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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of)
) Arizona Supreme Court No. R-14-0002
)
ARIZONA RULES OF)
EVIDENCE 801(d)(1)(B) AND)
803(6)-(8))
) **REPLY TO STATE BAR OF**
) **ARIZONA COMMENT**
)
)
_____)

Pursuant to Rule 28, Rules of the Supreme Court, the Advisory Committee on Rules of Evidence (“Committee”), by and through its Co-Chairs, Mark W. Armstrong and Samuel A. Thumma, submits this Reply to the Comment filed by the

State Bar of Arizona, and urges the Court to adopt the amendment of Rule 801(d)(1)(B), including the comment thereto, as proposed in the Petition.

I. INTRODUCTION AND BACKGROUND

On January 9, 2014, the Committee filed its Petition to Amend Rules 801(d)(1)(B) and 803(6)-(8), Arizona Rules of Evidence. The proposed rule changes track verbatim pending rule changes to the Federal Rules of Evidence. Similarly, the proposed comments track the Committee Notes of the federal Advisory Committee on Evidence Rules, which has described the proposed changes to Federal Rule of Evidence 801(d)(1)(B) as follows:

Rule 801(d)(1)(B) is the hearsay exemption for certain prior consistent statements. It would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they are admissible to 1) rebut an express or implied charge that the witness recently fabricated testimony or acted from a recent improper influence or motive in so testifying; and 2) rehabilitate the declarant's credibility when attacked on another ground. Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility—specifically, those that rebut a charge of recent fabrication or improper influence or motive—are also admissible substantively under the hearsay exemption. In contrast, other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of faulty recollection—are admissible only for rehabilitation but not substantively. There are two basic practical problems in distinguishing between substantive and credibility use as applied to prior consistent statements. First, the necessary

jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement ordinarily adds no real substantive effect to the proponent's case.

[Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure](#), September 2013, pp. 29-30.

II. SUMMARY OF STATE BAR COMMENT

On May 9, 2014, the State Bar of Arizona filed the sole comment to the petition. The State Bar generally supports the proposed rule changes, but recommends two changes to the comment to the proposed new Rule 801(d)(1)(B). The State Bar proposes to delete the last sentences of the third and fourth paragraphs of the comment, such that the modified comment would read as follows:

Comment to 2015 Amendment to Rule 801(d)(1)(B)

Rule 801(d)(1)(B), as originally adopted, provided for substantive use of certain prior consistent statements of a witness subject to cross-examination. As the federal Advisory Committee on Evidence Rules noted, “[t]he prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.”

Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left many prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in federal cases and cases from other jurisdictions; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.

The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication or improper influence or motive must have been made before the alleged fabrication or improper inference 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.~~

The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the

factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. ~~The amendment does not make any consistent statement admissible that was not admissible previously — the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.~~¹

The State Bar posits the following reasons for its proposed modification of the comment to proposed Rule 801(d)(1)(B):

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

* * * * *

¹ The State Bar's comment, on page 4, uses "not" so that the sentence ends "are not admissible substantively as well." The comment to the rule proposed by the Committee, however, uses "now" so that the sentence ends "are now admissible substantively as well." Although the State Bar's Comment uses the correct "now" on page 2, the Committee alerted the State Bar of this typographical error on page 4 immediately upon receipt of the Comment.

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

Moreover, subsection (A) of the same rule allows introduction of a declarant-witness's prior statement when such statement is inconsistent with the declarant's testimony. While our Supreme Court continues to recognize that it is permissible to admit prior *inconsistent* statements to both impeach and as substantive evidence of guilt—*see, e.g., State v. Skinner*, 110 Ariz. 135, 142 (1973), *State v. Hernandez*, 232 Ariz. 313, 323 (2013)—in *State v. Allred*, 134 Ariz. 274, 277 (1982), the court acknowledged that unfair prejudice can occur when impeachment evidence is used for substantive purposes. *Allred* held that before allowing use of impeachment evidence for substantive purposes, a trial court should consider five factors—among others—designed to highlight the trustworthiness of the statement as well as its prejudicial impact upon the trial.

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

III. COMMITTEE’S REPLY TO STATE BAR COMMENT

The purpose of the Committee is to “periodically conduct a review and analysis of the *Arizona Rules of Evidence*, review all proposals to amend the *Arizona Rules of Evidence*, compare the rules to the *Federal Rules of Evidence*, recommend revisions and additional rules as the Committee deems appropriate, entertain comments concerning the rules, and provide reports to this Court, as appropriate.” Arizona Supreme Court Administrative Order 2012-43. Since its inception, the Committee has been guided by the principle that, in the interest of uniformity and consistency, the Arizona Rules of Evidence should track the Federal Rules of Evidence unless there is a sound reason to do otherwise. In the matter at hand, the Committee could find no reason not to follow the proposed amendments of the Federal Rules of Evidence, including Committee Notes, which have been approved by the Judicial Conference and are pending before the United States Supreme Court. If the proposed amendments are approved by the Court, as expected, and Congress does not act to defer, modify or reject them, they will become effective December 1, 2014.

The two sentences in the comment that the State Bar suggests be deleted are taken verbatim from the proposed Committee Note to Federal Rule of Evidence 801(d)(1)(B). Accordingly, removing the two sentences could be viewed as suggesting that an Arizona Rule of Evidence should be construed differently than its

textually identical Federal Rule of Evidence counterpart. Such an approach would contravene substantial attempts to ensure uniformity and consistency in application of textually identical Arizona and Federal Rules of Evidence. In addition, the State Bar suggests that the two sentences make the comments internally inconsistent “regarding a court’s admission of evidence under the proposal (its [admission of evidence] mandatory or discretionary?).” Under current law, a trial court retains the discretion to exclude such evidence under Arizona Rule of Evidence 403, including considering the non-exclusive factors enumerated in *State v. Allred*, 134 Ariz. 274, 278, 635 p.2d 1326, 1330 (1982). *See, e.g., State v. Hernandez*, 232 Ariz. 313, 323 ¶ 48, 305 P.3d 378, 388 (2013); *State v. Joe*, 316 P.3d 615, 618 n.3 ¶ 13 (App. 2014). If the proposed amendment was adopted, a trial court would still retain the discretion to exclude such evidence under Arizona Rule of Evidence 403, including considering the non-exclusive factors enumerated in *Allred*. Accordingly, the claimed inconsistency noted in the State Bar’s comment does not currently exist and would not exist if the amendment was adopted.

CONCLUSION

The Committee respectfully requests that the Court approve the rule changes proposed in the Petition, including the comments as proposed, with an effective date of January 1, 2015.

DATED this ____ day of June, 2014.

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Co-Chair, Advisory Committee on Rules of Evidence

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