

September 29, 2011

Robert Greemore, Court Administrator  
Vermont Supreme Court  
109 State Street  
Montpelier, VT, 05069-0701

**Re: 2011 Annual Report of the Advisory Committee on the Rules of Evidence**

Dear Mr. Greemore:

This letter constitutes the Committee's annual report to the Vermont Supreme Court. Because the Chairperson is out of the country as of the date of this filing, he previously reviewed a draft of this report and authorized the reporter to file the report on the Committee's behalf.

The Committee is making three requests of the Court. The requests are explained below and will be summarized at the conclusion of this report.

The Committee met once since its last report. On December 10, 2010, the Committee considered a proposed amendment to V.R.E. 510 based upon F.R.E. 502. The Federal rule was adopted to protect against waiver by inadvertent disclosure and complement the "claw-back" provision of the civil rules. The Committee agreed to recommend the amendment and suggested several minor changes which the reporter incorporated. After email exchanges, the Committee authorized the reporter to transmit the proposed amendment to the Court to circulate for comment. The Court circulated the proposal on March 31 and ordered that comments be sent by May 31. Only two minor stylistic comments were received. The Committee declined to adopt these suggestions.

The reporter began discussions with the Chair of the Civil Rules Advisory Committee and James Dumont with regard to the proposed rule and a proposal to amend V.R.E. 408. These discussions were undertaken because the two evidence rules overlapped in some respects with two proposed civil rule amendments to Rule 16.3(g) and 26(b)(4). After a considerable period of discussions, this reporter received a letter from James Dumont on September 19 which contained suggestions to insure that those reading the proposed evidence amendments would be aware of the implications of the Uniform Mediation Act and the proposed civil amendments for the proposed evidence rules amendments.

As a result of the Civil Rules Committee suggestions and this Committee's email deliberations, the Evidence Committee added a section (c) to the proposed Rule 510 amendments and supporting Notes. This Committee is requesting that the Court adopt the attached revised

proposed amendments to V.R.E. 510 without circulating the revision for comment. Because of concerns of the Civil Rules Committee, we request that V.R.E. be adopted at the same time as the Court adopts the proposal to amend V.R.C.P. 26(b)(4) which affects the general waiver provision of V.R.E. 510(a). The revision to proposed V.R.E. 510 is not substantive. It merely provides a “heads-up” to the bar to consult related rules. Adopting the revised proposal without circulation for comment would facilitate the Civil Rules Committee desire to adopt these two rules simultaneously and avoid possible bar confusion.

Partly as a result of collaboration with the Civil Rules Committee, this Committee is proposing an amendment to V.R.E. 408 which governs admissibility of offers and acceptances made in attempts to compromise a claim and statements made in conjunction with these efforts.

The Uniform Mediation Act, which governs “mediation communications”, provides much more specific rules for the subset of statements made in the mediation context. Therefore this Committee has proposed new section V.R.E. 408(c) which refers to the UMA and the amendments to V.R.C.P. 16.3(g) proposed by the Civil Rules Committee to harmonize 16.3(g) with the UMA. (The Committee proposed that the Court adopt an amendment to the Reporter’s Notes to V.R.E. 408 in 2007 to apprise the bar of the impact of the UMA, but the Court declined to circulate the proposed change for comment. Kinvin Wroth and the Court Administrator deemed it inappropriate to amend the Reporter’s Notes without a related amendment to the rule itself. This Reporter has subsequently worked with the Civil Rules Committee in an attempt to insure that the two Committees response to the UMA was consistent.)

This Committee deferred proposing an amendment to V.R.E. 408 itself when the 2006 amendments to F.R.E. 408 were adopted for two reasons. First, the Committee disagreed with the controversial exception in the Federal amendment for certain statements made to a public office or agency. Second, the Committee thought it prudent to see if other states would adopt other provisions of the Federal amendments. In light of the desire to amend V.R.E. 408 in response to the UMA, this Committee is recommending Vermont adopt the majority of the Federal amendments because the revisions clarify issues which have arisen under the rule and provide superior organization and greater clarity than the current version.

The Committee is also requesting that the Court adopt two rules which were circulated for comment on January 2, 2008. The Chair received no significant comments to the proposed amendments to V.R.E. 404(a) and 606(b). Both proposed amendments would clarify the Rules and are consistent with Vermont practice. The Committee dropped the ball and did not request that the Court adopt the rules in its 2008 report to the Court or by communication addressed specifically to those two Rules.

In summary, the Evidence Rules Committee respectfully requests the following:

1. The Court adopt the revised proposed amendment to V.R.E. 510 without circulating the added section (c) for comment;
2. The Court circulate the proposed amendment to V.R.E. 408 for comment; and,

3. The Court adopt the proposed amendments to V.R.E. 404(a) and 606(b).

I have attached the proposed amendments for 1 and 2 above. We will have to rely on kind help of Deb Laferriere for the amendments proposed in 2007 and circulated in 2008 (number 3 above) since I cannot locate the circulated version in electronic form.

Respectfully submitted with apologies for our lapses,

Kenneth Kreiling, Reporter

for the Advisory Committee on the Rules of Evidence

cc: Kinvin Wroth, James Dumont, Deb Laferriere