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NACDL COMMENT ON PROPOSED RULE 801(d)(1)(A)

The National Association of Criminal Defense Lawyers opposes the proposed amendment to Fed. R. Evid. 801(d)(1)(A). The amendment would permit the substantive use of unsworn and presumptively unreliable out-of-court statements. The amendment would thus mark a sharp break with other exceptions to the hearsay rule, which generally require circumstantial assurances of reliability. There is no identified need that would justify such a striking impingement on the trial's truth-seeking function.

The draft committee note to the proposed amendment asserts that the requirement in the current rule that the prior inconsistent statement be made subject to penalty of perjury "stemmed mainly from a concern that it was necessary to regulate the possibility that the prior statement was never made or that its presentation in court is inaccurate--because it may be difficult to cross-examine a declarant about a prior statement that the declarant plausibly denies making." But the "penalty of perjury" requirement serves a second critical function as well: it provides

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some assurance that the prior statement is reliable. NACDL opposes removing this important check on the substantive admissibility of unreliable out-of-court statements.

When Rule 801(d)(1)(A) was first adopted, some argued that the "penalty of perjury" requirement was unnecessary, because the opportunity to cross-examine the witness on the stand provides sufficient assurance that false prior statements will be exposed. *See* Fed. R. Evid. 801, Advisory Committee Note. Congress rejected this view and included the "penalty of perjury" requirement in the rule. The proposed amendment presumably rests on the same argument that Congress found unpersuasive when it adopted the current rule. For two related reasons, that argument should again be rejected.

First, the opportunity to cross-examine the declarant at trial does not take account of the witness who purports to have forgotten the event about which he is being questioned. Most courts hold such testimony to be inconsistent with a prior statement in which the witness remembered the event, at least where the district court finds the memory loss to be feigned. *See, e.g., United States v. Owens*, 484 U.S. 554, 563 (1988) (dicta); *United States v. Mornan*, 413 F.3d 372, 379 (3d Cir. 2005); *United States v. Knox*, 124 F.3d 1360, 1364 (10th Cir. 1997).[1] In such a circumstance, these courts would allow the prior unsworn statement for its truth under the proposed rule, as long as it was recorded audiovisually (proposed Rule 801(d)(2)(A)(ii)) or the witness acknowledged making the statement (proposed Rule 801(d)(2)(A)(iii)). Given the witness' professed lack of memory of the event, however, meaningful cross-examination would be impossible. Courts are willing to countenance this lack of adversarial testing where the prior inconsistent statement was given under penalty of perjury, as required under current Rule

[1] Although beyond the scope of the proposed amendment, NACDL generally favors the admissibility of prior inconsistent statements for impeachment purposes when the witness professes a lack of memory of the event, regardless of whether the memory loss is feigned.

801(d)(1)(A). *See, e.g., Knox*, 124 F.3d at 1364 (sworn change of plea statements); *United States v. Di Caro*, 772 F.2d 1314, 1321-22 (7th Cir. 1985) (grand jury testimony); *United States v. Murphy*, 696 F.2d 282, 283-84 (4th Cir. 1982) (same). But extending the rule to unsworn statements would invite conviction on the basis of unreliable statements that cannot be subjected to meaningful cross-examination.

Second, allowing the substantive use of unsworn prior inconsistent statements would invite manipulation, particularly in cases involving witnesses who have agreed to cooperate with the prosecution in return for immunity, reduced charges, or other consideration. It is no secret that such witnesses often require many sessions with prosecutors and agents before their version of events aligns with the government's. Sometimes this is the result of a slowly refreshed recollection or a gradual overcoming of a reluctance to tell the truth about a former colleague's misconduct. Sometimes, however, such an evolution reflects an unscrupulous cooperator's increasingly precise understanding of what the government wants to hear. The proposed rule invites prosecutors and agents to refrain from any audiovisual recording while this process plays out. The camera will come on only when the cooperator's story meshes fully with the prosecution's theory. Then, if the cooperator varies from that story in his trial testimony, the prosecution can introduce the recorded statement for its truth. The risk of manipulation would be reduced if there were a requirement that *all* of a cooperating witness' interviews were recorded audiovisually--but there is no such federal requirement, and thus the proposed rule invites abuse.

In a similar vein, the proposed rule would effectively overrule a line of cases that prohibits prosecutors from calling a witness solely for the purpose of impeaching him with otherwise inadmissible prior inconsistent statements. *See, e.g., United States v. Hogan*, 763 F.2d 697, 702 (5th Cir. 1985); *United States v. Webster*, 734 F.2d 1191, 1192 (7th Cir. 1984); *United*

States v. Morlang, 531 F.2d 183, 191 (4th Cir. 1975). These cases rest on the notion that it would be unfair for the prosecution "to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence--or, if it didn't miss it, would ignore it." *Webster*, 734 F.2d at 1192; *see Morlang*, 531 F.2d at 191. Under the proposed rule, however, the out-of-court statements would be admissible as substantive evidence if recorded audiovisually or acknowledged by the witness. For such statements, there would be no danger of the jury missing the "subtle distinction" between impeaching and substantive evidence. Thus, the prosecution apparently would act permissibly in calling a witness who it knew would provide no useful evidence solely for the purpose of introducing the prior inconsistent statement. In this respect as well, the proposed rule invites manipulation.

By permitting the introduction of unsworn out-of-court statements merely because they are inconsistent with a witness' trial testimony, the proposed rule would mark a sharp break with the theory underlying other hearsay exceptions.[2] Those exceptions generally require some circumstantial assurance of reliability. Exceptions that do not require such assurances typically rest on considerations peculiar to the adversarial process. For example, prior consistent statements may be admissible as substantive evidence regardless of reliability, but only if the opponent of the evidence opens the door by attacking the declarant's credibility as a witness. Fed. R. Evid. 801(d)(1)(B).[3] Similarly, admissions of a party opponent may be admissible as substantive evidence under Fed. R. Evid. 801(d)(2) regardless of reliability "on the theory that

[2] Although Rule 801(d) is technically a definition of nonhearsay, we refer to it as an "exception" for the sake of convenience.

[3] Statements of prior identification may be introduced as substantive evidence. Fed. R. Evid. 801(d)(1)(C). Although the rule itself imposes no requirement of reliability, a substantial body of law requires that such identifications not be unduly suggestive and be otherwise reliable. *See, e.g., United States v. Kaquatosh*, 242 F. Supp. 2d 562, 564 (E.D. Wis. 2003).

their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule." Fed. R. Evid. 801, Advisory Committee Note.

No such considerations justify the proposed revision to Rule 801(d)(1)(A). Unlike the hearsay exceptions in Fed. R. Evid. 803 and 804, unsworn prior inconsistent statements have no inherent assurance of reliability. Indeed, such statements by cooperators seeking to curry favor with the government are often intensely unreliable. And unlike prior consistent statements and admissions of a party opponent, no considerations peculiar to the adversary system justify the admission of unsworn prior inconsistent statements despite their lack of reliability. The proposed amendment would undermine the trial's truth-seeking function for no apparent purpose.

For these reasons, NACDL opposes the proposed amendment to Rule 801(d)(1)(A).