

Senate Bill No. 578

(By Senators Hall and Barnes)

[Introduced February 21, 2011; referred to the Committee on the
Judiciary.]

A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §57-3A-1, §57-3A-2, §57-3A-3, §57-3A-4, §57-3A-5, §57-3A-6, §57-3A-7, §57-3A-8, §57-3A-9, §57-3A-10, §57-3A-11 and §57-3A-12, all relating to creating the Reliability in Expert Testimony Standards Act; providing standards of admission for expert witness testimony; opinion testimony by lay witnesses; testimony by experts; basis of expert opinion testimony; bars to expert testimony; mandatory pretrial hearing and disclosure of expert testimony; interpretation of article; interlocutory appeal; standard of review; severability clause; and providing effective date.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §57-3A-1, §57-3A-2, §57-3A-3, §57-3A-4, §57-3A-5, §57-3A-6, §57-3A-7, §57-3A-8, §57-3A-

1 9, §57-3A-10, §57-3A-11 and §57-3A-12, all to read as follows:

2 **ARTICLE 3A. COMPETENCY OF EXPERT WITNESSES.**

3 **§57-3A-1. Reliability in Expert Testimony Standards.**

4 This article may be known and cited as the "Reliability in
5 Expert Testimony Standards Act".

6 **§57-3A-2. Opinion testimony by lay witnesses.**

7 If a witness is not testifying as an expert, the testimony of
8 the witness in the forms of opinions or inferences is limited to
9 those opinions or inferences which are: (a) Rationally based on the
10 perception of the witness; (b) helpful to a clear understanding of
11 the witness' testimony or the determination of a fact in issue; and
12 (c) not based on scientific, technical, or other specialized
13 knowledge within the scope of section three of this article.

14 **§57-3A-3. Testimony by experts.**

15 If scientific, technical or other specialized knowledge will
16 assist the trier of fact to understand the evidence or to determine
17 a fact in issue, a witness qualified as an expert by knowledge,
18 skill, experience, training or education may testify thereto in the
19 form of an opinion or otherwise, if: (a) The testimony is based
20 upon sufficient facts or data; (b) the testimony is the product of
21 reliable principles and methods; and (c) the witness has applied
22 the principles and methods reliably to the facts of the case.

23 **§57-3A-4. Basis of expert opinion testimony.**

24 The facts or data in the particular case upon which an expert

1 bases an opinion or inference may be those perceived by or made
2 known to the expert at or before the hearing. If of a type
3 reasonably relied upon by experts in the particular field in
4 forming opinions or inferences upon the subject, the facts or data
5 need not be admissible in evidence in order for the opinion or
6 inference to be admitted. Facts or data that are otherwise
7 inadmissible shall not be disclosed to the jury by the proponent of
8 the opinion or inference unless the court determines that their
9 probative value in assisting the jury to evaluate the expert's
10 opinion substantially outweighs their prejudicial effect.

11 **§57-3A-5. Bars to expert testimony.**

12 (a) A witness qualified as an expert by knowledge, skill,
13 experience, training, or education may only offer expert testimony
14 with respect to a particular field in which the expert is
15 qualified.

16 (b) An expert witness may receive a reasonable and customary
17 fee for the rendering of professional services provided that the
18 testimony of an expert witness shall not be admitted if any such
19 compensation is contingent on the outcome of any claim or case with
20 respect to which the testimony is being offered.

21 **§57-3A-6. Mandatory pretrial hearing.**

22 If the witness is testifying as an expert, then upon motion of
23 a party, the court shall hold a pretrial hearing to determine
24 whether the witness qualifies as an expert and whether the expert's

1 testimony satisfies the requirements of sections three, four and
2 five of this article. The court shall allow sufficient time for a
3 hearing and shall rule on the qualifications of the witness to
4 testify as an expert and whether or not the testimony satisfies the
5 requirements of sections three, four and five of this article. The
6 hearing and ruling shall be completed no later than the final
7 pretrial conference contemplated in Rule 16(d) of the West Virginia
8 Rules of Civil Procedure. The trial court's ruling shall set forth
9 the findings of fact and conclusions of law upon which the order to
10 admit or exclude expert evidence is based.

11 **§57-3A-7. Mandatory pretrial disclosure of expert testimony.**

12 (a) Whether or not any party elects to request a pretrial
13 hearing contemplated in section six, all parties shall disclose to
14 other parties the identity of any person who may be used at trial
15 to present expert evidence.

16 (b) Except as otherwise stipulated or directed by the court,
17 this disclosure shall, with respect to a witness who is retained or
18 specially employed to provide expert testimony in the case or whose
19 duties as an employee of the party regularly involve giving expert
20 testimony, be accompanied by a written report prepared and signed
21 by the witness. The report shall contain a complete statement of
22 all opinions to be expressed and the basis and reasons therefor;
23 the data or other information considered by the witness in forming
24 the opinions; any exhibits to be used as a summary of or support

1 for the opinions; the qualifications of the witness, including a
2 list of all publications authored by the witness within the
3 preceding ten years; the compensation to be paid for the study and
4 testimony; and a listing of any other cases in which the witness
5 has testified as an expert at trial or by deposition within the
6 preceding four years.

7 (c) These disclosures shall be made at the times and in the
8 sequence directed by the court. In the absence of other directions
9 from the court or stipulation by the parties, disclosures shall be
10 made at least ninety days before the trial date or the date the
11 case is to be ready for trial, or if the evidence is intended
12 solely to contradict or rebut evidence on the same subject matter
13 identified by another party under subsection (b) of this section,
14 within thirty days after the disclosure made by the other party.

15 (d) A party may depose any person who has been identified as
16 an expert whose opinions may be presented at trial. If a report
17 from the expert is required under subsection (b) of this section,
18 the deposition shall not be conducted until after the report is
19 provided.

20 **§57-3A-8. Interpretation.**

21 In interpreting and applying this article, the courts of this
22 state shall follow the opinions of the Supreme Court of the United
23 States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S.
24 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997),

1 Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999), Weisgram v.
2 Marley, 528 U.S. 440 (2000), and their progeny; moreover, the
3 courts of this state may draw from other precedents binding in the
4 federal courts of this state applying the standards announced by
5 the Supreme Court of the United States in the foregoing cases.

6 **§57-3A-9. Interlocutory appeal.**

7 Interlocutory appeal of a ruling on the admissibility of
8 expert evidence shall be available at the discretion of the West
9 Virginia Supreme Court of Appeals. In deciding whether to grant
10 the interlocutory appeal, the court shall consider whether: (a) The
11 ruling involved any challenge to the constitutionality of this
12 section; (b) the ruling will help prove or disprove criminal
13 liability; or (c) the ruling will help establish civil liability at
14 or above \$75,000, where the testimony could be outcome-
15 determinative for establishing liability or determining damages.
16 Neither party's failure to seek interlocutory appeal nor the
17 Supreme Court of Appeals' decision to deny a motion for
18 interlocutory appeal shall waive a party's right to appeal a ruling
19 on the admissibility of expert evidence after an entry of judgment
20 in the case.

21 **§57-3A-10. Standard of review.**

22 (a) As the proper construction of the expert evidence
23 admissibility framework prescribed by this section is a question of
24 law, the West Virginia Supreme Court of Appeals shall apply a de

1 novo standard of review in determining whether the circuit court
2 fully applied the proper legal standard in considering the
3 admissibility of expert evidence.

4 (b) As the application of this section to determine the
5 admissibility of expert testimony is a question of fact, the West
6 Virginia Supreme Court of Appeals shall apply an abuse of
7 discretion standard in determining whether the trial court properly
8 admitted or excluded particular expert evidence.

9 **§57-3A-11. Severability clause.**

10 The provisions of this article are severable. If any portion
11 of this article is declared unconstitutional or the application of
12 any part of this article to any person or circumstances is held
13 invalid, the remaining portions of the article and their
14 applicability to any person or circumstance shall remain valid and
15 enforceable.

16 **§57-3A-12. Effective date.**

17 This article shall become effective upon enactment and shall
18 apply to all actions commenced on or after the effective date and
19 to all pending actions in which trial has not been scheduled or in
20 which trial has been scheduled in excess of ninety days after the
21 effective date.

NOTE: The purpose of this bill is to create the "Reliability
in Expert Testimony Standards Act" providing standards of admission
for expert witness testimony in West Virginia courts.

This article is new; therefore, strike-throughs and underscoring have been omitted.