12/772

#63 2/10/77

Memorandum 77-11

Subject: Study 63 - Evidence (Evidence Code Section 791)

Section 791 of the California Evidence Code provides:

> 791. Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
>
> (a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statement was made before the alleged inconsistent statement; or
>
> (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

In his study of the Federal Rules of Evidence, Professor Friedenthal reviews Section 791 and suggests that subdivision (a) of Section 791 "should be reconsidered with an eye to its repeal." The pertinent portion of his background study is attached as Exhibit I.

The purpose of Professor Friedenthal's background study is to point up areas where the Commission may wish to make an in depth study. Fortunately, in the case of Section 791, we have available a recently published law review article. The author of the law review article reaches the same conclusion as Professor Friedenthal--that subdivision (a) of Section 791 should be eliminated as a separate ground for admission of a prior consistent statement. See Hess, Rehabilitation of the Impeached Witness Through Prior Consistent Statements: An Analysis and Critique of California Evidence Code Section 791, 50 So. Cal. L. Rev. 109 (November 1976) (copy attached). The writer of the article suggests that Section 791 be revised as indicated in the draft on pages 151-153 of the article. The draft would eliminate subdivision (a) of the existing section and would tighten up the criteria pertaining to relevance to rebut the allegation of fabrication by requiring the proponent of the prior consistent statement to demonstrate, where the time of the arising of the motive to fabricate is unclear, that the proffered statement did in fact predate the motive.

The staff suggests that a tentative recommendation be prepared proposing that Evidence Code Section 791 be revised as suggested in the article by Mr. Hess and that, after review by the Commission, the tentative recommendation be distributed to interested persons for review and comment. You should read the attached material for background information.

Respectfully submitted,

John H. DeMoully
Executive Secretary

EXHIBIT 1

6. California Evidence Code § 791 governs the admissibility of prior consistent statements of a witness to rehabilitate the witness after his credibility has been challenged. There is no comparable federal rule, and thus it appears that it is up to the federal court in each case to determine, under general rules of relevancy, when such rehabilitation is appropriate. The lack of a federal provision is surprising. Courts have traditionally limited use of prior consistent statements to situations in which a charge is made that the witness developed a plan or motive to give false testimony. See generally McCormick, Evidence 105-106 (2d ed. 1972). A statement made prior to the time the alleged plan or motive was formed, if consistent with testimony at trial, is powerful evidence that no such plan was formed or carried into effect. Some courts go further and admit a prior consistent statement of a witness to bolster his claim that he did not make a prior inconsistent statement as claimed by the party who cross-examined him. The consistent statement must have been made at or near the time the alleged inconsistent statement was said to have been made.

Other than in these limited situations, courts have generally excluded prior consistent statements. It must be remembered that such statements are hearsay with regard to their truth, when admissible to rehabilitate a witness they are relevant only because they were made. Yet it is difficult, if not impossible, for jurors to ignore the truth of such statements and consider them only in context of whether a witness is or is not to be believed. Hence, as noted below, modern courts provide a hearsay exception for such statements once they are admitted to rehabilitate; thus, the statements can be considered not only as to credibility, but for their truth as well. This, of course, underscores the need for strict rules limiting admissibility. The fact that a witness has said something over and over again may delude a jury into believing it is true. In fact, there is very little evidentiary value to such repetition since it in no way guarantees that a witness is not lying or mistaken. If prior consistent statements were freely admissible, attorneys would encourage potential witnesses to repeat their stories to a broad range of acquaintances.

There is some indication that the lack of a federal rule governing admissibility of consistent statements was due to an oversight. Federal Rule 801(d)(1)(B) provides that prior consistent statements are not barred by the hearsay rule if they were made in a formal hearing subject to cross-examination and are offered to rebut a charge of "recent fabrication or improper influence or motive" on behalf of the witness to falsify his testimony. The quoted language is derived from the traditional rule regarding the admissibility of consistent statements for rehabilitation purposes. This strongly implies that drafters of the federal rules assumed that the traditional limits would apply. Otherwise why not make the hearsay exclusion apply to <u>any</u> statement made in a formal hearing subject to cross-examination and admitted to rehabilitate a witness? Certainly there is no reason whatsoever to grant a hearsay exclusion solely because the statement rebuts a charge of fabrication; there is nothing in such a statement that renders it any more immune to hearsay dangers than any other consistent statement.

The structure of the California provisions regarding consistent statements is substantially preferable to the federal rules. Section 791 governs when the statements are admissible for rehabilitation; § 1236 grants a hearsay exception for all statements that are admissible under § 791. Important differences between Federal Rule 801(d)(1)(B) and § 1236 regarding when such statements are admissible despite the hearsay rule are discussed later in the section on hearsay. There is some question, however, as to whether § 791 is not too liberal in admitting prior consistent statements. Section 791(b) adopts the traditional approach admitting statements to refute a change of recent fabrication or improper motive, if the statements were made prior to the alleged time the motive or decision to give false testimony was formed. However, § 791(a) goes somewhat beyond the traditional rule by permitting a consistent statement to be admitted if the witness' credibility has been attacked by a prior inconsistent statement and the consistent statement was made prior to the inconsistent statement. The argument is that the production of an inconsistent statement is, in itself, akin to a charge that the witness formed a motive to give false testimony and,

therefore, § 791(a) is a mere extension of the general rule. This reasoning is very weak indeed. One can make inconsistent statements, and often does, without having formed a plan or motive to give false testimony. A good examiner, on deposition, invariably will be able to push a witness to say things that will prove inconsistent with his subsequent testimony at trial. It is a rare witness who gives the exact same story twice. As noted above, in most situations, the value of a consistent statement is minor at best. After all, the witness has testified directly on the matters at issue and has been subject to cross-examination and re-direct.

In sum, then, the existence of § 791 covering consistent statements is preferable to the federal situation where there is no rule at all. On the other hand, § 791(a) should be reconsidered with an eye to its repeal.