

Education & Practice

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Virginia’s New and Distinctive Rules of Evidence

By Jeffrey Bellin

Whether in Los Angeles or New York, Austin or Seattle, the standard law school Evidence course focuses on the Federal Rules of Evidence. Typically, there is little discussion of the rules of evidence that apply in state courts, where the bulk of trials occur. Students usually do not suffer from this federal focus because state evidence codes tend to track the federal rules. In addition, the most difficult evidence concepts, such as hearsay and character evidence, are treated similarly in all American jurisdictions. This makes evidence knowledge readily transferable across jurisdictions. That said, a few state evidence codes, such as the Virginia Rules of Evidence, diverge more drastically than others from the federal rules. Consequently, it is important for those practicing, or seeking to practice in Virginia, to learn the distinctions between the Virginia Rules of Evidence

and the federal rules they were taught in law school.

For Virginia practitioners, this task became more manageable in 2012 when Virginia codified its evidence rules. Prior to codification, Virginia’s rules consisted of a judge-made common law of evidence supplemented by sporadic statutory interventions. If you wanted to make an evidence objection in a Virginia court, you would reference the dominant treatise. Everyone could then consult their (massive) copy and argue vigorously about the Virginia evidence “rule.”

The 2012 codification project put an end to the state’s evidentiary chaos. The codification also makes it easier for attorneys to transfer their federal-rule-based understanding of evidence to Virginia. But, as explained below, easier does not mean easy.

Some comparisons are straightforward. The Virginia

codifiers adopted the federal numbering and even copied the language of the federal evidence rules when Virginia case law appeared consistent with the federal rule. It is generally clear in these circumstances that the Virginia and federal evidence rules are the same, although the similarity is often obscured by the drafters’ reliance on pre-

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Jeffrey Bellin teaches Evidence at William & Mary Law School. He recently published The Virginia and Federal Rules of Evidence: A Concise Comparison with Commentary.

Chair's Column

**Professor
Jim Moliterno
Washington and Lee
School of Law**

Transition time
is upon us and
we are ready for
new challenges

Transition time

Aside from the Section's very useful, ongoing activities, such as the Professionalism Course at law schools and the mentoring program, we have been singularly-focused for the past three years, moving inexorably and doggedly toward our goal of facilitating a writing boot-camp CLE for Virginia lawyers. Now that target is scheduled and in sight. The first such program will be held at American University in April 2016. Now is the transition time: time to employ our imaginations and find another project worthy of our primary focus.

The Section has shown that it can accomplish much with its human resources. The Section is blessed with talent, determination, and most of all, willingness to work when the only reward is the work itself. The current achievement is but one of many valuable projects in the Section's almost 24 year history. The Professionalism for Law Students Program and the collaboration on the Young Lawyers Committee Pre Law Programs & Mentorship projects have been great successes.

What kind of new project should the Section pursue when there are so many possibilities? We should seek to accomplish what others cannot; we should seek to accomplish that which will actually matter. Frances Bacon told us that the purpose of science and research is to improve the condition of man. Our work should be work that matters. I suggest it should be a project that we are uniquely configured to accomplish, and a project that will make a genuine difference in the quality of legal education of Virginia lawyers. Now, we need your ideas. Somewhere, in the currently unexpressed ideas held by the Section's 480 members, is a great, next-project. Let the Board hear from you!

The Section's twenty-fifth anniversary is now in our view. As we decide on and pursue the next project, I suggest we reflect on what has happened in the nearly 25 years since the Section's founding. Legal markets changed dramatically. Law schools have pursued innovation, sometimes for the simple sake of excellence and sometimes for the sake of responding to changing market conditions. As someone who attended the first Conclave in 1992, I have seen the changes that were foretold at that early time. Without a doubt, law schools have moved in the directions urged by the judicial and practicing branches at the Conclave. In some instances the movement was already in process, though few knew. In other instances, the movement was undoubtedly motivated in part by markets and preferences of the practicing bar. But for whatever sets of reasons, law schools today teach more of what it means to do the lawyer's work than they did in the

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late 1980s. There are more courses aimed at teaching problem-solving, more aimed at teaching writing and advocacy, more aimed at enculturating students to the rigors of both transactional and litigation work, more aimed at sophisticated ethical challenges that lawyers face. There are more clinics and more courses in trial advocacy, to be sure, but their expansion is far from the only story about the experiential education movement at law schools. Courses that place students in the role of lawyers in specific practice areas, under careful, expert guidance, have expanded to take the teaching of the lawyer's work and role to new heights. The message of these changes in law schools has not always reached the practicing branch that has long encouraged such changes. The work of the law schools and the practicing branch have never been closer, in my opinion, than they are today. Certainly the gap that existed in 1991 was closed very considerably.

Transition time is upon us and we are ready for new challenges. But as we pause, ever briefly, we should take a moment to notice what has been accomplished and what has changed during our almost quarter century of work together. ✧

Virginia's New and Distinctive Rules of Evidence

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2011 federal language. This language looks different from the current federal rules because the Federal Rules of Evidence were "restyled" in 2011.

Frequently, however, the Virginia rules deviate in substantive ways from their federal analogues. One important example is the evidentiary treatment of settlement negotiations. To "promot[e] the public policy favoring the compromise and settlement of disputes," Federal Rule of Evidence 408 goes to great lengths to prohibit the use of settlement discussions as evidence. The federal rules' drafters rejected common law exceptions to the inadmissibility of settlement communications, such as exceptions for "factual admissions" uttered during a settlement discussion. The drafters noted that such exceptions, "constituted a preference for the sophisticated, and a trap for the unwary."

Virginia Rule of Evidence 2:408, by contrast, retains the "trap for the unwary." The Virginia rule states that "an express admission of liability, or an admission concerning an independent fact pertinent to a question in issue, is admissible even if made during settlement negotiations." This means that Virginia attorneys who fail to couch their (and their clients') settlement-related statements in hypothetical-ese or quali-

fy language like "without prejudice," risk their statements being classified as an "admission concerning an independent fact" or an "express admission of liability" and coming back to bite them in a Virginia trial. It is bad enough to have to tell your client that your efforts to settle the case did not succeed. Even worse is having to inform your client that your unfruitful efforts to settle generated evidence for your opponent to use against you at trial.

Another important distinction is Virginia's anachronistic Rule 2:608(e), a byproduct of the state's deviation from Federal Rule 608 which deals with credibility attacks on testifying witnesses. Virginia's unusual Rule 2:608(e) specifically burdens testimony of one type of witness: "a complaining witness in a sexual assault case." At a time when most other jurisdictions are decreasing the trial burdens on sexual assault victims, Virginia's Rule 608(e) will take most of those versed in the federal rules or analogous state rules by surprise.

There are many more distinctions. In some areas like privilege, the Virginia rules take on questions that the federal rules sidestep. In other areas, like Rule 2:106 (Rule of Completeness), the Virginia rules clarify questions that split the federal courts. And some rules, like the evidentiary morass that is Virginia Rule 2:607 ("Impeachment of Witnesses"), illustrate the wis-

dom of simpler federal rules. Another issue hidden in Virginia evidence law concerns the codification itself. The drafters of Virginia’s 2012 codification were only authorized to codify (not alter) pre-codification case law. But careful study of the rules reveals occasional areas where the codifiers strayed from Virginia case law. The Virginia courts have not yet taken on an instance of codification inconsistency, perhaps because litigants have not brought any to their attention. A particularly significant example arises with Virginia’s “new” hearsay exception for “Statements for Purposes of Medical Treatment,” Rule 2:803(4). The codified exception looks just like the federal rule, Rule 803(4). But Virginia’s case law is nothing like the federal rule. In fact, the codified rule seems both broader and inconsistent with pre-codi-

fication case law. The question hanging over the codification project is what Virginia courts will do when litigants point out areas, like Rule 2:803(4), where the codification purports to alter pre-codification case law. It is a fascinating issue and an important one, but not one practitioners will likely uncover absent close study of both the Virginia and federal rules of evidence. ✧

CONTRIBUTIONS

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The section gratefully acknowledges the following Virginia law firms and law schools for their generous support of section activities.

Gentry Locke

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* * * * *

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MEMBER RESOURCES AREA ELECTRONIC NEWSLETTERS FOR SECTION MEMBERS

<http://www.vsb.org/site/sections/educationoflawyers>

Don’t miss the opportunity to receive your newsletters electronically.

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Faculty News

Regent

- ◆ This past May, Professor **Michael Hernandez** was appointed Dean of the Regent University School of Law by the University's Board of Trustees.
- ◆ Professor **Lynne Marie Kohm** has been appointed Regent Law's Associate Dean for Faculty Development and External Affairs.
- ◆ Professor **Benjamin Madison III** has been appointed Regent Law's Associate Dean for Instructional and Curricular Affairs.
- ◆ Professor **Emeritus Wade Berryhill**, University of Richmond, has joined the Regent Law faculty as a Visiting Professor for the 2015-16 academic year.
- ◆ Professor **Bruce Cameron** has been appointed as a member of the Virginia State Advisory Committee to the U.S. Commission on Civil Rights.

University of Richmond

- ◆ Professor **Tara Casey** was appointed by Supreme Court of Virginia Chief Justice Donald Lemons to serve a three-year term on the Virginia Access to Justice Commission.
- ◆ Governor Terry McAuliffe appointed Professor **Julie McConnell**, Director of the Children's Defense Clinic, to serve a four-year term on the Advisory Committee on Juvenile Justice.
- ◆ Professor **Kimberly Robinson** released a new book, co-edited with Charles Ogletree of Harvard Law, this fall: *The Enduring Legacy of Rodriguez: Creating New Pathways to Equal Educational Opportunity*.

University of Virginia

- ◆ **Gregg Strauss**, a family law, jurisprudence and philosophy expert has joined the faculty as an associate professor of law.
- ◆ **Gordon Hylton**, a legal historian and 1977 graduate of the Law School, joined the faculty permanently after having been a visiting professor at UVA for more than a decade.

Washington & Lee

- ◆ Prof. **David Bruck**, director of the school's capital defense clinic, was appointed to lead the defense team for Dylann Roof, charged in the shooting at the Emmanuel African Methodist Church in Charleston, South Carolina.
- ◆ Prof. **Margaret Howard** was elected to be the inaugural recipient of the Jean Braucher Memorial Award from the American Bankruptcy Institute.
- ◆ Prof. **Sally Wiant** has been received the Marian Gould Gallagher Distinguished Service Award by the American Association of Law Libraries.

William & Mary

- ◆ Professor **Aaron-Andrew P. Bruhl** joined the Law School faculty as Professor of Law. Professor Bruhl teaches and writes on statutory interpretation, federal courts, and the legislative process.
- ◆ Professors **Jeffrey Bellin** and **Tara Leigh Grove** were awarded tenure and promoted to Professor of Law.
- ◆ Professor **Neal E. Devins** was named the inaugural Sandra Day O'Connor Professor of Law, and Professor **Nancy Combs** was named the Goodrich Professor of Law. Devins serves as the Director of the Institute of Bill of Rights Law; Combs serves as the director of the Human Security Law Center.
- ◆ Professor **Adam M. Gershowitz** was named Associate Dean for Research and Faculty Development.
- ◆ Professor **James S. Heller** received the Hall of Fame Award from the American Association of Law Libraries at the Association's 108th annual

conference in July.

- ◆ Professor **Frederic I. Lederer** was awarded the Chief Justice John Marshall Lifetime Achievement Award by the Judge Advocates Foundation on May 26. ✦



Regent

- ◆ The Fifth Annual Symposium of the Center for Global Justice, Human Rights, and the Rule of Law at Regent University's School of Law is entitled "WOMEN'S RIGHTS: 50 Years After *Griswold v. Connecticut*," and will be held on March 4, 2016.

University of Richmond

- ◆ Supreme Court Justice Sonia Sotomayor will join students, faculty, and guests of the University of Richmond School of Law for a conversation about her life and career with Dean Wendy Perdue in November.

University of Virginia

- ◆ The School of Law has launched efforts to improve how forensics evidence is analyzed and used in the criminal justice system as a partner in the recently formed Center for Statistics and Applications in Forensics Evidence. The center will focus on the statistical analysis of pattern and digital evidence.

Washington & Lee

- ◆ On January 29, 2016, the Journal of Civil Rights and Social Justice will hold a symposium titled "Policing in America: Powers and

Accountability," addressing mass incarceration, discriminatory use of force, and militarized policing in America.

- ◆ On Feb. 5-6, the W&L Law Review will hold a symposium titled "From Conviction to Clemency: A Case Study in the Modern Death Penalty." By highlighting the case of the Commonwealth of Virginia v. Joseph Michael Giarratano, the event will explore the ethical, legal, and public policy issues surrounding the use of the death penalty.

William & Mary

- ◆ On November 13, the Virginia Coastal Policy Center held its third annual climate change conference, entitled "Show Me the Money: The Economic Realities of Responding to Coastal Change and Adaptation in Virginia." ✦

Section Rolls Out Legal Writing Pilot CLE

When: April 28, 29, 2016

Where: American University Washington College of Law

What: This is an intensive writing course for Virginia lawyers providing hands on experience and editing, while working in small groups.

Space is limited to 32 registrants!

Why: Following the 2012 Conclave on Legal Education, the Virginia State Bar Section on the Education of Lawyers' focus on how to raise the level of legal writing has culminated in a partnership with VA CLE to create a pilot training experience in writing skills.

This effort is co-sponsored and assisted by the Virginia Bar Association's Law Practice Management Division and the American University Washington College of Law Legal Rhetoric Program in Washington, DC which will provide space for the program.

Stay tuned for further details from VA CLE about the program agenda and your opportunity to register.

CALL FOR NOMINATIONS

William R. Rakes Leadership in Education Award
 The Section on the Education of Lawyers in Virginia
 Virginia State Bar

The Section on the Education of Lawyers in Virginia has established an award to honor William R. Rakes, of Gentry Locke, for his longstanding and dedicated efforts in the field of legal education, both in Virginia and nationally. The inaugural award was presented to Mr. Rakes in conjunction with the 20th Anniversary Conclave on the Education of Lawyers in Virginia sponsored by the Virginia State Bar's Section on the Education of Lawyers in April 2012.

- 2015 Recipient — Hon. B. Waugh Crigler**
- 2014 Recipient — Hon. Elizabeth B. Lacy**
- 2013 Recipient — W. Taylor Reveley III**
- 2012 Inaugural Recipient — William R. Rakes**

Criteria

This award recognizes an individual from the bench, the practicing bar, or the academy who has:

- (1) demonstrated exceptional leadership and vision in developing and implementing innovative concepts to improve and enhance the state of legal education, and in enhancing relationships and professionalism among members of the academy, the bench, and the bar within the legal profession in Virginia.
- (2) made a significant contribution (a) to improving the state of legal education in Virginia, both in law school and throughout a lawyer's career; and (b) to enhancing communication, cooperation, and meaningful collaboration among the three constituencies of the legal profession.

Nomination Process

Nominations will be invited annually by the board of governors of the Section on the Education of Lawyers, although the award may only be made from time to time at the discretion of the selection committee appointed by the section's board of governors. The selection committee will include five members: at least three members of the Section on the Education of Lawyers, with one each from the bench, the practicing bar, and the academy, including the chair of the section; and at least one former award winner.

When a nominee is selected, the award will be presented at a special event to include a reception for the honoree and his/her family, friends and colleagues; past award recipients; and special guests. The law firm of Gentry Locke has agreed to underwrite the award and the special event to honor award recipients on an ongoing basis. Please submit the nomination form below, together with a letter describing specifically the manner in which your nominee meets the criteria established for the award. Nominations should be addressed to **Professor James E. Moliterno**, chair, Section on the Education of Lawyers, and submitted with your nomination letter to the Virginia State Bar: 1111 East Main Street, Suite 700, Richmond, VA 23219-0026. **Nominations must be received no later than December 7, 2015.**

For questions about the nomination process, please contact Elizabeth L. Keller, assistant executive director for bar services: keller@vsb.org (804) 775-0516.

**WILLIAM R. RAKES LEADERSHIP IN EDUCATION AWARD
 NOMINATION FORM**

Please complete this form and return it with your nomination letter to the Virginia State Bar: 1111 East Main Street, Suite 700, Richmond, VA 23219-0026. **Nominations must be received no later than December 7, 2015.**

Name of Nominee: _____

Profession: _____

Employer/Affiliation (Law Firm, Law School, Court): _____

Address of Nominee: _____

City: _____ State: _____ Zip: _____

Name of Nominator: _____ Telephone: _____

Email: _____ Signature: _____

Virginia State Bar

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