

STATE OF VERMONT
VERMONT SUPREME COURT
JANUARY TERM, 2010

Order Promulgating Emergency Amendments to the Vermont Rules of Criminal Procedure

Pursuant to the Vermont Constitution, Chapter II, Section 37, and 12 V.S.A. § 1, it is hereby ordered:

1. That Rules 15(e) and (f) of the Vermont Rules of Criminal Procedure are amended to read as follows (deleted matter struck through; new matter underlined):

RULE 15. DEPOSITIONS

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(e) Limitations.

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(5) Depositions of Minors in Sexual Assault Cases.

(A) No deposition of a victim under the age of 16 shall be taken in a prosecution under 13 V.S.A. §§ 2601 (lewd and lascivious conduct), 2602 (lewd and lascivious conduct with a child), 3252 (sexual assault), 3253 (aggravated sexual assault), or 3253a (aggravated sexual assault of a child) except by agreement of the parties or after approval of the court pursuant to ~~subdivision~~ subparagraph (B) of this ~~subdivision~~ paragraph (5).

(B) The court shall not approve a deposition under this subdivision unless the court finds that the testimony of the child is necessary to assist the trial, that the evidence sought is not reasonably available by any other means, and that the probative value of the testimony outweighs the potential detriment to the child of being deposed. In determining whether to approve a deposition under this subdivision, the court shall consider the availability of recorded statements of the victim and the complexity of the issues involved.

(C)(i) If a deposition is taken pursuant to this ~~subdivision~~ paragraph (5), the court shall issue a protective order to protect the deponent from emotional harm, unnecessary annoyance, embarrassment, oppression, invasion of privacy, or undue burden of expense or waste of

time. The protective order may include, among other remedies, the following: (I) that the deposition may be taken only on specified terms and conditions, including a designation of the time, place, and manner of taking the deposition; (II) that the deposition may be taken only by written questions; (III) that certain matters not be inquired into, or that the scope of the deposition be limited to certain matters; (IV) that the deposition be conducted with only such persons present as the court may designate; or (V) that after the deposition has been taken, the tape or transcription be sealed until further order of the court. The restrictions of 13 V.S.A. § 3255(a) shall apply to depositions taken pursuant to this ~~subdivision~~ paragraph (5).

(ii) If a deposition is taken pursuant to this ~~subdivision~~ paragraph (5), the court shall appoint an attorney to represent the child for the purposes of the deposition.

(f) Protection of Deponents.

(1) Deponent's Counsel and Victim Advocate. A deponent may have counsel present at the deposition and may make legal objections to questions. The deponent shall be treated as a party at hearings on motions pertaining to the deposition. A victim of an alleged crime may have a victim advocate present during the deposition. The deponent may apply to the court for a protective order if the deponent believes that he or she is being subjected to harassment or intimidation. A subpoena issued pursuant to V.R.Cr.P. 17, or other notice of the deposition given to the deponent, shall include notice that the deponent may have the assistance of counsel and the victim advocate as provided herein and seek a protective order as provided in ~~subdivision (f)~~ paragraph (3).

(2) Depositions of Sensitive Witnesses. A person under the age of 16 who is a victim in a prosecution for an offense other than one listed in ~~subdivision paragraph (e)(5) of this section~~, or any person aged 16 or older who is a victim in a prosecution under 13 V.S.A. § 2601 (lewd and lascivious conduct), 3252 (sexual assault), or 3253 (aggravated sexual assault) shall be considered a sensitive witness. Prior to taking the deposition of a sensitive witness, the party seeking to take the deposition shall consult with the other parties and the deponent in an effort to reach an agreement on the time, place, manner and scope of the taking of the deposition. If an agreement cannot be reached, the party seeking to take the deposition shall so advise the court and specify the matters which are in dispute. The court shall then issue an order regulating the taking of the deposition including, in its discretion, a requirement that the deposition be taken in the presence of a judge or special master. The restrictions of 13 V.S.A. § 3255(a) shall apply to depositions. If a party taking a deposition proposes to ask about information that falls within 13 V.S.A. § 3255(a)(3)(A)-(C), the party shall notify the other parties and the deponent of this intent prior to seeking agreement on the scope of the deposition.

(3) Protective Orders. At the request of a party or deponent, and for good cause shown, the court may make any protective order which justice requires to protect a party or deponent from emotional harm, unnecessary annoyance, embarrassment, oppression, invasion of privacy, or undue burden of expense or waste of time. Such orders may include, among other remedies, the following: (1) that the deposition may be taken only on specified terms and conditions, including a designation of the time, place, and manner of taking the deposition; (2) that the deposition may be taken only by written questions; (3) that certain matters not be inquired into, or that the scope of the deposition be limited to certain matters; (4) that the deposition be conducted with only such persons present as the court may designate; (5) that after the deposition has been taken, the tape or transcription be sealed until further order of the court; (6) that the deposition not be taken. In ruling on such request, the court may consider, among other things, the age, health, level of intellectual functioning and emotional condition of the witness, whether the witness has knowledge material to the proof of or defense to any essential element of the crime, whether the witness has provided a full written, taped or transcribed account of his or her proposed testimony at trial, whether the witness's testimony will relate only to peripheral issue in the case, or whether an informal interview or telephone conference with the witness will suffice for the purposes of discovery in the case.

(4) Pro se defendants. A pro se defendant in a prosecution for an offense listed in ~~subdivision paragraph~~ (e)(5) or (f)(2) ~~of this section~~ shall not be permitted to depose the victim directly. In such a case, the court shall appoint counsel for the defendant for purposes of the deposition.

Reporter's Notes—2010 Amendment

V.R.Cr.P.15 was amended by § 26 of Act No. 1 of 2009, An Act Relating to Improving Vermont's Sexual Abuse Response System. By virtue of § 53(b) of the Act, the amended rule was effective July 1, 2009. The present amendments are intended only to conform the style of internal references to the style of the Criminal Rules.

The legislative amendment added V.R.Cr.P. 15(e)(5), requiring agreement of the parties or court approval for a deposition of a victim under the age of 16 in prosecutions for lewd and lascivious conduct and sexual assault; setting standards for the court to apply in approving such a deposition; requiring a protective order with terms designed "to protect the deponent from emotional harm, unnecessary annoyance, embarrassment, oppression, invasion of privacy, or undue burden of expense or waste of time"; and requiring appointment of an attorney for the child for purposes of the deposition.

V.R.Cr.P. 15(f) was amended to adapt its protective order provisions to other provisions of the Act and to provide that a pro se defendant may take the deposition of a victim of an offense covered by the amended rule through counsel appointed for the defendant for that purpose.

Section 27 of the Act requires the Court Administrator and other relevant state departments, and invites the Vermont Bar Association and American Civil Liberties Union, to report to the Senate and House Judiciary Committees in January 2011 on the effect of the amended rule on disposition of cases covered by it. By virtue of Section 27a, the amended rule sunsets on July 1, 2011.

2. That these rules, as amended, are prescribed and promulgated to become effective immediately. The Reporter's Notes are advisory.

3. That the Court finds that these emergency amendments must be promulgated without resort to the notice and comment procedures set forth in Administrative Order No. 11, because the amendments as adopted by the Legislature in § 26 of Act No. 1 of 2009 took effect July 1, 2009, and the present amendments are stylistic only.

4. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 14th day of January, 2010.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice