

ADVISORY COMMITTEE ON THE RULES OF EVIDENCE

MINUTES

January 17, 2014

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

Speakers and guests present: Bram Kranichfeld; Megan Rowe; Anna Saxman; Anne Smith. There were no members of the public in attendance.

Chair called meeting to order at 9:37.

I. Proposed amendments to 804A and 807

a) Anne Smith appeared on behalf of the Vermont Center for Crime Victim Services (CVS). As the Committee is aware, there is a bill pending in the Legislature amending 804A and 807. The amendment before the Legislature is very similar to the one before the Committee. Smith urged the Committee to drop or delay consideration of the proposed amendment and let the Legislature take action on the pending bill. If the Committee continues considering the proposal before it, the Legislature will probably table the matter. CVS and other advocates think it is important to get public comment before the Legislature. Timing is also an important consideration as CVS expects the legislative process to be a faster route for the enactment of the amendment.

b) Ana Saxman appeared on behalf of the Appellate Defender. Saxman reported that 804A was the legislative response to the enactment of VRE 803(24) –a much broader hearsay exception. Thus, the Legislature clearly intended to limit the applicability of the exception to a particular set of cases. There is no reason why the Legislature would want to change course, now that the social sciences are raising questions about the inherent trustworthiness of children statements. Further, there is no empirical evidence to support that a child is unable to describe a simple assault. As to the expansion to witnesses, Saxman noted that there is no support in the literature or in the case law. There are many hearsay exceptions already in existence that are used in domestic violence cases.

Saxman expressed concerns about the burden on litigants and the courts. The increase of 804A hearings will delay cases; require participation of experts; and unduly invade a child's privacy because it may require disclosure of psychological and school records that have a bearing on credibility. While this may be necessary in sexual assault cases, the expansion to domestic assault matters seems unwarranted.

c) Bram Kranichfeld appeared on behalf of the Department of State's Attorneys. The Department supports the language of the proposed amendment in its entirety. The Department was not aware of the parallel proposal pending in the Legislature. They have reviewed the proposal and materials submitted by Tina Rainville before this Committee (see 12/06/13 minutes) and fully support it.

d) The Committee expressed an interest in continuing hearing from other constituencies and experts, such as the Vermont Network on Domestic Violence; VBA family law committee; and mental health organizations. Saxman and Gimenez will look at research on the trustworthiness issue and the need for exceptions in domestic violence matters. Kreiling questioned whether there is any actual evidence linking PTSD and child testimony in assault cases. Other members agreed that additional expert testimony is needed. Saxman requested time to bring other speakers at next meeting.

Judge Cohen stressed the importance of careful consideration about the burden on the courts. Having an 804A hearing for a witness seems burdensome and unnecessary. The number of cases where the rule would apply would delay the processes significantly because the issue of hearsay of children statements comes up very often. Marsh expressed similar concerns about delays in family court matters. Noted that other hearsay exceptions, such as excited utterance or state of mind, may be available for some of the statements that the expanded 804A would cover.

The Committee considered whether it should continue studying the proposal or defer to the Legislature. Kreiling pointed that another option is to either send the reporter to talk with the Legislature or send a draft for their consideration. O'Neill stated that the Legislature generally prefers to let the Committee work on rule amendments, because it is important that individuals with day to day expertise in evidence matters do the drafting. McAndrew would like communicate to the Legislature the importance of further study about the rule's impact on the courts as well as on the evidence of need for the changes. Levine suggested that in terms of timing this Committee may be faster than the legislative process. Justice Robinson will talk with Judge Davenport and with the Legislature about a resolution for this overlap.

II. Approval of the 12/06/13 Minutes. Kreiling moved to approve minutes, McAndrew Second. Motion passes.

III. Meeting adjourned by unanimous consent at 11:15.

Respectfully submitted,

Clara Gimenez, Reporter