VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF EVIDENCE
SEPTEMBER 6, 2019 MINUTES

The Evidence Rules Committee held a meeting on September 6 2019 at 3:00, at the Vermont Supreme Court.

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

Guests: Rebecca Turner, Office of Defender General

1. The minutes of the July 24, 2019 meeting were circulated and approved.

2. Public comment. Rebecca Turner reiterated some of her previous comments for changes to the proposed draft of Rule 807, including the Defender General's concern that setting the standard of proof as preponderance of the evidence may be insufficient under the Vermont Constitution.

3. Rule 807. As required at the previous meeting, Clara Gimenez provided a summary of a previously submitted research memo, addressing the Committee's questions on the impact of the *Crawford v. Washington* decision on *Craig v. Maryland,* and on possible challenges to Rule 807 under the Vermont Constitution.

   The Committee discussed two proposed options (Drafts attached to minutes): One option set the standard of proof at "preponderance of the evidence," essentially reflecting the instruction set by the Court in *Bergquist* as the standard needed to satisfy the Sixth Amendment as interpreted in *Craig.* Some members supported this option because it provides clear guidance to the courts by stating expressly a standard of proof. In addition, because the rule is a product of legislative action, this option leaves it up to Legislature to decide whether the rule should be amended in other respects beyond what *Bergquist* requires. The second option used the term "sufficient evidence" to define the standard of proof, leaving to the Reporter's Note a discussion of the possibility that a higher standard of proof would be in conformity with the Vermont Constitution in a criminal case. There were concerns, however, about relegating a critical element of the rule to the Note. Some members, including Mimi Brill and Pam Marsh, expressed support for this option because it allowed the maximum level of flexibility to adapt the rule to subsequent developments in case law, including a demand for a heightened standard in criminal cases, while permitting a lower standard in civil matters.

   Most members expressed concern with the adequacy of the preponderance of evidence standard and with the vulnerability of the rule to further constitutional challenges. Some members were also concerned that setting the standard at preponderance of the evidence

could be read as leaving the parties without the opportunity to argue for and the court without discretion to apply a higher standard.

Ultimately, a majority of members agreed that amending the language to read "only upon a finding by the minimum standard of preponderance of the evidence" met the requirement set in *Bergquist,* while leaving some flexibility and opportunities to argue for a higher standard of proof. The amendment that passed is attached to the minutes.

The committee reviewed the proposed amendments of sections (c) and (f), suggested minor edits, and approved the previously proposed language related to causation, which mirrors the guidance from the *Bergquist* decision and was discussed at a previous meeting. With regard to the level of impairment caused by the trauma, a motion to replace the language "which would substantially impair the ability of the witness to testify" with "such that the witness is incapable of expressing himself or herself concerning the matter" failed for lack of a second.

The approved amendments to sections (c) and (f) are attached to these minutes.

Mimi Brill reminded the Committee about the concerns with the use of the term "psychiatric disability" and proposed reversing back the term person "with mental illness," as the Committee has done already with Rule 804A. The reporter will add this correction to the draft and bring it to the next meeting for a formal vote.

Karen McAndrew observed that, unlike subsection (d), section (f) does not contain any language allowing the court to make modifications to the rule when a defendant is appearing pro se. Like in section (d) for recorded testimony, the court needs discretion to make modifications so that pro se defendant can properly cross examine a witness who appears by two-way CCTV. The reporter will add the same language to section (f) and bring it to the next meeting for a formal vote, along with a proposed Reporter's Note for all changes.

4. There being no other business, the meeting was adjourned at 4:50.