VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF EVIDENCE
JULY 24, 2019 MINUTES

The Evidence Rules Committee held a meeting on July 24, 2019 at 3:00, at the Vermont Supreme Court.

Present: Elizabeth Miller, Chair. Hon. Scot Kline (by phone), John Boylan, Mimi Brill (by phone), Dickson Corbett, Clara Giménez, Sandy Levine, Pam Marsh (by phone), Claudine Safar (by phone).

Guests: Rebecca Turner, Office of Defender General

1. Approval of minutes of May 30, 2019 meeting. Mimi Brill requested a sentence to be added regarding the reasons for her request that this committee reconsiders removing the term "psychiatric disability" from Rule 804. The change was made and minutes were approved.

2. Public comment. Rebecca Turner suggested some changes to the draft of Rule 807 that the Defender General had previously submitted. Although the original proposal suggested the term "sufficient evidence" to define the burden of proof, the Defender General would prefer "clear and convincing," which Erica Marthage had suggested at the May 30 meeting. Rebecca Turner also emphasized the importance of making the issue of causation of trauma as clear as possible. Suggests adding "caused by the presence of the party," to any pertinent subsection.
In terms of level of trauma, it should be "Such that the witness is incapable of expressing himself or herself considering the matter," mirroring the language of Rule 601.

3. Rule 807. Discussion of proposed drafts (Drafts attached to minutes). Pam Marsh noted that standard should not be clear and convincing in civil matters. Maybe rule needs to have a separate section, but she prefers the language "sufficient evidence."

John Boylan- disagreed with the Defender General proposal, observing that it goes far beyond what the Vermont Supreme Court has asked the Committee to do and beyond the US Constitution requirements. Quoted Bergquist, "standard does not require substantial trauma." See paragraph 62. John Boylan also finds that language from Rule 601 should not be applied to define level of trauma: if the standard of 601 applied here, the witness would be deemed incompetent to testify under any condition. Here, the determination necessarily assumes competence; the question is whether accommodations are needed to minimize trauma . John Boylan preferred draft labeled as "Option 2" (follows closely language from Bergquist). It does the right thing for vulnerable witness . In Option 2, however, Boylan is concerned about the sentence "will cause trauma to the witness and the trauma will impair the witness' ability to testify" because it suggests that it is a two-part test." Replace with "which", or rephrase. Use the Reporter's Note to clarify level of trauma and emphasize the need to find that trauma is caused by party's presence.

Many members of the Committee agreed that the linking the causation to the defendant/party's presence is key. The Committee worked on possible options to make this issue as clear as possible. The option that seemed more satisfactory was "requiring the witness to testify in court and seeing and hear the party will result in trauma caused by the presence of the party…" The Committee also

considered "requiring the witness to testify in court and seeing and hear the party will result in trauma." The Reporter's Note can elaborate and clarify further, using the language in *Bergquist* and *Craig*.

With regard to the standard of proof definition, the Committee was divided. Mimi Brill and Pam Marsh expressed a preference for "sufficient evidence." Sandy Levine would prefer the articulation of a specific standard in the rule. Judge Kline would also prefer a rule with clear guidance. His preference would be to set the rule at "preponderance of the evidence," and leave it up to the Legislature to go further, if they so choose. Dickson Corbett favors preponderance of the evidence as the minimum set in the rule, although in criminal cases it would be a good practice for prosecutors to ask judge to apply a clear and convincing standard. Maybe suggest that in Reporter's Note.
Mimi Brill noted that, if the standard is set incorrectly, the issue will end up being litigated and the committee will have to amend the rule again. A flexible, open standard allows for interpretation consistent with new case law. For example, *Bergquist* does not address the constitutionality of the rule under the Vermont Constitution. There may also be questions about the vitality of *Craig* after *Crawford v. Washington*. Thus, the committee should leave room in the rule for further developments in this area. The Reporter will bring some of the cited cases to the next meeting and will brief the committee on this question.

4. There being no other business, the meeting was adjourned at 5:07.