COLORADO SUPREME COURT
COMMITTEE ON RULES OF EVIDENCE

MINUTES OF MEETING
February 14, 2007

David R. DeMuro called the meeting to order at 2:41 p.m. in the Supreme Court Conference Room on the fifth floor at the Colorado Judicial Building at Two East 14th Avenue in Denver, Colorado.

The following members were present:

Catherine P. Adkisson
Judge Rebecca Bromley
Philip A. Cherner
Justice Nathan B. Coats
Judge Janice Davidson
David R. DeMuro, Chair
Elizabeth F. Griffin
Professor Sheila Hyatt
Professor Christopher B. Mueller
Henry R. Reeve
Judge Robert M. Russel

The following members were excused:

Judge Harlan Bockman
Judge Martin Egelhoff
Carol M. Haller

APPROVAL OF MINUTES FROM LAST MEETING, MAY 19, 2005

The minutes from the May 19, 2005 meeting were approved as corrected. The corrections include Mr. Cherner's reference to the Shreck issue at the bottom of page one, and Mr. Cherner's question at the May 19, 2005 meeting pertained to who pays for the flight on a Shreck issue.

Ms. Griffin noted that she was a proponent, not an opponent on page two.

On page six, Professor Mueller added to the third paragraph from the bottom of the page in the second line, he thinks he said that Shreck has not adopted Dauber wholesale.

APPROVAL OF MINUTES FROM THE NOVEMBER 9, 2001 MEETING

The minutes from the November 9, 2001 meeting were approved as submitted.

CHAIRMAN'S REPORT

At the last meeting, the committee recommended adoption of rules 608 (b) and 405 (b). The Court has adopted those changes which took effect January 1, 2006.

The Court reappointed four Committee members to the Evidence Committee. Members of the committee serve staggered three year terms. Mr. DeMuro pointed out that

Ms. Adkisson, Ms. Griffin, Judge Bromley, and he were reappointed. Mr. DeMuro indicated that four members will be up for reappointment later this year. Mr. DeMuro will call those members and ask about reappointment.

Mr. DeMuro indicated that a membership list is included in the packet, pages eight and nine. Please submit all updates.

CRE 404 (a): SHOULD THE COMMITTEE RECOMMEND ADOPTION OF 12/1/06 AMENDMENTS TO FRE 404 (a) (1) and (2) LIMITING THE RULE TO CRIMINAL CASES?

Mr. DeMuro said changes made in the federal rule are related to CRE 404 (a) on character evidence not admissible to prove conduct. There are materials in the packet about the changes. The federal materials start on page 17 of the agenda packet. Materials for the Colorado rule are on page 21 of the agenda packet. Mr. DeMuro pointed out that the Colorado rule is similar to the old federal rule. The changes to the rule are small. The federal rule makes reference to Rule 412. Colorado does not have a Rule 412.

Suggested changes include the addition of language in CRE 404 (a) (1) and 404 (a) (2). The new language expressly indicates that the rule only applies in criminal cases, not in civil cases. Many people thought that these never applied to civil cases. However, there is a Court of Appeals decision, Knowles, that indicates that 404 (a) applies in administrative, civil, and criminal cases.

Mr. DeMuro asked the Committee if adoption of a rule similar to the federal rule 404 (a) (1) and (2) would be appropriate to limit character evidence to criminal cases.

Professor Mueller indicated that the state rule should not be changed. It is a good idea to clear up an ambiguous area. However, changing the state rule is not the right way to deal with this issue. A person should be able to defend himself or herself in a civil case. The federal rule distinctly addresses criminal conduct.

Mr. DeMuro thought the rule may speak to civil cases on excessive force by police officers.

Ms. Hyatt said that the rule allow has been used to allow for civil defendants charged with criminal acts to put on character evidence. The biggest challenge is determining which cases are like criminal cases. There is a bias in all the rules against character evidence. If the Committee decides to honor precedent in Colorado then perhaps the rule should be limited to criminal like cases.

Judge Bromley asked what type of footnote or advisory comment the group could write. Mr. DeMuro wondered if the language could be fine-tuned.

Professor Hyatt indicated that currently in criminal like cases there is the thought that civil defendants should be able to offer character evidence. If the Committee leaves the

rule as it stands, then something similar will survive in Colorado. The Colorado Supreme Court has not yet made a ruling. If the rule is left as is, the Committee is still faced with what are like criminal cases. These types of cases don't seem to come up that much. If changes are made to the rule, precedent is erased.

Mr. Cherner asked if the federal change would overrule Knowles. Several members responded in the affirmative.

Professor Mueller commented that the Committee has not acted as a reform body. He agreed with all of the comments that Professor Hyatt made. This rule would require many changes. The current CRE 404 (a) allows for some room in interpretation. Courts make the rules. If the Committee amends the rule as the federal government has, than the possibility of flexibility and the courts making their own rules is gone.

Professor Mueller wants to start again and draft a new Rule 404. The Committee will most likely not draft a new rule. He urged the Committee to at least not change the rule in the same manner as the federal government. He has a growing sense that the rules related to character evidence have application in the civil rules. Using differences between civil and criminal cases is not the way to draw the line.

Professor Hyatt indicated that Knowles and Lombardi, and other civil cases where character evidence may be ok, have been around for a long time.

Professor Mueller indicated that another change in FRE 404 (a) (2) are references to rape shield provisions. There is a rape shield statute in Colorado. Perhaps the rule should be amended to refer to the Colorado statute.

Professor Mueller indicated that he prefers changing the language to indicate it is subject to the limitations in the Colorado rape shield statute, rather than including references to criminal cases.

Mr. Cherner asked about both the civil and criminal rape shield statute. Professor Hyatt indicated that 18-3-407 is the Colorado Rape Shield statutes and 13-25-131 is the Civil Sexual Assault statute.

Mr. DeMuro pointed out that the federal rule is structured such that criminal cases are subject to the limitations of rule 412, Colorado's version of the federal statute. He recommends that if the Committee makes changes in the Colorado rule that references to the statute should be included for criminal cases.

Professor Hyatt commented that the federal rule 412 covers both civil and criminal rape shield. If the Committee only refers to criminal cases then a reference is not needed to the civil statute.

Professor Mueller prefers to leave the state rule CRE 404 (a) (1) alone and add reference to criminal cases in CRE 404 (a) (2). He prefers that the rule refer only to criminal cases. Professor Hyatt commented that reference should be made to the statute.

Mr. Cherner asked about other factors that are moving the proposed change, other than changes in the federal rule. Professor Mueller responded that changes to CRE 404 (a) (1) and (2) is not a burning issue. Mr. DeMuro indicated that there are a small number of these types of cases. Judge Bromley agreed with Mr. DeMuro.

Professor Hyatt identified the case types as civil damage for any kind of assault, sexual assault, and fraud.

Mr. DeMuro asked the Committee for additional thoughts on changes to CRE 404 (a) (1) and (2). Mr. DeMuro indicated that the federal government is merely clarifying the rule and saying that they always meant for it to be a specific way. They identify the changes as a housekeeping issue. If the Committee creates an exception and indicates that the rule does not apply to civil cases, then the rule must be sent to subcommittee for work. He indicated that the committee could send the rule to subcommittee or choose to adopt the federal changes.

Judge Russel voiced that he prefer that the Committee not change the state rule. Several other members agreed. Mr. DeMuro indicated that if no changes are made there may be a group of people that question the decision and decide to raise the issue in civil cases.

Mr. Cherner pointed out that the federal rule is not the law in Colorado. The Knowles case is the precedent. Mr. DeMuro commented that in a book on evidence the author indicated that the court acted without authority in Knowles.

Ms. Hyatt indicated that in reading Knowles and the citations as to how the decision was arrived at regarding good character evidence in civil cases there really was no analysis of the situation. Mr. DeMuro commented that character evidence was not the court's focus. The case was decided on other issues.

Judge Davidson commented that the decision to leave CRE 404 (a) as it is would not be based on precedent. She indicated that there is no reason to change the rule. She is not aware of any conflict. The trial courts are not asking for guidance. Once there is an appeal, then there will be case law. This seems like a better way to handle the situation, rather than writing a rule.

Judge Bromley said that there is no need for guidance. She prefers that CRE 404 be left alone, rather than adopting the changes that were made in FRE 404. Many problems will be created by making the change.

Judge Davidson indicated that the first problem is changes to FRE 404 bring additional interpretation of the subject. The second problem is the two different categories of the rule. The first category is clarified and originally intended to apply to criminal procedures, based on the plain language. The issue is open to interpretation in Colorado. She suggested that the committee leave this issue alone. Let developments take place via case law. Judge Davidson indicated that CRE 404 (a) (2) should be more tightly drafted.

Mr. DeMuro asked the Committee if anyone else felt we should separate CRE 404 (a) (1) and 404 (a) (2)? Does anyone want to adopt changes to one rule and not the other?

Professor Mueller brought up an example. There are some issues in having CRE 404 (a) (2) only apply to criminal cases. He prefers that nothing be done to change CRE 404.

Ms. Griffin commented that she has never seen a case come through on CRE 404.

Professor Mueller commented that changes were made to the federal rule to clarify that rape shield controls an issue over FRE 404. CRE 404 may be clarified in the same manner. However, it is not a necessity to clarify it.

Judge Davidson said that people will read more into the change if only one rule is amended.

Mr. DeMuro indicated that the issue may be approached with two votes. First, the Committee may recommend no changes to the rule. Second, should the Committee wish to make a change, should the changes that were adopted in FRE 404 be adopted?

Judge Russel asked if it was possible as a Committee to not make any recommendations or does the Committee need to take action. Mr. DeMuro indicated that if the Committee decides to vote the rule down, then the Court should be informed.

Professor Hyatt pointed out that this subject is an agenda item and there is some question as to what should be done. Judge Russel indicated that the Committee could report that the issue was tabled to see how case law plays out.

Justice Coats indicated that the Court pays attention to what happens with this Committee. He informs the court of decisions, even if no recommendation is made.

A motion was made to recommend making no changes to CRE 404 (a), keeping the rule in its current form. The motion to make no changes to CRE 404 (a) passed 9:0. Mr. DeMuro indicated that the second motion regarding changes to CRE 404 (a) is moot, since the Committee voted not to change the rule.

CRE 404 (b): SHOULD THE COMMITTEE RECOMMEND ADOPTION OF 1991 AMENDMENT TO FRE 404 (b) REQUIRING NOTICE BEFORE USE OF SUCH EVIDENCE IN A CRIMINAL CASE?

Mr. DeMuro indicated that Ms. Griffin brought this issue related to CRE 404 (b) to the attention of the Committee.

Ms. Griffin provided history about the issue. This rule is used by prosecutors, but can be used by defendants. There is some case law on this issue. The defendant requests a showing of evidence. The court makes a finding and decision before a trial. A few years ago, a case was heard by the Court of Appeals where it was decided that there

was no requirement of notice. The court ruled that because changes to the federal rules were not adopted, reasonable notice was not required.

Ms. Griffin voiced a preference for placing the changes to the federal rule into the state rule. In some cases, parties are not being given notice, for example, People v. Warren.

Mr. DeMuro pointed out that CRE 404 (b) is similar to the federal rule before the change. The federal courts changed their rule in 1991. Mr. DeMuro indicated that he cannot recall if the change came before the Civil Rules Committee. Mr. DeMuro wondered if some of the changes may be related to motions in limine. Several Committee members responded in the affirmative. Judge Bromley indicated that this type of process has always been followed in her Court. Prosecution usually files a motion about the admissibility of the evidence.

Ms. Griffin said that some changes were made in practice after the Warren case.

Professor Hyatt asked if the defense ever files a motion in limine, indicating that if there is 404 (b) evidence it should be kept out of the case.

Mr. Cherner shared that he files a notice in every case, as CRE 404 (b) provides that he do so. He receives 404 (b) evidence in seventy five percent of the cases he is working on. If 404 (b) evidence is admitted he may lose the case, but if he is able to keep the evidence out he may win. This is part of the process. Mr. Cherner said that he always asks for this evidence. His practice is largely along the Front Range, but he's not sure what is happening elsewhere.

Professor Hyatt asked how frequently judges defer making a decision. Mr. Cherner responded about his experience. He files a number of motions in the beginning, asking for discovery. The state usually files a 404 (b) motion. The parties appear for a motions hearing, and that is usually a part of the motions hearing. This typically happens weeks before the trial.

Professor Hyatt pointed out that the judge may want to rule later when all evidence is in. She asked if it happens frequently that judge do not want to make an immediate ruling.

Mr. Cherner said that the last few judges he was in front of ruled on the motion. Some judges have said that they are not ready to rule, they want to see the big picture. Most of the time, judges make a ruling.

Judge Davidson wondered if the federal rule provides for sanctions. Ms. Griffin commented that the court determines what is reasonable. Sanctions are at the discretion of the court.

Professor Mueller indicated that there are appeals, but it is hard to get a reversal on this rule.

Judge Davidson inquired about discovery violations. How is this dealt with in the federal rules? Professor Mueller responded that notice must be given.

Ms. Griffin indicated that this is similar to the rape shield statute. Parties are required to give notice. This process promotes early resolution, prevents surprises, and is clearly required.

Mr. DeMuro pointed out the language from the Federal Committee. Notes from 1991 indicate that if proper notice is not received, evidence is inadmissible. Professor Mueller confirmed that if notice is not given evidence is inadmissible. He indicated that there are arguments about reasonable notice.

Mr. Cherner indicated that the federal rule codifies current state practices. In his experience, notice is given. It's a routine matter. This is a matter that trial judges know they need to deal with.

Professor Mueller indicated that most judges would be upset if a prior ruling was not made on the evidence. Judge Bromley replied that without a ruling of some kind related to evidence there can be a mistrial.

Mr. Cherner said that giving notice is a good idea. Requiring notice adds another obligation to those already in existence.

Professor Mueller said that the rule seems loose enough that late notice could be excused.

Professor Hyatt wondered why the court would excuse pretrial notice without a good cause. Mr. Cherner indicated that the defendant may have committed another crime the day before the trial. Judge Bromley indicated that there may be a case where a witness finally comes forward. Testimony is taken because a witness was just found.

Judge Russel responded that if an ambiguity could be clarified, then he would recommend adopting changes to CRE 404 (b).

Mr. Reeve said that notice is appropriate. Making changes to CRE 404 (b) as a result of changes to the federal rule might not be right, as the rule is sixteen years old. Changes are being proposed due to the public defender's office and one case. He wants to give the prosecutors a chance to respond before changing the rule. The district attorneys in the state need an opportunity to respond. Mr. Reeve thinks this is the fair thing to do. There is no particular need to make changes immediately. He personally has no problem with the proposed changes.

Mr. DeMuro asked the Committee if there is no need to move quickly.

Professor Mueller asked whether sometimes the court invites comment if there is concern over a particular issue.

Mr. DeMuro shared that the Court sometimes asks for public comment, including written. Items were adopted without comment, too. This would be the Court's call. He is unsure what the Court will do if the Committee sends the rule to them. He is unsure if the district attorneys will have a chance to address the issue.

Professor Mueller said that he thinks most of the district attorneys are operating in a manner consistent with what was heard on this issue. This is not a major concern. He favors soliciting written comment. He doesn't think any complaints exist on this issue.

Judge Davidson voiced that notice has always been a part of the rule. The reason that this has become an issue is that a case has occurred that relates to interpretation of the rule. The rule doesn't specifically state notice; maybe this was an oversight. But, the rule codifies practice. She does not think that district attorneys should have input before the rule goes to the Court. The content of the rule is up to the Supreme Court. Typically, the Court allows comments, so the district attorneys may comment then.

Mr. Reeve voiced that changes to CRE 404 (b) are a sound idea. However, he feels some ambivalence. He is unsure of the district attorneys' opinions. Out of fairness, comments from district attorneys should be allowed.

Ms. Griffin indicated that she attempted to talk to the district attorneys a few years ago about this same issue.

Mr. Cherner voiced that he does not want to wait two years to resolve this issue. He hopes that the Court will allow public comment and that the Committee will recommend public comment.

Ms. Adkisson indicated that she can't remember a case where notice is not given pretrial. She offered to relay the question to district attorneys. Ms. Adkisson voiced that she cannot see a problem.

Judge Bromley said that she approves of changes to CRE 404 (b) on the condition that she does not hear too many negative comments.

Mr. DeMuro said that in recent years the Court was adopted most rules so that they take effect on a January 1 or July 1 date, at least from the Civil Rules Committee. There is enough time before July to send the rule to the Court and allow for public comment. Mr. DeMuro asked the Committee if it is appropriate to send the rule to the Court and ask for a public comment period.

Justice Coats indicated that the Committee could act in that manner. What typically happens is that he makes the recommendation to put the issue on the Court's calendar. Usually, the Court gets a sense of whether there are any problems. Once the Court reviews it comes to a consensus, sometimes public comments are necessary. Notice is given to the public; and the Court waits for any comments. A public hearing is not scheduled unless there are significant comments. Sometimes, there are big issues where a hearing is necessary, and those are scheduled for hearing right away.

Judge Davidson indicated that the Committee could make the appropriate recommendation. In the report, the Committee can voice a concern for district attorneys input. The Court may want short comments or they may ignore the suggestion. Even if the district attorneys did not like the change she would not change her mind about changes to the rule. Typically, groups do not come into the court for comment unless

they are an experts on a certain issue. She does not see this as a controversial or hot topic.

Mr. Cherner indicated that each member represents constituents. There is some responsibility to poll colleagues before attending the meeting. He asked that members poll people while doing their daily business before coming to Committee meetings.

Mr. Reeve voiced that he views his involvement in the Committee as confidential. Mr. Cherner asked if members are to act in confidential manner. Mr. DeMuro indicated that he doesn't think that there is a confidentiality requirement. Mr. DeMuro pointed out that meeting minutes are public.

Mr. DeMuro asked Judge Russel if he would like to add to the proposal that the court consider public comment. Judge Russel indicated that he does not think that public comment is necessary.

Mr. DeMuro asked the committee for other comments. He said that the other question is related to wording in the federal rule. Advance notice of evidence is required prior to trial. Once the trial begins reasonable notice is required. The timing seems inconsistent. However, the wording may be used in order to allow for circumstances that arise. He wondered if any one else senses that the timing is odd.

Ms. Adkisson said that the timing should be left open, as in the federal rule.

Judge Russel indicated that there are problems with pro forma motions and vague motions. He said that this issue may be dealt with later. He indicated that a subcommittee could work on the language. Other members discussed working on the language.

Judge Russel put forward a motion recommending that the Supreme Court adopt the 1991 language changes in the federal rule to CRE 404 (b). The motion to make changes to CRE 404 (b) passed 8:0.

Professor Hyatt indicated that she almost abstained from voting. She wants to know about the specific changes that Judge Russel is recommending. She recommended removing the word "general."

CRE 408: SHOULD THE COMMITTEE RECOMMEND ADOPTION OF 12/1/06 AMENDMENTS TO FRE 408 LIMITING THE ADMISSIBILITY OF SOME STATEMENTS AND OFFERS MADE IN COMPROMISE NEGOTIATIONS?

Mr. DeMuro reminded the Committee that the group talked about this issue in 2005. The changes are not small. The federal government rewrote the rule and added subsections. The basic principles are still included in the rule on offers of compromise. The biggest change relates to admissible conduct and statements. The changes may be seen on pages 46 and 47 of the agenda packet. Offers will not be admissible, but certain conduct and statements will be admissible.

As an example, a nurse's license is revoked by the State Board of Nursing. During negotiations, the nurse admitted she took drugs from the hospital pharmacy. Under the current rule, that admission may not be used in a criminal case. However, changes to the rule would allow the statement about drug use in a criminal case.

Professor Mueller pointed out that the big change in the federal rule is hidden in the language. He indicated that information from civil settlements is inadmissible in criminal cases. For example, in the Kobe Bryant case, the prior version of the rule makes it difficult to determine if anything is admissible into the criminal case from the settlement process. The FRE 408 wording is different. Civil settlement negotiations are not admissible. There is an exception for regulatory settlements. The exception is related to the Justice Department. The amended federal rule looks good. The change is constructive. If Professor Mueller had his way, he would take out the exception. He prefers the changes to what is being used now, as the current rule is ambiguous.

There are also changes that deal with statements in a civil settlement being used to impeach. That was ambiguous in the old rule.

Mr. Cherner asked if the rule keeps the fact of the settlement out or the statements. Professor Mueller responded that statements are kept out. The premise of the rule is that it does apply in criminal cases. The exception is for conduct and statements with a government agency. The intent is to apply the rule across the board in criminal cases. If there was a civil settlement with a government agency on a regulatory matter, then the information may be used. Professor Mueller indicated that he does not think that the exception is a good idea.

Mr. DeMuro commented that in crafting the federal rule, the exception came about because this was an area where multiple comments were received.

Professor Mueller isn't too familiar with state proceedings that revoke licenses. He wondered if there are many such proceedings. Mr. DeMuro responded in the affirmative. There may, also, be state tax issues and environmental issues where this would apply.

Professor Mueller indicated that he might advise the nurse not to settle the license case if she may face criminal charges. Mr. Cherner responded that many state agencies proceed with the revocation and will not wait for license holders who choose not to settle or participate in the process.

Professor Mueller indicated that CRE 408 does not cover testimony, it covers attempts to settle.

Mr. Cherner voiced that it is hard to apply the federal changes to the state practice. Negotiations are typically done lawyer to lawyer. Not much is generated in the negotiation process that can be used in a criminal proceeding. In the nurse example, if an agreement is reached, he doubts that the settlement paperwork would make its way to court.

Professor Mueller asked if clients typically participate in this type of negotiation process. Mr. Cherner pointed out that the client typically does not participate in the negotiation process on a personal level.

Professor Mueller indicated that the proposed rule is an improvement over the current rule. He pointed out another provision, obstruction of prosecution.

Professor Hyatt said that the worst part of the rule is to negate efforts to prove criminal obstruction. In the Kobe Bryant example, the negotiations could be viewed as a buy off. Using different language can assist in delineating between obstructing justice and a civil settlement.

Professor Mueller indicated that settling in civil cases is a good thing.

Mr. Cherner looked up a statute on this issue. Professor Hyatt indicated that there is a relationship between the witness statute and compromise statements made in negotiation.

Professor Mueller spoke to FRE 408 and the extension to criminal proceedings. There is a piece that indicates that you cannot impeach based on inconsistent statements. Does the committee want to make an exception for state agencies? The problem is that if the exception is removed, the reference to criminal cases is also removed.

Professor Hyatt indicated that the rule is trying not to deter the conversations. Mr. DeMuro wondered if that approach is chilling the opportunity to settle on the civil side.

Ms. Griffin said that in license revocations, the party has a right to counsel.

Mr. Cherner pointed out that this is treated in different ways. For example, in the parole statute, there is immunity. Nothing that is said during a parole board hearing may be used against the party. An administrative board may say we don't care if your client has a fifth amendment right we are going ahead with this licensing procedure. Mr. Cherner said that he has run into this situation with school boards.

Professor Mueller inquired about school board cases. Mr. Cherner gave an example that the client commits a crime and is expelled. Sometimes the board will wait until the criminal proceeding is finished. Some judges will stay civil actions while a criminal case is pending. Judge Bromley agreed with Mr. Cherner. Mr. Cherner said that there is variety in how this issue is dealt with.

Judge Bromley spoke of an example of an appeal from county court involving a request for a civil restraining order. The basis for requesting the restraining order was the same as five misdemeanors. These cases were filed at the same time. The case went to hearing on the civil matter. The restraining order was issued. The criminal case went to trial nine months later and the defendant was acquitted.

Professor Hyatt used the example of a lawyer pleading guilty to a criminal charge leading to revocation of the license to practice. The criminal action may happen first. Then the regulatory action occurs. This situation may be res judicata. A defense can't be made in the license hearing.

Professor Mueller specified that in the corresponding criminal rule this already applies in civil cases. In a negotiation for a plea bargain, nothing can be used in a civil case. At least on the settlement, Rule 410 takes care of the issue.

Professor Hyatt pointed out that CRE 410 allows a guilty plea to be withdrawn later.

Professor Mueller indicated for this purpose the Committee is dealing with settlement negotiations. Professor Mueller voiced that perhaps the Committee is saying that the rule would be better without the exception. He suggested that three words be added in the beginning of the state rule, in criminal or civil cases. The part about state agencies could be removed. All civil settlement negotiations would be excluded from criminal cases.

Mr. Cherner agreed. He did indicate that settlement negotiations usually don't come out in the case.

Mr. DeMuro confirmed that statements made in addition to the offer are excluded.

Professor Mueller said that one should be able to settle a civil case without getting into additional trouble.

Judge Bromley said that this will be a big issue. A public hearing will be necessary. Professor Mueller asked if government agencies will feel strongly about this issue. Judge Bromley responded in the affirmative. Professor Mueller asked why the government would settle on a civil case and then bring criminal charges. Mr. Cherner responded that a different agency files the criminal charges.

Professor Hyatt asked about a state equivalent for the Justice Department. Mr. Cherner said that occasionally he will see a criminal case from the Attorney General's office with a civil component. Ms. Griffin indicated that some environmental investigations lead to criminal charges.

Judge Davidson pointed out that there are differences between encouraging settlements in civil cases versus regulatory matters. The regulatory matter is the enforcement of something like, a nurse or doctor license. She wondered if during a license suspension process if statements are taken from the doctor or nurse. There seem to be major differences between court cases and regulatory matters.

Professor Hyatt asked if settlement is different in regulatory cases versus civil cases. Are conditions imposed? Mr. DeMuro indicated that the licensing board may need more facts before deciding on a settlement. Many times negotiations occur between attorneys, but many license holders don't have counsel.

Mr. Reeve pointed out that a problem arises when the exception is removed. Is the criminal statute being undermined? This may involve a situation where a statement from a public servant was deceiving. It is difficult to prosecute in matters related to influencing public employees. Professor Mueller pointed out that obstruction of justice may apply. Mr. Reeve indicated that there are different criteria for obstruction of justice.

Mr. Cherner indicated that it would be surprising if the statement and facts of settlement were different from testimony in a criminal case. Professor Mueller said that if you are under oath when speaking with the governing body there may still be ways of dealing with this issue.

Mr. Cherner indicated that it would be surprising if the statement and facts of settlement were different from testimony in a criminal case. Professor Mueller said that if you are under oath when speaking with the governing body there may still be ways of dealing with this issue.

Mr. Cherner pointed out that it would be tough to restrict a district attorney on cross examination on this. Professor Mueller indicated that many times in a criminal trial defendants are cautioned about statements that are made. Mr. Cherner said that in practice lawyers from both sides are talking and they understand what can and can't be said.

Mr. DeMuro indicated that there are other changes in the federal rule. For example, the introductory language in FRE 408 indicates that statements made in negotiation can't be admissible on behalf of any party to create a positive slant. The end of the introduction, also, indicates that evidence can't be used to impeach prior inconsistent statements. A full sentence was dropped from the original rule.

Professor Mueller indicated that the sentence did not make sense. The meaning of the sentence seems to indicate that you can't bring all of your evidence.

Mr. Cherner asked if any members have had real world experience with this type of problem. He has been through the process many times and usually there is resolution at settlement or statement.

Professor Mueller made a few comments about misconstrued cases.

Professor Hyatt shared that there is confusion about privilege. In settlement matters the assumption is confidence. However, these matters may not be held in confidence. If a party tells his/her lawyer that he/she was drunk in relation to an accident, it does not mean that the other side can't ask about the matter.

Mr. DeMuro indicated that he needs direction from the Committee as to whether CRE 408 should be changed to make the rule more similar to FRE 408 or if the matter bears further examination or should be left alone.

Professor Mueller moved that the Committee adopt the federal language for use in CRE 408, as the language seems to be better than what Colorado currently has in place. The motion was seconded by Judge Davidson.

Discussion on the motion to adopt federal language for use in CRE 408 ensued as follows:

- Professor Hyatt indicated that she will vote against the motion, as she is concerned about under-representation in regulatory proceedings.
- Ms. Griffin indicated that she would add wording regarding representation by counsel.
- Mr. DeMuro raised the issue of notes. For example, should we add a note indicating that it is inappropriate to use against unrepresented parties.

The motion to adopt federal language for use in CRE 408 was approved 7:2.

Professor Mueller suggested adding a note about those that are unrepresented, just as in federal rule.

Mr. Cherner pointed out that federal courts are not bound by state law or negotiations regarding state agencies. He has had the federal government issue subpoenas to state agencies for confidential documents.

CRE 606 (b): SHOULD THE COMMITTEE RECOMMEND ADOPTION OF THE 12/1/06 AMENDMENTS TO FRE 606 (b) SO THAT JURORS MAY TESTIFY AS TO MISTAKES ON THE VERDICT FORM?

Mr. DeMuro turned the Committee's attention to CRE 606 (b). There is plenty of case law on this subject. He attached Stewart v. Rice. This is related to jurors' signed affidavits. Jurors cannot testify, except on two limited issues.

The FRE 606 (b) created a third section and reorganized the rule. The third section speaks to mistakes related to entering a verdict on a verdict form. This change is related to clerical errors. The Stewart v. Rice case does address clerical mistakes, but in the context of the CRE 606 (b).

Mr. DeMuro asked the group for feedback and direction. Should a section be added to CRE 606 (b) regarding juror testimony in the case of mistakes made in entering a verdict on a form?

Mr. Cherner indicated that verdicts related to his cases are simple. The forms are not difficult.

Mr. DeMuro said that there are more complex situations, such as Stewart v. Rice where jurors are completing forms related to special verdicts and damages. He was not sure

about the necessity of the change. Mr. DeMuro asked if this situation happens frequently.

Professor Mueller said that there are many examples of mistakes on verdict forms, such as on the third line of a form where an independent amount should be entered and the amount is the sum of lines one and two.

Professor Hyatt asked if the proposed changes would affect the case law. Mr. DeMuro responded that the case law would probably not be affected. Professor Mueller suggested writing a note about the change to the rule being consistent with the case law.

Mr. Cherner wondered about the definition of a clerical error. Professor Hyatt pointed out that this type of an error is a mistake entering the verdict on the verdict form. Professor Mueller provided an example of a clerical error, Kading v. Kading related to damages of personal property and real property. The judge asked the jury if they accidentally reversed the amounts. The wrong sum was on the wrong form and the mistake was caught when the jury was polled.

Mr. DeMuro said that the Committee is looking at cases that are post verdict.

Professor Mueller indicated that the federal language is designed to cut back on the number of federal cases where juror verdicts were changed. For example, a jury awards one million dollars in damages and places liability at twenty percent. Was the damage amount applied before or after liability was assigned? Federal courts were allowing jurors to change the verdict. Jurors indicated that the one million dollars was the bottom line figure. There is a Colorado case statute that this situation is not a clerical error but a juror misunderstanding. The federal changes are trying to do the same thing. This narrows the number of cases that are classified as clerical errors.

Mr. DeMuro indicated that he is afraid that changes to the rule will have the opposite effect in Colorado. This change may open the door to a new class of arguments about verdicts.

Professor Mueller pointed out that the federal change is trying to be narrow. Mr. DeMuro agreed.

Professor Hyatt said that the verdict must be understood. What did the jury mean? Did what the jury meant to do end up on the form? The jury may have been confused.

Professor Mueller indicated that this involves cases where the jury meant to write the figures on the form and did not.

Judge Davidson identified clerical errors, such as mistakes in addition or inconsistent check marks. The mistake is on the face of the verdicts. The forms are not reconciled. In these cases, jurors are asked to correct forms.

Originally, Judge Davidson liked the language of the rule. She voiced that she is now unsure. How do you ascertain what the verdict is until it is written down? It's important to get to what the jurors intended. That is a different situation than receiving different forms or forms that do not add up. These types of problems are frequent, especially in complex civil cases. The trial courts should be able to fix errors. This change may unintentionally open the door to questions. This is the mental process of the jury. How does one arrive at the mental process?

Mr. DeMuro asked that if you bring the jury back and put them on the stand, what questions will they be asked? It would be hard to get at what number did the jury mean to write down and how did the jury arrive at the verdict without going into their mental processes. He indicated that he feels a little apprehensive about the change.

Judge Bromley voiced her understanding of the issue as a jury not fully completing the forms. The judge can hand the forms back to the jury for completion. The trial judge should not allow the jury to go until the forms are complete.

Judge Davidson indicated that she can approve changes to CRE 606 (b) in the case of clerical error. Professor Mueller said that the existing language does not speak to clerical errors. Mr. DeMuro asked if Rule 60 (a) in the Civil Rules may be used to correct this type of error.

Ms. Griffin asked about reading the verdict and polling the jury. Professor Mueller indicated that if you have to ask the jury about the meaning of the verdict, than there is already a risk. The issue can be dealt with by indicating that the verdict is not being challenged. You are trying to understand what the verdict is. Nothing in the rule prevents this type of action.

Judge Russel indicated that it is clear that until the verdict is accepted the court may send the jury back to create a verdict that all may understand.

Ms. Griffin voiced that she is not sure that a rule change is necessary. You may not know on its face what the verdict is. However, once the jury is polled, the verdict should be evident.

Professor Mueller indicated that the language of a verdict may be amended. The jurors may be brought back.

Ms. Griffin spoke of polling the jurors. Professor Hyatt indicated that it is appropriate to poll the jury. If a juror balks or doesn't understand the verdict than the jurors may be sent back to deliberations. The Civil Rules speak to sending jurors back to deliberations. Judge Bromley agreed. The entire verdict should be read. The jury should be polled. If any jurors balk, then the jury should be sent back to deliberations.

Judge Davidson pointed out that CRE 606 (b) corrects clerical errors after the fact. May clerical errors be corrected while the jury is still present? Judge Bromley said that she is uncomfortable trying to ascertain the meaning of a verdict or to correct a verdict after the fact.

Professor Hyatt pointed out that there is a vehicle to inquire about the validity of verdicts. Juror testimony would most likely occur if there is a hearing on a motion for a new trial. There is a lot of policy, practice, and procedure in this rule, more than there is evidence. If jurors are allowed to testify regarding a mistake on the verdict entry form, how is the verdict defined, the individual's verdict, the jury's verdict, etc? This could be a real invitation to challenge verdicts. One week later a juror may say "that is not what I intended." That may be grounds for a motion for a new trial.

Judge Russel moved that the Committee recommend that changes to CRE 606 (b) not be adopted. Mr. Reeve seconded the motion.

Discussion ensued as follows:

- Mr. Cherner indicated that in criminal cases this is a good policy. Attorneys do not receive much information on jurors.

- Professor Hyatt indicated that judges should be trained to work with juries. Judge Bromley indicated that she has the jury correct any clerical errors before discharge.

The motion to not adopt changes to CRE 606 (b) was approved 8:1.

CRE 609: THERE IS NO COLORADO RULE 609 BECAUSE A STATUTE ADDRESSES THE ISSUE, BUT SHOULD THE COMMITTEE RECOMMEND THE ADOPTION OF FRE 609 ON IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME, INCLUDING ITS 12/1/06 AMENDMENTS?

Professor Mueller addressed the issue, indicating that the statute is not good. He did some research to see if the Committee had the power to disregard the statute. In both the civil and criminal rules statutes, the Supreme Court may adopt any rule changes. If the changes are inconsistent with the statute the change supersedes the statute. The evidence rules statute does not say the same thing. Rule 609 is better than the statute, but he doesn't think the Committee has the authority for such an action.

Mr. Cherner voiced trouble in understanding changes to FRE 609. The old rule had time guidelines and there were exceptions for crimes of turpitude. The new rule doesn't appear to have the ten year limit.

Professor Mueller indicated that the ten year limit still exists. The change is in 609 (a) (2). If there is a crime or conviction for felony theft and the underlying facts show embezzlement from the employer, then the crime becomes dishonesty or false statement.

Judge Russell asked for confirmation that in the statute there is no discretion. Professor Hyatt indicated that the statute does not address the discretion, but the case law allows discretion.

Professor Mueller said that he does not think the Committee may adopt the rule. The Committee will have to wait for the legislature to act on the statute.

Mr. DeMuro voiced the assumption that the Committee does not want to take on changes to the statute. Professor Hyatt agreed with the assumption. Statutes like 609 have been upheld constitutionally.

Professor Mueller talked about public defenders lobbying for changes to Rule 609. Ms. Griffin indicated that no legislation is currently drafted. That is not something that is usually done.

Mr. Cherner pointed out that in the case that upheld the rape shield there was a mix of judicial and legislative power. In the absence of judicial decision the legislature spoke. He doesn't know that it's impossible to pursue a rule that clashes with the statute.

Mr. DeMuro asked if there is other business. Mr. DeMuro said that he will create a document regarding changes voted on during the meeting and pass those recommendations on to the Court.

The meeting was adjourned at 4:40 p.m.

Respectfully submitted,

April Bernard