

## MEMORANDUM

**TO:** Ad Hoc Committee on Rules of Evidence

**FROM:** Subcommittee on Article VIII residual exceptions and last paragraph of FRE 801

**RE:** Recommended action

**DATE:** August 13, 2010

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This subcommittee was asked to examine the residual exceptions set out in ARE 803(24) and ARE 804(5) and to determine whether Arizona should adopt FRE807 as an alternative. This subcommittee was also asked to examine FRE 801 and to determine whether ARE 801 should be amended to include the last sentence of FRE 801(d)(2).

The subcommittee determined that it would be appropriate for Arizona to adopt the language of FRE 807 and to remove ARE 803(24) and ARE 804(b)(7). The subcommittee also determined that it would be appropriate to add the language of the last sentence of FRE 801(d)(2) to ARE 801(d)(2). A separate memorandum dated August 4, 2010, titled "Residual Hearsay Exception Memorandum" addressing ARE 803(24) and ARE 804(5) was provided to the Committee with Mark Armstrong's e-mail of August 6, 2010. A discussion of Rule 801(d)(2) follows.

### **Rule 801(d)(2)**

Both ARE 801(d)(2) and FRE 801(d)(2) exclude from the definition of "hearsay" admissions by a party-opponent. In addition to a party's own statement, ARE and FRE 801(d)(2) also exclude from the definition of "hearsay" (1) statements made by a person authorized by the party to make a statement concerning the subject (ARE and FRE 801(d)(2)(C)), (2) statements by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship (ARE and FRE 801(d)(2)(D)), and (3) statements by a co-conspirator of a party during the course and in furtherance of conspiracy (ARE and FRE 801(d)(2)(E)).

In 1997, FRE 801(d)(2) was amended in order to respond to issues raised by *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775 (1987). The following sentence was added to the Federal rule:

"The contents of the statements shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision

(D), or the existence of the conspiracy and the participation therein of the declarant and the party against who the statement is offered under subdivision (E).”

The notes of the advisory committee in 1997 with respect to the amendment explain the reasons for the amendment:

“Rule 801(d)(2) has been amended in order to respond to three issues raised by *Bourjaily v. United States*, 483 U.S. 171 (1987). First, the amendment codifies the holding in *Bourjaily* by stating expressly that a court shall consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to *Bourjaily*, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.

Second, the amendment resolves an issue on which the Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement. See, e.g., *United States v. Beckham*, 968 F.2d 47, 51 (D.C.Cir. 1992); *United States v. Sepulveda*, 15 F.3d 1161, 1181-82 (1st Cir. 1993), cert. denied, 114 S.Ct. 2714 (1994); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir.), cert. denied, 488 U.S. 821 (1988); *United States v. Clark*, 18 F.3d 1337, 1341-42 (6th Cir.), cert. denied, 115 S.Ct. 152 (1994); *United States v. Zambrana*, 841 F.2d 1320, 1344-45 (7th Cir. 1988); *United States v. Silverman*, 861 F.2d 571, 577 (9th Cir. 1988); *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988); *United States v. Hernandez*, 829 F.2d 988, 993 (10th Cir. 1987), cert. denied, 485 U.S. 1013 (1988); *United States v. Byrom*, 910 F.2d 725, 736 (11th Cir. 1990).

Third, the amendment extends the reasoning of *Bourjaily* to statements offered under subdivisions (C) and (D) of Rule 801(d)(2). In *Bourjaily*, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant's authority under subdivision (C), and the

agency or employment relationship and scope thereof under subdivision (D).”

ARE 104(a) and FRE 104(a) are identical. They state:

“(a) **Questions of admissibility generally.** Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.”

In construing ARE 801(d)(2) the Arizona Courts have appeared to follow the substance of the 1997 amendment to FRE 801(d)(2). In *State v. Frustino*, 142 Ariz. 288, 689 P.2d 547 (App. 1984), the Court noted that, in order for a statement to be admissible pursuant to ARE 801(d)(2)(C) or ARE 801(d)(2)(D), there must be independent proof of an agency relationship and its scope. 142 Ariz. at 294. In *State v. Fletcher*, 137 Ariz. 306, 670 P.2d 411 (App. 1983) the Court, in discussing ARE 801(d)(2)(E), noted that independent evidence of a conspiracy was necessary in order to allow the introduction of a co-conspirator’s statement. 137 Ariz. at 309. Consistent with *Bourjaily* the Court in *Fletcher* also noted that the Court’s determination of admissibility under ARE 104(a) was subject to a preponderance of the evidence standard.

The 1997 amendment to FRE 801(d)(2) appears consistent with Arizona case law. It would appear to be appropriate, therefore, for ARE 801(d)(2) to be amended consistent with FRE 801(d)(2).