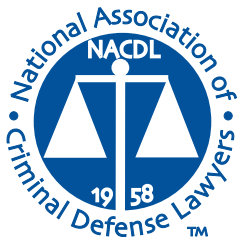

12-EV-005

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February 15, 2013
via e-mail

Peter G. McCabe, Secretary
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COMMENTS OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Concerning Proposed Amendments
to the Federal Rules of Evidence
Published for Comment in August 2012

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments with respect to the proposed changes in the Federal Rules of Evidence. NACDL's comments on the proposed amendments to the Criminal Rules are being submitted separately. Our organization has more than 10,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of over 30,000 private and public defenders. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

EVIDENCE RULE 801(d)(1)(B)

The proposed amendment would expand the definition of prior consistent statements deemed not to be hearsay under Rule 801(d)(B), by adding a new subsection that defines as non-hearsay any such statement that "otherwise rehabilitates the declarant's testimony as a witness." We oppose the proposed amendment, because it would increase the existing disparity between the admissibility of prior consistent and prior inconsistent statements, a change that would be inconsistent with the historic rationale for this area of evidence law, without furthering the objective of the Rules to promote reliability in factfinding. The proposed amendment would also encourage the admission of prior consistent statements of marginal

relevance and allow them to be used improperly to bolster a witness' testimony. The amendment would also introduce a fundamental ambiguity that precludes its adoption in the proposed form. Finally, the change would in practical effect have an unfair and imbalanced impact in criminal cases that would favor the government.

Instead of adopting this proposal, we would urge the Committee to amend Rule 801 to treat prior consistent statements the same as prior inconsistent statements – *i.e.,* to admit them as substantive evidence only when they were made under penalty of perjury and during a trial-like proceeding. Prior consistent statements that are not sworn (or the equivalent) should not be admitted as substantive evidence, that is, for their truth. Prior consistent statements that are unsworn (a term we use here to mean "not made under penalty of perjury" and during a prior trial, hearing or deposition) should be admissible only for purpose of rehabilitating a witness's credibility after it has been impeached by the adverse party, and subject to the logical limitations of the rule. See *Tome v. United States*, 513 U.S. 150 (1995).

The current rule defines prior inconsistent statements as non-hearsay only when they were made under "penalty of perjury" during a formal proceeding. F.R.E. 801(d)(1)(A). Unsworn prior consistent statements, by contrast, are non-hearsay whenever they are offered "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." F.R.E. 801(d)(1)(B). The proposed amendment would add a subparagraph (ii) to the latter section, defining as non-hearsay any prior consistent statement that "otherwise rehabilitates the declarant's credibility as a witness."

According to the Committee Note, the "amendment does not make any consistent statement admissible that was not admissible previously – the only difference is that all prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well." (*Prelim. Draft,* p. 219.) While we anticipate that the amendment would in fact allow prior consistenst statements to be admitted more frequently, what is more important is that the comment understates rather remarkably the difference between admitting evidence for its truth and allowing it (necessarily subject to a limiting instruction) only to impeach or rehabilitate the statement made by a witness under oath or affirmation in the courtroom. As is discussed further below, that difference is significant, and the reasons given for the expansion of prior consistent statements that would be admitted for their truth under the proposed amendment do not suppor it.

The *Report to the Standing Committee* gives two reasons in support of the proposed amendment. The first is the "basic practical problem[] in distinguishing between substantive and credibility use as applied to prior consistent statements. . . . [T]he necessary jury instruction is almost impossible for jurors to follow." (*Prelim. Draft,* p. 214.) But that rationale proves too much. If jurors cannot follow the limiting instruction that allows certain prior consistent statements to be used only for rehabilitative purposes, then it is necessarily true that they cannot follow the Rule 105 instruction that allows most prior *inconsistent* statements to be used only for impeachment purposes. Nor is the proper use of prior statements the only limiting instruction that requires such mental gymnastics from the jury. Jurors must not consider Rule 404(b) evidence as proof of the defendant's propensity to commit crimes.

Similarly, if a defendant testifies at trial and is impeached with prior convictions under Rule 609, the jurors must consider those only to the extent that they reflect on the defendant's credibility. They may not consider a prior conviction for the same or a similar offense as evidence that the defendant is guilty in the case at trial. Only with respect to co-conspirator accusations has the Supreme Court ever reached the conclusion that a limiting instruction is insufficient to protect a litigant's rights in such circumstances. See *Bruton v. United States*, 391 U.S. 123 (1968). Otherwise, limiting instructions are universally deemed sufficient and effective. See *Greer v. Miller*, 483 U.S. 756, 766 n.8 (1987). If the committee endorses here the perspective that jurors cannot comprehend and adhere to limiting instructions in this additional, and rather conventional context, a flood of appeals against the admission of evidence subject to such instructions in other situations is sure to follow.

Fairness dictates that prior consistent and inconsistent statements be treated under equivalent rules. If the Committee is correct in its statement that a "prior consistent statement is of little or no use for credibility unless the jury believes it to be true," then perforce a prior *inconsistent* statement is of little or no use in attacking credibility unless the jury believes it to be true. *(Prelim. Draft,* p. 214.) But in fact, this is not the rationale and traditional justification for these rules. Instead, what we expect jurors to perceive is that consistency often betokens truthfulness, while inconsistency may suggest deceit. But in neither case is the matter for the jury's consideration really the accuracy of the out-of-court statement; it is always the credibility of the in-court testimony that must be ascertained. Moreover, some liars are consistent in their false accounts, while some basically honest persons may tell an untrue tale initially, due to fear or confusion, and only later realize that the truth is the proper way. Accordingly, we support an amendment to the Rule that would treat prior consistent and inconsistent statements the same as one another.

The second stated reason for the proposed amendment is that "the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case." (*Id.*) We do not believe that this statement is accurate. The difference in the admissibility of prior inconsistent and consistent statements creates a hierarchy of evidence. The adverse party may not argue the truth of a prior inconsistent statement that was not made in a formal proceeding under penalty of perjury; it may argue only that the prior inconsistency impugns the witness's credibility. The party sponsoring the witness, by contrast, may argue the truth of the content of the prior consistent statement, thus countering what may have been an effective cross-examination impeaching credibility. The prior statement may be offered through a third-party rebuttal witness (such as a federal agent), with the impeached witness off the stand and protected from further attack if not impliedly bolstered.

In addition, a juror instructed that an unsworn prior inconsistent statement may be considered only for its impeachment value, while the unsworn prior consistent statement offered to rebut it may be considered for its substance and truth, will almost certainly infer that the latter is deemed by the judge to be of greater evidentiary value. How else would the difference in instructions be perceived?

In practice, the existing rule already favors the government in criminal cases. It does not apply to a defendant's prior statements, of course; those are nonhearsay by virtue of being "admissions" under F.R.E. 801(d)(2)(A). The witnesses in question are third parties. It is a simple fact that, in the aggregate, the government presents far more witnesses in criminal cases than the defense, and that it is government investigative agents who have taken most of the prior statements from trial witnesses in such cases. Consequently, it is usually the defense that presents prior inconsistent statements for the purpose of impeaching government witnesses and the government that offers prior consistent statements to rehabilitate those witnesses. Except in the rare circumstances where the prior inconsistent statements were made under penalty of perjury and in a trial-like setting, they are admissible under the current Rule only for impeachment purposes, reflecting the traditional view of evidence for centuries. The jury is consequently instructed, pursuant to F.R.E. 105, that it may consider such statements not for the truth of the matter asserted, but only for their impeachment effect on the witness's credibility. If the impeachment expressly or implicitly suggests that the witness is biased or has fabricated his/her trial testimony, then any prior consistent statement offered by the government to rebut that suggestion is already admissible as substantive evidence under Rule 801(d)(1)(B), as interpreted in *Tome*. Where the agents have recorded the prior statement, had the witness write it down, or secured the witness's signature on a version, the jury may even have a written or recorded prior consistent statement available in the jury room during deliberations. If so, it could be read or listened to repeatedly. The prior inconsistent statement, on the other hand, would never be physically present in the jury room. Consequently, it would not have the same impact on the deliberating jurors.

Finally, the proposed amendment is fatally ambiguous. The new provision would apply if the prior consistent statement "*otherwise* rehabilitates the declarant's credibility …." That is, read in full, the new provision would say that a witness's prior statement is not inadmissible as hearsay if it "is consistent with the declarant's testimony and … otherwise rehabilitates the declarant's credibility as a witness." It is not at all clear whether this means that the statement must tend to rehabilitate "otherwise" than by virtue of its mere consistency, or that it rehabilitates "otherwise" than as provided in what would become subsection (i) of Rule 801(d)(1)(B), that is, by virtue of its timing and lack of motive or influence. Until and unless the central ambiguity is clarified, the amendment should not be adopted.

For all these reasons, NACDL opposes the proposed amendment to F.R.E. 801(d).

EVIDENCE RULES 803(6)-(8)

We do not oppose the proposed amendments to F.R.E. 803 (6), (7) and (8). We believe, however, that there are inaccuracies in the Committee Notes that follow the amended rules that require correction.

In the case of business records, the amendment provides that once the proponent meets the foundational requirements for admissibility, the records are admissible if the "opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." F.R.E. 803(6)(E).

Similarly, once the proponent of a public record meets the foundational criteria, the records are admissible if "the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness." F.R.E. 803(8)(B). When a party seeks to introduce evidence of the absence of a record of a regularly conducted activity and meets the foundational criteria, the matter is admissible if the "opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness." F.R.E. 803(7)(C).

Unfortunately, the Committee Notes following these proposed amendments use different language that is apt to create confusion and increase the burden on the opponent of evidence proffered under F.R.E. 803 (6), (7) or (8). The Note following Rule 803(6) says:

> The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception . . . then the burden is on the opponent to **show** a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose the burden of **proving** untrustworthiness on the opponent, as the basic admissibility requirements are sufficient to establish a presumption that the record is reliable. (Emphasis added.)

Similarly, the Notes after F.R.E. 803(7) state that the amendment transfers the burden to the opponent to "**show** a lack of trustworthiness. (Emphasis added.)"

These passages in the Committee Notes do not accurately reflect the careful wording of the proposed amendments, which requires the opponent of the evidence only to "show" that the source of the information or other circumstances "indicate" a lack of trustworthiness. This difference is not inconsequential. A requirement that the opponent adduce information (which need not itself be admissible evidence; *see* F.R.E. 104(a)) "indicating" a lack of trustworthiness imposes a much lower burden than one calling for the opponent to "show" or "prove" a lack of trustworthiness. The Supreme Court has aptly noted that the use of the term "'indicates' certainly imposes less of a burden than, say, 'requires' or 'necessitates.'" *Rowland v. California Men's Colony,* 506 U.S. 194, 200 (1993).

The proposed amendment to the Rule basically places a burden on the opponent of the evidence, but that burden is not to "show" that the record lacks trustworthiness. The opponent's burden is only to "show" that there is some "indication" of lack of trustworthiness. The evidence must then be excluded unless the proponent refutes the indication; in effect, the opponent merely needs to place that question legitimately at issue. The difference is critically important, because the opponent of the evidence may well not be able to affirmatively establish the evidence lacks trustworthiness (as the draft Note would have it), because of lack of access to the actual sources of information or circumstances of preparation. The proponent of the evidence will generally have superior or perhaps even exclusive access to the actual sources of information and circumstances of preparation. The language of the Rule properly acknowledges that it would be unfair to impose an unrealistic burden on the opponent of the evidence to establish affirmatively that a record is untrustworthy. The Committee Notes should be

rewritten to reflect the actual (and well-constructed) language of the proposed amended Rule.

The National Association of Criminal Defense Lawyers is grateful for the opportunity to submit its views on these proposals. We look forward to continuing to work with the Committee in the years to come.

Very truly yours,
s/Peter Goldberger

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