12-EV-001

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CHAMBERS OF
JUDGE JOAN N. ERICKSEN
DISTRICT JUDGE
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December 28, 2012

Honorable Jeffrey S. Sutton
Chair, Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Comments on the Proposed Amendment to Evidence Rule 801(d)(1)(B)

Dear Judge Sutton and Committee Members:

I write to raise a few issues about the proposed amendment to Evidence Rule 801(d)(1)(B). The proposal has good surface appeal but I am not sure we need it, and there might be some unintended consequences that merit a second look. I write also to point out a few aspects of the proposed amendment and its public notice that might detract from the clarity of the notice.

The amendment is conceived and advertised as a fix to a jury instruction problem. Before the Evidence Rules are changed to address an instruction problem, it is worth making sure that the magnitude of the problem is not overstated.

Bear in mind that the instruction does not accompany 801(d)(1)(B) statements. Prior statements are most often admitted under the Rule, so the perceived problem does not arise every day. In January 2012 the Federal Judicial Center sent a questionnaire to federal judges, and some of them responded that they had never given the instruction.

If a prior consistent statement really is identical (or nearly) to in-court testimony, juror misunderstanding of a cautionary instruction cannot cause much harm. In fact, the extent to which the instruction is "incomprehensible" tracks with how harmless it is. It has been my experience in trials that the extent to which a prior statement is consistent tends to be more or less debatable. When a juror perceives

a difference, and is inclined to believe a detail from the first statement, I am not so sure that a cautionary instruction actually is incomprehensible. If it is, current treatment of sworn and unsworn prior *in*consistent statements bears reviewing. At the moment a prior consistent statement is offered, it is not always crystal clear how consistent it is or will turn out to be after it is exposed to cross-examination. If a judge has qualms about allowing testimony about a prior statement, the judge might opt to give a belt-and-suspenders limiting instruction. An instruction might help an appellate court see that any error was harmless. See United States v. Wilkerson, 411 F.3d 1 (2d Cir. 2005). As an aside, I doubt if belts and suspenders will help much if there is a Committee Note declaring that the instruction was so worthless that it required amendment of an entire rule of evidence.

For all those reasons, the existing problem seems relatively insignificant. And it could be that for the discrete black-and-white sort of statement where the prior is the same as live testimony there could be a jury instruction, rather than an Evidence Rule, fix. After all, the Evidence Rules are applied outside the jury context, especially in civil cases.

Good arguments can surely be made for and against changing the definition of hearsay. But public input on the point will not be as robust as possible unless the question is presented clearly and directly. Packaging the proposal as a jury instruction fix is one challenge to clarity. Another is the wording of the proposed new rule, particularly the inclusion of subdivision (i).

It is not entirely clear to me whether the Committee is concerned about abrogating Tome v. United States, 513 U.S. 150 (1995). On the one hand, the proposed change eliminates the timing and purpose requirements inherent in the existing Rule as refined by the Supreme Court. On the other hand, the proposal retains the language examined in Tome.

Retaining the old rule as (b)(1)(B)(i) seems odd. The new subsection will overwhelm the old. I cannot imagine why any lawyer practicing under the amended Rule would offer a statement under (i), when it could just as well be offered under (ii) without the restrictive timing and purpose requirements.

The FJC survey of judges posited an amendment that did not have the Tome language. The draft language sent to judges was this: "(B) [observe: no subsection (i) or (ii)] is consistent with the declarant's testimony and is otherwise

admissible to rehabilitate the declarant's credibility as a witness." For what it is worth, only 10% of the survey respondents favored an amendment with wording different from what was given in the survey.

Retaining the old language as a vestigial remnant might not do any substantive harm. But an unintended consequence of including it is that it could very well lull readers of the public notice into thinking that the proposed change is less radical than it is.

In addition to the published emphasis on juror comprehension and the retention of familiar language, the publication downplays the magnitude of the proposed change by minimizing any possible increase in prior statements, in part by optimistically suggesting cautionary language for the Advisory Committee Note. Members of the Committee might also be tempted to find comfort in the fact that the corresponding Minnesota state rule has been broadly worded since 1990, but I believe it would be a mistake to rely too heavily on that state's experience. I served on Minnesota's supreme court and also am responsible for the hearsay chapter of the Minnesota Evidence Deskbook, but do not claim to be an expert on current application of the state rule. Still, the language of the state rule, especially as interpreted by the appellate courts and applied in the districts (it has gotten particular attention in child sex abuse cases) probably is not especially instructive about how the proposed change to the federal rule might play out.

With at least three factors potentially affecting the robustness of public comment, I will offer a few of my own thoughts about possible unintended consequences. Again, this is not to say that the Rule should not be changed, but to highlight some factors that might not have received focused attention so far.

Rule 403, which is the only proffered limitation on substantive admission of prior consistent statements, is a pretty blunt and imprecise instrument. It keeps out relevant information only if the information's prejudicial effect *substantially* outweighs its probative value. Admissibility in general is subject to the preponderance standard of Bourjaily v. United States, 483 U.S. 171 (1987), and the fact-finder uses whatever standard is appropriate to the case. If 403 is the only guide, the Rules put a thumb on the scale for admission.

Partly because of the effect of 403, but also because 801 would carry an explicit green light for prior statements that currently are admitted cautiously if at all, it

seems inevitable that more prior statements would be heard by fact-finders under the amended rule. (Not to place too much weight on the FJC survey, but only 12% of responding judges disagreed with the statement that changing the Rule would lead to more prior consistent statements being admitted.) Courts now look at the reason for an offer—has the credibility of a declarant-witness been attacked (by the other side; virtually no examination has been undertaken of 801(b)(1)(B)'s interaction with 607) in a way that implies that an improper force is pulling the witness's strings. Even the Minnesota rule, which doesn't contain that requirement on its face, has it in practice. (Here is a moderately interesting fact about the Minnesota rule, by the way. The cases speak of "bolstering" as a laudable use of prior statements.) New (ii) allows all manner of rehabilitation—no need to tie it to any particular kind of attack. A jury will make up its own mind, of course, but bolstering statements are not inherently reliable.

Without guidelines, parties will face increased uncertainty in preparing for trial. Presently, an opponent can decide whether to open the door to substantive prior consistent statements. The 1972 Advisory Committee Note said that "[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." Short of forgoing cross-examination altogether, it will be difficult for an opponent to have any control over whether a testifying declarant will be deemed to need some rehabilitation of his "credibility as a witness." Imagine, for example, a lawyer in a civil case trying to plan cross-examination of a non-party witness, knowing that nothing but 403 stands between cross and a possible flood of prior consistent statements on redirect.

Even if the number of prior consistent statements permitted in evidence did not increase, but the non-substantive simply became substantive, more than jury instructions would be affected. Attorneys are able to distinguish between generally and specially admitted evidence, and that affects the way they argue the evidence in summation. If the number of prior statements admitted were to increase, it would raise the fairly obvious concern mentioned by the Court in Tome that "the whole emphasis of the trial could shift to the out-of-court statements, not the in-court ones."

Even if justice is better served by revising the Rule's approach to prior consistent statements, the current wording of the possible new rule seems problematic.

Subdivision (i) is a mystery. Subdivision (ii) is standardless and articulates a test that depends on result rather than purpose. It makes admissibility contingent on being rehabilitative, something that is not knowable at the time of offer. Jurors, after all, regularly reject in-court testimony and also any proffered rehabilitation evidence.

The actual notice to the public on the 801(d)(1)(B) amendment does not quite tee up the question at hand. Retaining the appearance of Tome is potentially lulling. Results of a judicial survey are presented, but judges opined on a differently worded amendment. The proposal to change a long-standing rule of evidence is presented as a jury instruction fix. Potential implications in civil cases do not seem to have been fully explored. Possible (I would say probable) impact on the number of prior statements received is downplayed.

For all these reasons, I urge the Committee to carefully consider whether it has all of the information necessary to be comfortable making what is a pretty big change to the substantive law of hearsay.

Respectfully submitted,

s/Joan N. Ericksen
Joan N. Ericksen
United States District Judge
District of Minnesota