COLORADO SUPREME COURT
COMMITTEE ON RULES OF EVIDENCE

MINUTES OF MEETING
November 4, 2011

David R. DeMuro called the meeting to order at 2:09 p.m. in the fifth floor conference room at the Denver News Agency building at 101 W. Colfax Avenue in Denver, Colorado.

The following members were present:

Catherine P. Adkisson
Judge Harlan Bockman
Philip A. Cherner
Judge Janice Davidson
David R. DeMuro, Chair
Judge Martin Egelhoff
Elizabeth F. Griffin
Carol M. Haller
Professor Sheila Hyatt
Professor Christopher B. Mueller
Henry R. Reeve
Judge Robert M. Russel

The following members were excused:

Judge Rebecca Bromley
Justice Nathan B. Coats

APPROVAL OF MINUTES OCTOBER 22, 2010

The October 22, 2010 minutes were approved as submitted.

CHAIRMAN'S REPORT

Mr. DeMuro asked that members provide updates to the member list. The following members were reappointed the committee: Judge Janice Davidson, Judge Harlan Bockman, Professor Sheila Hyatt, and Henry Reeve. C.R.E. 804(b)(3) was adopted by the Supreme Court. Mr. DeMuro thanked Elizabeth Griffin and the subcommittee.

CRS § 13-90-101 C.R.S.: SHOULD THE COMMITTEE RECOMMEND A RULE TO REPLACE THE STATUTE?

Mr. DeMuro introduced the third item on the agenda, indicating that the item relates to impeachment by evidence of conviction, pp. 7-33 of the agenda packet. The subcommittee held varying opinions on the issue and raised a number of questions. Mr. DeMuro asked the committee to decide if a rule is really necessary or if this issue should be taken up with the legislature.

Mr. DeMuro asked the committee to consider their role. Should the committee ask the court for direction? Carol Haller said that she talked with Sherry Stwalley, the legislative liaison for the Judicial Department. Ms. Haller said that rules committees adopt rules that do not necessarily follow statute. This course of action is usually safe in procedural

matters. The issue before the committee is a policy call. Ms. Haller said that she is reluctant to adopt a rule that is different from the statute on a non-procedural issue.

Ms. Stwalley said that the legislative agenda is set for the 2012 session. However, the committee may want to approach the district attorneys or public defenders, as they are cooperating on omnibus legislation where this item may fit in.

The Office of the State Court Administrator (SCAO) typically doesn't bring policy issues to the legislature. Usually, when judges need clarification those issues are brought to the legislature or issues that are important to the job of Judicial.

Judge Davidson agreed with Ms. Haller. She advised that it may be best to make a recommendation to the Colorado Bar after the subcommittee meets and creates a rule and recommendation. Perhaps the Bar would carry the legislation this year or next.

Judge Bockman said that he agreed somewhat with Ms. Haller. The rule should not conflict with the statute. The committee is in a position to study the issue and create a proposal.

Judge Martin Egelhoff supported exploring a rule change and making a recommendation. He asked to whom the recommendation should be made and if it was appropriate.

Philip Cherner responded that the committee may only recommend rules. He thought that the supreme court would not adopt a rule that is in conflict with statute. The only choice is to look at legislation. He asked if the committee would request removal of the statute or create a rule for the legislature to adopt. Perhaps the rule should be sent to the court instead of the legislature.

Judge Robert Russel suggested that the committee recommend a rule to the court that be adopted once the statute is changed. The supreme court may decide how to request a change to the statute. The current statute is inflexible and unfair. He suggested making a change to the statute with a proposed rule already created.

Judge Davidson shared her experience from the Appellate Rules Committee in creating a new interlocutory appeal rule and mentioned that the process could be a model. This rule may be a different matter. The Appellate Rules Committee formed a subcommittee, including attorneys and Appellate Committee members.

Judge Davidson suggested that the subcommittee create a proposed rule for the full committee to endorse and send to the court informally. If the court likes the concept, the committee could approach the Bar to carry legislation. Once the legislation is in place the proposed rule may be tweaked by the committee and submitted to the court for consideration. The court should weigh in on the proposed change.

Mr. DeMuro asked who the proposal should be sent to once the court informally approved it. Judge Davidson shared that the interlocutory appeal subcommittee members approached the Bar with the rule.

Professor Mueller agreed with the judges. He was unsure as to how the supreme court would act. The court could provisionally adopt a rule in the event that the legislature repealed the statute. The rule could sunset if the statute is not changed.

Mr. DeMuro asked if any members had history on the statute. Professor Hyatt responded that the statute is old and originates from a time when felons were prohibited from testifying due to competency. Over time competency has changed. Felons may testify, but the jury needs to know that the witness is a felon.

There was a discussion about discretion. Professor Mueller mentioned that Colorado is on this subject an outlier. There are only 4 jurisdictions in the United States that have no discretion rules. Ms. Griffin indicated that she does not support discretion. She voiced support for creating a rule and approaching a group to carry the legislation as long as there is consensus in the committee.

Professor Hyatt supported creating a rule before the statute is repealed or changed. She suggested amending the statute, telling the legislature that we are one of very few states with no discretion and providing examples of federal and state rules. She suggested adding the language "judge may" to the statute. The rule should recommend how the judge applies discretion. Judge Russel added that the statute and rule go hand in hand.

Mr. Reeve suggested a subcommittee make recommendations and create a report outlining issues and contingencies. Assuming that there is consensus the report should be given to the court. He was interested in moving to the substance of the rule.

Professor Mueller indicated that the current no discretion rule is terrible. It would be better to have a no crimes to impeach rule, the opposite extreme. He didn't believe there would be agreement on a bright line type of rule outlining crimes. The best practical option is a discretion rule.

Ms. Griffin said that currently if there is a felony conviction the rule is applied the same across the board.

Ms. Haller suggested that the committee look at 13-4-102.1 C.R.S. and draft a rule on the use of prior convictions in court. Perhaps the federal rule may be easiest to use. There shouldn't be a vacuum. The effective date would be long enough to allow for legislation.

Judge Davidson suggested approaching the district attorneys about inclusion of the change and rule in the omnibus bill. The Legislature may listen to the district attorneys and public defenders if a unified position is presented. It will be important to communicate that Colorado is an outlier state with an ancient statute that needs revision and a simple rule is needed, to be drafted by the Rules of Evidence Committee. It may be plausible for the legislature to pass a simple law, allowing the committee to create a rule. Judge Bockman agreed that the committee will be more effective if there is a majority opinion expressed.

Mr. DeMuro asked if a rule from the committee approved by the court would be better to submit to the Legislature. Judge Davidson wasn't sure that the court would approve a rule. Judge Russel wasn't sure that the entire committee would be able to agree on a rule.

Professor Mueller said that the federal rule is not wonderful, but is the best chance of creating something that the committee could agree on. 43 states have thoroughly vetted and agreed on the rule.

Mr. Cherner mentioned that the Legislature often defers to the Colorado Criminal Justice Commission (CCJJ) on these types of issues. This group could be included, as they have expertise. Ms. Haller said that Ms. Stwalley recommended that group. CCJJ was created 4 years ago and addresses criminal justice practices.

Judge Bockman asked if there is consensus within the committee. If not, there is no reason go forward. If there is consensus the committee should talk about how to implement the legislation and a rule. He agreed that the federal rule should be used. Professor Hyatt asked if there is consensus on making a change at all, as agreement on a proposed rule is second. Judge Bockman thought that there was agreement that a change should be made. The committee should move on to agreement about a proposed rule.

Mr. DeMuro turned the discussion to the substance of a rule. Ms. Griffin voiced preference for a rule where everything is clear and the law is applied in the same way to everyone. Judges may feel that prior acts are relevant when it comes to the defendant. However, the same may not be said for other witnesses and there is no recourse on appeal.

Professor Mueller indicated that there are thousands of cases addressing abuse of discretion under this rule. Judge Bockman asked if there are cases where certain classes of people are treated differently. Professor Hyatt answered that the rule treats classes of people differently.

Professor Mueller indicated that 99% of cases are defendants appealing drug convictions. These appeals aren't often won. There was a discussion about the similarity of charges and exclusion. A list of factors from a 1960s case is still applied today. There would likely be a number of cases where convictions are excluded if the analysis changes.

Professor Hyatt said that there may be a larger number of cases where the defendant chooses not to testify and there is no appeal. Under the current rule the defendant has no choice. Professor Mueller suggested an amendment to the proposed rule to account for Luce v. U.S., 469 U.S. 38 (1984).

Mr. Cherner mentioned that he likes the Tennessee graft onto the statute. He said that he couldn't decide if he is more interested in having a client testify or impeaching a witness who is testifying against his client. Ms. Haller said that some jurors don't seem to care about this type of impeachment. Judge Bockman responded that if the cases are similar jurors seem to care. He also added that any change is better than what exists now.

Judge Russel asked Judge Egelhoff about the burden on the trial court with discretion. Judge Egelhoff responded that at least everyone knows the rules. If discretion is added

the rules will be fluid, based on the defendant's decision to testify. The outcome will be a moving target that changes across courtrooms and districts. There is value to consistency even though the situation is not ideal.

Mr. DeMuro asked about crafting a more reasonable rule that outlines felonies of a certain type or from a specific time period without discretion. Ms. Griffin voiced an interest in this type of rule. Ms. Griffin said that a non-discretionary time bar would be a huge improvement and it would apply in the same way to everyone. The problem would be the type of felony, which should be specific rather than vague. The federal rule is too soft on this issue.

Judge Davidson supported a list of factors. The factors could be a condition precedent; if one factor isn't met the judge has no discretion or there could be a balance which adds an element of discretion. A time bar seems arbitrary and there was some concern about real life application. There was interest in having the trial court look at the felony and determine to what extent it relates to credibility.

Judge Bockman suggested that the committee start with the federal rule. The committee could begin discussing criteria and work toward consensus. The committee could look at several rules, perhaps the federal and Tennessee rules. Mr. DeMuro thought that the suggestion was reasonable. He asked the committee to look at the copy of the federal rule.

A member indicated that the rule needs to preserve the different standards between the accused and other witnesses in F.R.E. 609(a)(1). Ms. Griffin voiced a preference for the language in subsection 2, only.

Mr. Cherner mentioned impeachment of a witness with an act of dishonesty. Any witness at any time may be asked if they lied at any time in the past. He mentioned F.R.E. 608 and commented that F.R.E. 609(a)(2) doesn't seem like it adds or subtracts much. Professor Mueller said that there are a number of cases involving convictions under F.R.E. 609. F.R.E. 608 may not be used in this circumstance.

Mr. DeMuro asked the committee to move on to the general rule, F.R.E. 609(a). Ms. Griffin suggested removing (1). Professor Mueller agreed. However, this is the opposite end of the spectrum and may go too far for some. Professor Hyatt added that an attorney would not be able to ask the main witness against his/her client, the jail house snitch, if it is true that he/she was convicted of killing a guard. Mr. DeMuro said that the change would be big. There may be opposition from defense and prosecution as opportunities to challenge credibility are lost.

Catherine Adkisson agreed that the proposed change is too much. She voiced a preference for a time limit, except for crimes of dishonesty which should not have a limit. Several members agreed that there are many ways to organize time limits.

Mr. Cherner asked if there is interest in differentiating between defendant and witness prior acts. He voiced concern for a rule that makes it tough for a defendant with priors to

testify. The impact would not be apparent since the defendant isn't testifying. A rule allowing the defendant to testify freely would be beneficial.

Judge Bockman pointed out that witnesses may not appear on a voluntary basis. A summons forces the witness to testify. Including everyone may cause victims to hesitate in reporting crime. Professor Hyatt asked about empirical evidence to support the assertion that witnesses or victims are concerned about testifying if asked about priors. Ms. Griffin felt that the discussion demonstrates her concern about discretion. There may be solicitude toward victims and witnesses resulting in better treatment.

Mr. DeMuro observed that there may be a great deal of discretion in the federal rule. He asked about removing discretion, but keeping some right to use convictions to impeach both the defendant and the witness. He suggested all convictions in the last 5 years and all convictions for dishonesty regardless of time.

Professor Hyatt talked about the reasoning behind F.R.E. 609 treating witnesses and defendants differently. When a witness is dragged in and impeached it is a question of whether or not the jury will believe the testimony. When a defendant is impeached the consequences are whether or not the person is convicted of a crime. Mr. DeMuro asked if the committee preferred keeping the differential treatment of the witness and the defendant. Professor Hyatt suggested making impeachment for the defendant and the witness both more difficult. Both should be treated equally.

Professor Mueller suggested under F.R.E. 609(a)(2) adding language about defendants. He doesn't want judges spending time inquiring about the details of witnesses. He supported the language "crimes involving dishonesty or false statement."

Mr. DeMuro asked about keeping the option of discretion in the rule. Professor Mueller and Judge Russel voiced support for discretion in the rule. There may be unfair consequences with no discretion. Having discretion allows good trial judges to make a call. Judge Bockman felt that discretion allows the court to articulate a decision.

There was a discussion about prior convictions. Several members noted that pre-trial motions are typical for a hearing on the issue, like Shreck motions. Judge Egelhoff pointed out that some priors may be admitted and others disputed in part. Judge Bockman felt that priors have some significance, as they speak to the credibility in question. He mentioned that the same would apply to crimes noted in C.R.E. 404(b).

Mr. DeMuro discussed motions in limine. Professor Mueller pointed out that the judge doesn't have to make a ruling in advance or make a conditional ruling, deciding to exclude convictions if the defendant or witness takes the stand. A member suggested that C.R.E. 404(b) and F.R.E. 609 be combined if the committee decides to adopt the rule.

With regards to the pretrial list of witnesses, it is uncertain who the defendant and district attorney will call. The district attorney typically calls one quarter of the people endorsed.

Conviction of an ordinary witness is admitted subject to C.R.E. 403. There was a question as to whether the decision on this evidence will be known before the trial.

Ms. Griffin responded that the defense wants to know and the court has to make findings. An appeal may indicate that the court didn't articulate why the evidence was admitted. The appellate court may assume that the judge considered all factors.

Judge Bockman indicated that a very specific rule can result in reversals and problems. We trust judges to do the right thing. Appellate courts are available.

Mr. DeMuro said that it sounds like a few members like the bright line approach to avoid discretion. Ms. Adkisson felt that a bright line approach is clean and clear and applies to everyone, perhaps convictions within so many years. Ms. Griffin preferred adding language to the effect of "just felonies" or using the language in part 2 of the federal rule. She preferred more flexibility in the actual rule rather than discretion.

Mr. DeMuro asked the committee to address whether discretion should be in the rule. Professor Hyatt asked about creating a bright line, for example age of conviction, how much is revealed about the conviction (any felony but don't talk about the felony). What else would be included? A member mentioned including crimes that have an element of dishonesty.

Judge Bockman asked about defendants pleading to a lesser charge when originally charged with a crime involving honesty. Ms. Griffin voiced a preference for putting only convictions in the rule. Professor Hyatt offered that the attorney could still ask if it was true that the defendant lied to a police officer and then ask what the person was convicted of. Ms. Griffin pointed out that the rule as it stands addresses convictions. Judge Bockman voiced concern over the person charged with embezzlement who pled to a lesser charge. If the person pled to a lesser charge did they in fact actually embezzle? Without a bright line the judge has discretion.

Ms. Griffin mentioned that F.R.E. 608 speaks to the situation. Professor Mueller pointed out that the conviction is dealt with in F.R.E. 609. F.R.E. 608 doesn't speak to convictions. These two rules may not be combined.

Professor Hyatt said that if a defendant murders someone but pleas to manslaughter the attorney may only ask if the person was convicted of manslaughter. Other acts may not be brought up. However, if the defendant mentions the other acts the attorney may ask questions.

Professor Mueller said that the matter may be left to the court or covered by a rule. In the federal courts attorneys may ask 4 things, the name of the conviction, when the conviction occurred, the punishment for the conviction, and where the conviction occurred.

Mr. DeMuro offered the committee two alternatives, the federal rule as is with a few small tweaks versus a non-discretionary rule with time limits on convictions. Ms. Griffin supported changing the rule if the entire committee was in agreement. She didn't agree that any change might be an improvement. She voiced preference for the current rule over the federal rule, even in the situation where the question of prior convictions was determined pre-trial.

Professor Hyatt voiced concern about one judge admitting convictions while a different judge would not admit the convictions. She observed that judges exercise discretion in different ways. Ms. Griffin agreed that discretion is unpredictable and mentioned that she does not want a F.R.E. 404(b) rule.

Professor Mueller said that his yearly review of F.R.E. 609 cases yields no more than 6 cases in the federal system involving defendants impeaching the prosecution's witness. Most cases focus on the defendant as witness.

Ms. Griffin mentioned that abuse of discretion on standard on appeal is difficult. She also indicated that a larger number of public defenders would agree that the old rule is preferred over the new federal rule.

Judge Bockman asked if F.R.E. 609(a)(1) addresses Ms. Griffin's concerns. The reference to F.R.E. 403 could also be removed. Ms. Griffin agreed that the change may be better than the statute.

Mr. DeMuro suggested the language "as to the accused." There was disagreement on changing the language or leaving it as is. Ms. Adkisson was unsure about the change. Mr. Reeve asked about limiting impeachment of the defendant, perhaps element based, crimes of dishonesty (false statement) with no discretion.

Ms. Adkisson suggested that if a witness had 10 priors related to dishonesty and was testifying at a murder trial, all priors would go toward credibility. Professor Hyatt indicated that current circumstances are more likely to affect what happens now, instead of if a defendant was found guilty they are likely to lie or if they were found innocent they are likely to tell the truth.

Mr. DeMuro asked the committee to look at F.R.E. 609(b) time limit. He asked about a 10 year time limit with or without discretion. Is the time limit appropriate?

Judge Bockman mentioned that discretion may be given under C.R.E. 403. Why shouldn't discretion be applied to unique evidence? Is the evidence potentially powerful? He mentioned a 10 year time limit, whether or not a crime was punishable by death or imprisonment. Prejudice outweighs the prohibitive value. He didn't see a reason to deviate from the 10 year time limit. Several members voiced agreement with the time limit.

Mr. DeMuro asked the committee to look at the remainder of F.R.E. 609(b), the "unless" clauses. Professor Mueller said that annulments don't happen often, perhaps 4 decisions in 30 years. With regards to juvenile adjudication, compromise on juvenile crimes isn't prohibitive. There is the notion that one has the right to ask about some juvenile adjudications in attempting to accommodate rights of the defendant.

Mr. DeMuro turned again to time limits. Should there be discretion or a bright line? Professor Mueller asked about a few convictions that are older, one may not indicate a problem but several could.

Mr. DeMuro asked Ms. Griffin about an "unless" clause. Ms. Griffin declined the "unless" clause. He also observed that there seems to be a breakdown in discretionary versus non-discretionary in F.R.E. 609(a)(1) and (b). Mr. DeMuro asked if there are other problems. The committee responded in the negative.

Mr. Cherner asked about the definition of "felony." A felony may be defined differently across states. Other state convictions are often treated as felonies. Professor Mueller asked if the word "felon" is clear. Several members agreed on the language "felony in the jurisdiction where committed." Judge Bockman asked about habitual crimes. Another member inquired about child abuse and third degree assault. A member responded that these crimes are misdemeanors. Additional explanation about crimes or language changes may be necessary.

Mr. DeMuro asked about different standards for the witness and the accused in F.R.E. 609(a)(1). Professor Hyatt responded that there is reasoning for the distinction. The evidence is subject to F.R.E. 403. The use of priors against the defendant is strict, more so than F.R.E. 403 and is specifically outlined.

Mr. DeMuro restated the positions of the committee. The committee generally favors F.R.E. 609, however not all members endorse the rule. It appears that 5 members agree that the rule is generally better than the present statute and propose adoption of the federal rule. Three members propose that F.R.E. 609 not be adopted, as they prefer a hard rule and believe that adoption of the federal rule will result in more unfavorable consequences than the statute.

Mr. DeMuro asked the committee if its views on this issue are too divergent to send to the court for guidance. He suggested working with the subcommittee on a concrete proposal that includes majority and minority opinions. Professor Mueller agreed that the court should hear both opinions. Judge Bockman indicated that the committee could seek direction from the court. Judge Russel added that the court may decide that a rule shouldn't be pursued.

Mr. DeMuro will draft a letter to the court. He asked that minority members provide a draft of their view on the issue for inclusion in the letter.

FRE RULES OF EVIDENCE: SHOULD THE COMMITTEE REVISE THE COLORADO RULES OF EVIDENCE BASED ON THE RESTYLING OF THE FEDERAL RULES OF EVIDENCE?

The restyled Federal Rules of Evidence will go into effect on December 1, 2011. Professor Sheila Hyatt mentioned that rules are easier to read. The intent was to keep the rules identical. However, there are some differences that may lead to substantive changes. The restyled rules are helpful for teaching and learning. The benefit of following the federal changes is consistency in language.

Professor Mueller felt that the restyled federal rules aren't easier to use. Citation is difficult. He agreed that restyling may have made substantive changes. The Colorado and federal rules differ, for example C.R.E. 407, product cases.

Mr. Cherner said that it may be several years before attorneys see the effects of restyling. Mr. DeMuro counted 62 Colorado rules, about half of which are identical to the current federal rule. Of the rules that are different, most differ in a small way. At first, the task of changing the rules seemed daunting, but perhaps the project may not be bad. There are differences between the federal and state rules that will be kept.

Professor Hyatt mentioned that the State of Pennsylvania will restyle their rules. Mr. DeMuro said that there is no need to address the issue immediately, perhaps in the future when we see what other states do.

This process will not be completed for the Civil Rules, as that Committee decided it is too involved. However, the Civil Rules Committee will look to the restyled federal rule when rule changes are proposed, and perhaps restyle the rule at that time. Perhaps the Evidence Committee should do the same.

The meeting was adjourned at 4:07 p.m.

Respectfully submitted,

April Bernard