Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness, or (C) one of identification of a person made after perceiving the person, if the court is satisfied that the circumstances of the prior identification demonstrate the reliability of the prior identification, or (D) a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter.

(2) Statement by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of the party. In order to have a coconspirator's declaration admitted, there must be a showing, by a preponderance of the evidence, (i) that there was a conspiracy involving both the declarant and the party against whom the statement is offered, and (ii) that the statement was made in the course of and in furtherance of the conspiracy. In determining whether the required showing has been made, the Court may consider the declarant's statement; provided, however, the declarant's statement alone shall not be sufficient to establish the existence of a conspiracy for purposes of this rule. The statement may be admitted, in the discretion of the Court, before the required showing has been made. In the event the statement is admitted and the required showing is not made, however, the Court shall grant a mistrial, or give curative instructions, or grant the party such relief as is just in the circumstances.

(Amended effective January 1, 1990; amended effective September 1, 2006.)

Committee Comment - 1989

Rule 801(a), (b), and (c)

Rule 801(a), (b), and (c) provide the general definition of hearsay. The definition is largely consistent with the common law. Hearsay is an out of court statement that is used in court to prove the truth of the matter asserted in the statement. If the out of court statement is being offered for some other purpose, such as to prove knowledge, notice, or for impeachment purposes it is not hearsay. "Statement" is defined to include oral and written assertions as well as nonverbal conduct that is intended as an assertion, e.g., nodding of the head up and down to signify assent to a proposition. Nonverbal conduct that is not intended as an assertion is not a statement and is not affected by the hearsay rule. Hence, the rule puts to rest whatever lingering authority Wright v. Tatham, 7 Ad. & Ell. 313 (Ex.Ch.1837), aff'd 5 Cl. & Fin. 670, 7 Eng.Rep. 559 (H.L. 1838) has in

Minnesota. Wright involved a will contest in which it was claimed that the testator was not competent at the time he executed his will. To prove competence certain letters were introduced on the theory that the authors of the letters considered the testator to be fully alert or letters of this nature would not have been written. As "implied assertions of the authors" the letters were excluded as hearsay. Under the rule the conduct of writing a letter would not be hearsay and the admissibility of such conduct would be determined under a relevancy analysis. See Article 4.

Rule 801(d)(1)

Adoption of this rule will change Minnesota law as stated in State v. Saporen, 205 Minn. 358, 285 N.W. 898 (1939). The Court in Saporen held that prior inconsistent statements of witnesses are admissible only for impeachment purposes. But see Gave v. Pyrofax Gas Corp., 274 Minn. 210, 214, 215, 143 N.W.2d 242, 246 (1966). However, the Court on two occasions has indicated its willingness to reconsider the Saporen rule in the appropriate circumstances. See State v. Slapnicher, 276 Minn. 237, 241, 149 N.W.2d 390, 393 (1967), State v. Marchand, 302 Minn. 510, 225 N.W.2d 537, 538 (1975).

Four reasons were cited to support the decision in Saporen:

1. Lack of oath;

2. Lack of cross-examination;

3. A different ruling might encourage the manufacture of evidence by third degree or entrapment methods;

4. If inconsistent statements were admitted, consistent statements should be admitted.

It was the Committee's belief that the rule eliminates all but the second concern of the Court in Saporen. The requirement that the statement must be given under oath subject to the penalty of perjury is retained. Secondly, the witness must be presently available for cross-examination or explanation of the prior statement.

As amended, Rule 801(d)(1)(B) permits prior consistent statements of a witness to be received as substantive evidence if they are helpful to the trier of fact in evaluating the credibility of the witness. Originally, Rule 801(d)(1)(B) applied only to statements that were offered to rebut a charge of recent fabrication or undue influence or motive. The language of the original rule, if read literally, was too restrictive. For example, evidence of a prior consistent statement should be received as substantive evidence to rebut an inference of unintentional inaccuracy, even in the absence of any charge of fabrication or impropriety. Also, evidence of prompt complaint in sexual assault cases should be received as substantive evidence in the prosecution's case in chief, without the need for any showing that the evidence is being used to rebut a charge of "recent fabrication or improper influence or motive."

The amended rule is consistent with the result in State v. Arndt, 285 N.W.2d 478 (Minn. 1979). Because of the restrictive language of former Rule 801(d)(1)(B), however, the Arndt Court did not rely upon that rule. Instead, it relied upon the theory that the prior statement was not offered for the truth of the matter asserted, and hence was not hearsay under the definition set forth in Rule 801(c). As amended, Rule 801(d)(1)(B) eliminates the need for reliance upon this theory, and thereby eliminates the need for a limiting instruction informing the jury that the evidence cannot be used to prove the truth of the matter asserted.

Amended Rule 801(d)(1)(B) only applies to prior statements that are consistent with the declarant's trial testimony and that are helpful in evaluating the credibility of the declarant as a witness. Thus, when a witness' prior statement contains assertions about events that have not been

described by the witness in trial testimony, those assertions are not helpful in supporting the credibility of the witness and are not admissible under this rule.

Even when a prior consistent statement deals with events described in the witness' trial testimony, amended Rule 801(d)(1)(B) does not make the prior statement automatically admissible. The trial judge has discretion under Rules 611 and 403 to control the mode and order of presenting evidence and to exclude cumulative evidence. Thus, the trial judge may prevent the witness from reading a prepared statement before giving oral testimony, or prevent the proponent from using direct examination of the witness merely as a vehicle for having the witness vouch for the accuracy of a written report prepared by the witness. The trial judge may also exclude prior consistent statements that are a waste of time because they do not substantially support the credibility of the witness. Mere proof that the witness repeated the same story in and out of court does not necessarily bolster credibility.

The rule continues the existing practice of permitting testimony about the witness' prior out of court identification. See e.g., State v. Jones, 277 Minn. 174, 179, 152 N.W.2d 67, 72 (1967). The rationale for the rule stems from the belief that if the original identification procedures were conducted fairly, the prior identification would tend to be more probative than an identification at trial. Obviously, if the prior identification did not occur under circumstances insuring its trustworthiness, the identification should not be admissible. The Court must be satisfied as to the trustworthiness of the out of court identification before allowing it to be introduced as substantive evidence. See gen. Minn. R . Crim. P. 7.01 which requires that criminal defendants be given notice of certain identification procedures involved in their case.

Subdivision (d)(1)(D) represents a limited exception to the definition of hearsay. The subject matter of the statement must describe an event or condition at or near the time the declarant perceives the event or condition. The federal rules treat such a statement as hearsay but would include it as an exception to the hearsay rule without regard to the availability of the declarant at trial. Federal Rule 803(1). The committee was concerned with the trustworthiness of such statements when the declarant was not available to testify at trial. When the declarant does testify at trial the distinction between what he did or what he said contemporaneous with an event is frequently an artificial one. As a consequence the committee recommends treating such spontaneous statements as nonhearsay. Furthermore, the traditional concerns that gave rise to the hearsay rule of exclusion are satisfied by the requirement that the declarant be a witness and be subject to cross-examination.

Rule 801(d)(2)

The rule excludes party admissions from its definition of hearsay. The requirements of trustworthiness, firsthand knowledge, or rules against opinion which may be applicable in determining whether or not a hearsay statement should be admissible do not apply when dealing with party admissions. Because the rationale for their admissibility is based more on the nature of the adversary system than in principles of trustworthiness or necessity, it makes sense to treat party admissions as nonhearsay. In addition to a party's own statements and fully authorized statements made by agents of a party, the rule provides for the admissibility of adoptive admissions. For a discussion of the use of adoptive admissions in criminal cases see gen. Village of New Hope v. Duplessie, 304 Minn. 417, 231 N.W.2d 548, 551 (1975). These provisions should not change existing practice.

The admissibility of statements made by agents of a party has given rise to much litigation. The rule rejects the strict agency theory in determining whether or not the statement is admissible. Rather than focusing on the agent's authority to speak for the principle, the rule requires only that the statement be made concerning a matter within the scope of the agency. For example, the statement of a truck driver concerning an accident in which he was involved while driving the truck

for his employer can be received as an admission of the employer. Statements made after the employment relationship terminates will not be admissions of the employer.

In Bourjaily v. United States, 483 U.S. 171, 107 S.Ct.2775, 97 L.Ed.2d 144 (1987), the United States Supreme Court construed Fed. R. Evid. 801(d)(2)(E) so that the federal coconspirator rule differed from the Minnesota rule in two important particulars. First, Minnesota law required a prima facie showing of a conspiracy, and second, the showing had to be made without considering the coconspirator's statements. State v. Thompson, 273 Minn. 1, 139 N.W.2d 490 (1966). In Bourjaily the Court continued the prior federal rule that the showing had to be made by a preponderance of the evidence, which is a higher standard than the Minnesota standard of a prima facie showing. However, the Court held that the trial judge could consider the statements in determining whether a conspiracy had been shown, overruling a line of federal cases which held that the statements could not be considered. The amended rule adopts the Bourjaily holdings in the following respects: The quantum of proof required is a preponderance of the evidence, and under most circumstances the rule allows the judge to consider the statements in determining whether the showing has been made. The proviso in the amended rule precludes the declarant's statement by itself from establishing the conspiracy and is included to prevent the hearsay statement from becoming admissible solely on the basis of the content of the statement.

The amended rule continues prior Minnesota law that the order of proof rests in the discretion of the trial judge, who may admit the declaration before the required showing is made. Although there is a danger that the declarations will be admitted and the showing will not later be made, the Committee took the view that the danger is offset by the trial judge's authority to require the showing to be made outside the presence of the jury under Rule 104(c). Moreover, the amended rule expressly authorizes the judge to grant a mistrial or give such other relief as is just, in the event the statements are admitted and the foundation is not later shown.

The amended rule continues the prior limitation that the statement must be made in the course of and in furtherance of the conspiracy.

Committee Comment - 2006

Right to Confrontation.

In Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court adopted a new approach to Sixth Amendment confrontation analysis. The Court ruled that admitting against the accused "testimonial" hearsay from an unavailable declarant, violates the Sixth Amendment right to confrontation, absent a prior opportunity for cross-examination. The Crawford court stated,

> *Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in the development of hearsay law - as does [Ohio v.] Roberts, and as would an approach that exempted such statement from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.*

Crawford, 541 U.S. at 68.

The Crawford court did not define what constitutes "testimonial" hearsay. See id. Some types of evidence appear to be testimonial no matter how the term is defined. For example, courtroom testimony, including testimony at a preliminary hearing, or affidavits are testimonial, as are guilty pleas, allocutions, and grand jury testimony. The Crawford court also stated, "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard." Id. at 52.

The full implications of this new approach to Sixth Amendment interpretation is presently being worked out in the courts. See, e.g., State v. Hannon, 703 N.W.2d 498, 507 (Minn. 2005) (ruling that testimony from a witness at the defendant's prior trial did not violate the defendant's right of confrontation where the witness was unavailable, the defendant had an opportunity to cross-examine at the first trial, and the state's theory of the case had not substantially changed); State v. Martin, 695 N.W.2d 578, 584-86 (Minn. 2005) (holding that a dying declaration does not violate a defendant's Sixth Amendment right to confrontation because the Sixth Amendment did not repudiate dying declarations, which were readily admissible at early common law).

Rule 801(d)(2)

The change in the title to Rule 801(d)(2) conforms the title of the rule to the text. The amended title clarifies that the statement by a party opponent need not be an "admission" of guilt or liability in order to be excluded from the definition of hearsay.