

VERMONT SUPREME COURT
Advisory Committee on the Rules of Evidence
2017 Annual Report
July 10, 2018

The Advisory Committee on the Rules of Evidence submits this report to the Vermont Supreme Court pursuant to Administrative Order No. 23 §4. This report covers calendar year 2017. During this period, the committee convened on February 24, March 27, and September 19 to consider amendments and other matters pertaining to the Vermont Rules of Evidence.

I. PROMULGATED AND RECOMMENDED AMENDMENTS:

During this period, there were no newly promulgated or recommended amendments.

II. REVIEW OF AMENDMENTS OF CIVIL RULES RELEVANT TO EVIDENCE RULES

Remote appearance as “availability” for purposes of V.R.E. 804.

Throughout the year, the Evidence Rules Committee monitored and discussed the progress of proposed V.R.C.P. 43.1 and its impact on the determination of witness’ “availability” for purposes of V.R.E 804. The Special Committee on Video Appearance and the Advisory Committee on the Rules of Civil Procedure submitted to this Committee competing interpretations and proposed language to clarify whether a witness who appears by video is “available” for purposes of V.R.E.804(a)(5). The Committee unanimously rejected adopting either interpretation offered. It is the Committee’s position that procedural rules dealing with appearance by video should not define availability at this time, thus preserving the court’s discretion to make this determination. The Committee suggested instead some clarifying language to be added to the V.R.C.P. 43.1 Reporter’s Note.

III. MATTERS REMAINING IN THE COMMITTEE’S AGENDA

- a. Consideration of possible amendments to authentication and hearsay rules to reflect legislative action dealing with admissibility of evidence of blockchain transactions (12 V.S.A. § 1913).**

The Committee commenced its work on the review of 12.V.S.A. § 1913, a statute that provides the conditions for self-authentication pursuant to V.R.E. 902 and for admissibility as records of regularly conducted business activity pursuant to V.R.E. 803(6). The Committee considered proposed amendments to 803(6) and 902 to reflect

this legislative action but agreed that more information was needed regarding both the scope of the statute and blockchain technology prior to action on any specific amendment. The Committee continued with this work until the end of the year, and further discussions were scheduled for 2018.

b. Consideration of proposed privilege for communications with lawyer referral services.

At the request of the Vermont Bar Lawyers Referral Service, the Committee considered a proposed privilege for communications with non-attorneys employed by lawyer referral services. The request for the privilege arises out of concern that individuals making the initial intake through the referral service are not lawyers and may not be considered “a representative of the lawyer” as defined in 502. Thus, communications made during that initial intake may be unprotected. The privilege expansion was recommended for consideration by an American Bar Association resolution.

The Committee has not reached an agreement yet as to whether the expansion of the attorney client privilege, or a separate privilege, is warranted. The Committee intends to schedule additional meetings in 2018 and 2019 to hear testimony on this matter.

IV. COMMITTEE MEMBERSHIP

Judge Theresa DiMauro served on the Committee until the beginning of 2017; the Committee thanks her for her dedicated service. No other membership changes occurred during 2017.

The Committee and Reporter wish to thank all the members of the Vermont bench and bar, the members of the Legislative Committee on Judicial Rules, and others who have participated in the rule-making process through their thoughtful suggestions and comments. In particular, thanks are due to Hon. Beth Robinson for her assistance and support as Supreme Court liaison, and to Court Administrator Patricia Gabel, staff attorney Emily Wetherell, and Monica Bombard, Deb Laferriere and Elizabeth Finn of the Court Administrator’s staff for their continued and essential support.

Respectfully submitted,

Elizabeth Miller, Committee Chair
Clara Gimenez, Committee Reporter