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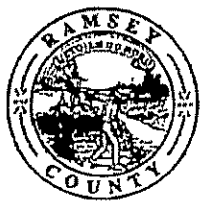

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DATE: December 15, 2006

TO: Frederick Grittner
Clerk of Appellate Court
FAX 651-297-4149

FROM: Susan Gaertner
Ramsey County Attorney
Ph. 651-266-3079

PAGES: (including cover): 10

COMMENTS:

Please see the attached letter and related document regarding requested modifications to the present wording of proposed Rule 12 to the General Rules of Practice for the District Courts. These materials also are being sent today by U.S. mail.

OFFICE OF THE RAMSEY COUNTY ATTORNEY

SUSAN GAERTNER
County Attorney

December 15, 2006 SENT BY FAX AND U.S. MAIL

Frederick K. Grittner
Clerk of Appellate Court
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul MN 55155

Re: Proposed Amendments to the General Rules of Practice for the District Courts: Comment on Proposed Rule 12 (Testimony from Child Witness)

Dear Mr. Grittner:

I write to suggest modifications to the present wording of proposed Rule 12 to the General Rules of Practice for the District Courts and to provide the perspective of prosecutors on this proposal. I believe this perspective is important because it appears the Advisory Committee on General Rules of Practice does not include any prosecutors.

As prosecutors, we are the segment of the bar most directly and frequently involved in cases in which the need arises to take the testimony of a child by alternate means. It is in child abuse prosecutions that children may be so traumatized by testifying in the presence of their abuser that they may be rendered unavailable as witnesses if forced to confront their abuser face-to-face. At the same time, the accused's constitutional right to confront the witnesses against him must always be protected.

As a direct response to the competing interests involved in this problem, the Minnesota Legislature in 1986 adopted Minn. Stat. § 595.02, subd. 4 (c), setting forth alternative procedures that could be employed in these cases. This statute has been applied for 20 years and has expressly been held to be constitutional. State v. Conklin, 44 N.W.2d 268 (Minn. 1989). Minnesota can be considered a pioneer in this area.

The proposed Rule 12 was brought to my attention by Assistant Ramsey County Attorney Jeanne Schleh, a prosecutor with 30 years of experience in child abuse cases. She was a member of the Advisory Committee on Minnesota Rules of Evidence. That committee initially considered this proposal but forwarded it to the Advisory Committee on General Rules of Practice. Ms. Schleh and other child abuse prosecutors in our office have

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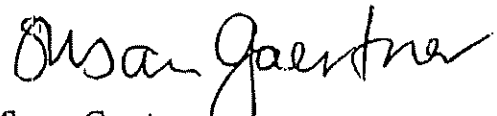
carefully reviewed each section of the proposed rule. Their proposed changes, and the rationale for each, are enclosed. I support their recommendations and urge the Court to do so.

We fully support the concept of Rule 12 but would strongly urge the Court to adopt language for the new rule of practice that parallels as closely as possible the language of Minn. Stat. § 595.02, subd. 4 (c). There is no need for ambiguity or inconsistency between the two, and the statute has demonstrated its workability.

Minnesota was on the cutting edge of the law in addressing this issue well before the National Conference of Commissioners on Uniform State Laws adopted its recommendations in 2003. These recommendations provide a valuable model for states that have not acted in this area. This model, however, should not be considered the only approach nor should it take precedence over Minnesota's well thought-out procedures. Any new rule of practice should mirror well-settled, existing law as much as possible, especially in light of the Advisory Committee's clear view that the proposed rule neither expands nor contracts admissibility of evidence already governed by Minn. Stat. § 595.02.

Thank you for considering the suggested changes in the wording of proposed Rule 12.

Very truly yours,



Susan Gaertner
Ramsey County Attorney

Enclosure

Objections and Proposed Modifications Submitted by the Ramsey County Attorney's Office Regarding Proposed Rule 12 (Recommendation 4: Testimony for Child Witnesses)

(Note: The document below is the proposal of the Advisory Committee on General Rules of Practice. Proposed modifications from the Ramsey County Attorney's Office are shown in underlined or stricken text and in boldface comments.)

***

Recommendation 4: The Court should adopt a rule to govern taking of testimony from child witnesses

Introduction

This recommendation follows the consideration of the issue of taking testimony from child witnesses by the Minnesota Supreme Court Advisory Committee on Rules of Evidence, and its conclusion that this subject would better be taken up by the general rules committee because the issue is a matter of procedure rather than substantive evidence law. The committee concurs with that conclusion.

The general background of this issue reflects the tension between the interests in protecting child witnesses, the occasional need for their testimony, and in criminal matters the defendant's constitutionally protected right to confront witnesses. These tensions, and the United States Supreme Court's recognition in *Maryland v. Craig*, 497 U.S. 836 (1990), that the Confrontation Clause does not require face-to-face confrontation in all cases, prompted the National Conference of Commissioners on Uniform State Laws to adopt its Uniform Act on Taking Testimony of Children by Alternative Methods in 2003. *See* Hon. Catherine L. Anderson, *Child Witneses: Alternatives to Face-to-Face Confrontation*, CRIM. J., Wint. 2004, at 22.

The advisory committee concluded that it is appropriate to adopt a uniform rule on this subject. The issue arises primarily, but not exclusively, in the criminal law context, and the Uniform Law provides separately for the greater discretion in civil proceedings. The committee's proposed rule is drawn directly from the Uniform Law, though the statutory language is converted to the format of these rules.

This recommended rule is not intended to change the substantive law relating to the competency of child witnesses. MINN. STAT. § 595.02 sets forth the competency standards in a number of ways. The rule is intended to create a standard procedural framework within which the trial judge can exercise the discretion allowed under the substantive evidence law. *See* MINN. STAT. §§ 595.02, subd. 1(j)(confidentiality of parent-child communications), 595.02, subd. 3 (admissibility of certain out-of-court statements made by child under 12), & 595.02, subd. 4 (allowing court to order that child witness under age 12 be allowed to testify other than from courtroom).

The proposed rule is derived from the proposed Uniform Act on Taking Testimony of Children by Alternative Methods. Because this subject relates directly to court procedure, the advisory committee believes it should be addressed in the court rules, and not by statute.

Specific Recommendation

The Court should adopt a new Rule 12 to provide a procedure for dealing with the issues presented by having child witnesses testify in both civil and criminal proceedings. ***[Note that underscoring for this rule is omitted because the entire text is new.]***

RULE 12. TESTIMONY FROM CHILD WITNESS

Rule 12.01. Applicability.

This rule applies to the testimony of a child witness in all court proceedings. This rule does not preclude, in a noncriminal proceeding, any other procedure permitted by law for a child witness to testify.

Rule 12.02. Definitions.

For the purposes of this Rule:

(a) "Alternative Method" means a method by which a child witness testifies which does not include all of the following:

1. having the child testify in person in an open forum;

2. having the child testify in the presence and full view of the finder of fact and presiding officer; and

3. allowing all of the parties to be present, to participate, and to view and be viewed by the child.

(b) "Child Witness" means an individual under the age of 13 who has been or will be called to testify in a proceeding.

(c) "Criminal Proceeding" means a trial or hearing before a court in a prosecution of a person charged with violating a criminal law in an adult or juvenile proceeding.

(d) "Noncriminal Proceeding" means a trial or hearing before a court having judicial or quasi-judicial powers, other than a criminal proceeding.

Rule 12.03. Hearing Whether To Allow Testimony By Alternative Method.

(a) The presiding officer in a criminal or noncriminal proceeding may order a hearing to determine whether to allow a child witness to testify by an alternative method. The presiding officer, on motion pursuant to Minn. Stat. § 595.02, subd. 4 (c) or for other good cause shown, shall order the hearing upon motion of a party~~, a child witness, or an individual determined by the presiding officer to have sufficient standing to act on behalf of the child~~.

(b) A hearing to determine whether to allow a child witness to testify by an alternative method must be conducted on the record after reasonable notice to all parties~~, any nonparty movant, and any other person the presiding officer specifies~~. The child's presence is not required at the hearing unless ordered by the presiding officer. In conducting the hearing, the presiding officer is not bound by rules of evidence except the rules of privilege.

Comment: The stated purpose of the new rule is conform to current substantive law. Ramsey's County's proposed changes to the draft accomplish that. Because Minnesota law has already been ahead of the curve in adopting Minn. Stat. § 595.02, subd. 4 (c), and that law has survived constitutional challenge and been on the books for 20 years, any parallel change in the rules of practice should model that law, not generalized model code language.

A motion pursuant to Minn. Stat. § 595.02, subd. 4 (c), *is* a good cause motion. Once made, no additional finding by the court should be required or implied.

Under Minn. Stat. § 595.02, subd. 4 (c), only the parties have the right to move the taking of the testimony of a child witness by alternate method. Absent any strong evidence to the contrary, there is no compelling reason to create additional rights for other persons to make such motions when, for 20 years, the interests of children have been adequately represented by parties and their legal counsel—at least in criminal cases. Adding another layer of litigants, with or without representation, contributes nothing to the fair presentation of this issue to the court and could even have counter-productive unintended consequences (such as unnecessary expense, delay and creating implied legal status for persons whose views or motives are irrelevant to a fair determination of the legal action in question).

Rule 12.04 Standards For Determining Whether Child Witness May Testify By Alternative Method.

(a) In a criminal proceeding, the presiding officer may allow a child witness to testify by an alternative method only if the presiding officer finds ~~by clear and convincing evidence~~ that the child would ~~suffer serious emotional trauma~~ be so psychologically traumatized ~~that~~ it would substantially impair the child's ability to communicate with the finder of fact if required to be confronted face-to-face by the defendant.

(b) In a noncriminal proceeding, the presiding officer may allow a child witness to testify by an alternative method if the presiding officer finds ~~by a preponderance of the evidence~~ that allowing the child to testify by an alternative method is necessary to serve the best interests of the child or enable the child to communicate with the finder of tact. In making this finding, the presiding officer shall consider:

(1) the nature of the proceeding;

(2) the age and maturity of the child;

(3) the relationship of the child to the parties in the proceeding;

(4) the nature and degree of emotional trauma that the child may suffer in testifying; and

(5) any other relevant factor.

Comment: Same as above (statutory language already in place should be used to the greatest extent possible). Minn. Stat. § 595.02, subd. 4 (c), specifies no burden of

proof which means fair preponderance is required. Certainly, there is no basis for requiring "clear and convincing," the standard reserved for *Spreigl* evidence.

Rule 12.05. Factors For Determining Whether To Permit Alternative Method.

If the presiding officer determines that a standard under Rule 12.04 has been met, the presiding officer shall determine whether to allow a child witness to testify by an alternative method and in doing so shall consider:

1. alternative methods reasonably available;

2. available means for protecting the interests of or reducing psychological ~~emotional~~ trauma to the child without resort to an alternative method;

3. the nature of the case;

4. the relative rights of the parties;

5. the importance of the proposed testimony of the child;

6. the nature and degree of ~~emotional~~ psychological trauma that the child may suffer if an alternative method is not used; and

7. any other relevant factor.

Comment: "Psychological" is the language of Minn. Stat. § 595.02, subd. 4 (c). This word adequately covers the concept and has survived judicial scrutiny. A different term could result in unnecessary litigation about the distinction.

Rule 12.06. Order Regarding Testimony By Alternative Method.

(a) An order allowing or disallowing a child witness to testify by an alternative method must state the findings of fact and conclusions of law that support the presiding officer's determination.

(b) An order allowing a child witness to testify by an alternative method must:

1. state the method by which the child is to testify;

2. list any individual or category of individuals allowed to be in, or required to be excluded from, the presence of the child during the testimony;

3. state any special conditions necessary to facilitate a party's right to examine or cross-examine the child;

4. state any condition or limitation upon the participation of individuals present during the testimony of the child; and

5. state any other condition necessary for taking or presenting the testimony.

~~(c) The alternative method ordered by the presiding officer may be no more restrictive of the rights of the parties than is necessary under the circumstances to serve the purposes of the order.~~

Comment: This subparagraph is unnecessary. Minn. Stat. § 595.02, subd. 4 (c), already sets forth several ways in which a child witness's testimony may be taken by alternate equivalent means. The parties generally agree on which method to use, but, if they do not, the court may pick. Neither is more or less restrictive than the other, and adding this addition level of court scrutiny is both immaterial and superfluous.

~~**Rule 12.07. Right of Party To Examine Child Witness.**~~

~~An alternative method ordered by the presiding officer must permit a full and fair opportunity for examination or cross-examination of the child witness by each party.~~

Comment: This rule is unnecessary. Either of the methods already set forth in Minn. Stat. § 595.02, subd. 4 (c), permits fair opportunity for examination or cross-examination of the child witness by each party. Fair opportunity to cross-examine a witness does not mean a guarantee of satisfactory or effective cross-examination. *United States v. Owens*, 484 U.S. 554 (1988). But this unneeded rule invites such litigation.

Advisory Committee Comments—2007 Amendment

Rule 12 is intended to provide procedural guidelines for taking testimony from child witnesses. The rule neither expands nor contracts the admissibility of this evidence, which is governed by statute in any event. *See* MINN. STAT. § 595.02. This rule is derived in large part from the Uniform Act on Taking Testimony of Children by Alternative Methods, proposed by the National Conference of Commissioners on Uniform State Laws, though it is converted to the format of these rules. The uniform law is discussed in greater detail in Hon. Catherine L. Anderson, *Child Witneses: Alternatives to Face-to-Face Confrontation*, CRIM. J., Wint. 2004, at 22.

This rule is intended to provide a procedural mechanism for dealing with the issues that arise most often by the concerns for child witnesses and the rights of a criminal defendant to faces the witnesses. The right to invoke these alternatives is guided by the substantive evidence and constitutional law; this rule is not intended to expand or contract the use of alternative methods for taking testimony from child witnesses.

Comment: Especially in light of the Advisory Committee's clear view that the proposed rule neither expands nor contracts admissibility of evidence already governed by Minn. Stat. § 595.02, it is crucial that any new rule of practice mirror well-settled, existing law as much as possible.