

**VERMONT SUPREME COURT  
ADVISORY COMMITTEE ON RULES OF EVIDENCE  
JANUARY 25, 2019**

Attendees: Liz Miller, Karen McAndrew, John Pacht, Mimi Brill, Sandy Levine, John Boylan, Beth Robinson, Scot Kline, Pam Marsh (by phone) Absent: Ken Kreiling, Claudine Safar, Clara Gimenez

Guests:

Jennifer Pullman, Vt Childrens Alliance  
Chris Fenno, Center for Crime Victim Services  
AJ Rubin, Disability Rights VT  
Rebecca Turner, Supervising Attorney Defender General Office  
Zach Hozid, Disability Rights VT

1. Blockchain update: Reported on adoption of rule and information from legislative counsel regarding no new blockchain-related bill pending. Sandy Levine suggested that the committee offer to host or facilitate a CLE for the VT Bar on the issue, so that the issue the Committee has flagged could be discussed with others in the Bar prior to determining whether to pursue changes. Pam Marsh will follow up with VT Bar and suggest it. Oliver Goodenough likely would be willing to be speaker.
2. 804A discussion: The Committee asked guest speakers to present on their concerns/comments regarding a proposed change to 804A to conform the language to that adopted in 807 (and elsewhere in VT law).

Chris Fenno: Provided written testimony, attached. Regarding 804A: Center supports language in the draft. Wants other changes too, as Disability Rights will propose. Wants committee to consider expanding 804A list – element of bodily injury or at least domestic assault crimes under 807. Individuals with disabilities are much more likely to experience assault/abuse – they are most at risk and least likely to report. Children find it hard to participate in court process, especially if disabled. Leads to difficult choices for prosecutions. In response to confrontation clause issues, while credibility and in person testimony is important, for children difficult when in person testifying requires confrontation of defendant. Unsolicited statements in this type of case actually may be more reliable.

Rebecca Turner: Doesn't see this as a technical correction but instead a substantive change that concerns confrontation clause and due process. 804A was a legislative creation that was an exception to what had happened previously and it should be narrowly construed. Legislature did not want a broad capture for who would qualify for this hearsay exception. Case law suggests that we should look narrowly at what Legislature intended for this exception and narrowly draw it when confrontation clause issue comes into play. Face to face testimony is best way to ensure that defendant's rights are protected. There are no VTSC case reviewing 804A or 807 in the context of whether it consistent with the confrontation clause. Cites to *Craig v. Maryland* and *U.S. v. Cox*

case. Also is concerned that Section 147 standard is broader than the ADA – for example, it doesn't even say "substantial" impairment, just impairment. Does not believe this committee has authority to go beyond legislative intent. Practically this change will create increased litigation and will burden/clog the court. For example, would PTSD qualify? What sort of litigation may arise over its scope? 804A also should have in its background the fundamental reliability of in court statements – that's why hearsay isn't allowed except narrow exceptions.

Zach Hozid – Disability Rights. DVT supports the amendment as is – it is respectful language; consistent with other laws and with 807. Believes it is appropriate to make these amendments, particularly as are often used together. Title 1 language adopted a few years ago came about after the Legislature put a committee together in order to come up with respectful language. Not meant to substantively change the law. Wanted it to spread to other statutes. Title 18 utilizes a standard of "substantial disorder of thought" whereas Title 1 is a little broader. There are still other indicia of reliability that will be present through the rule guardrails. The change promotes access to justice. Historically the rule has changed several times – it didn't even originally apply to people with disabilities, only kids. These minor changes will make it more respectful and inclusive. Disability rights also has other proposals: 804A bodily injury language; 807 has a number of listed crimes but does not include crimes against vulnerable adults under 13 VSA 1376-81 – they'd propose putting that in. They've been arguing for that treatment already through the ADA but it would be better if it were in 807. Regarding Rebecca Turner arguments, the only difference between Title 1 language and the ADA is the word "substantial." The VT Fair Housing statute which is the state equivalent of the ADA here also doesn't have the word "substantial."

Jennifer Pullman: Vt Childrens Alliance –Not commenting specifically on the proposal. But would like to advocate for expansion of 804A, 807 to protect children who are subjected to physical abuse not just sexual abuse. The landscape has changed – we now have SIUs in every county. Every child is now brought to a center where video and audio recording happens and trained forensic interviews occur. Those are available to both sides. Much better microscope on reliability now than we did before – so I'd suggest we would do this now. There should be no difference between sex and physical abuse. That behavior creates trauma in similar ways – in fact sometimes physical worse because of "grooming" that can occur in sex abuse cases. In most counties, the vast majority of cases are sex abuse so there isn't a deluge/admin problem to handle these. So strongly ask that we reconsider the issue we raised before. More than half of the states extend protections to physical abuse (or even witness in some states).

After testimony, the committee asked questions and a general discussion ensued:

Boylan Q: No one is going to disagree generally with expansion to these other areas. What we'd need is some sort of evidence as to why it matters practically – what is the expansion protecting and what is the evidence. Why do we need these changes (both wording and new changes advocates ask for).

Judge Pacht – what does “availability” mean and how does it relate to confrontation. For example, if the child is there but at the time remembers nothing – how does that comport with confrontation. In terms of expanding the rule, you’ll be expanding court time. Is the expansion warranted – psychiatric issues as stated in the language change could be quite broad.

Judge Kline: 807 and 804A deal with different things. It is not driven by protection of the witness under 807 since they still need to be available. Two separate hearings etc.

Mimi: Two separate issues under and 807 v. 804A Two separate hearings quite extensive. Worried that if we had to do that for all domestic violence cases courts would be overwhelmed. DUI with child in car is “cruelty” etc. – what is the line drawing that would occur. Worried that this is supposed to be a very narrow exception. There could be a confrontation clause issue in the Rules already so am worried about the nebulous categories and definitions. Court time could be spent on these issues. Worried about expansion and court time.

Pam does not think we should look at expansion beyond the language change noticed in the agenda. On the language change, intended to be a technical correction only. Not supposed to require extra court time.

Sandy – As to the changes that are proposed, is concerned it creates a substantive expansion.

Karen: share some of the concerns – DSM diagnosis are one thing, there are all sorts of disabilities that don’t meet DSM – so there may be a layer of confusion than others. Where is the line drawing.

Justice Robinson: Would be helpful to have a line up of the definitions and wording, in Title 1, Title 18 VT Fair Housing and ADA

AJ Rubin then offered testimony: Both these rules are focused on the same person in any individual case; can’t emphasize enough that we should be using respectful language. Psychiatric disability is the right wording; “mental illness” was not changed in certain places because there were so many precedents and it would be confusing. On the issue of reliability – don’t think you can assert that changing the definition would have any impact on reliability. The people that it is directed at don’t have significantly different reliability indicia. Why did we change 804 – because people would not be vindicated if certain out of court statements couldn’t come in. We recognized the need to protect children and vulnerable victims so we changed it. There was a reason why we created this rule and that is why we did it – justice.

The definitions proposed are consistent with the VT Fair Housing Act – so there is VT law on the scope and definition. Alarmist fears of floodgates opening should be rejected. VTSC cases on 804A – there are 37 cases overall, only 3 involved a witness with disability. And none of those were regarding what the disability was.

Further committee questions for AJ Rubin: For psychiatric disability, concerned that “grossly” and “substantially” are missing; what is the significance in Title 18 v. VT Fair Housing v. Title 1?

Also interested into whether “intellectual disability” is an expansion that has definition/can be managed.

AJ Rubin response: Title 18 is about taking away liberty v. 804A indicia of reliability.

Sandy Levine question: What is the practical effect of not adopting the new language – those that would fall within it would get 807 protection, but their out of court statement would not admitted?

Rebecca Turner response: Suggests the committee check times when legislature has considered and rejected broadening of 804A. Committee doesn't have authority to make this expansion.

Pam: Is it true that very few other states have an 804A that includes those beyond children – other states versions of 804A?

Committee discusses next steps – no action on amendment; will continue discussion at next meeting. All guests given next date and told that Committee reporter will contact them to remind them of date in March.

Committee requests further work/research on:

- 1) memo refreshing committee on what the committee has done in the last few years re: 804A and 807, and what interactions there have been with the legislature. Chair recalls that we prepared a memo for Leg Counsel last year; will find and update.
- 2) Line up of various definitions noted in testimony today: Title 1 Title 18, Vt Fair Housing, ADA, so that committee can see difference and impact.
- 3) Any info on what other states have done on this issue
- 4) Justice Robinson: 804A was adopted as a statute initially, not as a Rule – does that affect the ability of the committee and the Court to change it?

New business: Justice Robinson informed the committee that the Chief Justice's Commission on Lawyer Wellness has finished; one of the recommendations involves VRE changes for Lawyer Assistance Project privilege. Committee should take it up, revisiting also the earlier request of Bar counsel re: lawyer referral service perhaps too.

Meeting adjourned at 3 p.m. Next meeting scheduled for March 29 at 1 p.m., location TBD.