

COLORADO SUPREME COURT  
COMMITTEE ON RULES OF EVIDENCE

MINUTES OF MEETING  
November 9, 2001

David R. DeMuro called the meeting to order at 1:30 p.m. in the Supreme Court Conference Room.

The following members were present:

David R. DeMuro, Chair  
Judge Harlan R. Bockman  
Judge Rebecca S. Bromley  
Philip A. Cherner  
Judge Janice B. Davidson  
Elizabeth F. Griffin  
Professor Sheila Hyatt

Christopher A. Miranda  
Professor Christopher B. Mueller  
David K. Rees  
Henry R. Reeve  
Robert M. Russel

The following members were excused:

The Honorable Nathan B. Coats

Judge Martin F. Egelhoff

**Approval of Minutes:**

The minutes from the September 14, 2001 meeting were approved without objection.

**CRE 702**

Justice Coats previously informed Mr. DeMuro that he wanted the committee to openly discuss this rule without being in attendance.

Professor Mueller discussed his report, which was mailed to the members prior to the meeting. Professor Mueller provided a description of the available options (pg. 15 of the packet). Option 1 recommends the same language that the federal system adopted. Option 2 informs people that Rule 702 embodies a validity standard for scientific evidence. Option 3 recommends no change at all. Professor Mueller recommends Option 1 because it allows us to maintain the People v. Schreck standard, which is consistent with Colorado law.

There was a lengthy committee discussion regarding the options. Judge Davidson suggested adding a short committee comment that would reference Schreck. Mr. Rees stated that might give the impression that we are adopting the federal standard and disagrees that Schreck and Daubert imply the same things. Mr. Rees stated that he is in favor of adopting the federal rule with the federal comment because there isn't any reason that the Colorado rule needs to be different from the federal rule. Judge Bockman stated that we should not make our own rule, but a comment should be added referring to Schreck, which will allow us to identify the importance of Schreck. Judge Davidson expressed concern about changing the rule and altering the decision that the Supreme Court adopted. Ms. Griffin indicated that she agrees with Judge Bockman's statement.

Professor Mueller stated that Schreck and Daubert conceptualize the problem in different ways and that both indicate that scientific evidence has to satisfy the standards, although the standards are not the same. He feels that it is important that the committee inform the Supreme Court of the best course of action, which is Option 1.

Mr. Rees suggested introducing a motion to deal separately with the rule and the comment and that we modify the federal rule afterwards. Professor Mueller stated the only reason for changing the rule would be the addition of the case holdings in the rule. Judge Davidson indicated that lawyers practicing in this area are perfectly capable of recognizing and learning that they need to go back to Schreck and that we should leave it alone and keep the rule in its current form.

Mr. DeMuro stated that he has questions about why the Supreme Court decided this case but did not simply go to the federal rule, with Judge Davidson in agreement. Mr. Russel indicated that they might not have been aware of the very recent federal change when the opinion was written. Mr. Rees stated that the committee needs to come up with a recommendation and should not attempt to second-guess the Supreme Court. Professor Mueller stated that he doesn't think the first clause in the rule is responsive to Daubert, and the second clause is Daubert and Schreck.

Mr. DeMuro asked the committee members whether they were interested in Option 2, because he hasn't heard many comments about this option. Judge Bockman stated that there's already too much change in Colorado law and trying to codify Colorado law based on one case is a mistake. Mr. Russel suggested that we could add more to the comment and Professor Mueller stated that he would be willing to work on the comment. Mr. Reeve suggested that adding a committee comment with the phrase 'Colorado requires' would be very helpful. Mr. DeMuro stated that would move us more towards a federal 702 without a comment.

A straw vote was called by Mr. DeMuro asking how many members were in favor of adopting the Federal rule 702 as it is, with 7 in favor. Then, Mr. DeMuro asked how many members would like to keep the current Colorado 702 rule but add a comment, with 4 in favor. He next asked how many members would like to keep the current Rule 702 with no changes, with 4 in favor.

The discussion continued with Mr. DeMuro indicating that he is currently leaning towards making no change and adding a comment with a note to Schreck. Professor Mueller stated that in Schreck, it appears that Colorado has bought into Daubert. Ms. Griffin stated that she wonders if the Supreme Court's intent was to keep their options open and see if something develops in the future. Mr. Miranda indicated that he feels that we should keep everything as is and see what happens in the future. Judge Davidson discussed the effect of having differences in the federal law and the state law.

Judge Bromley stated that maybe the issue should be shelved for a year. Mr. Reeve indicated that he would be concerned about our message and the role of the court, if the issue is shelved for a year. Professor Mueller stated that an advisory committee usually gives a recommendation, but in this case the bar is uncomfortable with the way the Rule works and the way the Supreme Court handled it without regard to the language of 702.

The committee discussed whether the Rule was flawed and whether that should have an effect on the committee's decision. The members also discussed adopting this language as it agrees with Colorado law versus the federal language. Judge Bockman stated that apparently both federal courts and Colorado courts set up their own rules and that Rule 702 is not very helpful to anyone at this point and the committee needs to try to articulate what the law should be.

A motion was made that the committee recommends that adoption of Rule 702 with a comment. The motion passed with 7 members in favor and 4 opposed.

A motion was made to adopt Rule 702 with the comment that appears on the first half of page 20 with the caveat that it needs rewriting and that there have to be findings on the record. The motion passed with 7 members in favor and 4 opposed.

The committee discussed the changes to the comment and whether Schreck distances itself from Daubert. The committee also discussed whether Rule 702 and 403 should be linked in the comment to follow Schreck. Professor Mueller suggested that he work with Mr. DeMuro on perfecting the comment and then circulating it to everyone on the committee. Mr. DeMuro asked for comments. Judge Bromley suggested citing the case and taking out the parenthetical summary.

### **Rule 701 and 703**

Mr. DeMuro asked the committee whether Rule 701 and Rule 703 should be changed. A motion was made to recommend to the court that it adopt the federal changes to Rule 701 and Rule 703. The motion was seconded.

The committee discussed whether Rule 702 would create more problems with the types of witnesses. Judge Bockman stated that he isn't sure that Section C is necessary. Mr. Reeve stated that under Rule 702 an expert has to comply with Rule 16 and this issue only comes up during a case management order and it does change the way a case is litigated. Mr. DeMuro suggested that the change isn't designed to solve the problem, but to clarify that there needs to be a boundary and it reinforces the distinction.

After some further discussion Mr. Russell suggested the committee wait and give more time to think about changes to these rules.

Nine members voted in favor of adopting the Federal changes to Rule 701 and 703, with two members opposed.

Mr. DeMuro asked whether anyone wanted to file a minority report. He suggested that if anyone does want to draft a minority report, it should be submitted to him before the final report is submitted to the court. Mr. Rees stated that he will probably draft a minority report on 702. Mr. DeMuro stated that he will include the contrary view in his report to the Court and he will send a copy to all committee members.

The committee adjourned at 4:00 pm. There are no other meeting dates set.

Respectfully submitted by Troy C. Singleton