A Guide to the Rules of Evidence in Virginia

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Project Reporter for the Evidence Committee
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and
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Rule 2:404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

- (a) Character evidence generally. Evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
 - (1) Character trait of accused. Evidence of a pertinent character trait of the accused offered by the accused, or by the prosecution to rebut the same;
 - (2) Character trait of victim. Except as provided in Rule 2:412, evidence of a pertinent character trait or acts of violence by the victim of the crime offered by an accused who has adduced evidence of self-defense, or by the prosecution (i) to rebut defense evidence, or (ii) in a criminal case when relevant as circumstantial evidence to establish the death of the victim when other evidence is unavailable; or
 - (3) Character trait of witness. Evidence of the character trait of a witness, as provided in Rules 2:607, 2:608, and 2:609.
- (b) Other crimes, wrongs, or acts. Except as provided in Rule 2:413 or by statute, evidence of other crimes, wrongs, or acts is generally not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith. However, if the legitimate probative value of such proof outweighs its incidental prejudice, such evidence is admissible if it tends to prove any relevant fact pertaining to the offense charged, such as where it is relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if they are part of a common scheme or plan.

NOTES

Subsection (a). The general rule excluding character proof is Virginia law. Williams v. Commonwealth, 203 Va. 837 (1962) (criminal case);

Commonwealth ex rel. Davis v. Malbon, 195 Va. 368 (1953); S.H. Kress & Co. v. Roberts, 143 Va. 71 (1925) (civil proceeding); National Union Fire Ins. Co. v. Burkholder, 116 Va. 942 (1914). Subsections (1) and (2) generally apply to criminal cases while subsection (3) applies to civil and criminal cases. Note: Isolated acts of prior bad conduct are not admissible on this basis in civil or criminal cases. See McMinn v. Rounds, 267 Va. 277 (2004) (admissibility in certain civil cases).

Subdivision (a)(1). The exception to the general rule of exclusion permits a criminal defendant to introduce evidence of his character, Barlow v. Commonwealth, 224 Va. 338 (1982), and once he has opened the door by doing so, allows the Commonwealth to introduce rebuttal character evidence. Zirkle v. Commonwealth, 189 Va. 862, 871 (1949); Roach v. Commonwealth, 157 Va. 954, 961 (1932); see Gravely v. Commonwealth, 13 Va. App. 560 (1992); see also Gardner v. Commonwealth, 288 Va. 44 (2014) ("a defendant is not limited solely to reputation evidence regarding truthfulness, but may offer evidence to prove good character for any trait relevant in the case"—whether or not the witness has "discussed" that reputation with others—and in rebutting such proof the Commonwealth, unlike the defendant, is limited to evidence of the defendant's bad reputation for the particular trait before the defendant was accused of the present crime or the trial began. Id. at 50.); Argenbright v. Commonwealth, 57 Va. App. 94 (2010) (admissibility of character proof regarding truthfulness and lawabidingness on the issue of guilt in a forgery/money by false pretenses case, and on the issue of credibility of the defendant as a witness—standards for character witness testimony discussed). Note that the exception for reputational proof of character is limited to criminal proceedings. National Union Fire Ins. Co. v. Burkholder, 116 Va. 942, 945 (1914); see Jackson v. Commonwealth, 266 Va. 423 (2003). Under the seminal decision in Zirkle v. Commonwealth, 189 Va. 862 (1949), a defendant's evidence of good character may be "negative," stating that the qualified character witness has not heard of any reputation of the defendant for bad character with respect to a particular trait. Gardner, 288 Va. 44; Barlow v. Commonwealth, 224 Va. 338, 340 (1982).

Subdivision (a)(2). Introduction of evidence of a pertinent character trait of the victim where the defendant argues self-defense is permitted by Virginia law. Carter v. Commonwealth, 293 Va. 537, 544-45 (2017) (threats allegedly made by the victim); Barnes v. Commonwealth, 214 Va. 24 (1973); Canipe v. Commonwealth, 25 Va. App. 629 (1997); see Randolph v. Commonwealth, 190 Va. 256 (1949). Regarding admissibility of prior charges and convictions to show the victim's character for violent or turbulent behavior, see Anderson v. Commonwealth, 69 Va. App. 396, 402-05 (2018). The prosecution may offer proof of the victim's character for pertinent traits only after the defendant has put the victim's character in issue. Lee v. Commonwealth, 188 Va. 360, 365-66 (1948). Evidence pertaining to the victim of a criminal sexual assault is controlled by the statute embodied in Rule 2:412. See also Epperly v. Commonwealth, 224 Va. 214 (1982) (to establish death of victim). On the character of the victim, see Luck v. Commonwealth, 30 Va. App. 36 (1999). On the issue of how recent the victim's conduct must be in order to be admissible, see Carter, 293 Va. at 546-47

("the ultimate issue becomes whether such evidence of prior conduct was sufficiently connected in time and circumstances" as to be probative of present character). The court has discretion to determine how many prior acts of the victim will be received. *Id.* (allowing recent acts but excluding events years earlier).

Subdivision (a)(3). The exception to the general rule of exclusion that permits the introduction of character evidence to impeach a witness, including an accused who takes the stand, is also Virginia law. Land v. Commonwealth, 211 Va. 223, 226 (1970).

Subsection (b). Evidence that shows or tends to show a defendant has committed a prior crime generally is inadmissible to prove the crime charged. Woodfin v. Commonwealth, 236 Va. 89, 95 (1988); Kirkpatrick v. Commonwealth, 211 Va. 269, 272 (1970); see Burley v. Commonwealth, 29 Va. App. 140 (1999). Such evidence implicating an accused in other crimes unrelated to the charged offense is inadmissible because it may confuse the issues being tried and cause undue prejudice to the defendant. Guill v. Commonwealth, 255 Va. 134 (1998); see McGowan v. Commonwealth, 274 Va. 689 (2007); Boggs v. Commonwealth, 199 Va. 478, 486 (1957); Hall v. Commonwealth, 32 Va. App. 616 (2000); see also Commonwealth v. Minor, 267 Va. 166 (2004) (prior rapes of other victims irrelevant to prove lack of consent in rape charged).

Under Virginia Code § 18.2-67.7:1(A), an exception to the doctrine under Rule 2:404(b) enacted in 2014, a defendant's prior conviction for a sexual offense (as defined in the statute) is "admissible and may be considered for its bearing on any matter to which it is relevant" as proof in the prosecution of a felony sexual offense involving a child victim. Effective July 1, 2014, the Supreme Court of Virginia adopted Virginia Rule 2:413 to implement the specific provisions of this statute, and the opening phrase of Rule 2:404(b) was added to provide a cross-reference to the new Virginia statute and Rule, which establish an exception to the general ban of Rule 2:404(b) on the use of prior conduct to support the inference that a defendant committed the presently charged offense. There is very little reported case law interpreting these provisions as this edition of the Guide is prepared, but the clear intention of the statute is that "any matter" to which the prior conviction is relevant will include use of the prior offense to prove that the defendant committed the presently charged offense (that he or she has a "propensity" to commit such crimes and perhaps to address other issues, such as knowledge or intent. As is true of all "prior bad acts," proof admissible in Virginia under Rule 2:404(b), pursuant to Rule 2:413(e), of evidence of prior sex crime convictions, while "admissible" (not barred by basic character evidence principles or Rule 2:404(b), for example), may nonetheless be excluded "in accordance with the Virginia Rules of Evidence, including but not limited to Rule 2:403." Va. Code § 18.2-67.7:1(E); see Blankenship v. Commonwealth, 69 Va. App. 692, 700-02 (2019) (prior convictions may only be excluded under the statute if the danger of unfair prejudice substantially outweighs their probative value. The trial court may consider the details of the prior convictions in determining admissibility, but only the conviction orders themselves may be received in evidence). The statute and Rule are not limited to instances when the defendant elects to testify and is subject to impeachment as provided in Rule 2:609.

There are several other exceptions to the general rule excluding evidence of prior conduct of the accused under Virginia case law. Evidence of "other crimes" is relevant and admissible if it tends to prove any element of the offense charged. Thus, evidence of other crimes is allowed when it tends to prove motive, intent, or knowledge of the defendant. Guill, 255 Va. at 138; Kirkpatrick, 211 Va. at 272; see McGowan v. Commonwealth, 274 Va. 689 (2007); Pryor v. Commonwealth, 276 Va. 312 (2008) (incidents after the crime unduly prejudicial as bad acts offered to show identification of the perpetrator); see also Slaughter v. Commonwealth, 49 Va. App. 659 (2007) (other acts admissible to show intent); Thomas v. Commonwealth, 44 Va. App. 741 (2005) (crime scene facts and motive); Mughrabi v. Commonwealth, 38 Va. App. 538 (2002) (showing state of mind and intent to defraud). The Supreme Court has stated that the Commonwealth is required to prove every element of its case, and is entitled to do so by presenting relevant evidence in support of the offense charged. The Commonwealth cannot have its evidence barred or "sanitized" simply because the defendant takes the position that the offense did not occur and therefore intent is not genuinely in dispute. Kenner v. Commonwealth, 299 Va. 414, 426 (2021).

Evidence of other crimes, wrongs, or acts may also be introduced to show such things as relationship, identification, preparation, general plan or scheme, and absence of mistake or accident, where the probative value for such a purpose outweighs the prejudice to the defendant. Ortiz v. Commonwealth, 276 Va. 705 (2008); Rodriguez v. Commonwealth, 249 Va. 203 (1995); Woodfin v. Commonwealth, 236 Va. 89, 95 (1988); Cheripka v. Commonwealth, 78 Va. App. 480 (2023) (proof regarding defendant's sexual abuse of one minor daughter was admissible as relevant to show motive, intent, scheme, or plan in a prosecution charging abuse of another minor daughter); see Castillo v. Commonwealth, 70 Va. App. 394, 416-17 (2019) (use of protective order on issues of access to crime scene and authority to enter premises). Concerning the admission of other crimes proof to show a "common plan," see Severance v. Commonwealth, 67 Va. App. 629, 645 (2017) ("common plan or scheme"); Scates v. Commonwealth, 262 Va. 757 (2001) (this ground for admission requires such a concurrence of common features that the various acts in the present case are naturally to be explained as part of a general plan of which they are the individual manifestations); Satcher v. Commonwealth, 244 Va. 220, 230-31 (1992); McWhorter v. Commonwealth, 191 Va. 857, 870-71 (1951). On the admissibility of evidence of pornography in prosecutions for other crimes, see Kenner, 299 Va. at 426-27; Quinones v. Commonwealth, 35 Va. App. 634 (2001).

Evidence of other crimes must address a matter genuinely in dispute. See generally Guill v. Commonwealth, 255 Va. 134 (1998); Cooper v. Commonwealth, 31 Va. App. 643 (2000) (nexus requirement in general scheme); Barlow v. Commonwealth, 26 Va. App. 421 (1998); Bullock v. Commonwealth, 27 Va. App. 255 (1998). Where an assault defendant sought to offer proof of specific acts relating to the victim's mental and behavioral health

history, such was properly excluded under Rule 2:404(b) as defendant was not aware of the acts at the time of the assault. *Griffin v. Commonwealth*, 78 Va. App. 116 (2023).

Evidence of other crimes may be admitted to impeach the credibility of the witness or criminal defendant. *Hackney v. Commonwealth*, 28 Va. App. 288, 293 (1998); see *Pearce v. Commonwealth*, 53 Va. App. 113 (2008) (proof of substance abuse at the time of the offense as impeachment).

Virginia Rule of Evidence 2:404(b) expressly directs that admission of evidence of other crimes committed by a defendant, under the exceptions to the general rule of exclusion of such proof, is subject to the further requirement that the legitimate probative value of the evidence must exceed the incidental prejudice to the defendant. Kenner, 299 Va. at 427; Harvey v. Commonwealth, 76 Va. App. 436 (2023); Castillo v. Commonwealth, 70 Va. App. 394, 417 (2019); Pryor v. Commonwealth, 276 Va. 312 (2008); see McGowan v. Commonwealth, 274 Va. 689 (2007); Commonwealth v. Minor, 267 Va. 166, 172 (2004); Scates v. Commonwealth, 262 Va. 757, 761 (2001); Guill, 255 Va. at 139; Lewis v. Commonwealth, 225 Va. 497, 502 (1983).

Although Rule 2:404(b) also requires the trial court to balance the probative value of the evidence against its potential prejudice, it does not use the "substantially outweighs" standard from Rule 2:403(a). Instead, Rule 2:404(b) permits the introduction of otherwise admissible prior-bad-act evidence only "if the legitimate probative value of such proof outweighs its incidental prejudice." The difference in balancing tests makes it easier for a party to introduce relevant evidence generally than to introduce relevant prior-bad-act evidence. Prior-bad-act evidence that is otherwise admissible must be excluded whenever its probative value is merely outweighed by its incidental prejudice; the prejudice need not substantially outweigh the probative value. See Williams v. Commonwealth, Record No. 0545-24-2, 2025 Va. App. LEXIS 546, 2025 WL 2649516 (Va. Ct. App. Sept. 16, 2025).

Concerning the similarity of prior crimes used to show the identity of the perpetrator of the crime on trial, see Rose v. Commonwealth, 270 Va. 3 (2005); Minor, 267 Va. at 171; Powell v. Commonwealth, 267 Va. 107, 141 (2004); Turner v. Commonwealth, 259 Va. 645, 651 (2000); Chichester v. Commonwealth, 248 Va. 311, 326 (1994) ("Proof of modus operandi is competent evidence where there is a disputed issue of identity."); Spencer v. Commonwealth, 240 Va. 78, 90 (1990). See also Severance, 67 Va. App. at 647.

Concerning the staleness of prior conduct, see *Turner*, 259 Va. 645.

On related crimes, see *Jackson v. Commonwealth*, 267 Va. 666 (2004); *Wolfe v. Commonwealth*, 37 Va. App. 136 (2001) (application of the doctrine in sentencing proceedings); *Robbins v. Commonwealth*, 31 Va. App. 218 (1999).

Where evidence of prior crimes or bad acts is appropriate under these principles, the court will allow the evidence if there is sufficient proof that the jury could reasonably find that the event took place. In determining whether to admit evidence of prior bad acts, the trial court cannot resolve questions of credibility unless the witness' testimony is inherently incredible. *Boney v. Commonwealth*, 29 Va. App. 795 (1999); *Pavlick v. Commonwealth*, 27 Va. App. 219, 227 (1998); *see Stottlemyer v. Ghramm*, 268 Va. 7 (2004) (prior incidents of improper conduct in civil litigation).

Where a material element of the crime is the fraudulent intent of the accused, both the Commonwealth and the accused are allowed broad scope in introducing evidence with even the slightest tendency to establish or negate such intent. Brooks v. Commonwealth, 220 Va. 405 (1979); Mughrabi v. Commonwealth, 38 Va. App. 538 (2002).

Evidence of gang membership. Subject to a limiting instruction in the court's discretion, evidence of gang membership may be admitted under Rule 2:404(b) where the legitimate probative value of such proof on issues in the case outweighs its incidental prejudice to the defendant. Lambert v. Commonwealth, 70 Va. App. 740 (2019) (upholding admission of proof defendant was a member of the Bloods gang and a "General" in its leadership, as relevant to a charge under Va. Code § 18.2-357.1(B) that he used intimidation to cause another person to engage in prostitution).

Rule 2:405. METHODS OF PROVING CHARACTER TRAITS

- (a) Reputation proof. Where evidence of a person's character trait is admissible under these Rules, proof may be made by testimony as to reputation; but a witness may not give reputation testimony except upon personal knowledge of the reputation. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
- (b) Specific instances of conduct. In cases in which a character trait of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of conduct of such person on direct or cross-examination.

NOTES

Subdivision (a). This provision limits the kind of evidence that may be used to prove character when character evidence is admissible. Current Virginia law recognizes only reputation testimony. See Argenbright v. Commonwealth, 57 Va. App. 94 (2010); Marable v. Commonwealth, 142 Va. 644 (1925).

At common law, reputation testimony had to be based on knowledge of a person's reputation in the community where that individual lived. Virginia has long recognized, however, that a person may have a pertinent reputation in communities other than the one in which he lives. See id. A defendant may offer "negative" character proof, stating that the witness has not heard disparaging reputation about the defendant for the relevant trait. See Jackson v. Commonwealth, 266 Va. 423 (2003). On cross-examination, a witness's familiarity with the character she has testified to, as well as her standards for evaluating character, may be tested by asking her about specific instances of conduct that are relevant to the character trait testified to. See Zirkle v. Commonwealth, 189 Va. 862, 872 (1949); Kanter v. Commonwealth, 171 Va. 524 (1938).

Subdivision (b). Sometimes a person's character or trait of character is an essential element in the case. For example, damages in a defamation action are awarded for injury to reputation. When character or a trait of character are essential, they can be shown by specific instances of conduct as well as by reputation. Whether character or a trait of character is an essential element is a matter of substantive law and not evidence law. See Jordan v. Commonwealth, 216 Va. 768 (1976); Barnes v. Commonwealth, 214 Va. 24, 25-26 (1973).

Although, as a general rule, the Commonwealth may not rebut character evidence by proving specific acts of misconduct, other than by cross-examining the defendant's character witnesses as to their knowledge of those acts (see Land v. Commonwealth, 211 Va. 223, 225-26 (1970)), the Supreme Court has uniformly held that even in the guilt phase of a trial where a defendant attempts to present evidence which may mislead the fact-finder regarding his good character or history, the Commonwealth is entitled to rebut the false impression and misleading evidence. See Roy v. Commonwealth, 191 Va. 722, 726-28 (1951); Zirkle v. Commonwealth, 189 Va. 862 (1949); Locke v. Commonwealth, 149 Va. 447, 451-52 (1928); Harris v. Commonwealth, 129 Va. 751, 753-54 (1921); see also Pughsley v. Commonwealth, 33 Va. App. 640 (2000); Lockhart v. Commonwealth, 251 Va. 184 (1996). A single act of bad conduct does not establish one's unfavorable character. While evidence of a series of bad acts may collectively be admissible to establish poor character, the conduct in a single incident is insufficient. See McMinn v. Rounds, 267 Va. 277 (2004).

Rule 2:406. HABIT AND ROUTINE PRACTICE IN CIVIL CASES (derived from Code § 8.01-397.1)

- (a) Admissibility. In a civil case, evidence of a person's habit or of an organization's routine practice, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion conformed with the habit or routine practice. Evidence of prior conduct may be relevant to rebut evidence of habit or routine practice.
- (b) Habit and routine practice defined. A "habit" is a person's regular response to repeated specific situations. A "routine practice" is a regular course of conduct of a group of persons or an organization in response to repeated specific situations.

NOTES

Subsections (a) and (b). The Virginia Supreme Court's decision in Ligon v. Southside Cardiology Associates, P.C., 258 Va. 306 (1999), addressing habit proof, predates the passage of Virginia Code § 8.01-397.1, which appears in large measure to displace that decision. "Habit under current law must be based on a sufficiently numerous set of regular incidents, and is 'never to be lightly established." See Kimberlin v. PM Transp., Inc., 264 Va. 261 (2002); Stottlemyer v. Ghramm, 268 Va. 7 (2004) (prior isolated incidents of improper conduct were not admissible as habit).

Prior to *Ligon*, it appeared that Virginia law on habit was in accord with the common law. The prior cases appeared to accept evidence of a specific habit but reject evidence of a general habit. *Compare Washington, Alexandria & Mount Vernon Ry. v. Trimyer*, 110 Va. 856 (1910), with *Jackson v. Chesapeake & Ohio Ry.*, 179 Va. 642 (1942). The distinction turns on the question of specificity: admissible habit is a regular or semi-automatic response to a particular repeated situation, such as always putting on the parking brake before getting out of a car. More general traits, like carelessness or aggressiveness, are matters of character, which are addressed elsewhere in the Guide. They are generally not admissible topics. *See generally Graham v. Commonwealth*, 127 Va. 808, 823 (1920).

The admission of the habit evidence even though there are eyewitnesses is consistent with *Alexandria & Fredericksburg Railroad v. Herndon*, 87 Va. 193 (1890), and no special corroboration of habit proof is required by the Virginia cases. Evidence admissible under this doctrine is not conclusive, but merely some

evidence on the issue of what happened. This evidence is also subject to review under Rule 2:403.

Evidence of custom or course of dealing in a particular trade is relevant to prove the intent of parties to a contract, on the issue of due care, or on the issue of whether an act is willful or wanton. See Peacock Buick, Inc. v. Durkin, 221 Va. 1133, 1138 (1981) (evidence of trade customs admissible to show that defendant's act was willful or wanton); M.W. Worley Constr. Co. v. Hungerford, Inc., 215 Va. 377, 381 (1974) (the general usage of the business in a given situation is admissible as evidence of what is reasonable and proper to be done in that situation).

Habit proof in criminal cases. As adopted by the Supreme Court of Virginia, Rule 2:406 is limited to the use of habit proof in civil litigation. This reflects the fact that Virginia Code § 8.01-397.1(C), on which Rule 2:406 is based, specifies that this statute does not apply in criminal cases. Regarding habit proof in criminal cases, see *Hodges v. Commonwealth*, 45 Va. App. 735 (2005), rev'd on other grounds, 272 Va. 418 (2006) (discussing the Supreme Court's articulation of the law in *Ligon v. Southside Cardiology Assocs.*, P.C., 258 Va. 306 (1999) and its narrow treatment of the earlier criminal case involving habit proof, *Graham v. Commonwealth*, 127 Va. 808, 823 (1920)).