

8.31 Prior Consistent Statement¹

(1) Except as otherwise provided in this rule, a prior statement of a testifying witness that is consistent with the witness's testimony is not admissible in evidence.

(2) A statement of a witness made before the witness's testimony, at a time when there was no motive to fabricate, and which is consistent with that testimony, is admissible to aid in establishing the witness's credibility when a party creates the inference of, or directly characterizes the testimony of the witness as a recent fabrication, as set forth in Guide to New York Evidence rule 6.20.

(3) A statement of a witness made before the witness's testimony that constitutes a "prompt outcry" is admissible to the extent set forth in Guide to New York Evidence rule 8.37.

(4) A statement of a witness made before the witness's testimony that describes the person alleged to have committed the charged offense and is consistent with the witness's testimony is admissible, not for its truth, but rather as evidence that assists the jury in evaluating the witness's opportunity to observe at the time of the crime, and the reliability of her memory at the time of the corporeal identification.

(5) A statement of a witness made before the witness's testimony is admissible when the statement is admitted not for the truth of its contents but for some other relevant purpose, such as explaining what led to an investigation and arrest.

Note

Subdivision (1) states the general rule that excludes a testifying witness's prior consistent statements. As summarized in *People v McDaniel* (81 NY2d 10, 16 [1993]):

“A witness’ trial testimony ordinarily may not be bolstered with pretrial statements. Several rationales underlie the rule: untrustworthy testimony does not become less so merely by repetition; testimony under oath is preferable to extrajudicial statements; and litigations should not devolve into contests as to which party could obtain the latest version of a witness’ story” (citations omitted).

McDaniel, however, also recognized exceptions to the general rule of exclusion.

Subdivision (2) sets forth an exception for the admission of a prior consistent statement of a witness when the testimony of the witness is challenged as a “recent fabrication,” meaning “the defense is charging the witness not with mistake or confusion, but with making up a false story” (*People v Singer*, 300 NY 120, 123-124 [1949]; Guide to NY Evid rule 6.20 [Impeachment by Recent Fabrication]; see generally, Michael J. Hutter, *Admissibility of Prior Consistent Statement*, NYLJ, Dec. 4, 2014, available at <https://www.law.com/newyorklawjournal/almID/1202677999322/admissibility-of-prior-consistent-statement/>).

As stated by the Court of Appeals, “[t]his exception is rooted in fairness; it would be unjust to permit a party to suggest that a witness, as a result of interest, bias or influence, is fabricating a story without allowing the opponent to demonstrate that the witness had spoken similarly even before the alleged incentive to falsify arose” (*People v McDaniel*, 81 NY2d at 18).

The “recent fabrication” exception for admissibility of a prior consistent statement is derived from the substantial Court of Appeals precedent which holds that a prior consistent statement is admissible where the “cross-examiner has created the inference of, or directly characterized the testimony as, a recent fabrication” (*People v Davis*, 44 NY2d 269, 277 [1978]; see *Fishman v Scheuer*, 39 NY2d 502, 504 [1976] [“The plaintiff had not attempted to assert that the testimony of [the] witness was a recent fabrication. In the absence of such claim, prior consistent statements are inadmissible”]; *Crawford v Nilan*, 289 NY 444, 450-451 [1943]; *People v Seit*, 86 NY2d 92, 96 [1995] [“The implication that the testimony was recently fabricated arises only if it appears that the cross-examiner believes and wants the jury to believe that the witness is testifying falsely to ‘meet the exigencies of the case’ ” (citing *People v Katz*, 209 NY 311, 340 [1913])]). The further condition for admissibility that the statement was made before the charged fabrication is also derived from substantial Court of Appeals precedent (see *Davis*, 44 NY2d at 277 [“prior consistent statements made at a time when there was no motive to falsify are admissible to repel the implication or charge”]).

Consistent with the “recent fabrication” condition, the Court of Appeals has noted that mere impeachment with a prior inconsistent statement or other attack on the credibility of a witness is an insufficient basis for admitting a prior consistent

statement (*People v Ramos*, 70 NY2d 639 [1987]; *Crawford*, 289 NY at 450 [“testimony of an impeached or discredited witness may not be supported and bolstered by proving that he has made similar declarations out of court”]).

When a prior consistent statement is admissible under the exception recognized by this section, the Court of Appeals has noted that the statement “may be admitted, not to prove or disprove any of the facts in issue, but to aid in establishing the credibility of the witness” (*People v McClean*, 69 NY2d 426, 428 [1987]; *People v McDaniel*, 81 NY2d 10, 18 [1993]).

Proof of the prior consistent statement(s) may be testified to by the witness or otherwise by “independent verification of the prior statements” (*People v Mirenda*, 23 NY2d 439, 452 [1969] [“We see no reason why a witness cannot attempt to rehabilitate himself by testifying to prior consistent statements after a claim of recent fabrication. It is open to the adversary, of course, to point out to the jury that this rehabilitation testimony is a less reliable indication of veracity than if independent verification of the prior statements had been offered”]; see *People v Maldonado*, 97 NY2d 522, 529 [2002] [“composite sketch may be admissible as a prior consistent statement where the testimony of an identifying witness is assailed as a recent fabrication”]; *Seit*, 86 NY2d at 98 [a 911 tape should have been admitted in response to a claim of recent fabrication]; *People v Baker*, 23 NY2d 307, 323 [1968] [approving testimony by the witness and the person to whom the prior consistent statements were made]).

Subdivision (3) is explained in the Guide to New York Evidence rule 8.37 (Prompt Outcry) (see *People v Rosario*, 17 NY3d 501, 511 [2011] [“The prompt outcry rule—an exception to the inadmissibility of the prior consistent statements of an unimpeached witness—‘permits evidence that a timely complaint (of a sexual assault) was made,’ but does not allow further testimony as to the ‘details of the incident’ ” (citation omitted)]).

Subdivision (4) is derived from the Court of Appeals decision in *People v Huertas* (75 NY2d 487, 488-489 [1990]). In that case, the Court allowed the “admission into evidence, on the People’s direct case, of the complaining witness’s account of a description of her assailant given to the police shortly after she was raped” (*id.* at 488), noting that the “probative force of the complainant’s description evidence is not based on an assumption that the prior description is or is not true, nor does the comparison conclusively establish the identification as accurate or inaccurate. It is, however, evidence that assists the jury in evaluating the witness’s opportunity to observe at the time of the crime, and the reliability of her memory at the time of the corporeal identification—both important aspects of the critical issue. Thus, the description testimony was properly admitted for this nonhearsay purpose” (*id.* at 493; but see *People v Fluitt*, 80 NY2d 949, 950 [1992] [where the complainant’s showup identification of the defendant had been suppressed, “it was improper for complainant to give a physical description of the robber—there having been no finding that such description, given for the first time *after* the showup, was

untainted”]).

In addition to the complainant’s testimony of the description, a police officer to whom the “crime victim” gave a description of the perpetrator may testify “to a victim’s description, where it does not tend to mislead the jury” by giving the jury, for example, the “false impression that there was ‘an impressive amount of testimony’ corroborating [the complainant’s] account” (*People v Smith*, 22 NY3d 462, 464, 467 [2013]).

Subdivision (5) is a catchall provision derived from Court of Appeals decisions allowing for the introduction in evidence of a prior consistent statement when the statement is admitted not for its truth but for some other relevant reason, such as explaining the “investigative process and completing the narrative of events leading to the defendant’s arrest” (e.g. *People v Gross*, 26 NY3d 689, 694-695 [2016]; *People v Ludwig*, 24 NY3d 221, 231 [2014]). In those cases, witnesses were permitted to testify that the child whom the defendant was accused of sexually abusing had made “nonspecific statements,” a “disclosure,” relating to sexual abuse and the “steps they took after hearing the disclosure,” not for the truth of the child’s statements, but rather to explain the process that led to the investigation and arrest of the defendant.

¹ In June 2022, this rule was amended to number the sole existing paragraph of the rule to be subdivision (2) and to amend the content of that subdivision to conform with the addition of rule 6.02 on “recent fabrication.” Further, subdivisions (1), (3), (4), and (5) have been added to reflect in the rule information that was in part in the Note.