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

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-14-0002
PETITION TO AMEND RULE 801(d)(1)(B) AND 803(6)-(8), ARIZONA RULES OF EVIDENCE	**COMMENT OF THE STATE BAR OF ARIZONA**

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

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

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).

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

The comment to the proposed rule states: "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.... [T]he only difference [between the current version and the proposed version] is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well."

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.

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

- The last sentence of the third paragraph should be stricken in its entirety. The new paragraph would read (deletions are indicated by strikethroughs):

> 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 of 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 last sentence of the fourth paragraph should also be stricken in its

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

> 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 direction 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 not admissible substantively as well.~~

CONCLUSION

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

RESPECTFULLY SUBMITTED this 8th day of May, 2014.

John Furlong
General Counsel

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

by: _____