COLORADO SUPREME COURT
COMMITTEE ON RULES OF EVIDENCE

MINUTES OF MEETING
October 4, 2013

Chairman David R. DeMuro called the meeting to order at 1:34 p.m. in the Court of Appeals en banc conference room of the Ralph L. Carr Colorado Judicial Center at 2 East 14th Ave., Denver, Colorado.

The following members were present:

Catherine Adkisson
Judge R.S. Bromley
Justice Nathan B. Coats
David DeMuro, Chair
Elizabeth Griffin
Professor Sheila Hyatt
Chief Judge Alan Loeb
Professor Christopher Mueller
Henry Reeve
Robert Russel

The following members were excused:

Judge Harlan Bockman
Philip Cherner
Judge Martin Egelhoff
Carol Haller

APPROVAL OF MINUTES NOVEMBER 4, 2011

The November 4, 2011 minutes were approved as submitted.

CHAIRMAN'S REPORT

Chairman DeMuro welcomed Chief Judge Loeb, the committee's first ever new member. Next, Chairman DeMuro passed around a membership list and asked the members to make any needed updates. Chairman DeMuro stated that reappointment letters have been sent to Justice Coats, and that the Supreme Court will reappoint all of the committee members to three-year terms.

Chairman DeMuro reported that the Supreme Court had decided not to take action on the committee's proposal on FRE 609 regarding impeachment. In response to the committee's request for guidance on if they should restyle the Colorado Rules of Evidence based on the restyling of the Federal Rules of Evidence, the Supreme Court replied that the committee should not take on an overall restyling of the rules. However, as the committee considers changes to the CRE, it should consider the new style of the equivalent federal rules and can recommend that style as part of rule change proposals if it chooses to.

Member Elizabeth Griffin asked whether the committee had adopted a more general taking of the minutes. Chairman DeMuro replied that the committee's minutes have become more thorough over time. Attorneys now staff the rules committee meetings so that the minutes have greater detail. Member Griffin requested that meeting minutes be distributed to members sooner if they are going to be more detailed. Chairman DeMuro responded that that was a good idea because this committee used to wait for the next meeting to distribute minutes, but they meet so rarely that the minutes should go out much sooner so that members can review them while they recall the meeting's content.

CRE 803(10): SHOULD THE COMMITTEE RECOMMEND THE RULE BE AMENDED TO ADD A "NOTICE-AND-DEMAND" PROCEDURE TO PROVE THE ABSENCE OF A PUBLIC RECORD IN A CRIMINAL CASE?

Chairman DeMuro introduced the third item on the agenda [pages 11–46 of the agenda packet], and stated that FRE 803(10) is currently working its way through the federal system, with an expected effective date of December 1, 2013. He then distributed a handout with the current CRE 803(10), the current FRE 803(10), and the proposed FRE 803(10) expected to be effective December 1, 2013.

Chairman DeMuro then gave an overview of the issue, which concerns proving the absence of a public record. In the federal system, proving the absence of a record can be considered testimonial, which invokes a defendant's Sixth Amendment confrontation clause right, so just proving the absence of a record by certificate rather than live testimony may be improper. United States Supreme Court cases *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 564 U.S. ___ (2011) indicate that this is a problem, and there is movement for change. Member Mueller added that this issue is prevalent in federal immigration cases. In prosecutions for illegal entry, prosecutors make their cases by showing that defendants did not have permission to enter the country, which requires an examination of the relevant federal records. If there is no record of the Secretary of State giving permission to reenter, a certificate is issued saying as much. Member Mueller continued that federal cases mostly say such evidence is not testimonial, but some say it is, and there is no United States Supreme Court pronouncement on the issue. He believes it is testimonial.

Chairman DeMuro asked the committee if there are crimes in the state system where this issue could arise. Member Griffin gave the example of a prosecutor wanting to show that a driver's license was not reinstated. Member Sheila Hyatt added that a prosecutor may also use a certificate to show that a person does not have a Colorado driver's license in the first place. Member Griffin also gave the examples of a certificate being used to show the absence of a marriage license and whether a person has a medical marijuana card. Member Robert Russel gave the example of prosecution for not registering as a sex offender. Member Bromley

stated that she had asked her colleagues in 4th Judicial District about this issue, and none of them had encountered it. The only situation they could think of where it might arise is in reporting similar transactions (for example, reporting to social services and the police), but no one had seen anyone try to do that.

Member Griffin stated that amending CRE 803(10) to have a "notice-and-demand" procedure might encourage use like Member Bromley's example. Member Griffin went on to say that CRE 803(10) clearly seems testimonial because of its "diligent search " language. She stated that searches of public records will be more diligent if the people making the searches are actually subject to cross examination, and are not able to dispose of the matter with a certificate.

Chairman DeMuro distinguished the proposed addition to CRE 803(10) from the facts in *Cropper v. People*, 251 P.3d 434 (Colo. 2011), stating that the proposal has a notice-and-demand procedure for the absence of a record, whereas *Cropper* dealt with an actual report, not the absence of one. *Cropper* applied CRS §16-3-309(5), not CRE 803(10). However, Chairman DeMuro noted that the majority opinion of *Cropper* is softer on this issue than the proposed rule. Member Mueller said that was logical because the statute is softer than the proposal. CRS §16-3-309(5) does not require the prosecution to notify the defendant of its intent to offer the lab report. Member Mueller believes the defendant in Cropper was treated unfairly, because the defense did not know the prosecution was going to offer the lab report. Member Hyatt replied that as long as the prosecution lists the lab report as an exhibit that fulfills the notice requirement. Chairman DeMuro asked the committee whether a prosecutor using CRE 803(10) with the proposed amendment could list a certificate of the lack of a document as an exhibit and that would satisfy the notice-and-demand procedure. Member Mueller replied that the proposal would mean just listing the certificate would not be enough.

Member Loeb asked where the 14 days and 7 days timelines in the amended FRE 803(10)(B) came from, what the thinking behind those timelines was, and asked the committee if the timelines were reasonable. Member Bromley replied that the timelines made sense. She further stated that certificates of the absence of public records are good because they bring up the issue before trial, which prevents the issue from being a surprise in the middle of a trial.

Member Griffin questioned whether CRE 803(10) should be amended at all. As a defense lawyer, she takes issue with the Committee on Rules of Practice and Procedure comment on FRE 803(10) [page 29 of the agenda packet] that the amendment addresses the confrontation clause "problem." She doesn't see the Confrontation Clause as a "problem" to find a way around, rather it is a right. Member Griffin stated that amending CRE 803(10) is a bad idea and that changing it would set a bad precedent for the potential to amend all the rules in the Colorado Rules of Evidence.

Chairman DeMuro asked Member Griffin wouldn't the proposal help criminal defense attorneys? He stated that under the proposal, a defense attorney would at least get notice of a certificate, which is more than the current situation under *Cropper*. Now, a public defender runs the risk of not knowing about a certificate for the absence of a public record. Member Griffin replied that *Cropper* only applies to CRS §16-3-309(5). She agrees that there should be a notice requirement, but she believes the proposal sets a precedent for avoiding the Confrontation Clause. She asked what's so bad about bringing someone into court to say what her job is and where she looked for the public record. Member Griffin stated that Philip Cherner agree with this point. Member Catherine Adkisson stated that it is a very ministerial act for the person who searched for the public records to say "I looked and there wasn't anything there." There's not a lot of information in that testimony. Member Adkisson stated that the proposal seems like a good safeguard. Member Russel stated that if the certificate is in question, an attorney can object and have the document brought in.

Member Mueller stated that the proposal is very positive for defendants, and that if a certificate of the absence of a public record is seen as testimonial, defense attorneys should be in favor of the proposal. He said the proposal resolves a question that will hang if the committee does not address it.

Chairman DeMuro stated that he was concerned with the 7 day timeline in the amended FRE 803(10), which could be read to say that if a prosecutor provides written notice to the defense of intent to offer a certificate, that triggers required defense action in 7 days or the defense has lost its ability to object to the certificate. Member Griffin stated that her concern with the proposal is that it is a trap for the unwary. Her stated that the Office of the Colorado State Public Defender where she works has a policy that if a case has any lab testimony, the public defender demands in-person testimony on the lab report. She stated that there is no reason a defense lawyer would not demand live testimony. Member Mueller replied that a potential reason is if the defense attorney knows the public record in question does not exist, and does not want the person who searched for the public record to testify. Member Griffin replied that she doesn't disagree in regards to lab testimony, but with certificates for the absence of a public record a defense attorney wants live testimony because if she makes the demand and the witness does not show up at trial, the prosecution cannot put on the evidence. She also stated that she is surprised to hear that courts could think certificates are not testimonial.

Member Mueller stated that there is a case footnote stating there does not have to be live testimony from every person who handles a sample. These are statements made in prep for trial. Member Mueller stated that business and administrative documents follow *Cropper*, but he is not persuaded by these cases.

Member Reeve stated that he didn't see what the need for the proposed change is. Chairman DeMuro asked Member Mueller what case law he would find persuasive,

possibly a case holding that a certificate of the absence of a public record is testimonial? Member Mueller suggested the following scenario: if the state prosecutes someone for doing something you need a license for, and the prosecutor has to prove absence of certification, he does that by looking through the index of that particular record and not seeing name. Is that a routine administrative function even though we know it was done in prep of trial, or is it testimonial? Member Russel replied that it could be in an agency's regular course of business to be periodically checking their records against who is doing the licensed activity. Member Reeve offered the example of criminal impersonation and the unauthorized practice of law. Member Mueller replied that the Colorado Supreme Court would not issue a certificate of the absence of a public record for that situation.

Member Hyatt stated that there is an important distinction between the existence of a record and its nonexistence. A certificate is just to show there is no public record. Regarding the existence of a license, that record is not created for trial, and it has a separate administrative purpose, so those are easily non-testimonial, but the certificate of absence of a public record is different because that is prepared for trial. Member Bromley replied that the same people performing the ministerial task of looking at the records, and it should not make any difference if the record search is being done for a trial or not. Member Mueller stated that for an agency with records, they can look up a record in a minute on the computer. It is easy to show a record exists, but if the point is to prove there is no record, that's a harder task. Member Bromley replied that a witness could be questioned about that on the stand.

Member Reeve asked if there are other considerations beyond limiting the Confrontation Clause in questioning a witness to prove a lack of public record? Is there another reason to separate proving the existence and nonexistence of a record? Member Hyatt replied that it is a hearsay question. If a witness testifies that he previously looked at a computer and did not see a record, that is an out of court statement. She stated that the rule makers did not want that statement to be considered hearsay, so they made it a hearsay exception. The issue arises from the fact that the same person can make that statement on a certificate instead of as a witness in court, and the certificate can stand instead of testimony. You cannot cross-examine the certificate.

Member Mueller stated that proving the absence of a public record under FRE 803(10) does not have the same restrictions in the rules as there are for using the public records themselves. He stated that previously, to use FRE 803(6) regarding records of a regularly conducted activity, a lawyer had to call a foundational witness to testify about the business records, but then the system went to using certificates because of the looseness of who could qualify as a witness made it seem like it was not worth calling the witness. In FRE 803(10), the language of the rule limits what a public record can be used to prove, but an attorney does not get to readily question the authenticity of the record.

Chairman DeMuro stated that certifications under FRE 902 are an overlay of FRE 803, and that FRE 902(11) requires certification. He stated that there are two notice provisions at play in the FRE. Member Mueller stated that FRE 902 just applies to business records, not public records, and that there are no time provisions for certified proof of public records. Member Reeve asked why amended FRE 803(10) doesn't mention FRE 902(4). Member Mueller stated that FRE 902(4) embraces the proof of authenticity of a public record in FRE 803(8), but the absence of a public record has always been addressed in FRE 803(10). Chairman DeMuro stated that there are no other cross-references in FRE 803(6) or FRE 902(11) to each other, and that neither FRE 902(4) nor FRE 902(11) mentions the absence of a record.

Member Hyatt asked how you authenticate the absence of a record. Member Russel replied that it was done through affidavit.

Chairman DeMuro asked Member Griffin if she thought changing the timing in the proposed rule would make her more positive about the proposal. Member Griffin replied that the proposal would hurt people's lawyers who don't know about it or don't know better. She stated that 14 days before trial lawyers are very busy and might make a mistake and not make the demand for testimony. She asked why put the proposed language in the Rules at all because it will just trap people who don' t know to demand testimony on certificates of the absence of a public record. Member Hyatt asked whether the statutes already trap witnesses with forensics reports?

Chairman DeMuro stated that he was worried about the proposed language's timing at the beginning of a case and that the defense attorney only has 7 days to react. Member Loeb stated that there will be litigation on this issue. He gave an example of there being a pretrial order asking for all witnesses and evidence 30 days before trial, and then 14 days before trial the prosecutor gives notice of intent to use a certificate. Member Russel added that conflict could also arise if the notice of intent to offer a certificate comes in late and then the court decides to allow more time. Member Bromley added that in that situation a judge is likely to allow more time because you need to give the defendant every opportunity.

Chairman DeMuro asked if the concept of the proposed rule change could be separated from its timing, and if the committee could recommend the proposed rule but change its timing. Member Mueller asked how far in advance of trial do prosecutors list their exhibits. Member Bromley replied that there is no standard and it depends on each court's process. Member Griffin added that it is often done off record, and often not even done two weeks before trial. Member Bromley stated that it depends on how big a case is and how many exhibits there are. In a serious criminal case, she stated that a judge will insist on having the materials earlier. Member Reeve added that it varies by case and by judge, and that serious cases will have status conferences where the judge will request exhibit lists and stock jury instructions from both sides.

Member Loeb stated that the proposal is useful because *Cropper* comments on specific documents, but there are other kinds of cases where these issues will arise. For example, in a medical malpractice license case, if the defendant says he has a license, that's an affirmative defense that the prosecution will have to disprove. Member Loeb said that there have to be other agency examples as well where an element of an offense or an affirmative defense will be at play, so it would be useful to put a burden of proof on the prosecution and the defense through a notice-and-demand procedure. Member Griffin replied that the proposal would actually remove burdens because a prosecutor has to prove the elements of an offense, but with the proposed language the prosecutor would not have to call a witness about the absence of a public record unless the defense objects. Member Mueller replied that the proposal would put defense attorneys in a better position than without the proposal because without it they do not know if a judge will say the certificate is testimonial or not. He stated that about two dozen federal cases say these documents are not testimonial, and 3 cases say they are. Member Mueller continued that he believed for a long time that such documents were not testimonial, but a few cases and his co-author say that they are testimonial. He said that before *Melendez-Diaz*, 99 out of 100 cases on the kind of lab reports at issue in the case were considered not testimonial, so the opinion was a surprise.

Member Reeve stated that with the amended FRE 803(10) about to go into effect, there will likely be a case soon on whether or not certificates for absence of a public record are testimonial or not. Member Griffin stated that under the current CRE 803(10), a prosecutor can either bring a certificate or do testimony. She was operating under the assumption that these certificates were considered testimonial. She said that if they are considered not testimonial, the proposal could be a good thing. Member Hyatt stated that the Colorado Supreme Court found the type of lab report at issue in *Melendez-Diaz* to be testimonial before the United States Supreme Court did, so Colorado was ahead of the game.

Member Russel said that for an incompetent attorney, the situation would be the same under the proposal as it is now because the attorney could fail to object to the certificate or not object on the correct basis.

Chairman DeMuro asked the committee how it would like to proceed with the proposal, offering the options of recommending its adoption, rejecting the proposal, or recommending to the Supreme Court to delay a decision on this proposal until there has been time to observe its effect in the federal system. Member Adkisson stated that from an appellate perspective, the proposal is a good fix to avoid fighting about a certificate for the absence of a public record on appeal. Member Hyatt agreed to the extent she believes the certificates are testimonial. She stated that the proposal would flag the issue in the Colorado Rules of Evidence, and an inexperienced lawyer might at least look at the rules.

Member Griffin suggested that the proposal could be amended to say that the prosecutor must give notice and that his notice must inform the defendant of his duty to object in writing in 7 days or waive his confrontation right. She said that such language would make the rule extra clear because requiring notice just puts a defense attorney on notice of the prosecutor trying to admit a certificate, not of the defense's right to object to the certificate. Member Loeb replied that Member Griffin's suggestion assumes that there is a constitutional right at play and that the certificate is testimonial. He asked if the Supreme Court would like to see that in a rule or if they would prefer to wait for those questions to be resolved in a case.

Chairman DeMuro suggested changing the proposal language to "this is a notice under CRE 803(10)(B)" to make it more neutral. Member Griffin replied that 14 days before trial attorneys are very busy and that to get their attention, the language needs to be very direct. She would like to see language requiring the prosecutor to provide written notice of his intent to offer the certificate and the defendant's opportunity to object. Member Mueller stated that it is fine to reference a rule in a notice, but it is unwise to include how many days the defendant has to object because that is controlled by the rule, not the notice. Chairman DeMuro asked if there were any other rules requiring a prosecutor to give notice and tell the defendant that he has the option to object. Member Bromley replied yes, there are in estate law because these notices are often going to people who are not represented by attorneys.

Member Russel asked Member Reeve if the proposal would be burdensome to prosecutors. Member Reeve replied that on the other side of Member Griffin's comment regarding the proposed language giving a defense attorney the opportunity to stumble is that if a defense attorney misses the flag, the prosecution has endorsed the witness and provided the document showing the absence of a public record. He said that the proposal would not be too burdensome if lawyers are educated about it.

Member Russel stated that the proposal does provide protection for defendants, and he moved to submit the federal version of Rule 803(10) about to take effect to the Supreme Court for approval. Chairman DeMuro asked if any committee members wanted to suggest style changes to CRE 803(10). Member Mueller said that he was fine with the Colorado Rules of Evidence having some variation in style and that the Federal Rules of Evidence are harder to cite after the restyling because of the extensive subsectioning.

On a call for the vote, the motion passed 7:1.

Chairman DeMuro asked if the committee would like to include a committee note like the federal one [page 35 of the agenda packet]. Member Reeves stated that a note might help create a greater chance of preserving the integrity of an outcome. He suggested copying the federal note verbatim or having a note that points to

Melendez-Diaz. Member Hyatt said that such a note should also point to *Cropper* and *Hinojos-Mendoza v. People*, 169 P.3d 662 (Colo. 2007). Member Mueller cautioned the committee against referencing *Cropper* and building in the idea that CRE 803(10) could be construed like *Cropper*, which applied CRS §16-3-309(5), not CRE 803(10). Member Griffin stated she preferred no reference to *Cropper* because there is no notice requirement in CRS §16-3-309(5), just that "party may request" [page 46 of the agenda packet]. Member Loeb suggested that the note should just highlight the federal note because that would highlight the constitutional issues. Chairman DeMuro recommended the language "the committee recommends the adoption of a rule in response to the adoption of a comparable rule of FRE and that committee provided ..."

CRE 801(d)(1)(B): SHOULD THE COMMITTEE RECOMMEND THAT THE RULE BE AMENDED TO ALLOW PRIOR CONSISTENT STATEMENTS AS SUBSTANTIVE EVIDENCE?

Chairman DeMuro called the committee's attention to the fourth agenda item [pages 47–79 of the agenda packet], and stated that an amendment to FRE 801(d)(1)(B) is currently working its way through federal system, with an anticipated effective date of December 1, 2014. However, there is the possibility of other amendments being made to the proposed FRE 801(d)(1)(B) between now and December 1, 2014. Chairman DeMuro stated that the issue was brought to his attention by Member Hyatt and asked her to give an overview.

Member Hyatt stated that she became aware of the issue through decisions talking about self-serving statements made by defendants and holding that these statements are inadmissible. She thinks these decisions are wrong. The term "self-serving" is associated with prior consistent statements of witnesses, and an amendment to CRE 801(d)(1)(B) could state that such prior consistent statements are admissible.

Member Hyatt continued that there's always been another route for admissibility of prior consistent statement: rehabilitating the witness, not for truth, but just to show that the witness had told a consistent story. Federal courts have been letting in prior consistent statements under the rehabilitation theory despite a United States Supreme Court ruling saying that the statements have to be limited. The federal rule makers are saying the amendment to FRE 801(d)(1)(B) is just to codify what is already the practice. Member Hyatt continued that prior consistent statements should also be allowed in for their truth because juries struggle to distinguish between statements made to show a witness's consistency and statements offered for their substantive truth.

Member Hyatt stated that in *People v. Eppens*, 979 P.2d 14 (Colo. 1999), Colorado established the idea that the admissibility of prior consistent statements is not limited to what is contained in the Colorado Rules of Evidence, but that they could

come in for other purposes as well, such as rehabilitating a witness. The amended federal rule will codify what was already the practice in Colorado. However, Member Hyatt stated that the proposed rule does have problems. One of the reasons for the limitation on uses of prior consistent statements in the first place is the desire not to encourage the accumulation or manipulation of a paper trail. Also, the proposal facilitates directing the attention of the jury away from live testimony to the paper containing the prior consistent statement. Furthermore, codifying the *Eppens* doctrine would encourage more prior consistent statements to be admitted. For example, if a witness is impeached because she can't remember something, then her prior consistent statement could be brought in, which has much more detail than her live testimony. Attorneys will fight over the admissibility of that prior consistent statement. Member Hyatt also noted that the National Organization of Magistrates was very against the change to FRE 801(d)(1)(B).

Chairman DeMuro distributed copies of page 53 of the agenda packet, containing the current CRE 801(d)(1)(B) and the proposed FRE 801(d)(1)(B). Then, he clarified that *Eppens* does not limit admittance of prior consistent statements to just rebutting a charge of recent fabrication, but is instead saying prior consistent statements can be used for impeachment. Member Hyatt stated that the proposal extends beyond the *Eppens* holding because it would allow prior consistent statements to come in for their truth and not just for consistency.

Member Mueller asked how often this issue arises for defendants trying to get their statements admitted. Member Griffin replied that Member Phil Cherner wanted her to ask the committee whether a defendant could take advantage of the proposed rule if the defendant was not testifying. Member Griffin stated she does not know how often this issue arises with testifying defendants. Member Mueller stated that he has seen the issue arise in cases where the defendant appeals a conviction and the defense offers prosecution witnesses' statements. Member Griffin added that especially in sexual assault cases there are a lot of prior consistent statements. Member Bromley added that the judge she has talked to about this issue lets most prior consistent statements in because the jury should hear it all.

Member Mueller stated that he is conflicted over this proposal. He likes that the proposal is in line with the intent of the original rule and that prior consistent statements should come in for all purposes or not at all because juries struggle to make the distinctions between statements to show consistency and statements offered for their substantive proof. However, Member Mueller stated that he is concerned that courts would abuse it. The proposal could allow for the conviction of defendants based on out of court statements and not on live testimony because there would be so much more detail in the previous consistent statement than the very brief, but consistent, statement at trial. Member Mueller expressed his shock at the ruling in *Tome v. United States*, 513 U.S. 150 (1995), where a young witness just answered yes and no to leading questions at trial when she had previously described the abuse at issue in the case in detail.

Member Griffin stated that she is opposed to the proposal because prior consistent statements are already being admitted liberally and the committee should not open up the possibility of even more admittance. She continued that it is not a good rationale to change a rule because the courts are applying it incorrectly already and juries can't handle it.

Member Griffin stated that district attorneys should not be able to argue a prior consistent statement in their closing arguments as substantive evidence. Member Hyatt stated that courts are struggling with if these prior consistent statements are substantive evidence. She pointed to *People v. Banks*, 2012 WL 4459101 (Colo.App., 2012) [mentioned on pages 50 and 51 of the agenda packet], where a witness made two inconsistent statements before trial, was impeached at trial, and then the prosecutor rehabilitated the witness by showing a video tape of the statement that was consistent with what the witness said at trial. Member Griffin stated that at least under the current rule an attorney can object to the statement's use in closing arguments and can ask for a new trial. Member Hyatt asked why the federal rule makers want to amend FRE 801(d)(1)(B). Member Mueller replied that the revision is for neatness. The rule as adopted did not cover everything it was meant to and they haven't yet addressed the issue of courts letting too much in and calling it consistent. Member Mueller said that people are being convicted on evidence really brought in to rehabilitate witnesses, and that he thinks the federal rule change is not an improvement.

Chairman DeMuro suggested the alternative of codifying *Eppens*. Member Mueller stated that *Eppens* belonged in Article VI of the CRE with the prior statement rule. Member Hyatt stated that *Eppens* could also go under CRE 801(c) as another example of non-hearsay, but that Colorado has not codified any of the other examples, such as verbal acts.

Chairman DeMuro expressed his concern that the committee proposing a change to CRE 801(d)(1)(B) would precede FRE 801(d)(1)(B)'s change, and there might be more work done on the federal rule before it goes into effect. He suggested letting the federal rule take effect and observing its impact before looking at Colorado's rule. Member Bromley asked if the committee would like to add any language about what is seen as substantive evidence and what is not. Member Hyatt replied that *Eppens* makes the distinction clear, but that *Eppens* does not appear in the CRE. Member Mueller pointed out that there are many situations that the Federal Rules of Evidence do not discuss, such as impeachment, bias, lack of capacity, prior consistent statements, etc. Chairman DeMuro stated that the committee will pass on the issue for now and reconsider it when the federal process has played out.

CRE 803(6)–(8): SHOULD THE COMMITTEE RECOMMEND THAT THE RULES BE AMENDED TO PROVIDE THAT THE BURDEN OF SHOWING A LACK OF TRUSTWORTHINESS OF EVIDENCE IS ON THE OPPONENT OF THE EVIDENCE?

Chairman DeMuro drew the committee's attention to the fifth agenda item [pages 63–79 of the agenda packet]. He stated that changes to FRE 803(6)–(8) were scheduled to go into effect on December 1, 2014, and that the changes concern hearsay exceptions and which party has the burden of showing the evidence's trustworthiness. The proposal is for the proponent of the evidence to have the initial burden of proof in getting evidence admitted, but in a challenge to the evidence's trustworthiness the burden shifts to the opponent. Chairman DeMuro stated that he had looked through the case law, and he didn't see a Colorado case addressing this two-phased version of burden of proof. Member Hyatt stated that she vaguely recalled a case where there was a piece of evidence that the court said looked like a business record, but that it did not look trustworthy. The case applied CRE 803(6), but it did not discuss it.

Chairman DeMuro suggested deferring on the issue like the committee had done with the previous issue concerning a federal rule that had not finished going through the rule change process. Member Mueller stated that the reason for the amendments to FRE 803(6)–(8) is that the restyling project buried the original verbiage of the three exceptions, and that the original rule had made it clear that it was the opponent who had the burden of showing untrustworthiness. Member Mueller stated that Colorado hasn't restyled its rules, so he doesn't think there's doubt in our rules and we don't need to amend them, but that this amendment is harmless.

Chairman DeMuro suggested rolling over the last two issues discussed and reporting to the Supreme Court on the proposed change to CRE 803(10) including adding the discussed comment.

The meeting was adjourned at 3:20p.m.

Respectfully submitted,

Cecily Nicewicz