AGENDA

COLORADO SUPREME COURT
ADVISORY COMMITTEE ON THE
RULES OF EVIDENCE

Friday, February 7, 2025, 1:30 p.m.
Via WebEx and
Ralph L. Carr Colorado Judicial Center
2 E.14th Ave., Denver, CO 80203
Fourth Floor, Supreme Court Conference Room

I. Call to order

II. Approval of December 8, 2023, Meeting Minutes [Pages 2-4]

III. Announcements from the Chair

IV. Old Business

a. Rule 804 (Lisa Weisz, Rick Lee, and Judge Villaseñor) [Pages 5-9]

V. New Business

a. 2026 Proposed Amendments to the Federal Rule of Evidence 801 (Judge Freyre) [Pages 10-21]

b. Rule 807 (Judge Freyre)

VI. Adjourn

COLORADO SUPREME COURT
ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

December 8, 2023, Meeting Minutes

A quorum being present, the Colorado Supreme Court's Advisory Committee on the Rules of Evidence was called to order by Judge Rebecca R. Freyre at 1:30 pm in the Ralph. L. Carr Colorado Judicial Center Fourth Floor Conference Room and via WebEx. Members present or excused from the meeting were:

Name	Present	Absent
Judge Rebecca R. Freyre, Chair	X	
David DeMuro	X	
Judge Stephanie Dunn	X	
Judge Sean Finn	X	
Judge Melina Hernandez	X	
Rick Lee	X	
Luke McConnell		X
Professor Christopher Mueller		X
Norman Mueller	X	
Chief Judge Román	X	
Corelle Spettigue		X
Professor Karen Steinhauser	X	
Judge Juan G. Villaseñor		X
Lisa Weisz	X	
Judge Shay Whitaker		X

I. Attachments & Handouts

- December 8, 2023, Agenda
- December 2, 2022, Minutes
- Approved Federal Evidence Rule Changes for 2023
- Proposed Federal Evidence Rule Changes for 2024
- Draft Rules 106; 615 A; 615 B; and 806

II. Minutes

- The December 2, 2022, minutes were adopted as submitted.

III. Announcements from the Chair

- Judge Freyre made no announcements.

IV. Old Business

a. CRE 702 Update (Judge Freyre)

At last year's meeting, this Committee discussed proposed changes to FRE 702 and wanted to pursue updating CRE 702 to mirror the federal rule. Following the Committee's decision, Judge Freyre discussed this issue with Justice Samour, and then also spoke with the entire Court during one of their conferences. The Court decided not to change CRE 702.

V. New Business

a. 2023 Amendments to the Federal Rules of Evidence (Rules 106 and 615) (Judge Freyre)

Rule 106: it was amended to encompass other ways of communicating. The intent of these changes is to displace the common law. One member noted that while these are not the most necessary changes, it does make sense to propose them to the Court because then the Colorado rule will align with the federal version *and* Colorado jurisprudence. Another member noted this is essentially a housekeeping amendment. A motion and second were taken. It passed unanimously. Judge Freyre will submit this proposal to the Court.

Rule 615: the federal amendment adds a new section to prohibit disclosure of testimony. A member noted that much of the new language is already how the rule is used in practice. A few members agreed that new section (b) might be a good change with the adoption of remote hearings, and that the proposed change will assist judges. Judge Freyre presented two versions of 615 for the Committee's consideration. 615 A conforms completely to the federal version; 615 B adds 4 to subsection (a) and adds 615 (b). The Committee noted that the biggest distinction is that 615 A follows the federal version more closely. A motion and second were taken to adopt 615 A. It passed unanimously. Judge Freyre will submit this proposal to the Court.

b. 2024 Proposed Amendments to the Federal Rules of Evidence (New Federal Rule of Evidence 107; and Rules 613, 801, 804, and 1006) (Judge Freyre)

New Rule 107: this proposed new rule provides standards for illustrative aids, allowing them to be used at trial after the court balances the utility of the aid against the risk of unfair prejudice, confusion, and delay. Members noted that this impacts civil more than criminal cases, and that the new rule does not change the state of the law, but instead provides clarification. Another member stated that the changes could be helpful in the context of appeals, too. No members shared concerns regarding the new rule.

Rule 613: this proposed amendment provides that extrinsic evidence of a prior inconsistent statement is not admissible until the witness is given an opportunity to explain or deny the statement. The Colorado rule currently allows this, and making the federal changes would require an overhaul of the Colorado rule. One member noted that the Colorado rule does not specify, "unless the court orders

otherwise…" One member observed that this language is vague; while another stated that it might refer specifically to timing.

Rule 801: the proposed language resolves a dispute among the courts about the admissibility of statements by the predecessor-in-interest of a party-opponent, providing that such a hearsay statement would be admissible against a declarant's successor-in-interest. One member noted this would impact civil only. A few members stated their concern that the changes appear cryptic and could be easily misapplied.

Rule 804: this proposed amendment would broaden what a trial court can consider related to hearsay exceptions. There are some Colorado Supreme Court cases that cover this area. A member observed that this proposed change may provide important clarification to the Colorado rule. Another member noted being very conflicted about this proposed change and wondered how big the scope of admitted evidence would become. Several members stated that this is a very complicated issue. Judge Freyre said that the Committee might need to heavily consider this given its complicated nature. Rick Lee and Lisa Weisz may be called upon to do a deeper dive into this issue ahead of the Committee's consideration.

Rule 1006: this proposed amendment adds a reference to Rule 107.

c. Making the CRE Gender-Neutral (Judge Freyre and Judge Finn)

Chairs of all the Colorado Supreme Court rules committees are determining how to gender-neutralize Colorado's rules. Judge Finn attended the meeting in Judge Freyre's place. Once the group develops a proposal, they will send it to the Supreme Court for approval. Then, once the Supreme Court determines how to proceed, Judge Finn will ask members to join a subcommittee to implement these changes. Judge Freyre will contact the Committee with any updates.

d. Removal of a Comma from Rule 806 (Judge Freyre)

This issue was brought to Judge Freyre by a division of the Court of Appeals. There is a comma in Rule 806 that does not appear in the federal version. The comma in question appears in the first line of Colorado's rule, "Rule 801 (d)(2), (C), (D), or (E)…". A motion and second were taken to remove the second comma in the first sentence of the rule. It passed unanimously.

VI. Future Meeting date

The committee adjourned at 2:49 pm.

MEMORANDUM

TO: Judge Freyre

FROM: Lisa Weisz

DATE: 10/23/2024

RE: CRE 804(b)(3)(B) – Extrinsic Corroboration for Statements Against Interest

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I. THE PROPOSED AMENDMENT

CRE 804(b)(3)(B) currently reads:

> (3) *Statement Against Interest.* A statement that:
>
> (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
>
> (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

The proposed amendment would alter subsection (B) to read:

> (B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness after considering the totality of the circumstances under which it was made and any evidence that supports or undermines it.

II. WHAT THE AMENDMENT WOULD ACCOMPLISH

Under current law, the proponent of a statement against interest must establish its trustworthiness through an analysis limited to intrinsic factors (i.e., the circumstances that surround the making of the statement, such as where and when it was made, to whom it was made, what prompted it, how it was made, and what it contained).

Under the amendment, the proponent must still establish the trustworthiness of the statement, but the analysis may rely on both intrinsic and extrinsic factors (independent evidence that supports or undermines the truth of the statement).

III. HISTORY AND PRACTICAL IMPLICATIONS

Before 2011, corroboration was only required for statements against interest offered to *exculpate* the accused. The pre-2011 version of CRE 804(b)(3) provided:

> Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability *and offered to exculpate the accused* is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Under the former rule, the defense could establish corroboration through both intrinsic and extrinsic factors, under a line of cases tracing back to *Chambers v. Mississippi*, 410 U.S. 284 (1973). *See People v. Newton*, 966 P.2d 563, 574 (Colo.1998); *accord People v. Fletcher*, 546 P.2d 980, 985 (Colo. App. 1975), *rev'd on other grounds*, 566 P.2d 345 (Colo. 1977); *People v. Harding*, 671 P.2d 975, 978 (Colo. App. 1983); *People v. Lupton*, 652 P.2d 1080, 1083 (Colo. App. 1982); *People v. Pack*, 797 P.2d 774, 777 (Colo. App. 1990). The prosecution was not required to establish corroboration.

In 1998, the Colorado Supreme Court engrafted a judicially created requirement that the prosecution must not only establish corroboration for statements against interest, but that it could do so only through reliance on intrinsic factors. *People v. Newton*, 966 P.2d 563, 575 (Colo. 1998). Although this requirement appeared nowhere in Rule 804, the Court reasoned that its incorporation via caselaw would ensure compliance with both the hearsay rules and the Confrontation Clause. *Id.* at 573. At the time, the Confrontation Clause analysis required the prosecution to establish the reliability of a hearsay statement, *Ohio v. Roberts*, 448 U.S. 56, 66 (1980), based solely on intrinsic corroboration, *Idaho v. Wright*, 497 U.S. 805, 819–24 (1990). This new requirement – that a proponent of a statement against interest offered to inculpate the accused must establish its reliability through intrinsic corroboration – became known as the "third prong of *Newton*" or "the third 804(b)(3) prong." *Bernal v. People*, 44 P.3d 184 (Colo. 2002).

Newton imposed two additional limitations on the admission of a statement against interest. "First, statements that are so self-serving as to be unreliable should be excluded. Second, if the trial court determines that the declarant had a significant motivation to curry favorable treatment, then the entire narrative is inadmissible." *Newton*, 966 P.2d at 579.

Newton also defined the scope of CRE 804(b)(3) to allow the introduction of the precise statement against interest and related, collaterally neutral statements. *Newton*, 966 P.2d at 578. This differs from the federal rule, which only allows introduction of the precise statement against interest.

In 2004, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36, 65-69 (2004), which eschewed the reliability test of *Ohio v. Roberts* in favor of an analysis that examined whether a hearsay statement was testimonial.

On December 1, 2010, FRE 804(b)(3) was amended to require corroboration for all statements against penal interest offered in criminal cases, and not just those offered to exculpate the accused. The advisory committee note to the 2010 amendment states, "A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception."

On January 13, 2011, Colorado modified CRE 804(b)(3) to align with the federal rule. Although the federal amendment was intended to create a unitary approach, a committee comment to the Colorado Amendment indicated that statements offered to inculpate the accused were still limited to intrinsic corroboration under the third prong of *Newton*. The committee comment states, "The rule was revised, consistent with recent amendments to FRE 804(b)(3), only to clarify that corroborating circumstances are required regardless of whether a statement is offered to inculpate or exculpate an accused. *See People v. Newton*, 966 P.2d 563 (Colo.1998) (prosecutors seeking to admit statements against the accused must satisfy the corroboration requirement solely by reference to the circumstances surrounding its making)."

It was not until 2017, in *Nicholls v. People*, 396 P.3d 675, 683-85 (Colo. 2017), that the Colorado Supreme Court adopted *Crawford* and held that nontestimonial statements do not implicate Colorado's Confrontation Clause. *Id.* at 681. As such, "the third prong of the *Newton* test, which was grounded in the Confrontation Clause, is not constitutionally required for the admission of a nontestimonial statement against interest." *Id.* at 685.

The jury trial in *Nicholls* occurred in 2008, so the Colorado Supreme Court interpreted the pre-2011 version of CRE 804(b)(3) and held that, under the former rule, the prosecution did not need to establish corroboration for nontestimonial statements against interest. Yet, *Nicholls* also endorsed *Newton*'s prohibition against the admission of statements against penal interest that are so self-serving as to be unreliable, or that are made by a declarant who had a significant motivation to curry favorable treatment. *Id.* at 684. Thus, *Nicholls* does require some consideration of the reliability of statements against penal interest offered by the prosecution, even under the pre-2011 version of CRE 804(b)(3). But it did not differentiate intrinsic from extrinsic corroboration.

Nicholls' holding that the third prong of *Newton* is not required as a matter of constitutional law, did not expressly eliminate the intrinsic corroboration limitation on the prosecution's corroboration obligation under the post-2011 version of CRE 804(b)(3). Moreover, *Nicholls* did not overrule *Newton* in its entirety (*Nicholls* also endorsed *Newton*'s rule allowing the admission of related, collaterally neutral statements).

Today, "corroborating circumstances" are required under CRE 804(b)(3)(B) regardless of whether a statement inculpates or exculpates the defendant, or by whom it is offered. And the 2010/2011 amendments were intended to create parity between the prosecution and

the accused and a unitary approach to statements against interest. But the case law is not entirely clear on whether the prosecution may offer corroborating circumstances from extrinsic, independent evidence, as is the case when evaluating corroborating circumstances as applied to statements that exculpate the defendant. The proposed amendment would allow consideration of both intrinsic corroboration and extrinsic factors in determining the trustworthiness of all statements against penal interest.[1]

[1] The majority of state courts allow extrinsic corroboration of statements against interest, including: Arizona, Connecticut, District of Columbia, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, and Virginia. Not all states were researched; research ceased when it became evident that this was the majority rule. This research did not differentiate whether the statement was offered to exculpate or inculpate the accused.

Rule 804. Hearsay Exceptions: Declarant Unavailable

(a) [NO CHANGE]

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) - (2) [NO CHANGE]

(3) Statement Against Interest. A statement that: (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and (B) if offered in a criminal case as one that tends to expose the declarant to criminal liability, is supported by corroborating circumstances that clearly indicate its trustworthiness after considering the totality of the circumstances under which it was made and any evidence that supports or undermines it~~, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability~~.

(4) - (5) [NO CHANGE]

PRELIMINARY DRAFT

Proposed Amendments to the Federal Rules of Appellate and Bankruptcy Procedure, and the Federal Rules of Evidence

Request for Comments on Amendments to:

Appellate Rules	29 and 32; Appendix on Length Limits; and Form 4;
Bankruptcy Rules	1007, 3018, 5009, 9006, 9014, 9017, new Rule 7043, and Official Form 410S1; and
Evidence Rule	801

Written Comments Due By
February 17, 2025

Prepared by the
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
August 2024

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: The Bench, Bar, and Public

FROM: Honorable John D. Bates, Chair
Committee on Rules of Practice and Procedure

DATE: August 15, 2024

RE: Request for Comments on Proposed Amendments to Federal Rules and Forms

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The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) has approved publication for public comment of the following proposed amendments to existing rules and forms, as well as one new rule:

- Appellate Rules 29 and 32, Appendix on Length Limits, and Form 4;
- Bankruptcy Rules 1007, 3018, 5009, 9006, 9014, 9017, new Rule 7043 and Official Form 410S1; and
- Evidence Rule 801.

The proposals, supporting materials, and instructions on submitting written comments are posted on the Judiciary's website at:

https://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment

Opportunity to Submit Written Comments

Comments concerning the proposals must be submitted electronically no later than **February 17, 2025**. Please note that comments are part of the official record and publicly available.

Opportunity to Appear at Public Hearings

On the following dates, the advisory committees will conduct public hearings on the proposals either virtually or in person:

- Appellate Rules on January 10, 2025, and February 14, 2025;
- Bankruptcy Rules on January 17, 2025, and January 31, 2025; and
- Evidence Rule on January 22, 2025, and February 12, 2025.

If you wish to appear and present testimony regarding a proposed rule or form, you must notify the office of Rules Committee Staff **at least 30 days before the scheduled hearing** by emailing RulesCommittee_Secretary@ao.uscourts.gov. Hearings are subject to cancellation due to lack of requests to testify.

At this time, the Standing Committee has only approved the proposals for publication and comment. After the public comment period closes, all comments will be carefully considered by the relevant advisory committee as part of its consideration of whether to proceed with a proposal.

Under the Rules Enabling Act, 28 U.S.C. §§ 2072-2077, if any of the published proposals are later approved, with or without revision, by the relevant advisory committee, the next steps are approval by the Standing Committee and the Judicial Conference, and then adoption by the Supreme Court. If adopted by the Court and transmitted to Congress by May 1, 2026, absent congressional action, the proposals would take effect on December 1, 2026.

If you have questions about the rulemaking process or pending rules amendments, please contact the Rules Committee Staff at 202-502-1820 or visit https://www.uscourts.gov/rules-policies.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

TO: Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Patrick J. Schiltz, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 15, 2024*

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 19, 2024, at the Administrative Office in Washington, D.C. On the morning of the meeting, the Committee convened a panel of experts who discussed developments in Artificial Intelligence (AI) and machine learning and provided guidance on how the rules of evidence might need to be adjusted to handle evidence that is the product of AI. At its subsequent meeting, the Committee processed the comments of the panelists, and also considered three possible amendments to the rules. The Committee approved a proposed amendment to Rule 801(d) for public comment and agreed to

* Revised to incorporate changes reflecting decisions at the June 4, 2024, meeting of the Committee on Rules of Practice and Procedure.

continue to consider a possible amendment to Evidence Rule 609 and a possible amendment that would add a rule governing evidence of prior false accusations of sexual misconduct made by alleged victims in criminal cases.

* * * * *

II. Action Item

Proposed Amendment to Rule 801(d)(1)(A)[**]

The Committee recommends that a proposed amendment to Rule 801(d)(1)(A) be released for public comment. Currently, Rule 801(d)(1)(A) provides for a very limited exemption from the hearsay rule for prior inconsistent statements of a testifying witness: the prior statement is substantively admissible only when it is made under oath at a formal proceeding. While all prior inconsistent statements are admissible for impeachment purposes, only a very few are admissible as substantive evidence. So in the typical case, a court upon request will have to instruct the jury that a prior inconsistent statement may be used to impeach the witness's credibility, but may not be used as proof of a fact.

The amendment approved by the Committee for public comment would provide that all prior inconsistent statements admissible for impeachment are also admissible as substantive evidence, subject, of course, to Rule 403. The amendment would track the 2014 change to Rule 801(d)(1)(B), which provides that all prior consistent statements admissible to rehabilitate a witness are also admissible as substantive evidence (again, subject to Rule 403). This convergence of substantive and credibility use dispenses with the need for confusing limiting instructions with respect to all prior statements of a testifying witness.

The amendment adopts the position of the original Advisory Committee, which proposed that all prior inconsistent statements would be admissible over a hearsay objection. As the original Advisory Committee noted, the dangers of hearsay are "largely nonexistent" because the declarant is in court and can be cross-examined about the prior statement and the underlying subject matter, and the trier of fact "has the declarant before it and can observe the demeanor and the nature of his testimony as he denies it or tries to explain away the inconsistency." Adv. Comm. Note to Rule 801(d)(1)(A) (quoting California Law Revision Commission). The amendment is consistent with the practice of a number of states, including California.

The current Rule 801(d)(1)(a) limitations are based on three premises. The first premise is that a prior statement under oath is more reliable than a prior statement that is not. While this is probably so, the ground of substantive admissibility is that the very person who made the prior statement is present at trial and, while under oath, is subject to cross examination about it. The

[**] After the June 4, 2024 meeting, minor changes were made to the committee note for Rule 801. The word "prior" was added before "inconsistent statements" in the first sentence. "Timing requirement" was changed to "requirements" in the last sentence and one sentence ("[t]he rule is one of admissibility, not sufficiency") was deleted.

problem with hearsay is that the declarant is not subject to cross-examination, but with prior statements of testifying witnesses, the declarant is by definition subject to cross-examination. Moreover, if an oath at the time of the statement is so critical, no explanation is given for why prior identifications under Rule 801(d)(1)(C) are admissible without an oath requirement. It is anomalous that a prior identification that is inconsistent with a witness's in-court testimony is admissible substantively under Rule 801(d)(1)(C) but not under Rule 801(d)(1)(A), when the rationale for admissibility is the same under both rules.

The second premise for the current rule was a concern that statements not made at formal proceedings could be difficult to prove. But there is no reason to think that an unrecorded prior inconsistent statement is any more difficult to prove than any other unrecorded fact. And any difficulties in proof can be taken into account by the court under Rule 403 -- as the Committee recently recognized in the 2023 amendment to Rule 106, which allows admission of oral unrecorded statements for completion purposes.

The third premise was that if a witness denies making the prior statement, then cross-examination about the statement might be difficult. But there is effective cross-examination in the very denial. *See* Nelson v. O'Neil, 402 U.S. 622, 629 (1971) (noting that the declarant's denial of the prior statement "was more favorable to the respondent than any that cross-examination by counsel could possibly have produced, had [the declarant] 'affirmed the statement as his'").

A majority of the Committee concluded that the amendment would remove an unreasonable limitation on admissibility and end the need for trial judges to give (in virtually all trials) a limiting instruction that is difficult for lay jurors to understand and thus follow.

The Committee approved the proposed amendment to Rule 801(d)(1)(A) for public comment. Two Committee members dissented, and the Department of Justice abstained.

The Committee recommends that the proposed amendment, and the accompanying Committee Note, be released for public comment.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

* * * * *

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

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

(A) is inconsistent with the declarant's testimony ~~and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition~~;

(B) is consistent with the declarant's testimony and is offered:

[1] Matter to be omitted is lined through.

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

* * * * *

Committee Note

The amendment provides for substantive admissibility of prior inconsistent statements of a testifying witness. The Committee has determined, as have a number of states, that delayed cross-examination under oath is sufficient to allay the concerns addressed by the hearsay rule. As the original Advisory Committee noted, the dangers of hearsay are "largely nonexistent" because the declarant is in court and can be cross-examined about the prior statement

and the underlying subject matter, and the trier of fact "has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency." Adv. Comm. Note to Rule 801(d)(1)(A) (quoting California Law Revision Commission). A major advantage of the amendment is that it avoids the need to give a jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements.

The original rule, requiring that the prior statement be made under oath at a formal hearing, is unduly narrow and has generally been of use only to prosecutors, where witnesses testify at the grand jury and then testify inconsistently at trial. The original rule was based on three premises. The first was that a prior statement under oath is more reliable than a prior statement that is not. While this is probably so, the ground of substantive admissibility is that the prior statement was made by the very person who is produced at trial and subject to cross examination about it, under oath. Thus any concerns about reliability are well-addressed by cross-examination and the factfinder's ability to view the demeanor of the person who made the statement. The second premise was a concern that statements not made at formal proceedings could be difficult to prove. But there is no reason to think that an unrecorded prior inconsistent statement is any more difficult to prove than any other unrecorded fact. And any difficulties in proof can be taken into account by the court under Rule 403. See the Committee Note to the 2023 amendment to Rule 106. The third premise was that if a witness denies making the prior statement, then cross-examination becomes difficult. But there is effective cross-examination in the very denial. *See* Nelson v. O'Neil, 402 U.S. 622, 629 (1971) (noting that the declarant's denial of the prior statement "was more favorable to the respondent than any that cross-examination by counsel could possibly

have produced, had [the declarant] 'affirmed the statement as his'").

Nothing in the amendment mandates that a prior inconsistent statement is sufficient evidence of a claim or defense.

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