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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel Capra, Reporter
Re: Suggestion to Change Rule 801(d) “Not Hearsay” Designation
Date: September 16, 2010

Attached is an interesting article¹ from Professor Sam Stonefield, which he submitted to me as a formal proposal to amend the Federal Rules of Evidence. Professor Stonefield raises an anomaly in the treatment of hearsay: Rule 801(d) treats two categories of statements as “not hearsay” when in fact statements fitting under that Rule definitely fit within the definition of hearsay. Essentially the Rule says that statements that are clearly hearsay are “not hearsay” in the same manner as someone saying that an elephant is “not an elephant.” Professor Stonefield analyzes, in painstaking detail, the reasons for the anomaly of the Rule 801(d) categories of hearsay statements. The basic explanation is as follows:

Subdivision (d) technically provides an exemption from, rather than an exception to, the hearsay rule. The Advisory Committee determined that the statements covered by subdivision (d) should be categorized as “not hearsay” rather than as “hearsay subject to an exception” because the basis for admitting these statements is different from that supporting the other standard hearsay exceptions, such as excited utterances and dying declarations, which are found in Rules 803, 804, and 807. Statements falling within these latter exceptions are admitted because they are made pursuant to circumstantial guarantees of reliability that substitute for the in-court guarantees of oath, cross-examination, etc.² For example, excited utterances are made while the declarant is under the

¹ At least for Evidence professors.

² The exceptions to the circumstantial guarantee of reliability-basis for admission are: 1) Rule 803(5), past recollections recorded, which are admissible because the witness who prepared the record must be produced and subject to cross-examination; and 2) Rule 804(b)(6), where admission is the result of misconduct by the party against whom the hearsay statement is offered. (As to the latter exception, it should be noted that it was added years after the decision was made

influence of a startling event and for that reason is less likely to be able to lie.

In contrast, prior statements of testifying witnesses (Rule 801(d)(1)) are admitted not because they were reliable when made, but because the person who made them is testifying at the trial or hearing under oath and subject to cross-examination. And statements of party-opponents (Rule (d)(2)) are allowed not because they are reliable, but because the adversary or his agents made them — if a party happens to make an unreliable statement, it is not up to the Judge to protect him from use of the statement by the adversary; it is up to the party to try to explain the statement or to diminish its importance. The drafters of the Federal Rules thought that it would be confusing to lump prior statements of testifying witnesses and statements of party-opponents together with reliability-based exceptions under a single label of “hearsay exceptions.” As Professor Stonefield describes the original Advisory Committee’s rationale, the hearsay statements in Rule 801(d) presented a “poor fit” with the standard hearsay exceptions.

Professor Stonefield does not dispute the validity of the reason for breaking out the Rule 801(d) statements from the other hearsay exceptions. He agrees that they are a poor fit with Rules 803 and 804. He objects, however to the “not hearsay” designation, because it is simply confusing. Statements that clearly fit the definition of hearsay are labeled, *ipse dixit*, “not hearsay.” His further objection is that it makes no sense to group prior statements of testifying witnesses with statements of party-opponents because the reason for admitting the former set of statements (the ability to cross-examine the declarant) is completely different from the reason for admitting the latter (the adversary theory).

Professor Stonefield proposes that Rule 801(d) statements be redesignated as hearsay but subject to an exception. He concedes that his proposal will not change any evidentiary result as a practical matter, because there is no practical difference between an exception to the hearsay rule and an exemption from that rule. If a statement fits either an exemption or an exception, it is not excluded by the hearsay rule, and it can be considered as substantive evidence if it is not excluded by any other Rule (e.g. Rule 403). Professor Stonefield also concedes that courts have had no problem with the anomalous designation of Rule 801(d) statements as not hearsay — they know it makes no difference and so don’t get hung up on any distinction between “not hearsay” and “hearsay subject to an exception.”³

to create the “not hearsay” categories of Rule 801(d)).

³ One example of courts coping with the anomaly is in the application of Rule 805 — hearsay upon hearsay. That rule says that there is hearsay upon hearsay, each part of the combined statements must conform “with an exception to the rule.” Technically, conforming with one of the Rule 801(d) provisions would not satisfy Rule 805 because these are not an “exception” to the hearsay rule. But courts have had no problem finding, for example, that statements of party-opponents satisfy one of the steps in a multiple hearsay problem. See, e.g., *United States v. Dotson*, 821 F.2d 1034, 1035 (5th Cir. 1987) (“For the purposes of the hearsay-within-hearsay principle expressed in Rule 805, nonhearsay statements under Rule 801(d) * * *

The question for the Committee is whether the costs of an amendment — disruption of settled expectations, necessary adjustment, possible inadvertent changes, etc. — is outweighed by the benefit of a more logical approach to the hearsay rule and its exceptions. In the end, the major argument against the proposal is that the existing Rule 801(d), however logically flawed and perhaps confusing to novices, has not appeared to result in any practical problems of application.

Assuming the Committee were to decide to more fully consider an amendment to designate Rule 801(d) statements as hearsay exceptions, the question remains how that could be done. Professor Stonefield essentially provides two alternatives, which he refers to as “minimalist” and “thorough-going.” The minimalist approach includes moving the exception for past recollection recorded into the exception for prior statements — which is more than minimalist. So really there are three alternates, all set forth below. Generally speaking, the less drastic the approach, the less cost of disruption, but also the less benefit provided:

1. Minimalist Alternative — Simply Redesignating Rule 801(d) Statements, No Change to Past Recollection Recorded..

(d) Statements That Are Not Hearsay Exceptions to the Rule Against Hearsay [– Prior Statements of Testifying Witnesses and Statements of Party-Opponents]. A statement that meets the following conditions is not excluded by the rule against 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 given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered 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

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

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

should be considered in analyzing a multiple hearsay statement as the equivalent of a level of the combined statements that conforms with an exception to the hearsay rule.”).

- (A) was made by the party in an individual or representative capacity;
- (B) is one the party manifested that it adopted or believed to be true;
- (C) was made by a person whom the party authorized to make a statement on the subject;
- (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
- (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Reporter's Comments:

1. This proposal is obviously simple and accomplishes the limited objective of calling something what it really is. These really are hearsay exceptions and they are so designated.

2. It could be thought somewhat odd to have a separate rule for "hearsay exceptions" when there are already other rules providing hearsay exceptions, specifically 803, 804 and 807. Perhaps it would be useful to elaborate in the heading, as in the bracketed material: "Hearsay Exceptions for Prior Statements of Testifying Witnesses and Statements of Party-Oponents."

3. The alternative of moving these exceptions into Rules 803 and 804 is not viable for at least two reasons. First, prior statements of testifying witnesses don't fit under either rule: they are not admissible regardless of whether the declarant is unavailable, because the declarant's testifying is the major requirement for admissibility; and of course the declarant is not unavailable so they don't fit under Rule 804. Party-opponent statements could technically fit under Rule 803, but including them there would have a negative impact on the residual exception. Rule 807 requires a statement to have circumstantial guarantees of trustworthiness that are equivalent to those found in the exceptions in Rules 803 and 804. Party-opponent statements are not admitted because they are reliable. Adding party-opponent statements to Rule 803 would thus result in a lowering of the equivalency standard for reliability of Rule 807 statements. More fundamentally, statements of party-opponents are simply a poor fit for Rule 803, which is based on circumstantial guarantees of reliability.

3. What remains from this proposal is the illogic of lumping together two separate exceptions under a single designation. The exceptions really have nothing to do with each other, as one is based on reliability (cross-examining the declarant) while the other has nothing to do with reliability but

is rather based on the consequences of the adversary system (if you or your agents say it, it is your problem, not the court's). But perhaps the lack of logical connection in the grouping of exceptions is a tolerable cost — because any other change will result in disruption to electronic searches and settled expectations.

4. An alternative that would uncouple the two exceptions would be to create separate subdivisions, as follows:

(d) ~~Statements That Are Not Hearsay~~ Exceptions to the Rule Against Hearsay — A Declarant-Witness's Prior Statement. A statement that meets the following conditions is not excluded by the rule against hearsay:

(1) ~~A Declarant-Witness's Prior Statement.~~ The declarant testifies and is subject to cross-examination about a prior statement; ~~and the statement:~~

(2) The statement

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered 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

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

~~————~~***(2)(e) Exceptions to the Rule Against Hearsay — An Opposing Party's Statement.*** The A statement is not excluded by the rule against hearsay if it is offered against an opposing party and:

(A 1) was made by the party in an individual or representative capacity;

(B 2) is one the party manifested that it adopted or believed to be true;

(C 3) was made by a person whom the party authorized to make a statement on the subject;

(D 4) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E 5) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

The problem with the alternative is obvious — it alters numeration and upsets electronic searches. The Committee would have to determine whether the benefits in promoting the internal logic of the hearsay exception outweigh the disruption that would be caused by the change.

5. Any change in designation — either the simple approach or the renumeration set forth above — *would require a conforming change to Rule 806*. Rule 806, providing for the impeachment of hearsay declarants, provides as follows:

Rule 806. Attacking and Supporting the Declarant's Credibility

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

The reason for the special designation of Rule 801(d)(2) is that under current practice statements falling within that rule are not technically hearsay statements — so without the specification, an agent-declarant's credibility could not be attacked by the opponent. If an amendment is adopted that makes Rule 801(d) statements exceptions to, rather than exclusions from, the hearsay rule, that would of course mean that a statement falling within the hearsay rule is then a “hearsay statement” within the meaning of Rule 806. Thus, the special designation under Rule 805 needs to be struck as unnecessary (and confusing). As follows:

~~When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) —~~ has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Note that any change to Rule 801(d)(1) raises an anomaly in relation to Rule 806. An amendment that makes all Rule 801(d) statements hearsay means that all statements thereunder are covered by the term “hearsay statement” in Rule 806. But Rule 806 does not mesh with all of the statements that are admissible under Rule 801(d) — which is why Rule 806 only specifies statements that fall under Rule 801(d)(2)(C)-(E), i.e., statements of agents of party-opponents. Rule 801(d)(1) statements are not included because it is not necessary to do so — the declarant is by definition testifying and so of course his credibility can be attacked like any other witness. Rule 801(d)(2)(A) and (B) statements are not included because those statements are made by the party himself, who obviously has no incentive to attack his own credibility.

The result of amending Rule 801(d) to designate *all* statements covered therein as hearsay statements is to make Rule 806 a redundancy for some of those statements (those within Rule 801(d)(1)) and a useless device for others (party statements and adoptive statements). Thus, it could be a bit problematic if an amendment designed to bring logical coherence to the hearsay rule ends up resulting in some incoherence.

2. Minimalist Plus — Redesignation and Moving Past Recollection Recorded.

Professor Stonefield recommends moving the exception for past recollection recorded to the exception that will be created for prior statements of testifying witnesses. He notes that logically, past recollection recorded belongs there because it is an exception dependent on the in-court testimony of the declarant who prepared the record.⁴

The current location for the past recollection recorded exception makes little sense. It’s located in Rule 803, where availability of the declarant is supposed to be irrelevant, but in fact a statement cannot be admitted as a past recollection recorded unless the declarant who prepared the record *testifies at trial*. Under the terms of the Rule, the record must be on a matter that “the *witness* once knew about but cannot recall well enough to testify fully and accurately.” So past recollection recorded is to say the least a poor fit for Rule 803. Notably, it is a bad fit for Rule 804 as well. A witness doesn’t have to be unavailable within the meaning of Rule 804 for a past recollection recorded to be admissible. While lack of memory is a ground for unavailability, the past recollection recorded declarant need not have an absolute lack of memory of the underlying event. It is enough that the declarant “cannot recall well enough to testify fully and accurately.”

The historical record indicates that the original Advisory Committee was not sure about where to put the past recollection recorded exception — so it decided to put it in the grouping of records exceptions in Rule 803. While that grouping is useful, the fact remains that past recollection

⁴ As his article notes, the Hawaii Rules of Evidence have a separate exception for prior statements of testifying witnesses, and past recollection recorded is included in that exception.

recorded does not belong in a rule in which the availability of the declarant is irrelevant.

If the exception for past recollection recorded is included in a “minimalist” amendment to Rule 801(d), it might look like this:

(d) Statements That Are Not Hearsay Exceptions to the Rule Against Hearsay [– Prior Statements of Testifying Witnesses and Statements of Party-Opponents]. A statement that meets the following conditions is not excluded by the rule against 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 given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered 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~~

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

(D) is in a record that:

(1) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(2) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(3) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Of course, a conforming amendment would be required in Rule 803 — striking Rule 803(5). Also, the above changes could be broken out into two separately numbered subdivisions (i.e., 801(d) and 801(e)) as shown in one of the alternatives above.

Reporter's Comment:

1. Moving past recollection recorded out of Rule 803(5) resolves an anomaly, but it comes with the cost of disruption of electronic searches. The change would be disruptive and carries no real practical benefits, as the exception works just fine now despite its misplacement.

2. There is also some tension in the new grouping of Rule 803(5) with the other prior statements of testifying witnesses. The statements currently in Rule 801(d)(1) are considered reliable because the witness is subject to cross-examination. Rule 803(5) is considered reliable because the proponent must show that the record was accurate when made; one of the ways to prove that is through testimony of the declarant who prepared the record, *but that is not the only way*. See, e.g., *United States v. Porter*, 986 F.2d 1014 (6th Cir. 1993) (past recollection recorded admissible even though the declarant who made the statement denies its accuracy; the government established circumstantial guarantees that indicated the trustworthiness of the statement). Thus, the fit is not perfect — though it's significantly better logically than Rule 803.

3. "Thorough-going" alternative: Renumeration.

The more aggressive proposal is to house each category of hearsay exception under a separate rule number. The Federal Rules on hearsay would be renumbered from Rule 803 to the end, as follows:

Rule 803: Exceptions to the Rule Against Hearsay — Prior Statements of Testifying Witnesses.

- (a) Inconsistent Statement**
- (b) Consistent Statement**
- (c) Statement of Identification**
- (d) Past Recollection Recorded**

[The language of the rule would be the same as alternative 2, above]

Rule 804: Exceptions to the Rule Against Hearsay — Statements of Party-Opponents.

- (a) Party Statement**
- (b) Adopted Statement**
- (c) Statement of Authorized Agent**
- (d) Statement of Agent About a Matter Within Scope of Authority**
- (e) Statement of a Coconspirator**

Rule 805: Exceptions to the Rule Against Hearsay — Regardless of Whether the Declarant Is Available as a Witness.

- (a)⁵ Present Sense Impression.**
- (b) Excited Utterance.**
- (c) Then-Existing Mental, Emotional, or Physical Condition.**
- (d) Statement Made for Medical Diagnosis or Treatment.**

⁵ It would be possible to make this a number, e.g., Rule 805(1). But as the Rule itself is being renumbered — thus already disrupting electronic searches — it can be argued that you might as well go the whole way and use the style convention of letters after numbers. Substituting letters for numbers could be argued to be a collateral benefit of the proposed change. On the other hand, it could be argued that the numbers should be retained so that the change is not so jarring. Those who know the 803 exceptions think of business records as Exception 6, and will probably continue to do so even if the Rule itself is renumbered.

(e) [Transferred to Rule 803(d)]⁶

(f) **Records of a Regularly Conducted Activity.**

[The reference in Rules 902(11) and 902(12) to Rule 803(6) would have to be changed.]

And so forth.

Rule 806. Exceptions to the Rule Against Hearsay — When the Declarant Is Unavailable as a Witness.

(a) **Criteria for Being Unavailable.**

And so forth— note that internal citations in subdivision 5 would have to be renumbered.

(b) **The Exceptions.**

And so forth.

Rule 807. Residual Exception.

[The reference in the residual exception to “Rule 803 or 804” would have to be changed to “Rule 805 or 806”]

Note: You could move all the remaining rules up in the same order they are now. So existing 805 would become Rule 807, etc. But it is clearly better to keep Rule 807 where it is and move current 805 and 806 to the end of the line. First, the residual exception is best placed in a grouping with all the other exceptions. The only reason it isn’t currently so placed is because it was added well after the original Rules were adopted — the Advisory Committee wanted to avoid the disruption that would have been caused by making the residual exception Rule 805 and moving all the other rules up one number. Given that the proposed amendment would already be renumbering, it would make sense to now group all the hearsay exceptions together. It also makes sense to retain the residual exception as Rule 807 so as to avoid

⁶ This will be an argument, much like the fight in restyling over retaining the gap created when Rule 804(b)(5) was moved. It makes sense to retain the gap here — it will help users in figuring out where the past recollection recorded exception went, for one thing. It also avoids the disruption of changing the renumbering (or relettering) of all the subsequent exceptions.

disrupting electronic searches of residual hearsay cases.

Rule 808. Hearsay Within Hearsay.

Rule 809. Attacking and Supporting the Declarant's Credibility.

Reporter's Comment:

This is a disruptive change. And after the dust settles, it won't change any evidentiary result or fix any practical problem. But it does have some virtues, including: 1. Treating hearsay exceptions as what they are — exceptions — and thus avoiding any possible confusion; 2. Grouping all hearsay exceptions together numerically; 3. Separating prior statements of testifying witnesses and statements of party-opponents into their own exceptions, thus fixing the illogical grouping that currently exists; and 4. Putting the exception for past recollection recorded in the most logical, if not perfect, place.

Of course it is for the Committee to determine whether the benefits in propounding a logical and coherent system are worth the disruption. If the Committee decides to more fully consider any of the above options, a proposed amendment and Committee Note will be drafted for the next meeting.