2004 - 2007 REPORT OF THE

SUPREME COURT COMMITTEE ON

THE RULES OF EVIDENCE

January 19, 2007

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I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendments to the Hearsay Rule in Light of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004)

In the watershed decision of Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court sharply departed from its prior view of how hearsay exceptions could be reconciled with the Confrontation Clause of the Sixth Amendment. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." Before Crawford, the Supreme Court had held that hearsay did not offend the Confrontation Clause if the out-of-court statement fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 2538, 65 L. Ed. 2d 597, 608 (1980). Now, under Crawford, testimonial statements made by witnesses absent from trial may be "admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." 541 U.S. at 59, 124 S. Ct. at 1369, 158 L. Ed. 2d at 197. In Crawford, the Court did not precisely define "testimonial statements," but it provided this guidance: "Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations." 541 U.S. at 68, 124 S. Ct. at 1374, 158 L. Ed. 2d at 203. In a more recent case, Davis v. Washington, ___ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court elaborated on the meaning of testimonial:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.
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> [Id. at ____, 126 S. Ct. at 2273-74, 165 L. Ed. 2d at 237.]

The Committee thought it impractical to revise every exception to the hearsay rule to take account of the change in the law under Crawford. Therefore, the Committee recommends that language be added to N.J.R.E. 802, 803, and 804, indicating that hearsay may not be admitted if it contravenes the Confrontation Clause. Additionally, the Committee recommends a Committee comment to these changes to the Rules explaining that the additional language was added because of the significant change in Confrontation Clause jurisprudence caused by Crawford.

RULE 802 HEARSAY RULE

Hearsay is not admissible except as provided by these rules or by other law. **Hearsay otherwise admissible shall not be admitted if admission would contravene the Confrontation Clause of the Constitutions of the United States or New Jersey**.

2007 Supreme Court Committee Comment

The language regarding the Confrontation Clause was added to alert judges and practitioners to the major change in Confrontation Clause jurisprudence occasioned by Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004) and its progeny, including Davis v. Washington, _____ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) and, here in New Jersey, State v. Buda, ____ N.J. Super. ____ (App. Div. 2006). Under Crawford, testimonial statements made by witnesses absent from trial may be "admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." 541 U.S. at 59, 124 S. Ct. at 1369, 158 L. Ed. 2d at 197.

[RULE 803](c) STATEMENTS NOT DEPENDENT ON DECLARANT'S AVAILABILITY. Whether or not the declarant is available as a witness, **the following statements may be admitted provided admission of the statement does not contravene the Confrontation Clause of the Constitutions of the United States or New Jersey**:

2007 Supreme Court Committee Comment

The language regarding the Confrontation Clause was added to alert judges and practitioners to the major change in Confrontation Clause jurisprudence occasioned by Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004) and its progeny, including Davis v. Washington, _____ U.S. ___, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) and, here in New Jersey, State v. Buda, ____ N.J. Super. ____ (App. Div. 2006). Under Crawford, testimonial statements made by witnesses absent from trial may be "admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." 541 U.S. at 59, 124 S. Ct. at 1369, 158 L. Ed. 2d at 197.

Rule 804. Hearsay Exceptions: Declarant Unavailable.

(a) DEFINITION OF UNAVAILABLE. Except when the declarant's unavailability has been procured or wrongfully caused by the proponent of declarant's statement for the purpose of preventing declarant from attending or testifying, a declarant is "unavailable" as a witness if declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the statement; or

(2) persists in refusing to testify concerning the subject matter of the statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of the statement; or

(4) is absent from the hearing because of death, physical or mental illness or infirmity, or other cause, and the proponent of the statement is unable by process or other reasonable means to procure the declarant's attendance at trial, and, with respect to statements proffered under Rules 804(b)(4) and (7), the proponent is unable, without undue hardship or expense, to obtain declarant's deposition for use in lieu of testimony at trial.

(b) HEARSAY EXCEPTIONS. Subject to Rule 807, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness, **provided admission of the statement does not contravene the Confrontation Clause of the Constitutions of the United States or New Jersey.**

(1) *Testimony in prior proceedings.*

(A) Testimony given by a witness at a prior trial of the same or a different matter, or in a hearing or deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive in the prior trial, hearing or proceeding to develop the testimony by examination or cross-examination.

(B) In a civil action or proceeding, and only when offered by the defendant in a criminal action or proceeding, testimony given in a prior trial, hearing or deposition taken pursuant to law to which the party against whom the testimony is now offered was not a party, if the party who offered the prior testimony or against whom it was offered had an opportunity to develop the testimony on examination or cross-examination and had an interest and motive to do so which is the same or similar to that of the party against whom it is now offered.

Expert opinion testimony given in a prior trial, hearing, or deposition may be excluded, however, if the judge finds that there are experts of a like kind generally available within a reasonable distance from the place in which the action is pending and the interests of justice so require.

(2) *Statement under Belief of Imminent Death.* In a criminal proceeding, a statement made by a victim unavailable as a witness is admissible if it was made voluntarily and in good faith and while the declarant believed in the imminence of declarant's impending death.

(3) *[Statement against interest--Adopted as Rule 803(c)(25)]*

(4) *Statement of personal or family history.* A statement (A) concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, ancestry, relationship by blood, adoption, or marriage, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or (B) concerning the foregoing matters, and the death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matters declared.

(5) *[Other Exceptions--not adopted]*

(6) *Trustworthy statements by deceased declarants.* In a civil proceeding, a statement made by a person unavailable as a witness because of death if the statement was made in good faith upon declarant's personal knowledge in circumstances indicating that it is trustworthy.

(7) *Voters' statements.* A statement by a voter concerning the voter's qualifications to vote or the fact or content of the vote.

2007 Supreme Court Committee Comment

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B. Proposed Addition of the Mediation Privileges Created Under the "Uniform Mediation Act," N.J.S.A. 2A:23C-1 to -13

In 2004, the New Jersey Legislature adopted the "Uniform Mediation Act," N.J.S.A. 2A:23C-1 to -13, which provides that mediation communication is privileged. Although creating privileges is the province of the Legislature, the privileges created by statute are assigned a rule number within Article V of the Rules of Evidence, as a convenience to the reader. The Committee, therefore, recommends that the privilege created in the Uniform Mediation Act be added to the Rules of Evidence as N.J.R.E. 519.

RULE 519. MEDIATOR PRIVILEGE

(a) N.J.S. 2A:23C-4 provides:

a. Except as otherwise provided in section 6 of P.L. 2004, c. 157 (C. 2A:23C-6), a mediation communication is privileged as provided in subsection b. of this section and shall not be subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided by section 5 of P.L. 2004, c. 157 (C. 2A:23C-5).

b. In a proceeding, the following privileges shall apply:

(1) a mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) a mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) a nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

c. Evidence or information that is otherwise admissible or subject to discovery shall not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

(b) N.J.S. 2A:23C-5 provides:

a. A privilege under section 4 of P.L. 2004, c. 157 (C. 2A:23C-4) may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

b. A person who discloses or makes a representation about a mediation communication that prejudices another person in a proceeding is precluded from asserting a privilege under section 4 of P.L. 2004, c. 157 (C. 2A:23C-4), but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

c. A person who intentionally uses a mediation to plan, attempt to commit or commit a crime, or to conceal an ongoing crime or ongoing criminal activity is precluded from asserting a privilege under section 4 of P.L. 2004, c. 157 (C. 2A:23C-4).

(c) N.J.S. 2A:23C-6 provides:

a. There is no privilege under section 4 of P.L. 2004, c. 157 (C. 2A:23C-4) for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) made during a session of a mediation that is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime;

(4) intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) sought or offered to prove or disprove a claim or complaint filed against a mediator arising out of a mediation;

(6) except as otherwise provided in subsection c., sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) sought or offered to prove or disprove child abuse or neglect in a proceeding in which the Division of Youth and Family Services in the Department of Human Services is a party, unless the Division of Youth and Family Services participates in the mediation.

b. There is no privilege under section 4 of P.L. 2004, c. 157 (C. 2A:23C-4) if a court, administrative agency, or arbitrator finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication is sought or offered in:

(1) a court proceeding involving a crime as defined in the "New Jersey Code of Criminal Justice," N.J.S. 2C:1-1 et seq.; or

(2) except as otherwise provided in subsection c., a proceeding to prove a claim to rescind or reform or a defense to avoid liability on a contract arising out of the mediation.

c. A mediator may not be compelled to provide evidence of a mediation communication referred to in paragraph (6) of subsection a. or paragraph (2) of subsection b.

d. If a mediation communication is not privileged under subsection a. or b., only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subsection a. or b. does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

(d) N.J.S. 2A:23C-7 provides:

a. Except as required in subsection b., a mediator may not make a report, assessment, evaluation, recommendation, finding, or other oral or written communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

b. A mediator may disclose:

(1) whether the mediation occurred or has terminated, whether a settlement was reached, and attendance; or

(2) a mediation communication as permitted under section 6 of P.L. 2004, c. 157 (C. 2A:23C-6).

c. A communication made in violation of subsection a. may not be considered by a court, administrative agency, or arbitrator.

(e) N.J.S. 2A:23C-8 provides:

Unless made during a session of a mediation which is open, or is required by law to be open, to the public, mediation communications are confidential to the extent agreed by the parties or provided by other law or rule of this State.

II. PREVIOUSLY APPROVED RECOMMENDATIONS

A. Proposed Amendment to N.J.R.E. 609 to Permit Evidence of Prior False Accusations

In State v. Guenther, 181 N.J. 129 (2004), the Supreme Court created a narrow exception to N.J.R.E. 608 to permit admission of prior false accusation evidence. The Court also referred this issue to the Committee on the Rules of Evidence "for any recommendations . . . not inconsistent with this opinion." After considerable debate, the Committee decided to recommend that prior false accusation evidence should be admitted in civil, as well as criminal cases, and that N.J.R.E. 609 should be amended, not N.J.R.E. 608. Specifically, the Committee recommended adding the following paragraph to N.J.R.E. 609:

> (b) For the purpose of affecting the credibility of any witness, the witness' prior false accusation against any person of conduct that would constitute a crime or other statutory offense similar to the wrongful conduct about which the witness is testifying shall be admissible if the judge determines, by a hearing pursuant to Rule 104(a), that the prior accusation was made and was false.

When the proposed rule change was published, a number of comments were received objecting to the expansion to civil cases. The major basis of these objections was that if this type evidence was admitted in domestic violence restraining order hearings, it would negatively affect domestic violence victims.

The Court approved the Committee's proposal after significant changes. The Court rejected the Committee's recommendation to permit the admission of prior false accusation evidence in civil cases. The Court also decided to amend N.J.R.E. 608 instead of N.J.R.E. 609, as the Committee had recommended. Accordingly, the Court amended N.J.R.E. 608 to add the following paragraph:

> (b) The credibility of a witness in a criminal case may be attacked by evidence that the witness made a prior false accusation against any person of a crime similar to the crime with which defendant is charged if the judge preliminary determines, by a hearing pursuant to Rule 104(a), that the witness knowingly made the prior false accusation.

III. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Hearsay Exception to Permit Admission of Statements by Children Alleging Abuse or Neglect.

A Superior Court judge wrote to the Committee suggesting that it consider revising the hearsay rules to admit out-of-court statements by children alleging abuse or neglect, at least under emergent circumstances. He pointed out that the treatment of such hearsay was inconsistent in that it may be admitted under N.J.S.A. 9:6-8.46 at Division of Youth and Family Services hearings investigating child abuse, but not in any other context, such as matrimonial cases.

After a thorough discussion of the issue, the Committee came to a consensus that the hearsay rules should not be changed. The Committee considered that allegations of child abuse and neglect are very common in matrimonial cases. The Committee thought that the admission of a child's statement, without the child's testimony, was subject to misuse, particularly in a divorce proceeding. It concluded that such a serious decision as a change in child visitation or custody should not be made on the papers, without the benefit of the child's testimony. In such a circumstance, the judge can schedule an emergent hearing.

B. Cross-Referencing of N.J.S.A. 2C:25-29

A Superior Court judge wrote to the Committee suggesting that N.J.S.A. 2C:25-29(a) should be cross-referenced in the Rules of Evidence. N.J.S.A. 2C:25-29(a), in part, precludes testimony given in a domestic violence restraining order hearing from being used in a criminal matter against the defendant. Judge Sabatino thought that such a cross-reference would be helpful to judges and practitioners.

The Committee decided not to recommend the cross-referencing of N.J.S.A. 2C:25-29(a). Because the evidentiary exclusion of N.J.S.A. 2C:25-29(a) applies to a very narrow category of evidence, the Committee thinks it is more appropriate that it be mentioned in a comment to the Rules of Court, Part 5:7A, Domestic Violence: Restraining Orders. The Committee took a similar position with regard to N.J.S.A. 2C:14-7, which excludes evidence of a sexual assault victim's prior sexual conduct (commonly known as the Rape Shield Law).

IV. MATTERS HELD FOR CONSIDERATION

A. Excited Utterance Exception

In State v. Branch, 182 N.J. 338, 372 (2005), the Supreme Court asked the Committee to study whether the excited utterance exception to the hearsay rule should be altered so that such hearsay is admissible only if the declarant testified or was unavailable. The Committee reached a consensus that before it makes a recommendation to change the excited utterance exception that it ask for the input from other groups such as the Supreme Court Committees on Criminal Practice and Family Practice, the Domestic Violence Working Group, the Prosecutors' Association and the Association of Criminal Defense Lawyers of New Jersey. The Committee will seek such input during its next term.

V. CONCLUSION

The members of the Supreme Court Committee on the Rules of Evidence appreciate the opportunity to serve the Supreme Court in this capacity.

Respectfully submitted,

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