COLORADO SUPREME COURT
COMMITTEE ON RULES OF EVIDENCE

MINUTES OF MEETING
May 21, 2010

David R. DeMuro called the meeting to order at 2:39 p.m. in the fifth floor conference room at the Denver News Agency building at 101 W. Colfax 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
Henry R. Reeve
Judge Robert M. Russel

The following members were excused:

Judge Harlan Bockman
Justice Nathan B. Coats
Judge Martin Egelhoff
Carol M. Haller
Professor Christopher B. Mueller

APPROVAL OF MINUTES JANUARY 28, 2008

The January 28, 2008, minutes were approved as submitted.

CHAIRMAN'S REPORT

With regards to the last rule addressed, C.R.E 804(b)(6), the Supreme Court agreed that there should be no amendments to the rule. David DeMuro asked that members provide updates to the member list.

CRE 804(b)(3): SHOULD WE RECOMMEND A CHANGE TO THE HEARSAY EXCEPTION FOR STATEMENTS AGAINST INTEREST?

Elizabeth Griffin proposed adopting the federal rule change re: hearsay exceptions and adding a committee comment, handed out at the meeting. According to a Colorado case People v. Newton, 1998, when a statement against interest is made, corroboration of some type is required whether a statement is to inculpate or exculpate.

Members made a number of comments. Without the addition of the comment, practitioners may be lead to the conclusion that Newton is not good law. Perhaps the comment language should be in the rule. It's a good idea to have the rule and case law in a single location for practitioners. It's also important to note the deviation between the federal and Colorado rule. There was discussion about indicating in the rule that it is not the committee's intent to affect the Newton. There was also discussion about dropping

Newton. Several committee members voiced that the committee should not make recommendations based on the direction of the law. Additional case law, i.e. Lilley, indicates that any third party statements that inculpate the defendant are suspect.

When the Newton decision was made there was no Crawford. Robert's reliability test was used. Corroboration of inculpatory statements in Colorado involves a reliability test for confrontation, whereas the federal rules no longer require the reliability test.

Two approaches to corroborating circumstances are necessary, depending on whether the prosecution or defense offer the statement. Corroboration is about reliability. A statement so far against a person's interest wouldn't have been made unless it is true. The probable truth under the circumstances that the statement was made is important.

Exculpatory statements are different. For example, the defendant puts his mother on the stand. She heard someone confess to the crime but never heard the name of the confessor. The statement is a potential fabrication and may or may not be plausible. Corroboration is necessary for these kinds of statements. The statement may pass the reliability test, but there is trouble with the smell test. That's why extrinsic corroboration is sought.

According to U.S. v. Williamson, implication of the other person must be removed in an inculpatory statement that self-inculpated and implicated someone else. "I took the funds in the cash register, but the other person was the shooter." The information about the other person is not admitted, but the portion of the statement about the defendant taking the money is admitted. According to Colorado case law the whole statement is admitted under the hearsay exception. The rule is a reminder to judges to look at statements and other evidence.

Several members voiced preference for the simple language of the proposed Federal Rules of Evidence 804(b)(3)(A). However, federal rule 804(b)(3)(B) is problematic, i.e. the word "corroborating." 804(b)(3)(B) should be rewritten to codify Newton and clarify the application of inculpating and exculpating statements.

A motion was made and seconded to adopt the federal language in C.R.E. 804(b)(3)(A), but to modify part (B) as below:

> C.R.E. 804(b)(3) **Statement against interest.** A statement that...(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability. When the statement is offered to inculpate the accused, the trial court should look only to the circumstances surrounding the making of the statement and should not rely on other independent evidence that also implicates the defendant. When the statement is offered to exculpate the accused, the court may examine both the circumstances surrounding the statement as well as other independent evidence that supports the statement.

After discussion about the motion, it was proposed that the matter didn't need to be resolved immediately. In addition, several members wanted to see how the new rule language worked in the federal court.

A motion was made and seconded to table the issue. The motion passed 6:1.

A motion was made and seconded to form a subcommittee to work on the language of the rule. The motion passed 7:0. The subcommittee includes Judge Rebecca Bromley, Elizabeth Griffin, Henry Reeve, and Judge Bob Russel.

FRE 502: SHOULD WE RECOMMEND ADOPTION OF THE FEDERAL RULE ON LIMITATIONS ON WAIVER OF ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT?

Mr. DeMuro introduced the issue as clarifying waiver law in Colorado. There are extensive privilege statutes in Colorado, as well as waiver statutes. Colorado has no specific subject matter waiver. A few states have adopted this federal rule.

A member indicated that this issue should be addressed by the Civil Rules Committee, perhaps in the discovery area. Another member was concerned about sending the issue to Civil Rules since the federal government placed this in the rules of evidence. A member responded that much of the scope of the federal rules does not apply to Colorado. Inadvertent disclosure is part of the interest of a company, a subject that the civil rules deal with.

A motion was made and seconded to table this issue indefinitely. The motion was approved 7:0.

COMMITTEE COMMENTS: SHOULD WE RECOMMEND THE REMOVAL OF "OLD" COMMITTEE COMMENTS IN THE COLORADO RULES OF EVIDENCE?

Mr. DeMuro indicated that there are comments in the Rules of Evidence that refer to outdated federal rules, i.e. 1979 *Federal Advisory* comments, or statutes no longer exist. The comments were useful for the transition period related to the rules in 1980. Now the comments are obsolete or antiquated. Mr. DeMuro will provide a specific proposal at the next meeting re: the removal of comments. Contact Mr. DeMuro with information about comments that need to be deleted.

THE FRE "STYLE" AMENDMENTS ARE ON THE HORIZON

The federal civil rules were rewritten with regards to style. The Civil Rules Committee discussed rewriting the Civil Rules in the same manner, but rejected the project. As new rules are created the committee will consider style.

The committee decided not to rewrite the style of the Rules of Evidence. This issue is more of an information item. In the future the committee will consider style as changes

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are made. Henry Reeve offered to send to members an electronic book about style in rule writing.

The committee plans to meet again in September. Mr. DeMuro will send information to the committee and poll the group on the specific date for the next meeting.

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

Respectfully submitted,

April Bernard