

August 30, 2017

Hon. William K. Sessions, III  
Chair, Advisory Committee on the Rules of Evidence  
United States District Court  
Federal Building  
11 Elmwood Avenue, 5th Floor  
Burlington, VT 05401

Re: Invitation for Comment on a Possible Amendment to Fed.R.Evid. 801(d)(1)(A)

Dear Judge Sessions:

The American Association for Justice (“AAJ”), formerly known as the Association of Trial Lawyers of America (“ATLA”), hereby submits these comments in response to Invitation for Comment on Possible Amendment to Fed.R.Evid. 801(d)(1)(A) (hereinafter “Invitation for Comment”) posted by the Advisory Committee on the Rules of Evidence (hereinafter “Advisory Committee”). AAJ, with members in the United States, Canada and abroad, works to preserve the constitutional right to trial by jury and access to justice when people are injured by the negligence or misconduct of others. AAJ advocates to ensure that all plaintiffs receive their Constitutional right to their day in court under fair, just and reasonable rules of evidence.

The Advisory Committee is considering a rule amendment that would allow the introduction of prior inconsistent statements made in audiovisual recordings for substantive purposes. AAJ believes that this rule change would ultimately prove important in very few civil cases, and would have more significant impact on criminal cases. While AAJ is still considering the proposed impact this amendment would have on civil litigation, it does wish to acknowledge the implication of this rulemaking could have on the ever-increasing importance of cell phone recordings and social media recordings as evidence. AAJ does not believe that the rule change itself would lead to an increase in recordings.

AAJ is hard pressed to find a single civil case in which an audiovisual recording of a prior inconsistent statement would have proven important in the disposition of a case if admitted for substantive reasons, not just impeachment. However, it is not hard to imagine such a case. For instance, a cell-phone recording taken immediately after a car accident where, inconsistent with testimony at trial, a defendant in the case makes a statement admitting fault in the video. While this recording could currently be introduced to impeach the witness, under the proposed rule change, this cell phone recording could now also be admitted as substantive evidence.

Cell phone recordings, which will certainly qualify as “audiovisual” recordings under this proposed rule change, will only become more prevalent, and as such are more likely to become important evidence in civil cases. The same is equally true of videos posted on social media outlets, such as Facebook and Instagram. These recordings likewise could potentially become evidence, which under the proposed rule could be admitted for substantive reasons if inconsistent with a person’s testimony at trial. Cell phone recordings seem ubiquitous for all events occurring in public spaces or those involving the police or other authorities, which may be why this proposed rule change has a limited

application. Live-streaming and other tools make video available instantly so the purpose of this rule may be of limited application as the video will be subject to viewing long before the declarant witness testifies.

Ultimately, the rules regarding hearsay are intended to preserve reliability of evidence. While the implications of this rule may grow as cell-phone recordings and social media recordings become more prevalent, changes in technology would not inherently affect the reliability of a recording that captures both the audio and visual aspects of a statement. Such a recorded statement provides context, is reliable and subject to proper cross-examination. As such, AAJ does not foresee this draft amendment impacting many civil cases.

However, given the everchanging audio visual landscape AAJ suggests that the Advisory Committee be mindful of the types of evidence that this rule change may implicate as technology evolves. More specifically, AAJ recommends that the Committee consider expanding the committee note to acknowledge that it is the intent of the Committee that “audiovisual recording” be deemed to apply to changes in technology, not just traditional videotaped recordings. Currently, the note does not specifically define “audiovisual”, but perhaps it would be useful to give examples of technology that are included in the proposed amendment, including the use of cell phone recordings and social media with an audiovisual component.

AAJ appreciates this opportunity to submit comments regarding Federal Rule of Evidence 801(d)(1)(A). If you have any questions or comments, please contact Sue Steinman, Senior Director of Policy and Senior Counsel, American Association for Justice, at (202) 944-2885.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kathleen L. Natri', with a stylized flourish at the end.

Kathleen L. Natri  
President  
American Association for Justice