PROPOSED REVISIONS

to the

WEST VIRGINIA RULES OF EVIDENCE

PUBLIC COMMENT VERSION

Public comments are due by December 16, 2013.

Approved by Order: September 16, 2013

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

Historical Note

The West Virginia Rules of Evidence were adopted by the Supreme Court of Appeals on December 18, 1984, to be effective February 1, 1985. Since that time there has not been a comprehensive review of the Rules of Evidence to determine whether the rules should be updated.

By order entered November 1, 2012, the Court appointed a select committee with directions to undertake a comprehensive review of the West Virginia Rules of Evidence and make recommendations to the Court as to whether the rules should be updated, particularly in light of revisions to the Federal Rules of Evidence that have been implemented since 1985. The members of the Committee on the Revision of the Rules of Evidence are as follows:

Honorable Ronald L. Wilson, Chairman
Judge of the First Judicial Circuit, New Cumberland, WV

Robert P. Fitzsimmons
Wheeling, WV

W. Henry Jernigan, Jr.
Charleston, WV

Louis J. Palmer, Jr.
Charleston, WV

Christopher C. Quasebarth
Martinsburg, WV

The Committee completed its work in May 2013 and submitted a set of proposed revisions — along with Committee comments — to the Court for review and consideration. On September 16, 2013 the Court entered an order approving a 90-day period of public comment, which concludes on December 16, 2013.

About This Revision

In many instances, the proposed revisions adopt the general restyling recommendations that were incorporated into the Federal Rules. Because many of the rules contain extensive restyling, including the titles and headings within various rules, strikethrough and underlining are not used. Instead, the Committee Comments explain the changes. If there are substantive changes in the text, the Comments will alert the reader. The Comments are provided only to assist the reader in understanding the rules and do not constitute a substantive component of the rules.

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How to Submit Public Comments

Members of the public, lawyers, judges, and other interested parties are encouraged to submit written comments on the proposed revisions. The Court will carefully review the written comments, which often result in improvements to the rules once they are implemented.

Comments must be in writing. Comments in the body of an e-mail are often not useful. The preferred method for individual comments is to use letterhead identifying the person making the comment. Where possible, practice groups who are affected by the proposed revisions should aggregate comments and use the letterhead of the group or association. (Comments of this nature are very useful to the Court.) When commenting, make reference to the specific rule and/or Committee Comment. If you wish to propose an alternative version of any rule, please feel free to do so.

Comments by Mail

Address written comments to:
Rory L. Perry II, Clerk of Court
State Capitol, Room E-317
1900 Kanawha Blvd. East
Charleston WV 25305

Comments by E-mail

Include written comments *as a PDF or Word attachment* to an e-mail addressed to: <rory.perry@courtswv.gov>.

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 or statutory authority; and

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

Committee Comment on Rule 101

Rule 101 is patterned after, but not taken verbatim from, its federal counterpart. Rule 101(a) is substantially the existing state rule with only stylistic changes. Rule 101(b) has been taken verbatim from the federal rule. As explained in the Advisory Committee Notes to the 2011 Amendments to the Federal Rules of Evidence:

> The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.
>
> The reference to electronically stored information is intended to track the language of Fed. R. Civ. P. 34.

2011 Advisory Committee Notes, Federal Rule 101 (In this document, references to Advisory Committee Notes on the Federal Rules of Evidence that are published in 28 United States Code Annotated are identified by the year of the amendment and the rule number.)

The current version of West Virginia Rule of Civil Procedure 34 does not contain a reference to electronically stored information, and the Committee recommends that such a reference be added.

Rule 102. Purpose

These rules should 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.

Committee Comment on Rule 102

Rule 102 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. As explained in the Advisory Committee Notes to the 2011 Amendments:

> The language of Rule 102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

2011 Advisory Committee Notes, Federal Rule 102.

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.

Committee 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). The commentary to the 2000 amendment to Federal Rule 103(b) explains the provision as follows:

> The amendment applies to all rulings on evidence whether they occur at or before trial, including so-called "*in limine*" rulings. One of the most difficult questions arising from *in limine* and other evidentiary rulings is whether a losing party must renew an objection or offer of proof when the evidence is or would be offered at trial, in order to preserve a claim of error on appeal. […]
>
> The amendment provides that a claim of error with respect to a definitive ruling is preserved for review when the party has otherwise satisfied the objection or offer of proof requirements of Rule 103(a). When the ruling is definitive, a renewed objection or offer of proof at the time the evidence is to be offered is more a formalism than a necessity. […]
>
> The amendment imposes the obligation on counsel to clarify whether an *in limine* or other evidentiary ruling is definitive when there is doubt on that point. […]
>
> Even where the court's ruling is definitive, nothing in the amendment prohibits the court from revisiting its decision when the evidence is to be offered. If the court changes its initial ruling, or if the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal. The error, if any, in such a situation occurs only when the evidence is offered and admitted. […]
>
> A definitive advance ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the advance ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike. […] Similarly, if the court decides in an advance ruling that proffered evidence is admissible subject to the eventual introduction by the proponent of a foundation for the evidence, and that foundation is never provided, the opponent cannot claim error based on the failure to establish the foundation unless the opponent calls that failure to the court's attention by a timely motion to strike or other suitable motion.

2000 Advisory Committee Notes, Federal Rule 103. *See United States v. Nixon*, 694 F.3d 623, 628 (6th Cir. 2012) ("This court has elaborated on the Rule by stating that 'if the [district] court's ruling is in any way qualified or conditional, the burden is on counsel to [again] raise objection to preserve [the] error.'").

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;

(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.

Committee Comment on Rule 104

Rule 104 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 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.

Committee 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. The Advisory Committee's Note for this Rule makes the following statement:

> A close relationship exists between this rule and Rule 403 which requires exclusion when "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403.

1972 Advisory Committee Notes, Federal Rule 105.

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 require 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.

Committee Comment on Rule 106

Rule 106 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. The Advisory Committee Notes to the 1972 Proposed Rules state, in part, as follows:

> The rule is an expression of the rule of completeness. McCormick §56. It is manifested as to depositions in Rule 32(a)(4) of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement.
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> The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial. See McCormick §56; California Evidence Code §356. The rule does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case.
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> For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.

1972 Advisory Committee Notes, Federal Rule 106.

Article II. Judicial Notice

Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. 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.

Committee 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.

Committee Comment on Rule 202

Rule 202 of the State Rule has not been changed. There is no federal counterpart to this Rule, for the reasons set forth in this portion of the Advisory Committee Notes on the 1972 proposed rules:

> *Note on Judicial Notice of Law*. By rules effective July 1, 1966, the method of invoking the law of a foreign country is covered elsewhere. Rule 44.1 of the Federal Rules of Civil Procedure; Rule 26.1 of the Federal Rules of Criminal Procedure. These two new admirably designed rules are founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure. The Advisory Committee on Evidence, believing that this assumption is entirely correct, proposes no evidence rule with respect to judicial notice of law, and suggests that those matters of law which, in addition to foreign-country law, have traditionally been treated as requiring pleading and proof and more recently as the subject of judicial notice be left to the Rules of Civil and Criminal Procedure.

1972 Advisory Committee Notes, Federal Rule 106.

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.

Committee 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, and makes the rule applicable to the State. 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.

Committee 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.

Committee 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.

Committee 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.

Committee 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 Supreme Court of Appeals of West Virginia's ruling in *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 W.V.R.E. 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.

Committee 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.

Committee 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.

Committee 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." The latter insertion is explained in the Advisory Committee Notes to the 1997 Amendments:

> [R]ule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove "a defect in a product or its design, or that a warning or instruction should have accompanied a product." This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions. See *Raymond v. Raymond Corp., 938 F.2d 1518, 1522* (1st Cir. 1991); *In re Joint Eastern District and Southern District Asbestos Litigation v. Armstrong World industries, Inc.,* 995 F.2d 343 (2d Cir. 1993)(additional citations omitted).
>
> Although this amendment adopts a uniform federal rule, it should be noted that evidence of subsequent remedial measures may be admissible pursuant to the second sentence of Rule 407. Evidence of subsequent measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.

1997 Advisory Committee Notes, Federal Rule 407.

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 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 — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(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.

Committee Comment on Rule 408

Rule 408 is patterned after, but not taken verbatim from, its federal counterpart. Rule 408(a) states that evidence is not admissible to prove "the validity or amount of a disputed claim." The current State version of the rule refers to proving "liability for or invalidity of the claim or its amount." The revised version of the rule does not refer to "liability." The 2011 commentary to the federal rule explained this change as follows:

> The Committee deleted the reference to "liability" on the ground that the deletion makes the Rule flow better and easier to read, and because "liability" is covered by the broader term "validity." Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the Rule is intended.

2011 Advisory Committee Notes, Federal Rule 408

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. The commentary to the federal rule explains this restriction as follows:

> The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See McCormick on Evidence* at 186 (5th ed. 1999) ("Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). *See also EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542 (10th Cir.1991) (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging uninhibited settlement negotiations).

2006 Advisory Committee Notes, Federal Rule 408

Rule 408(a)(1) is not new. This language is found in the beginning of the first sentence of the current State rule, though worded slightly differently.

Rule 408(a)(2) is a mixture of old and new. The first part of the revised provision states, "conduct or a statement made during compromise negotiations about the claim." This language, with slight changes, is

found in the second sentence of the current State rule. The last provision in revised Rule 408(a)(2) is new and is found in the federal rule. The commentary to the federal rule explains this provision as follows:

> [R]ule 408 does not prohibit the introduction in a criminal case of statements or conduct during compromise negotiations regarding a civil dispute by a government regulatory, investigative, or enforcement agency. *See, e.g., United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (admissions of fault made in compromise of a civil securities enforcement action were admissible against the accused in a subsequent criminal action for mail fraud). Where an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator or an attorney for the government.
>
> Statements made in compromise negotiations of a claim by a government agency may be excluded in criminal cases where the circumstances so warrant under Rule 403. For example, if an individual was unrepresented at the time the statement was made in a civil enforcement proceeding, its probative value in a subsequent criminal case may be minimal. But there is no absolute exclusion imposed by Rule 408.

2006 Advisory Committee Notes, Federal Rule 408.

Rule 408(b) contains the last two sentences of the current State rule. The federal rule only contains the last sentence. The remaining sentence was deleted from the federal rule. The commentary to the federal rule explains this deletion as follows:

> The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

2006 Advisory Committee Notes, Federal Rule 408

The Committee believed the federal justification was not strong enough to delete the sentence from the revised State rule.

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.

Committee 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.

Committee Comment on Rule 410

Rule 410 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 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 proving agency, ownership, or control.

Committee Comment on Rule 411

Rule 411 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 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.

Committee 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 was 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 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.

Rule 413. Similar Crimes in Sexual-Assault Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary

of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Sexual Assault." In this rule and Rule 415, " sexual assault" means a crime under state law or laws of a foreign jurisdiction involving:

(1) any conduct prohibited by W.Va. Code § 61-8B-1 *et seq*.;

(2) contact, without consent, between any part of the defendant's body--or an object--and another person's genitals or anus;

(3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;

(4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)-(4).

Committee Comment on Rule 413

Rule 413 is a new rule. Except for the reference to W.Va. Code § 61-8B-1 *et seq*. in Rule 413(d)(1), the text of the rule was taken verbatim from the federal rule. For further comment on Rule 413, see Comment to Rule 415.

Rule 414. Similar Crimes in Child-Molestation Cases

(a) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.

(b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

(d) Definition of "Child" and "Child Molestation." In this rule and Rule 415:

(1) "child" means a person below the age of 14; and

(2) "child molestation" means a crime under state law or laws of a foreign jurisdiction involving:

(A) any conduct prohibited by W.Va. Code § 61-8B-1 et seq. and committed with a child;

(B) any conduct prohibited by W.Va. Code § 61-8A-1 et seq., W.Va. Code § 61-8C-1 et seq., W.Va. Code § 61-8D-5, or similar statute;

(C) contact between any part of the defendant's body--or an object--and a child's genitals or anus;

(D) contact between the defendant's genitals or anus and any part of a child's body;

(E) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(F) an attempt or conspiracy to engage in conduct described in subparagraphs (A)-(E).

Committee Comment on Rule 414

Rule 414 is a new rule. Except for the references to various provisions of the West Virginia Code in Rule 414(d)(2)(A) and (B), the text of the rule was taken verbatim from the federal rules. For further comment on Rule 414, see Comment to Rule 415.

Rule 415. Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation

(a) Permitted Uses. In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.

(b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.

(c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

Committee Comment on Rule 415

Rule 415 is a new rule that was taken verbatim from the federal rules. Consistent with its approach to adopting the language of the federal rules where feasible, the Committee as a whole recommends that Rules 413 through 415 be adopted. However, it is important to note that at the time Congress initially adopted these rules in 1995, it did so over the strong objections of the Judicial Conference and most members of the Standing Committee on Rules. The opposing viewpoint is set out in a report by the Judicial Conference submitted to Congress on February 9, 1995, in response to Congress' invitation, portions of which are excerpted below:

> After careful study, the Judicial Conference urges Congress to reconsider its decision on the policy questions underlying the new rules for reasons set out … below.
>
> * * * *

On October 17-18, 1994, the Advisory Committee on Evidence Rules met in Washington, D.C. It considered the public responses, which included 84 written comments, representing 112 individuals, 8 local and 8 national legal organizations. The overwhelming majority of judges, lawyers, law professors, and legal organizations who responded opposed new Evidence Rules 413, 414, and 415. The principal objections expressed were that the rules would permit the admission of unfairly prejudicial evidence and contained numerous drafting problems not intended by their authors.

The Advisory Committee on Evidence Rules submitted its report to the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) for review at its January 11-13, 1995 meeting. The committee's report was unanimous except for a dissenting vote by the representative of the Department of Justice. The advisory committee believed that the concerns expressed by Congress and embodied in new Evidence Rules 413, 414, and 415 are already adequately addressed in the existing Federal Rules of Evidence. In particular, Evidence Rule 404(b) now allows the admission of evidence against a criminal defendant of the commission of prior crimes, wrongs, or acts for specified purposes, including to show intent, plan, motive, preparation, identity, knowledge, or absence of mistake or accident.

Furthermore, the new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. These protections form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law. A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person.

In addition, the advisory committee concluded that, because prior bad acts would be admissible even though not the subject of a conviction, mini-trials within trials concerning those acts would result when a defendant seeks to rebut such evidence. The committee also noticed that many of the comments received had concluded that the Rules, as drafted, were mandatory — that is, such evidence had to be admitted regardless of other rules of evidence such as the hearsay rule or the Rule 403 balancing test. […]

* * * *

The Judicial Conference concurs with the views of the Standing Committee and urges that Congress reconsider its policy determinations underlying Evidence Rules 413-415. […]

Historical Notes to Federal Rule of Evidence 413, 28 U.S.C.A. 565-567.

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.

Committee Comment on Rule 501

Rule 501 is patterned after its federal counterpart, with modifications designed to make the rule applicable to the State. The federal reference to statutes was deleted in light of the Supreme Court's inherent authority to prescribe rules of evidence. The revised rule is substantively the same as the current State rule.

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

[Not recommended for adoption.]

Committee Comment on Rule 502

The Committee does not recommended the adoption of federal Rule 502. However, the Committee has included this comment for review as part of the public comment period. The areas covered by federal Rule 502 have been recognized in judicial opinions. *See State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998) (inadvertent disclosure); *State ex rel. McCormick v. Zakaib*, 189 W.Va. 258, 430 S.E.2d 316 (1993) (waiver of the attorney-client and work product privileges as to subject matter). The federal rule was adopted in 2008. The Advisory Committee set out the following justification for the rule:

> This new rule has two major purposes:
>
> 1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product — specifically those disputes involving inadvertent disclosure and subject matter waiver.
>
> 2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Hopson v. City of Baltimore*, 232 F.R.D. 228, 244 (D.Md. 2005) (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work-product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work-product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999) (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers v. Burleson*, 100 F.R.D. 436 (D.D.C. 1983) (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

2007 Advisory Committee Notes to Federal Rule 502.

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.

Committee 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.

Committee 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. The Advisory Committee Notes to the 1972 proposed rules state:

> "* * * [T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information." McCormick § 10, p. 19. These foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception. 2 Wigmore § 650. It will be observed that the rule is in fact a specialized application of the provisions of Rule 104(b) on conditional relevancy.
>
> This rule does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement. Rules 801 and 805 would be applicable. This rule would, however, prevent him from testifying to the subject matter of the hearsay statement, as he has no personal knowledge of it.
>
> The reference to Rule 703 is designed to avoid any question of conflict between the present rule and the provisions of that rule allowing an expert to express opinions based on facts of which he does not have personal knowledge.

1972 Advisory Committee Notes, Federal Rule 602.

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.

Committee 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 The Advisory Committee Notes to the 1972 proposed rules state:

> The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. As is true generally, affirmation is recognized by federal law. "Oath" includes affirmation, 1 U.S.C. § 1; judges and clerks may administer oaths and affirmations, 28 U.S.C. §§ 459, 953; and affirmations are acceptable in lieu of oaths under Rule 43(d) of the Federal Rules of Civil Procedure. Perjury by a witness is a crime, 18 U.S.C. § 1621.

1972 Advisory Committee Notes, Federal Rule 603.

Rule 604. Interpreter

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

Committee 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 Codes § 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.

Committee 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. Competency of Juror as 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.

Committee 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. It is believed that the subtle differences in the federal counterpart might

give the misleading impression that a trial court has discretion to allow a juror to testify at trial. To avoid this misleading point, it is recommended that the current provision, with its greater clarity, remain 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. The commentary for federal Rule 606(b)(2)(C) explains the provision as follows:

> Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. (Citations omitted)
>
> In adopting the exception for proof of mistakes in entering the verdict on the verdict form, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. Thus, the exception established by the amendment is limited to cases such as where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty. […]
>
> It should be noted that the possibility of errors in the verdict form will be reduced substantially by polling the jury. Rule 606(b) does not, of course, prevent this precaution. […]

2006 Advisory Committee Notes, Federal Rule 606.

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.

Committee 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.

Committee Comment on Rule 608

Rule 608 was taken verbatim from the federal counterpart with only one substantive change — adding the phrase "other than the accused" in Rule 608(b) — taken from the State rule and the previous change in the Federal Rule. The change to the State rule is substantively the same as the current rule, but is organized differently for greater clarity. The change will also remove the term credibility in 608(b). It 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). The Committee found it 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' character for truthfulness. No inference should be derived from the fact that the Committee proposed an amendment to Rule 608(b) but not to Rules 609 and 610. The Advisory Committee Notes to the 2011 amendments state, in part:

> The Committee is aware that the Rule's limitation of bad-act impeachment to "cross-examination" is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term "on cross-examination" to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

2011 Advisory Committee Notes, Federal Rule 608.

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, false swearing or making false statements with the intent to deceive.

(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.

Committee Comment on Rule 609

Rule 609(a) was taken verbatim from the current State rule, with a slight addition. The Committee determined that the phrase "or making false statements with the intent to deceive" in Rule 609(a)(1) was consistent with case law on the subject, and should be added. *See* Syl. pt. 9, *State v. Clements*, 175 W.Va. 463, 334 S.E.2d 600 (1985) ("In the trial of a criminal case, a defendant who elects to testify may have his credibility impeached by showing prior convictions of perjury or false swearing and criminal convictions of *making false statements with intent to deceive*, but it is impermissible to impeach his credibility through any other prior convictions.")(emphasis added).

The provisions of Rule 609(b)-(e) were taken verbatim from their federal counterpart, with one exception. The 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.

Committee 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 adverse party, or a witness identified with an adverse party.

Committee Comment on Rule 611

Rule 611(a) and (c) were 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. It is not recommended that the federal counterpart provision be 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 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 believed to be 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 cross 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 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 produced at the trial or hearing, 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 includes unrelated or privileged matter, the court must examine the writing 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. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or — if justice so requires — declare a mistrial.

Committee Comment on Rule 612

Rule 612 was taken verbatim from the federal counterpart with the following substantive and stylistic changes.

Rule 612(a) was modified to include the phrases "an object" and "for the purpose of testifying at trial or hearing" 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. Also, the word "or privileged" was added for clarity.

Rule 612(c) was modified to include the phrase "if production of the writing or object at the trial, hearing or deposition is impracticable, the court may order it made available for inspection."

References to "deposition" in the current state rule were removed because the Rules of Evidence do not apply to depositions.

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, show it or disclose its contents 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, or the interest of justice otherwise require. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Committee Comment on Rule 613

Rule 613 was taken verbatim from the federal counterpart with only two stylistic changes. Rule 613(a) includes the phrase "a *pro se* adverse party" and 613(b) includes the phrase "the interest of justice otherwise requires," which is just a choice of keeping the State rule expression. 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.

Committee 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. Exclusion of Witness

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.

Committee 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. The federal Rule 615(d) provides: "a person authorized by statute to be present." The Committee determined that the trial judge should have the discretion to decide whether a witness should be allowed to remain in the courtroom.

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.

Committee 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. The Advisory Committee Notes to the 2000 amendments to federal Rule 701(c) explain the provision as follows:

> Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a

> party will not evade the expert witness disclosure requirements ... 16 by simply calling an expert witness in the guise of a layperson.
>
> The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

2000 Advisory Committee Notes, Federal Rule 701.

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

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

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

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

Committee Comment on Rule 702

Rule 702 was taken verbatim from its federal counterpart. The revised rule is substantively the same as the current State rule, except for three new provisions. The three new provisions are revised Rule 702(b)-(d). These provisions were taken from their federal counterpart, but are not found in the State rule. The Advisory Committee Notes to the 2000 amendments to federal Rule 702(b)-(d) explain the provisions as follows:

> Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). […] The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171 (1987).
>
> * * * *
>
> When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the

product of competing principles or methods in the same field of expertise. […] As the court stated in *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 744 (3d Cir. 1994), proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable…. The evidentiary requirement of reliability is lower than the merits standard of correctness." […]

[…] Under the amendment, as under *Daubert*, when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. […] The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994), "*any* step that renders the analysis unreliable … renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology*."

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. […]

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. […] While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. […] Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. […]

2000 Advisory Committee Notes, Federal Rule 702.

The State Supreme Court followed *Daubert* in *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993) and *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995), but only for scientific expert testimony. The Court implicitly rejected *Kumho's* application of *Daubert* to non-scientific expert testimony in *Watson v. Inco Alloys Intern., Inc.*, 209 W.Va. 234, 545 S.E.2d 294 (2001). By adopting the three new provisions of revised Rule 702(b)-(d), there should no longer be any distinction between admission of scientific or nonscientific expert testimony.

Additional Comment on Rule 702, by Justice Menis E. Ketchum, Joined by Justice Margaret L. Workman

The Committee's proposed Rule 702 eliminates the distinction between scientific and non-scientific expert testimony. It will precipitate numerous "gatekeeper hearings" of experts who testify in non-scientific areas, e.g. real estate appraisals, ability to work, and cost to repair a damaged car.

Our cases have rejected the "gatekeeper function" adopted in *Daubert* and *Kumho* in non-scientific expert testimony. Since West Virginia case law only requires that the "gatekeeper function" apply to scientific expert testimony, I propose the following alternative Rule 702 be adopted in lieu of the version proposed by the Committee.

> **Rule 702. Testimony by Experts**
>
> **(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 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.

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.

Committee Comment on Rule 703

Revised rule 703 is substantively the same as the current State rule and the changes are merely stylistic. The rule does not adopt the following sentence from the federal rule that is not found in the State rule: "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."

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.

Committee Comment on Rule 704

Rule 704 of the State rule has not been changed. The Committee determined not to adopt the federal rule because the federal rule contains a provision, Rule 704(b), that was rejected by the State Supreme Court. 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.

Committee 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 Experts.

(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.

Committee 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

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is

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

(B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or

(C) one of identification of a person made after perceiving the person; or

(2) Admission by Party-Opponent. The statement is offered against a party and is

(A) the party's own statement, in either an individual or a representative capacity, or

(B) a statement of which the party has manifested an adoption or belief in its truth, or

(C) a statement by a person authorized by the party to make a statement concerning the subject, or

(D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or

(E) a statement by a co-conspirator of a party during the course 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).

Committee Comment on Rule 801

Rule 801 is taken verbatim from the current State version, except for one provision. The revised rule has added the last sentence to Rule 801(d)(2)(E). This provision was taken verbatim from its federal counterpart. The provision was added to the federal rule in 1997, and the Advisory Committee Notes explain the new provision as follows:

> Rule 801(d)(2) has been amended in order to respond to three issues raised by *Bourjaily v. United States*, 483 U.S. 171 (1987). First, the amendment codifies the holding in *Bourjaily* by stating expressly that a court shall consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According *to Bourjaily*, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.
>
> Second, the amendment resolves an issue on which the Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement.
>
> Third, the amendment extends the reasoning of *Bourjaily* to statements offered under subdivisions (C) and (D) of Rule 801(d)(2). In *Bourjaily*, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant's authority under subdivision (C), and the agency or employment relationship and scope thereof under subdivision (D).

1997 Advisory Committee Notes, Federal Rule 801.

Rule 802. The Rule Against Hearsay

Hearsay is not admissible except as provided by these rules.

Committee Comment

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

Rule 803. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

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

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

(4) Statements for Purposes of Medical Diagnosis or Treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him or her to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless 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 Entry in Records Kept in Accordance With the Provisions of Paragraph (6). Evidence that a matter is not included in the memoranda reports, records, or

data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth

(A) the activities of the office or agency, or

(B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or

(C) in civil actions and proceedings and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

(**9) Records of Vital Statistics**. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of Public Record or Entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of Religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market Reports, Commercial Publications. Market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

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

(20) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to Character. Reputation of a person's character among associates or in the community.

(22) Judgment of Previous Conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to Personal, Family, or General History, or Boundaries. Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

Committee Comment on Rule 803

Rule 803 is taken verbatim from the current state version, except for one additional provision and one provision that was removed. Revised Rule 803(6) contains a new provision in Rule 803(6)(D) that is found in its federal counterpart. This provision allows for certification of a record. The Advisory Committee Notes to the 2000 amendment to federal Rule 803(6) explain the new provision as follows:

> The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and 18 U.S.C. § 3505 for foreign records in criminal cases.

2000 Advisory Committee Notes, Federal Rule 803(6). The revised rule has also removed section (24) of Rule 803 because now appears in a new rule—Rule 807.

Rule 804. Hearsay Exceptions; Declarant Unavailable

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his or her statement; or

(2) persists in refusing to testify concerning the subject matter of his or her statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his or her statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

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

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a

civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

(2) Statement Under Belief of Impending Death. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal or Family History.

(A) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(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 was made by decedent, and that it was made in good faith and on decedent's personal knowledge, and the statement was made under circumstances such as to 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.

Committee Comment on Rule 804

Rule 804 is taken verbatim from the current State version, except for three changes. First, revised Rule 804(b)(5) has been substantively changed. The original provision in Rule 804(b)(5) has been transferred to Rule 807. Second, the substance of revised Rule 804(b)(5) has no federal counterpart. The provision was modeled after New Hampshire Rule of Evidence 804(b)(5) and California Evidence Code § 1261(b). The Supreme Court of New Hampshire has explained the rule as follows:

> [T]he plaintiff, although executrix of her husband's estate, brought this action in her personal capacity. The plaintiff, however, argues that Rule 804(b)(5) applies generally to actions involving a decedent's interests, and that the decedent's interests are at issue here. We decline to read Rule 804(b)(5) so broadly. We find that Rule 804(b)(5) is inapplicable here because this suit does not involve the decedent's estate, and is not an action, suit or proceeding "by or against the representatives of deceased persons." […]
>
> The purpose of the statute is "to prevent injustice to the estates of deceased persons by permitting an executor in certain circumstances to give the deceased's version of a disputed transaction. The admissibility of the evidence is based upon guarantees of truthfulness in the form of preliminary findings by the Court."

Chinburg v. Chinburg, 660 A.2d 1127, 1129-1130 (N.H. 1995)(citations omitted).

Third, revised Rule 804(b)(6) is a new provision that is found in its federal counterpart. This provision allows for forfeiture of hearsay grounds under specific conditions. The 1997 Advisory Committee Notes to Rule 804(b)(6) explain the new provision as follows:

> Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204 (1984). The wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government.
>
> Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied. The … cases apply a preponderance of the evidence standard. The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.

1997 Advisory Committee Notes, Federal Rule 804(b)(6) (citations omitted).

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.

Committee 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.

Committee 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.

Committee 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**.**

Committee Comment on Rule 901

Rule 901 was taken verbatim from the federal counterpart with only one stylistic change in 901(b)(10), by adding the 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).

Committee 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. The 2000 Advisory Committee Notes for federal Rule 902(11) and Rule 902(12) explain the new provisions as follows:

> The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. […]
>
> The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

2000 Advisory Committee Notes, Federal Rule 902.

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.

Committee 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 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 produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

Committee Comment on Rule 1001

Rule 1001 is taken verbatim from its federal counterpart and the only change is the use of the word "copy" in place of "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.

Committee 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. 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.

Committee 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.

Committee Comment on Rule 1004

Rule 1004 is the 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.

Committee 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. And the court may order the proponent to produce the originals or duplicates in court.

Committee Comment on Rule 1006

Rule 1006 is taken verbatim from its federal counterpart and has only a substitution of the phrase "the originals or duplicates" in place of "them" for clarity. 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.

Committee 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.

Committee 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.

Committee Comment on Rule 1101

Except for the addition of "or supervised release" in Rule 1101(b)(3), this Rule is the State rule without any proposed changes.

Rule 1102. Title

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

Committee Comment on Rule 1102

Rule 1102 is the State rule without any proposed changes.