

September 25, 2007

Lee Suskin, Court Administrator  
Vermont Supreme Court  
Montpelier, Vermont 05069-0701

**2007 ANNUAL REPORT OF THE ADVISORY COMMITTEE ON THE RULES OF EVIDENCE**

Dear Lee:

This letter constitutes the Committee's annual report to the Supreme Court.

The Committee met once during the past year on November 17, 2006. The Committee communicated several times by e-mail to review minutes of the meeting and the reporter's draft of proposed rule amendments.

The Committee considered several topics at the November meeting. The Chair related his communication with the House Judiciary Committee requesting that the issue of whether the Vermont Legislature should adopt FRE 413-415 be referred to the Evidence Rules Committee. The Committee agreed that the Vermont courts judiciously utilized VRE 404 and the *Lipka* decision to admit prior related sexual offenses when necessary to rebut claims by the defense. The reporter drafted a letter for the Chair which expressed the Committee's view that FRE 413-415 were not needed, tip too heavily toward the prosecution, disregard the basic principle reflected in VRE 404 and that few states have adopted the Rules.

The Committee considered the federal revision to Rule 408 and the impact of Vermont's adoption of the Uniform Mediation Act. The Committee decided unanimously not to recommend that the Court adopt the federal amendment. The amended federal rule carves out an exception to the ordinary rule protecting statements made during negotiations in criminal prosecutions "related to a claim by a public office or agency . . . ."

The Committee was concerned that Vermont practitioners would rely on the protection for statements made in compromise negotiations under Rule 408 without awareness of the Uniform Mediation Act adopted in 2006 as 12 V.S.A. §§ 5711 et seq. The latter provides what the authors refer to as an evidentiary privilege for "mediation communications" and would often provide greater protection than does Rule 408. Potential confusion is exacerbated by V.R. Civ. P.

16.3(g) which provides for protection for communications made “in connection with or during an alternative dispute resolution proceeding conducted under this rule.”

The Committee charged the reporter with drafting a note which explained the rules and statutory overlap. The reporter submitted a draft to the Committee and discussed the draft with Kinvin Wroth and Lee Suskin. Kinvin suggested that a Reporter’s Notes should not be used merely to warn practitioners of a problem related to application of the rule and Lee was inclined to concur with Kinvin. Several members of the Committee then suggested that the Committee at least recommend to the Court a very brief reference to the Uniform Mediation Act. The reporter has drafted a one sentence alternative to the original relatively comprehensive suggested note. Both the original note and the one sentence alternative are included with this report for consideration by the Court.

The Court might consider an alternative to a Reporter’s Notes as a vehicle to apprise the bar of a related Vermont provision which should be considered in conjunction with a Vermont Court Rule. The Rules of Civil Procedure contain two short notes without a caption which apprise the bar that a former Rule has been abrogated. See VRCP 73 and 80.3. Another such note is included as “Reporter’s Notes.” See VRCP 76. The Committee requests that the Court consider methods in addition to Reporter’s Notes to apprise the bar of closely related potential traps for the unwary. The note could be called an “Editor’s Note” or could simply be untitled as with the two rules cited above. As in the three examples above, the note should appear directly below any text.

The Committee considered the 2006 amendment to FRE 606. That amendment clarifies the language of the original rule and explicitly provides that a juror may testify as to whether there was a mistake in entering the verdict onto the verdict form. For reasons expressed in the Reporter’s Notes, the Committee strongly supported Vermont adoption of the amendment.

The Committee also strongly supported adoption of the 2006 amendment to FRE 404. The amendment makes it clear that evidence of character is never admissible in civil cases. The Committee proposal incorporates reference to Vermont’s revised victim shield law (an earlier Reporter’s Notes made reference to a predecessor statute). The proposal appears to be consistent with Vermont practice.

The Committee has not established an agenda for 2007-2008. The Committee welcomes any suggestions the Court may have for topics the Committee should consider during the forthcoming year.

## **RECOMMENDATIONS**

The Committee respectfully requests the Court take the following action with regard to the above:

1. Circulate the proposed amendments to VRE 404(a) and 606(b) for comment; and

2. Circulate a note, with or without an appropriate caption, which substantially follows one of the two alternatives set forth in the enclosed Reporter's Notes to Rule 408 - 2007.

Respectfully submitted,

Jerome O'Neill, Chair

For the Committee:

John J. Boylan, Esq.  
Hon. Theresa S. DiMauro  
Hon. Harold Eaton  
Kevin W. Griffin, Esq.  
Sandra Levine, Esq.  
Karen McAndrew, Esq.  
Robert V. Simpson, Esq.  
Hon. Denise Johnson, Supreme Court Liaison  
Kenneth Kreiling, Reporter