**VERMONT SUPREME COURT**
**ADVISORY COMMITTEE ON RULES OF EVIDENCE**
**MINUTES**
**MEETING OF MAY 30, 2019**

The Evidence Rules Committee held a meeting on May 30, 2019, at the Vermont Supreme Court.

Present: Elizabeth Miller, Chair. Hon. Scot Kline, Hon. John Pacht, John Boylan, Mimi Brill, Clara Giménez, Pam Marsh, Karen McAndrew, Claudine Safar (by phone).

Guests: David Carico (by phone), Zachary Hozid, Erica Marthage, James Pepper, AJ Ruben, Dawn Seibert, and Rebecca Turner.

1. Approval of minutes of March, 2019 meeting. Approved unanimously.
2. New business:

Discussion of proposed amendment to Rule 807. The Committee heard input from several invited guests as described below. There were no other members of the public present.

**Rebecca Turner,** Office of the Defender General, offered an alternative amendment proposal. The Standard of proof should be left at "*sufficient*." That way, there is no commitment to clear and convincing or other standard. There may be constitutional arguments for a higher standard, particularly under Article 10 of VT Constitution. Substantive due process under VT Const requires that "Defendant must be present at all stages of proceedings"

**Dawn Seibert,** Office of Defender General, also noted that there are issues regarding 807 that are still percolating through the court, including a case she recently litigated. There was no VT Supreme Court decision, as the State ultimately conceded error, but the question is likely to reappear. Amendment should leave the term "trauma". Do not replace with serious emotional distress, but add "caused by the presence of the party" to make clear that it must be the exclusive cause of the trauma. The level of trauma should be defined as "Witness is incapable expressing himself or herself concerning the matter, tracking the language of Rule 601. Mirroring 601 also puts the judge on the active role to inquire directly from the witness and conduct some independent determination, rather than rely on expert testimony. Crux is to link the language with 601 so that there is no suggestion of a lower standard. Also in section f, add "by the transmission" so that the court makes a specific finding that, in close-circuit proceedings, the mere transmission is traumatic. Staying present in some form while witness testifies is a crucial right of the defendant that should not be eliminated absent a compelling need. It is important in assessing credibility the witness: does he look the defendant, witness conduct, etc. In fact, this was one of the errors in the recent case Seibert litigated

**Zach Hozid,** Disability Rights VT. Points out that the Court in *Bergquist* gave pretty narrow guidance: standard of proof left at preponderance of evidence as required in *Craig*. This rule is a balancing act that weighs the rights of a victim against a defendant's rights. Although DRVT represents a large number of people with disabilities, their requests for accommodations are very rare. Hozid reminded the Committee of the difficulty to testify for people with disabilities, and how some witness refuse to testify without accommodations. In fact, some prosecutors refuse to put disabled individuals on the stand to avoid trauma. The procedures are necessary and should not be

unfairly restricted. To raise the standard of proof beyond what is constitutionally required, there must be a public policy interest. If that is the case, then this is a policy question for the Legislature. Hozid summarized other points submitted ahead of the meeting in letter from Disability Rights VT to the Committee, which is incorporated to and attached to these minutes.

**Erica Marthage**- The State would agree to a heightened standard of proof, such as clear and convincing, although preponderance of evidence is constitutionally sufficient. It will not make a difference to the State and it may make a difference to the Defendant.
The State would also be comfortable with a rule that gave discretion to the judge to meet to the witness to make the determination. The State supports the current language in the rule and continue tying the standard to impairment in communication, without demanding a measurement of the "magnitude of trauma" as suggested by David Carico's memo.
The State would object to proposals demanding an independent forensic evaluation: the child treating therapist and/or medical provider is in the best position to assess the impact of providing testimony. Any bias can be investigated in cross examination. Don't retraumatize a child with anther adult asking intrusive questions. If defendant cannot be forced to be examined by prosecution we should not we force a child to have an independent examination.

**David Carico** Provided comments on the memo submitted to the Committee, which is incorporated to and attached to these minutes. Carico took issue with the assertion that preponderance of evidence meets the constitutional minimum. Even if *Bergquist* reaches that conclusion, other jurisdictions disagree. Carico urged the addition of an independent determination by the court, instead of relying on expert testimony. If the object of the inquiry is whether the witness can reasonably communicate, judges are better to assess the witness ability to testify. Therapists may over-estimate and can cause more harm that good if child is over protected. The risk of causing short term anxiety to a child needs to be weighed against the long-term impact of a possible erroneous conviction. Carico proposed adding factors to the rule, as detailed in his memo. Carico also noted the term "party" is confusing.

The Committee discussed the issues raised, focusing on the following points:

a) There was an agreement that the witness should be referred to as "the witness" not the "vulnerable witness"
b) The appropriate standard of proof. The Committee did not reach an agreement. Some member supported staying close to the Court's mandate (Boylan, Miller), while others favored a heightened standard of proof. (Safar, Marsh). Several members pointed out that amending the rule beyond what is required by Constitution should be left to Legislature. (Kline, Pacht, Miller). There was some interest in the "sufficient evidence" standard, perhaps with a Reporter's note, as way to send it back to the Legislature.
c) The level of trauma that must be shown and how is defined. The committee discussed whether trauma should be further defined, or replaced by other term such us serious emotional distress. Judge Pacht noted that serious emotional distress is a more immediate effect, whereas trauma may be short or long term. Dawn Seibert noted that in case law is defined as something more than fleeting or momentary stress. David Carico noted that the rule should require both a finding of trauma and inability to testify and the requirements should not be conflated. Overall, the committee expressed a preference for the term trauma.
d) Causation of the trauma. There is agreement that the causation of the trauma must be the presence of the defendant.

e) The level of impairment of communication and how to define it. In response to Defender's General proposal, Karen McAndrew noted that there is a difference between reasonable communication and incapacitation. Matching the language of this rule with Rule 601 is not necessary or advisable. – Miller agreed. Boylan refers to *Bergquist* paragraph 68 foot 16: that the child will be substantially impaired. Others refer to the language cited with approval in *Bergquist*, at 69: "trauma would impair her ability to testify."
f) Clarify that the presence of the party can mean the transmission of the image of the party in subsection related to close circuit.
g) Brill proposed that the committee consider removing "psychiatric disability" and replacing it with "mental illness," the reason being that when the committee amended the rule it unduly expanded the category of conditions covered. Psychiatric disability in Title 1 encompasses a larger number of conditions than "mental illness" as defined in the pertinent statute.

The Committee decided to convene again and consider two drafts: a proposed amendment following the Bergquist mandate and another following the Defender General's proposed "sufficient evidence" language, and addressing all other issues as discussed above.

3. Old business. Reporter informed that Rule 804 is ready to go out for comment. It will be sent out when Reporter returns in July.
4. Schedule of future meetings: a new meeting was scheduled for July 24 at 3:00 pm
5. Adjournment at 4:45.