**GEORGE MASON AMERICAN INN OF COURT**



**EVIDENCE JEOPARDY**

**January 17, 2017**

**Team Members:**

**Jesse R. Binnall, Esq. (Team Leader)**

**Louise T. Gitcheva, Esq.**

**Jonathan T. Woodward, Esq.**

**Taylor S. Chapman, Esq.**

**Nicholas R. Johnson, Esq.**

**Kathryn M. Lipp, Esq.**

**Colette McCrone (Student Member)**

**Richard Cole (Student Member)**

**Steven Horn (Student Member)**

1. Introduction
	1. Updates to evidence rules
		1. New Rules of Evidence
		2. Re-written Rules of Evidence
		3. Prospective Changes
	2. Update on Supreme Court of Virginia decisions on Evidence
		1. Rule 2:201: Judicial Note of Adjudicative Facts
		2. Rule 2:401: Definition of “Relevant Evidence”
		3. Rule 2:403: Exclusion of Relevant on Grounds of Prejudice, Confusion, Misleading the Jury, or Needless Presentation of Cumulative Evidence
		4. Rule 2:609: Impeachment by Evidence of Conviction of Crime
		5. Rule 2:702: Testimony by Experts
		6. Rule 2:703: Basis of Expert Testimony
	3. Evidence Jeopardy
2. Updates to Evidence Rules
	1. New Rules of Evidence
		1. Rule 2:803.1: Statements by Child Describing Acts Relating to Offense Against Children
			1. This is a new hearsay exception.
			2. Only applies to out-of-court statement made by a child under age of 13, who is an alleged victim of offense against children, and the statement describes any act against the child relating to such offense.
			3. Requires court, in a hearing conducted before trial, to find “sufficient indicia of reliability.”
			4. The child must either testify or be declared unavailable. If the child is declared unavailable by the court, then statement can only be admitted if there is corroborative evidence of the act.
			5. Requires at least 14 days’ notice in writing to opposing party of intent to use statements and provide a copy of the statement the party seeks to introduce
	2. Re-written Rules of Evidence
		1. Rule 2:408: Compromise Offers and Conduct or Statements during Negotiations
			1. New rule became effective July 1, 2016
			2. Takes out language that allows admissibility of “express admission of liability, or an admission concerning an independent fact pertinent to a question in issue, . . .even if made during settlement negotiations.”
			3. Keeps out evidence of “furnishing, promising, or offering - or accepting, promising to accept, or offering to accept - a valuable consideration in compromising or attempting to compromise the claim . . .”
			4. Also keeps out “. . .conduct or any statements made during compromise negotiations about the claim.”
			5. Such evidence can still be used to show witness’s bias or prejudice or negate a claim of undue delay.
			6. This re-working of the rule gives stronger protection to statements made during settlement negotiations.
			7. Does not exclude any documents or physical evidence that existed prior to the existence of compromise negotiations.
		2. Rule 2:615: Exclusion of Witnesses
			1. Only change is addition of language “and in an unlawful detainer action filed in general district court, a managing agent as defined in § 55-248.4…”
			2. This allows a managing agent in an unlawful detainer agent to be exempt from exclusion during trial.
	3. Prospective Changes
		1. Rule 2:607: Incompetency of Witnesses
			1. The Rule currently provides that "[s]ubject to the provisions of Rule 2:403, the credibility of a witness may be impeached by any party other than the one calling the witness, with any proof that is relevant to the witness's credibility."
			2. Committee wishes to consider whether to recommend revision of this rule to allow any party, including the party that has called the witness, to impeach the witness (as is permitted in federal court and a majority of the states).
			3. Still would not allow party to call witness solely to impeach them
3. Update on Supreme Court of Virginia decisions on Evidence
	1. Rule 2:201: Judicial Note of Adjudicative Facts
		1. Williams v. Commonwealth, 289 Va. 326 (2015)
			1. Uncover officer sought to purchase cocaine from defendant. Defendant agreed to sell him cocaine at location A but then instruction officer to drive to location B where the sale actually occurred.
			2. At trial undercover officer testified that location A was within the city limits but did not testify as to whether location B was within the city limits.
			3. Defendant made a Motion to Strike for failure to establish venue because undercover officer did not testify as to the location of the street where he purchased cocaine from defendant.
			4. Court denied motion and Court of Appeals upheld because found that Circuit Court took judicial notice of where street was located.
			5. Supreme Court found that Circuit Court had not taken judicial notice of location and could not because location of street was not common knowledge.
	2. Rule 2:401: Definition of “Relevant Evidence”
		1. Payne v. Commonwealth, 2016 Va. LEXIS 209 (2016)
			1. Victim was robbed while responding to an internet advertisement for the sale of a computer. Victim identified the man who robbed him through a photo lineup.
			2. Detective in the case sent an email expressing concern about the identification because two of the suspects were similar in appearance.
			3. Defendant sought to admit the email; the trial court admitted a heavily redacted version of the email.
			4. Defendant argued that the email showed evidence discrediting a police investigation and therefore was relevant.
			5. The Supreme Court agreed that evidence discrediting an investigation is relevant but the redacted information at issue in this case was not relevant because it did not tend to discredit the investigation.
		2. Dorman v. State Industries, Inc., 292 Va. 111 (2016)
			1. Dorman moved into an apartment. Two days later high levels of carbon monoxide were detected at the door of the apartment. The technician entered the apartment and found the occupants unconscious. Five days later the atmospheric-vented gas hired hot water heater, manufactured by State, was tested. The carbon monoxide conditions were recreated with all the bedroom doors shut, the hot water heater running, and the air conditioner running. The hot water heater was not functioning properly.
			2. At trial, State put into evidence the number of heaters sold, their safety record, and absence of prior injuries.
			3. In food poisoning cases, evidence of absence of other injuries is inadmissible in a negligence action.
			4. In this case, the information was relevant and admissible because there was a claim for breach of implied warranty of merchantability and it went to whether or not the heater was unreasonably dangerous.
			5. The number of heaters sold was directly relevant to whether it would “pass without objection in the trade.”
	3. Rule 2:403: Exclusion of Relevant on Grounds of Prejudice, Confusion, Misleading the Jury, or Needless Presentation of Cumulative Evidence
		1. Commonwealth v. Proffitt, 792 S.E. 2d 3 (2016)
			1. Commonwealth wanted to involuntarily commit Proffitt under Civil Commitment of Sexually Violent Predators Act.
			2. At trial Commonwealth presented expert testimony by a doctor that she had diagnosed Proffitt with sexual sadism disorder, antisocial personality disorder, and alcohol use disorder. She arrived at this opinion after reviewing Proffitt’s institutional records, criminal records, and a meeting with Proffitt. She also based her opinion on a report given by a M.J. a victim of a rape for which Proffitt was convicted. The doctor also read the report of A.G. a victim of a crime for which Proffitt was indicted but later *nolle prosequi*. The expert relied upon M.J.’s report but did not rely on A.G’s, even though she read the report.
			3. The Commonwealth then sought to call M.J. and A.G. as witnesses.
			4. The trial court granted Proffitt’s motion to exclude the testimony of the two victims as cumulative and inflammatory. The jury found that that Proffitt was not a sexually violent predator and the Commonwealth appealed.
			5. The Supreme Court found the testimony of M.J. and A.G. was relevant because it showed a pattern of predatory behavior and a likelihood that he would re-offend in the future.
		2. Lee v. Spoden, 290 Va. 235 (2015)
			1. The parties were divorced and entered into a property settlement agreement that was incorporated but not merged into the final decree. The parties were both owners in a company, Strategic Healthcare Company, Inc. (“SHC”), and the agreement provided that Spoden would relinquish her ownership rights but remain an employee with certain guarantees.
			2. Spoden filed suit for breach of the terms of the property settlement agreement against both Lee and SHC. Spoden also filed a rule to show cause for violations of the agreement.
			3. Spoden also claimed that Lee and SHC sold a Florida property, that was covered by the agreement, in bad faith.
			4. At show cause hearing, court denied the rule to show cause because property settlement agreement was not signed by SHC; therefore, it was not bound by terms. The court also found that Lee had not violated the agreement.
			5. At trial, the court excluded all evidence related to the court’s ruling in the contempt proceedings.
			6. The Supreme Court found that the ruling in the contempt proceeding was both relevant and highly probative of whether Lee and SHC acted in bad faith in the contract action.
	4. Rule 2:609: Impeachment by Evidence of Conviction of Crime
		1. Shifflett v. Commonwealth, 289 Va. 10 (2015)
			1. Shifflett was charged and found of guilty of aggravated sexual battery.
			2. Shifflett appealed claiming that the trial court erred by allowing the Commonwealth to cross-examine him about whether a prior felony conviction involved lying, cheating, or stealing.
			3. Shifflett was previously convicted of subornation of perjury. Trial court did not permit Commonwealth to mention the crime by name but allowed Commonwealth to ask if Shifflett had been convicted of a crime that involved lying, cheating, or stealing.
			4. Generally, if the former conviction is perjury, it can be mentioned by name.
			5. The court stated that Shifflett’s credibility had already been impeached due to evidence of his prior felony convictions.
			6. The Supreme Court found that the admission of this testimony was harmless error because the evidence went to his credibility and had no prejudicial effect as to his guilt or innocence of sexual battery.
	5. Rule 2:702: Testimony by Experts
		1. Welton v. Branch Banking & Trust Co., 2016 Va. Unpub. LEXIS 14 (2016)
			1. The executor for the estate of Welton filed a claim against BB&T for the principal amount plus interest of a money market certificate Welton purchased in 1979. The Weltons claimed that, in 2002, when the certificate was presented for payment, the Bank refused payment.
			2. At trial, the Weltons called a banker to testify as an expert witness regarding the interest that a savings account would have earned since 1979. The banker did not work in a job that involved setting interest rates until 2007.
			3. When Welton moved to qualify the banker as an expert in the field of establishing interest rates, BB&T objected because of the banker’s lack of qualifications to determine historic interest rates and any opinion of his would be based on speculation.
			4. The trial court found that the banker could only opine as to interest rates starting in 2007, but his opinion was not admissible because he had not performed an analysis of local savings rates or those specific to BB&T. Therefore, the banker’s opinion was speculative and not admissible.
			5. The Supreme Court upheld the trial court’s ruling that the banker’s testimony was speculative and, therefore, inadmissible.
	6. Rule 2:703: Basis of Expert Testimony
		1. Holiday Motor Corp. v. Walters, 790 S.E. 2d 447 (Va. 2016)
			1. Holiday Motor Corporation, Mazda Motor Corporation and Mazda Motor of America, Inc. (“Mazda”) appealed a $20 million jury verdict in favor of Walters, who sustained a serious cervical spine injury when her 1995 Mazda Miata overturned when she was operating it with the soft top closed.
			2. Walters alleged that she was injured when the windshield header disconnected from the top and that the design of the latches were defective because they were not designed to stay closed in a rollover crash.
			3. Walters’s expert testified at trial that when a convertible top is up and latched that the design objective is to have a three load path. The expert examined the vehicle and determined that the connections in the three load path failed due to the latches in the front failing during the crash.
			4. The expert testified that he did not apply any other safety standards than the “right-hand rule”, which is a rule of thumb followed by engineers to determine loading. He did not rely upon any engineering papers, literature, or written standards. He also did not perform a vibration analysis or test the latches at issue to determine under what circumstances vibration would cause the latches to part.
			5. The Supreme Court found that the expert’s opinion was not admissible because it was based on two unfounded assumptions: (1) latches would not have disconnected if designed differently, and (2) if latches had held the roof would not have collapsed. There was no adequate foundation for the expert’s opinion.
4. Evidence Jeopardy