REVISIONS

to the

WEST VIRGINIA RULES OF EVIDENCE

FINAL VERSION

The revisions are effective September 2, 2014.

Approved by Order: June 2, 2014
Corrected by Orders: June 25, 2014 and August 28, 2014

The Court's order and a PDF version of the proposed revisions are available online at: http://www.courtswv.gov/legal-community/court-rules.html

West Virginia Rules of Evidence

(Revised effective September 2, 2014)

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on June 25, 2014, the following order was made and entered:

RE: NOTICE OF CORRECTION TO RULE 608(a) OF THE WEST VIRGINIA RULES OF EVIDENCE

By order issued June 2, 2014, the Court approved revisions to the West Virginia Rules of Evidence, to become effective September 2, 2014. Due to an error derived from the 2014 Michie's West Virginia Code Annotated, Federal Court Rules Volume (at p. 718), the text of Rule 608(a) and the comment to Rule 608 have been corrected as noted in this Order.

Originally Published Rule

> **(a) Reputation or Opinion Evidence**. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Corrected Rule

> **(a) Reputation or Opinion Evidence**. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

Corrected Comment (deletions shown in strikethrough)

> Rule 608 was taken verbatim from the federal counterpart with only one substantive change: the use of the phrase "other than the accused" in Rule 608(b), which is contained in the existing state rule. ~~The term credibility in 608(b) has been replaced by the term "character for truthfulness" in the last sentence of subdivision (b). However, the term "credibility" is also used in subdivision (a). It is unnecessary to substitute "character for truthfulness" for "credibility" in Rule 608(a), because subdivision (a)(1) already serves to limit impeachment to proof of such character. Rules 609(a) and 610 also use the term "credibility" when the intent of those rules is to regulate impeachment of a witness's character for truthfulness. No inference should be derived from the fact that Rule 608(b) differs from the federal rule, but Rules 609 and 610 do not.~~

The Rules attached to the Court's June 2, 2014 order and posted to the Court's website have been updated to reflect this correction. The Clerk is directed to provide a copy of this order to all publishers who normally receive notice of rule changes.

A True Copy

Attest: //s// Rory L. Perry II
Clerk of Court

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals, continued and held at Charleston, Kanawha County, on August 28, 2014, the following order was made and entered:

RE: NOTICE OF CORRECTION TO RULE 612(b) AND THE COMMENT ON RULE 611 OF THE WEST VIRGINIA RULES OF EVIDENCE

By order issued June 2, 2014, the Court approved revisions to the West Virginia Rules of Evidence, to become effective September 2, 2014. Upon additional review, the Court is of the opinion that a correction is necessary in Rule 612(b), in order to clarify the role of the Rules of Evidence in certain depositions. In addition, a slight correction to the comment on Rule 611 is necessary. Additions are shown by underlining, and deletions are shown by strikethrough.

Rule 612. Writing Used to Refresh a Witness's Memory (In Part)

(b) Adverse Party's Options; Deleting Unrelated Matter. An adverse party is entitled to have the writing or object produced at the trial, ~~or~~ hearing, or deposition to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing or object includes unrelated matter, the court must examine the writing or object in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

COMMENT ON RULE 612

Rule 612 was taken from the federal counterpart with the following substantive and stylistic changes. The entire rule was modified to include the phrase "an object" taken from the state rule. Rule 612(b) was modified to include the word "trial" taken from the state rule that was not contained in the federal rule. Rule 612(c) was modified to include the phrase "if production of the writing or object at the trial or hearing is impracticable, the court may order it made available for inspection." The requirement in the existing state rule that in a criminal case the court must strike testimony or declare a mistrial was removed. ~~References to "deposition" in the current state rule were removed because the Rules of Evidence do not apply to depositions.~~ This rule is applicable to depositions and deposition testimony.

* * * *

Rule 611. Mode and order of Examining Witnesses and Presenting Evidence

COMMENT ON RULE 611 (IN PART)

The limitation of cross-examination to the "subject matter of direct examination" in Rule 611(b)(2) is not intended to restrict cross-examination only to those facts elicited during ~~cross~~ direct examination.

The Rules attached to the Court's June 2, 2014 order and posted to the Court's website have been updated to reflect this correction. The Clerk is directed to provide a copy of this order to all publishers who normally receive notice of rule changes.

A True Copy

Attest: //s// Rory L. Perry II
Clerk of Court

West Virginia Rules Of Evidence

By order issued June 2, 2014, the Supreme Court of Appeals of West Virginia approved comprehensive revisions to the West Virginia Rules of Evidence. A correction to Rule 608(a) was issued on June 25. A correction to Rule 612(b) was issued on August 28. The revisions are effective September 2, 2014. Given the extensive restyling of the rules, strikethrough and underlining are not used. Comments are provided to alert the reader to any substantive changes, and also to provide guidance where necessary.

Article I. General Provisions

Rule 101. Scope; Definitions

(a) Scope. These rules apply to proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101. Rules of evidence set forth in any West Virginia statute not in conflict with any of these rules or any other rules adopted by the Supreme Court of Appeals shall be deemed to be in effect until superseded by rule or decision of the Supreme Court of Appeals of West Virginia.

(b) Definitions. In these rules:

(1) "civil case" means a civil action or proceeding;

(2) "criminal case" includes a criminal proceeding;

(3) "public office" includes a public agency;

(4) "record" includes a memorandum, report, or data compilation;

(5) a "rule prescribed by the Supreme Court of Appeals of West Virginia" means a rule adopted by the Supreme Court of Appeals of West Virginia under constitutional, statutory, or inherent rulemaking authority; and

(6) a reference to any kind of written material or any other medium includes electronically stored information.

Comment on Rule 101

Rule 101(a) is substantially the existing state rule with only stylistic changes. Rule 101(b) has been patterned after the federal rule with minor changes in order to make it state-specific.

Rule 102. Purpose

These rules shall be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Comment on Rule 102

Rule 102 is taken verbatim from its federal counterpart, with the exception of the term "shall" instead of "should" in the first sentence. The revised rule is substantively the same as the current state rule and the changes are merely stylistic.

Rule 103. Rulings on Evidence

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) Taking Notice of Plain Error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Comment on Rule 103

Rule 103(a), (c), (d), and (e) are substantively the same as the current state version of the rule. The revised provisions have merely incorporated stylistic changes, which were taken verbatim from the federal rule. Rule 103(b) is a new provision that was taken verbatim from Federal Rule 103(b).

Motions *in limine* on legal issues presented in a vacuum are often frivolous. Boilerplate, generalized objections in motions *in limine* are inadequate and tantamount to not making any objection at all and will not preserve error. For example, a motion that simply asks the trial court to prohibit the adverse party from presenting hearsay evidence or mentioning insurance at trial is a waste of judicial resources. Generally, a motion *in limine* should not be filed (or granted) until the trial court has been given adequate context, and the evidence is sufficient to permit the trial court to make an informed ruling.

Rule 104. Preliminary Questions

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession or evidence seized as a result of a search and seizure;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Comment on Rule 104

Rule 104 is largely taken from its federal counterpart. The revised rule is substantively the same as the current state rule and the changes are merely stylistic. Language was added to 104(c)(1) in accordance with the requirement that hearings on the admissibility of evidence seized as a result of a search and seizure must be held out of the presence of the jury.

Rule 105. Limiting Evidence That is Not Admissible Against Other Parties or for Other Purposes

If the court admits evidence that is admissible against a party or for a purpose — but not against another party or for another purpose — the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Comment on Rule 105

Rule 105 is taken verbatim from its federal counterpart. The revised rule is substantively the same as the current state rule and the changes are merely stylistic.

Rule 106. Remainder of or Related Writings or Recorded Statements

If a party introduces all or part of a writing or recorded statement, an adverse party may request the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.

Comment on Rule 106

Rule 106 is taken verbatim from its federal counterpart, except for the use of the term "request" instead of "require" in the first sentence. The trial court should limit the introduction, by an adverse party, of any other part of a writing or recorded statement to information that is relevant or assists the jury in placing the writing or recorded statement in context. The adverse party does not have the absolute right to place the entire writing or recorded statement in evidence.

Article II. Judicial Notice

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must, if requested, instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must, if requested, instruct the jury that it may or may not accept the noticed fact as conclusive.

Comment on Rule 201

Rule 201 is taken verbatim from its federal counterpart, except for the "if requested" language in subsection (f).

Rule 202. Judicial Notice of Law

(a) When Mandatory. A court shall take judicial notice without request by a party of the common law, constitutions, and public statutes in force in every state, territory, and jurisdiction of the United States.

(b) When Discretionary. A court may take judicial notice without request by a party of:

(1) private acts and resolutions of the Congress of the United States and of the legislature of West Virginia and ordinances and regulations of governmental subdivisions or agencies of West Virginia and the United States; and

(2) the laws of foreign countries.

(c) When Conditionally Mandatory. A court shall take judicial notice of each matter specified in paragraph (b) of this rule if a party requests it and:

(1) furnishes the court sufficient information to enable it properly to comply with the request and

(2) has given each adverse party such notice as the court may require to enable the adverse party to prepare to meet the request.

Comment on Rule 202

Rule 202 of the state rules has not been changed. There is no federal counterpart to this rule.

Article III. Presumptions

Rule 301. Presumptions in Civil Cases Generally

In a civil case, and proceedings not otherwise provided for by statute or by these rules, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Comment on Rule 301

Rule 301 is taken verbatim from its federal counterpart with the exception of the phrase "and proceedings not otherwise provided for by statute or by these rules," which is taken from the state rule. The revised rule is substantively the same as the current state rule.

Article IV. Relevancy And Its Limits

Rule 401. Test for Relevant Evidence

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

Comment on Rule 401

Rule 401 adopts the language of the federal rule in its entirety to make it more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:

(a) the United States Constitution;

(b) the West Virginia Constitution;

(c) these rules; or

(d) other rules adopted by the Supreme Court of Appeals of West Virginia.

Irrelevant evidence is not admissible.

Comment on Rule 402

Rule 402 adopts the language of the federal rule, with modification to substitute the State of West Virginia sources, to make it more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Comment on Rule 403

Rule 403 adopts the language of the federal rule in its entirety to make it more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Rule 404. Character Evidence; Crimes or Other Acts

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

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

(2) Permitted Uses; Notice Required. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Any party seeking the admission of evidence pursuant to this subsection must:

(A) provide reasonable notice of the general nature and the specific and precise purpose for which the evidence is being offered by the party at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Comment on Rule 404

Rule 404 adopts the language of the federal rule, with modification, to make it more easily understood and to make style and terminology consistent throughout the rules. The modification reflects the requirements of *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994), and broadens the requirement of reasonable notice to every party, not just the state in a criminal prosecution, of the general nature of and the specific and precise purpose for which the evidence is being offered by the party at trial.

Consistent with the federal rule, the "rape shield" provisions formerly in Rule 404(a) are moved to a new Rule 412. There is no intent to change any result in any ruling on evidence admissibility.

Rule 405. Methods of Proving Character

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Comment on Rule 405

Rule 405 adopts the language of the federal rule in its entirety to make it more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Rule 406. Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Comment on Rule 406

Rule 406 adopts the language of the federal rule in its entirety to make it more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407. Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

(a) negligence;

(b) culpable conduct;

(c) a defect in a product or its design; or

(d) a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Comment on Rule 407

Rule 407 was taken verbatim from the federal counterpart. In addition to stylistic changes, the rule makes two substantive changes. First, the words "injury or harm," found in the first sentence of the rule, were substituted for the word "event" in line 3 of the current state rule. Second, the rule has two new express grounds for exclusion: "a defect in a product or its design" and "a need for a warning or instruction."

Rule 408. Compromise Offers and Negotiations

(a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim, the liability of a party in a disputed claim, or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim.

(b) Exceptions. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Comment on Rule 408

Rule 408 is patterned after, but not taken verbatim from, its federal counterpart. Rule 408(a) does not allow the admission of evidence "to impeach by a prior inconsistent statement or a contradiction." This restriction is not contained in the current state rule. Rule 408(a)(1) contains language found in the beginning of the first sentence of the current state rule, though worded slightly differently. Rule 408(a)(2) contains language, with slight changes, that is found in the second sentence of the current state rule. Rule 408(b) contains the last two sentences of the current state rule. The federal rule only contains the last sentence.

Rule 409. Offers to Pay Medical and Similar Expenses

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Comment on Rule 409

Rule 409 adopts the language of the federal rule in its entirety to make it more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Rule 410. Pleas, Plea Discussions, and Related Statements

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under Rule 11 of the West Virginia Rules of Criminal Procedure or a comparable state or federal procedure; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Comment on Rule 410

Rule 410 adopts the language of the federal rule, with modification to substitute West Virginia sources, to make it more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or, if controverted, proving agency, ownership, or control. This evidence may be admissible against a party that places in controversy the issues of the party's poverty, inability to pay, or financial status.

Comment on Rule 411

Rule 411 largely adopts the language of the federal rule, adding the "if controverted" phrase in the second sentence as an important clarifier. The third sentence is new and is not contained in the federal rule. It clarifies that evidence of liability insurance may be admissible if an opposing party presents evidence of inability to pay or places the party's financial status at issue in a trial.

Rule 412. Sex-Offense Cases: the Victim's Sexual Behavior or Predisposition

(a) Prohibited Uses. The following evidence shall not be admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior;

(2) evidence offered to prove a victim's sexual predisposition; or

(3) evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct in any prosecution in which the victim's lack of consent is based solely on the incapacity to consent because such victim was below a critical age, mentally defective, or mentally incapacitated.

(b) Exceptions.

(1) Criminal Cases. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) except as provided in (a)(3), evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor;

(C) evidence of specific instances of the victim's sexual conduct with persons other than the defendant, opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct solely for the purpose of impeaching credibility, if the victim first makes his or her previous sexual conduct an issue in the trial by introducing evidence with respect thereto; and

(D) evidence whose exclusion would violate the defendant's constitutional rights.

(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) Hearing.

(A) Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(B) The court shall admit the evidence if it determines that such evidence is specifically related to the act or acts for which the defendant is charged and is necessary to prevent manifest injustice.

(d) In any prosecution under this rule, neither age nor mental capacity of the victim shall preclude the victim from testifying.

(e) At any stage of the proceedings, in any prosecution under this rule, the court may permit a child who is eleven years old or less to use anatomically correct dolls, mannequins or drawings to assist such child in testifying.

(f) Definition of "Victim." In this rule, "victim" includes an alleged victim.

Comment on Rule 412

Rule 412 is a new "rape shield" rule. The rule is intended to provide the standard for the introduction of evidence of a victim's sexual history. The rule supersedes the rape shield statute, W.Va. Code § 61-8B-11, to the extent that the statute is in conflict with the rule.

The rule was taken verbatim from the federal rules with two exceptions, which are intended to incorporate terms that are contained in West Virginia's current rape shield laws. The phrase "opinion evidence of the victim's sexual conduct and reputation evidence of the victim's sexual conduct" was retained in Rule 412(a)(3) and (b)(1)(C), and the phrase "mentally defective, or mentally incapacitated" was retained in Rule 412(a)(3).

Rule 412(a)(3) and (b)(1)(C) refer to "reputation and opinion evidence," but Federal Rule 412 does not make reference to "reputation and opinion evidence." In its original enactment in 1978, Federal Rule 412 referred to "reputation and opinion evidence" in two provisions. *See* PL 95–540, 1978 HR 4727. References to "reputation and opinion evidence" in the original rule were removed in a 1994 amendment. However, the Advisory Committee Notes to the 1994 amendment make clear that the current version of Federal Rule 412 still limits evidence to that "of specific instances of sexual behavior in recognition of the limited probative value and dubious reliability of evidence of reputation or evidence in the form of an opinion." 1994 Advisory Committee Notes, Federal Rule 412.

The 1994 amendment to Federal Rule 412 completely revised the rule. The intended effects of the revision are set out in the federal commentary, in part, as follows:

> Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of

intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence of for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.

The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation. Rule 412 extends to "pattern" witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible. When the case does not involve alleged sexual misconduct, evidence relating to a third-party witness' alleged sexual activities is not within the ambit of Rule 412. The witness will, however, be protected by other rules such as Rules 404 and 608, as well as Rule 403.

The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occurred. It does not connote any requirement that the misconduct be alleged in the pleadings. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct." When this is not the case, as for instance in a defamation action involving statements concerning sexual misconduct in which the evidence is offered to show that the alleged defamatory statements were true or did not damage the plaintiff's reputation, neither Rule 404 nor this rule will operate to bar the evidence; Rule 401 and 403 will continue to control. Rule 412 will, however, apply in a Title VII action in which the plaintiff has alleged sexual harassment.

The reference to a person "accused" is also used in a non-technical sense. There is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense. Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, the evidence is subject to the requirements of Rule 404.

1994 Advisory Committee Notes to Federal Rule 412.

Article V. Privileges

Rule 501. Privilege in General

The common law governs a claim of privilege unless any of the following provides otherwise:

(a) the United States Constitution;

(b) the West Virginia Constitution;

(c) rules prescribed by the Supreme Court of Appeals of West Virginia;

(d) West Virginia statutes.

Comment on Rule 501

Rule 501 is patterned after its federal counterpart, with modifications designed to make the rule applicable to West Virginia. The revised rule is substantively the same as the current state rule.

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work product protection.

(a) Disclosure Made in a Court or Agency Proceeding; Scope of a Waiver. When the disclosure is made in a West Virginia court or agency proceeding and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a West Virginia court or agency proceeding, the disclosure does not operate as a waiver if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error.

(c) Disclosure Made in a Proceeding in a Federal or Another State's Court or Agency. When the disclosure is made in a federal or another state's court or agency proceeding and is not the subject of a court order concerning waiver, the disclosure does not

operate as a waiver in a West Virginia proceeding if the disclosure would not be a waiver under this rule if it had been made in a West Virginia court or agency proceeding.

(d) Controlling Effect of a Court Order. A West Virginia court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court, in which event the disclosure is also not a waiver in any other court or agency proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a West Virginia proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

Comment on Rule 502

This a new rule patterned after Rule 502 of the Federal Rules of Evidence. Subsection (c)(2) of the federal rule has been eliminated, because it is not needed under West Virginia law. Under West Virginia law, attorney-client privilege determinations are governed by the law of the forum. *See Kessel v. Leavitt*, 204 W.Va. 95, 184-85, 511 S.E.2d 720, 809-10 (W. Va. 1998) (citing Syl. Pts. 2 & 3, *Forney v. Morrison*, 144 W. Va. 722, 110 S.E.2d 840 (1959)). The substance of subsection (c)(1) of the federal rule has been retained to protect a party in a West Virginia proceeding who made an inadvertent disclosure in another jurisdiction.

Article VI. Witnesses

Rule 601. Competency to Testify in General

Every person is competent to be a witness except as otherwise provided for by these rules.

Comment on Rule 601

Rule 601 is taken verbatim from our current Rule 601 except for the use of the federal title and the deletion of the reference to "statute" in our Rule 601.

Rule 602. Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Comment on Rule 602

Rule 602 was taken verbatim from the federal counterpart. The rule is substantively the same as the current state rule but is organized differently for greater clarity.

Rule 603. Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Comment on Rule 603

Rule 603 is taken verbatim from it federal counterpart. The rule is substantively the same as the current state rule but is organized differently for greater clarity.

Rule 604. Interpreter

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Comment on Rule 604

Rule 604 is taken verbatim from it federal counterpart. The rule is substantively the same as the current state rule but is organized differently for greater clarity. This rule implements requirements contained in West Virginia Code § 57-5-7 and § 5-13A-8 as well as West Virginia Rule of Criminal Procedure 28.

Rule 605. Judge's Competency as a Witness

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Comment on Rule 605

Rule 605 is taken verbatim from its federal counterpart. The rule is substantively the same as the current state rule but is organized differently for greater clarity.

Rule 606. Juror's Competency as a Witness

(a) At the Trial. A member of the jury shall not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

(b) During an Inquiry Into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

Comment on Rule 606

Rule 606(a) has not been changed and was taken directly from the current state rule. The federal counterpart is slightly different. The federal counterpart provides that a juror "may not" testify; whereas the state rule provides that a juror "shall not" testify. The federal rule also provides that a court "must give a party an opportunity to object" to a juror testifying; whereas the state rule indicates the issue is preserved without an objection. To avoid the misleading impression that a trial court has discretion to allow a juror to testify at trial, the existing provision remains in the rule.

Rule 606(b) was taken verbatim from its federal counterpart. Except for Rule 606(b)(2)(C), the revised Rule 606(b) is substantively the same as the current rule, but is organized differently for greater clarity. Rule 606(b)(2)(C) was added to the federal rule in 2006. This provision allows a juror to testify that a mistake was made in entering the verdict.

Rule 607. Who May Impeach a Witness

The credibility of a witness may be attacked and impeached by any party, including the party calling the witness.

Comment on Rule 607

Rule 607 is taken verbatim from the current state version except for a stylistic modification in the title.

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination of a witness other than the accused, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Comment on Rule 608

Rule 608 was taken verbatim from the federal counterpart with only one substantive change: the use of the phrase "other than the accused" in Rule 608(b), which is contained in the existing state rule.

Note from the Clerk: By order issued on June 25, 2014, the originally published text of Rule 608(a) was corrected due to an error derived from the 2014 Michie's West Virginia Code Annotated, Federal Court Rules Volume (at p. 718). The comment to Rule 608 was updated as well. This document contains the corrected version.

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) General Rule.

(1) Criminal Defendants. For the purpose of attacking the credibility of a witness accused in a criminal case, evidence that the accused has been convicted of a crime shall be admitted but only if the crime involved perjury or false swearing.

(2) All Witnesses Other Than Criminal Defendants. For the purpose of attacking the credibility of a witness other than the accused

(A) evidence that the witness has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and

(B) evidence that the witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if the court determines, in the interests of justice, that:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Comment on Rule 609

Rule 609(a) was taken verbatim from the current state rule. The provisions of Rule 609(b)-(e) were taken verbatim from their federal counterpart, with one exception. Federal Rule 609(b) did not contain the standard "if the court determines, in the interests of justice." This standard is found in the current state rule. All of the other revised provisions of Rule 609(b)-(e) are substantively the same as the current rule. The only change is stylistic.

Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible to attack or support the witness's credibility.

Comment on Rule 610

Rule 610 was taken verbatim from the federal counterpart with only one stylistic change. The phrase "the beliefs or opinions of a witness on matters of religion" was retained from the State rule. The change is stylistic only and is substantively the same as the current rule, but is organized differently for greater clarity.

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination.

(1) Party Witness. A party may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interest of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

(2) Non-Party Witnesses. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the non-party witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an expert witness, an adverse party, or a witness identified with an adverse party.

Comment on Rule 611

Rule 611(a) is taken verbatim from the federal counterpart. The revised provisions are substantively the same as the current state rule. The only change is stylistic.

Rule 611(b) was taken verbatim from the current state rule. The federal counterpart is not adopted because it differs materially. The federal counterpart limits cross-examination of a party and non-party to testimony given on direct examination; however, the existing state rule allows a party to be cross-examined on any relevant matter, and only limits cross-examination of a non-party to testimony given on direct examination. The state approach is the better way handling cross-examination.

The limitation of cross-examination to the "subject matter of direct examination" in Rule 611(b)(2) is not intended to restrict cross-examination only to those *facts* elicited during direct examination. "The subject matter of direct [examination] does not mean literally the precise facts developed on direct. It means the subject matter opened up[.]" *State v. Deitz*, 182 W.Va. 544, 551, 390 S.E.2d 15, 22 (1990)(quoting F. Cleckley, *Handbook on Evidence for West Virginia Lawyers* § 3.3(D)(3) (2d ed. 1986)(emphasis omitted).

Rule 611(c) is taken verbatim from the federal counterpart, except that expert witnesses are included in Rule 611(c)(2), which is consistent with the existing state rule.

Rule 612. Writing Used to Refresh a Witness's Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing or object to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. An adverse party is entitled to have the writing or object produced at the trial**,** hearing, or deposition to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing or object includes unrelated matter, the court must examine the writing or object in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. If production of the writing or object at the trial or hearing is impracticable, the court may order it be made available for inspection.

Comment on Rule 612

Rule 612 was taken from the federal counterpart with the following substantive and stylistic changes. The entire rule was modified to include the phrase "an object" taken from the state rule. Rule 612(b) was modified to include the word "trial" taken from the state rule that was not contained in the federal rule. Rule 612(c) was modified to include the phrase "if production of the writing or object at the trial or hearing is impracticable, the court may order it made available for inspection." The requirement in the existing state rule that in a criminal case the court must strike testimony or declare a mistrial was removed. This rule is applicable to depositions and deposition testimony.

Rule 613. Witness's Prior Statement

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, provide a copy to a *pro se* adverse party or an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Comment on Rule 613

Rule 613 was taken from the federal counterpart with only minor changes. Rule 613(a) includes the phrase "a *pro se* adverse party" and substitutes the phrase "provide a copy" for the phrase "show it or disclose its contents." The revised rule is substantively the same as the current state rule.

Rule 614. Court's Calling or Examining a Witness

(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) Examining. The court may examine a witness regardless of who calls the witness. In jury trials the court's examination shall be impartial so as not to prejudice the parties.

(c) Objections. A party may object outside the presence of the jury to the court's calling or examining a witness.

Comment on Rule 614

Rule 614 was taken verbatim from the federal counterpart with only two stylistic changes. Rule 614(b) includes the sentence taken from the state rule: "In jury trials the court's examination shall be impartial so as not to prejudice the parties" and 614(c) includes the state rule wording "outside the presence of the jury." The revised rule is substantively the same as the current state rule.

Rule 615. Excluding Witnesses

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) a person the court believes should be permitted to be present.

Comment on Rule 615

Rule 615 was taken verbatim from its federal counterpart. With one exception, the revised rule is substantively the same as the current state rule and only has stylistic changes. The one exception is revised Rule 615(d). This provision was patterned after its federal counterpart, but is not found in the current state rule. Federal Rule 615(d) provides: "a person authorized by statute to be present." Because the trial judge should have the ultimate discretion to decide whether a witness should be allowed to remain in the courtroom, subsection (d) differs from the federal rule.

Article VII. Opinions And Expert Testimony

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Comment on Rule 701

Rule 701 was taken verbatim from its federal counterpart. With one exception, the revised rule is substantively the same as the current state rule and only has stylistic changes. The one exception is revised Rule 701(c). This provision was taken from its federal counterpart, but is not found in the state rule.

Rule 702. Testimony by Expert Witnesses

(a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

(b) In addition to the requirements in subsection (a), expert testimony based on a novel scientific theory, principle, methodology, or procedure is admissible only if:

(1) the testimony is based on sufficient facts or data;

(2) the testimony is the product of reliable principles and methods; and

(3) the expert has reliably applied the principles and methods to the facts of the case.

Comment on Rule 702

Rule 702 is a modified version of its federal counterpart. The revised rule applies existing case law that requires expert testimony based upon novel scientific theories to be evaluated by the trial court exercising its "gatekeeper" function. *See* Syllabus point 2, *Harris v. CSX Transportation*, 232 W.Va. 617, 753 S.E.2d 275 (2013).

Rule 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Comment on Rule 703

Rule 703 is taken verbatim from the federal rule, and is essentially a restyled version of the current state rule with one addition. The revised rule incorporates the last sentence of the federal rule in accordance with syllabus point 3 of *Doe v. Wal-Mart*, 210 W.Va. 664, 558 S.E.2d 663 (2001).

Rule 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.

Comment on Rule 704

Rule 704 of the state rule has not been changed. Federal Rule 704(b) is not adopted in accordance with case law. *See State v. Dietz*, 182 W.Va. 544, 550 n.3, 390 S.E.2d 15, 21 n.3 (1990) ("W.Va.R.Evid. 704 initially provided for a subdivision (b) like its federal counterpart when the state rules became effective on February 1, 1985. However, subdivision (b) of the state rule was repealed by an amendment effective on October 16, 1985. *See State v. Swiger,* 175 W.Va. 578, 588 n. 10, 336 S.E.2d 541, 551 n. 10 (1985). *See also State v. Smith,* 178 W.Va. 104, 107-108 n. 1, 358 S.E.2d 188, 191 n. 1 (1987).")

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion — and give the reasons for it — without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Comment on Rule 705

Rule 705 is taken verbatim from its federal counterpart. The revised rule is substantively the same as the current state rule and the changes are merely stylistic.

Rule 706. Court-Appointed Expert Witnesses

(a) Appointment. The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he or she consents to act. A witness so appointed shall be informed of his or her duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his or her findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) Disclosure of Appointment. The jury shall in no way be advised that the court appointed the witness, absent an agreement to so advise by all parties.

(d) Parties' Experts of Own Selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Comment on Rule 706

Rule 706 is largely taken verbatim from the current state version with one exception. The reference to condemnation actions in subsection (b) was deleted because it is not accurate.

Article VIII. Hearsay

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

The following definitions apply under this article:

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Comment on Rule 801

Rule 801 is taken verbatim from the current federal rule. The changes are stylistic.

Rule 802. The Rule Against Hearsay

Hearsay is not admissible except as provided by these rules.

Comment on Rule 802

Rule 802 is taken verbatim from the current state rule. It is not necessary to adopt the federal rule references to statutes.

Rule 803. Exceptions to the Rule Against Hearsay

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for — and is reasonably pertinent to — medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(9) Public Records of Vital Statistics. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of a Public Record. Testimony — or a certification under Rule 902 — that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) a person who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the opposing party does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection, or the court otherwise permits for good cause shown.

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose — unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. A statement in a document that is at least 20 years old and whose authenticity is established.

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage — or among a person's associates or in the community — concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community — arising before the controversy — concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgments Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [Other Exceptions .] [Transferred to Rule 807.]

Comment on Rule 803

Rule 803 is taken verbatim from the current federal rule. The changes are stylistic only.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement Under the Belief of Imminent Death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) Statement of Personal or Family History. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) Statement of a Deceased Person. In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased — whether oral or written — shall not be excluded as hearsay provided the trial judge shall first find as a fact that the statement:

(A) was made by the decedent; and

(B) was made in good faith and on decedent's personal knowledge; and

(C) was made under circumstances that indicate it was trustworthy.

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

(7) [Other Exceptions .] [Transferred to Rule 807.]

Comment on Rule 804

The stylistic changes in Rule 804 are taken verbatim from the federal rule with the exception of Rule 804(b)(5), which was added in accordance with syllabus points 6 and 7 of *State Farm Fire & Cas. Co. v. Printz*, 231 W.Va. 96, 743 S.E.2d 907 (2013), which invalidated the so-called Dead Man's Statute (W.Va. Code § 57-3-1).

Rule 805. Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Comment on Rule 805

Rule 805 is taken verbatim from its federal counterpart. The revised rule is substantively the same as the current state rule and the changes are merely stylistic. There is no intent to change any result in any ruling on evidence admissibility.

Rule 806. Attacking and Supporting the Declarant's Credibility

When a hearsay statement — or a statement described in Rule 801(d)(2)(C), (D), or (E) — has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Comment on Rule 806

Rule 806 is taken verbatim from its federal counterpart. The revised rule is substantively the same as the current State rule and the changes are merely stylistic. There is no intent to change any result in any ruling on evidence admissibility.

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) 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 the declarant's name and address, so that the party has a fair opportunity to meet it.

Comment on Rule 807

Rule 807 is a new rule that was taken verbatim from the federal rules. Federal Rule 807 was added to the Federal Rules of Evidence in 1997. The Advisory Committee set out the following justification for the new rule: "The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended." 1997 Advisory Committee Notes, Federal Rule 807.

Article IX. Authentication And Identification

Rule 901. Authenticating or Identifying Evidence

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only — not a complete list — of evidence that satisfies the requirement:

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

(2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion identifying a person's voice — whether heard firsthand or through mechanical or electronic transmission or recording — based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by a Rule. Any method of authentication or identification provided by the Supreme Court of Appeals of West Virginia**.**

Comment on Rule 901

Rule 901 was taken verbatim from the federal counterpart with only one stylistic change in 901(b)(10) adding the following phrase taken from the state rule: "provided by the Supreme Court of Appeals of West Virginia." The federal rule is substantively the same as the current rule, but is organized differently for greater clarity. The reference to statutes was deleted because it is not necessary.

Rule 902. Self-Authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position

(A) of the executing or attesting person, or

(B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any law of the United States or of this state.

(5) Official Publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and Periodicals. Printed materials purporting to be newspapers or periodicals.

(7) Trade Inscriptions and the Like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions Created by Law. Any signature, document, or other matter declared by any law of the United States or of this state to be presumptively or prima facie genuine or authentic.

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a state statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them.

(12) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a state statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Comment on Rule 902

Rule 902 is taken verbatim from the current state version, except for two provisions. Revised Rule 902 contains two new provisions, Rule 902(11) and Rule 902(12), that are found in the federal counterpart. These provisions allow for certification of domestic and foreign records

Rule 903. Subscribing Witness's Testimony

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

Comment on Rule 903

Rule 903 is taken verbatim from its federal counterpart. The revised rule is substantively the same as the current state rule and the changes are merely stylistic.

Article X. Contents Of Writings; Recordings & Photographs

Rule 1001. Definitions That Apply to This Article

In this article:

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) A "photograph" means a photographic image or its equivalent stored in any form.

(d) An "original" of a writing or recording means the writing or recording itself or any copy or counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout — or other output readable by sight — if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) A "duplicate" means a copy or counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Comment on Rule 1001

Rule 1001 is taken verbatim from the federal rule with the exception of the use of the word "copy" in addition to "counterpart" used in Federal Rule 1001(d) and (e). The revised rule is substantively the same as the current state rule but is organized differently for greater clarity.

Rule 1002. Requirement of the Original

An original writing, recording, or photograph is required in order to prove its content unless these rules or a state statute provides otherwise.

Comment on Rule 1002

Rule 1002 is taken verbatim from its federal counterpart and has only a substitution of the word "state" in place of "federal" to make it applicable to the State of West Virginia. The revised rule is substantively the same as the current state rule.

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Comment on Rule 1003

Rule 1003 is taken verbatim from its federal counterpart and is substantively the same as the current state rule.

Rule 1004. Admissibility of Other Evidence of Content

An original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(a) Originals Lost or Destroyed. All the originals are lost or destroyed, and not by the proponent acting in bad faith; or

(b) Original Not Obtainable. An original cannot be obtained by any available judicial process; or

(c) Original in Possession of Opponent. The party against whom the original would be offered had control of the original was put on notice- by pleadings or otherwise- that the original would be a subject of proof at the trial, hearing or deposition; and then fails produce it when required to do so; or

(d) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

Comment on Rule 1004

Rule 1004 is the current state rule with some federal wording changes for clarity. The revised rule is substantively the same as the current State rule.

Rule 1005. Copies of Public Records to Prove Content

The proponent may use a copy to prove the content of an official record — or of a document that was recorded or filed in a public office as authorized by law — if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Comment on Rule 1005

Rule 1005 is taken verbatim from its federal counterpart and is substantively the same as the current state rule.

Rule 1006. Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or

copying, or both, by other parties at a reasonable time and place, unless the originals or duplicates to be used are identified and previously produced by any party. The court may order the proponent to produce the originals or duplicates in court.

Comment on Rule 1006

Rule 1006 is largely taken verbatim from its federal counterpart, The phrase "the originals or duplicates" is used in place of "them" for clarity. A clarifying phrase was added to prevent repeated unnecessary disclosures. The revised rule is substantively the same as the current state rule.

Rule 1007. Testimony or Statement of a Party to Prove Content

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Comment on Rule 1007

Rule 1007 is taken verbatim from its federal counterpart and is substantively the same as the current state rule.

Rule 1008. Functions of Court and Jury

When the admissibility of secondary evidence to prove contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104(a). However, when an issue is raised in a jury trial, the jury determine—in accordance with Rule 104(b)—any issue about:

(a) whether the asserted writing, recording or photograph ever existed, or

(b) whether another writing, recording, or photograph produced at the trial is the original, or

(c) whether other evidence of content correctly reflects the content.

Comment on Rule 1008

Rule 1008 is patterned after the state rule, but organized like the federal rule. The additional language in Rule 1008 "in a jury trial, the jury determine – in accordance with Rule 104(b) – any issue about:" is taken directly from its federal counterpart. The revised rule is substantively the same as the current state rule.

Article XI. Miscellaneous

Rule 1101. Applicability

(a) Rules Applicable. Except as otherwise provided in subdivision (b), these rules apply to all actions and proceedings in the courts of this state.

(b) Rules Inapplicable. Unless otherwise provided by rules of the Supreme Court of Appeals, these rules other than those with respect to privileges do not apply in the following situations:

(1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

(2) Grand Jury. Proceedings before grand juries.

(3) Miscellaneous Proceedings. Sentencing; granting or revoking probation or supervised release; issuance of warrants for arrest, criminal summonses and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Contempt Proceedings. Contempt proceedings in which the court may act summarily.

(5) Depositions. Depositions are governed by the Rules of Civil Procedure.

Comment on Rule 1101

Except for the addition of "or supervised release" in Rule 1101(b)(3), and the additions of Rule 1101(b)(5) regarding depositions, this rule is the existing state rule without any proposed changes.

Rule 1102. Title

These rules may be known and cited as the West Virginia Rules of Evidence (WVRE).

Comment on Rule 1102

Rule 1102 is the existing state rule without any proposed changes.