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Submitted online

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Advisory Committee on Rules of Evidence
Committee on Rules of Practice & Procedure
Judicial Conference of the United States

AMENDMENTS TO EVIDENCE RULES PROPOSED FOR COMMENT, Aug. 2024

To the Committee and Staff:

The National Association of Criminal Defense Lawyers (NACDL) is pleased to submit our comments on the proposed amendment to Rule 801 of the Federal Rules of Evidence. NACDL enthusiastically supports this proposal.

Founded in 1958, NACDL is the preeminent organization in the United States representing the views, rights and interests of the criminal defense bar and its clients. Our association has more than 10,000 direct members. With NACDL's 90 state and local affiliates spanning nearly every state, we represent a combined membership of some 40,000 private attorneys, public defenders, and interested academics.

EVIDENCE RULE 801(d) – STATEMENTS THAT ARE NOT HEARSAY

NACDL strongly supports the proposed amendment to FRE 801(d)(1)(A). The committee proposal would remove the requirement that a prior inconsistent statement have been given under oath before it may be admitted as substantive evidence, whenever the declarant testifies and is subject to cross-examination about the statement. We also agree with the reasoning underlying the new language. The dangers presented by hearsay are "largely nonexistent" when the declarant of the out-of-court statement is present and can be examined about its contents. NACDL agrees with the Committee's analysis that the three premises for the present rule disallowing unsworn prior inconsistent statements as substantive evidence are not persuasive.

As the Committee points out, the first premise – *viz.*, that a prior statement made under oath is more reliable than one that is not – is not sufficient to justify disparate treatment under Rule 801(d)(1). The Committee notes that unsworn statements of identification come in as substantive evidence under Rule 801(d)(1)(C). It is also true that unsworn prior consistent statements come in as substantive evidence under 801(d)(1)(B) when offered to rebut an attack on a witness's credibility. NACDL is unaware of any support for the proposition that unsworn prior *inconsistent* statements are any less reliable than unsworn prior *consistent* statements, which have long been admitted as substantive evidence when offered for rehabilitation of the witness.

The second premise underlying the current, more restrictive rule is that statements not made at formal proceedings can be difficult to prove. That rationale provides scant support for the rule as currently framed. First, not all unsworn prior inconsistent statements are unrecorded. Many

of them are contained in police reports or other writings. *Cf.* Fed.R.Evid. 803(8)(A)(iii) (admissibility of police reports when offered by the defendant in a criminal case). They are frequently contained in written or recorded statements taken from witnesses. It is not the lack of recordation that has been used to justify the current rule; it is the lack of an oath. But even when the prior inconsistent statement is not recorded anywhere, it is no harder to prove its content than that of any other unrecorded fact. Yet the lack of recordation is not a basis to exclude other types of relevant evidence. There is no principled basis on which to allow some unrecorded statements to come in as substantive evidence, while barring others.

The third premise simply does not make sense. It is true that, "if a witness denies making the prior statement, then cross-examination about the statement might be difficult." (Committee Report, at 88 of 109.) But the current rule does not prohibit cross-examination about a prior inconsistent statement. It merely denies the opposing counsel the right to argue the substantive content of the statement – even in situations where the witness admits making it. Neither the current rule nor the proposed amendment has any effect on the difficulty of a given cross-examination. In any event, the difficulty of cross-examination is not otherwise a reason for the exclusion of evidence.

There is one more reason to support amending Rule 801(d)(1) that is not discussed in the Committee Report. That is the fact that the current rule, as applied in criminal cases, has long favored the government over the defense. Although the rule is neutral on its face and applies equally to both sides, the fact is that the overwhelming majority of witnesses at a criminal trial testify for the prosecution. That means that impeachment with a prior *inconsistent* statement is usually done by the defense, while rehabilitation of the witness with a prior *consistent* statement is usually attempted by the government. Because of the Rule's disparate treatment of the two types of statements, the prosecution is able to argue the substantive truth of the prior consistent statements that it relies on, while the defense can argue only that the prior inconsistent statement reflects negatively on the witness's credibility. As the Committee notes, this leads to complicated instructions that are confusing to many jurors. And when the judge tells them that they may consider the substantive truth of prior consistent statements, but not of prior inconsistent statements, some jurors will undoubtedly conclude that the court is saying that the former are more reliable than the latter. NACDL respectfully submits that it is long past time to remove this unfair disparity from the Rule and to admit prior statements used for impeachment and for rehabilitation on an equal footing.

For these reasons, NACDL supports the Advisory Committee's proposal to amend Fed.R.Evid. 801(d), as published.

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NACDL thanks the Committee for its valuable work and for this opportunity to contribute our thoughts. We look forward to continuing our longstanding relationship with the advisory committees as a regular submitter of written comments.

Respectfully submitted,
THE NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS

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