COLORADO SUPREME COURT
COMMITTEE ON RULES OF EVIDENCE

MINUTES OF MEETING
January 18, 2008

David R. DeMuro called the meeting to order at 2:33 p.m. in the Supreme Court Conference Room on the fifth floor at the Colorado Judicial Building at Two East 14th Avenue in Denver, Colorado.

The following members were present:

Catherine P. Adkisson
Judge Rebecca Bromley
Philip A. Cherner
Judge Janice Davidson
David R. DeMuro, Chair
Elizabeth F. Griffin
Professor Sheila Hyatt
Professor Christopher B. Mueller
Judge Robert M. Russel

The following members were excused:

Judge Harlan Bockman
Justice Nathan B. Coats
Judge Martin Egelhoff
Carol M. Haller
Henry R. Reeve

CRE 804 (b) (6): SHOULD THE COMMITTEE RECOMMEND THE ADOPTION OF THE 1997 AMENDMENT TO FRE 804 WHICH ADDED A HEARSAY EXCEPTION ON FORFEITURE BY WRONGDOING?

During the last meeting of November 2, 2007 the Committee decided not to recommend adoption of F.R.E 804(b)(6). This may be the right time to make a recommendation about F.R.E. 804, as the Colorado Supreme Court issued a decision on Vasquez which addresses confrontation and hearsay issues. In addition, the U.S. Supreme Court is dealing with another relevant case, Giles.

There was some skepticism from members about adopting F.R.E. 804(b)(6). The federal courts adopted the rule in 1997 on the rationale that defendants should not profit from wrongdoing. This is a punishment for misconduct. This hearsay exception of tampering with and deterring the witness is the only exception not based on a statement being more reliable than another. There is skepticism about this as a hearsay exception. Members offered various views as follows.

A committee member argued that the Colorado Supreme Court expressed its opinion on the reliability of hearsay in Vasquez. Evidence must be reliable. There was discussion about the possibility that the Colorado Supreme Court may be looking for a hearsay exemption.

F.R.E. is inconsistent with the court's opinion. The proposed rule would pre-empt what the intent is supposed to be. The proposed rule change undermines Vasquez. In

Colorado, hearsay is not admitted unless reliability is determined. The rule would not fit the case law.

A rule could coexist with the Vasquez opinion. However, the court may have to change the opinion with regards to the reliability of hearsay.

The federal courts don't test reliability. An exception can't be created unless something is written into the rule and that changes the nature of the exception. If the exception is adopted one can't worry about reliability. Intent would have to be written into the rule.

What if in the sample case the confrontation clause was satisfied, but hearsay was not? The statement is inadmissible. Perhaps the statement is needed in relationship to motive and is not admitted for its truth.

In looking at the confrontation clause there seem to be no cases where it was waived and the statement came in under a hearsay exception. The battle is over intent. The Colorado Supreme Court made the correct decision on intent. A more robust intent clause provides more protection for the defendant, rather than a reliability requirement. The hearsay exception is better.

This issue must be developed by case law, rather than through a rule.

There may be some pressure on the trial court judge where the confrontation clause is waived, the witness is rendered unavailable, and there is a finding that the statement of the witness is available under hearsay. The decision may be reviewed for abuse of discretion. There is no hearsay exception if the defendant frightens the witness. The intent is for the defendant to lose protection if he/she intentionally prevents a witness from testifying.

There was discussion about intent. An example was used where a defendant is selling drugs and says to his wife, "don't go to the police." The wife goes to the police and the husband kills her to keep her from testifying. Are statements related to domestic abuse two years earlier admitted? Intent has to relate to statements offered.

There was discussion about language. Use the same language from Vasquez. There may be problems when different language is used. The court uses the language "with the intent to deprive the criminal justice system of evidence." This language indicates that the statement doesn't have to apply to this murder trial.

The federal courts deleted the intent requirement for hearsay forfeiture. A member wondered if intent was softened in Vasquez. Widening the reference to the criminal justice system seems softer on intent. It's easier to show intent, as it is broadened.

The committee discussion reliability and hearsay exceptions. F.R.E. 804 is not about reliability. It's a forfeiture of a hearsay exception due to the defendant's actions to quiet a witness. Reliability is not an issue in confrontation. Cross examination tests reliability. The Colorado Supreme Court said that a reliability test will be done on non-testimonial

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evidence. If a rule is adopted there may be different requirements and language for confrontation and hearsay.

A motion was made, seconded and defeated 2:6 to adopt Michigan's version of C.R.E. 804 (b) (6).

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(6) Statement by declarant made unavailable by opponent. A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Discussion about the language in the motion included "involved in or responsible for." The word "involve" seemed loose. This option lets in evidence not already admissible. The only gain is intent, as reliability exists.

A motion was made, seconded and defeated 2:7 to adopt Michigan's version of F.R.E. 804 with the addition of "unless the statement is found to be unreliable or untrustworthy" at the end of the second sentence.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(6) Statement by declarant made unavailable by opponent. A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness unless the statement is found to be unreliable or untrustworthy.

Discussion about the motion yielded problems with differences in the language between the proposed rule and the case law that may confuse practitioners. A member indicated that reliability requirements should be the burden of the prosecution. This option may fortify abandonment of intent requirements.

A motion was made, seconded and defeated 4:5 to adopt Michigan's version of C.R.E. 804 (b) (6) with the addition of "that is reliable and" after the word "statement."

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(6) Statement by declarant made unavailable by opponent. A statement that is reliable and offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

Another motion was made to modify the Michigan rule by adding "that is reliable and" after "statement." This was defeated 4:5 with the chair voting to break the tie.

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A motion was then made, seconded and approved 5:1 not to propose a version of federal C.R.E. 804(b)(6). Discussion about the motion included a suggestion that the issue be brought up at a later time. A memo could be sent to Justice Coats indicating that the issue was discussed; a federal rule was passed and the committee decided not to adopt a rule.

Mr. DeMuro will pass on the committee's comments to the Court.

The meeting was adjourned at 4:42 p.m.

Respectfully submitted,

April Bernard

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