DRAFT

COLORADO SUPREME COURT
COMMITTEE ON RULES OF EVIDENCE

MINUTES OF MEETING
November 2, 2007

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 Harlan Bockman
Justice Nathan B. Coats
Judge Janice Davidson
David R. DeMuro, Chair
Judge Martin Egelhoff
Elizabeth F. Griffin
Professor Sheila Hyatt
Professor Christopher B. Mueller
Henry R. Reeve
Judge Robert M. Russel

The following members were excused:

Judge Rebecca Bromley
Philip A. Cherner
Carol M. Haller

APPROVAL OF MINUTES LAST MEETING, FEBRUARY 14, 2007

The minutes from the February 14, 2007 meeting were approved as corrected. Several comments were corrected and removed.

CHAIRMAN'S REPORT

The Supreme Court adopted Colorado Rules of Evidence 404 (a) and (b), 408 and 606 (b) (with comment) on September 27, 2007, effective immediately (attached as pages 19-24).

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?

Confrontation clause cases are becoming an issue that is raised regularly by prosecutors. Despite this, many states have not yet adopted a confrontation clause. A case that is currently in the Colorado Supreme Court, Vasquez, may shed some light on this issue. In addition, the United States Supreme Court may take up this issue within one to two years. The question remains, is intent necessary in a murder case?

A member suggested separating the rule from the confrontation clause and hearsay objections. The constitutional idea of forfeiture may not be codified. Forfeiture without

a confrontation clause may not belong in the proposed rule. If the discussion is about forfeiting hearsay objections then this rule is appropriate.

The opinion issued by Judge Taubman regarding Vasquez goes through the confrontation analysis and ends up on hearsay. If the confrontation is forfeited so is the hearsay objection. Colorado currently has no exception.

A member used the example of being in court with the ability to use two objections. First, the judge doesn't accept the confrontation clause. Is the hearsay objection still available? How do you deal with this situation under current law in Colorado? Another member responded that confrontation may not be an issue that is handled by the committee. Hearsay in Colorado is subject to constitutional limitations.

Colorado does not follow the federal government regarding non-testimonial statements and reliability analysis. There are non-testimonial statements not barred by the confrontation clause that would be barred under hearsay. However, if the witness is not available due to the actions of the defendant the forfeiture clause allows unreliable non-testimonial hearsay statements to be admitted. The requirement of intent to silence the witness is critical with regards to hearsay exemptions.

There was some controversy about whether or not a rule is needed. Some members prefer no changes, whereas others prefer a a new rule. Those that did not wish to act mentioned the pending case in the Colorado Supreme Court.

Current practices include the use of hearsay, C.R.E. 403, and reliability tests. Forfeiture has nothing to do with C.R.E. 403 and reliability. Trial court judges are using a two step approach. The judges look at the availability of the witness due to acquiescence or the actions of the defendant and the reliability of statements according to C.R.E. 403.

A motion was made not to adopt any hearsay exceptions.

Forfeiture of confrontation doesn't rule out determining whether or not statements are reliable. The case law indicates that when the right to confrontation is lost, so is the hearsay exception. If there is no hearsay exception the statement doesn't come in. Trial courts are making their own hearsay exception rules. Each trial court is deciding forfeiture by wrong doing, standards, and intent. There should be a statewide standard for consistency.

In Colorado, non-testimonial statements are subject to reliability tests. A confrontational issue would arise. That clause would not arise if the defendant did not kill with the intent to keep the witness quiet. Is the committee confronting case requirements for reliability? When acts of misconduct are committed confrontation is forfeited. In addition, hearsay is forfeited. These two items are not separated. Another member disagreed. Hearsay and confrontation are separate. It is sensible and reasonable to treat the two issues differently.

Moreno opened the door to analyze intent differently. For confrontational clause purposes there will most likely be an intent requirement. The issue is about hearsay. There are cases on appeal where no hearsay clause was used and there is not a confrontational clause. This situation happens in the trial courts frequently, where decisions are made in many directions. Currently when trial courts deal with hearsay exceptions they look to the residual clause or early federal court cases.

The motion to adopt the proposed changes to the rule without a hearsay exception was withdrawn.

A motion was made, seconded, and defeated 4:5 to table discussion of the adoption of changes to C.R.E. 804 (b)(6) until after the Vasquez case is decided by the Colorado Supreme Court.

A motion was made, seconded, and defeated 4:5 to recommend adoption of the proposed 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) Forfeiture by wrongdoing. 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, for the purpose of preventing the declarant from attending or testifying. However, a statement is not admissible under this rule unless the proponent has ~~given to each adverse~~ party advance written ~~notice of an~~ intention to introduce the statement of sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

Discussion about the proposal included the opinion that the change will keep many statements in domestic issues outside of the courtroom. When a victim is killed, statements by the victim made to family members or friends should be allowed.

In the past, when a prosecutor's witness did not appear, the prosecutor attempted to make a case without the witness. Is the committee proposing that the prosecutor now obtain a continuance and keep the case alive? In the past the case was dismissed. Colorado has a criminal statute pertaining to intimidation of the witness.

The victim calls the prosecutor and indicates he/she is scared. The prosecutor may put the police on the stand and the trial continues forward. This happens unless the prosecutor is unable to show that he/she does not appear because of the defendant. It's a difficult issue. Because the witness does not appear due to threats, is there an issue of forfeiture? The prosecutor may need more than just what witnesses say.

A member indicated that the committee should follow the federal rule. Another member disagreed. Five states adopted their own rule, different than the federal rule, while other states are uneasy about the federal rule. The federal rule was adopted quickly, without

comments, notes, and case law. Extreme examples of conduct and broad exceptions related to testimony and statements are cited.

The federal rule was adopted in 2000 and there is plenty of case law. Trial judges may be acting without any guidance. A member responded that the absence of the rule tells judges that this isn't done in Colorado. However, this method is not working. Colorado has not yet adopted forfeiture by wrongdoing or hearsay exception. Another member said that there is forfeiture in Colorado, and guidance needs to be provided.

A motion was made and seconded to adopt FRE 804.

A member voiced that they are against the language used in the federal rule. Historically, the federal law is not attuned to the state law, especially in the case of assaults on children. What about statements to a child? "Don't tell anyone" is similar to "don't come to court." Courts parse out degrees of statements. There is no specific case law on this issue; the case law is broad.

A motion was made, seconded, and approved 5:4 to adopt some version of FRE 804.

The committee looked at FRE 804 to make appropriate changes by straw vote. The motion to use the term "encourage," rather than "acquiesce," was approved 5:3.

The motion to require notice was approved 5:4.

The motion to require written notice was defeated 2:5.

The motion to approve the following proposed rule C.R.E. 804 (b)(6) without the word "written" was approved 5:2.

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

(6) Forfeiture by wrongdoing. A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance notice of an intention to introduce the statement of sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

The motion to add "for the purpose of preventing the declarant from attending or testifying" was defeated 4:5.

A motion was made and tied 4:4 to adopt the FRE 804 as C.R.E. 804 (b)(6) below with the two changes, adding the word "encourage" with a change in the word order and "engaged in or encouraged," and the sentence regarding notice.

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

(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged in or encouraged in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance notice of an intention to introduce the statement of sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

A motion was made, seconded, and defeated 4:5 to adopt FRE 804.

This is not a simple issue. The difficulties of the committee will be reported to the Colorado Supreme Court. The court will address the issue and advise the committee if it is necessary to reconvene and take up this issue again. Several members voiced that should direction be received from the court the committee will take action. A motion was made and approved 5:0 to ask the Colorado Supreme Court as part of the report if the committee needs to take action.

C.R.E. 609

Colorado does not currently have a rule 609. The higher court said that there is no discretion to exclude felony convictions. A defendant may be a witness at his/her trial as long as they are not a convicted felon. The statute was adopted in 1883 as part of a reform package, removing those with felony status from a list of people that should testify. A felony can come out to impeach the testimony. The federal rule is better, as there is discretion to include a felon in testimony. A member recommended adopting federal rule 609. This issue will be discussed at the next meeting.

The meeting was adjourned at 4:51 p.m.

Respectfully submitted,

April Bernard