

VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF EVIDENCE
JULY 15, 2022 MINUTES

The Evidence Rules Committee held a virtual meeting on July 15, 2022, at 10:00 AM via Microsoft Teams.

Present: Hon. Harold Eaton, Hon. John Pacht, H. Dickson Corbett IV, Mimi Brill, Jennifer K. Rushlow, Pamela Marsh, Karen McAndrew, Claudine Safar, Scot Kline, John J. Boylan III

Minutes from the last committee meeting approved.

Committee Membership:

- The VT Supreme Court approved a revised membership list for the committee, adding three members with specified criteria for membership slots in order to ensure practice area diversity. There will be several at-large seats that are not specified, with the idea being that people with various areas of civil experience will fill those seats. It will be a committee of 13 members instead of committee of 10.
- Next steps: The committee will get a revised designation from the Supreme Court, and the committee can then allocate existing members to most of the seats and advertise for the four remaining seats to be filled. All existing members fit easily into the new designations. The committee will generate a list from attorney licensing of people that indicated interest in this committee on their application. We will distribute notice to get the word out to potential members. Diversity is a goal (geographic, demographic).
- Action item: Dickson will get new designation from Supreme Court; draft a recruitment notice and circulate; ask people to send resumes and letter of interest by a certain date; and circulate applications to committee members. Membership updates will be considered at the next meeting.

Old Business

Rule 807: Liz unavailable today.

Lawyer referral privilege:

- Pam spoke to attorneys from VT Bar Association who said they do want the privilege for non-attorney employees. VBA would appreciate this committee creating a rule to allow those employees who are doing client intakes and helping find attorneys to make sure that those conversations are privileged.
- We are not aware of any complaints about this, but there is interest in addressing potential problems proactively.
- We are not aware of an existing legislative/statutory privilege
- Broader question: What is our role in creating a privilege where one did not previously exist (rather than it being a legislative role)?
 - Pam: All of our rules have to be reviewed by the legislative rule committee, so our drafting a rule might prompt legislative action
- A draft rule on this issue was considered in 2017 and 2018. This committee had intended to hold a hearing on the matter. The committee hasn't gotten to it, but there was no substantive decision not to pursue it.

- Action item:
 - Small subcommittee: Pam, with assistance from Jenny, to work on drafting the language.
 - Next meeting: Draft proposed language for committee to look at.
 - Pam will invite Mike Kennedy or someone from VBA to attend the next committee meeting and present about the need and why the proposed language solves the need.

Lawyers Assistance Project – Liz unavailable today.

Restyling rules: gendered pronouns

- Karen: There are not many gendered pronouns in the rules. Revising the reporters notes will be more challenging. In many instances, notes are quoting from a case. Karen is working on it and will have something for the committee to review soon.

Restyling: For description of proposed FRE changes, see summary in Dickson’s Corbett Memo “Promulgated and Proposed Amendments to the Federal Rules of Evidence, 2011-Present” dated July 13, 2022. Note: These are proposed rule changes and still out for public comment.

- 404(b) discussion:
 - Advisory committee on criminal procedure rules might be right committee to decide whether the VRE notice provision should be amended. We could write a short letter to the committee saying we noticed this issue and refer to their committee for consideration. Mimi is on that committee and will highlight that issue. This committee expresses support for that change, and it is what VT cases have been requiring already.
- Prior consistent statements 801(d)(1)(B) discussion:
 - Mixed opinions. Overall support for revising the rule. Credibility of witnesses is usually quite important in cases. Allowing evidence that will help jurors make their determination on credibility is important.
 - Next: We will consider adopting the FRE amendment to rule 801(d)(1)(B) at our next meeting. Dickson volunteers to research VT caselaw to identify threads on this issue in VT, and will circulate a memo to committee members before the next meeting. John Boylan will present on the practitioners experience with the rule.
- Business records and public records FRE 803(6-8) discussion:
 - Committee members are not aware of this being an issue in VT. This rule change is not a priority in the short term.
- Absence of public records discussion
 - No need for this change.
- Ancient documents discussion:
 - No need for this change.
- Self authentication, records generated by electronic process discussion:
 - A lot of time spent on this before. No need for this change.
 - Judge Pacht will reach out to other judicial committees to see if anyone else is taking it up
- The committee received a comment on Rule regarding re self incrimination. This is the first time this issue has been brought up. The committee will invite Attorney Larson to submit a memo and present to the committee.

Next meeting: Friday 10/28 at 2 PM

Adjourned 11:54 AM

