

2016

Prior Consistent Statements: The Dangers of Misinterpreting Recently Amended Federal Rule of Evidence 801(d)(1)(B)

Laird C. Kirkpatrick

The George Washington University Law School

Christopher B. Mueller

University of Colorado Law School

Follow this and additional works at: <http://scholar.law.colorado.edu/articles>

 Part of the [Common Law Commons](#), [Courts Commons](#), [Evidence Commons](#), and the [Supreme Court of the United States Commons](#)

Citation Information

Laird C. Kirkpatrick & Christopher B. Mueller, Prior Consistent Statements: The Dangers of Misinterpreting Recently Amended Federal Rule of Evidence 801(d)(1)(B), 84 Geo. Wash. L. Rev. Arguendo 193 (2016), <http://www.gwlr.org/wp-content/uploads/2017/03/84-Geo.-Wash.-L.-Rev.-Arguendo-193.pdf>, available at <http://scholar.law.colorado.edu/articles/514/>.

Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact erik.beck@colorado.edu.

Prior Consistent Statements: The Dangers of Misinterpreting Recently Amended Federal Rule of Evidence 801(d)(1)(B)

Laird C. Kirkpatrick* and Christopher B. Mueller**

ABSTRACT

A recent amendment to Federal Rule of Evidence 801(d)(1)(B) expands the situations in which prior consistent statements by testifying witnesses can be used as substantive evidence, and not merely as rehabilitative evidence. In this piece, the Authors argue that the revised rule may mislead judges and lawyers to conclude that prior consistent statements are always usable as substantive evidence when offered to rehabilitate a witness. Nothing could be further from the truth. The intent, although hard to discern on the face of the revised rule, is only to allow substantive use of consistent statements that are otherwise admissible to rehabilitate the testimony of a witness whose credibility has been attacked in a way that can be properly answered by proving prior consistencies. Thus the rule allows substantive use of consistent statements when they are relevant to repair attacks charging the witness with having forgotten what actually happened or charging the witness with making prior inconsistent statements in those limited cases in which proving consistent statements could refute such an attack. Perhaps most importantly, the revised rule does not do away with the pre-motive requirement adopted by the Supreme Court in the Tome case more than twenty years ago.

Federal Rule of Evidence (“FRE”) 801(d)(1)(B) has long provided that prior statements consistent with the testimony of a witness who is subject to cross-examination may be introduced and used as substantive evidence when 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.”¹ At the end of 2014, the rule was amended to also allow prior consistent statements to be introduced as substantive evidence when offered “to rehabilitate the declarant’s credibility as a witness when attacked on another ground.”²

When the Federal Judicial Center circulated the proposed amendment

* Louis Harkey Mayo Research Professor of Law, The George Washington University Law School.

** Henry S. Lindsley Professor of Procedure and Advocacy, University of Colorado School of Law.

¹ FED. R. EVID. 801(d)(1)(B)(i).

² FED. R. EVID. 801(d)(1)(B)(ii).

to federal district judges for comment, they overwhelmingly predicted that the amendment would lead to a significant expansion in attempts to introduce prior consistent statements at trial, even though this was not the purpose of the amendment.³ To respond to this concern, the Advisory Committee added a Note to the amended rule, specifically stating:

This amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. . . . The amendment *does not make any consistent statement admissible that was not admissible previously*—the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.⁴

Nonetheless, a significant danger remains that the amended rule will be misunderstood by lawyers and judges and applied in an overly-expansive fashion. This risk is not only because Advisory Committee Notes are sometimes overlooked or ignored in the heat of trial,⁵ but also because the amended rule *does not itself specify* when prior consistent statements may be used to rehabilitate witnesses. Instead, it adopts federal common law on the issue of when prior consistent statements are admissible for rehabilitation and merely provides that *if* a prior consistent statement is admissible for rehabilitation, it is also admissible for its truth. Thus, to apply the amendment properly, attorneys and courts must research and consider law *outside* FRE 801(d)(1)(B).

This point would have been made clearer if the drafters had added just three words to the amended language, so that it read “*when otherwise admissible* to rehabilitate the declarant’s credibility as a witness when attacked on another ground.”⁶ As a leading academic commentator has noted, the lack of such a constraint means that lawyers and judges may “be lulled into a false sense of security that the rehabilitation requirement is

³ See TIM REAGAN & MARGARET S. WILLIAMS, FED. JUDICIAL CTR., SURVEY OF DISTRICT COURT JUDGES ON A PROPOSED AMENDMENT TO FEDERAL RULE OF EVIDENCE 801(D)(1)(B) CONCERNING PRIOR CONSISTENT STATEMENTS 9 (Mar. 2, 2012), [http://www.fjc.gov/public/pdf.nsf/lookup/rule801d1b.pdf/\\$file/rule801d1b.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/rule801d1b.pdf/$file/rule801d1b.pdf).

⁴ FED. R. EVID. 801 advisory committee’s note to 2014 amendment (emphasis added).

⁵ See generally, e.g., *Hill v. U.S. Postal Serv.*, 961 F.2d 153, 156 (11th Cir. 1992) (citing *Hunt v. Dep’t of Air Force*, 787 F. Supp. 197 (M.D. Fla. 1992)) (“The court in *Hunt* overlook[ed] . . . the Advisory Committee Notes.”); *Vergis v. Grand Victoria Casino & Resort*, 199 F.R.D. 216, 217 (S.D. Ohio 2000) (“[T]he Sixth Circuit appears to have completely ignored [a] particular Advisory Committee Note.”).

⁶ FED. R. EVID. 801(d)(1)(B)(ii).

automatically satisfied for any prior consistent statement falling within the amended Rule” and misinterpret the rule “to bless and automatically admit any prior consistent statement offered to repair an impeaching attack.”⁷

Even those lawyers and judges who recognize that proper application of FRE 801(d)(1)(B) requires resort to law outside the rule itself face a challenge, because there is no other provision in the Federal Rules of Evidence addressing rehabilitation by use of prior consistent statements. Instead, they must look to the federal common law.⁸ The Advisory Committee’s Note says the amended rule is subject to the “traditional and well-accepted limits” on admitting prior consistent statements for rehabilitation, but it does not detail what they are.⁹

Perhaps the most fundamental common law limitation on the use of prior consistent statements is that they cannot be introduced to rehabilitate a witness after *every* kind of impeaching attack, despite the language in the rule about using prior consistent statements to rehabilitate after the witness has been attacked “on another ground.”¹⁰ For example, impeachment by evidence of prior convictions, prior bad acts, bad character for truthfulness, and failure of perception (such as bad eyesight) do not ordinarily provide a basis to rehabilitate a witness by introducing a prior consistent statement.¹¹

The only two types of attack mentioned in the Advisory Committee Note as potentially being covered by the amended language are (1) a charge of “faulty memory” and (2) evidence of “an inconsistency in the witness’s testimony.”¹² Certainly an attack on a witness’s memory should trigger the right to rehabilitate the witness by evidence of a consistent statement made at or near the time of the event about which she is testifying. But even here caution is in order. A charge of faulty memory

⁷ Liesa Richter, *Seeking Consistency for Prior Consistent Statements*, 46 CONN. L. REV. 937, 972–73 (2014).

⁸ See 6 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801:12, at 242–44 (7th ed. 2012) (explaining that situations exist in which prior consistent statements “may be admitted without reference to Rule 801(d)(1)(B)”; 4 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 801.03[4][j] (10th ed. 2011) (citing cases that demonstrate that FRE 801(d)(1)(B) is not the only authority under which to admit prior consistent statement).

⁹ FED. R. EVID. 801 advisory committee’s note to 2014 amendment.

¹⁰ See generally 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8.39, at 340–41 (4th ed. 2013) (explaining that prior consistent statements can only be introduced to rehabilitate a witness after certain attacks and quoting FRE 801(d)(1)(B)(ii)).

¹¹ See 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE §§ 8.38–.39 (4th ed. Supp. 2016).

¹² FED. R. EVID. 801 advisory committee’s note to 2014 amendment.

does not open the door to all prior consistent statements.¹³ For example, if a witness is challenged about her ability to remember the details of an accident she observed four years ago, it does not rehabilitate her to bring out a consistent statement she made at a deposition two weeks prior to her current testimony.

Similarly, it has never been the rule that impeachment by prior inconsistent statement automatically opens the door to evidence of prior consistent statements.¹⁴ Proving prior consistent statements does not remove the sting of vacillation raised by the inconsistent statements because the inconstancy remains.¹⁵ Only in certain limited circumstances does a prior consistent statement rehabilitate a witness who has been impeached with a prior inconsistent statement. For example, a prior consistent statement may rehabilitate a witness by clarifying or giving context to the alleged prior inconsistent statement or by supporting a denial that the prior inconsistent statement was ever made.¹⁶ And, of course, sometimes impeachment by a prior inconsistent statement will suggest that the direct testimony of the witness is a recent fabrication or a product of improper influence or motive, which would trigger the opportunity to rehabilitate the witness with a prior consistent statement under FRE 801(d)(1)(B)(i).¹⁷

If federal judges are correct that adoption of this amendment will lead to more frequent attempts to offer prior consistent statements, another danger presents itself. Sometimes attorneys offer prior consistent statements containing significant details that were not included in the trial testimony of the declarant.¹⁸ An important and well-established common law limitation on the use of prior consistent statements, particularly since they are generally not made under oath, is that they cannot go beyond what the witness testified to at trial.¹⁹ This restriction is another that will require

¹³ See MUELLER & KIRKPATRICK, *supra* note 10, § 8.38, at 344–45.

¹⁴ See *id.* § 6.102, at 647.

¹⁵ See *id.* § 6.102, at 651.

¹⁶ See, e.g., *United States v. Castillo*, 14 F.3d 802, 806 (2d Cir. 1992) (holding that the district court properly admitted prior consistent statements where the statements clarified whether alleged inconsistent statements were actually inconsistent); *United States v. Payne*, 944 F.2d 1458, 1471–72 (9th Cir. 1991) (holding that district court properly admitted prior consistent statements where statements put inconsistent statements in context, mitigating the significance of the inconsistencies).

¹⁷ See FED. R. EVID. 801(d)(1)(B)(i).

¹⁸ See, e.g., *Jordan ex rel. Shealey v. Masters*, 821 So. 2d 342, 349–50 (Fla. Dist. Ct. App. 2002) (holding that evidence of prior consistent statement should not have been admitted because it contained new information that was not in trial testimony).

¹⁹ See MUELLER & KIRKPATRICK, *supra* note 10, § 8:38, at 337–39.

careful judicial policing in those cases where prior consistent statements are properly admissible under the amended rule.

Another possible misinterpretation of the amended rule would be to view it as eliminating the premotive requirement established by *Tome v. United States*.²⁰ In *Tome*, the Supreme Court held that a prior consistent statement offered to rehabilitate a witness who had been impeached by an alleged motive to fabricate, hence admissible as substantive evidence under FRE 801(d)(1)(B), must have been made *prior* to the time that motive arose.²¹

The primary goal of the earliest advocates for amending the rule was to overturn *Tome* and reject the premotive requirement.²² Based on its earlier drafts and commentary, the Advisory Committee originally appeared to be headed in this direction.²³ However, the Committee apparently had second thoughts about using a proposed rule amendment to overturn a Supreme Court decision. Thus, the amended rule was submitted to the Supreme Court and promulgated with an Advisory Committee Note that specifically states: “The amendment retains the requirement set forth in *Tome v. United States* . . . that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication [or] improper influence or motive must have been made before the alleged fabrication or improper inference or motive arose.”²⁴

The question remains whether a postmotive statement, even if not admissible under FRE 801(d)(1)(B) as substantive evidence, can nonetheless be received solely for rehabilitation, as a few courts have permitted.²⁵ Such a strategy is inconsistent with both *Tome* and the

²⁰ *Tome v. United States*, 513 U.S. 150 (1995).

²¹ *Id.* at 167.

²² See, e.g., Frank W. Bullock, Jr. & Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 FLA. ST. U.L. REV. 509, 534 (1997) (urging that FRE 801(d)(1)(B) be amended to allow postmotive statements to be admitted as substantive evidence, thereby overturning *Tome*).

²³ See Minutes of the Meeting of May 3, 2013, Advisory Comm. on Evidence Rules, 3–4 (June 3–4, 2013), http://federalevidence.com/pdf/FRE_Amendments/801d/ACER.Minutes.5-13.pdf (explaining that one version of the proposed amendment caused concern over potential inconsistency with *Tome*’s premotive rule).

²⁴ FED. R. EVID. 801 advisory committee’s note to 2014 amendment. The Note mistakenly uses the phrase “recent fabrication of improper influence” where it should say “recent fabrication or improper influence.” *Id.* The Note also contains a mistakenly placed “1” in the text. *Id.*

²⁵ See, e.g., *United States v. Harris*, 761 F.2d 394, 399–400 (7th Cir. 1985) (holding that trial court did not err in admitting postmotive prior consistent statements solely for rehabilitative purposes); *United States v. Parry*, 649 F.2d 292, 296 (5th Cir. 1981) (holding that trial court erred in excluding postmotive prior consistent statement offered for

amended rule. In adopting the premotive requirement, the *Tome* Court was stating a common law relevancy principle as well as interpreting a hearsay rule.²⁶ It is extremely unlikely that the *Tome* Court would have approved the use of the postmotive statements offered in that case if only a limiting instruction had been given telling the jury they were to be considered merely for rehabilitation.

To allow postmotive statements for rehabilitation would also go against both the letter and the spirit of the amended rule. The amended rule states that any prior consistent statement properly admitted for rehabilitation is now substantive evidence.²⁷ To allow a postmotive statement for rehabilitation only, a court would have to block the automatic effect of FRE 801(d)(1)(B) by giving a limiting instruction. But in doing so, the court would be returning to a two-tier system where some prior consistent statements come in as substantive evidence and others only for rehabilitation. The very purpose of the amendment was to abolish this two-tier system and eliminate the need for courts to give limiting instructions when prior consistent statements are properly received for rehabilitative purposes.²⁸

Litigators and judges would be well advised to consult both common law rehabilitation principles, as well as *Tome*, when seeking to interpret and apply the recently-amended language of FRE 801(d)(1)(B).

rehabilitative purposes).

²⁶ See *Tome v. United States*, 513 U.S. 150, 157–59 (1995).

²⁷ FED. R. EVID. 801(d); FED. R. EVID. 801 advisory committee's note to 2014 amendment.

²⁸ See Richter, *supra* note 7, at 942.