IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN RE: SOLICITATION OF PUBLIC COMMENT ON THE REPORT OF THE ADVISORY COMMITTEE ON RULES TO THE SUPREME COURT OF THE VIRGIN ISLANDS.	**S. Ct. Misc. No. 2021-0019**

NOTICE OF ENTRY OF JUDGMENT/ORDER

TO: **Justices of the Supreme Court**
Judges and Magistrate Judges of the Superior Court
Judges and Magistrate Judges of the District Court
Charlotte Perrell, Esq., President, V.I. Bar
Hinda Carbon, Executive Director, V.I. Bar
Regina D. Petersen, Administrator of Courts
Veronica J. Handy, Esq., Clerk of the Supreme Court
Tamara Charles, Clerk of the Superior Court
Glenda L. Lake, Esq., Clerk of the District Court
Supreme Court Law Clerks
Supreme Court Secretaries
Order Book

Please take notice that on August 6, 2021, a(n) **ORDER** dated August 6, 2021, was entered by the Clerk in the above-entitled matter.

Dated: August 6, 2021

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: _____
Natasha Illis
Deputy Clerk II

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IN RE: SOLICITATION OF PUBLIC COMMENT ON THE REPORT OF THE ADVISORY COMMITTEE ON RULES TO THE SUPREME COURT OF THE VIRGIN ISLANDS.	)	**S. Ct. Misc. No. 2021-0019**

ORDER

THIS MATTER is before the Court pursuant to a Report to the Supreme Court of the Virgin Islands, dated June 29, 2021, to the Supreme Court of the Virgin Islands from the Advisory Committee on Rules, which proposes several amendments to the Virgin Islands Rules of Criminal Procedure, the Virgin Islands Rules of Evidence, and the Rules of the Superior Court of the Virgin Islands. Having reviewed the Report, this Court has determined that it would be beneficial to solicit feedback from the public, the bench, and the Bar to aid this Court in its consideration of the proposed amendments. Accordingly, it is hereby

ORDERED that the public, the bench, and the Bar are **HEREBY INVITED, on or before October 1, 2021,** to submit comments to the June 29, 2021, Report to the Supreme Court of the Virgin Islands by the Advisory Committee on Rules, which is attached to this Order as "Exhibit 1." Such comments may be electronically filed under this case number or filed conventionally with the Clerk of the Supreme Court. It is further

ORDERED that copies of this Order shall be distributed to the appropriate parties.

SO ORDERED this 6th of August, 2021.

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONIA J. HANDY, ESQ.
Clerk of the Court

By: _____
Deputy Clerk II

Dated: 8/9/2021

Copies to:
Justices of the Supreme Court
Judges and Magistrate Judges of the Superior Court
Judges and Magistrate Judges of the District Court
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Exhibit 1

Advisory Committee on Rules of Court

Report to the Supreme Court of the Virgin Islands

June 29, 2021

Introduction

On May 27, 2021 the Advisory Committee on Rules of Court met to discuss a large number of possible Rule revisions. The first four sets of revisions noted below relate to amendments that have been implemented in the federal rules of criminal procedure and evidence for which there are analogous provisions in the Virgin Islands Rules of Criminal Procedure and the Virgin Islands Rules of Evidence. The Committee also discussed other federal rules changes enacted in recent years and found them un-needed or inapplicable to Virgin Islands Practice. Items ❶ through ❹ -- considered because of parallel federal rule amendments – were unanimously approved for recommendation to the Supreme Court.

In addition, the Advisory Committee on May 27 considered and endorsed for promulgation one additional new Rule – unrelated to federal rule changes. Item ❺ recommends promulgation of a new Superior Court Rule 17.1 that tracks a "Standing Order" issued last year by the Presiding Judge (December 3, 2020: SX-2020-MC-00087) regarding filing and assignment of "related cases," the provisions of which are adopted verbatim.

The following items received unanimous support from the Committee as recommendations to the Supreme Court for promulgation.

Respectfully submitted,

Judge Douglas Brady

Prof. Kent Sinclair

❶ Criminal Rule 12.4 re "Disclosure Statements"

Federal Criminal Rule 12.4 was amended in 2018 to clarify its application to corporate parties, and to note the obligation of the prosecution to provide disclosure statements regarding the impact of the charged criminal conduct on "organizational victims" of which the trial court should be made aware. The Federal Advisory Committee explains the change:

> *Subdivision (a).* Rule 12.4 requires the government to identify organizational victims to assist judges in complying with their obligations under the Code of Conduct for United States Judges. The 2009 amendments to Canon 3(C)(1)(c) of the Code require recusal only when a judge has an "interest that could be affected substantially by the outcome of the proceeding." In some cases, there are numerous organizational victims, but the impact of the crime on each is relatively small. In such cases, the amendment allows the government to show good cause to be relieved of making the disclosure statements because the organizations' interests could not be "affected substantially by the outcome of the proceedings."
>
> *Subdivision (b).* The amendment specifies that the time for making the disclosures is within 28 days after the initial appearance.
>
> Because a filing made after the 28-day period may disclose organizational victims in cases in which none were previously known or disclosed, the caption and text have been revised to refer to a later, rather than a supplemental, filing. The text was also revised to be more concise and to parallel Civil Rule 7.1(b)(2).

The Advisory Committee recommends amending existing V.I. Rule provisions to match those of the FRCr.P, which would involve these edits:

Rule 12.4 Disclosure Statement

(a) ~~-~~*Who Must File*.

(1) ~~-~~Nongovernmental ~~**Corporation.**~~Corporate Party. Any nongovernmental corporate party to a proceeding in a district court must file a statement ~~identifying the party's~~ that identifies any parent corporation and ~~subsidiaries and~~ any publicly held corporation that ~~holds~~owns 10% or more of its stock or states that there is no such corporation.

(2) ~~**Partnership.** Any partnership that is a party must file a statement identifying all partners, including silent partners.~~

~~(3)~~ Organizational Victim. ~~If an organization is a~~Unless the government shows good cause, it must file a statement identifying any organizational victim of the alleged criminal activity~~, the government must file a statement identifying the victim~~. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4~~-~~(a)(1) to the extent it can be obtained through due diligence.

(b) -*Time ~~for~~to Filing; ~~Supplemental~~Later Filing*. A party must:

(1) file the Rule 12.4-(a) statement ~~upon~~within 28 days after the ~~defendant's~~defendant's initial appearance; and

(2) promptly file a ~~supplemental~~later statement ~~upon~~if any ~~change in the~~required information ~~that the statement requires~~changes.

❷ Criminal Rules 45 on Computing and Extending Time and 49 on Filing and Serving Papers.

In 2018, the provisions of Federal Rules of Criminal Procedure 45 and 49 were amended. The Federal Advisory Committee explains the 2018 amendment to FRCrP Rule 45 as follows:

> **Notes of Advisory Committee on 2018 Amendments.** Rule 49 previously required service and filing "in a manner provided" in the Civil Rules, and the time counting provisions in Criminal Rule 45(c) referred to certain means of service under Civil Rule 5. A contemporaneous amendment moves the instructions for filing and service in criminal cases from Civil Rule 5 into Criminal Rule 49. This amendment revises the cross references in Rule 45(c) to reflect this change.

FRCrP 45(c) is changed in this 2018 amendment to read:

> (c) *Additional Time After Certain Kinds of Service*. Whenever a party must or may act within a specified time after being served and service is made under Rule 49(a)(4)(C), (D), and (E), 3 days are added after the period would otherwise expire under subdivision (a).

Comparable changes to V.I. Criminal Procedure Rule 45(c) would be:

Rule 45. Computing and Extending Time.

* * * *

(c) *Additional Time After Certain Kinds of Service.* Whenever a party must or may act within a specified period after service and service is made in the manner provided under Virgin Islands Rule of ~~Civil Procedure 5(b)(2)(B), (C), or (D)~~Criminal Procedure 49(a)(4)(C), (D), and (E), 3 days are added after the period would otherwise expire under Rule 45(a).

At the same time, FRCrP 49 was greatly revised in 2018. The Advisory Committee's explanations are as follows:

Rule 49 previously required service and filing in a "manner provided" in "a civil action." The amendments to Rule 49 move the instructions for filing and service from the Civil Rules into Rule 49. Placing instructions for filing and service in the criminal rule avoids the need to refer to two sets of rules, and permits independent development of those rules. Except where specifically noted, the amendments are intended to carry over the existing law on filing and service and to preserve parallelism with the Civil Rules.

Additionally, the amendments eliminate the provision permitting electronic-filing only when authorized by local rules, moving—with the Rules governing Appellate, Civil, and Bankruptcy proceedings—to a national rule that mandates electronic-filing for parties represented by an attorney with certain exceptions. Electronic filing has matured. Most districts have adopted local rules that require electronic filing by represented parties, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts for a party represented by an attorney, except that nonelectronic filing may be allowed by the court for good cause, or allowed or required by local rule.

Rule 49(a)(1). The language from former Rule 49(a) is retained in new Rule 49(a)(1), except for one change. The new phrase, "Each of the following must be served on every party" restores to this part of the rule the passive construction that it had prior to restyling in 2002. That restyling revised the language to apply to parties only, inadvertently ending its application to nonparties who, on occasion, file motions in criminal cases. Additional guidance for nonparties appears in new subdivision (c).

Rule 49(a)(2). The language from former Rule 49(b) concerning service on the attorney of a represented party is retained here, with the "unless" clause moved to the beginning for reasons of style only.

Rule 49(a)(3) and (4). Subsections (a)(3) and (4) list the permissible means of service. These new provisions duplicate the description of permissible means from Civil Rule 5, carrying them into the criminal rule.

By listing service by filing with the court's electronic filing system first, in (3)(A), the rule now recognizes the advantages of electronic filing and service and its widespread use in criminal cases by represented defendants and government attorneys.

But the e-filing system is designed for attorneys, and its use can pose many challenges for pro se parties. In the criminal context, the rules must ensure ready access to the courts by all pro se defendants and incarcerated individuals, filers who often lack reliable access to the internet or email. Although access to electronic-filing systems may expand with time, presently many districts do not allow e-filing by unrepresented defendants or prisoners. Accordingly, subsection (3)(A) provides that represented parties may serve registered users by filing with the court's electronic-filing system, but unrepresented parties may do so only if allowed by court order or local rule.

Subparagraph (3)(B) permits service by "other electronic means," such as email, that the person served consented to in writing.

Both subparagraphs (3)(A) and (B) include the direction from Civil Rule 5 that service is complete upon e-filing or transmission, but is not effective if the serving party learns that the person to be served did not receive the notice of e-filing or the paper transmitted by other electronic means. The language mirrors Civil Rule 5(b)(2)(E). But unlike Civil Rule 5, Criminal Rule 49 contains a separate provision for service by use of the court's electronic-filing system. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic-filing system that an attempted transmission by the court's system failed.

Subsection (a)(4) lists a number of traditional, nonelectronic means of serving papers, identical to those provided in Civil Rule 5.

Rule 49(b)(1). Filing rules in former Rule 49 appeared in subdivision (d), which provided that a party must file a copy of any paper the party is required to serve, and required filing in a manner provided in a civil action. These requirements now appear in subdivision (b).

The language requiring filing of papers that must be served is retained from former subdivision (d), but has been moved to subsection (1) of subdivision (b), and revised to restore the passive phrasing prior to the restyling in 2002. That restyling departed from the phrasing in Civil Rule 5(d)(1) and inadvertently limited this requirement to filing by parties.

The language in former subdivision (d) that required filing "in a manner provided for in a civil action" has been replaced in new subsection (b)(1) by language drawn from Civil Rule 5(d)(1). That provision used to state "Any paper . . . that is required to be served—together with a certificate of service—must be filed within a reasonable time after service." A contemporaneous amendment to Civil Rule 5(d)(1) has subdivided this provision into two parts, one of which addresses the Certificate of Service. Although the Criminal Rules version is not subdivided in the same way, it parallels the Civil Rules provision from which it was drawn. Because "within" might be read as barring filing before the paper is served, "no later than" is substituted to ensure that it is proper to file a paper before it is served.

The second sentence of subsection (b)(1), which states that no certificate of service is required when service is made using the court's electronic-filing system, mirrors the contemporaneous amendment to Civil Rule 5. When service is not made by filing with the court's electronic-filing system, a certificate of service must be filed.

Rule 49(b)(2). New subsection (b)(2) lists the three ways papers can be filed. (A) provides for electronic filing using the court's electronic-filing system and includes a provision, drawn from the Civil Rule, stating that a filing made through a person's electronic-filing account and authorized by that person, together with the person's name on a signature block, constitutes the person's signature. The last sentence of subsection (b)(2)(A) contains the language of former Rule 49(d), providing that e-filed papers are "written or in writing," deleting the words "in compliance with a local rule" as no longer necessary.

Subsection (b)(2)(B) carries over from the Civil Rule two nonelectronic methods of filing a paper: delivery to the court clerk and delivery to a judge who agrees to accept it for filing.

Rule 49(b)(3). New subsection (b)(3) provides instructions for parties regarding the means of filing to be used, depending upon whether the party is represented by an attorney. Subsection (b)(3)(A) requires represented parties to use the court's electronic-filing system, but provides that nonelectronic filing may be allowed for good cause, and may be required or allowed for other reasons by local rule. This language is identical to that adopted in the contemporaneous amendment to Civil Rule 5.

Subsection (b)(3)(B) requires unrepresented parties to file nonelectronically, unless allowed to file electronically by court order or local rule. This language differs from that of the amended Civil Rule, which provides that an unrepresented party may be "required" to file electronically by a court order or local rule that allows reasonable exceptions. A different approach to electronic filing by unrepresented parties is needed in criminal cases, where electronic filing by pro se prisoners presents significant challenges. Pro se parties filing papers under the criminal rules generally lack the means to e-file or receive electronic confirmations, yet must be provided access to the courts under the Constitution.

Rule 49(b)(4). This new language requiring a signature and additional information was drawn from Civil Rule 11(a). The language has been restyled (with no intent to change the meaning) and the word "party" changed to "person" in order to accommodate filings by nonparties.

Rule 49(b)(5). This new language prohibiting a clerk from refusing a filing for improper form was drawn from Civil Rule 5(d)(4).

Rule 49(c). This provision is new. It recognizes that in limited circumstances nonparties may file motions in criminal cases. Examples include representatives of the media challenging the closure of proceedings, material witnesses requesting to be deposed under Rule 15, or victims asserting rights under Rule 60. Subdivision (c) permits nonparties to file a paper in a criminal case, but only when required or permitted by law to do so. It also requires nonparties who file to serve every party and to use means authorized by subdivision (a).

The rule provides that nonparties, like unrepresented parties, may use the court's electronic-filing system only when permitted to do so by court order or local rule.

Rule 49(d). This provision carries over the language formerly in Rule 49(c) with one change. The former language requiring that notice be provided "in a manner provided for in a civil action" has been replaced by a requirement that notice be served as required by Rule 49(a). This parallels Civil Rule 77(d)(1), which requires that the clerk give notice as provided in Civil Rule 5(b).

The Rules Advisory Committee resolved to recommend that the Supreme Court promulgate conforming amendments to V.I. Criminal Procedure Rule 49, the changes would be as follows:

Rule 49. Serving and Filing Papers~~.~~

(a) ~~*When Required.* A party~~*Service on a Party.*

(1) **What is required.** Each of the following must ~~serve~~be served on every ~~other~~ party: any written motion (other than one to be heard ex parte), ~~opposition,~~ written notice, designation of the record on appeal, or ~~other~~similar paper ~~submitted to~~.

(2) **Serving a Party's Attorney**. Unless the court~~. Any motion requesting affirmative relief should be accompanied by a proposed order for execution by the court.~~

~~(b) *How Made*. Service must be made in the manner provided for in a civil action. When~~ orders otherwise, when these rules or a court order requires or permits service on a party represented by an attorney, service must be made on the attorney instead of the party~~, unless the court orders otherwise~~.

~~(c) *Notice of a Court Order.*~~

~~(1) In all cases where a party or the party's attorney is not present, immediately upon the entry of an order on a~~ (3) **Service by Electronic Means.**

(A) Using the Court's Electronic-Filing System. A party represented by an attorney may serve a paper on a registered user by filing it with the court's electronic-filing system. A party not represented by an attorney may do so only if allowed by court order or local rule. Service is complete upon filing, but is not effective if the serving party learns that it did not reach the person to be served.

(B) Using Other Electronic Means. A paper may be served by any other electronic means that the person consented to in writing. Service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served.

(4) **Service by Nonelectronic Means**. A paper may be served by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address—in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person has no known address; or

(E) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(b) *Filing.*

(1) **When Required; Certificate of Service**. Any paper that is required to be served must be filed no later than a reasonable time after service. No certificate of service is required when a paper is served by filing it with the court's electronic filing system. When a paper is served by other means, a certificate of service must be filed with it or within a reasonable time after service or filing.

(2) **Means of Filing.**

(A) Electronically. A paper is filed electronically by filing it with the court's electronic-filing system. A filing made through a person's electronic-filing account and authorized by that person, together with the person's name on a signature block, constitutes the person's signature. A paper filed electronically is written or in writing under these rules.

(B) Nonelectronically. A paper not filed electronically is filed by delivering it:

(i) to the clerk; or

(ii) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3) **Means Used by Represented and Unrepresented Parties.**

(A) Represented Party. A party represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) Unrepresented Party. A party not represented by an attorney must file nonelectronically, unless allowed to file electronically by court order or local rule.

(4) **Signature.** Every written motion and other paper must be signed by at least one attorney of record in the attorney's name—or by a person filing a paper if the person is not represented by an attorney. The paper must state the signer's address, e-mail address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or person's attention.

(5) **Acceptance by the Clerk.** The clerk must not refuse to file a paper solely because it is not in the form prescribed by these rules or by a local rule or practice.

(c) *Service and Filing by Nonparties.* A nonparty may serve and file a paper only if doing so is required or permitted by law. A nonparty must serve every party as required by Rule 49(a), but may use the court's electronic-filing system only if allowed by court order or local rule.

(d) *Notice of a Court Order*. When the court issues an order on any post-arraignment motion, the clerk must serve notice of the entry on each party ~~a~~as required by Rule 49(a). A

party also may serve notice of the entry ~~of the order and must make a note in the docket of the service. Service must be made in the manner provided for in a civil action. A party's lack of notice of the entry of the order~~ by the same means. Except as ~~Federal Rule of Appellate Procedure 4(b)~~ Virgin Islands Rule of Appellate Procedure 5(b) provides otherwise, the clerk's failure to give notice does not affect the time to appeal, or relieve~~--~~—or authorize the court to relieve~~--the party's~~—a party's failure to appeal within the ~~time allowed, except as permitted by the Rules of the Supreme Court of the Virgin Islands~~allowed time.

~~(2) Nothing in this rule shall preclude a judge or magistrate judge or an authorized staff member from performing the function of the clerk prescribed in Rule 49(c)(1).~~

~~(d) *Filing.*~~

~~A party must file with the court a copy of any paper the party is required to serve. A paper must be filed in a manner provided for in a civil action.~~

~~(e) *Electronic Service and Filing*. Reserved.~~

NOTE: copies of this draft revision to V.I. Criminal Rule 49 were been provided to the Clerk's Office personnel responsible for e-filing and processing of case papers, and they were studied by the Clerk and other staff. No conflicts were found between the proposed Rule 49 amendments set forth above, and the existing e-filing procedures in Superior Court.

❸ Federal Rule of Evid. 807 "the residual or catchall" hearsay exception

As explained by the **Notes of Federal Advisory Committee on 2019 amendments,** Rule 807 has been amended to fix a number of problems that the courts have encountered in applying it.

Courts have had difficulty with the requirement that the proffered hearsay carry "equivalent" circumstantial guarantees of trustworthiness. The "equivalence" standard is difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all). The "equivalence" standard has not served to guide a court's discretion to admit hearsay, because the court is free to choose among a spectrum of exceptions for comparison. Moreover, experience has shown that some statements offered as residual hearsay cannot be compared usefully to any of the categorical exceptions and yet might well be trustworthy. Thus the requirement of an equivalence analysis has been eliminated. Under the amendment, the court should proceed directly to a determination of whether the hearsay is supported by guarantees of trustworthiness. See Rule 104(a). As with any hearsay statement offered under an exception, the court's threshold

finding that admissibility requirements are met merely means that the jury may consider the statement and not that it must assume the statement to be true.

The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The rule now provides for a uniform approach, and recognizes that the existence or absence of corroboration is relevant to, but not dispositive of, whether a statement should be admissible under this exception. Of course, the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence.

The amendment does not alter the case law prohibiting parties from proceeding directly to the residual exception, without considering the admissibility of the hearsay under Rules 803 and 804. A court is not required to make a finding that no other hearsay exception is applicable. But the opponent cannot seek admission under Rule 807 if it is apparent that the hearsay could be admitted under another exception.

The rule in its current form applies to hearsay “not specifically covered” by a Rule 803 or 804 exception. The amendment makes the rule applicable to hearsay “not admissible under” those exceptions. This clarifies that a court assessing guarantees of trustworthiness may consider whether the statement is a “near-miss” of one of the Rule 803 or 804 exceptions. If the court employs a “near-miss” analysis it should—in addition to evaluating all relevant guarantees of trustworthiness—take into account the reasons that the hearsay misses the admissibility requirements of the standard exception.

In deciding whether the statement is supported by sufficient guarantees of trustworthiness, the court should not consider the credibility of any witness who relates the declarant's hearsay statement in court. The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule provides that the focus for trustworthiness is on circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

Of course, even if the court finds sufficient guarantees of trustworthiness, the independent requirements of the Confrontation Clause must be satisfied if the hearsay statement is offered against a defendant in a criminal case.

The Committee decided to retain the requirement that the proponent must show that the hearsay statement is more probative than any other evidence that the proponent can reasonably obtain. This necessity requirement will continue to serve to prevent the residual exception from being used as a device to erode the categorical exceptions.

The requirements that residual hearsay must be evidence of a material fact and that its admission will best serve the purposes of these rules and the interests of justice have been

deleted. These requirements have proved to be superfluous in that they are already found in other rules. See Rules 102, 401.

The notice provision has been amended to make four changes in the operation of the rule:

• First, the amendment requires the proponent to disclose the "substance" of the statement. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. See Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the "substance" of the evidence).

• Second, the prior requirement that the declarant's address must be disclosed has been deleted. That requirement was nonsensical when the declarant was unavailable, and unnecessary in the many cases in which the declarant's address was known or easily obtainable. If prior disclosure of the declarant's address is critical and cannot be obtained by the opponent through other means, then the opponent can seek relief from the court.

• Third, the amendment requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

• Finally, the pretrial notice provision has been amended to provide for a good cause exception. Most courts have applied a good cause exception under Rule 807 even though the rule in its current form does not provide for it, while some courts have read the rule as it was written.

Experience under the residual exception has shown that a good cause exception is necessary in certain limited situations. For example, the proponent may not become aware of the existence of the hearsay statement until after the trial begins, or the proponent may plan to call a witness who without warning becomes unavailable during trial, and the proponent might then need to resort to residual hearsay.

The rule retains the requirement that the opponent receive notice in a way that provides a fair opportunity to meet the evidence. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures, such as a continuance, to assure that the opponent is not prejudiced.

After discussion, the Rules Advisory Committee unanimously recommends that comparable changes be made to V.I. Rule of Evidence 807. The changes to our existing Rule would be as follows:

Rule 807. Residual Exception

(a) ~~-~~*In General*.

Under the following ~~circumstances~~conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not ~~specifically covered by~~admissible under a hearsay exception in Rule 803 or 804:

(1) the statement ~~has equivalent circumstantial~~is supported by sufficient guarantees of trustworthiness~~;~~

~~(2)~~—after considering the totality of circumstances under which it ~~is offered as~~was made and evidence ~~of a material fact;~~, if any, corroborating the statement; and

(~~3~~2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts~~; and~~.

~~(4) admitting it will best serve the purposes of these rules and the interests of justice.~~

(b) ~~-~~*Notice.*

The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of the intent to offer the statement ~~and its particulars, —~~ including its substance and the ~~declarant's~~declarant's name ~~and address, —~~so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

❹ Evidence Rule 404 on "Other Bad Acts" Proof

The "other bad acts" provision was amended in FRE 404 in 2020. The V.I. Rules Advisory Committee was unanimously in agreement that similar amendments should be made to the V.I. Rule of Evidence 404(b) wording. The explanation provided for the similar national re-writing of the Rule is as follows:

Notes of Advisory Committee on 2020 amendments. Rule 404(b) has been amended principally to impose additional notice requirements on the prosecution in a criminal case. In addition, clarifications have been made to the text and headings.

The notice provision has been changed in a number of respects:

• The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. The earlier requirement that the prosecution provide notice of only the "general nature" of the evidence was understood by some courts to permit the government to satisfy the notice obligation

without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.

• The pretrial notice must be in writing—which requirement is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

• Notice must be provided before trial in such time as to allow the defendant a fair opportunity to meet the evidence, unless the court excuses that requirement upon a showing of good cause. See Rules 609(b), 807, and 902(11). Advance notice of Rule 404(b) evidence is important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied—even in cases in which a final determination as to the admissibility of the evidence must await trial. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures to assure that the opponent is not prejudiced. See, e.g., United States v. Lopez-Gutierrez, 83 F.3d 1235 (10th Cir. 1996) (notice given at trial due to good cause; the trial court properly made the witness available to the defendant before the bad act evidence was introduced); United States v. Perez-Tosta, 36 F.3d 1552 (11th Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire).

• The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for the timing of the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.

• Finally, the amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is provided when the government moves in limine for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus outlived any usefulness it may once have had.

As to the textual clarifications, the word “other” is restored to the location it held before restyling in 2011, to confirm that Rule 404(b) applies to crimes, wrongs and acts “other” than those at issue in the case; and the headings are changed accordingly. No substantive change is intended.

Amendments to the V.I. version of Rule 404(b) to parallel the federal changes are recommended, and would be as follows:

Rule 404. Character Evidence; Other Crimes, Wrongs, or ~~Other~~ Acts * * * *

(b) *Other Crimes, Wrongs, or ~~Other~~ Acts*.

(1) **Prohibited Uses**. Evidence of ~~a~~any other crime, wrong, or ~~other~~ act is not admissible to prove a ~~person's~~person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) **Permitted Uses~~; Notice in a Criminal Case. Evidence of a crime, wrong, or other act~~**. This evidence may be admissible for ~~other purposes~~another purpose, such as ~~addressing issues, if actually contested in the case, concerning~~proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident~~ -- provided that the probative value of such proof, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. On request by a defendant in a criminal case, the prosecutor must:~~.

(3) **Notice in a Criminal Case**. In a criminal case, the prosecutor must:

(A) provide reasonable notice of ~~the general nature of~~ any such evidence that the prosecutor intends to offer at trial~~;~~, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(~~B~~C) do so in writing before trial~~ -- --~~ or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

❺ Filing and Processing of Related Cases.

The Advisory Committee has learned that a well-drafted Standing Order was issued by Judge Willocks last year relating to the filing and processing of "related cases" as defined in the Order. Because this Standing Order is not readily accessible, the Advisory Committee unanimously recommends that its text be incorporated into a new Rule 17.1 of the Superior Court Rules – to make it available and to emphasize its application.

The Standing Order involved is as follows:

SUPERIOR COURT OF THE VIRGIN ISLANDS

IN RE: **PROCEDURE FOR THE ASSIGNMENT AND REASSIGNMENT OF RELATED CASES AND PROCEEDINGS.**	**CASE NO. SX-2020-MC-00087**

STANDING ORDER

WHEREAS, the practice of the Clerk of the Superior Court has been to rotate the assignment of new cases and proceedings (hereinafter "case" or "cases") among the judges and magistrate judges (hereinafter "judicial officers") of the Superior Court, except those judicial officers assigned exclusively to a division like the Family Division; and

WHEREAS, the random assignment of cases has resulted in related cases as well as duplicative or successive litigation (collectively "related cases") being assigned to different judicial officers; and

WHEREAS, "'the Virgin Islands judiciary has not promulgated a rule mandating that counsel [and self-represented individuals] identify related cases at the trial court level.'" *Sixteen Plus Corp. v. Yousef*, 72 V.I. 610, 628 (Super. Ct. 2020) (quoting *Abraham v. St. Croix Renaissance Group LLLP*, 70 V.I. 84, 105 (Super. Ct. 2019)); and

WHEREAS, assigning related cases to different judicial officers is inefficient, wasteful of scarce judicial resources, and may result in inconsistent determinations; by contrast,"[a]ssigning related cases to the same judge can be more efficient because the judge . . . has knowledge of both cases and their respective procedural histories and can 'issue any other orders' short of formal consolidation 'to avoid unnecessary cost or delay[,]'" *In re: Kelvin Manbodh Asbestos Litig. Series*, 69 V.I. 394, 422 (V.I. Super. Ct. 2018) (quoting V.I. R. Civ. P. 42(a)(3)); and

WHEREAS, by law "[t]he presiding judge of the Superior Court [is] . . . the administrative head of the . . . Court . . . . [and] responsible for . . . prescribing the duties of its judges and officers[,]" 4 V.I.C.

§ 72b(a); and

WHEREAS, the Presiding Judge may also implement a case assignment policy and then "delegate the enforcement of . . . [that] policy to other individuals, such as . . . the Clerk's Office[,]" *Vanterpool v. Gov't of the V.I.*, 63 V.I. 563, 574 n.4 (2015).

NOW, THEREFORE, pursuant to the authority conferred by Title 4, Section 72b(a), of the Virgin Islands Code, **IT IS HEREBY ORDERED** that the following assignment and reassignment policy is **ADOPTED**:

> Civil cases are deemed related when two or more lawsuits: (1) concern the same property (real or personal); or (2) involve the same or similar claim(s) between one or more of the same parties (or their successors-in-interest) that arises out of the same event, transaction, or contract. Civil cases are also deemed related if a successive lawsuit is filed following the dismissal of an earlier lawsuit between one or more of the same parties. When a civil case is filed, the plaintiff / petitioner, or his attorney, shall file a notice, contemporaneously with the complaint or petition, identifying by caption and number, each related case, if any, pending in the Superior Court. If no related cases are pending, a notice should not be filed. The notice must be served on every defendant / respondent when serving summons and a copy of the complaint. Each defendant / respondent, or his attorney, shall serve and file a notice, contemporaneously with his first responsive pleading, objecting to or concurring with the related case designation. Failure to serve and file a notice will be construed as consent to the related case designation.
>
> Attorneys and self-represented parties shall immediately notify the Clerk's Office, in writing, anytime they become aware of the existence of a related case. Objections should be served and filed within fourteen (14) days thereafter.
>
> Once a notification of related case is filed, the Clerk's Office shall assign (or reassign) the newer case to the same judicial officer assigned to the older case. In the event of an objection, the judicial officer assigned to older case shall decide whether the cases are, in fact, related. If the judicial officer determines the cases are not related, he shall return the newer case(s) to the Clerk's Office for reassignment to another judicial officer. If the judicial officer determines that the cases are related, the Clerk's Office shall skip that judicial officer when assigning new cases at random in proportion to the number of cases deemed related.

It is further **ORDERED** that this Standing Order shall take effect **IMMEDIATELY**, shall be **ENFORCED** by the Clerk's Office, and **REMAIN** in effect unless and until it is modified or set aside by another Presiding Judge, abrogated by the promulgation of a rule by the Supreme Court of the Virgin

Islands, or superseded by statute

DONE and so Ordered this 3rd day of December, 2020.

/S/ Harold W.L. Willocks

Presiding Judge of the Superior Court

The Advisory Committee on Rules of Court recommends that this Standing Order be implemented in a new Rule 17.1 to read as follows (preserving the content of the prior Order, making minor wording revisions, and assigning subpart numbers for clarity):

Superior Court Rule 17.1 – RELATED CIVIL CASES

(a) *Related Cases*. Civil cases are deemed related when two or more lawsuits (1) concern the same property (real or personal), or (2) involve the same or similar claim(s) between one or more of the same parties (or their successors-in-interest) that arise out of the same event, transaction, or contract. Civil cases are also deemed related if a successive lawsuit is filed following the dismissal of an earlier lawsuit between one or more of the same parties involving the same or similar claim(s) that arise out of the same event, transaction, or contract.

(b) *Filing Notices and Objections at the Outset of Litigation.* When a civil case is filed, the plaintiff/petitioner, or that party's attorney, must file a notice contemporaneously with the complaint or petition, identifying by caption and number each related case, if any, pending in the Superior Court. If no related cases are pending, no notice should be filed. A notice under this rule must be served on each defendant/respondent when serving the summons and a copy of the complaint. Each defendant/respondent, or that party's attorney, must serve and file a notice, contemporaneously with the party's first responsive pleading, objecting to or concurring with the related case designation. Failure of a defendant/respondent to serve and file a notice with the responsive pleading will be construed as consent to the related case designation.

(c) *Later Notices Regarding Related Cases; Objections.* At any time during the pendency of an action, attorneys and self-represented parties must immediately notify the Clerk's Office, in writing, if they become aware of the existence of a related case pending on the docket of the Superior Court. Any objections to such designations by other parties in the action must be served and filed within 14 days thereafter.

(d) *Assignment and Reassignment by Clerk's Office.* Once a notification of related case is filed, the Clerk's Office must assign (or reassign) the newer case to the same

judicial officer to whom the older case was assigned. In the event of an objection, the judicial officer assigned to the older case will decide whether the cases are, in fact, related. If it is determined that the cases are not related, the newer case(s) must be returned to the Clerk's Office for reassignment to another judicial officer. If the judicial officer determines that the cases are related, the Clerk's Office must skip that judicial officer when assigning new cases at random in proportion to the number of cases deemed related.