

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

October 24, 2014 Meeting Minutes

A quorum being present, the Colorado Supreme Court’s Advisory Committee on the Rules of Evidence was called to order by Judge Gale T. Miller at 1:30, in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Judicial Center. Members and guests present or excused from the meeting were:

Name	Present	Excused
Judge Gale T. Miller, Chair	X	
Catherine P. Adkisson	X	
Harlan Bockman		X
Philip A. Cherner	X	
Judge Theresa Cisneros	X	
David DeMuro	X	
Judge Martin Egelhoff		X
Elizabeth F. Griffin	X	
Judge Marcelo Kopcow	X	
Professor Shelia Hyatt	X	
Chief Judge Alan Loeb	X	
Professor Christopher Mueller	X	
Norman Mueller		X
Henry R. Reeve		X
Robert M. Russel	X	

I. Attachments & Handouts

October 24, 2014 Agenda Packet

II. Announcements from the Chair

The Honorable Gale T. Miller was appointed chair of the Rules of Evidence Committee on January 1, 2014. Judge Miller recognized David DeMuro for his service as chair, and thanked Mr. DeMuro for remaining on the committee. Judge Miller introduced and welcomed new members Judge Theresa Cisneros, Judge Marcelo Kopcow, and Norman Mueller.

III. Business

a. FRE 502

Mr. DeMuro began by explaining that the court adopted CRCP 26(b)(5)(B) that sets forth a procedure to follow when a party learns it has produced information in disclosure or discovery that is subject to a claim of privilege or the work-product rule.

The new civil rule is a mechanism to bring a disclosure before the court, but it does not provide the court with a standard in making its determination.

The committee discussed incorporating the factors from *Floyd v. Coors Brewing Co.*, 952 P.2d 797, 809 (Colo. App. 1997), into a new rule. With e-discovery, large document exchanges make the disclosure of privileged information common, and some members thought setting a standard in a rule would be best. A subcommittee of Professor Christopher Mueller, David DeMuro, Henry Reeve, Christina Habas, and Lino Lipinsky agreed to look at the issue and present a proposal to the committee.

b. FRE 801(d)(1)(B)

The proposed amendment makes prior consistent statements admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The reasoning behind the amendment is first, the practical problem of distinguishing between rehabilitative versus substantive use and second, the difficulty in drafting the appropriate jury instruction.

The committee discussed whether or not Colorado should adopt a similar amendment. In *People v. Eppens*, 979 P.2d 14 (Colo. 1999), the court held that where prior consistent statements are offered for the limited purpose of rehabilitation, and not for their truth, the statements are not hearsay, and thus admissible outside of CRE 801(d)(1)(B). However, these prior consistent statements are admissible for rehabilitation only, not as substantive evidence. The committee discussed whether or not adopting the federal amendment would change substantive law in Colorado, and a subcommittee of Catherine Adkisson, Liz Griffin, and Professor Shelia Hyatt agreed to look at the issue and present a proposal to the committee.

c. FRE 803(6)-(8)

The federal restyling project revealed an inconsistency where FRE 803(6)-(8) didn't state which party had the burden to prove documents were untrustworthy. The proposed amendments clarify that the opponent has the burden of proving documents in question are untrustworthy. The committee discussed whether or not Colorado should adopt a similar amendment. Hearing no consensus, Judge Miller stated that the committee will table discussion for now, but if a subcommittee wants to draft an amendment to CRE 803(6)-(8) the committee would entertain a future proposal.

d. Restyling

Judge Miller discussed the prospect of restyling the Colorado Rules of Evidence, and asked Chief Judge Loeb, chair of the Appellate Rules Committee, to describe the Appellate Rules Committee's experience with the extensive revision they are currently in the middle of. Chief Judge Loeb explained that the committee is 1½ years into the project and had made changes for uniformity and modernization, in consultation with the Federal Rules of Appellate Procedure. A working group meets before each meeting to draft proposed changes and flag issues for discussion.

Regarding the restyled federal rules, some members thought the rules were now harder to cite while other members like the specificity and thought they were easier to read. Professor Hyatt offered to create a document that compares the restyled Federal Rules of Evidence, next to the Colorado Rules of Evidence, so the committee can see the rules side by side. At the next meeting the committee will decide if it wants to undertake this project.

IV. Future Meetings

May 8, 2015

The committee adjourned at 2:45.

*Respectfully submitted,
Jenny A. Moore*