

STATE OF VERMONT  
VERMONT SUPREME COURT  
OCTOBER TERM 2011

**Order Promulgating Amendments to Rule 404(a)(1)(2) and Rule 606(b)  
of the Vermont Rules of Evidence**

Pursuant to Chapter II, Section 37, of the Vermont Constitution and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 404(a)(1)(2) of the V.R.E. be amended as follows (new matter underlined; deleted matter overstruck):

**RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO  
PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES, WRONGS  
OR ACTS**

(a) **Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* In a criminal case, ~~E~~evidence of a pertinent trait of the accused's character offered by an accused, or by the prosecution is to rebut the same, or if evidence of a trait of character of the victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) *Character of a victim.* In a criminal case and subject to the limitations imposed by 12 V.S.A. § 3255, ~~E~~evidence of a pertinent trait of character of a victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

\* \* \* \* \*

**Reporter's Notes – 2011 Amendment**

Rule 404 is amended to clarify possible issues under the rule. The amendment text elevates a point made in the original reporter's notes to the rule text and will result in similarity in state and federal practice with regard to admissibility of character evidence. The amendment is based on the 2006 amendment to F.R.E. 404

“The [federal] Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to

prove that the person acted in conformity with the character trait.” Advisory Committee Note – 2006 Amendment. Courts have generally been consistent in excluding so-called propensity or conformity evidence in civil cases. There are no Vermont civil cases admitting character evidence “for the purpose of proving action in conformity therewith on a particular occasion.” The amendment thus appears consistent with Vermont practice.

The amended rule itself now explicitly states the limiting effect of Vermont’s victim shield law, 12 V.S.A. § 3255, which may preclude use of evidence of victim’s character in sexual assault and abuse of an elderly or disabled person cases. This effect of the predecessor statute was noted in the original reporter’s notes to the rule.

2. That Rule 606(b) of the V.R.E. be amended as follows (new matter underlined; deleted matter overstruck):

#### **RULE 606. COMPETENCY OF JUROR AS WITNESS**

\* \* \* \* \*

**(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon his that or any other juror’s mind or emotions as influencing ~~him~~ the juror to assent to or dissent from the verdict or indictment or concerning his the juror’s mental processes in conjunction therewith, ~~nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received;~~ ~~b~~ But a juror may testify ~~on the question about~~ (1) whether extraneous prejudicial information was improperly brought to the jury’s attention, (2) whether any outside influence was improperly brought to bear upon any juror, (3) whether there was a mistake in entering the verdict onto the verdict form, or (4) whether any juror discussed matters pertaining to the trial with persons other than his fellow jurors. A juror’s affidavit or evidence of any statement made by the juror may not be received on a matter about which the juror would be precluded from testifying.

#### **Reporter’s Notes - 2011 Amendment**

Rule 606(b) is amended to make the rule easier to read and to provide that juror testimony may be utilized to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The amendment is based upon the text of the 2006 amendment to the Federal Rules of Evidence. The content of the amended Vermont rule is substantially the same as the federal rule except for (4) which is carried over from the original Vermont rule.

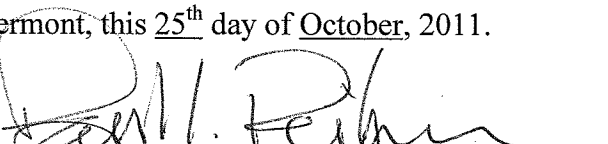
The new language in (3) is consistent with the purpose of Rule 606(b), to insulate “mental operations and emotional reactions of jurors in arriving at a given result [which] would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment.” Advisory Committee’s Note – Federal Rule 606(b). The amendment allows inquiry only as to the verdict’s accuracy in capturing what the jurors had agreed upon and does not allow testimony as to mental processes underlying the verdict. Advisory Committee’s Note –2006 Amendments to Federal Rule 606. There are no Vermont reported cases considering the subject of the amendment. The Vermont Advisory Committee believes the amendment is consistent with Vermont practice and promotes a sensible result.

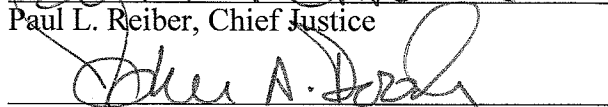
The Federal Advisory Committee’s Note to the amendment suggests that “the possibility of errors in the verdict form will be reduced substantially by polling the jury,” a practice consistent with the amendment.

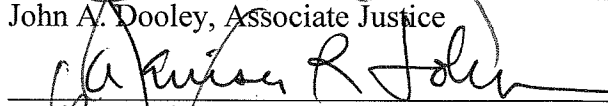
3. That these rules as amended or added are prescribed and promulgated to become effective on December 27, 2011. The Reporter's Notes are advisory.

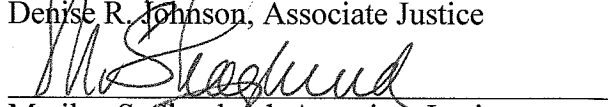
4. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

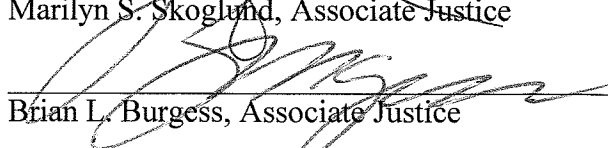
Dated in Chambers at Montpelier, Vermont, this 25<sup>th</sup> day of October, 2011.

  
Paul L. Reiber, Chief Justice

  
John A. Dooley, Associate Justice

  
Denise R. Johnson, Associate Justice

  
Marilyn S. Skoglund, Associate Justice

  
Brian L. Burgess, Associate Justice