

VERMONT SUPREME COURT
Advisory Committee on the Rules of Evidence
2019 Annual Report
December 30, 2019

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 2019. During this period, the committee convened on January 25th, March 29th, May 30th, July 24th, September 6th, and November 15th to consider amendments and other matters pertaining to the Vermont Rules of Evidence.

I. PROMULGATED AND RECOMMENDED AMENDMENTS:

Rule 804a

The Committee recommended an amendment to Rule 804a. The purpose of the amendment is to reflect the Legislature’s efforts to eliminate offensive language, and to make this rule’s language more consistent with the language of Rule 807. The proposed amendment maintains the definition of “mental illness” provided in 18 V.S.A. §7101(14), rather than using the term “psychiatric disability” provided by 1 V.S.A. §147. In the Committee’s judgment, “psychiatric disability” is a broader term that encompasses a wider arc of impairments. Its use in this rule would cause the expansion of a rule that was originally intended to be applied narrowly.

The Committee received one comment during the public comment period, which echoed comments that had been made by the same organization during Committee meetings, was considered in full during Committee meetings prior to finalizing the draft of the proposed amendment, and was addressed in the Reporter’s Note to the amendment. Elizabeth Miller appeared before the Legislative Committee on Judicial Rules on December 6, 2019. The LCJR reviewed the amendment and expressed no objection, noting that the review of the proposed amendments to VRE 807 (see below) would in any case give an opportunity to reconsider the matter if necessary. On December 16, 2019, the Committee sent a Recommended Promulgation Order to the Vermont Supreme Court.

Rule 807

The Committee proposed amending Rule 807 to address the rule’s constitutional deficiencies described in *State v. Bergquist*, 2019 VT 17. Sections (c) and (f) were amended to ensure the Rule comports with the minimum constitutional standard set in *Maryland v. Craig*, 497 U.S. 836 (1990), as interpreted in *Bergquist*.

In addition, the Committee proposed amending Section (a) to correct the unintended effect of an earlier amendment. The proposed amendment reverts back to the use of the term “mental illness” as defined in 18 V.S.A. §7101(14), for the reasons stated above, in the discussion of Rule 804a.

Finally, a proposed amendment to Section (f) clarifies that, as in Section (d), the court has discretion to modify the provisions regarding two-way closed-circuit television

proceedings and the placement and role of the party, to ensure that a pro se defendant's ability to examine witnesses is not impaired.

There was public participation at all Committee meetings concerning these amendments, by (at times) staff for DRVT, the Defender General's Office, the Vermont Center for Crime Victim Services, the Vermont Children's Alliance, and the State's Attorneys Office. These proposed amendments are currently posted for public comment. The public comment period will end in February 2020.

II. MATTERS REMAINING IN THE COMMITTEE'S AGENDA

- a. **Consideration of privilege for Vermont Lawyers Assistance Program participants.** The Committee is aware of the activity of the Vermont's Commission of Attorney Well-Being to strengthen the Vermont Lawyers Assistance Program. The Committee's agenda for 2020 includes monitoring developments in this area in case a specific privilege to protect communications of participants in the Lawyers Assistant Program is deemed necessary
- b. **Victim-Crisis Worker Privilege.** The Committee will also consider whether the rules should be amended to include this privilege, which currently exists by virtue of a statute. 12 V.S.A. § 1614.

III. COMMITTEE MEMBERSHIP

There were several membership changes during 2019. Judge Scot Kline joined to Committee to fill the vacancy left by Judge Cohen's departure at the end of 2018. Attorney Dickson Corbett was appointed to replace Professor Kenneth Kreiling, who resigned in March after many years of service as a Reporter and later as Committee member. The Committee thanks Judge Cohen and Professor Kreiling for their dedicated service.

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 Deb Laferriere, Monica Bombard, 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