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February 15, 2013

The Honorable Jeffrey S. Sutton, Chair
Committee on Rules of Practice
and Procedure
c/o Peter G. McCabe, Secretary
Administrative Office
of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

The Honorable Sidney A. Fitzwater, Chair
Advisory Committee on Evidence Rules
c/o Peter G. McCabe, Secretary
Administrative Office
of the United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Proposed Amendment to Evidence Rule 801(d)(2)(B)

Dear Judges Sutton and Fitzwater:

As a past member of the Advisory Committee on Evidence Rules, I have some misgivings about writing to criticize a proposed amendment to those rules that was considered and passed on to the Standing Committee on my watch. I find, though, that my concerns with the downside of the proposed amendment have not lessened with the passage of time. I am also reassured by the fact that a former Evidence Advisory Committee colleague, Judge Joan Ericksen, has already raised concerns about the proposed amendment.

I oppose this proposed amendment because I don't think it changes evidence law in a sensible way, and I believe it creates too great a risk that the amended rule would increase the admission of out-of-court, unsworn statements as substantive evidence without our having considered evidence and reached a conscious policy conclusion that such evidence should be more widely admitted. The rationale for the proposed change – that it will eliminate the need for some (but far from all) complicated jury instructions regarding the difference between substantive evidence and non-substantive evidence – is not an adequate reason for changing the law of evidence, at least without further study.

Rule 801(d)(1) is already internally inconsistent, and the amendment would aggravate the existing imbalance. Even before the proposed amendment, it is difficult to rationalize the Rules' treatment of a prior inconsistent statement ("PIS") on the one hand and a prior consistent statement ("PCS") on the other. Non-party PISs admitted for impeachment have to overcome barriers before being considered as substantive evidence of the truth of the declarant's statement. Even if the declarant has testified and is subject to cross (more likely further direct) examination, her PIS is substantive evidence only if it was given under penalty of perjury in a trial, hearing, other proceeding or deposition. But a PCS of the same non-party, made in a text message, at a cocktail party, or on the checkout line, is substantive evidence under existing law, so long as it is offered to rebut an express *or* implied charge of recent fabrication of the initial testimony, or of improper influence or motive in giving the testimony. I do not see any sound basis for this distinction. Broadening the class of PCS evidence that is made substantive doesn't solve a problem; it aggravates it.

Treating PCS evidence as substantive is unnecessary. Inherently, PCS evidence is rehabilitative. The declarant has testified that the light was green, and the plaintiff introduces her deposition testimony that the light was red. Then she or another witness comes back to testify about other occasions on which she said the light was green. This testimony may be necessary or appropriate to beat back the assertion that she was bribed, or that her memory is failing, or that she is color blind, but it is not a necessary element of either party's proof (as the PIS evidence might be) because we already have her non-hearsay initial testimony that the light was green. Not long after the adoption of Rule 801(d)(1), Judge Friendly observed that "[i]t is not entirely clear why the Advisory Committee felt it necessary to provide for admissibility of certain prior consistent statements as affirmative evidence. . . . [T]his had been a non-problem." *United States v. Rubin,* 609 F.2d 51, 70 n. 4 (2d Cir. 1979)(Friendly, J., concurring), *aff'd,* 449 U.S. 424 (1981).

Amending the rule would change the law of evidence without intending to, and without full consideration of whether the change is called for. The discussions and minutes regarding the proposed amendment are marbled with two thoughts : (1) that "impermissible bolstering" of testimony by cumulative repetition is to be avoided, (2) that the amended rule should not lead to a relaxation of the existing safeguards and limitations on the admission of hearsay in the form of PCS evidence. Those points are also stressed in the comment to the proposed amendment.

But it seems rather clear that the amendment would in fact be very likely to increase the frequency of PCS evidence. I remain troubled by the results of the Federal Judicial Center survey conducted at the request of the Advisory Committee. First, those results suggest strongly that, in practice, amendment of the rule *would* lead to the admission of more PCS evidence. Seventy-two per cent of the judges responding thought that the amendment "would lead to more prior consistent statements being admitted." Second,

there is an issue here – whether the reception of more PCS evidence would be a good thing or a bad thing – that cries out for careful study and robust debate, neither of which has occurred. According to the study, 48% of the responding judges think that the increased use of PCS evidence is a good thing, while 25% of them think the opposite. Those numbers tell us that we should think hard about the question – whether more PCS evidence is a good thing or a bad thing – before pushing forward with this amendment.

Simplifying the task of judges charging juries is a worthy goal; making jury instructions more intelligible is even worthier. But I believe that adopting this proposed amendment would change the law of evidence without intending to do so, and without having squarely addressed the question whether that change is a good thing.

Thank you for considering these comments.

Sincerely,

William T. Hangley

cc: Professor Daniel J. Capra
Benjamin J. Robinson, Esquire