

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF EVIDENCE
MARCH 29, 2019
MINUTES**

The Evidence Rules Committee held a meeting at 1 p.m. on March 29, 2019, at the Vermont Supreme Court.

Present: Elizabeth Miller, Chair; Hon. Beth Robinson, Hon. Scot Kline, Hon. John Pacht, John Boylan, Mimi Brill, Clara Gimenez, Sandy Levine, Pam Marsh, Claudine Safar (by phone).

Absent: Karen McAndrew.

Guests:

Zach Hozid, Disability Rights VT

Rebecca Turner, Supervising Attorney Defender General Office

1. Public comment.

Zach Hozid reiterated Disability Rights VT support for the proposed changes to Rule 804, noting the importance of using respectful language to define individuals with disabilities, and also to keep this rule consistent with other rules.

Rebecca Turner expressed the Defender General's Office position: the proposed change actually expands the categories of persons covered under 804A. Ms. Turner points to the new Vermont Supreme Court decision on 807 as highlighting the issue now raised about 804A.

2. Approval of minutes. Minutes approved unanimously. It is noted that minutes include an attachment with written comments submitted by Chris Fenno (Center for Crime Victims Services) at the last meeting.

3. Discussion of 804A.

The Committee was briefly updated on the issue of whether this Committee has authority to amend or expand a rule enacted by legislative action. There is some tension between the last sentence of 12 VSA §1, (barring change by rule of a statutory action repealing, revising, or modifying an existing rule or amendment) and the Vermont Constitution, ch. II, sec. 37.

Regardless of this tension, it was noted that there are several examples of court rules that seem to change legislatively adopted rules or amendments in the name of implementation or clarification. Thus, if the Committee finds that the proposed changes are simply a clarification or technical correction, it is probably within its purview. If the Committee finds that the amendment is an expansion of the existing rule, the possible conflict with the legislative intent should be further explored.

Mimi Brill explained why the recent Vermont Supreme Court's decision, *State v. Bergquist*, affects this Committee's consideration of 804A. Mimi Brill does not see this amendment as a technical correction. The term "psychiatric disability" is very expansive, compared with definition of "mental illness."

Judge Pacht emphasizes the importance of face to face confrontation whenever possible to ensure compliance with the Confrontation Clause. The *Berquist* decision sends the message that we should reserve rules 804A and 807 to deal with exceedingly rare cases, not going the opposing direction and expanding the rule.

John Boylan agrees: we need to be sensitive to defense bar concerns.

Pam Marsh agrees that the rule should not be expanded; she understands the frustration of victim advocates but the rule protects adequately in the cases where it is absolutely needed.

Judge Pacht and Sandy Levine noted that the change of language in 804A may affect precedent and confuse the interpretation of the rule. Several members also noted their concern that extending the application of the rule will necessarily result in additional 804A and 807 hearings, impairing the efficient disposition of cases.

The committee agrees, however, that adding the term “intellectual” to clarify the scope of “intellectual and developmental disability” was a needed clarification that does not significantly alter the scope of the rule and makes it comport with the new definitions in 1 V.S.A. §§146 and 147.

Thus, the proposed amendment was modified as follows:

- (a) Statements by a person who is a child 12 years of age or under or who is a person with a mental illness as defined in 18 V.S.A. §7101(14) ~~or developmental disability as defined in 18 V.S.A. § 8722(2)~~ intellectual, or developmental disability as defined in 1 V.S.A. §§ 146, 148 at the time the statements were made are not excluded by the hearsay rule if the court specifically finds at the time they are offered that [...]

Judge Pacht moved to vote on the proposed amendment. Boylan seconds. The amendment passed unanimously.

4. Other business.

- a. The Committee discussed 807 and gave the reporter some direction to amend rule as to make it consistent with the *Berquist* decision. Justice Robinson recused herself from this discussion. The proposed amendment will be in next meeting’s agenda.
- b. Liz Miller reminded the committee that a future meeting will be dedicated to privileges discussion. There are three proposals to be considered: privileges for participants in the Lawyer Assistance Program; for prospective clients using the Lawyers Referral Service, and an update of the rule to reflect the already existing Crisis worker/victim privilege. Justice Robinson noted that the Commission on Attorney’s Wellbeing contains a recommendation for the implementation of a robust support system for lawyers, perhaps handled by a new, independent entity. It may be important to wait until the format of this support system is clearer so that we can better tailor the language of privilege.

5. Future meetings: the next meeting is scheduled for May 30 at 3:00pm

Adjourned 2:34.