

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF EVIDENCE
APRIL 14, 2022 MINUTES

The Evidence Rules Committee held a virtual meeting on April 14, 2022, at 2:00 PM via Microsoft Teams.

Present: Hon. Harold Eaton, John J. Boylan III, Mimi Brill, H. Dickson Corbett IV, Pamela Marsh, Karen McAndrew, Elizabeth H. Miller, Jennifer K. Rushlow, Claudine Safar

Guests: Zachary Hozid of Disability Rights Vermont, Rebecca Turner of the VT Office of the Defender General

1. Committee Membership

The committee has one member vacancy to fill. The committee discussed possibilities for potential new members. The criteria for member selection includes needs of the committee with regard to subject matter expertise, practice area, and geographic and demographic diversity. The committee is asked to name three names for potential appointees and identify one top recommendation. Members discussed various areas of substantive expertise where additional representation would be beneficial. Member of the public Rebecca Turner voiced support for a designated seat for the Defender General or a designee.

The committee then discussed whether to focus on restructuring the committee at this time rather than focusing on filling the one open seat. The committee voted on a motion “to recommend that the Supreme Court consider redefining the membership of the committee under Administrative Order 23 to include designated seats, with the representation to be determined by the Vermont Supreme Court, and not more than fifteen members.” The motion passed with a unanimous vote. Dickson and Jenny will work on presenting a motion to the Supreme Court.

The committee discussed whether the motion to the Supreme Court should be accompanied by names of potential members. The committee voted on a motion “to post publicly-available recruiting notice with the goal of ensuring that our nomination reflects qualified candidates and our commitment to diversity.” The motion passed with a unanimous vote. Member of the public Zachary Hozid voiced support for including a member practicing in the non-profit sector.

2. Old business

a. Completed revisions (2011-2020)

- VRE 404, character evidence in civil cases
- VRE 408, how offers of compromise can be used in mediation and alternative dispute resolution
- VRE 510, inadvertently disclosed information
- VRE 606, allowing inquiry amongst jurors as to whether reporter made error on verdict form
- VRE 804(a), discussed extensively, certain matters resolved with regard to expanding scope of rule, amendments were made to make language consistent with legislative efforts to replace offensive and outdated language
- VRE 902, blockchain records
- VRE 804, Resolved question of whether VRE 804 should be amended to reflect changes to understanding of unavailability. Declined to take action.

3. Open Matters

- Amendments to VRE 807(c) and (f) were posted for public comment in 2019. There was one typographic error in the final voted version. At next meeting, the committee will take up that clarification and then send back to Supreme Court. This does not require public comment because it is not a substantive change. Dickson will circulate redlined version of the rule ahead of next committee meeting.
- In 2013, the committee began considering whether to restyle the VT rules in the manner of the FRE, has not been undertaken as a project yet. Discussed several times, but has not been undertaken. Also, our rules still contain gender problems, for instance there are a number of areas where assumption is made that the witness will be male. Moving forward, the committee is inclined to table the restyling, but Karen is going to look at the gender pronoun issue.
- In 2019, the committee discussed whether there should be privilege for communications with non-attorneys employed for referral purposes, request arising out of concerns expressed from VBA and ABA. Moving forward, committee wants to check with them about how they feel about the issue given the passage of time. We need more information about the nature of the problem to be solved and the need for an amendment to the rules to help solve the problem. Pam is point person.
- In 2019, the committee began considering privilege for communications between participants in lawyers assistance program. We were waiting to see whether amendment would be recommended by VT Commission for Attorney Wellbeing. Moving forward, the committee requires more information as to whether this privilege was recommended or not. Liz will follow up with Mike Kennedy.
- Committee had discussed whether to amend rules to include victim crisis worker privilege, which currently exists in statute (12 VSA s. 1614). Committee agreed to close out this agenda item.

4. Future Action Items

The Committee will consider what items to take up in the future. None identified today. Dickson provided a summary of the biggest recent changes to the Federal Rules of Evidence in recent years, including:

- FRE 702, slight tightening for admissibility criteria for expert opinions
- FRE 404(b), to reflect concern that rule be more rigorously applied for prior bad acts in criminal cases
- FRE 803, hearsay exceptions, regarding confrontation problems, business records, public records, ancient documents
- FRE 606(b), how to account for racial bias or possibly other constitutional violations during deliberations
- FRE 611, more guidelines for use of illustrative aids and demonstrative exhibits during trial
- FRE 615, whether rule is only about physical exclusion of witnesses from courtroom, or also preventing witnesses from accessing trial testimony in any form during trial.
- Prior consistent statements, whether there is a difference between statements that are admissible only for rehabilitation versus substantively, and whether difference is a workable or meaningful difference.
- Considering whether social media communications are being handled appropriately by existing hearsay rules, whether they are being excluded too much or not enough, or being admitted but

only through misinterpretation of existing exceptions. Considering whether new rules are needed for that.

- Discussion regarding whether certain hearsay exceptions continue to be justified by existing social science understandings.

Dickson will circulate a written summary of these recent changes to the Federal Rules of Evidence ahead of the next meeting.

Meeting adjourned at 3:43 PM. The next meeting will take place on Friday July 15th at 10:00 AM EST.