ARTICLE IV. RELEVANCY, POLICY, AND CHARACTER TRAIT PROOF

Rule 2:401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence.

NOTES

This Rule of Evidence defines relevance and is consistent with traditional and current case law. *See* ***Gamache v. Allen*, 268 Va. 222 (2004)**; ***McNeir v. Greer-Hale Chinchilla Ranch*, 194 Va. 623, 628 (1953)**. The court used similar language in ***Hardy v. Commonwealth*, 110 Va. 910, 922 (1910)**: "However remote or insignificant a fact may be, if it tends to establish a probability or improbability of a fact in issue, to make it more or less probable, it is admissible."

Accord ***Ravenwood Towers, Inc. v. Woodyard*****, 244 Va. 51, 56 (1992)** (citing cases); *see* ***Barkley v. Wallace*****, 267 Va. 369 (2004)** (medical bills admitted on non-damage issues); ***Marsh v. Commonwealth*****, 32 Va. App. 669 (2000)** (relevance of voice exemplars). In a criminal case, "[e]vidence which has no tendency to prove guilt, but only serves to prejudice an accused, should be excluded on the ground of lack of relevancy." ***McMillan v. Commonwealth*****, 277 Va. 11, 22 (2009)**.

The language used in Virginia Rule of Evidence 2:401, "any fact in issue" appears to have a meaning similar to the phraseology used in most other jurisdictions: "any fact that is of consequence to the determination of the action." This is sometimes referred to as the "materiality" element of relevance. *See* ***Commonwealth v. Proffitt*****, 292 Va. 626, 634 (2016)** (evidence tending to prove a matter that is properly in issue is material). The language of the Rule as adopted reflects that, in Virginia, as in all other states, the fact that the evidence is offered to prove need not be an ultimate issue in the case. For example, in ***Goodloe v. Smith*****, 158 Va. 571, 584 (1932)**, the court stated, "It is not necessary . . . that the evidence should bear directly upon the issue. It is admissible if it . . . constitutes a link in the chain of proof." Regarding the relevance and admissibility of "corroborating" evidence, *see* ***Proffitt,* 292 Va. at 638** (such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or the point in issue). On a motion in limine, excluding evidence pertaining to a defendant's proposed necessity defense on relevance grounds was not error where defendant failed to proffer evidence on a required element of that defense, i.e., a lack of other adequate means to avoid the threatened harm. *See* ***Warren v. Commonwealth***, **76 Va. App. 788 (2023)**.

Concerning judicial admissions to obviate proof, see ***Jones v. Ford Motor Co.*****, 263 Va. 237 (2002)**. "To constitute a judicial admission, the admission must conclusively establish a fact in issue. The admission may not be thereafter qualified, explained, or rebutted by other evidence. Consequently, once a fact has been established by a judicial admission, evidence tending to prove the fact admitted becomes irrelevant." ***Id.* at 254** (quoting ***General Motors Corp. v. Lupica*****, 237 Va. 516, 520 (1989)**).

Rule 2:402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

(a) *General Principle.* All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of Virginia, statute, Rules of the Supreme Court of Virginia, or other evidentiary principles. Evidence that is not relevant is not admissible.

(b) *Results of Polygraph Examinations.* The results of polygraph examinations are not admissible.

NOTES

The Virginia Supreme Court has said, "The general rule is that a litigant is entitled to introduce all competent, material and relevant evidence which tends to prove or disprove any material issue raised." ***Hepler v. Hepler*, 195 Va. 611, 620 (1954)**; *see also* ***Williams v. Garraghty*, 249 Va. 224, *cert. denied*, 516 U.S. 814 (1995)**; ***Peacock Buick, Inc. v. Durkin*, 221 Va. 1133, 1136 (1981)** ("Evidence having rational probative value and which adds force and effect to other evidence will be admitted unless some other rule requires its exclusion.").

Although admissibility of relevant evidence is the general rule, it is not an absolute rule. Not all relevant evidence is admissible. For example, evidence may be relevant, yet inadmissible because it violates another rule or principle of evidence, e.g., the rule against hearsay. Additionally, there may be counterbalancing factors which substantially outweigh the need and usefulness of the evidence even though that evidence is relevant. *See* Va. R. Evid. 2:403; *see also* ***Allstate Ins. Co. v. White*, 257 Va. 73, 76 (1999)**. *See generally* ***Velocity Express Mid-Atlantic v. Hugen*, 266 Va. 188 (2003)** (cross-examination of expert should not mention unrelated drug use by a personal injury plaintiff or prior episodes of depression).

The second sentence of the Rule states that irrelevant evidence is inadmissible. This principle is also one that is a foundation of any system of evidence. *See* ***Bunting v. Commonwealth*, 208 Va. 309, 314 (1967)**.

This Rule also recognizes the binding force of state and federal constitutional law. In addition, there are statutes that make potentially relevant evidence inadmissible (e.g., Va. Code § 46.2-378, prohibiting the introduction of investigative reports of automobile accidents). Virginia evidence law applies in any case tried in the Commonwealth's courts, whether the cause of action arises under state or federal law (for example, a civil rights action). *See also* ***Smith v. Litten*, 256 Va. 573 (1998)** (where the evidence presented a jury issue on the award of

punitive damages, it was proper to advise the jury that the defendant's net worth was $50 million).

Similar circumstances proof. Evidence of other similar accidents or occurrences, when relevant, is admissible to show that the defendant had notice and actual knowledge of a defective condition, provided the prior accidents or occurrences happened under substantially the same circumstances, and had been caused by the same or similar defects and dangers as those in issue. ***Funkhouser v. Ford Motor Co.*, 285 Va. 272 (2013)**; ***Jones v. Ford Motor Co.*, 263 Va. 237 (2002)**; ***General Motors Corp. v. Lupica*, 237 Va. 516, 520 (1989)**; ***Spurlin v. Richardson*, 203 Va. 984, 989 (1962)**; *accord* ***Roll 'R' Way Rinks, Inc. v. Smith*, 218 Va. 321, 325 (1977)**. Evidence of prior accidents is not admissible for the purpose of proving negligence or causation at the time of the accident in issue. ***Roll 'R' Way Rinks*, 218 Va. at 325**. Case law in Virginia precludes admission of proof to show the *absence* of similar injuries or events. *See* ***Goins v. Wendy's Int'l, Inc.*, 242 Va. 333 (1991)**; *see also* ***Wood v. Woolfolk Props., Inc.*, 258 Va. 133 (1999)**. By statute, in punitive damage claims relating to drunk driving, evidence of similar conduct by the same defendant subsequent to the date of the personal injury or death at issue shall be admissible at trial for consideration by the jury or other finder of fact for the limited purpose of determining what amount of punitive damages may be appropriate to deter the defendant and others from similar future conduct. Va. Code § 8.01-44.5.

Accident (crash) reports and DMV driving records. By statute, accident reports are inadmissible even if relevant. Va. Code § 46.2-379. *See generally* ***Acuar v. Letourneau*, 260 Va. 180 (2000)**. In addition, Virginia Code § 46.2-208(B)(5) and (8) make certain driver records provided by DMV to rental car companies and insurers inadmissible.

Alcohol-sensing devices. On the admission of the results of certain alcohol tests, see ***Hall v. Commonwealth*, 32 Va. App. 616 (2000)**. Concerning the admission of preliminary breath tests, see ***Flannagan v. Commonwealth*, 75 Va. App. 349 (2022)**. *See also* Va. Code §§ 18.2-268.2, 18.2-268.9; ***Rasmussen v. Commonwealth*, 31 Va. App. 233 (1999)**. Under § 19.2-187 of the Virginia Code, the Commonwealth may introduce a duly attested BAC report as proof that the driver was operating a vehicle under the influence. § 19.2-187.1 gives the driver the right to require the Commonwealth to call the attesting technician for any lab report and to cross-examine him or her as to the validity of the results. A defendant who fails to demand the presence of the technician waives the right to be confronted with the witnesses against him or her under the Sixth Amendment's Confrontation Clause. Where a locality has elected to purchase equipment permitting two-way video conferencing, and upon satisfaction of prerequisites set forth in § 19.2-187(D), testimony from a person who performed the analysis resulting in a certificate of analysis may be given using such equipment. *See* ***Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009)**.

Flight by criminal defendant. See ***Turman v. Commonwealth*, 276 Va. 558 (2008)** (requirement that defendant flee to avoid detection, apprehension,

arrest or criminal prosecution); ***Thomas v. Commonwealth*, 279 Va. 131 (2010)** (circumstances where flight raises inference of guilt); ***Lovitt v. Commonwealth*, 260 Va. 497 (2000)**; ***Clagett v. Commonwealth*, 252 Va. 79, 85 (1996)**; *see also* ***Ricks v. Commonwealth*, 39 Va. App. 330 (2002)** (surveying cases on conduct showing "consciousness of guilt"); ***Leonard v. Commonwealth*, 39 Va. App. 134 (2002)** (flight by defendant facing several charges).

Dog alerts and tracking behavior. The Supreme Court has approved admission of evidence concerning the behavior of trained canines upon foundational testimony establishing appropriate training and reliability of the dog in tracking persons or in the detection of specific drugs by odor, and the witness-handler's qualifications in interpreting the dog's behavior, together with circumstances conducive to dependable interpretation of the dog's responses. *See* ***Jones v. Commonwealth*, 277 Va. 171 (2009)** (drug detection dog alerts); ***Epperly v. Commonwealth*, 224 Va. 214, 233 (1982)** (dog tracking evidence); *see also* ***Castillo v. Commonwealth*, 70 Va. App. 394 (2019)** (cadaver dog evidence). For discussion of the foundation for expert testimony, see the Notes to Rule 2:702.

Private rules. The private rules of a party are generally not admissible into evidence either to show that the party was negligent or was free from negligence. If an injured person was aware of the private rules or relied on them, or was a party to such rules, they may be admissible to establish the standard of care. ***Pullen v. Nickens*, 226 Va. 342 (1983)**; ***Virginia Ry. & Power Co. v. Godsey*, 117 Va. 167 (1915)**. Private rules of a party may also be admissible into evidence when offered for purposes other than establishing the standard of care. *See* ***Riverside Hosp., Inc. v. Johnson*, 272 Va. 518 (2006)**. In ***New Bay Shore Corp. v. Lewis*, 193 Va. 400 (1952)**, the safety rules adopted by the defendant and its instructions to its employees were deemed probative of the defendant's awareness of potential danger. *See also* ***Shiflett v. M. Timberlake, Inc.*, 205 Va. 406 (1964)** (private rules admitted into evidence without objection).

Certain expressions of sympathy. While not embodied in a Rule of Evidence, the doctrine has been adopted by statute in Virginia that expressions of sympathy by health care professionals in certain medical contexts will be inadmissible in later court proceedings. The applicable code provisions expressly define health care providers and "relatives," along with other terms, and are located in the wrongful death and medical malpractice chapters of the Code of Virginia. *See generally* Va. Code §§ 8.01-52.1, 8.01-581.20:1.

Proof of a criminal defendant's mental condition. A package of provisions approved by the General Assembly in 2021 added Virginia Code § 19.2-271.6, relating to criminal proceedings and consideration of the defendant's mental condition—quite apart from the issues in an insanity defense. Under this provision, in any criminal case, evidence offered by the defendant concerning the defendant's mental condition at the time of the alleged offense, including expert testimony, [1] is relevant, [2] is not evidence concerning an ultimate issue of fact, and [3] "'shall be admitted' if such evidence (i) tends to show the defendant did not have the intent required for the offense charged and (ii) is otherwise admissible

pursuant to the general rules of evidence." The legislation provides that to establish a mental condition for such purposes, the defendant must show that the condition existed at the time of the offense and that such condition satisfies the diagnostic criteria for (a) a mental illness, as defined in the new statute; (b) an intellectual or developmental disability, as defined in the section; or (c) an autism spectrum disorder, as defined in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. If a defendant intends to present such evidence, Virginia Code § 19.2-271.6 requires the defendant or counsel to give notice in writing to the attorney for the Commonwealth within specified time periods.

Subdivision (b). This subpart of the Rule makes polygraph testing results inadmissible. Polygraph tests are generally afforded a misleading aura of reliability while being in fact wholly unreliable. ***Robinson v. Commonwealth*, 231 Va. 142 (1986)**; ***White v. Commonwealth*, 41 Va. App. 191 (2003)** (probation revocation proceeding); *see* ***Turner v. Commonwealth*, 278 Va. 739 (2009)** (approving *White* and requiring exclusion of the opinions of the polygraph operator or others purporting to offer expert opinion interpreting the test results). However, "[a]ny voluntary statements or admissions made by a person being tested remain admissible subject to the ordinary rules of evidence." ***Id.* at 743-44**.