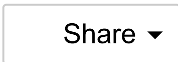

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Comment from Chris Corzo Injury Attorneys

Posted by the **United States Courts** on Feb 13, 2025

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2025.02.12 Final CCIA Letter Comments on Proposed Changes to FRE 801

Download (https://downloads.regulations.gov/USC-RULES-EV-2024-0003-0009/attachment_1.pdf)

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USC-RULES-EV-2024-0003-0009

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m72-dhai-06mo

Comment Details **Submitter Info**

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February 11, 2025

The Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544 (test)

Re: Comment on Proposed Amendment to Federal Rule of Evidence 801(d)(1)(A)

Dear Members of the Committee:

We are writing to provide comments on the proposed amendment to Federal Rule of Evidence 801(d)(1)(A), which addresses the admissibility of prior statements of a witness who is testifying at trial. Specifically, the rule change seeks to make all prior inconsistent statements not only admissible for impeachment but also admissible as substantive evidence. We appreciate the Committee's ongoing efforts to review and refine the Federal Rules of Evidence to ensure that they continue to serve the interests of justice, and we would like to offer feedback regarding the potential implications of this proposed change.

As understood, the amendment seeks to clarify and perhaps expand the scope of Rule 801(d)(1)(A) by providing further guidance on the circumstances under which prior inconsistent statements by a testifying witness may be admitted as non-hearsay. We believe this is an important and timely discussion in light of evolving trial practices, especially with the advent and lightning-paced development of artificial intelligence (AI).

A rigorous law school education teaches the difference between whether a prior inconsistent statement is being used to call a witness's credibility into question or is being offered to prove the truth of the matter asserted. Most lawyers therefore understand the difference. However, even the clearest instruction from the trial judge will not allow most jurors in deliberation to make a legal distinction between the two.

While the intent behind this amendment is laudable, we have concerns regarding any loosening of the hearsay rules. Specifically, the proposed changes could potentially lead to an increased volume of prior inconsistent statements considered as positive evidence, which may complicate the trial process and burden the jury with additional, potentially prejudicial information.

It is not hard to imagine a world in the near future where AI brings to every computer the ability, with a click of a button, to generate deep-fake audio voices and videos of anyone based on data gleaned from accessible sources like social media posts.

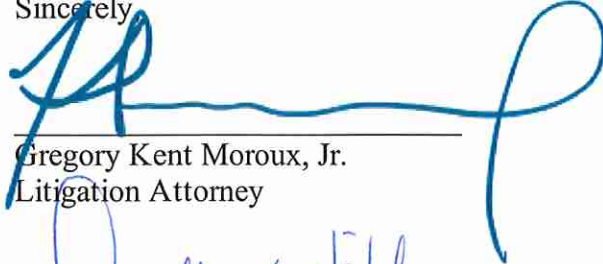
Presently, we see AI deepfake videos of celebrities dancing, or we hear cautionary tales of the elderly receiving deepfake voice calls from relatives requesting wired money. However, we will soon encounter sophisticated AI generated videos and audio purporting to be prior inconsistent statements, and courts will have to oversee litigants and witnesses who dispute ever making the statements.

We urge the Committee to consider not eroding safeguards regarding the relationship between the witness's prior statements and the witness's ability to provide live testimony in a current case. Ensuring that such statements are not only relevant but also not unduly prejudicial will be critical for maintaining fairness in trials. We are concerned that any loosening of Rule 801(d)(1)(A) will make it easier for AI deepfakes purporting to be prior inconsistent statements to unjustly become positive evidence at trial. At least presently, the safeguard built into Rule 801(d)(1)(A), allowing as substantive evidence prior inconsistent statements made under oath at a trial, hearing, or other proceeding or in a deposition, carries the certification that a court reporter heard and documented the prior inconsistent statement.

I respectfully suggest that further attention be given to the potential effects this amendment could have on the judicial process, especially regarding how courts might handle objections to such statements and the criteria for determining the weight of prior inconsistent statements in the context of rapidly-developing AI.

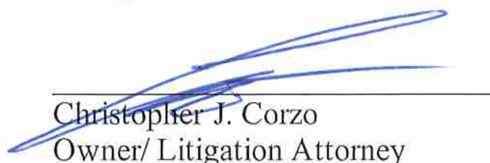
Thank you for considering our comments. We are confident that the Committee will carefully weigh the implications of this amendment and continue to uphold the integrity of the Federal Rules of Evidence. Should you need any additional information or clarification, please do not hesitate to contact us.

Sincerely,



Gregory Kent Moroux, Jr.
Litigation Attorney

Jonathan E. Mitchell
Managing/Litigation Attorney



Christopher J. Corzo
Owner/ Litigation Attorney

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Comment from Miller, Colin

Posted by the **United States Courts** on Feb 18, 2025

Comment

Dear Judicial Conference Committee on Rules of Practice and Procedure,

I am a law professor, the Blog Editor of EvidenceProf Blog, and the co-host of the Undisclosed Podcast, which covers cases of wrongful conviction. In connection with my podcast, I worked on the case of Jamar Huggins. Mr. Huggins was charged in connection with a 2014 home invasion in South Carolina. Essentially the only evidence against him was a police statement by an alleged accomplice in the crime naming his as one of the perpetrators. When this alleged accomplice took the stand at trial, she testified that Mr. Huggins was not one of the perpetrators of the home invasion. The prosecution then admitted her police statement as a prior inconsistent statement.

The defense moved for a directed verdict, but the judge denied the motion. Currently, South Carolina is one of only a few states that have a version of Rule 801(d)(1)(A) that provides a hearsay exclusion for statements not given subject to the penalty of perjury. As such, the alleged accomplice's statement was substantive evidence of Mr. Huggins's guilt. At the end of Mr. Huggins's trial, the jury found him guilty. Despite the alleged accomplice subsequently signing an affidavit naming someone else as the other perpetrator of the home invasion, Mr. Huggins has not yet been able to secure his release.

As a result of the Jamar Huggins case, I write in strong opposition to the proposed amendment to Federal Rule of Evidence 801(d)(1)(A). This amendment would make it easier for prosecutors to secure wrongful convictions against defendants like Jamar Huggins. If a witness tells the police that the defendant committed a crime, that accusation would be admissible against the defendant as substantive evidence of their guilt when that witness is unwilling to stand by their statement at trial. As in the Jamar Huggins case, that prior accusation alone could be enough to secure a conviction, even with the witness testifying to the defendant's innocence at trial. The possibility of such a wrongful conviction outweighs any utility that could be derived from the rule.

Sincerely,

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Colin Miller

Comment ID

USC-RULES-EV-2024-0003-0010

Tracking Number

m75-09ms-rf8u

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Feb 14, 2025

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Comment from Garcia, Marisol

Posted by the **United States Courts** on Feb 18, 2025

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Comment

Introduction

I am writing to provide my comments on the proposed amendment to Rule 801(d)(1)(A) of the Federal Rules of Evidence. As someone with a keen interest in the legal system and the rules of evidence, I believe it is essential to contribute to the discussion on this significant amendment. The proposed change seeks to expand the admissibility of prior inconsistent statements, which has the potential to impact the fairness and efficiency of trials. My comments aim to support this amendment while highlighting some considerations for its implementation.

Background

The current Rule 801(d)(1)(A) provides a limited exception to the hearsay rule for prior inconsistent statements of a testifying witness, allowing them to be used as substantive evidence only if made under oath at a formal proceeding. The proposed amendment would expand this exception to include all prior inconsistent statements admissible for impeachment and also admissible as substantive evidence. This change is in line with the 2014 amendment to Rule 801(d)(1)(B), which allows prior consistent statements to be used substantively.

Analysis

1. Rationale for the Amendment:

The primary reason for expanding the admissibility of prior inconsistent statements is that the declarant is present in court and can be cross-examined about the statement. This mitigates the traditional concerns associated with hearsay, as the trier of fact can assess the declarant's credibility and demeanor.

The amendment seeks to eliminate the need for confusing jury instructions that differentiate between substantive and impeachment uses of prior inconsistent statements. Simplifying these instructions can help jurors better understand and evaluate the evidence presented.

2. Consistence with Other Rules:

The amendment aligns Rule 801(d)(1)(A) with Rule 801(d)(1)(B), which already allows prior consistent statements to be used substantively. This consistency promotes a more streamlined and logical application of the hearsay exceptions.

3. Addressing Premises of the Current Rule:

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Reliability: While prior statements made under oath may be more reliable, the opportunity for cross-examination at trial sufficiently addresses concerns about reliability.

Proof Difficulties: There is no significant reason to believe that unrecorded prior inconsistent statements are more difficult to prove than other unrecorded facts. Rule 403 can account for any potential difficulties.

Cross-examination: Effective cross-examination can still occur even if the witness denies making the prior statement. The denial itself can be a point of cross-examination.

Conclusion

In conclusion, the proposed amendment to Rule 801(d)(1)(A) represents a positive step towards improving the fairness and efficiency of trials by expanding the admissibility of prior inconsistent statements as substantive evidence. The amendment addresses the concerns associated with hearsay and aligns with other rules of evidence, making it a logical and consistent change. I support adopting this amendment and believe it will contribute to a more equitable judicial process.

Thank you for considering my comments.

Sincerely,

Marisol Garcia

Vermont Law School Juris Doctorate/Master of Public Policy Candidate 2026

Comment ID

USC-RULES-EV-2024-0003-0011

Tracking Number

m76-gytc-s2pu

Comment Details **Submitter Info**

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Feb 15, 2025

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Comment from National Association of Criminal Defense Lawyers

Posted by the **United States Courts** on Feb 18, 2025

Docket (/docket/USC-RULES-EV-2024-0003)
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Comment

Comments of NACDL are attached.

Attachments 1

NACDL comments FRE 801 021525

Download (https://downloads.regulations.gov/USC-RULES-EV-2024-0003-0012/attachment_1.pdf)

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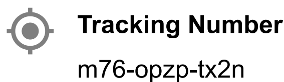

Tracking Number

m76-opzp-tx2n

Comment Details **Submitter Info**

National Association of Criminal Defense Lawyers
12th Floor, 1660 L Street, NW
Washington, DC 20036

February 15, 2025
Submitted online

H. Thomas Byron III, Esq., Secretary
Advisory Committee on Rules of Evidence
Committee on Rules of Practice & Procedure
Judicial Conference of the United States

AMENDMENTS TO EVIDENCE RULES PROPOSED FOR COMMENT, Aug. 2024

To the Committee and Staff:

The National Association of Criminal Defense Lawyers (NACDL) is pleased to submit our comments on the proposed amendment to Rule 801 of the Federal Rules of Evidence. NACDL enthusiastically supports this proposal.

Founded in 1958, NACDL is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. Our association has more than 10,000 direct members. With NACDL's 90 state and local affiliates spanning nearly every state, we represent a combined membership of some 40,000 private attorneys, public defenders, and interested academics.

EVIDENCE RULE 801(d) – STATEMENTS THAT ARE NOT HEARSAY

NACDL strongly supports the proposed amendment to FRE 801(d)(1)(A). The committee proposal would remove the requirement that a prior inconsistent statement have been given under oath before it may be admitted as substantive evidence, whenever the declarant testifies and is subject to cross-examination about the statement. We also agree with the reasoning underlying the new language. The dangers presented by hearsay are "largely nonexistent" when the declarant of the out-of-court statement is present and can be examined about its contents. NACDL agrees with the Committee's analysis that the three premises for the present rule disallowing unsworn prior inconsistent statements as substantive evidence are not persuasive.

As the Committee points out, the first premise – *viz.,* that a prior statement made under oath is more reliable than one that is not – is not sufficient to justify disparate treatment under Rule 801(d)(1). The Committee notes that unsworn statements of identification come in as substantive evidence under Rule 801(d)(1)(C). It is also true that unsworn prior consistent statements come in as substantive evidence under 801(d)(1)(B) when offered to rebut an attack on a witness's credibility. NACDL is unaware of any support for the proposition that unsworn prior *inconsistent* statements are any less reliable than unsworn prior *consistent* statements, which have long been admitted as substantive evidence when offered for rehabilitation of the witness.

The second premise underlying the current, more restrictive rule is that statements not made at formal proceedings can be difficult to prove. That rationale provides scant support for the rule as currently framed. First, not all unsworn prior inconsistent statements are unrecorded. Many

of them are contained in police reports or other writings. *Cf.* Fed.R.Evid. 803(8)(A)(iii) (admissibility of police reports when offered by the defendant in a criminal case). They are frequently contained in written or recorded statements taken from witnesses. It is not the lack of recordation that has been used to justify the current rule; it is the lack of an oath. But even when the prior inconsistent statement is not recorded anywhere, it is no harder to prove its content than that of any other unrecorded fact. Yet the lack of recordation is not a basis to exclude other types of relevant evidence. There is no principled basis on which to allow some unrecorded statements to come in as substantive evidence, while barring others.

The third premise simply does not make sense. It is true that, "if a witness denies making the prior statement, then cross-examination about the statement might be difficult." (Committee Report, at 88 of 109.) But the current rule does not prohibit cross-examination about a prior inconsistent statement. It merely denies the opposing counsel the right to argue the substantive content of the statement – even in situations where the witness admits making it. Neither the current rule nor the proposed amendment has any effect on the difficulty of a given cross-examination. In any event, the difficulty of cross-examination is not otherwise a reason for the exclusion of evidence.

There is one more reason to support amending Rule 801(d)(1) that is not discussed in the Committee Report. That is the fact that the current rule, as applied in criminal cases, has long favored the government over the defense. Although the rule is neutral on its face and applies equally to both sides, the fact is that the overwhelming majority of witnesses at a criminal trial testify for the prosecution. That means that impeachment with a prior *inconsistent* statement is usually done by the defense, while rehabilitation of the witness with a prior *consistent* statement is usually attempted by the government. Because of the Rule's disparate treatment of the two types of statements, the prosecution is able to argue the substantive truth of the prior consistent statements that it relies on, while the defense can argue only that the prior inconsistent statement reflects negatively on the witness's credibility. As the Committee notes, this leads to complicated instructions that are confusing to many jurors. And when the judge tells them that they may consider the substantive truth of prior consistent statements, but not of prior inconsistent statements, some jurors will undoubtedly conclude that the court is saying that the former are more reliable than the latter. NACDL respectfully submits that it is long past time to remove this unfair disparity from the Rule and to admit prior statements used for impeachment and for rehabilitation on an equal footing.

For these reasons, NACDL supports the Advisory Committee's proposal to amend Fed.R.Evid. 801(d), as published.

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NACDL thanks the Committee for its valuable work and for this opportunity to contribute our thoughts. We look forward to continuing our longstanding relationship with the advisory committees as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
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