(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs.

(d) **Disclosing the Appointment to the Jury.** The court may authorize disclosure to the jury that the court appointed the expert.

(e) **Parties' Choice of Their Own Experts.** This rule does not limit a party in calling its own experts.

History of FRE 706: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.

ANNOTATIONS

Quiet Tech. DC-8, Inc. v. Hurel-DuBois UK Ltd., 326 F.3d 1333, 1348-49 (11th Cir.2003). "[W]e are unfamiliar with any set of circumstances under which a district court bears an affirmative obligation to appoint an independent expert [under FRE 706(a)]. Quite the contrary, as long as the district court thoroughly considers a request for the appointment of such an expert and reasonably explains its ultimate decision thereon, that decision is vested in the sound discretion of the trial court." *See also* ***Gaviria v. Reynolds***, 476 F.3d 940, 945 (D.C.Cir.2007); ***Walker v. American Home Shield Long Term Disability Plan***, 180 F.3d 1065, 1071 (9th Cir.1999).

Techsearch L.L.C. v. Intel Corp., 286 F.3d 1360, 1378 (Fed.Cir.2002). "A district court's appointment of a technical advisor, outside of the purview of Rule 706 ..., falls within the district court's inherent authority, and the Ninth Circuit has held that district courts may use technical advisors when desirable and necessary. It also implicitly recognized that district courts should use this inherent authority sparingly and then only in exceptionally technically complicated cases. *At 1379:* [I]n appointing a technical advisor[, the court] must: use a 'fair and open procedure for appointing a neutral technical advisor ... addressing any allegations of bias, partiality or lack of qualifications' in the candidates; clearly define and limit the technical advisor's duties, presumably in a writing disclosed to all parties; guard against extra-record information; and make explicit, perhaps through a report or record, the nature and content of the technical advisor's tutelage concerning the technology. The fact that the use of a technical advisor is permissible under such guidelines does not mean that it is invariably desirable or that safeguards are not required. As a practical matter, there is a risk that some of the judicial decision-making function will be delegated to the technical advisor. District court judges need to be extremely sensitive to this risk and minimize the potential for its occurrence." *See also* ***In re Joint E.&S. Dist. Asbestos Litig.***, 830 F.Supp. 686, 693 (E.D.N.Y.1993) (work of appointed experts is especially critical in dealing with complex mass-tort problems).

Ledford v. Sullivan, 105 F.3d 354, 361 (7th Cir. 1997). "In this case, when the district court stated that no funds existed to pay for the appointment of an expert, it failed to recognize that it had the discretion [under FRE 706(b), now FRE 706(c),] to apportion all the costs to one side. We caution against reading Rule 706(b) [now Rule 706(c)] in such a narrow fashion that the rule would allow for court-appointed experts only when *both* sides are able to pay their respective shares. Read in such a restrictive way, Rule 706(b) [now Rule 706(c)] would hinder a district court from appointing an expert witness whenever one of the parties is indigent, even when that expert's testimony would substantially aid the court."

ARTICLE VIII. HEARSAY

FRE 801. DEFINITIONS THAT APPLY TO THIS ARTICLE; EXCLUSIONS FROM HEARSAY

(a) **Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) **Declarant.** "Declarant" means the person who made the statement.

(c) **Hearsay.** "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(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 per-

jury at a trial, hearing, or other proceeding or in a deposition;

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

(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 rebutt the declarant's credibility as a witness when attacked on another ground; or

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

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

2014 Notes of Advisory Committee

[¶1] Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the Advisory Committee noted, "[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally."

[¶2] Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

[¶3] The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication of improper influence or motive must have been made before the alleged fabrication or improper influence or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness—such as the charges of inconsistency or faulty memory.

[¶4] The 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. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. 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.

History of FRE 801: Adopted Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1926, eff. July 1, 1975. Amended Oct. 16, 1975, P.L. 94-113, §1, 89 Stat. 576, eff. Oct. 31, 1975; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 11, 1997, eff. Dec. 1, 1997; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 25, 2014, eff. Dec. 1, 2014.

See *Commentaries*, "Hearsay exceptions," ch. 8-C, §4.3, p. 755.

ANNOTATIONS

Definition – Statement

U.S. v. Waters, 627 F.3d 345, 358 (9th Cir.2010). "'Tell the truth' is an imperative and not an assertion of fact. It therefore does not fall within the meaning of 'statement' in Rule 801(a) and cannot be hearsay, because a nonassertion cannot have been offered to prove the truth of the matter asserted." *See also* ***Katzenmeier v. Blackpowder Prods.***, 628 F.3d 948, 951 (8th Cir. 2010) (instruction to someone to do something is not hearsay).

U.S. v. Pang, 362 F.3d 1187, 1192 (9th Cir.2004). "[O]ut-of-court statements that are offered as evidence of legally operative verbal conduct are not hearsay. They are considered 'verbal acts.' Checks [written on a bank account] fall squarely in this category of legally-operative verbal acts that are not barred by the hearsay rule."

Definition – Hearsay

U.S. v. Benitez-Avila, 570 F.3d 364, 367-68 (1st Cir. 2009). "The principal vice of hearsay is the inability of the opponent of the evidence to cross-examine the person who made the out-of-court statement (the 'declarant'). The opponent of the evidence is thus unable to get the declarant's testimony as to whether in fact the declarant said what has been attributed to him, what he meant by it, whether he had a reliable basis for the assertion, and whether he might have been influenced by a bias which undermines his reliability."