

1 John Furlong, Bar No. 018356
2 General Counsel
3 State Bar of Arizona
4 4201 N. 24th Street, Suite 100
5 Phoenix, AZ 85016-6288
6 (602) 340-7236
7 John.Furlong@staff.azbar.org

8 **IN THE SUPREME COURT**
9 **STATE OF ARIZONA**

10 In the Matter of:

Supreme Court No. R-14-0002

11 **PETITION TO AMEND RULE**
12 **801(d)(1)(B) AND 803(6)-(8),**
13 **ARIZONA RULES OF EVIDENCE**

COMMENT OF
THE STATE BAR OF ARIZONA

14 The State Bar of Arizona supports the petition to amend the Arizona Rules of
15 Evidence concerning the admissibility of non-hearsay prior statements and the
16 burden surrounding the trustworthiness of hearsay-excepted documents. The State
17 Bar believes that the recommended changes to Rule 803(6)-(8) should be accepted
18 in their entirety as requested. However, the State Bar believes that some
19 modifications need to be made to the proposed comment to Rule 801(d)(1)(B). As
20 discussed below, the State Bar suggests two substantive modifications to the
21 comment to Rule 801(d)(1)(B).

22 The proposed amendment to Rule 803(6)-(8) adequately clarifies the identity
23 of the party bearing the burden surrounding the introduction of the hearsay-excepted
24 documents, placing the burden on the opponent of the evidence to show lack of
25 trustworthiness. For this reason, the proposed amendment should be adopted.

1 The proposed modification to Rule 801(d)(1)(B) makes sense. It broadens a
2 party's capability of showing that the witness's testimony is reliable notwithstanding
3 evidence to the contrary. The comment to the rule, however, is internally
4 inconsistent regarding a court's admission of evidence under the proposed rule (is it
5 mandatory or discretionary?), and provides an evidentiary use/value incongruent, if
6 not inconsistent, with that afforded subsection (A) of the same rule. For these
7 reasons, the State Bar recommends modifications to the proposed comment to Rule
8 801(d)(1)(B).

9 **Suggested change to the comment to Rule 801(d)(1)(B)**

10 The comment to the proposed rule states: "The intent of the amendment is to
11 extend substantive effect to consistent statements that rebut other attacks on a witness
12 —such as the charges of inconsistency or faulty memory.... [T]he only difference
13 [between the current version and the proposed version] is that prior consistent
14 statements otherwise admissible for rehabilitation are now admissible substantively
15 as well."

16 If the rule is intended to render prior *consistent* statements admissible as
17 substantive evidence, the rule itself does not convey that intent. The rule is silent
18 on the permissible use of prior consistent testimony.

19 Moreover, subsection (A) of the same rule allows introduction of a
20 declarant-witness's prior statement when such statement is inconsistent with the
21 declarant's testimony. While our Supreme Court continues to recognize that it is
22 permissible to admit prior *inconsistent* statements to both impeach and as substantive
23 evidence of guilt – see, e.g., *State v. Skinner*, 110 Ariz. 135, 142 (1973), *State v.*
24 *Hernandez*, 232 Ariz. 313, 323 (2013) -- in *State v. Allred*, 134 Ariz. 274, 277
25 (1982), the court acknowledged that unfair prejudice can occur when impeachment

1 evidence is used for substantive purposes. *Allred* held that before allowing use of
2 impeachment evidence for substantive purposes, a trial court should consider five
3 factors – among others -- designed to highlight the trustworthiness of the statement as
4 well as its prejudicial impact upon the trial.

5 It is incongruent with the truth-seeking process to have courts hold that a
6 prior *inconsistent* statement admissible pursuant to Rule 801(d)(1)(A) may *not* be
7 considered as substantive evidence in light of any of the *Allred* factors (which are
8 non-exhaustive), while in accordance with the proposed rule's comment prior
9 *consistent* statements introduced pursuant to the very next subsection, Rule
10 801(d)(1)(B), *are* to be considered as substantive evidence. The substantive use
11 of any prior *consistent* statement admitted pursuant to subsection (B) should be
12 conditioned upon the same or similar non-exhaustive factors set out in *Allred*
13 governing the substantive use of prior *inconsistent* statements.

14 In light of the above, the State Bar recommends two changes to the comment
15 to the proposed new Rule 801(d)(1)(B):

- 16 • The last sentence of the third paragraph should be stricken in its entirety.

17 The new paragraph would read (deletions are indicated by strikethroughs):

18
19 The amendment retains the requirement set forth in *Tome v.*
20 *United States*, 513 U.S. 150 (1995): that under Rule
21 801(d)(1)(B), a consistent statement offered to rebut a charge of
22 recent fabrication of improper influence or motive must have
23 been made before the alleged fabrication or improper inference
24 or motive arose. ~~The intent of the amendment is to extend
substantive effect to consistent statements that rebut other attacks
on a witness — such as the charges of inconsistency or faulty
memory.~~

- 25 • The last sentence of the fourth paragraph should also be stricken in its

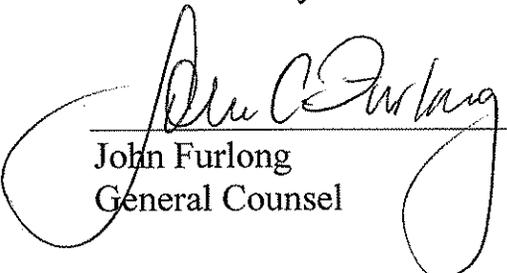
1 entirety. The new paragraph would read (deletions are indicated by strike-
2 throughs):

3 The amendment does not change the traditional and well-
4 accepted limits on bringing prior consistent statements before the
5 factfinder for credibility purposes. It does not allow
6 impermissible bolstering of a witness. As before, prior consistent
7 statements under the amendment may be brought before the
8 factfinder only if they properly rehabilitate a witness whose
9 credibility has been attacked. As before, to be admissible for
10 rehabilitation, a prior consistent statement must satisfy the
11 strictures of Rule 403. As before, the trial court has ample
12 direction to exclude prior consistent statements that are
13 cumulative accounts of an event. ~~The amendment does not make
14 any consistent statement admissible that was not admissible
15 previously — the only difference is that prior consistent
16 statements otherwise admissible for rehabilitation are not
17 admissible substantively as well.~~

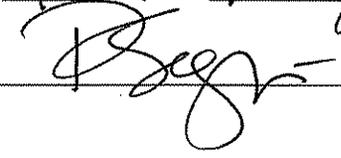
14 CONCLUSION

15 The State Bar of Arizona agrees that the proposed amendments to the two
16 evidence rules improve and clarify the existing rules. It recommends, however, that
17 the Court adopt the State Bar's recommended modifications to the proposed
18 comment to Rule 801(d)(1)(B).

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20 RESPECTFULLY SUBMITTED this 8th day of May, 2014.

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25 John Furlong
General Counsel

1 Electronic copy filed with the
2 Clerk of the Arizona Supreme Court
3 this 9th day of May, 2014.

4 by: 

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