CHANGES AND UPDATES TO THE WEST VIRGINIA RULES OF EVIDENCE

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I. INTRODUCTION

On September 2, 2014, mass revisions to the West Virginia Rules of Evidence ("Evidence Rules" or "Rules of Evidence") took effect.[1] While the majority of changes are stylistic,[2] the Final Order issued by the West Virginia Supreme Court of Appeals ("West Virginia Supreme Court") did make several substantive changes to the Evidence Rules.[3]

Some substantive changes merely reflect new interpretations of old rules found in recent case law, while others morph old state rules into their federal counterparts.[4] Still, some updates retain uniquely West Virginian evidence elements born of case law that runs contrary to federal rules and holdings.[5]

This article will identify and outline these changes to West Virginia's Rules of Evidence. It will tackle the changes in numerical order for the sake of ease. The discussion of each new rule will include an analysis of the judiciary's intent regarding the change, and, where appropriate, an example of a federal or West Virginia case to highlight how West Virginia courts will likely apply the updated state rule.

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1 Order, Approval of Revisions to the West Virginia Rules of Evidence, (June 2, 2014), *available at* http://www.courtswv.gov/legal-community/court-rules/Orders/2014/8-28-14RulesEvidenceFinalCorrected.pdf.

2 *See generally id.*

3 *Id.*

4 *See* W. VA. R. EVID. 407–408 cmts. (The changes to Rules 407 and 408 illustrate both of these types of changes.).

5 W. VA. R. EVID. 702 cmt.

The following rules will be discussed in this article: 404, 407, 408, 411, 412, 502, 606, 608, 611, 702, and 804.[6] While this list includes the major substantive changes to the Evidence Rules, nearly every rule underwent some form of edits. Practitioners should make note of these changes as well. If an attorney has a motion in limine template for certain evidence challenges, then the attorney must update those templates with the new language. No attorney wants to submit a motion with old language, even if its substantive meaning is the same.

II. ANALYSIS

This section will take each rule with a substantive change and outline those changes. It will note, where appropriate, how the new rule changes evidence rulings. The article may do so by using federal case law that applies a the federal counterpart, West Virginia cases applying the old rule, and the West Virginia Supreme Court's comments to the rule changes.

A. Rule 404. Character Evidence; Crimes or Other Acts[7]

Generally, new Rule 404 is a substantive recreation of the Federal Rule.[8] Furthermore, it does little to change rulings under the old West Virginia Rule 404.[9] What the new rule does, however, is expressly incorporate the current state of the case law.[10]

In *State v. McGinnis,*[11] the West Virginia Supreme Court outlined requirements that a party must comply with if it intends to use crimes, wrongs, and other acts as character evidence.[12] The new state rule codifies the requirement that the party offering the crime, wrong, or other act "identify the specific purpose for which the evidence is being offered."[13] The Federal Rule merely requires the offeror to "provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial."[14]

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[6] *See* Approval of Revisions to the West Virginia Rules of Evidence for a full discussion of all the changes including only syntax updates. Order, Approval of Revisions to the West Virginia Rules of Evidence, (June 2, 2014), *available at* http://www.courtswv.gov/legal-community/court-rules/Orders/2014/8-28-14RulesEvidenceFinalCorrected.pdf.

[7] The Relevant portions of updated Rule 404 are as follows:

> (b) Crimes, Wrongs, or Other Acts.
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> (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.

W. VA. R. EVID. 404(b)

[8] *See id.* cmt. *See also* FED. R. EVID. 404.

[9] *See* W. VA. R. EVID. 404.

[10] *Id*. cmt.; State v. McGinnis, 455 S.E.2d 516 (W. Va. 1994).

[11] 455 S.E.2d 516 (W. Va. 1994)

[12] *See* Syl. Pt. 1, *McGinnis*, 455 S.E.2d at 520..

[13] W. VA. FED. R. EVID. 404(b)(2)(A) ("Any party seeking the admission of evidence pursuant to this subsection must: provide reasonable notice of the general nature and specific and precise purpose for which the evidence is being offered by the party at trial."); Syl. Pt. 1, *McGinnis*, 455 S.E.2d at 520.

[14] FED. R. EVID. 404(b)(2)(A).

Another major change to Rule 404 regards notice when using crimes, wrongs, and other acts as character evidence.[15] The old rule only required notice where the prosecution intended to use crimes, wrongs, and other acts as character evidence in a criminal case.[16] The notice requirement has been significantly broadened in the new rule.[17] Now, whenever a party offers this type of evidence for a permissible purpose, notice must be provided to the opposing party.[18] This includes providing notice to the opposing side of the proponent's intent to use crimes, wrongs, and other acts in civil cases as well.[19]

B. Rule 407. Subsequent Remedial Measures[20]

The new Rule 407 has adopted verbatim from the Federal Rule 407.[21] The major change to this rule is the addition of two new express grounds for exclusion of remedial measures made after an event that would have made the earlier injury less likely to occur.[22] Now, remedial measures can no longer be used to show a defect in a product or its design, or a need for a warning or instruction.[23] Again, this mirrors Federal Rule 407.[24]

C. Rule 408. Compromise Offers and Negotiations

The major change to Rule 408 regards new section 408(a).[25] Evidence of compromise offers and negotiations can now no longer be used to impeach a witness by a prior inconsistent statement or a contradiction.[26] Unlike Federal Rule 408, the new West Virginia Rule 408 does not allow for use of conduct and statements made during compromise negotiations when offered in a criminal case when the negotiations relate to claim by a public officer in its exercise of authority.[27] Thus, West Virginia's rule is very protective of representations and communications made by parties during negotiations, which reflects a policy of encouraging negotiation and settlement.

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15 *See* W. VA. R. EVID 404(b)(2).

16 W. VA. R. EVID. 404 cmt.

17 *Id.*

18 *See id.*

19 W. VA. R. EVID. 404(b).

20 New Rule 407 reads as follows:

> 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.

W. VA. R. EVID. 407.

21 W. VA. R. EVID. 407 cmt.

22 *Id.*

23 *Id.*

24 *Id.*; FED. R. EVID. 407.

25 W. VA. R. EVID. 408 cmt.

26 W. VA. R. EVID. 408(a)(1)–(2).

27 W. VA. R. EVID. 408(a)(2) cmt. *Compare* FED. R. EVID. 408(a)(2), *with* W. VA. R. EVID. 408(a)(2).

D. Rule 411. Liability Insurance[28]

The only notable change to this rule regards the new third and final sentence.[29] Evidence of liability insurance can now be introduced, and may be admissible, "against a party that places in controversy the issues of the party's poverty, inability to pay, or financial status."[30] Otherwise, evidence of liability insurance is not admissible to show fault.[31]

E. Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior and Predisposition[32]

This is the new rape shield rule adapted from Federal Rule 412.[33] While this rule is entirely new to West Virginia's Evidence Rules, its application is not.[34] West Virginia Code Section 61-8b-11 already covered nearly all of what new Rule 412 does.[35] The major differences are the procedural instructions. These instructions require a motion that gives the other side notice of the offeror's intent to use sexual behavior evidence in a rape case.[36] This will allow the Court to rule on the proper use of the evidence outside of the jury's presence more easily. Notably, where the Section 61-8b-11 contradicts new Rule 412, the Evidence Rule prevails.[37]

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[28] New Rule 411 reads as follows:

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

W. VA. R. EVID. 411.

[29] W. VA. R. EVID. 411 cmt.

[30] *Id.*

[31] *Id.*

[32] The relevant portions of new Rule 412 appear below:

> (c) Procedure to Determine Admissibility.
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> (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
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> (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.

W. VA. R. EVID. 412.

[33] *See* W. VA. R. EVID. 412 cmt.

[34] *Id.*

[35] *See id.*; *see also* W. Va. Code § 61-8b-11 (2014).

[36] *See* W. VA. R. EVID. 412 cmt.

[37] *See id.*

F. Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver[38]

New Rule 502 is substantially the same as its federal counterpart, and it generally incorporates the current state of West Virginia law.[39] The new Rule simplifies and clarifies the admittedly murky case law.

For instance, in *Horkulic v. Galloway*, the Court was tasked with determining whether attorney client privilege had been waived between an insurance company and its law firm.[40] Here, an insurance company, TIG, covered Attorney William Galloway.[41] The Horkulics sued a Mr. Galloway for legal malpractice regarding his failure to observe the statute of limitations for the Horkulics' automobile accident claims.[42] TIG hired another attorney for Mr. Galloway's defense.[43] The Horkulics then asserted a third party bad faith claim against TIG for underinsuring Mr. Galloway.[44]

Essentially the Court held that "within the context of a first-party bad faith action against an insurer, the attorney-client privilege and work product rule attach to documents contained in an insured claim file and litigation file."[45] So, even if those documents not covered in the action regarding the statute of limitations action, the protection of those documents is not then automatically waived in the bad faith action.[46]

New Rule 502 codifies and simplifies how waiver operates where documents and conversations are relevant in multiple cases, cleaning up the confusing case law.[47] It gives black letter rules regarding waiver in multiple actions, including those outside of West Virginia.[48] Furthermore, the new rule outlines the following factors now used to determine when an inadvertent disclosure does not operate as wavier: (1) "the holder of the privilege or protection took reasonable steps to prevent disclosure," and (2) "the holder promptly took reasonable steps to rectify the error."[49] This new rule should allow practitioners to better predict how waiver will operate where multiple actions are pending, and where there has been an accidental disclosure.

G. Rule 606. Juror's Competency as a Witness[50]

There is only one minor addition to new Rule 606. Rule 606(b)(2)(C), also found in the federal version, was added.[51] Jurors can now testify that a mistake was made in entering the verdict on the verdict form.[52]

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38 *See* W. VA. R. EVID. 502. Because Rule 502 is entirely new and quite lengthy, it does not appear in this article.

39 *See* W. VA. R. EVID. 502 cmt.

40 665 S.E.2d 284 (W. Va. 2008).

41 *Id.* at 289.

42 *Id.* at 290.

43 *Id.*

44 *Id.*

45 *Id.* at 296.

46 *Id.*

47 *See* W. VA. R. EVID. 502 cmt.

48 *Id.*

49 *Id.*

50 The relevant portion of Rule 606 is as follows: "(2) Exceptions. A juror may testify about whether: . . . (C) a mistake was made in entering the verdict on the verdict form." W. VA. R. EVID. 606(b)(2)(C).

51 W. VA. R. EVID. 606 cmt.

52 W. VA. R. EVID. 606(b)(2)(C).

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

This Rule got a major language overhaul, and now closely mirrors the federal version.[53] However, the Rule underwent little substantive change. Notably, the Judiciary retained a key difference between the old rule and the federal rule.[54] The West Virginia rules allow Specific Instances of Conduct regarding character for truthfulness or untruthfulness to be inquired into "on cross-examination of a witness *other than the accused*."[55] The federal rule has no such limitation, hence, under federal rules an attorney may challenge even the accused's character for truthfulness by introducing specific instances that speak to that character.[56]

I. Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence[57]

New Rule 611 is included in this article for its refusal to conform to the federal rules. New Rule 611 continues West Virginia's tradition regarding the scope of cross-examination.[58] 611(b) still allows for full cross-examination into any relevant matter if the witness is a party, and allows the Court discretion for similar cross with a non-party witness.[59] This is unlike Federal Rule 611, which only allows cross-examination into matters covered during direct.[60]

J. Rule 702. Testimony by Expert Witness[61]

New Rule 702 incorporates West Virginia's jurisprudence regarding expert witness testimony, and, by doing so, does not adopt the federal practice.[62] Federal case law outlines that the Court is to exercise its "gatekeeper" function, meaning that it excludes expert testimony based on the Daubert

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53 W. VA. R. EVID 608; *see also* FED. R. EVID. 608.

54 *See* W. VA. R. EVID. 608 cmt.

55 W. VA. R. EVID. 608(b) (emphasis added).

56 FED. R. EVID. 608(b).

57 Rule 611(b) states the following:

> (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.

W. VA. R. EVID. 611(b).

58 *See* W. VA. R. EVID. 611 cmt.

59 W. VA. R. EVID. 611(b).

60 *See* FED. R. EVID. 611.

61 Rule 702 appears in full here:

> (a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
>
> (b) In addition to the requirements in subsection (a), expert testimony based on a novel scientific theory, principle, methodology, or procedure is admissible only if: (1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the expert has reliably applied the principles and methods to the facts of the case.

W. VA. R. EVID. 702.

62 *See* W. VA. R. EVID. 702 cmt.

factors, where any expert is testifying based on a novel theory, principle, methodology, or procedure.[63] West Virginia, notably, only requires the Court to exercise the "gatekeeper" function where novel scientific testimony is being presented.[64] For instance, in West Virginia, a music industry expert explaining a novel way to scout artists would not have to pass a Daubert analysis. However, a doctor describing a new way to test for cancer would.

The New Rule explicitly outlines this distinction in West Virginia law.[65] New Rule 702(b) states that "expert testimony based on a novel *scientific* theory . . ." is only admissible if the Daubert factors are met.[66] This should clear up any confusion on where the West Virginia Supreme Court stands regarding expert witness practice.

K. Rule 804. Hearsay Exceptions; Declarant Unavailable[67]

The New Rules bring little change to West Virginia's hearsay rules.[68] However, Rule 804, governing hearsay where the declarant is unavailable, had an addition thanks to recent case law.[69] In *State Farm Fire & Casualty Company v. Prinz*,[70] the Supreme Court eliminated the West Virginia's Dead Man's Statute, which prevented witness testimony and documentary evidence as it pertained to any statement made by a deceased person.[71]

In response to this decision, Rule 804(b)(5) has been added.[72] Where an action is by or against a deceased person, "any statement of the deceased—whether oral or written—shall not be excluded as hearsay" if three elements are satisfied.[73] The statements may be let in if the trial judge "first finds as a fact that the statement: was made by the decedent."[74] Next, the trial judge must find that "the statement . . . was made in good faith and on decedent's personal knowledge."[75] Finally, if the trial judge also finds that "the statement . . . was made under circumstances that indicate it was trustworthy," then the statement will be allowed in under 804(b)(5).[76] Hence, West Virginia now has an express rule that guides

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63 *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999).

64 Syl. Pt. 2, Harris v. CSX Transp., Inc., 735 S.E.2d 275 (W. Va. 2013); *see also* Doe v. Wal-Mart Stores, Inc., 558 S.E.2d 663 (W. Va. 2001).

65 *See* W. VA. R. EVID. 702 cmt.

66 W. VA. R. EVID. 702 (emphasis added).

67 The relevant provision of Rule 804 appears below:

> (5) Statement of a Deceased Person. In actions, suits or proceedings by or against the representatives of deceased persons, including proceedings for the probate of wills, any statement of the deceased — whether oral or written — shall not be excluded as hearsay provided the trial judge shall first find as a fact that the statement: (A) was made by the decedent; and (B) was made in good faith and on decedent's personal knowledge; and (C) was made under circumstances that indicate it was trustworthy.

W. VA. R. EVID. 804(b)(5).

68 While there were few substantive changes, one Rule did change locations to mirror the Federal Rules. New Rule 807 incorporates the Residual Exception that previously had been found in West Virginia's Rules 803(24) and 804(b)(5). *See* W. VA. R. EVID. 807 cmt.

69 W. VA. R. EVID. 804 cmt.

70 743 S.E.2d 907 (W. Va. 2013).

71 W. VA. CODE § 57-3-1, *declared unconstitutional by* State Farm Fire & Cas. Co. v. Prinz, 743 S.E.2d 907 (W. Va. 2013).

72 *See* W. VA. R. EVID. 804 cmt.

73 W. VA. R. EVID. 804(b)(5).

74 *Id.*

75 *Id.*

76 *Id.*

attorneys seeking to introduce evidence previously barred by statute. This should ease the transition as West Virginia moves away from the long standing inadmissibility of statements made by the deceased.

III. CONCLUSION

Many of the changes made on September 2, 2014 to the Evidence Rules mark an increase in clarity and simplicity for the rules as the language becomes more like that found in the Federal Rules of Evidence. The rules are now broken down into more subdivisions that will make pin citing more precise and the rules easier to read. Overall, the changes are likely a positive. While everything new has a learning curve, the new rules clarify case law and modernize language, which should simplify trial practice in West Virginia.