

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

November 9, 2018 Meeting Minutes

A quorum being present, the Colorado Supreme Court’s Advisory Committee on the Rules of Evidence was called to order by Judge Rebecca R. Freyre at 1:30 pm in the Court of Appeals Full Court Conference Room on the third floor of the Ralph L. Carr Colorado Judicial Center. Members and guests present or excused from the meeting were:

Name	Present	Excused
Judge Rebecca R. Freyre, Chair	X	
Scott Bauer	X	
Harlan Bockman	X	
Prof. John Campbell		X
Philip A. Cherner	X	
David DeMuro	X	
Judge Martin Egelhoff		X
Elizabeth F. Griffin	X	
Judge Marcelo Kopcow	X	
Chief Judge Alan Loeb		X
Judge Gale T. Miller		X
Professor Christopher Mueller	X	
Norman Mueller	X	
Henry R. Reeve	X (phone)	

I. Attachments & Handouts

- November 9, 2018 Agenda
- A letter to the committee from Judge Freyre
- September 8, 2017 Minutes
- Committee Roster
- FRE 803(16) – Statements in Ancient Documents

II. Minutes

- The September 8, 2017 minutes were adopted as submitted.

III. Announcements from the Chair

- Judge Freyre introduced the new supreme court liaison, Justice Samour;

- Justice Samour greeted everyone and reported that he will attend the initial portion of committee meetings to say hello, answer questions, and provide updates;
- Judge Freyre welcomed Scott Bauer, the new committee member from the Attorney General's office; and
- Judge Freyre reported that membership terms will now begin on January 1st and end on December 31st.

IV. Old Business

a. FRE 803(16) and FRE 902(13) and (14).

Changes to the above rules were adopted on December 1, 2017. Judge Freyre reported that Professor Campbell will provide more information at a future date as to whether Colorado should consider similar rule changes, and if so, a subcommittee will be formed to make recommendations to consider these changes.

The committee then discussed the federal rule changes themselves. One committee member noted that the main purpose of these subsections is to save time in getting records admitted. So far, one case has cited to these provisions on a federal level. In that case, the evidence being considered was data records from a global positioning system that tracked a parolee wearing an ankle bracelet. The committee also discussed other electronic records that may be impacted, including: cell phone usage, hospital records, and social media posts.

The committee also discussed authentication of these digital records. How do you truly authenticate digital records that are easily altered? The advisory committee seems to be saying that the only part of authentication they are addressing is: did it come from the internet, and if so, did it come from the site on the internet that is indicated. There's a 2015 published COA case, *People v. Glover*, that gives factors on authentication for electronic records to determine whether something is admissible.

Judge Freyre also mentioned that she is a member of the Criminal Jury Instructions Committee, and on that committee, a subcommittee is looking at modifying the stock instruction relating to judicial notice following a 2015 COA case, *Doyle vs. People*. When this proposal is finalized, Judge Freyre will alert the evidence committee.

b. CRE 606(b)

The proposed citation was submitted and rejected by the supreme court. Committee Chair Judge Freyre will communicate with Justice Samour in the future when submitting proposed rule changes to the supreme court.

V. New Business

- a. Professor Mueller reported that the Federal Rules of Evidence Committee is considering two changes:
 - i. FRE 106 on remainder of writings. The committee is considering expanding this rule to cover all statements, not just written or recorded.
 - ii. FRE 702 on expert testimony. The committee is unhappy with experts using “to a reasonable scientific certainty” and is considering adding a clause that experts not be allowed to overstate conclusions.
- b. Judge Freyre asked whether the committee has ever considered adding a forfeiture by wrongdoing hearsay exception. Currently, Colorado’s exception is solely in case law. Judge Freyre will ask Justice Samour if he thinks this is worth the committee’s time. Professor Mueller will look at what other states have done in this area.
- c. One committee member noted that the Federal Rules of Evidence Committee sends out packets regarding their considerations. These packets might be helpful to this committee, though unfortunately, they are several hundred pages long.

VI. Future Meeting date

TBD

The committee adjourned at 2:12pm.