

8.31. Prior Consistent Statement

A statement of a witness made prior to his or her testimony and consistent with that testimony is admissible when offered to rebut an express or implied claim of recent fabrication and when the statement was made prior to the circumstances supporting that claim.

Note

This rule sets forth an exception for a prior consistent statement of a witness where the witness testifies at a proceeding and the statement is offered to prove the truth of the matter asserted therein (*see e.g. People v Seit*, 86 NY2d 92, 95 [1995] [prior consistent statement was admissible “under the recent fabrication exception to the hearsay rule”]; *People v Singer*, 300 NY 120, 123 [1949] [“exception to the hearsay rule” for prior consistent statements that rebut a charge of recent fabrication]). 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 10,18 [1993]).

The exception’s “recent fabrication” condition for admissibility is derived from the substantial Court of Appeals precedent which holds that a prior consistent statement is only 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]; *Seit*, 86 NY2d at 96 [“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 under the rule (*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 also serve to rehabilitate the witness (*see People v McDaniel*, 81 NY2d 10,18 [1993]; *People v McClean*, 69 NY2d 426, 428 [1987]).

Apart from the hearsay exception recognized by this section, a prior consistent statement may be offered for a purpose other than its truth, for example, to explain the investigative process leading to a defendant’s arrest when such evidence is relevant to a jury’s assessment of the witness’s alleged motive to lie (*see People v Gross*, 26 NY3d 689, 694 [2016] [child’s report of sexual abuse by the defendant testified to by her mother, a sister and school principal, and two police officers assigned to investigate her allegations]; *People v Ludwig*, 24 NY3d 221, 230-232 [2014] [a child’s report of sexual abuse by the defendant testified to by her mother and older half-brother]).

Where the witness is the complainant in a proceeding involving the commission of a sexual offense, and at issue is the admissibility of a statement made by the witness/complainant reporting the matter after the purported incident, the prompt outcry rule may apply (*see* Guide to NY Evid rule 8.37, Prompt Outcry).