

EVIDENCE OVERSIGHT COMMITTEE MEETING

February 27, 2007

2:00 - 4:00 p.m.

Attorney Conference Room
231 Capitol Avenue, Hartford, Conn.

AGENDA

A. Old Business

1. Minutes of Meeting - October 25, 2006
2. Proposed new section of Code of Evidence - Tender Years
 - a. Draft (NEW) Hearsay Exception: Tender Years
 - b. Material submitted by Judge Corradino; sent to Committee members on November 30, 2006.
 - i. 29 Am Jur 2d §§ 687, 688
 - ii. 29A Am Jur 2d § 868
 - iii. State v. Carlson, 812 P.2d 536 (Wash. App. 1991)
 - iv. State v. Jalette, 382 A.2d 526 (R.I. 1978)
 - v. State v. Doe, 719 P.2d 554 (Wash. 1986)
 - vi. Idaho v. Wright, 4987 U.S. 805 (1990)
 - vii. State v. Allen, 755 P.2d 1153 (Ariz. 1987)
 - viii. U.S. v. Thunder Horse, 370 F.2d 745 (8th Cir. 2004)
 - ix. State v. Smith, 909 P.2d 236 (Utah 1995)
 - x. State v. Ryan, 691 P. 2d 165 (Wash. 1984)
 - xi. U.S. Renville, 779 F.2d 430 (8th Cir. 1985)
 - xii. People v. Dist. Ct. of El Paso, 776 P.2d 1083 (Colo. 1989)
 - xiii. State v. Conklin, 444 N.W. 2d 268 (Min. 1989)
 - xiv. Norris v. State, 788 S.W.2d 65 (Tex. App. 1990)
 - xv. State v. Robinson, 735 P.2d 801 (Ariz. 1987)
 - xvi. D.A.H. v. G.A.H., 371 N.W. 2d 1 (Minn. App. 1985)
 - xvii. State v. Stevens, 794 P. 2d 38 (Wash. App. 1990)
 - xviii. 71 ALR 5th 637, "Validity, Construction and Application of Child Hearsay Statutes."
 - xix. "Alabama's Child's Hearsay Exception," 47 Ala. L. Rev. 215 (1995-1996)
 - xx. State v. R.B., 873 A.2d 511 (N.J. 2005)
 - c. Senate Bill No. 587, An Act Concerning The Admissibility of the Statement of a Child Concerning Sexual Misconduct

3. Section 6-11. Prior Consistent Statements of Witnesses; Constancy of Accusation by Sexual Assault Victim.

- a. Elimination of Constancy of Accusation by Sexual Assault Victim provision of Section 6-11.

At its October 25, 2006 meeting, the committee voted to recommend the following revision of Section 6-11 and its Commentary. The Committee reserved to itself the opportunity to reconsider its decision after completing its review of a proposed tender years hearsay exception.

Sec. 6-11. Prior Consistent Statements of Witnesses; Constancy of Accusation by a Sexual Assault Victim

(a) General rule. Except as provided in this section, the credibility of a witness may not be supported by evidence of a prior consistent statement made by the witness.

(b) Prior consistent statement of a witness. If the credibility of a witness is impeached by (1) a prior inconsistent statement of the witness, (2) a suggestion of bias, interest or improper motive that was not present at the time the witness made the prior consistent statement, or (3) a suggestion of recent contrivance, evidence of a prior consistent statement made by the witness is admissible, in the discretion of the court, to rebut the impeachment.

~~(c) Constancy of accusation by a sexual assault victim. A person to whom a sexual assault victim has reported the alleged assault may testify that the allegation was made and when it was made, provided the victim has testified to the facts of the alleged assault and to the identity of the person or persons to whom the assault was reported. Any testimony by the witness about details of the assault shall be limited to those details necessary to associate the victim's allegations with the pending charge. The testimony of the witness is admissible only to corroborate the victim's testimony and not for substantive purposes.~~

Commentary

- (a) General rule.

Connecticut's rule on the admissibility of prior consistent statements is phrased in terms of a general prohibition subject to exceptions. E.g., *State v. Valentine*, 240 Conn. 395, 412-13, 692 A.2d 727 (1997); *State v. Dolphin*, 178 Conn. 564, 568-69, 424 A.2d 266 (1979). Exceptions to the general prohibition are set forth in subsections (b) ~~and (c)~~. (b) Prior consistent statement of a witness.

Common law permits the use of a witness' prior statement consistent with the witness' in-court testimony to rehabilitate the witness' credibility after it has been impeached via one of the three forms of impeachment listed in the rule. E.g., *State v. Valentine*, supra, 240 Conn. 413; *State v. Brown*, 187 Conn. 602, 607-608, 447 A.2d 734 (1982). The cases sometimes list a fourth form of impeachment—a claim of inaccurate memory — under which prior consistent statements could be admitted to repair credibility. E.g., *State v. Valentine*, supra, 413; *State v. Anonymous (83-FG)*, 190 Conn. 715, 729, 463 A.2d 533 (1983). This form of impeachment is not included because it is subsumed under the "impeachment by prior inconsistent statements" category. The only conceivable situation in which a prior consistent statement could be admitted to counter a claim of inaccurate memory involves: (1) impeachment by a prior inconsistent statement made some time after the event when the witness' memory had faded; and (2) support of the witness' in-court testimony by showing a prior consistent statement made shortly after the event when the witness' memory was fresh. Cf., e.g., *Brown v. Rahr*, 149 Conn. 743, 743-44, 182 A.2d 629 (1962); *Thomas v. Ganezer*, 137 Conn. 415, 418-21, 78 A.2d 539 (1951).

Although Connecticut has no per se requirement that the prior consistent statement precede the prior inconsistent statement used to attack the witness' credibility; see *State v. McCarthy*, 179 Conn. 1, 18, 425 A.2d 924 (1979); the trial court may consider the timing of the prior consistent statement as a factor in assessing its probative value.

Prior consistent statements introduced under subsection (b) are admissible for the limited purpose of repairing credibility and are not substantive evidence. E.g., *State v. Brown*, supra, 187 Conn. 607; *Thomas v. Ganezer*, supra, 137 Conn. 421.

In stating that evidence of a witness' prior consistent statement is admissible "in the discretion of the court," Section 6-11 stresses the broad discretion afforded the trial judge in admitting this type of evidence. See *Thomas v. Ganezer*, supra, 137 Conn. 420; cf. *State v. Mitchell*, 169 Conn. 161, 168, 362 A.2d 808 (1975).

(c) Constancy of accusation by a sexual assault victim provision deleted.

The 2000 edition of the Code contained a subdivision (c) which read as follows: "(c) Constancy of accusation by a sexual assault victim. A person to whom a sexual assault victim has reported the alleged assault may testify that the allegation was made and when it was made, provided the victim has testified to the facts of the alleged assault and to the identity of the person or persons to whom the assault was reported. Any testimony by the witness about details of the assault shall be limited to those details

necessary to associate the victim's allegations with the pending charge. The testimony of the witness is admissible only to corroborate the victim's testimony and not for substantive purposes.”

The Commentary contained the following text:

“Subsection (c) reflects the supreme court's recent modification of the constancy of accusation rule in *State v. Troupe*, 237 Conn. 284, 304, 677 A.2d 917 (1996).

Evidence introduced under subsection (c) is admissible for corroborative purposes only. Evidence may be introduced substantively only where permitted elsewhere in the Code. E.g., Section 8-3 (2) (spontaneous utterance hearsay exception); see *State v. Troupe*, supra, 237 Conn. 304 n. 19.

Admissibility is contingent on satisfying the relevancy and balancing standards found in Sections 4-1 and 4-3, respectively. See id., 305 & n. 20.”

Subsection (c) and the related portion of the Commentary were deleted in recognition of the further discussion of the law in this area in *State v. Samuels*, 75 Conn. App. 671, 674-77 (questionable rationale of constancy of accusation doctrine; underlying foundations unfounded) and *State v. Samuels*, 273 Conn. 541, 546-553 (2005).

B. New Business

1. Section 4-4(a)

a. December 11, 2006 letter from Attorney Susann Gill E. Gill to Justice Peter T. Zarella, Chair, Rules Committee of the Superior Court, regarding proposed amendment to Section 4-4 (a) - sent to Committee members on December 15, 2006

2. Such other matters as may come before the Committee.

3. Next meeting.