

# GEORGE MASON AMERICAN INN OF COURT



## EVIDENCE JEOPARDY AND UPDATE

January 22, 2020

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# This is... (Evidence) Jeopardy

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## Evidence Update and Trivia

- I. Overview
- II. Summary of Changes to Virginia Rules of Evidence
  - a. No substantive changes to Virginia Rules of Evidence
  - b. 2:615 is non-technical, it only updates a statutory reference
- III. Comparison of Federal and Virginia Rule on Witnesses (R. 615)
  - i. Federal Rule:

### Rule 615. Excluding Witnesses

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

- (a) a party who is a natural person;
- (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
- (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
- (d) a person authorized by statute to be present.

ii. Virginia Rule:

Rule 2:615 EXCLUSION OF WITNESSES (Rule 2:615(a) derived from Code §§ 8.01-375, 19.2-184, and 19.2-265.1; Rule 2:615(b) derived from Code § 8.01-375; and Rule 2:615(c) derived from Code § 19.2-265.1)

(a) The court, in a civil or criminal case, may on its own motion and shall on the motion of any party, require the exclusion of every witness including, but not limited to, police officers or other investigators. The court may also order that each excluded witness be kept separate from all other witnesses. But each named party who is an individual, one officer or agent of each party which is a corporation, limited liability entity or association, and an attorney alleged in a habeas corpus proceeding to have acted ineffectively, and in an unlawful detainer action filed in general district court, a managing agent as defined in § 55-248.4 shall be exempt from the exclusion as a matter of right.

(b) Where expert witnesses are to testify in the case, the court may, at the request of all parties, allow one expert witness for each party to remain in the courtroom; however, in cases pertaining to the distribution of marital property pursuant to § 20-107.3 or the determination of child or spousal support pursuant to § 20-108.1, the court may, upon motion of any party, allow one expert witness for each party to remain in the courtroom throughout the hearing.

(c) Any victim as defined in Code § 19.2-11.01 who is to be called as a witness may remain in the courtroom and shall not be excluded unless pursuant to Code § 19.2-265.01 the court determines, in its discretion, that the presence of the victim would impair the conduct of a fair trial.

IV. Supreme Court of Virginia Evidence Update

a. *Martin v. Lahti*, 295 Va. 77 (2018)

i. Lay witness opinion testimony offered pursuant to Va. Sup. Ct.

R. 2:701 must not be speculative in nature.

- ii. Instead, it must be based on perception of witness or the witness's personal knowledge.
- iii. Reminder: evidentiary decisions are reviewed for abuse of discretion.

b. *Emerald Point, LLC v. Hawkins*, 294 Va. 544 (2017)

- i. It is an abuse of discretion to admit expert testimony if the opinions of the expert are not disclosed in discovery.
- ii. The expert cannot go beyond the disclosure, if requested in discovery.
- iii. The evidence must support a finding of intentional loss or destruction of evidence in order to prevent its use in litigation before the court may permit the spoliation inference. In short, to allow such a severe sanction as a matter of course when a party has only negligently destroyed evidence is neither just nor proportionate.
- iv.

c. *Shumate v. Mitchell*, 296 Va. 532

- i. Dead men tell... all of the tales they want!
  - 1. Virginia Deadman's Statute is extremely broad because the legislature chose to make it that way

2. Codified at Va. Code § 8.01-397
  - a. No judgment for a testifying survivor unless testimony is corroborated (based upon interest of witness)
  - b. A relevant hearsay declaration of the decedent/incapacitated person is admissible even if survivor does not testify
3. Relevance is the only limitation on the statutory limitation on what declarations are admissible
4. Regardless of whether or not it's good policy, the General Assembly adopted the statute and it's up to them to change it
5. Note: Remember, the hearsay exception part of the Deadman's Statute is **procedural** in nature and does not apply in federal court.

V. Evidence Jeopardy (see attached)