

**COLORADO SUPREME COURT
COMMITTEE ON RULES OF EVIDENCE**

**MINUTES OF MEETING
May 19, 2005**

David R. DeMuro called the meeting to order at 2:35 p.m. in the Supreme Court Conference Room.

The following members were present:

Catherine P. Adkisson
Judge Rebecca Bromley
Philip A. Cherner
Justice Nathan B. Coats
David R. DeMuro, Chair

Judge Martin Egelhoff
Elizabeth F. Griffin
Professor Sheila Hyatt
Professor Christopher B. Mueller
Judge Robert M. Russel

The following members were excused:

Judge Harlan Bockman
Judge Janice Davidson

Carol M. Haller
Henry R Reeve

CHAIRMAN'S REPORT:

Mr. DeMuro asked the members to review the revised Committee Membership Roster on pages 1 through 3 of the Agenda Packet and let him know if there are any changes or corrections that need to be made.

Justice Coats reported that he will be sending out appointment letters to the members to let them know when their term of office needs to be renewed. Mr. DeMuro and Justice Coats reported that the Committee's proposal to follow the Federal change in Rule 702 was not adopted by the Supreme Court. However, Justice Coates and the Court wanted to express their gratitude to the committee members for all their hard work on this proposed Rule change.

PEOPLE V. SCHRECK:

Mr. DeMuro provided the members with information about People vs. Shreck. Professor Mueller reported that many courts do not want to hold hearings and there are no formal requirements for the hearings. Many District Courts require individuals to propose findings for the issues.

Judge Egelhoff reported that this issue seems to be calming down in Denver District Courts and he hasn't received many requests for hearings. Mr. Cherner reported that although one of his witnesses was threatened with Shreck for, eventually they agreed that there was no Shreck issue. Judge Bromley reported that she hasn't seen many Shreck issues, but there have been some

motions involving head injury cases. More recently, there have been cases in the medical area and issues have been raised as to whether doctors can testify about life expectancies. Judge Bromley also reported that although one of her cases dealt with genetic issues, it's not clear whether this issue will be raised again. Ms. Hyatt reported that some judges have requested the submission of Shreck motions. Judge Russel reported that there not been any cases involving Shreck at the Court of Appeals. Professor Mueller reported that he has seen quite a few cases that deal with the Shreck issue. Judge Bromley reported that she knew of a judge who had held a joint federal and state hearing on a Daubert issue. Ms. Griffin reported that she feels there are criteria that the opponents need to satisfy which may require a hearing. Professor Hyatt indicated that many of the issues can be decided without involving the extra work of Shreck motions.

A question was raised regarding what happens if each side files a request. The members responded that in these cases a hearing should be held. A question was raised regarding whether any of the members had dealt with cases that had Shreck motions that used experts in similar fields. The response was that both experts could be accepted in these cases.

AMENDMENT TO FRE 608(b):

Mr. DeMuro distributed an additional copy of Rule 608 as page 11A, that included additional changes that the Federal Courts have made since December 1, 2003, and were supposed to be included in the final changes. Professor Mueller reported that the change on the last line of Page 11A, involves self incrimination and the scope of the information. This change is designed to help clarify the Rule. Section (b) addresses some of the confusion for the Federal Courts, but not the state courts, who seem to understand the meaning. Ms. Griffin reported that she agrees with this assessment and there may still be confusion on whether intrinsic evidence is really admissible.

Mr. DeMuro asked whether any of the members had reservations about recommending the changes or whether they would rather see it recommended in terms of credibility. Ms. Griffin suggested that she felt it would be acceptable to adopt the Federal standards. Mr. DeMuro suggested that if the changes at the beginning of Rule 608(b) are recommended, then the Committee should also make changes to credibility for truthfulness and take out the male pronouns and substitute the word "witness".

A motion was made to make the following changes to Rule 608(b):

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in 13-90-101, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

The motion was seconded and passed 8/0.

CHANGES TO FRE 404(a), 408 and 606(b):

Mr. DeMuro reported that the proposed changes to Rules 404(a), 408 and 606(b) are through the Federal committees and are currently waiting for United States Supreme Court action before being sent to Congress. Mr. DeMuro suggested that it might be a good idea for the this Rules Committee to start discussing these changes before the Federal changes are adopted.

The Federal changes are included on page 27 of the Agenda Packet. Professor Mueller has submitted a memo on page 51 of the Agenda Packet that summarizes the effects of the Federal changes. Professor Mueller provided the members with background information regarding a Colorado case that dealt with these issues. Professor Hyatt reported that there is currently a case involving discipline of a teacher, which allowed the teacher to enter evidence regarding his good character. The courts have allowed evidence of good character to be entered in civil cases. Mr. DeMuro reported that the Federal cases reflect a belief that only criminal cases are involved in these issues. Professor Hyatt reported that there have been several civil cases that involved police statements about evidence of good character. Professor Mueller indicated that the Federal Courts seems to be slamming the door on this issue and there are some other issues involved. Professor Mueller reported that the State of Oregon has a rule that allows evidence of character to be entered in civil cases.

Judge Bromley asked whether the number of cases involving these issues seems to be increasing and whether there is a list of Colorado cases that address this issue. Professor Hyatt provided the members with the statute that would be affected.

Professor Mueller suggested the language of the Rule clearly excludes civil cases and the current wording of the rule doesn't sound as though it applies to criminal cases either. The Federal Rules Committee is proposing that the statements can be made in criminal cases.

The members discussed the possible reasons that the Federal Committee has proposed these changes and the effect mediation and dispute resolution has had on this issue, especially to the extent that we may have to expand admissibility. Professor Mueller also reported that Rule 408 may block the use of a settlement statement as to impeachment. The proposed Federal changes to block an impeaching effort may be a good proposal. Some of the members discussed the drawbacks to allowing blanket exclusion. Professor Mueller suggested that the existing language in the Rule is very narrow. Judge Bromley reported that she has seen a number of post trial questions of jurors and there seem to be quite a few attorneys looking for extraneous evidence about the jurors, so that there is sufficient evidence to appeal the cases. Judge Egelhoff reported that this does not appear to be occurring in civil cases. Some attorneys are also sending out investigators to talk to the jurors. Professor Hyatt suggested that judges are supposed to

determine whether jurors are competent and the Committee might want to consider adding language that clarifies whether a clerical error or something else is involved. Several members suggested that the interpretation has to be very narrow or it will end up being more confusing. The members discussed whether the jury instructions need to be improved.

Mr. DeMuro suggested that the members review this section of the agenda packet materials and plan on continuing the discussion at a future meeting. Professor Mueller agreed to provide the members with another draft of Rule 408 for a future meeting.

The committee adjourned at 4:07 p.m. There are no other meeting dates set.

Respectfully submitted by Troy C. Singleton