Advisory Committee on Evidence Rules

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

July 6, 2017

The Advisory Committee on Evidence Rules is considering a possible amendment that would provide for substantive admissibility of more prior inconsistent statements than is currently permitted under Fed.R.Evid. 801(d)(1)(A). Currently, the Rule provides for substantive admissibility only for inconsistent statements that were made under oath at a formal proceeding. The Committee has determined that the major reason for the Rule's limitation is a concern over whether a prior inconsistent was ever made, because cross-examination of the witness about the statement is unlikely to be productive if the witness denies ever making it. The oath and formality requirements assure that there will be no dispute over whether the statement was made or the context in which it was made. The Committee is exploring expanding substantive admissibility to statements that have been audiovisually recorded, on the ground that (as with the statements currently covered by the Rule) there will be no dispute about whether such statements were made or in what context they are made. The argument therefore can be made that audiovisually recorded statements are entitled to substantive admissibility because the person who made the statement will be subject to adequate cross-examination and there will no longer be a need to provide a confusing limiting instruction for such statements.

The Committee seeks preliminary comment on the consequences to litigants and courts that might arise if audiovisually recorded prior inconsistent statements are given substantive effect. Questions include whether the amendment might lead to more statements being audiovisually recorded; whether any such increase will lead to positive or negative results;

whether certain parties might be disadvantaged; practical problems, if any, in determining whether a recording should be admitted; and any other costs or benefits that might occur.

What follows is the proposed amendment to Rule 801(d)(1)(A) that the Committee is considering, together with a draft Committee Note. (Bracketed material concerns another possible expansion that would allow substantive admissibility for statements that the witness acknowledges having been made. The Committee invites comment on this proposal as well).

(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~~:

(i) was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(ii) was recorded by audiovisual means, and the recording is available for presentation at trial; or

[(iii) is acknowledged by the declarant, while testifying at the trial or hearing, as the declarant's own statement; or]

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

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

A working draft of the Committee Note provides as follows:

The amendment provides for greater substantive admissibility of inconsistent statements of a testifying witness, which is appropriate because the declarant is by definition testifying under oath and is subject to cross-examination about the statement. The requirement that the statement be made under oath at a former proceeding is unnecessarily restrictive. That requirement stemmed mainly from a concern that it was necessary to regulate the possibility that the prior statement was never made or that its presentation in court is inaccurate --- because it may be difficult to cross-examine a declarant about a prior statement that the declarant plausibly denies making. But as shown in the practice of some states, there is a less onerous alternative --- not widely available at the time the rule was drafted --- to assure that what is introduced is what the witness actually said. The best proof of what the witness said, and that the witness said it, is when the statement is made in an audiovisual record. That is the safeguard provided by the amendment. Given this important safeguard, there is good reason to dispense with the confusing jury instruction that seeks to distinguish between substantive and impeachment uses for prior inconsistent statements.

The amendment expands substantive admissibility for prior inconsistent statements only if there is no dispute that the witness actually made the statement. Subidivision (A)(ii) requires a statement to be recorded by "audiovisual" means. So to be substantively admissible, it must be clear that the witness made the statement on both audio and video. "Off-camera" statements are not substantively admissible under the amendment.

It may arise that a prior inconsistent statement, even though made in an audiovisual record, is challenged for being unreliable --- for example that the witness was subject to undue influence, or impaired by alcohol at the time the statement was made. These reliability questions are generally for the trier of fact, and they will be relatively easy to assess given the existence of an audiovisual recording and testimony at trial by the person who made the statement.

Questions may arise when the recording is partial, or subject to technical glitches. Courts in deciding the analogous question of authenticity under Rule

901 have held that deficiencies in the recording process do not bar admissibility unless they "render the recording as a whole untrustworthy." *United States v. Adams*, 722 F.3d 788, 822 (6th Cir. 2013). *See also United States v. Cejas*, 761 F.3d 717 (7th Cir. 2014) (intermittent skips in video recording did not render recordings untrustworthy). Courts can usefully apply that standard in assessing the witness's prior statement for substantive admissibility.

There is overlap between subdivisions (A)(i) and (A)(ii). For example, audiovisual recording of a deposition is potentially admissible under both provisions. But the Committee decided to retain the longstanding original provision, as it has been the subject of extensive case law that should not be discarded. Rather than replace the original ground of substantive admissibility, the decision has been made to add a new, if somewhat overlapping, ground.

[New Subdivision (A)(iii) provides for an additional, limited ground of substantive admissibility: where the declarant acknowledges having made the prior statement while testifying at the trial or hearing. Acknowledgment by the witness eliminates the concern that the statement was never made, so the acknowledging witness can be fairly cross-examined about the statement. It is for the court in its discretion to determine under the circumstances whether the witness has, in testifying, sufficiently acknowledged making the statement that is offered as inconsistent. There is no requirement that the court undertake a line-by-line assessment.]

While the amendment allows for somewhat broader substantive admissibility of prior inconsistent statements, it does not affect the use of any prior inconsistent statement for impeachment purposes. A party may wish to introduce an inconsistent statement not to show that the witness's testimony is false and prior statement is true, but rather to show that neither is true. Rule 801(d)(1)(A) is inapplicable if the proponent is not offering the prior inconsistent statement for its truth. If the proponent is offering the statement solely for impeachment and because it was false, it does not fit the definition of hearsay under Rule 801(c), and so Rule 801(d)(1)(A) never comes into play.

Because this is an ongoing project, there is no formal time limit on submission of commentary about Rule 801(d)(1)(A). But for the Committee to receive maximum benefit from any submission, it would be most helpful if it were received no later than August 31, 2017. Any comments should be submitted to: Rules_Comments@ao.uscourts.gov.