

ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

MINUTES April 25, 2014

Present: Jerome O'Neill, Chair; Hon. Beth Robinson; Hon. Theresa DiMauro; Members John Boylan; Sandy Levine; Elizabeth Miller; Pamela Marsh; Karen McAndrew; Kenneth Kreiling; Clara Gimenez, Reporter.

Others present: Christopher Montgomery, Virginia Redfrew, Megan Rowe, Anna Saxman, Daniel McManus (phone attendance)

Chair called meeting to order at 9:33

I. Proposed amendments to 804A and 807

Christopher Montgomery appeared as a member of the defense bar and urged the committee not to expand 804a. The rule in its present form is problematic already but it is understood that it is a policy compromise to accommodate a particularly difficult type of cases. In his experience, those policy reasons do not apply to domestic assault. He has found that children have little trouble testifying and it is easy to detect when improper influence has occurred. Further, assaults generally have more corroborating evidence: excited utterances; photographs; witnesses; and physical evidence that may not be available in CSA.

If the rule is expanded, the State will be able to replace live testimony with hearsay testimony in a larger number of cases, imposing a significant burden on criminal defendants. This is particularly problematic because -unlike child sexual abuse investigators-- responders to domestic violence are not trained to interview children and therefore may not follow appropriate non-suggestive techniques. There is also a risk that jurors will assess credibility of the statement based on credibility of hearsay witness, or give it undue weight if several hearsay witnesses repeat it.

Christopher Montgomery also expressed concern with the increase of 804A hearings if the rule is expanded to include domestic assault cases.

Daniel McManus appeared as a member of the defense bar. McManus related his experience in a jury trial and a sentencing proceeding involving CCTV. The use of this technology created numerous difficulties, the most significant being the defense counsel's inability to properly object, to approach the bench as needed, and to confer with client. Jurors had difficulty hearing the questions and were not able to see the witness clearly.

Pam Marsh noted that she has not received feedback from the VBA family bar but observed that 804A is not invoked in family law matters and most judges are extremely reluctant to deem children available for testimony.

Judge DiMauro observed that in family court the first approach is to avoid children testifying at all. It is not only difficult for the child, but procedurally cumbersome because it requires the appointment of a lawyer and a guardian for the child. She is not sure that expansion to domestic violence would add a significant burden because there are not that many hearsay statements. Nevertheless, Judge DiMauro expressed her concern about the use of this exception to introduce a child's testimony when another victim, such as the mother, recants. Forcing the child to testify under those circumstances would be highly traumatic.

Jerry O'Neill moved to recommend to the Supreme Court the adoption of the proposed amendment to 804A and its publication for comment.

Motion failed for lack of second

Jerry O'Neill moved to recommend to the Supreme Court the adoption of the proposed amendment to 807 and its publication for comment. John Boyland seconds

Yes - 3; No - 3; Abs- 1. Motion failed

Karen McAndrew moved to recommend adoption of Reporter's proposed amendment to eliminate offensive language. John Boylan seconds. Motion passed

The Committee discussed the possibility of considering more limited amendments to rules 804A and 807 in order to expand some protections to child victims of domestic violence.

Jerry O'Neill asked for a vote on whether the Committee would entertain any proposal for drafting amendments to any part of 804A.

Yes-1; No-5; Abs 1

Jerry O'Neill asked for a vote on whether the Committee should announce Discussion and vote on a proposed amendment to expand the applicability of 807 to the testimony of prosecutions of domestic assault (victims only).

Yes-5; No-1; Clara Gimenez will draft proposed amendment and send it to Committee members via email.

II. Jerry O'Neill moved to adjourn.

Adjourned 12:15

Respectfully submitted,
Clara Gimenez, Reporter