

SOURCE NOTES
VIRGINIA RULES OF EVIDENCE
OCTOBER 2011

Rule 2:101 TITLE

Source Note

New.

Rule 2:102 SCOPE AND CONSTRUCTION OF THESE RULES

Source Note

New. A numbering system has been adopted that is consistent with the Federal Rules of Evidence, and that is used in 42 other states, solely for convenience of practitioners. The numbering system has no substantive effect on the law of evidence in Virginia, and its use is not intended to make corresponding rules from other jurisdictions (and common law interpretations of them) applicable to these Virginia Rules of Evidence.

Rule 2:103 OBJECTIONS AND PROFFERS

Source Note

Subdivision (a). The Rule embodies existing law and practice.

Objection and error preservation: See *Clinton v. Commonwealth*, 204 Va. 275, 130 S.E.2d 437 (1963), rev'd on other grounds, 377 U.S. 158 (1964); *Marlowe v. Commonwealth*, 2 Va. App. 619, 347 S.E.2d 167 (1986); *Wright v. Commonwealth*, 23 Va. App. 1, 473 S.E.2d 707 (1996). *Smith v. Commonwealth*, 43 Va. App. 374, 598 S.E.2d 325 (2004); *Wright v. Norfolk & W. Ry.*, 245 Va. 160, 168, 427 S.E.2d 724, 728 (1993); *Burns v. Board of Supervisors*, 227 Va. 354, 315 S.E.2d 856 (1984). *Zook v. Commonwealth*, 31 Va. App. 560, 525 S.E.2d 32 (2000); *Commonwealth v. Jenkins*, 255 Va. 516, 499 S.E.2d 263 (1998); *Vasquez v. Mabini*, 269 Va. 155, 606 S.E.2d 809 (2005); *Riner v. Commonwealth*, 268 Va. 296, 601 S.E.2d 555 (2004). See also Rules 5:25 and 5A:18 of the Rules of the Virginia Supreme. The Rule continues the existing and well established practice of allowing counsel, upon approval of the trial court, "to make a continuing objection to a related series of questions in order to avoid the necessity of repetitious objection." *Rodriguez v. Commonwealth*, 18 Va. App. 277, 286, 443 S.E.2d 419, 425 (1994), aff'd, 249 Va. 203, 454 S.E.2d 725 (1995).

Numerous cases construe the contemporaneous objection requirement under Rule 5:25 and Rule 5A:18, and the provisions of Code §8.01-384. This Rule does not affect that case law and is subject to the protections of that statute. *Shelton v. Commonwealth*, 274 Va. 121, 127-28, 645 S.E.2d 914, 917 (2007). See *Helms v. Manspile*, 277 Va. 1, 6, 671 S.E.2d 127, 129 (2009); *Graham v. Cook*, 278 Va. 233, 682 S.E.2d 535 (2009). In addition, there is a body of case law regarding recognition of objections where the ground was readily apparent or obvious in the context. The present Rule does not affect those decisions. See, e.g., *Lear v. Commonwealth*, 195

Va. 187, 192, 77 S.E.2d 424, 427 (1953); Solomon v. Atlantic C. RR., 187 Va. 240, 243, 46 S.E.2d 369, 370 (1948); Evans v. Commonwealth, 161 Va. 992, 170 S.E. 756 (1933); Smith v. Commonwealth, 165 Va. 776, 182 S.E. 124 (1935); Saunders v. Commonwealth, 186 Va. 1000, 45 S.E.2d 307 (1947); Compton v. Commonwealth, 163 Va. 999, 175 S.E. 879 (1934); Boggs v. Commonwealth, 153 Va. 838, 149 S.E. 464 (1929); Norfolk & Western R. Co. v. Shott, 92 Va. 34, 22 S.E. 811 (1895); Robertson v. Atlantic, etc., R. Co., 129 Va. 494, 106 S.E. 521 (1921).

Offers and Proffers. See Bloom v. Commonwealth, 262 Va. 814, 554 S.E.2d 84 (2001). Owens v. Commonwealth, 147 Va. 624, 630, 136 S.E. 765, 767 (1927); Williams v. Harrison, 255 Va. 272, 497 S.E.2d 467 (1998); Lockhart v. Commonwealth, 34 Va. App. 329, 542 S.E.2d 1 (2001); Whittaker v. Commonwealth, 217 Va. 966, 969, 234 S.E.2d 79, 81 (1977), Pettus v. Gottfried, 269 Va. 69, 606 S.E.2d 819 (2005); Drinkard-Nuckols v. Andrews, 269 Va. 93, 606 S.E.2d 813(2004); Combs v. Norfolk & Western Ry. Co., 256 Va. 490, 499, 507 S.E.2d 355, 360 (1998); Hubbard v. Commonwealth, 243 Va. 1, 9, 413 S.E.2d 875, 879 (1992); Whitten v. McClelland, 137 Va. 726, 741, 120 S.E. 146, 150 (1923); Brooks v. Bankson, 248 Va. 197, 207, 445 S.E.2d 473, 478 (1994); Hoier v. Noel, 199 Va. 151, 155, 98 S.E.2d 673, 676 (1957). See also Ray v. Commonwealth, 55 Va. App. 647, 688 S.E.2d 879 (2010).

This Rule does not affect the established doctrine and practice with respect to motions to strike testimony when its defects or insufficiency become apparent. See Vasquez v. Mabini, 269 Va. 155, 606 S.E.2d 809 (2005) and Countryside Corporation v. Taylor, 263 Va. 549, 561 S.E.2d 680 (2002)(motion to strike expert testimony made at the conclusion of the expert's testimony was proper, even though no objection was made while the expert was testifying. The procedure satisfied the purpose of the contemporaneous objection rule because "the party objecting to flawed expert testimony made no objection while the testimony was being given, but moved to strike at its conclusion, after the flaws had become apparent, thus giving the trial court a proper opportunity to correct the error of admitting it." Vasquez, 269 Va. at 163, 606 S.E.2d at 813. See also Kondaurov v. Kerdasha, 271 Va. 646, 629 S.E.2d 181 (2006).

Subdivision (b). Reflects existing Virginia law and practice. See generally Winston v. Starke, 53 Va. (12 Gratt.) 317 (1855). See also Rule 3A:9 (objection before trial).

Rule 2:104 PRELIMINARY DETERMINATIONS

Source Note

Subdivision (a). Subdivisions (a) and (b) reflect the traditional division of labor between judge and jury in Virginia: judges decide whether or not evidence is admissible or excludable under the various evidence doctrines; juries determine how much weight to give to the evidence that judges find admissible.

In making preliminary determinations on questions of admissibility, the judge is not bound by strict rules of evidence, other than privilege. See Rule 2:1101(b). In appropriate circumstances, representations by counsel and summary testimony may be considered by the judge in ruling on admissibility. This is not a bar to the judge's requiring actual testimony by a person with knowledge on any issue. Rather, it is a

codification of the common law's recognition that evidence issues ought not to give rise to formal minitrials in the midst of a trial on the merits of a dispute. See, e.g., *Floyd v. Commonwealth*, 219 Va. 575, 581-82, 249 S.E.2d 171, 175 (1978) (trial judge has discretion in procedure for admission of proof). On occasion the judge must make a preliminary determination that evidence is relevant or that it relates to the events in suit. See, e.g., *Claytor v. Anthony*, 27 Va. (6 Rand.) 285, 291, 299-300 (1828). Generally the proponent of evidence has the burden to show admissibility and the court applies a preponderance standard in determining whether the proponent of evidence has met its burden. See *Lynch v. Commonwealth*, 272 Va. 204, 207-08, 630 S.E.2d 482, 484 (2006).

Subdivision (b). This subdivision covers situations in which one piece of evidence depends on the existence of another for its probative value. The offering party must supply sufficient connecting evidence to make it relevant, and once this is done, the trier of fact will decide whether to rely on the evidence. While often the judge will require a sufficient linkage before receiving the evidence, the Rule reflects the traditional discretion of the court to accept evidence subject to later “connection” by other proof. See *Floyd v. Commonwealth*, 219 Va. 575, 249 S.E.2d 171 (1978).

The language “sufficient to support a finding” used in this Rule signifies that evidence may be admitted even though it alone would not prove a point beyond a reasonable doubt, by clear or convincing evidence, or even by a preponderance of the evidence. The test for admissibility is whether a trier of fact could reasonably draw the inference it is asked to draw. If it could, the evidence is admitted.

Subdivision (c). The rule recognizes that it is desirable to have hearings on evidence issues outside the presence of the jury to assure that the jury is not influenced by evidence that is ruled inadmissible or by arguments and comments of counsel. It implements existing Virginia law. *Matthews v. Commonwealth*, 207 Va. 915, 918-20, 153 S.E.2d 238, 240-41 (1967); *Enoch v. Commonwealth*, 141 Va. 411, 426-37, 126 S.E.2d 222, 227-30 (1925). The United States Supreme Court has required that trial judges make independent rulings on the admissibility of confessions. *Jackson v. Denno*, 378 U.S. 368 (1964). This subdivision carries out the intent of that opinion. In some situations, hearings must be held before trial. See, e.g., Va. Code § 19.2-266.2 (suppression of confession).

Subdivision (d). This rule is consistent with the general proposition that a witness may not be cross-examined beyond the scope of the direct examination. Moreover, it provides the accused with the protection that is constitutionally required. *Washington v. Commonwealth*, 214 Va. 737, 738-39, 204 S.E.2d 266, 267 (1974); see *Simmons v. United States*, 390 U.S. 377 (1968) (the defendant’s testimony on a constitutionally based motion to suppress evidence may not be used as part of the prosecution’s case-in-chief). Regarding impeachment use of such statements, see *United States v. Kahan*, 415 U.S. 239, 243 (1974); *United States v. Salvucci*, 448 U.S. 83, 93-94 (1980) .

Subdivision (e). Virginia courts have held that evidence relevant to the credibility of a witness or the weight to be accorded to evidence is as material in the constitutional sense as evidence that goes directly to the question of guilt or liability. See, e.g., *Fitzgerald v. Bass*, 64 Va. App. 38, 53, 366 S.E.2d 615, 623 (1988).

Rule 2:105 PROOF ADMITTED FOR LIMITED PURPOSES

Source Note

Virginia law has long held that evidence that is admissible for one purpose may be received for that purpose even though it may not be received for another purpose. *Spotsylvania County Sch. Bd. v. Seaboard Sur. Co.*, 243 Va. 202, 210, 415 S.E.2d 120, 125 (1992); *Stockton v. Commonwealth*, 241 Va. 192, 205, 402 S.E.2d 196, 203 (1991); *Rosenberg v. Mason*, 157 Va. 215, 160 S.E. 190 (1931). Where the evidence is limited, either because it is admissible against some but not all parties or for some but not all purposes, the court can so instruct the jury. *Meyer's Sons v. Falk*, 99 Va. 385, 388, 38 S.E. 178, 179 (1901).

The rule in Virginia is that a party must ask for a limiting instruction if one is desired. *Hall v. Commonwealth*, 233 Va. 369, 374, 355 S.E.2d 591, 595 (1987); see *Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d 599 (1990); *Clanton v. Commonwealth*, 223 Va. 41, 54, 286 S.E.2d 172, 179 (1982). Failure to make a request generally bars a party from complaining on appeal about the absence of an instruction. See, e.g., *Commercial Distribs., Inc. v. Blankenship*, 240 Va. 382, 397 S.E.2d 840 (1990); *Manetta v. Commonwealth*, 231 Va. 123, 127 n.2, 340 S.E.2d 828, 830 n.2 (1986); *Carter v. Pickering*, 191 Va. 801, 811, 62 S.E.2d 856, 861 (1951). The trial judge may also give a limiting instruction *sua sponte*. *Hernandez v. Commonwealth*, 15 Va. App. 626, 630, 636, 426 S.E.2d 137, 139, 143 (1993). Nothing in this doctrine prohibits a party from objecting to an instruction to the jury by the trial judge. *Yarborough v. Commonwealth*, 247 Va. 215, 220, 441 S.E.2d 342, 345 (1994); *Wright v. Norfolk & W. Ry.*, 245 Va. 160, 168, 427 S.E.2d 724, 728 (1993). Counsel who object to a limiting instruction should do so in a timely manner.

Rule 2:106 REMAINDER OF A WRITING OR RECORDED STATEMENT

Source Note

Subdivision (a). This is a rule of fairness and completeness with respect to writings and recordings which prevents parts from being taken out of context and used unfairly. While there rarely has been an issue about this basic principle, the case law supports the doctrine. See, e.g., *Downer & Co. v. Morrison*, 43 Va. (2 Gratt.) 250 (1845); *Stonestreet v. Doyle*, 75 Va. 356 (1881) (holding that the entire text of a correspondence must be admitted). This provision is also consistent with Virginia Supreme Court Rule 4:7(a)(5), which provides that “[i]f only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.”

Subdivision (b). This subdivision embodies the substance of Code § 8.01-417.1, which would be repealed upon the General Assembly's approval of Rules of Evidence containing this provision. This Code section addresses civil cases only and does not supplant the more general principles set forth in subdivision (a).

Rule 2:201 JUDICIAL NOTICE OF ADJUDICATIVE FACTS

Source Note

Subdivision (a). This subdivision permits notice of facts beyond reasonable controversy, and embodies existing law and practice in Virginia. *Griswold v. Commonwealth*, 19 Va. App. 477, 484, 453 S.E.2d 287, 290 (1995), rev'd on other grounds, 252 Va. 113, 472 S.E.2d 789 (1996) (“The trial court may take judicial notice of facts which are either (a) common knowledge or (b) easily ascertainable by reference to reliable sources. These are two separate and distinct grounds for judicial notice.”). The key to a fair trial is the opportunity to use appropriate tools (rebuttal evidence, cross-examination, and argument) to meet adverse material. These considerations call for dispensing with traditional methods of proof only in clear cases. Courts may take judicial notice of matters which are “common knowledge” or part of the “general experience of society.” *Keese v. Commonwealth*, 216 Va. 174, 175, 217 S.E.2d 808, 810 (1975); *Taylor v. Commonwealth*, 28 Va. App. 1, 502 S.E.2d 113 (1998). See, e.g., *Thacker v. Commonwealth*, 131 Va. 707, 108 S.E. 559 (1921) (whiskey is intoxicating). The courts may also take judicial notice of “easily ascertainable facts.” See, e.g., *Ryan v. Commonwealth*, 219 Va. 439, 446, 247 S.E.2d 698, 703 (1978) (newspaper time charts establish sunrise); *Johnson v. Commonwealth*, 141 Va. 452, 126 S.E. 5 (1925) (location in question appears on maps in common use). This provision does not change the Virginia rule that a trial court may not take judicial notice of the authenticity of its records, judgments, and orders in other and different cases or proceedings, even though such cases or proceedings may be between the same parties. *Young v. Commonwealth*, 194 Va. 780, 75 S.E.2d 479 (1953); *Fleming v. Anderson*, 187 Va. 788, 794, 48 S.E.2d 269, 272 (1948). See also *Taylor*, 28 Va. App. 1, 502 S.E.2d 113. Regarding the use of encyclopedias and similar reference works by the courts, see *Harrison-Wyatt v. Ratliff*, 267 Va. 549, 593 S.E.2d 234 (2004.)

Subdivision (b). In accord with the general view, judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal. The Virginia Supreme Court has, on its own motion, taken judicial notice of facts. See *Lakeside Inn Corp. v. Commonwealth*, 134 Va. 696, 114 S.E. 769 (1922) (that January 8, 1922 fell on a Sunday). Note, however, that the court has declined to allow notice at the appellate level to supply elements which should have been proven in the trial court. See, e.g., *Rufty v. Commonwealth*, 221 Va. 836, 275 S.E.2d 584 (1981). This Evidence Rule does not purport to address that issue.

Subdivision (c). Basic fairness demands that counsel have an opportunity to be heard on the propriety of taking judicial notice. *State Farm Mut. Auto. Ins. Co. v. Powell*, 227 Va. 492, 318 S.E.2d 393 (1984) (error to take notice where party “had no prior opportunity to be heard either to dispute the 'facts' or to object to the court's action”). Often, a request for the taking of judicial notice will afford the adversary an opportunity to comment on whether a factual matter is truly incontestable. In the absence of advance notice, a request to be heard made promptly after the fact should be considered timely.

This provision takes no position on the effect of judicial notice in civil or criminal cases, or on the issue of appropriate instructions to the jury with respect to facts

noticed. In *Williams v. Commonwealth*, 190 Va. 280, 56 S.E.2d 537 (1949), the court observed in a criminal case that, after judicial notice has been taken, “the opponent is not prevented from disputing the matter, if he believes it disputable.” This doctrine allows a criminal defendant to contest a judicially noticed fact, which avoids any constitutional issues about the taking of notice against a criminal defendant.

Rule 2:202 JUDICIAL NOTICE OF LAW

Source Note

Virginia Code §§ 8.01-386 and 19.2-265.2 are embodied in this Rule, and would be repealed with approval of the General Assembly of these Rules setting forth the same principles. Since 1977, this doctrine has included notice of local ordinances.

Rule 2:203 JUDICIAL NOTICE OF OFFICIAL PUBLICATIONS

Source Note

Virginia Code § 8.01-388 is the source of this Rule, and would be repealed upon approval by the General Assembly of this provision in the Rules. .

**Rule 2:301 PRESUMPTIONS IN GENERAL IN CIVIL
ACTIONS AND PROCEEDINGS**

Source Note

This general approach reflects existing Virginia law. See Martin v. Phillips, 235 Va. 523, 526, 369 S.E.2d 397, 399 (1988); Campbell v. Commonwealth, 162 Va. 818, 174 S.E. 856 (1934). However, there are a wide variety of subject-specific presumptions in Virginia which have different meanings and impose different burdens on the parties. Hence, the general principle stated in this Rule applies unless there is a more specific doctrine governing the particular cause of action at bar. Some presumptions arise by statute, others from the common law. Central Virginia Obstetrics & Gynecology Assocs., P.C. v. Whitfield, 42 Va. App. 264, 590 S.E.2d 631 (2004). This Rule does not address the law of permissible inferences or conclusive presumptions.

**Rule 2:302 APPLICABILITY OF FEDERAL LAW IN CIVIL
ACTIONS AND PROCEEDINGS**

Source Note

In those cases where a Virginia court tries an action arising under federal law, federal substantive law controls, and any applicable federal presumptions would be applied. See generally Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952); Central Vermont R.R. v. White, 238 U.S. 507 (1915).

Rule 2:401 DEFINITION OF “RELEVANT EVIDENCE”

Source Note

This section defines relevance in accord with traditional and current Virginia case law. See Gamache v. Allen, 268 Va. 222, 601 S.E.2d 598 (2004); McNeir v. Greer-Hale Chinchilla Ranch, 194 Va. 623, 628, 74 S.E.2d 165, 169 (1953). The court used similar language in Hardy v. Commonwealth, 110 Va. 910, 922, 67 S.E. 522, 527 (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, 419 S.E.2d 627, 630 (1992) (citing cases). See Marsh v. Commonwealth, 32 Va. App. 669, 530 S.E.2d 425 (2000) (relevance of voice exemplars); Barkley v. Wallace, 267 Va. 369, 593 S.E.2d 190 (2004)(medical bills admitted on non-damage issues). See Thomas v. Commonwealth, 44 Va. App. 741, 753-54, 607 S.E.2d 738, 743-44, adopted en banc, 45 Va. App. 811, 613 S.E.2d 870 (2005) (“[E]very fact, however remote or insignificant, that tends to establish the probability or improbability of a fact in issue is relevant. Put another way, evidence has relevance if it tends to cast any light on any material point. It is its tendency to prove or disprove — not its sufficiency, standing alone, to satisfy the ultimate burden of proof — that makes a fact relevant This standard entrusts juries with the task of weighing evidence of all probative gradations and gives them the freedom to accept or reject what they will. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill.”) (citations and internal quotation marks omitted).

The language “any fact in issue” reflects the fact 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, 164 S.E. 379, 383 (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.”

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

Source Note

Subdivision (a). The Supreme Court of Virginia 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, 79 S.E.2d 652, 657 (1954). *See also* Williams v. Garraghty, 249 Va. 224, 455 S.E.2d 209 (1995); Peacock Buick, Inc. v. Durkin, 221 Va. 1133, 277 S.E.2d 225 (1981) (“Evidence having rational probative value which adds force and effect to other evidence will be admitted unless some other rule requires 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 Rule 403. *See also* Allstate Ins. Co. v. White, 257 Va. 73, 76,

510 S.E.2d 461, 463 (1999). See generally *Velocity Express Mid-Atlantic v. Hugen*, 266 Va. 188, 585 S.E.2d 557 (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, 157 S.E.2d 204, 208 (1967).

This Rule recognizes the binding force of state and federal constitutional law. In addition, there are statutes that make potentially relevant evidence inadmissible (e.g., 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).

The general principle of Rule 2:402 implements myriad specific statutes barring or requiring admission of proof, and does not disturb the case law on several recurring topics:

Accident reports. By statute, accident reports are inadmissible even if relevant. Code § 46.2-379. See generally *Acuar v. Letourneau*, 260 Va. 180, 531 S.E.2d 316 (2000).

Alcohol sensing devices. On the admission of the results of certain alcohol tests, see *Hall v. Commonwealth*, 32 Va. App. 616, 529 S.E.2d 829 (2000). See also Code §§ 18.2-268.2, -268.9; *Rasmussen v. Commonwealth*, 31 Va. App. 233, 522 S.E.2d 401 (1999).

Dog Alerts and Tracking Behavior. Evidence concerning the behavior of trained canines is admissible 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, 670 S.E.2d 727 (2009)(drug detection dog alerts); *Epperly v. Commonwealth*, 224 Va. 214, 233, 294 S.E.2d 882, 893 (1982)(dog tracking evidence).

Flight by criminal defendant. See *Thomas v. Commonwealth*, 279 Va. 131, 688 S.E.2d 220 (2010) (circumstances where flight raises inference of guilt); *Turman v. Commonwealth*, 276 Va. 558, 667 S.E.2d 767 (2008)(requirement that defendant flee to avoid detection, apprehension, arrest or criminal prosecution); *Lovitt v. Commonwealth*, 260 Va. 497, 537 S.E.2d 866 (2000); *Clagett v. Commonwealth*, 252 Va. 79, 85, 472 S.E.2d 263, 266-67 (1996); *Boykins v. Commonwealth*, 210 Va. 309, 170 S.E.2d 771 (1969). See also *Ricks v. Commonwealth*, 39 Va. App. 330, 573 S.E.2d 266 (2002) (surveying cases on conduct showing "consciousness of guilt"); *Leonard v. Commonwealth*, 39 Va. App. 134, 571 S.E.2d 306 (2002) (flight by defendant facing several charges).

Subdivision (b). Polygraph tests are generally viewed as carrying the misleading aura of reliability while being in fact wholly unreliable. This Rule makes no change in that doctrine. See *Robinson v. Commonwealth*, 231 Va. 142, 341 S.E.2d 159 (1986); *White v. Commonwealth*, 41 Va. App. 191, 583 S.E.2d 771 (2003) (probation revocation proceeding). See *Turner v. Commonwealth*, 278 Va. 739, 685 S.E.2d 665

(2009)(approving White and requiring exclusion of the opinions of the polygraph operator or others purporting to offer expert opinion interpreting the test results, but noting that "[a]ny voluntary statements or admissions made by a person being tested remain admissible subject to the ordinary rules of evidence.")

Rule 2:403 EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, MISLEADING THE JURY, OR NEEDLESS PRESENTATION OF CUMULATIVE EVIDENCE

Source Note

This Rule embodies existing Virginia law and practice.

Unfair Prejudice. This Rule recognizes the power of the court to exclude otherwise admissible evidence as unduly prejudicial. See, e.g., *Gamache v. Allen*, 268 Va. 222, 601 S.E.2d 598 (2004)(articulating the balance: the dangers of offered proof must "substantially outweigh" its probative value to warrant exclusion under this rule); *Dandridge v. Marshall*, 267 Va. 591, 596, 594 S.E.2d 578, 581 (2004); *Walker v. Commonwealth*, 258 Va. 54, 68, 515 S.E.2d 565, 573 (1999); see also *General Motors Corp. v. Lupica*, 237 Va. 516, 522, 379 S.E.2d 311, 315 (1989) (citing cases). Virginia courts have long been careful to assess the prejudicial impact of proffered evidence, and this review has been endorsed by the Supreme Court of Virginia. *Seilheimer v. Melville*, 224 Va. 323, 328, 295 S.E.2d 896, 898 (1982). See *Abunaaj v. Commonwealth*, 28 Va. App. 47, 502 S.E.2d 135 (1998) (admission of evidence of HIV infection); *Jackson v. Commonwealth*, 267 Va. 107, 590 S.E.2d 537 (2004) (direct, eye-witness testimony).

Virginia law generally favors admission of all relevant evidence, as set forth in the Source Notes for Rules 2:401 and 2:402. Thus, the present Rule calls for the exclusion of relevant evidence only when its probative value is substantially outweighed by unfair prejudice. *Gamache*, supra. *Accord Norfolk and Portsmouth Railroad v. Wilson*, 276 Va. 739, 667 S.E.2d 735 (2008); *Brown v. Commonwealth*, 3 Va. App. 182, 187, 348 S.E.2d 849, 852 (1986) (exclusion of otherwise relevant evidence where the prejudice is shown to "substantially outweigh" the probative value of the evidence).

The Virginia Supreme Court has recognized that probative evidence obviously prejudices the opponent in the sense that it makes it more likely the opponent will lose. *Stockton v. Commonwealth*, 227 Va. 124, 143, 314 S.E.2d 371, 383 (1989). Prejudice in this sense does not justify exclusion of the evidence. The prejudice that the cases are concerned with is the improper use of or reaction to evidence by suggesting an improper basis for decision such as racial antipathy. See, e.g., *Shelby Ins. Co. v. Kozak*, 255 Va. 411, 497 S.E.2d 864 (1998) (reference to alcohol history unduly prejudicial where it played no role in the current case). Similar discretion exists to review admission of photographs, which may be gruesome or shocking. *Walton v. Commonwealth*, 256 Va. 85, 501 S.E.2d 134 (1998). See *Dandridge v. Marshall*, 267 Va. 591, 594 S.E.2d 578 (2004) (proof that a plaintiff spent money on an "assault weapon" instead of additional medical care).

Confusion of the issues and misleading the jury. In *Farley v. Commonwealth*, 20 Va. App. 495, 498, 458 S.E.2d 310, 312 (1995), the court stated: "Among the policy

considerations that weigh against admitting probative evidence are: (1) its prejudice unfairly outweighs its probative value; (2) its admission is unnecessarily time consuming; and (3) it is confusing and will likely mislead the jury.” See *Cherry v. D.S. Nash Constr. Co.*, 252 Va. 241, 244, 475 S.E.2d 794, 796 (1996); *Spurlin v. Richardson*, 203 Va. 984, 990, 128 S.E.2d 273, 278 (1962) (misleading the jury); *Davis v. Commonwealth*, 34 Va. App. 257, 540 S.E.2d 513 (2001) (drug courier profiles).

Being unnecessarily time consuming and cumulative evidence. Virginia judges have long had the authority to limit prolonged examination of a witness in order to expedite proceedings. *Locke v. Commonwealth*, 149 Va. 447, 141 S.E. 118 (1928). Useless repetition of cumulative proof need not be condoned. *Parsons v. Commonwealth*, 154 Va. 832, 846, 152 S.E. 547, 552 (1930). Similar considerations are reflected in the trial judge's power to limit re-direct examination to avoid repetition of testimony. See *Hardyman v. Commonwealth*, 153 Va. 954, 151 S.E. 286 (1930); *Wilson v. Wooldridge*, 118 Va. 209, 86 S.E. 872 (1915). Control over recall of witnesses reflects similar policies vesting discretion in the trial judge. *Tate v. Bank of the State of N. Y.*, 96 Va. 765, 32 S.E. 476 (1899); *Howel v. Commonwealth*, 46 Va. [5 Gratt.] 664 (1848).

Photographs. The Supreme Court has repeatedly held that the admission of arguably inflammatory photographic evidence rests within the sound discretion of the trial court. See *Burns v. Commonwealth*, 261 Va. 307, 541 S.E.2d 872 (2001); *Hedrick v. Commonwealth*, 257 Va. 328, 338, 513 S.E.2d 634, 639 (1999); *Goins v. Commonwealth*, 251 Va. 442, 459, 470 S.E.2d 114, 126 (1996). See also *Jackson v. Commonwealth*, 267 Va. 178, 590 S.E.2d 520 (2004)(discussion of “in-life” photographs of murder victims).

Prior crimes. Admissibility of prior crimes evidence, which also turns on a weighing of prejudice, is addressed in Rule 2:404.

Rule 2:404 CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

Source Note

This Rule embodies existing Virginia law and practice.

Subsection (a). The general rule excluding character proof is Virginia law. *National Union Fire Ins. Co. v. Burkholder*, 116 Va. 942, 83 S.E. 404 (1914); *Commonwealth ex rel. Davis v. Malbon*, 195 Va. 368, 78 S.E.2d 683 (1953); *S. H. Kress & Co. v. Roberts*, 143 Va. 71, 129 S.E. 244 (1925) (civil proceeding); *Williams v. Commonwealth*, 203 Va. 837, 127 S.E.2d 423 (1962) (criminal case). Subdivisions (1) and (2) generally apply to criminal cases while subdivision (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, 591 S.E.2d 694 (2004)(admissibility on similar grounds in certain civil cases).

(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, 297 S.E.2d 645 (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, 55 S.E.2d 24, 29 (1949); *Roach v. Commonwealth*, 157 Va. 954, 961, 162 S.E. 50, 52 (1932); see *Gravely v. Commonwealth*, 13 Va. App. 560, 414 S.E.2d 190 (1992). 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, 83 S.E. 404, 405-06 (1914). See *Jackson v. Commonwealth*, 266 Va. 423, 587 S.E.2d 532 (2003).

(2) Introduction of evidence of a pertinent character trait of the victim where the defendant argues self-defense is permitted by Virginia law. *Barnes v. Commonwealth*, 214 Va. 24, 197 S.E.2d 189 (1973); *Canipe v. Commonwealth*, 25 Va. App. 629, 491 S.E.2d 747 (1997). See *Randolph v. Commonwealth*, 190 Va. 256, 56 S.E.2d 226 (1949). 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, 49 S.E.2d 608, 610-11 (1948). Evidence pertaining to the victim of a criminal sexual assault is controlled by the rape shield statutes and implemented in Rule 2:412. See also Code 18.2-68 (proof of reputation of complaining witness in prosecution for seduction); *Epperly v. Commonwealth*, 224 Va. 214, 294 S.E.2d 882 (1982) (prosecution may address character of the victim to establish death of victim). On the character of the victim, see *Luck v. Commonwealth*, 30 Va. App. 36, 515 S.E.2d 325 (1999).

(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, also embodies existing Virginia law. *Land v. Commonwealth*, 211 Va. 223, 226, 176 S.E.2d 586, 588-89 (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, 372 S.E.2d 377, 380 (1988); *Kirkpatrick v. Commonwealth*, 211 Va. 269, 272, 176 S.E.2d 802, 805 (1970). See *Burley v. Commonwealth*, 29 Va. App. 140, 510 S.E.2d 265 (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, 495 S.E.2d 489 (1998). See *McGowan v. Commonwealth*, 274 Va. 689, 652 S.E.2d 103 (2008). Compare *Quinones v. Commonwealth*, 35 Va. App. 634, 547 S.E.2d 524 (2001) (possession of pornography). See *Boggs v. Commonwealth*, 199 Va. 478, 486, 100 S.E.2d 766, 772 (1957); *Hall v. Commonwealth*, 32 Va. App. 616, 529 S.E.2d 829 (2000). See also *Commonwealth v. Minor*, 267 Va. 166, 591 S.E.2d 61 (2004) (prior rapes of other victims irrelevant to prove lack of consent in rape charged).

There are several exceptions to the general rule excluding this type of evidence. 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, 495 S.E.2d at 491. *Kirkpatrick*, 211 Va. at 272, 176 S.E.2d at 805. See *McGowan v. Commonwealth*, 274 Va. 689, 652 S.E.2d 103 (2008); *Pryor v. Commonwealth*, 276 Va. 312, 661 S.E.2d 820 (2008) (incidents after the crime unduly prejudicial as bad acts offered to show identification of the perpetrator). See also *Mughrabi v.*

Commonwealth, 38 Va. App. 538, 567 S.E.2d 542 (2002) (showing state of mind and intent to defraud); *Thomas v. Commonwealth*, 44 Va. App. 741, 607 S.E.2d 738, adopted en banc, 45 Va. App. 811, 613 S.E.2d 870 (2005)(crime scene facts and motive). 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, 667 S.E.2d 751 (2008); *Rodriguez v. Commonwealth*, 249 Va. 203, 454 S.E.2d 725 (1995); *Woodfin v. Commonwealth*, 236 Va. 89, 95, 372 S.E.2d 377, 380-81 (1988). Concerning the admission of other crimes proof to show a “common plan” see *Scates v. Commonwealth*, 262 Va. 757, 553 S.E.2d 756 (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, 421 S.E.2d 821, 827-28 (1992); *McWhorter v. Commonwealth*, 191 Va. 857, 870-71, 63 S.E.2d 20, 26 (1951).

Evidence of other crimes must address an issue in the case. See generally *Guill v. Commonwealth*, 255 Va. 134, 495 S.E.2d 489 (1998); *Cooper v. Commonwealth*, 31 Va. App. 643, 525 S.E.2d 72 (2000) (nexus requirement in general scheme); *Barlow v. Commonwealth*, 26 Va. App. 421, 494 S.E.2d 901 (1998); *Blaylock v. Commonwealth*, 26 Va. App. 579, 496 S.E.2d 97 (1998); *Bullock v. Commonwealth*, 27 Va. App. 255, 498 S.E.2d 433 (1998).

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, 504 S.E.2d 385, 388 (1998). See *Pearce v. Commonwealth*, 53 Va. App. 113, 669 S.E.2d 384 (2008)(proof of substance abuse at the time of the offense as impeachment).

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. . *Pryor v. Commonwealth*, 276 Va. 312, 661 S.E.2d 820 (2008). See *McGowan v. Commonwealth*, 274 Va. 689, 652 S.E.2d 103 (2008); *Scates v. Commonwealth*, 262 Va. 757, 761, 553 S.E.2d 756, 759 (2001); *Minor*, 267 Va. at 172, 591 S.E.2d at 65; *Guill*, 255 Va. at 139, 495 S.E.2d at 491-92; *Lewis v. Commonwealth*, 225 Va. 497, 502, 303 S.E.2d 890 (1983).

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, 613 S.E.2d 454 (2005); *Commonwealth v. Minor*, 267 Va. 166, 171, 591 S.E.2d 61, 65 (2004); *Chichester v. Commonwealth*, 248 Va. 311, 448 S.E.2d 638 (1994) (“Proof of modus operandi is competent evidence where there is a disputed issue of identity”); *Spencer v. Commonwealth*, 240 Va. 78, 90, 393 S.E.2d 609, 616, (1990); *Powell v. Commonwealth*, 267 Va. 107, 141, 590 S.E.2d 537, 558 (2004); *Turner v. Commonwealth*, 259 Va. 645, 651, 529 S.E.2d 787, 790-91 (2000); *Chichester v. Commonwealth*, 248 Va. 311, 326-27, 448 S.E.2d 638, 649 (1994)

Concerning the staleness of prior conduct, see *Turner v. Commonwealth*, 259 Va. 645, 529 S.E.2d 787 (2000).

On related crimes, see *Jackson v. Commonwealth*, 267 Va. 107, 590 S.E.2d 537 (2004); *Robbins v. Commonwealth*, 31 Va. App. 218, 522 S.E.2d 394 (1999). See *Wolfe v. Commonwealth*, 37 Va. App. 136, 554 S.E.2d 695 (2001)(application of the doctrine in sentencing proceedings).

Facts that are so inseparably connected with the events being litigated as to be an inherent part of explaining the events may be considered part of the *res gestae* and the court has discretion to permit proof of such matters. *Compton v. Commonwealth*, 190 Va. 48, 55, 55 S.E.2d 446, 450 (1949); *Jones v. Commonwealth*, 11 Va. App. 75, 83, 396 S.E.2d 844, 848 (1990). See also *Guill v. Commonwealth*, 255 Va. 134, 495 S.E.2d 489 (1998).

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, 514 S.E.2d 810 (1999); *Pavlick v. Commonwealth*, 27 Va. App. 219, 227, 497 S.E.2d 920, 924 (1998). See *Stottlemyer v. Ghramm*, 268 Va. 7, 597 S.E.2d 191 (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, 258 S.E.2d 504 (1979); *Mughrabi v. Commonwealth*, 38 Va. App. 538, 567 S.E.2d 542 (2002).

Rule 2:405 METHODS OF PROVING CHARACTER

Source Note

This Rule embodies existing Virginia law and practice.

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 *Marable v. Commonwealth*, 142 Va. 644, 128 S.E. 463 (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 *Marable*. 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, 587 S.E.2d 532 (2003). On cross-examination, a witness' 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. *Zirkle v. Commonwealth*, 189 Va. 862, 872, 55 S.E.2d 24, 30 (1949); *Kanter v. Commonwealth*, 171 Va. 524, 199 S.E. 477 (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 *Barnes v. Commonwealth*, 214 Va. 24, 25-26, 197 S.E.2d 189, 190 (1973); *Jordan v. Commonwealth*, 216 Va. 768, 222 S.E.2d 573 (1976).

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, 176 S.E.2d 586, 588 (1970), the Supreme Court has uniformly held that even in the guilt phase of a trial where a defendant attempts to present evidence regarding his good character or history, which may mislead the fact finder, the Commonwealth is entitled to rebut the false impression and misleading evidence. See *Zirkle v. Commonwealth*, 189 Va. 862, 55 S.E.2d 24 (1949); *Roy v. Commonwealth*, 191 Va. 722, 726-28, 62 S.E.2d 902, 903-04 (1951); *Locke v. Commonwealth*, 149 Va. 447, 451-52, 141 S.E. 118, 120 (1928); *Harris v. Commonwealth*, 129 Va. 751, 753-54, 105 S.E. 541, 542 (1921); see also *Lockhart v. Commonwealth*, 251 Va. 184, 466 S.E.2d 740 (1996); *Pughsley v. Commonwealth*, 33 Va. App. 640, 536 S.E.2d 447 (2000).

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, 591 S.E.2d 694 (2004).

Rule 2:406 HABIT AND ROUTINE PRACTICE IN CIVIL CASES

Source Note

The Supreme Court's decision in *Ligon v. Southside Cardiology Assocs.*, 258 Va. 306, 519 S.E.2d 361 (1999), addressing habit proof, predates the passage of Code § 8.01-397.1, which is the source for the civil provision here. "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, 563 S.E.2d 665 (2002). See *Stottlemyer v. Ghramm*, 268 Va. 7, 597 S.E.2d 191 (2004)(prior isolated incidents of improper conduct were not admissible as habit).

Case law prior to *Ligon* accepted evidence of a specific habit, but to reject evidence of a general habit. Compare *Washington, A. & Mt. V. Ry. v. Trimyer*, 110 Va. 856, 67 S.E. 531 (1910), with *Jackson v. Chesapeake & Ohio Ry.*, 179 Va. 642, 20 S.E.2d 489 (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 addressed elsewhere in the Rules of Evidence, and such topics are generally not admissible. See generally *Graham v. Commonwealth*, 127 Va. 808, 823, 103 S.E. 565, 570 (1920).

The admission of the habit evidence even though there are eyewitnesses is consistent with *Alexandria & F. R.R. v. Herndon*, 87 Va. 193, 12 S.E. 289 (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 *M. W. Worley Constr. Co. v. Hungerford, Inc.*, 215 Va. 377, 381, 210 S.E.2d 161, 164 (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). *Peacock Buick, Inc. v. Durkin*, 221 Va. 1133, 1138, 277 S.E.2d 225, 228 (1981) (evidence of trade customs admissible to show that defendant's act was willful or wanton).

Criminal Cases. Code § 8.01-397.1(C) specifies that this statute does not apply in criminal cases. Regarding habit proof in criminal cases, see *Hodges v. Commonwealth*, 45 Va. App. 735, 613 S.E.2d 834 (2005) (discussing the Supreme Court's articulation of the law in *Ligon* and its narrow treatment of the earlier criminal case involving habit proof, *Graham v. Commonwealth*, 127 Va. 808, 823, 103 S.E. 565, 570 (1920)). Pending further explanation of the principles governing habit proof in criminal cases, this Rule does not address the use of habit proof in criminal cases.

Rule 2:407 SUBSEQUENT REMEDIAL MEASURES

Source Note

Virginia Code § 8.01-418.1 is the source of this Rule. The proposed Rule, like the statute on which it is based, takes no position on product liability cases. See *Gordon Harper Harley-Davidson Sales, Inc. v. Cutchin*, 232 Va. 320, 325, 350 S.E.2d 609, 612 (1986) (recall notice admissible); *Holcombe v. NationsBanc Fin. Servs. Corp.*, 248 Va. 445, 449, 450 S.E.2d 158, 160-61 (1994) (exceptions to the general rule). Cf. *Hoar v. Great E. Resort Mgmt., Inc.*, 256 Va. 374, 506 S.E.2d 777 (1998).

Rule 2:408 COMPROMISE AND OFFERS TO COMPROMISE

Source Note

This Rule embodies existing Virginia law and practice. The Virginia Supreme Court stated the common law rule to be that “an offer to compromise or settle a disputed claim will not be received as an admission of the party making the offer.” *Hendrickson v. Meredith*, 161 Va. 193, 205, 170 S.E. 602, 606 (1933). This doctrine is intended to encourage efforts to settle disputes. See *Agelasto v. Frank Atkinson Real Estate*, 229 Va. 59, 65, 327 S.E.2d 84, 87 (1985) (rule applies to claim on trial and to third-party claims); see also *Brickell v. Shawn*, 175 Va. 373, 9 S.E.2d 330 (1940). This doctrine makes settlement offers inadmissible to show a strong or weak case, but not for other purposes. The doctrine shields some ancillary statements in connection with settlement, but not express admissions of liability or express admissions of independent facts. See *Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp.*, 249 Va. 426, 457 S.E.2d 28 (1995).

For the principles excluding an offer of compromise to operate, there must be a “claim” which is “disputed as to either validity or amount.” In *Dart Drug Corp. v. Nicholakos*, 221 Va. 989, 277 S.E.2d 155 (1981), the parties sought an interpretation

of a lease. At the time the statements were made, there was not yet any dispute between the parties over the meaning of the lease nor any “claim” requiring settlement. Therefore, the statements were not barred by the rule excluding compromises.

Virginia law allows evidence relating to a compromise to be admitted for purposes other than concession of liability, such as to contradict a witness, *Fielding v. Robertson*, 141 Va. 123, 126 S.E. 231 (1925); *Anchor Co. v. Adams*, 139 Va. 388, 124 S.E. 438 (1924), or to explain undue delay. *Hanover Fire Ins. Co. v. Drake*, 170 Va. 257, 196 S.E. 664 (1938) (ongoing negotiations explained delay in pursuing claim).

Rule 2:409 EVIDENCE OF ABUSE ADMISSIBLE IN CERTAIN CRIMINAL TRIALS

Source Note

Existing Code § 19.2-270.6 supplies the text of this Rule.

Rule 2:410 WITHDRAWN PLEAS, OFFERS TO PLEAD, AND RELATED STATEMENTS

Source Note

Provisions concerning the admission of evidence about withdrawn pleas in criminal cases are contained in a larger and more complete rule of Criminal Procedure, Rule 3A:8, which addresses guilty pleas, withdrawn pleas, and pleas of nolo contendere in subdivision (c)(5). In accord with Code § 8.01-418, the principles set forth in that Rule do not bar the use of a guilty plea or nolo contendere plea that is not withdrawn or of statements made in conjunction with either of these pleas. See *Koutsounadis v. England*, 238 Va. 128, 133, 380 S.E.2d 644, 647 (1989).

Rule 2:411 LIABILITY INSURANCE

Source Note

The Rule follows existing Virginia law. Evidence of insurance is not probative on the issue of the insured party's negligence or culpability. Evidence of insurance may tend to prejudice the jury in favor of the plaintiff because it shows that the defendant will not have to satisfy the judgment personally. In *Willard v. Aetna Cas. & Sur. Co.*, 213 Va. 481, 483, 193 S.E.2d 776, 778 (1973), the Virginia Supreme Court recognized this view as the rule in Virginia: “It is a well-grounded matter of public policy in Virginia that the mention of insurance coverage in liability cases is to be avoided in order to prevent bias or prejudice on the part of the jury, and deliberate injection of insurance may constitute reversible error.” *See also Allstate Ins. Co. v. Wade*, 265 Va. 383, 579 S.E.2d 180 (2003) (disclosure that insurer would pay judgment not permitted).

The general rule of inadmissibility of liability insurance does not apply where the evidence is offered for a specific purpose distinct from proof of culpable conduct. Thus, the existence of insurance may be relevant to show the possibility that a witness

is biased because of his employment with or interest in an insurance company. See *Highway Express Lines, Inc. v. Fleming*, 185 Va. 666, 672, 40 S.E.2d 294, 297-98 (1946) (plaintiff permitted to question defense witness regarding employment even though the result would be to establish that the defendant carried liability insurance, since it went to bias or interest). The Rule lists as examples of specific purposes warranting mention of insurance cases in which evidence of liability insurance is admissible to show “proof of agency, ownership, or control, or bias or prejudice of a witness.”

For a discussion of the operation of the bias exception to the general rule, see *Lombard v. Rohrbaugh*, 262 Va. 484, 551 S.E.2d 349 (2001) (while generally inadmissible, “testimony concerning liability insurance may be elicited for the purpose of showing bias or prejudice of a witness if there is a substantial connection between the witness and the liability carrier”). See also Rule 2:105 (cautionary instructions).

Rule 2:412 ADMISSIBILITY OF COMPLAINING WITNESS' PRIOR SEXUAL CONDUCT; CRIMINAL SEXUAL ASSAULT CASES; RELEVANCE OF PAST BEHAVIOR

Source Note

The proposed Rule tracks existing Code § 18.2-67.7. It is anticipated that this Code section will remain in Title 18.2, and that this Rule of Evidence will be amended from time to time to conform to the text of the statute. The 2007 amendment to subsection (a) adding " or under §§18.2-370, 18.2-370.01, or 18.2-370.1" has been included in this draft of the Rules.

“Prior sexual conduct” for purposes of this shield statute is defined in Code § 18.2-67.10(5) to be “any sexual conduct on the part of the complaining witness which took place before the conclusion of the trial, excluding the conduct involved in the offense alleged under this article.” It has been held that where the evidence offered involves prior allegations, not “sexual conduct” under Code §18.2-67.7, the rape shield statute is not implicated. See *Roadcap v. Commonwealth*, 50 Va. App. 732, 653 S.E.2d 620 (2007). See also *Richardson v. Commonwealth*, 42 Va. App. 236, 590 S.E.2d 618 (2004), citing cases.

This rape-shield law specifically excludes general reputation and opinion testimony to prove the character of the complaining witness. See *Hoke v. Commonwealth*, 237 Va. 303, 309, 377 S.E.2d 595, 599 (1989); *Winfield v. Commonwealth*, 225 Va. 211, 217-19, 301 S.E.2d 15, 19-20 (1983); *League v. Commonwealth*, 9 Va. App. 199, 202-06, 385 S.E.2d 232, 234-37 (1989).

On the scope of evidence on specific sexual conduct, see *Clinebell v. Commonwealth*, 235 Va. 319, 368 S.E.2d 263 (1988); *Brown v. Commonwealth*, 29 Va. App. 199, 510 S.E.2d 751 (1999). On the issue of impeachment use of evidence of the victim's prior conduct, see *Cairns v. Commonwealth*, 40 Va. App. 271, 579 S.E.2d 340 (2003) (diary/journal of victim). Concerning the proof required to show that a complaining witness has previously made false accusations, see *Richardson v. Commonwealth*, 42 Va. App. 236, 590 S.E.2d 618 (2004); *Clifford v. Commonwealth*, 48 Va. App. 499, 633 S.E.2d 178 (2006). See also *Ortiz v. Commonwealth*, 276 Va. 705, 667 S.E.2d 751 (2008)(discussing impeachment evidence and the “nexus”

requirements for proof of a victim's motive to fabricate accusations). As to whether a hearing must be held under the statute, see *Blackmon v. Commonwealth*, 33 Va. App. 728, 536 S.E.2d 918 (2000).

Rule 2:501 PRIVILEGED COMMUNICATIONS

Source Note

As is true in almost every jurisdiction in America, privilege principles in Virginia are partly codified and partly a result of case law doctrines. While this version of Rule 2:501 is not particularly informative, it restates the basic principle and leaves certain topics in the realm of case law or statute.

Subsequent Rules in this Article set forth the elements of privileges currently recognized in Virginia. There are several privilege or quasi-privilege doctrines which at present are neither codified nor fully spelled out in case law. These doctrines are therefore not set forth in these Rules.

(1) Virginia lacks a formal government information privilege. However, some similar protections are found in exclusions to the Virginia Freedom of Information Act, Code § 2.2 3700 et seq., and specific statutory provisions limiting public access to information. See, e.g., Code §§ 2.2 3704), 46.2 377 (accident reports).

(2) Virginia cases recognize the existence of an informant's privilege. *Webb v. Commonwealth*, 137 Va. 833, 836, 120 S.E. 155, 156 (1923); see also *Dellastatious v. Boyce*, 152 Va. 368, 147 S.E. 267 (1929). Case law recognizes the privilege in a general way, without defining its parameters. Hence no definition of elements and exceptions of this privilege can be prepared at this time.

(3) The Virginia Supreme Court recognized a qualified reporter's privilege in *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974). However, that privilege is defined by federal constitutional decisions, First Amendment concerns, Due Process considerations, and fair trial needs. As a result, no specific definition of the scope and application of the privilege is presently possible.

Statutes bearing upon the assertion of privilege, as of 2005, include the following:

Code § 22-3704(B) (FOIA exemptions)

Code § 2.2-4119 (dispute resolution confidentiality)

Code § 3.1-249.68 (trade secrets protected in pesticide inquiries)

Code § 3.1-884.32 (self-incrimination privilege may be claimed in poultry investigations)

Code § 8.01-398 (spousal privilege)

Code § 8.01-399 (physician-patient privilege)

Code § 8.01-400 (clergy privilege with person counseled)

Code § 8.01-400.1 (interpretation for the deaf does not waive privilege)

Code § 8.01-400.2 (privileged communications with clients of licensed counselors and psychologists, and clinical social workers)

Code § 8.01-576.10 (dispute resolution proceedings)

Code § 8.01-581.17 (medical reviews in malpractice)

Code § 8.01-581.22 (mediation)

Code § 8.01-654 (habeas corpus petitions challenging adequacy of counsel waive attorney-client privilege to extent needed to litigate the claim)

Code § 13.1-518(B) (information obtained by the Corporation Commission investigating securities matters to remain confidential)

Code § 13.1-567 (franchise investigation to remain confidential)

Code § 16.1-303 (information developed by juvenile court personnel)

Code § 19.2-67 (illegally intercepted communications do not lose any applicable privilege)

Code §§ 19.2-164, -164.1 (communications through an interpreter, otherwise privileged, remain privileged)

Code § 19.2-169.5 (report of psychiatric examination of criminal defendant protected by attorney-client privilege, unless mental issue is tendered by the defense)

Code § 19.2-271.2 (spousal privilege, and exceptions for specific circumstances)

Code § 19.2-271.3 (clergy privilege in criminal cases)

Code § 20-124.3:1 (mental health records in custody and visitation proceedings)

Code § 32.1-320 (government access to patient records in Medicaid fraud investigations)

Code § 46.2-377 (garage accident reports to law enforcement authorities)

Code § 46.2-379 (accident reports generally inadmissible)

Code § 54.1-2966.1 (disclosure of dangerous conditions to DMV is not a violation of physician-patient privilege)

Code § 54.1-2967 (reporting certain wounds)

Code § 54.1-2968 (reporting identity of handicapped individuals)

Code § 58.1-3 (information obtained by taxation officials to remain secret, generally)

Code § 59.1-9.10 (self-incrimination in certain investigations)

Code § 65.2-607 (physician-patient privilege inapplicable where compensation is claimed)

Code § 65.2-1308 (statewide workers' compensation coordinating committee records and communications are privileged)

Rule 2:502 ATTORNEY-CLIENT PRIVILEGE

Source Note

The attorney-client privilege has not been codified in Virginia. Rather, it is governed by common law. See generally *Parker v. Carter*, 18 Va. (4 Munf.) 273 (1814). The privilege follows the traditional model protecting confidential statements between lawyer and client. *Cook v. Hayden*, 183 Va. 203, 31 S.E.2d 625 (1944); *Sevachko v. Commonwealth*, 35 Va. App. 346, 544 S.E.2d 898 (2001). See *Via v. Commonwealth*, 42 Va. App. 164, 590 S.E.2d 583 (2004) (discussing “indispensability” of the agent of the attorney). See *Walton v. MidAtlantic Spine*

Specialists, P.C., 280 Va. 113, 694 S.E.2d 545 (2010)(reviewing the purpose, importance and scope of the attorney-client privilege, and issues regarding knowing and inadvertent waiver).

There are several statements of the scope of the privilege. See, e.g., Commonwealth v. Edwards, 235 Va. 499, 370 S.E.2d 296 (1988); Robertson v. Commonwealth, 181 Va. 520, 539, 25 S.E.2d 352, 360 (1943); Virginia-Lincoln Furniture Corp. v. Southern Factories & Stores Corp., 162 Va. 767, 174 S.E. 848 (1934). See also Virginia Elec. & Power Co. v. Westmoreland-LG&E Partners, 259 Va. 319, 526 S.E.2d 750 (2000) (corporate context); Jones v. Ford Motor Co., 263 Va. 237, 559 S.E.2d 592 (2002).

The usual exceptions also apply. See, e.g., Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 413 S.E.2d 630 (1992) (fraud on the court vitiates privilege); Seventh Dist. Comm. v. Gunter, 212 Va. 278, 183 S.E.2d 713 (1971); Cogdill v. Commonwealth, 219 Va. 272, 247 S.E.2d 392 (1978) (no privilege when communication is in contemplation of crime); Sevachko v. Commonwealth, 35 Va. App. 346, 544 S.E.2d 898 (2001) (crime or fraud exception); Virginia Rule of Professional Conduct 1.6(c)(2); see also Eason v. Eason, 203 Va. 246, 123 S.E.2d 361 (1962) (deceased testator exception). The burden of proof is upon the person seeking to establish the existence of the privilege. Commonwealth v. Edwards, 235 Va. at 509, 370 S.E.2d at 301. Additionally, § 8.01-654(B)(6) establishes in a habeas case alleging ineffective assistance of counsel, waiver of the privilege to the extent necessary to permit a full and fair consideration of the claim. The privilege may be waived – either expressly or by implication – and is not applicable where the communication is made in circumstances where there is no expectation of confidentiality. See Banks v. Mario Industries of Virginia, 274 Va. 438, 650 S.E.2d 687 (2007)(use of an office computer to draft letter regarding legal issues).

Rule 2:503 CLERGY AND COMMUNICANT PRIVILEGE

Source Note

A clergy-communicant privilege is codified in Code § 8.01-400 (civil cases) and § 19.2-271.3 (criminal cases), from both of which the text of this Rule is taken. See generally Seidman v. Fishburne-Hudgins Educ. Found., Inc., 724 F.2d 413 (4th Cir. 1984). Under Virginia law, the privilege is vested in the clergyman rather than in the communicant.

Rule 2:504 SPOUSAL TESTIMONY AND MARITAL COMMUNICATIONS PRIVILEGES

Source Note

The Rule embodies Virginia Code provisions setting forth both a spousal testimony privilege, Code § 19.2-271.2 (applicable in criminal cases) and the marital communications privilege, Code § 8.01-398 (applicable to civil cases). *If the General Assembly repeals these Code sections these principles will be set forth in the Rules of Evidence. If the General Assembly retains these Code sections, this Rule of Evidence will be amended from time to time to conform to the provisions of the statutes.* These

provisions were significantly re-written in the 2005 session of the General Assembly and decisions interpreting prior versions of the provisions - relating both to the protections and the "exceptions" conferred by these sections - should be read with great caution. See *Carpenter v. Commonwealth*, 51 Va. App. 84, 654 S.E.2d 345 (2007); *Turner v. Commonwealth*, 33 Va. App. 88, 531 S.E.2d 619 (2000); see generally *Creech v. Commonwealth*, 242 Va. 385, 410 S.E.2d 650 (1991); *Church v. Commonwealth*, 230 Va. 208, 335 S.E.2d 823 (1985); *Nowlin v. Commonwealth*, 40 Va. App. 327, 579 S.E.2d 367 (2003). Exceptions to the privileges have also been enacted. See Code § 63.2-1519 (child abuse). As to cases where the offense is against one of the spouses, see *Kirby v. Commonwealth*, 264 Va. 440, 570 S.E.2d 832 (2002). The privilege only applies to testimony. See *Burns v. Commonwealth*, 261 Va. 307, 541 S.E.2d 872 (2001) (letters); *Wolfe v. Commonwealth*, 37 Va. App. 136, 554 S.E.2d 695 (2001). *Compare Cairns v. Commonwealth*, 35 Va. App. 1, 542 S.E.2d 771 (2001) (statement of codefendant wife to authorities at police station was not testimony excluded by the statutes).

Rule 2:505 HEALING ARTS PRACTITIONER AND PATIENT PRIVILEGE

Source Note

The Commonwealth's general physician-patient privilege stems from Code § 8.01-399(A) and only applies in civil cases.

The privilege may be claimed by the patient, unless waived, and under the currently revised statute it must be claimed by any duly licensed practitioner of any branch of the healing arts, including a clinical psychologist licensed pursuant to Code § 54.1-2932. It will be inapplicable when the condition of the patient is in issue in the case. See, e.g., *City of Portsmouth v. Cilumbrello*, 204 Va. 11, 129 S.E.2d 31 (1963); *De Foe v. Duhl*, 286 F.2d 205 (4th Cir. 1961). The statute was amended in material respects in 2005 and older case authority construing this section should be read in light of these changes. Various statutory exceptions apply. The 2009 legislation rephrased the disclosure limitation in the Code provision to state that "no duly licensed practitioner of any branch of the healing arts shall be permitted to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity," negating any contention that the section gives the health care provider a choice as to whether to disclose privileged information. See Code § 65.2-607 (examination under the Virginia Workers' Compensation Act), § 54.1-2966 (reports of aircraft pilot disabilities), § 54.1-2967 (reporting of certain wounds), § 54.1-2968 (reporting identity of handicapped persons under certain circumstances), § 63.2-1509 (child abuse). See generally *King v. Cooley*, 274 Va. 374, 650 S.E.2d 523 (2007); *Holmes v. Levine*, 273 Va. 150, 639 S.E.2d 235 (2007); *Riverside Hospital v. Johnson*, 272 Va. 518, 636 S.E.2d 416 (2006); See also *Pettus v. Gottfried*, 269 Va. 69, 606 S.E.2d 819 (2005); see also Rule 2:4:10, "Physical and Mental Examination of Persons."

Rule 2:506 MENTAL HEALTH PROFESSIONAL AND CLIENT PRIVILEGE

Source Note

Virginia statutes now provide a privilege in the above terms, covering “communications between counselors, social workers and psychologists and clients.” Code § 8.01-400.2. The privilege does not protect “matters relating to child abuse and neglect nor serve to relieve any person from the reporting requirements set forth in § 63.2-1509.” The statute also provides that the privilege will not apply “when the physical or mental condition of the client is at issue” or “when a court, in the exercise of sound discretion, deems such disclosure necessary to the proper administration of justice.”

Rule 2:507 PRIVILEGED COMMUNICATIONS INVOLVING INTERPRETERS

Source Note

Virginia has statutorily enacted a limited interpreter's privilege. Virginia Code § 8.01-400.1 provides that otherwise privileged material does not lose its privileged nature when a deaf person uses an interpreter. *See also* Code § 19.2-164.1. Virginia Code § 19.2-164 provides similar protection for communications made to interpreters for non-English-speaking persons.

Rule 2:601 GENERAL RULE OF COMPETENCY

Source Note

The Rule makes no change in existing Virginia law.

Subdivision (a). Virginia statutes and case law have made parties, persons interested in the litigation, convicts, spouses, and persons of whatever religious faith (or lack of it) competent witnesses. See Code §§ 8.01-396, 19.2-269, 8.01-398, 57-1; see also Code § 8.01-397. *Compare* Lombard v. Rohrbaugh, 262 Va. 484, 551 S.E.2d 349 (2001) (bias).

Subdivision (b). Virginia courts retain the power to declare any person, including a proposed minor witness, incompetent if that particular person lacks the capacity to testify. The provision is not inconsistent with the 1993 enactments of the General Assembly which reject the automatic disqualification of child witnesses. *See also* Greenway v. Commonwealth, 254 Va. 147, 487 S.E.2d 224 (1997) (citing cases); Kiracofe v. Commonwealth, 198 Va. 833, 840, 97 S.E.2d 14, 18, 19 (1957).

Competence requires the capacity to observe events, to recollect and communicate them, ability to understand questions, and to frame and make intelligent answers with a consciousness of the duty to speak the truth. Cross v. Commonwealth, 195 Va. 62, 77 S.E.2d 447 (1953).

The court may receive expert opinion regarding a witness' competence, but such opinion is not determinative. The issue of competence rests in the discretion of the trial court. Turnbull v. Commonwealth, 216 Va. 328, 218 S.E.2d 541 (1975); Helge v. Carr, 212 Va. 485, 184 S.E.2d 794 (1971).

See also Rule 2:603 requiring that a witness must be able to understand and appreciate the sanctity of the oath before that person may be permitted to testify. *See also* Code § 8.01-396.1.

Rule 2:602 LACK OF PERSONAL KNOWLEDGE

Source Note

This section states the requirement of personal knowledge on the part of lay witnesses normally applied in Virginia. See, e.g., *Virginia Ry. & Power Co. v. Burr*, 145 Va. 338, 133 S.E. 776 (1926); *Richards v. Commonwealth*, 107 Va. 881, 59 S.E. 1104 (1908) (requiring that a lay witness have personal knowledge of the underlying facts before the witness may state an opinion).

Rule 2:603 OATH OR AFFIRMATION

Source Note

The Rule makes no change in existing law.

Virginia has followed the common law practice of requiring that a witness swear to the truthfulness of his proposed testimony before taking the stand. See *Perry v. Commonwealth*, 44 Va. (3 Gratt.) 645 (1846). Understanding and appreciation of the sanctity of the oath is a prerequisite to a finding of competency. See *Taylor v. Beck*, 24 Va. (3 Rand.) 316 (1825); *Mullins v. Commonwealth*, 174 Va. 472, 5 S.E.2d 499 (1939). In addition, Virginia has by statute provided for the use of an affirmation in place of an oath in a proper case. See Code §§ 1-228, 49-9, 49-10.

Nothing in Rule 2:603 detracts from the authority of the court to determine whether a child is capable of understanding the obligation to testify truthfully. The court retains its ability to obtain a declaration from a child witness in an appropriate manner, which may differ from the manner in which an oath or affirmation is administered to an adult.

Rule 2:604 INTERPRETERS

Source Note

The Rule makes no change in existing law.

The Virginia Code provides that an interpreter shall be sworn. See Code § 8.01-406 (interpreter to be sworn to translate truly); see also *Stubblefield v. Commonwealth*, 10 Va. App. 343, 350, 392 S.E.2d 197, 200 (1990) (competency is determined by the court). In civil cases, see Code § 8.01-400.1. In criminal cases, see also Code §§ 19.2-164, -164.1.

Rule 2:605 COMPETENCY OF COURT PERSONNEL AS WITNESSES

Source Note

The Rule follows the provisions on this topic found in Code § 19.2-271. This provision is extensively construed by the Court of Appeals in *Epps v. Commonwealth*, 47 Va. App. 687, 626 S.E.2d 912 (2006)(en banc).

Rule 2:606 COMPETENCY OF JUROR AS WITNESS

Source Note

The Rule makes no change in existing law.

Virginia law holds that the testimony and affidavits of jurors are generally inadmissible to impeach their verdict, especially where the ground of impeachment is their own misconduct. *Phillips v. Campbell*, 200 Va. 136, 141, 104 S.E.2d 765, 768 (1958). See *Fuller v. Commonwealth*, 190 Va. 19, 55 S.E.2d 430 (1949) (juror misunderstanding of instructions did not affect verdict); see also *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 206, 361 S.E.2d 436, 446 (1987); *Caterpillar Tractor Co. v. Hulvey*, 233 Va. 77, 82, 353 S.E.2d 747, 750 (1987). Hearsay affidavits of jurors are not admissible in a motion for a new trial, but may require the trial court to investigate by summoning one or more jurors to testify under oath in open court. *Commercial Union Ins. Co. v. Moorefield*, 231 Va. 260, 265, 343 S.E.2d 329, 333 (1986). See *Litz v. Harman*, 151 Va. 363, 144 S.E. 477 (1928) (quoting affidavits); *Jenkins v. Commonwealth*, 244 Va. 445, 423 S.E.2d 360 (1992) (alleged speculation about parole by jurors during deliberations did not warrant further investigation by trial court).

Rule 2:607 IMPEACHMENT OF WITNESSES

Source Note

The Rule makes no change in existing law.

Subdivision (a). This subdivision states the principle established by a wealth of Virginia authority that when testimony or admissible statements from a witness are offered at the hearing, the credibility of the witness or declarant is placed at issue in the case. See *Smith v. Commonwealth*, 212 Va. 675, 676, 187 S.E.2d 191, 192 (1972). Several specific methods of potential impeachment are set forth in detail in other sections of the Guide, and are cross-referenced here. Contradiction can be a form of impeachment and a witness may be impeached with contradictory testimony of others, including admissible deposition testimony. See *Jones v. Ford Motor Co.*, 263 Va. 237, 559 S.E.2d 592 (2002); *McCarter v. Commonwealth*, 38 Va. App. 502, 566 S.E.2d 868 (2002). In addition, any other proof which has a logical tendency to draw into question the accuracy of the witness's perception, recordation, recollection, narration, veracity or sincerity is admissible to impeach. *Pearce v. Commonwealth*, 53 Va. App. 113, 669 S.E.2d 384 (2008). Intoxication of the witness at the time of the events has been recognized as impeaching in certain cases. See *Burnette v. Commonwealth*, 172 Va. 578, 581, 1 S.E.2d 268, 269 (1939); *Allstate Ins. Co. v. White*, 257 Va. 73, 76, 510 S.E.2d 461, 463 (1999). The Supreme Court has held that a party calling an adverse witness may not impeach that witness by prior conviction or evidence of bad general character for truth telling. See *Smith v. Lohr*, 204 Va. 331, 130 S.E.2d 433 (1963). No case law has been located addressing the permissible impeachment of an adverse witness under subdivision (a)(3) of this Rule.

Subdivision (b). The statute being restated here provides the basic principle that adverse party witnesses may be examined as upon cross-examination. *Whitehead v. Commonwealth*, 31 Va. App. 311, 522 S.E.2d 904 (2000). Note that employees are

not necessarily adverse. *Hegwood v. Virginia Natural Gas, Inc.*, 256 Va. 362, 505 S.E.2d 372 (1998).

Subdivision (c). A party was not allowed to impeach its own witness at common law. *Green v. Commonwealth*, 122 Va. 862, 94 S.E. 940 (1918); see *Smith v. Lohr*, 204 Va. 331, 130 S.E.2d 433 (1963). Virginia Code § 8.01-403 provides statutory exceptions to this doctrine. The statute applies to civil and criminal cases. See *Teleguz v. Commonwealth*, 273 Va. 458, 643 S.E.2d 708 (2007) (brother of defendant as person with adverse interest to the prosecution); *Smallwood v. Commonwealth*, 36 Va. App. 483, 553 S.E.2d 140 (2001) (discussing the distinction between denial of information and injurious testimony); see also *Brown v. Commonwealth*, 6 Va. App. 82, 366 S.E.2d 716 (1988). Note that a party may contradict its own witnesses with other proof. *Washington & Old Dominion Ry. v. Jackson*, 117 Va. 636, 85 S.E. 496 (1915).

In order for a witness to be considered adverse under Va. Code § 8.01-403, his testimony must be injurious or damaging to the case of the party who called the witness; it is not sufficient if his testimony merely fails to meet the expectations of the party. *Virginia Elec. & Power Co. v. Hall*, 184 Va. 102, 105-06, 34 S.E.2d 382, 383 (1945); *Maxey v. Commonwealth*, 26 Va. App. 514, 495 S.E.2d 536 (1998); *Brown v. Commonwealth*, 6 Va. App. 82, 85, 366 S.E.2d 716, 718 (1988); see *Smallwood*, 36 Va. App. 483, 553 S.E.2d 140.

Subdivision (d). This Code provision carries forward the right of a party to impeach witnesses called by other parties and does not impair the right of a party to impeach an adversary party with a prior statement. See *Mastin v. Theirjung*, 238 Va. 434, 384 S.E.2d 86 (1989); see also *McCarter v. Commonwealth*, 38 Va. App. 502, 566 S.E.2d 868 (2002). See generally *infra* §§ 612, 613, and 614.

Rule 2:608 IMPEACHMENT BY EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS

Source Note

No change is made in existing law under any of the subdivisions of this Rule.

Subdivision (a). Virginia follows the common law approach of using reputation evidence on matters of character impeachment of witnesses. See *Bradley v. Commonwealth*, 196 Va. 1126, 86 S.E.2d 828 (1955); *Clark v. Commonwealth*, 202 Va. 787, 120 S.E.2d 270 (1961); *Homestead Fire Ins. Co. v. Ison*, 110 Va. 18, 65 S.E. 463 (1909); *Lendvay v. Sobrito*, 211 Va. 548, 178 S.E.2d 532 (1971). Only the character trait for truth-telling is pertinent. See *Land v. Commonwealth*, 211 Va. 223, 176 S.E.2d 586 (1970); *Fenner v. Commonwealth*, 152 Va. 1014, 148 S.E. 821 (1929). A civil party's credibility may not be supported unless it has been attacked. *Mottesheard v. Castern*, 256 Va. 11, 500 S.E.2d 512 (1998). A party calling an adverse witness may not impeach that witness by prior conviction or evidence of bad general character for truth-telling. See *Smith v. Lohr*, 204 Va. 331, 130 S.E.2d 433 (1963)(citing numerous cases).

The trial judge must determine whether a witness has sufficient familiarity with the reputation that the testimony has probative value. Traditionally, reputation evidence relates to the community in which the target witness lives or works, but these

categories are generously construed. *Clark v. Commonwealth*, 202 Va. 787, 120 S.E.2d 270 (1961); *Bradley v. Commonwealth*, 196 Va. 1126, 86 S.E.2d 828 (1955). Remoteness of the witness' knowledge of the reputation goes to the weight of the reputation testimony and not its admissibility. *Brown v. Commonwealth*, 147 Va. 660, 662, 137 S.E. 492, 492 (1927). See *Blaylock v. Commonwealth*, 26 Va. App. 579, 496 S.E.2d 97 (1998).

Subdivision (b)(1) sets forth the basic Virginia doctrine barring inquiry on cross-examination about specific instances of the witness' own conduct reflecting on truth-telling propensities (e.g., prior acts of lying or fraud). See *Gamache v. Allen*, 268 Va. 222, 601 S.E.2d 598 (2004); *Stottlemeyer v. Ghramm*, 268 Va. 7, 597 S.E.2d 191 (2004) (prior incidents of improper conduct). See also *McGowan v. Commonwealth*, 274 Va. 689, 652 S.E.2d 103 (2008)(subsequent drug transaction).

Subdivision (b)(2). In accord with established practice, to prevent a digression into a minitrial on the background of a mere witness, extrinsic evidence of prior acts bearing on truth-telling is foreclosed unless expressly authorized by statute or rule. One example of express authorization is found in Rule 2:609 (impeachment by prior conviction). See also Rule 2:412 (sexual assault cases).

Subdivision (c) is consistent with Virginia law, which has permitted a party cross-examining a character witness to ask whether the witness has "heard" of specific instances of conduct by the person about whose character the witness on the stand has testified. See *Kanter v. Commonwealth*, 171 Va. 524, 199 S.E. 477 (1938).

Subdivision (d) sets forth the rule enunciated by the Court of Appeals in *Lambert v. Commonwealth*, 9 Va. App. 67, 383 S.E.2d 752 (1989). *Lambert* did not change the rule that the court make the threshold decision that there is a reasonable probability that the witness had previously committed perjury. *Clinebell v. Commonwealth*, 235 Va. 319, 323, 368 S.E.2d 263, 265 (1988).

Subdivision (e) reflects the holding by the Supreme Court in *Clinebell v. Commonwealth*, 235 Va. 319, 323, 368 S.E.2d 263, 265 (1988). See also Rule 2:412; Code §§ 18.2-67.7, 19.2-270.6. A victim's prior false accusations of sexual abuse ordinarily may be admissible in defense to a later charge of sexual abuse: a defendant in a sex-crime case may "cross-examine his accuser about prior false accusations the accuser has made, but only where the court could make a threshold determination that there was a reasonable probability that the prior accusations were false." *Roadcap v. Commonwealth*, 50 Va. App. 732, 653 S.E.2d 620 (2007); *Clifford v. Commonwealth*, 274 Va. 23, 24, 645 S.E.2d 295, 296-97 (2007); *Clinebell*, 235 Va. at 325, 368 S.E.2d at 266. Absent a "proper foundation" showing a reasonable probability of falsity, the impeachment evidence may not be admitted. *Via v. Commonwealth*, 42 Va. App. 164, 187-88, 590 S.E.2d 583, 594 (2004). The focus is upon the falsity of the accusations to ensure that the trial does not stray from the central issue of the guilt or innocence of the defendant into a full-scale investigation of charges made by the victim against other persons. *Roadcap*, 50 Va. App. 732, 653 S.E.2d 620. A mere assertion of falsity does not lay a satisfactory foundation because it is "inherently self-serving and does not, by itself, establish falsity." *Richardson v. Commonwealth*, 42 Va. App. 236, 241, 590 S.E.2d 618, 621 (2004). Unless the prior claims of sexual abuse are "patently untrue" on their face, *Clinebell*, 235 Va. at 325, 368 S.E.2d at 266

(dismissing as "obviously false" a claim by a prepubescent child that she was pregnant), the defendant must proffer evidence sufficient to persuade a trial court of a "reasonable probability that the victim's allegations were false." *Roadcap*, 50 Va. App. 732, 653 S.E.2d 620; *Richardson*, 42 Va. App. at 242, 590 S.E.2d at 621. See also *supra* § 412; Va. Code §§ 18.2-67.7, 19.2-270.6.

For other principles of evidence relating to character evidence, see Rules 404 and 405.

Rule 2:609 IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

Source Note

No change of Virginia law would be made by any of the subdivisions of this Rule.

Subdivisions (a) and (b). This Rule follows existing Virginia law as enunciated in *Payne v. Carroll*, 250 Va. 336, 461 S.E.2d 837 (1995) (civil cases); *Harmon v. Commonwealth*, 212 Va. 442, 446, 185 S.E.2d 48, 51 (1971) (general rule in criminal case). See also *Sadoski v. Commonwealth*, 219 Va. 1069, 254 S.E.2d 100 (1979). The principles set forth here are subject to the provision enunciated in *McAmis v. Commonwealth*, 225 Va. 419, 304 S.E.2d 2 (1983), that where the accused on cross-examination discloses additional information about the conviction, the Commonwealth may thereafter inquire concerning the name of the offense. See also *Santmier v. Commonwealth*, 217 Va. 318, 228 S.E.2d 681 (1976) (defendant's denial of drug use opened door for naming of prior marijuana offense); *Johnson v. Commonwealth*, 224 Va. 525, 528, 298 S.E.2d 99, 101 (1982); *Dammerau v. Commonwealth*, 3 Va. App. 285, 290, 349 S.E.2d 409, 412 (1986). Compare *Jewel v. Commonwealth*, 260 Va. 430, 536 S.E.2d 905 (2000) (the word "conviction" includes a guilty plea accepted by the court), with *Webb v. Commonwealth*, 31 Va. App. 466, 524 S.E.2d 164 (2000), and *Bright v. Commonwealth*, 31 Va. App. 488, 524 S.E.2d 175 (2000) (impeachment only after sentence in jury proceeding).

Virginia Code § 19.2-269 provides that a conviction of "felony or perjury" may be shown; the Supreme Court of Virginia has held that, in addition, the witness may be impeached by showing a conviction of a misdemeanor involving moral turpitude. *Hackman v. Commonwealth*, 220 Va. 710, 261 S.E.2d 555 (1980); *Parr v. Commonwealth*, 198 Va. 721, 96 S.E.2d 160 (1957) (stating the rule and defining moral turpitude). See also *Newton v. Commonwealth*, 29 Va. App. 433, 512 S.E.2d 846 (1999) (error to allow cross-examination about a witness' unrelated, unadjudicated assault offense).

The term "moral turpitude" includes lying, cheating, and stealing, and may also cover other crimes. See, e.g., *Tasker v. Commonwealth*, 202 Va. 1019, 121 S.E.2d 459 (1961); *Great Coastal Express v. Ellington*, 230 Va. 142, 334 S.E.2d 846 (1985) (surveying case law applying the principles).

Guilty pleas. See *Jewel v. Commonwealth*, 260 Va. 430, 536 S.E.2d 905 (2000) (the word "conviction" includes a guilty plea accepted by the court).

Older Virginia law held it improper to show the results of any juvenile proceeding. See *Kiracofe v. Commonwealth*, 198 Va. 833, 97 S.E.2d 14 (1957). On occasion, however, impeachment with juvenile record information may attain constitutional

status. See *Davis v. Alaska*, 415 U.S. 308 (1974); *Fulcher v. Commonwealth*, 226 Va. 96, 306 S.E.2d 874 (1983); *Bostic v. Commonwealth*, 31 Va. App. 632, 525 S.E.2d 67 (2000). Pending further development of case law or statutes, no specific statement of an evidence rule in this regard is possible.

Subdivision (c). See *Thomas v. Commonwealth*, 279 Va. 131, 688 S.E.2d 220 (2010)(impeachment with juvenile adjudications); *Fulcher v. Commonwealth*, 226 Va. 96, 306 S.E.2d 874 (1983)(same).

Subdivision (d). In *Smith v. Lohr*, 204 Va. 331, 130 S.E.2d 433 (1963), it was held that a party calling an adverse witness may not impeach that witness by prior conviction, or by proof of a bad general reputation for truth-telling. It appears that contradiction and prior inconsistent statement impeachment of an adverse witness is permitted under this decision ("the party who produces a witness shall not impeach his [credibility] by evidence of bad character, but may contradict him by other evidence, and may also prove that he has made at other times statements inconsistent with his present testimony").

Rule 2:610 BIAS OR PREJUDICE OF A WITNESS

Source Note

The admissibility of bias impeachment is a fundamental feature of Virginia evidence. See, e.g., *Jackson v. Commonwealth*, 266 Va. 423, 587 S.E.2d 532 (2003); *Goins v. Commonwealth*, 251 Va. 442, 465, 470 S.E.2d 114, 129 (1996); *Barker v. Commonwealth*, 230 Va. 370, 376, 337 S.E.2d 729, 733 (1985) (right to inquire into bias, unless abused); *Banks v. Commonwealth*, 16 Va. App. 959, 964, 434 S.E.2d 681, 683 (1993) (was not collateral); *Speller v. Commonwealth*, 2 Va. App. 437, 345 S.E.2d 542 (1986); *Fulcher v. Commonwealth*, 226 Va. 96, 306 S.E.2d 874 (1983). See also *Scott v. Commonwealth*, 25 Va. App. 36, 486 S.E.2d 120 (1997) (examination permitted about misdemeanors not involving moral turpitude, to show bias); *Lewis v. Commonwealth*, 43 Va. App. 126, 596 S.E.2d 542 (2004)(showing prior joint crimes by witness and defendant to illuminate the witness' bias in favor of the defendant). Extrinsic evidence of bias is admissible in Virginia law. See, e.g., *Langhorne v. Commonwealth*, 76 Va. 1012 (1882). With respect to impeachment using prior adult and juvenile convictions for general credibility purposes and for bias, see *Thomas v. Commonwealth*, 279 Va. 131, 688 S.E.2d 220 (2010). See also *Cousins v. Commonwealth*, 56 Va. App. 257, 693 S.E.2d 283 (2010)(gang membership of a witness admissible as proof of bias where the crime victim was also a member).

Cross-examination designed to demonstrate a witness' bias may exceed the general limitations on impeachment by prior conviction. See *Scott v. Commonwealth*, 25 Va. App. 36, 486 S.E.2d 120 (1997) (details about convictions that may show bias).

Rule 2:611 MODE AND ORDER OF INTERROGATION AND PRESENTATION

Source Note

No change in existing practice is made in this Rule.

Subdivision (a). Virginia has allowed its trial judges great latitude regarding the mode and order of examination of witnesses. See, e.g., *Butler v. Parrocha*, 186 Va.

426, 43 S.E.2d 1 (1947). After adverse examination of a witness, cross-examination must be allowed. *Food Lion, Inc. v. Cox*, 257 Va. 449, 513 S.E.2d 860 (1999). See also Code § 18.2-67.9 regarding testimony of child witnesses, applied in *Parrish v. Commonwealth*, 38 Va. App. 607, 567 S.E.2d 576 (2002).

Subdivision (b)(i). Virginia cases have generally limited cross-examination to the scope of the direct testimony. *Smith v. Irving*, 268 Va. 496, 604 S.E.2d 62 (2004); *Velocity Express Mid-Atlantic v. Hugen*, 266 Va. 188, 585 S.E.2d 557 (2003); *Miller v. Commonwealth*, 153 Va. 890, 149 S.E. 459 (1929); *Duncan v. Carson*, 127 Va. 306, 103 S.E. 665 (1920). See *Stottlemeyer v. Ghramm*, 268 Va. 7, 597 S.E.2d 191 (2004). However, once the direct examination has touched upon a particular matter, the cross-examiner may develop further details of that matter although such details were not dealt with on direct examination. *Basham v. Terry*, 199 Va. 817, 102 S.E.2d 285 (1958); *Fielding v. Robertson*, 141 Va. 123, 126 S.E. 231 (1925). Virginia has also recognized the principle that a party who wishes to cross-examine a witness as to matters not covered on direct examination makes that witness the party's own as to matters not falling within the scope of the original direct examination. *Smith v. Stanley*, 114 Va. 117, 75 S.E. 742 (1912). See also Rules 403; and 613.

Subpart (b)(ii) reflects the Supreme Court's holdings in *Satcher v. Commonwealth*, 244 Va. 220, 252, 421 S.E.2d 821, 840 (1992) and *Bunch v. Commonwealth*, 225 Va. 423, 438, 304 S.E.2d 271, 279-80 (1983). See *Drumgoole v. Commonwealth*, 26 Va. App. 783, 497 S.E.2d 159 (1998) (explaining rule). For scope of redirect, see *Lockhart v. Commonwealth*, 18 Va. App. 254, 443 S.E.2d 428, reh'g, 19 Va. App. 436, 451 S.E.2d 421 (1994), aff'd, 251 Va. 184, 466 S.E.2d 740 (1996).

Subdivision (c). Leading questions have been permitted on direct examination in Virginia in certain situations, e.g., where the witness is reluctant to answer, *Pendleton v. Commonwealth*, 131 Va. 676, 109 S.E. 201 (1921), or slow to understand, *Hausenfluck v. Commonwealth*, 85 Va. 702, 8 S.E. 683 (1889). The matter has traditionally been held to be within the discretion of the trial judge. *Portner v. Portner*, 133 Va. 251, 112 S.E. 762 (1922). See also Code § 8.01-401 (examination of adverse party as on cross-examination). An “adverse party” is a party to the litigation whose interest is adverse to the examining party. A “witness having an adverse interest” is a person, though not a party, who has a financial or other personal interest in the outcome. *Weller v. Commonwealth*, 16 Va. App. 886, 892, 434 S.E.2d 330, 335 (1993) (citing *Daniels v. Morris*, 199 Va. 205, 211, 98 S.E.2d 694, 698 (1957)); *Matthews v. Hicks*, 197 Va. 112, 122, 87 S.E.2d 629, 635 (1955); *Butler v. Parrocha*, 186 Va. 426, 431, 43 S.E.2d 1, 4 (1947). A “hostile witness” is one who does not meet either of the prior definitions, but whose actual hostility to the examining party is demonstrated during his testimony. *Weller*, 16 Va. App. at 892, 434 S.E.2d at 335 (citing *Nelson v. Commonwealth*, 153 Va. 909, 919, 150 S.E. 407, 410 (1929)); *Pendleton v. Commonwealth*, 131 Va. 676, 706, 109 S.E. 201, 211 (1921).

Rule 2:612 WRITING OR OBJECT USED TO REFRESH MEMORY

Source Note

No change to existing law or practice is made by this Rule.

Refreshment of memory while testifying has long been permitted in Virginia. See, e.g., *Harrison v. Middleton*, 52 Va. (11 Gratt.) 527 (1854). The right of an opposing party to examine whatever is used to refresh memory during trial is well established. See *McGann v. Commonwealth*, 15 Va. App. 448, 452, 424 S.E.2d 706, 709 (1992) (distinguishing pretrial review, which does not create a right for the adversary to review the item, and refreshment during testimony, which does; see *id.* at n.1). The right of the adverse party to cross-examine the witness concerning material used to refresh memory may be limited where the material used to refresh memory is itself inadmissible as evidence under statute or case law. See, e.g., *Acuar v. Letourneau*, 260 Va. 180, 531 S.E.2d 316 (2000) (accident reports); *Davis v. Colgin*, 219 Va. 5, 244 S.E.2d 750 (1978) (error to cross-examine a police officer concerning the contents of a DMV report made inadmissible by Code § 46.2-378 and § 46.2-379).

Rule 2:613 PRIOR STATEMENTS OF WITNESS

Source Note

All subparts of this rule follow existing Virginia law.

Subdivision (a)(i). Virginia adheres to the traditional rule that counsel must call a statement to the attention of the witness prior to effecting the impeachment. *Wickham & Northrop v. Turpin*, 112 Va. 236, 70 S.E. 514 (1911). This requirement is administered flexibly. See *Gordon v. Funkhouser*, 100 Va. 675, 42 S.E. 677 (1902). The provision tracks the language used in Code § 8.01-403.

Subdivision (a)(ii). Virginia has long permitted the use of prior inconsistent statements to impeach. *Cassady v. Martin*, 220 Va. 1093, 266 S.E.2d 104 (1980); *Neblett v. Hunter*, 207 Va. 335, 150 S.E.2d 115 (1966); *Russell v. Commonwealth Transp. Comm'r*, 261 Va. 617, 544 S.E.2d 311 (2001). Virginia statute and case law have required that a foundation be laid on cross-examination before extrinsic evidence of a prior inconsistent statement was admissible. *Unis v. Charlton*, 53 Va. (12 Gratt.) 484 (1855); *Davis v. Franke*, 74 Va. (33 Gratt.) 413 (1880); *Neblett*, 207 Va. at 340, 150 S.E.2d at 119; *Wickham v. Turpin*, 112 Va. 236, 70 S.E. 514 (1911); *Gordon v. Funkhouser*, 100 Va. 675, 42 S.E. 677 (1902); Code §§ 8.01-403, 8.01-404, 19.2-268.1. See *Proctor v. Commonwealth*, 40 Va. App. 233, 578 S.E.2d 822 (2003); see also *Newton v. Commonwealth*, 29 Va. App. 433, 512 S.E.2d 846 (1999). A statement may be used if comparison of the prior and present contexts shows that it is arguably inconsistent. See *Jones v. Commonwealth*, 50 Va. App. 437, 650 S.E.2d 859 (2007); *Russell v. Commonwealth Transp. Comm'r*, 261 Va. 617, 544 S.E.2d 311 (2001).

Certain statements will not be available for impeachment because their use in evidence is barred by other Virginia statutes—see Code § 46.2-379 (DMV reports), § 19.2-270 (certain statements of accused given as a witness in prior proceedings); see *Frazier v. Commonwealth*, 268 Va. 412, 601 S.E.2d 624 (2004)—or by the Constitutions of the United States or the Commonwealth. See, e.g., *New Jersey v. Portash*, 440 U.S. 450 (1979).

For a definition of “collateral statements,” see *Seilheimer v. Melville*, 224 Va. 323, 326-327, 295 S.E.2d 896, 898 (1982).

Subdivision (b). This subdivision embodies the principles in Code §8.01-404 and § 19.2-268.1, which would be repealed by the General Assembly upon its approval of these Rules. The 2007 amendment to §8.01-404 is reflected in this draft. Concerning the applicability of Code § 8.01-404, see generally Gray v. Rhoads, 268 Va. 81, 597 S.E.2d 93 (2004). The court has held that an investigator's notes, not signed by the declarant, were not within the limitations of this Code provision. Scott v. Greater Richmond Transit Co., 241 Va. 300, 402 S.E.2d 214 (1991).

Prior consistent statements. On the use of prior consistent statements to rehabilitate an impeached witness, see McLean v. Commonwealth, 32 Va. App. 200, 527 S.E.2d 443 (2000). But see Proctor v. Commonwealth, 40 Va. App. 233, 578 S.E.2d 822 (2003) (bolstering on direct not permitted).

Rule 2:614 CALLING AND INTERROGATION OF WITNESSES BY COURT

Source Note

The Rule follows existing Virginia law.

Subdivision (a). See Wornom v. Hampton Normal & Agric. Inst., 144 Va. 533, 538-39, 132 S.E. 344, 346 (1926) (civil cases). See Bradley v. Canter, 201 Va. 747, 753-54, 113 S.E.2d 878, 884 (1960), and Robinson v. Peterson, 200 Va. 186, 192-93, 104 S.E.2d 788, 792 (1958), for the admonition that it is not the general practice for Virginia trial judges to call witnesses in a civil case, and that the matter rests in the sound discretion of the court, which should be exercised with great care. Case law discussion on the topic of the judge calling witnesses in criminal cases has not been located, and hence this Rule does not address this practice as related to criminal cases.

Subdivision (b). Regarding civil cases, see Wornom, 144 Va. at 538-39, 132 S.E. at 346. As to criminal cases, see Goode v. Commonwealth, 217 Va. 863, 865-66, 234 S.E.2d 239, 240-41 (1977); Mazer v. Commonwealth, 142 Va. 649, 655, 128 S.E. 514, 516 (1925), and Cunningham v. Commonwealth, 2 Va. App. 358, 365, 344 S.E.2d 389, 393 (1986), which observe that in criminal cases it is at times appropriate for the trial judge to interrogate witnesses. When the judge questions a witness, any objection to the questions must be timely raised, or it is waived under Rule 5:25. Rose v. Jaques, 268 Va. 137, 152, 597 S.E.2d 64, 73 (2004).

Rule 2:615 EXCLUSION OF WITNESSES

Source Note

The Rule embodies existing Virginia law.

Virginia Code §§ 8.01-375, 19.2-184, and 19.2-265.1 set forth the provisions for exclusion of witnesses embodied in this Rule, and would be repealed upon the General Assembly's approval of these Rules.

Where a witness learned only immaterial information during violation of an exclusion order, it was not error to permit her to testify despite the violation. Bennett v. Commonwealth, 236 Va. 448, 374 S.E.2d 303 (1988). See Code § 19.2-183(B). See also Code § 19.2-265.5, which allows for the complaining witness to remain in court throughout the entire trial where no attorneys are present if necessary for the orderly presentation of witnesses for the prosecution. See Motley v. Tarmac Am., Inc., 258

Va. 98, 516 S.E.2d 7 (1999); *Warmouth v. Commonwealth*, 29 Va. App. 476, 513 S.E.2d 418 (1999). *See also* Rule 2:412.

The restriction in the final sentence of the Rule conforms to the policy set forth in Code § 19.2-265.01. *See Hernandez-Guerrero v. Commonwealth*, 46 Va. App. 366, 371, 617 S.E.2d 410, 413 (2005) ("To support a claim of unfairness under Code § 19.2-265.01, a defendant must proffer to the trial court facts which, if true, would make the victim witness uniquely vulnerable to being manipulated, consciously or not, by the suggestive power of other witnesses' testimony. This could be shown by a proffer that the victim witness had previously admitted a lack of knowledge on some crucial fact on which other witnesses will testify to in detail, or that the victim witness has natural limitations (either by age, mental capacity, or psychological makeup) that would make him susceptible to memory enhancement or manipulation. But simply saying — as [defendant] does in this case — that the victim witness may hear the testimony of others and be affected by it is facially insufficient to take away the victim's presumptive right under Code § 19.2-265.01 to be present in the courtroom throughout the trial.").

Rule 2:701 OPINION TESTIMONY BY LAY WITNESSES

Source Note

The Rule follows existing Virginia law.

Trial courts in Virginia and the Supreme Court of Virginia have vast experience in dealing with questions of the admissibility of lay opinion testimony. Although the common law rule restricted lay opinion, *see, e.g., Davis v. Souder*, 134 Va. 356, 114 S.E. 605 (1922) (facts, not opinions, are admissible), some lay opinions have always been admitted while others have been excluded. *Tyler v. Sites*, 90 Va. 539, 19 S.E. 174 (1894). Thus, witnesses have long been permitted to testify in Virginia courts as to their opinion of a person's sanity or capacity to make a will. *See, e.g., Davis v. Alderson*, 125 Va. 681, 100 S.E. 541 (1919) (sanity); *McComb v. Farrow*, 128 Va. 455, 104 S.E. 812 (1920) (will). Owners of property have been permitted to express opinions as to its value. *See, e.g., Walls v. Commonwealth*, 248 Va. 480, 450 S.E.2d 363 (1994); *Haynes v. Glenn*, 197 Va. 746, 91 S.E.2d 433 (1956). *Accord Norfolk & W. Ry. v. Keatley*, 211 Va. 507, 178 S.E.2d 516 (1971). *See also Crowder v. Commonwealth*, 41 Va. App. 658, 664, 588 S.E.2d 384, 387 (2003) (monetary value of property owned by witness).

The test in Virginia is whether a witness is able to fully report observations without resorting to opinion and inference; if not, and if some use of opinions and inferences in a witness' testimony actually adds to the trier of fact's understanding of the witness' perception, the use has been permitted. In *Richards v. Commonwealth*, 107 Va. 881, 889-90, 59 S.E. 1104, 1107 (1908), the court stated that opinions may be admitted where a witness cannot report observations without them and the witness, like any ordinary person, is capable of understanding and reporting observations through some use of opinion testimony. Similar language is found in other cases. *E.g., Shenandoah Valley Loan & Trust Co. v. Murray*, 120 Va. 563, 578-79, 91 S.E. 740 (1917) (opinion of witness that plaintiff appeared to be suffering and nervous admissible to fully inform jurors as to what the witness observed). *See also Virginia Ry. & Power Co. v.*

Burr, 145 Va. 338, 133 S.E. 776 (1926) (witness' infirmity or difficulty with language might require use of opinion testimony).

Subhead (iii) in this rule reflects the policy presently stated expressly in Code § 8.01-401.3(B).

Specific instances where lay opinion is allowed: Speed – Moore v. Lewis, 201 Va. 522, 111 S.E.2d 788 (1960); Doe v. Dewhirst, 240 Va. 266, 396 S.E.2d 840 (1990); Shrader v. Commonwealth, 2 Va. App. 287, 343 S.E.2d 375 (1986); Smith v. Commonwealth, 213 Va. 781, 195 S.E.2d 845 (1973); Meade v. Meade, 206 Va. 823, 147 S.E.2d 171 (1966). Time – Citizens Rapid Transit Co. v. O'Hara, 203 Va. 979, 128 S.E.2d 270 (1962). Sanity – Ford v. Ford, 200 Va. 674, 107 S.E.2d 397 (1959). Capacity to Make a Will – McComb v. Farrow, 128 Va. 455, 104 S.E. 812 (1920). Suffering or Nervousness – Shenandoah Valley Loan & Trust Co. v. Murray, 120 Va. 563, 91 S.E. 740 (1917). Disability – Speller v. Commonwealth, 2 Va. App. 437, 345 S.E.2d 542 (1986). Causation – Peterson v. Neme, 222 Va. 477, 281 S.E.2d 869 (1981); Sumner v. Smith, 220 Va. 222, 257 S.E.2d 825 (1979). Property Value – Haynes v. Glenn, 197 Va. 746, 91 S.E.2d 433 (1956); Stainback v. Stainback, 11 Va. App. 13, 396 S.E.2d 686 (1990); Norfolk & W. Ry. v. Briggs, 103 Va. 105, 48 S.E. 521 (1904). Identity of Persons – Bowman v. Commonwealth, 30 Va. App. 298, 516 S.E.2d 705 (1999). Meaning of slang or argot – Tweed v. Commonwealth, 36 Va. App. 363, 550 S.E.2d 345 (2001). Similarity of objects – Claud v. Commonwealth, 217 Va. 794, 232 S.E.2d 790 (1977). Handwriting – Adams v. Ristine, 138 Va. 273, 287, 122 S.E. 126, 130 (1924), Wileman v. Commonwealth, 24 Va. App. 642, 484 S.E.2d 621 (1997). Visibility – New York P. & RR v. Wilson, 109 Va. 754, 64 S.E. 1060 (1909). General Physical Situation at a Location – Robinson v. Commonwealth, 197 Va. 754, 91 S.E.2d 396 (1956).

On the need for medical testimony, see Nichols v. Kaiser Found. Health Plan, Inc., 257 Va. 491, 514 S.E.2d 608 (1999). Cf. Mullin v. Mullin, 45 Va. App. 289, 610 S.E.2d 331 (2005) (mother's lay opinion on physical condition of child).

Rule 2:702 TESTIMONY BY EXPERTS

Source Note

Subdivision (a). This provision authorizes expert testimony in any situation where it would be helpful to the trier of fact. See Breeden v. Roberts, 258 Va. 411, 518 S.E.2d 834 (1999); Keese v. Donigan, 259 Va. 157, 524 S.E.2d 645 (2000); Holmes v. Doe, 257 Va. 573, 515 S.E.2d 117 (1999) (testimony on general principles). See also Norfolk S. Ry. v. Bowles, 261 Va. 21, 539 S.E.2d 727 (2001); Hoar v. Great E. Resort Mgmt., Inc., 256 Va. 374, 506 S.E.2d 777 (1998). On medical-related testimony, see Combs v. Norfolk & W. Ry., 256 Va. 490, 507 S.E.2d 355 (1998); Phillips v. Southeast 4-H Educ. Ctr., Inc., 257 Va. 209, 510 S.E.2d 458 (1999); Nichols v. Kaiser Found. Health Plan, Inc., 257 Va. 491, 514 S.E.2d 608 (1999); Sami v. Varn, 260 Va. 280, 535 S.E.2d 172 (2000); John v. Im, 263 Va. 315, 559 S.E.2d 694 (2000) (brain injury); Norfolk & W. Ry. v. Keeling, 265 Va. 228, 576 S.E.2d 452 (2003) (bio-mechanical testimony about conditions of the inner ear). See also Christian v. Surgical Specialists, 268 Va. 60, 596 S.E.2d 522 (2004). But see Fitzgerald v. Commonwealth, 273 Va. 596, 643 S.E.2d 162 (2007) (testimony of

licensed professional counselor); *Conley v. Commonwealth*, 273 Va. 554, 643 S.E.2d 131 (2007) (testimony by licensed clinical social worker). See also *Dagner v. Anderson*, 274 Va. 678, 651 S.E.2d 640 (2007); *Christian v. Surgical Specialists*, 268 Va. 60, 596 S.E.2d 522 (2004). An expert need not be licensed to practice the discipline in the Commonwealth unless subject-specific statutes so provide. See *Commonwealth v. Allen*, 269 Va. 262, 609 S.E.2d 4 (2005) (sexual predator expert proof statute changed after trial). On the issue whether expert testimony is required in a case involving medical care, see *Webb v. Smith*, 276 Va. 305, 661 S.E.2d 457 (2008) (failure to perform one of two agreed procedures); *Coston v. Bio-Medical Applications of Va., Inc.*, 275 Va. 1, 5, 654 S.E.2d 560, 562 (2008) (defective treatment chair). An expert need not be licensed to practice the discipline in the Commonwealth unless subject-specific statutes so provide. See *Commonwealth v. Allen*, 269 Va. 262, 609 S.E.2d 4 (2005) (sexual predator expert proof statute changed after trial). Regarding testimony by podiatrists on medical issues, see Code § 54.1-2900 (amended in 2010 to include "diagnosis" of physical conditions, diseases, pain, or infirmities of the human foot and ankle as part of the authorized practice of podiatry) and Code § 8.01-401.2:1 (precluding testimony of podiatrists as expert witnesses in medical malpractice proceedings against a doctor of medicine or osteopathic medicine).

Scientific reliability and new scientific procedures. The Supreme Court of Virginia has left "open for future consideration" the question whether Virginia trial courts should apply the analysis of *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) to determine the scientific reliability of expert testimony. See *John v. Im*, 263 Va. 315, 322, 559 S.E.2d 694, 698 (2000). When asked to adopt the *Daubert* analysis in *John v. Im*, 263 Va. 315, 322, fn.3, the Supreme Court of Virginia cited two of its opinions decided before *Daubert* regarding the trial court's role in making a threshold finding of scientific reliability when unfamiliar scientific evidence is offered. *Satcher v. Commonwealth*, 244 Va. 220, 244, 421 S.E.2d 821, 835 (1992) and *Spencer v. Commonwealth*, 240 Va. 78, 97-98, 393 S.E.2d 609, 621 (1990). This reliability standard is applicable in both the guilt and the penalty phases of a criminal case, and the burden of making a prima facie showing of the reliability of the scientific method offered rests upon the proponent of the evidence, subject to the opponent's opportunity for cross-examination and refutation. See *Billips v. Commonwealth*, 274 Va. 805, 652 S.E.2d 99 (2007) (error to require a defendant to introduce evidence of unreliability when the Commonwealth offers scientific proof unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis). Concerning "blood spatter" evidence and the testability of scientific proof, see *Smith v. Commonwealth*, 265 Va. 250, 576 S.E.2d 465 (2003). Concerning blood spatter evidence and the testability of scientific proof, see *Smith v. Commonwealth*, 265 Va. 250, 576 S.E.2d 465 (2003). Some forms of scientific or technical proof are "so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis" *Dowdy v. Commonwealth*, 278 Va. 577, 686 S.E.2d 710 (2009) (validation of the fingerprint identification methodology is not a necessary part of an expert's testimony).

Subdivision (b). Cantrell v. Commonwealth, 229 Va. 387, 395-96, 329 S.E.2d 22, 28 (1985); Spruill v. Commonwealth, 221 Va. 475, 479, 271 S.E.2d 419, 421 (1980); Velazquez v. Commonwealth, 263 Va. 95, 557 S.E.2d 213 (2002). Expert testimony concerning the veracity of witnesses is not admissible. See James v. Commonwealth, 254 Va. 95, 97, 487 S.E.2d 205, 206 (1997). Cf. Turnbull v. Commonwealth, 216 Va. 328, 218 S.E.2d 451 (1975) (dicta re expert proof on witness competency). The expert may not substitute his judgment for the court or jury. See generally Coppola v. Commonwealth, 220 Va. 243, 251-53, 257 S.E.2d 797, 803-04 (1979) (psychiatrist properly barred from testifying as to his opinion about a witness' honesty); Currie v. Commonwealth, 30 Va. App. 58, 515 S.E.2d 335 (1999) (expert testimony on eyewitness identification). Payne v. Commonwealth, 277 Va. 531, 674 S.E.2d 835 (2009)(behavior of alcoholics)..

General requirements. The trial judge is entrusted with considerable discretion in deciding when expert testimony will assist the trier of fact. The Virginia Supreme Court has held that an expert need not be the most qualified person; it is sufficient if the witness has sufficient credentials to assist the fact-finder, even if others might be more qualified. See, e.g., Rollins v. Commonwealth, 207 Va. 575, 580-81, 151 S.E.2d 622, 625-26 (1966) (psychologist permitted to give expert testimony on mental condition). See Wood v. Bass Pro Shops, 250 Va. 297, 462 S.E.2d 101 (1995). See also Hegwood v. Virginia Natural Gas, Inc., 256 Va. 362, 505 S.E.2d 372 (1998) (scope of expertise). With respect to damage projections, see ITT Hartford Group, Inc. v. Virginia Fin. Assocs., Inc., 258 Va. 193, 520 S.E.2d 355 (1999), appeal after remand, 266 Va. 177, 585 S.E.2d 789 (2003); Lockheed Info. Mgmt. Sys. Co. v. Maximus, Inc., 259 Va. 92, 524 S.E.2d 420 (2000).

The Court has found that expertise can come from study or experience, and that a person who has become an expert need not know everything that experts in the field know. Norfolk & W. Ry. v. Anderson, 207 Va. 567, 571, 151 S.E.2d 628, 631 (1966). But the court also has cautioned that an expert must not go outside his area of expertise to give an opinion. Virginia Elec. & Power Co. v. Lado, 220 Va. 997, 1005, 266 S.E.2d 431, 436 (1980) (real estate expert had no knowledge of hazards of maintaining power line in proximity to lake); Norfolk & Portsmouth Traction Co. v. Ellington, 108 Va. 245, 251, 61 S.E. 779, 782 (1908) (conductor-motorman not an expert on constructing a cross-over track); John v. Im, 263 Va. 315, 559 S.E.2d 694 (2000) (psychologist not qualified to offer opinion on causation of brain injury).

Factual foundation for expert testimony. Expert testimony is admissible when it is based on an adequate factual foundation. Countryside Corp. v. Taylor, 263 Va. 549, 561 S.E.2d 680 (2002). See Code §§ 8.01-401.1 and -401.3; Lawson v. Doe, 239 Va. 477, 482-83, 391 S.E.2d 333, 336 (1990); Clark v. Chapman, 238 Va. 655, 664-65, 385 S.E.2d 885, 891 (1989). Expert testimony is inadmissible if it is speculative or founded on assumptions that have no basis in fact. Vasquez v. Mabini, 269 Va. 155, 606 S.E.2d 809 (2005)(testimony on loss of earning capacity); Countryside Corp., 263 Va. 549, 561 S.E.2d 680; John v. Im, 263 Va. 315, 559 S.E.2d 694 (2000). See Gilbert v. Summers, 240 Va. 155, 159-60, 393 S.E.2d 213, 215 (1990); Cassady v. Martin, 220 Va. 1093, 1100, 266 S.E.2d 104, 108 (1980). Testimony is not speculative simply because it is based, in whole or in part, upon a disputed fact. See Ames & Webb, Inc. v. Commercial Laundry Co., 204 Va. 616, 133 S.E.2d 547 (1963).

Additionally, expert testimony is inadmissible if the expert fails to consider all the variables that bear upon the inferences to be deduced from the facts observed. *John*, 263 Va. 315, 559 S.E.2d 694; *Griffin v. Spacemaker Group, Inc.*, 254 Va. 141, 146, 486 S.E.2d 541, 544 (1997); *Tittsworth v. Robinson*, 252 Va. 151, 154, 475 S.E.2d 261, 263 (1996).

Expert opinion is properly offered when "based on a reasonable degree of professional certainty." See, e.g., *Norfolk S. Ry. Co. v. Bowles*, 261 Va. 21, 539 S.E.2d 727 (2001)(ergonomics). In medical testimony, a requirement that the conclusion be expressed to "a reasonable degree of medical probability" is often stated. See *Fruiterman v. Granata*, 276 Va. 629, 668 S.E.2d 127 (2008).

Subject-specific statutes. In specific subject matters, statutes may require particular qualifications for expert testimony (e.g., medicine, real estate appraisal). See, e.g., *Hinkley v. Koehler*, 269 Va. 82, 606 S.E.2d 803 (2005); *Sami v. Varn*, 260 Va. 280, 535 S.E.2d 172 (2000); *Christian v. Surgical Specialists*, 268 Va. 60, 596 S.E.2d 522 (2004); see also Code § 8.01-581.20; *Jackson v. Quereshi*, 277 Va. 114, 671 S.E.2d 163 (2009)(abuse of discretion not to qualify expert on uncontroverted testimony that different specialties have the same standard of care on the issue involved); *Lloyd v. Kime*, 275 Va. 98, 654 S.E.2d 563 (2008)(qualification of experts in related fields); *Perdieu v. Blackstone Family Practice Ctr.*, 264 Va. 408, 568 S.E.2d 703 (2002) (applying statute and case law in the nursing home context); *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004)(performance of the exact procedure involved); *Lee Gardens Arlington Limited Partnership v. Arlington County Board*, 250 Va. 534, 463 S.E.2d 646 (1995) (real estate appraisal).

Several decisions have discussed the requirements set forth in Code § 8.01-399 for the testimony of treating physicians, and have addressed the distinction between statements that convey medical diagnoses, which must be expressed to a reasonable degree of medical probability, and statements that are "factual in nature," to which that standard does not apply. See generally *Graham v. Cook*, 278 Va. 233, 682 S.E.2d 535 (2009); *King v. Cooley*, 274 Va. 374, 650 S.E.2d 523 (2007); *Holmes v. Levine*, 273 Va. 150, 639 S.E.2d 235 (2007), *Pettus v. Gottfried*, 269 Va. 69, 606 S.E.2d 819 (2005).

Rule 2:703 BASIS OF EXPERT TESTIMONY

Source Note

Subdivision (a). Virginia Code § 8.01-401.1 states the general rule: It allows experts to base opinion testimony on any material normally considered in the discipline involved, even if that information would be inadmissible in evidence. states the general test for use of expert testimony used in the vast majority of American jurisdictions today. Most states, and the federal system, use this test in both civil and criminal contexts. The General Assembly adopted this standard several years ago, for use in civil litigation. See *Holmes v. Doe*, 257 Va. 573, 515 S.E.2d 117 (1999) (testimony on general principles). See also *State Farm Mut. Auto. Ins. Co. v. Kendrick*, 254 Va. 206, 491 S.E.2d 286 (1997) (party may qualify as expert). See *Reid v. Boyle*, 259 Va. 356, 527 S.E.2d 137 (2000). In civil cases, Code § 8.01-401.1 as set forth above allows an expert to rely on inadmissible material in forming an opinion.

For cases discussing the extent to which an expert may rely on hearsay in forming an opinion, see *Lawrence v. Commonwealth*, 279 Va. 490, 689 S.E.2d 748 (2010); *Boyce v. Commonwealth*, 279 Va. 644, 691 S.E.2d 782 (2010); *Commonwealth v. Garrett*, 276 Va. 590, 667 S.E.2d 739 (2008). Reliance upon hearsay by an expert in forming an opinion does not render that hearsay admissible on direct examination, regardless of whether the hearsay involves opinions or fact statements. *Lawrence*, supra. See generally *Commonwealth v. Wynn*, 277 Va. 92, 671 S.E.2d 137 (2009).

Subdivision (b). The Rule reflects the traditional test applied in criminal cases as restated in *Simpson v. Commonwealth*, 227 Va. 557, 318 S.E.2d 386 (1984) (“Generally, an expert may not base opinion testimony on facts not in evidence.”); *Wright v. Commonwealth*, 245 Va. 177, 427 S.E.2d 379 (1993); *Buchanan v. Commonwealth*, 238 Va. 389, 416, 384 S.E.2d 757, 773 (1989). See generally *Jones v. Commonwealth*, 54 Va. App. 219, 677 S.E.2d 61 (2009); *Corado v. Commonwealth*, 47 Va. App. 315, 328, 623 S.E.2d 452, 458 (2005) (en banc). In referring the limitations on expert proof in criminal cases generally, this Rule is drafted so that it does not affect the decisions in *Funderburk v. Commonwealth*, 6 Va. App. 334, 368 S.E.2d 290 (1988) (evidence of population percentages of combinations of blood characteristics, when based on established facts, is reasonably within the expertise of the forensic expert); *Hills v. Commonwealth*, 33 Va. App. 442, 534 S.E.2d 337 (2000) (expert “DNA” testimony where the underlying statistical data is not received in evidence), or *Kern v. Commonwealth*, 2 Va. App. 84, 341 S.E.2d 397 (1986) (permissible use of market publication as basis for value opinion). Cf. *Patterson v. Commonwealth*, 3 Va. App. 1, 348 S.E.2d 285 (1986) (out-of-court summary of evidence improper as basis for opinion). See also *Wright v. Commonwealth*, 245 Va. 177, 197, 427 S.E.2d 379, 392 (1993), vacated, 512 U.S. 1217 (1994); see also Code § 19.2-270.5 (DNA proof); *Smith v. Commonwealth*, 265 Va. 250, 576 S.E.2d 465 (2003) (foundation for “blood spatter” proof); *Pelletier v. Commonwealth*, 42 Va. App. 406, 592 S.E.2d 382 (2004) (dog tracking as non-scientific expert testimony).

Rule 2:704 OPINION ON ULTIMATE ISSUE

Source Note

Subdivision (a). The provisions of Code § 8.01-401.3(B) and (C) govern in civil litigation and are the source of this subdivision of the Rule. These provisions have not been extensively construed as of the time of the drafting of these Rules.

Subdivision (b). In cases not controlled by Code § 8.01-401.3, the rule in Virginia is that opinions on ultimate issues are inadmissible. In practice this has meant that legal conclusions and opinions on culpability or legal capacity (except as permitted in an insanity defense) are not admissible. See, e.g., *Jenkins v. Commonwealth*, 254 Va. 333, 492 S.E.2d 131 (1997); *Stamper v. Commonwealth*, 228 Va. 707, 324 S.E.2d 682 (1985); *Peeples v. Commonwealth*, 30 Va. App. 626, 519 S.E.2d 382 (1999); see also *Cartera v. Commonwealth*, 219 Va. 516, 519, 248 S.E.2d 784, 786 (1978) (error to permit a doctor to testify that two girls had been raped); *Waye v. Commonwealth*, 219 Va. 683, 696, 251 S.E.2d 202, 210 (1979) (opinion by psychiatrist that defendant did not deliberate and premeditate at time of killing was properly excluded). *Compare*

Pritchett v. Commonwealth, 263 Va. 182, 557 S.E.2d 205 (2002) (“an expert may testify to a witness' or defendant's mental disorder and the hypothetical effect of that disorder on a person in the witness' or defendant's situation, so long as the expert does not opine on the truth of the statement at issue”); Fitzgerald v. Commonwealth, 223 Va. 615, 630, 292 S.E.2d 798, 806 (1982). See Jackson v. Commonwealth, 266 Va. 423, 587 S.E.2d 532 (2003). See also Bond v. Commonwealth, 226 Va. 534, 311 S.E.2d 769 (1984) (improper to opine that victim was pushed in four-story fall to death); Strawderman v. Commonwealth, 200 Va. 855, 108 S.E.2d 376 (1959) (opinion that child's vaginal injury was caused by penetration by penis improper); Ramsey v. Commonwealth, 200 Va. 245, 105 S.E.2d 155 (1958) (improper to characterize fire as “of incendiary origin”). See Hussen v. Commonwealth, 257 Va. 93, 511 S.E.2d 106 (1999) (proof consistent with crime). Concerning the testimony by a certified nurse examiner in sexual assault cases, see Velazquez v. Commonwealth, 263 Va. 95, 557 S.E.2d 213 (2002) (trained witness may testify as an expert, and opinion that injuries are “inconsistent with consensual intercourse” was admissible, but opinion that injuries were “consistent with non-consensual intercourse” must be excluded). See also Askew v. Commonwealth, 40 Va. App. 104, 578 S.E.2d 58 (2003) (police officer's opinion relating to personal use of drugs or intent to sell).

This doctrine, however, is not a blanket proscription of opinions on important facts. Thus, the Supreme Court has upheld the admission of opinions on many key factual matters: See, e.g., Freeman v. Commonwealth, 223 Va. 301, 288 S.E.2d 461 (1982) (child psychologist could opine that pictures made by defendant would appeal to prurient interest of minors); Payne v. Commonwealth, 233 Va. 460, 357 S.E.2d 500 (1987) (future dangerousness opinion admissible); Compton v. Commonwealth, 219 Va. 716, 250 S.E.2d 749 (1979) (expert testimony that the victim was sitting when shot was permissible).

With respect to expert psychological or psychiatric opinions relating to the mental state of a defendant or a witness, see Shifflett v. Commonwealth, 221 Va. 760, 274 S.E.2d 305 (1981); Price v. Commonwealth, 228 Va. 452, 323 S.E.2d 106 (1984); Jones v. Commonwealth, 28 Va. App. 444, 506 S.E.2d 27 (1998); White v. Commonwealth, 46 Va. App. 123, 616 S.E.2d 49 (2005).

Rule 2:705 FACTS OR DATA USED IN TESTIMONY

Source Note

Subdivision (a). Provisions of Code § 8.01-401.1 govern in civil litigation. Under the second subparagraph of that Code section, the expert may testify to the conclusions without first setting forth the factual basis. Opposing counsel are permitted to inquire into the factual basis on cross-examination. The court has discretion to require disclosure of the predicate for the opinion in advance. While the statute is permissive in that the proponent of the expert proof may elect to disclose the factual basis for the expert opinion prior to the witness rendering an opinion, it has been held that the proponent may not elicit inadmissible material such as hearsay on direct examination of the witness. Todd v. Edwin L. Williams, M.D., Ltd., 242 Va. 178, 409 S.E.2d 450 (1991). See also McMunn v. Tatum, 237 Va. 558, 379 S.E.2d 908 (1989); Chandler v. Graffeo, 268 Va. 673, 682, 604 S.E. 2d 1, 5 (2004); Holmes

v. Levine, 273 Va. 150, 639 S.E.2d 235 (2007). See also Commonwealth v. Wynn, 277 Va. 92, 671 S.E.2d 137 (2009)(precluding recitation by an expert in direct testimony of hearsay relied upon in forming an opinion, whether the hearsay is characterized as a matter of "hearsay opinion" or of fact).

Subdivision (b). There is no comparable Code provision for criminal cases. See generally Rule 2:703(b) and the accompanying Source Note. Unadmitted material, such as medical records not offered into evidence, or out-of-court summaries of proof prepared by counsel, may not serve as a basis for expert opinion in a criminal case. Simpson v. Commonwealth, 227 Va. 557, 565, 318 S.E.2d 386, 391 (1984) (unadmitted records); Patterson v. Commonwealth, 3 Va. App. 1, 348 S.E.2d 285 (1986) (inadmissible summaries of proof).

Personal knowledge of the expert includes information gained in the expert's practice and experience, Cantrell v. Commonwealth, 229 Va. 387, 395, 329 S.E.2d 22, 27; Simpson, 227 Va. at 566, 318 S.E.2d at 391, and at least some standard reference sources consulted. See Kern v. Commonwealth, 2 Va. App. 84, 341 S.E.2d 397 (1986) (industry price guide for gemstones).

A hypothetical question based on materially incomplete or erroneous factual information is inadmissible. Waitt v. Commonwealth, 207 Va. 230, 148 S.E.2d 805 (1966). Speculation is not permitted. Thorpe v. Commonwealth, 223 Va. 609, 292 S.E.2d 323 (1982); Doughty v. Commonwealth, 204 Va. 240, 129 S.E.2d 664 (1963).

Rule 2:706 USE OF LEARNED TREATISES WITH EXPERTS

Source Note

Subdivision (a). In civil cases learned treatises may be raised with an expert on cross-examination and portions read into the record if the witness recognizes the published work as a reliable authority, or the proponent of the published work satisfies the court that it is a reliable authority by other testimony or by stipulation. Code § 8.01-401.1. If the statements are to be introduced through direct examination of a witness, the Code section requires 30-day pre-notification of the intention to use such statements. "[T]he article that is used during the cross-examination, not the author, must be recognized by the witness as standard and authoritative in the field." Griffett v. Ryan, 247 Va. 465, 443 S.E.2d 149 (1994). Testimony regarding "trends in medical literature" is not admissible nor are the unpublished, out-of-court opinions of the article's or publication's author(s). Todd v. Edwin L. Williams, M.D., Ltd., 242 Va. 178, 182-83, 409 S.E.2d 450, 452-53 (1991). See also Weinberg v. Given, 252 Va. 221, 225, 476 S.E.2d 502, 504 (1996) (applying Code § 8.01-401.1); May v. Caruso, 264 Va. 358, 568 S.E.2d 690 (2002) (identification of the statements to be offered, and trial court discretion on whether to admit such statements). To permit use of learned materials under this section, the witness must testify that he relied on the article in forming his opinion, which is consistent with the views expressed by the absent author. Bostic v. About Women OB/GYN, P.C., 275 Va. 567, 659 S.E.2d 290 (2008). If a party wishes to establish the authoritativeness of learned material by its own witness, for later use in cross-examination of an adverse expert, the material must be provided to the opponent 30 days prior to trial. Budd v. Punyanitya, 273 Va. 583, 643 S.E.2d 180 (2007).

Subdivision (b). In criminal cases, the common law restriction on use of learned treatises in examining witnesses remains in effect, limiting such use to impeachment of the expert and barring receipt on the merits of statements even from authorities the witness acknowledges to be authoritative. See *Hopkins v. Gromovsky*, 198 Va. 389, 395, 94 S.E.2d 190, 194 (1956).

Rule 2:801 DEFINITIONS

Source Note

This definitional Rule sets forth existing Virginia principles.

Subdivision (a) covers any form of statement, oral, written, or conduct that is intended as an assertion. The Rule excludes implied assertions which permit the factfinder to infer something other than the intended content of a statement. The key to this subdivision is whether the declarant intended by words or conduct to communicate or assert something. If so, an intended assertion is a statement which may be hearsay. See *Brown v. Commonwealth*, 25 Va. App. 171, 487 S.E.2d 248 (1997) (assertion implied by question). Under this principle, the facts of *Stevenson v. Commonwealth*, 218 Va. 462, 237 S.E.2d 779 (1977), would continue to be classified as hearsay. In *Stevenson*, the declarant complied with a request to surrender clothes worn on a particular night. Because this surrender was intended as an assertion that “these are the clothes,” it was hearsay and would continue to be classified as such by Rule 2:801.

An example of non-hearsay is testimony that an individual opened an umbrella, offered to prove that it was raining. Unless there is evidence that the individual intended to communicate to someone that it was raining, the conduct is non-assertive and thus is not within the definition of hearsay. Although no class of evidence is immune to dangers of fabrication, the likelihood of fabrication is less when the declarant does not consciously intend the assertion.

Subdivision (b) uses the familiar word “declarant” to identify the person who makes an extra-judicial statement. The Court of Appeals has held that test results given by a machine are not statements produced by a witness, and hence no hearsay or Confrontation Clause barriers arise. *Wimbish v. Commonwealth*, 51 Va. App. 474, 658 S.E.2d 715 (2008) (breath-alcohol content readings on Intoxilyzer 5000 testing device); *Penny v. Commonwealth*, 6 Va. App. 494, 370 S.E.2d 314 (1988) (“call trap” device that monitored telephone activity on a particular telephone line).

Subdivision (c) defines hearsay statements as those offered for the truth of their contents. This subdivision excludes from the definition of hearsay the entire category of “verbal acts” in which the utterance of the statement itself, not the truth of the contents of the statement, affects the legal rights of the parties or is a circumstance bearing on a person's conduct. See, e.g., *McDonald v. National Enters.*, 262 Va. 184, 547 S.E.2d 204 (2001) (operative documents); *Eckhart v. Commonwealth*, 222 Va. 213, 279 S.E.2d 155 (1981); *Upchurch v. Commonwealth*, 220 Va. 408, 258 S.E.2d 506 (1979) (police radio report admitted, not for the truth of what was said, but to explain the police officer's reaction to the report); see also *Fuller v. Commonwealth*, 201 Va. 724, 113 S.E.2d 667 (1960); *Foster v. Commonwealth*, 209 Va. 297, 163

S.E.2d 565 (1968); Warner v. Commonwealth, 30 Va. App. 141, 515 S.E.2d 803 (1999). Prior consistent statements are generally hearsay, inadmissible unless some specific exception authorizes their receipt into evidence. Faison v. Hudson, 243 Va. 397, 404, 417 S.E.2d 305, 309 (1992); Proctor v. Commonwealth, 40 Va. App. 233, 578 S.E.2d 822 (2003). See Wimbish v. Commonwealth, 51 Va. App. 474, 658 S.E.2d 715 (2008)(testimony regarding compliance with regulations or established procedures – without quoting them – is not hearsay).

On the issue of statements offered for the non-hearsay purpose of explaining what a party did, see Wright v. Kaye, 267 Va. 510, 593 S.E.2d 307 (2004); Chandler v. Graffeo, 268 Va. 673, 682, 604 S.E. 2d 1, 5 (2004); Fuller v. Commonwealth, 201 Va. 724, 113 S.E.2d 667 (1960); Fisher v. Commonwealth, 42 Va. App. 395, 592 S.E.2d 377 (2004).

Rule 2:802 HEARSAY RULE

Source Note

This section states the basic hearsay exclusionary rule long a feature of Virginia law. Its terms contain a savings clause to preserve any existing or future statutory or case law exceptions not covered by the rules. See Decipher, Inc. v. iTRiBE, Inc., 262 Va. 588, 553 S.E.2d 718 (2001) (“Generally, the hearsay rule precludes a witness from quoting from, or summarizing the contents of, even admissible records until they have been received in evidence”). The proponent of hearsay bears the burden of proving by a preponderance of the evidence that the evidence fits within an exception to the general rule of hearsay inadmissibility. Lynch v. Commonwealth, 272 Va. 204, 207-08, 630 S.E.2d 482, 484 (2006).

Rule 2:803 HEARSAY EXCEPTIONS WHERE AVAILABILITY OF THE DECLARANT NEED NOT BE SHOWN

Source Note

This multi-part Rule identifies the presently recognized Virginia exceptions to the hearsay rule that do not depend on the unavailability of the declarant. No change in existing law is involved.

Exception (0). Virginia's traditional treatment of admissions as a key exception to the hearsay rule is embodied in this Rule. Subpart (A) party's own admission, Goins v. Commonwealth, 251 Va. 442, 470 S.E.2d 114 (1996); Tyree v. Lariew, 208 Va. 382, 158 S.E.2d 140 (1967); McCarter v. Commonwealth, 38 Va. App. 502, 566 S.E.2d 868 (2002); subpart (B)Adoptive admissions, Prince v. Commonwealth, 228 Va. 610, 324 S.E.2d 660 (1985); Clemmer v. Commonwealth, 208 Va. 661, 159 S.E.2d 664 (1968); subpart (C) admission by personal representative, Gaines v. Alexander, 48 Va. (7 Gratt.) 257 (1851), or designated speaking agent. Although an agent employed for the purpose of making a statement may qualify under subdivision (C), very few employees are hired to be speaking agents. Subpart (D) reflects Virginia case authority admitting the statements of employees and other “non-speaking agents” only on matters within the sphere of their responsibilities and during the term of their

employment. *Turner v. Norfolk S. Ry.*, 205 Va. 691, 139 S.E.2d 68 (1964); *Barr v. S.W. Rodgers Co.*, 34 Va. App. 50, 537 S.E.2d 620 (2000).

Excluded are “admissions of an agent made after the completion of the transaction in which he was engaged.” *Bankers Fire Ins. Co. v. Henderson*, 196 Va. 195, 83 S.E.2d 424 (1954). The general rule is that a railway company is not bound by the “declarations or admissions of any of its servants beyond the immediate sphere of their agency, and during the transaction of the business in which they are employed.” *Blue Ridge Light & Power Co. v. Price*, 108 Va. 652, 655, 62 S.E. 938, 939 (1908). Subpart (E) statements of co-conspirators are admitted under Virginia case law. *Anderson v. Commonwealth*, 215 Va. 21, 205 S.E.2d 393 (1974); *Berger v. Commonwealth*, 217 Va. 332, 228 S.E.2d 559 (1976); *Floyd v. Commonwealth*, 219 Va. 575, 249 S.E.2d 171 (1978). The confrontation clause operates as a restriction on admissibility of co-defendant and co-conspirator statements. See generally *Crawford v. Washington*, 541 U.S. 36 (2004)(Clause bars use of “testimonial statements” unless the declarant is unavailable and the opponent had the opportunity to cross-examine the statement previously); *Lilly v. Commonwealth*, 258 Va. 548, 523 S.E.2d 208 (1999); *Dearing v. Commonwealth*, 259 Va. 117, 524 S.E.2d 121 (2000); *Bass v. Commonwealth*, 31 Va. App. 373, 523 S.E.2d 534 (2000). The requirement for independent evidence of the existence of the conspiracy has been recognized in Virginia. *Donahue v. Commonwealth*, 225 Va. 145, 300 S.E.2d 768 (1983). This rule is subject to Code § 8.01-418, which allows pleas of guilty or nolo contendere to be admitted as evidence in certain civil actions. Cf. *Santen v. Tuthill*, 265 Va. 492, 578 S.E.2d 788 (2003) (general district court guilty plea not available for impeachment after appeal to circuit court). See generally *Gray v. Rhoads*, 268 Va. 81, 597 S.E.2d 93 (2004) (applicability of Code § 8.01-404, use of prior statements as admissions).

Note that Code §§8.01-52.1 and 8.01-581.20:1, enacted in 2005, control the admissibility of expressions of sympathy in certain medical malpractice and wrongful death contexts.

Exception (1). Virginia recognizes a “present sense impression” exception applicable when the statement is made contemporaneously with the events to which it relates. See generally *Donahue v. Commonwealth*, 225 Va. 145, 300 S.E.2d 768 (1983) (recognizing the exception); *Clark v. Commonwealth*, 14 Va. App. 1068, 421 S.E.2d 28 (1992) (applying the exception). The exception is a successor to the traditional “res gestae” rule which applies to statements explaining an act when made by or to a person whose action is relevant to the issue. *Scott v. Shelor*, 69 Va. (28 Gratt.) 891 (1877). The substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation. See generally *Wilder v. Commonwealth*, 55 Va. App. 579, 687 S.E.2d 542 (2010)(statements in 911 call were sufficiently contemporaneous, explanatory and spontaneous to qualify for admission under this hearsay exception, but excludable if Sixth Amendment Confrontation Clause standards are not satisfied).

Exception (2). A statement comes within the excited utterance exception to the hearsay rule, and is admissible to prove the truth of the matter stated, when the statement is spontaneous and impulsive, prompted by a startling event, and is made at such time and under such circumstances as to preclude the presumption that it was made as the result of deliberation. *Goins v. Commonwealth*, 251 Va. 442, 470 S.E.2d

114 (1996); *Braxton v. Commonwealth*, 26 Va. App. 176, 493 S.E.2d 688 (1997). In addition, the declarant must have firsthand knowledge of the startling event. *Goins*, 251 Va. at 460, 407 S.E.2d at 126. The decision whether the statement qualifies as an excited utterance lies within the discretion of the trial court. *Clark*, 235 Va. at 292, 367 S.E.2d at 486. Admissible excited utterances may either describe an event or relate to it, and must be made at any time during the duration of the condition of excitement. *Doe v. Thomas*, 227 Va. 466, 318 S.E.2d 382 (1984); *Goins v. Commonwealth*, 218 Va. 285, 237 S.E.2d 136 (1977); *Esser v. Commonwealth*, 38 Va. App. 520, 566 S.E.2d 876 (2002) (startling event need not be the crime itself).

Exception (3) summarizes Virginia law with respect to existing mental conditions, *Jones v. Commonwealth*, 217 Va. 226, 228 S.E.2d 124 (1976), and physical conditions, *O'Boyle v. Commonwealth*, 100 Va. 785, 40 S.E. 121 (1901). The provision dealing with statements of “memory” relating to wills recognizes that statements limited to the creation, revocation, or identification of a will are often important because of the unavailability of the testator. Virginia case law admits declarations of the testator, not made contemporaneously with execution of the will, to show “his feelings,” “his mental condition,” and his “testamentary capacity,” but does not admit the testator's statements to “establish the substantive fact of undue influence.” *Core v. Core*, 139 Va. 1, 7, 124 S.E. 453, 454-55 (1924); *Savage v. Nute*, 180 Va. 394, 23 S.E.2d 133 (1942). Declarations offered to show state of mind must relate to a mental state that is relevant to the litigation. *Clay v. Commonwealth*, 262 Va. 253, 546 S.E.2d 728 (2001); *Pavlick v. Commonwealth*, 27 Va. App. 219, 497 S.E.2d 920 (1998). *See also* *Elliot v. Commonwealth*, 30 Va. App. 430, 517 S.E.2d 271 (1999); *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 196, 361 S.E.2d 436, 441 (1987). On the issue of the victim's state of mind in a criminal case, see *Clay v. Commonwealth*, 262 Va. 253, 546 S.E.2d 728 (2001); *Hodges v. Commonwealth*, 45 Va. App. 735, 613 S.E.2d 834 (2005).

Statements of Intention to Act. The Court of Appeals has applied the traditional doctrine of *New York Life Ins. v. Hillmon*, 145 U.S. 285 (1892), to statements, including statements of crime victims, concerning their intention to act in a particular way. The court treats these statements as some evidence of the declarant's future conduct. *See Hodges v. Commonwealth*, 45 Va. App. 735, 613 S.E.2d 834 (2005).

Exception (4). Virginia case law admits in evidence a patient's statements concerning past pain, suffering and subjective symptoms for the purpose of establishing “the basis of the physician's opinion as to the nature of the injuries or illness.” *Cartera v. Commonwealth*, 219 Va. 516, 248 S.E.2d 784 (1978). *See Jenkins v. Commonwealth*, 254 Va. 333, 492 S.E.2d 131 (1997).

Exception (5) states the common law exception that is well established. *See Ashley v. Commonwealth*, 220 Va. 705, 261 S.E.2d 323 (1980) (“that familiar exception to the hearsay rule”). The application of this exception was summarized in *Scott v. Greater Richmond Transit Co.*, 241 Va. 300, 402 S.E.2d 214 (1991). *See also* *Abney v. Commonwealth*, 51 Va. App. 337, 657 S.E.2d 796 (2008); *Scearce v. Commonwealth*, 38 Va. App. 98, 561 S.E.2d 777 (2002) (“the memorandum of past recollection recorded need not be made by the witness whose memory is at issue. . . . It is sufficient if the memorandum was made by someone else but has been examined by the witness and is known by him to be correct.” However, the witness must have

“clear and accurate” memory at the time). Concerning use of police accident reports, see *Acuar v. Letourneau*, 260 Va. 180, 531 S.E.2d 316 (2000).

Exception (6) embodies the modern business records exception recognized in Virginia. *Kettler & Scott, Inc. v. Earth Tech. Cos.*, 248 Va. 450, 449 S.E.2d 782 (1994). *Accord Marefield Meadows, Inc. v. Lorenz*, 245 Va. 255, 264, 427 S.E.2d 363, 368 (1993); *Ford Motor Co. v. Phelps*, 239 Va. 272, 389 S.E.2d 454 (1990); *Ashley v. Commonwealth*, 220 Va. 705, 707-08, 261 S.E.2d 323, 324-25 (1980). Virginia recognizes both the “shopbook rule,” *Buchanan v. Higginbotham*, 123 Va. 662, 97 S.E. 340 (1918), and the traditional business records exception, *French v. Virginian Ry.*, 121 Va. 383, 93 S.E. 585 (1917). Virginia case law admits facts or events contained within the business record, but not otherwise inadmissible opinions or conclusions expressed therein. *Neeley v. Johnson*, 215 Va. 565, 211 S.E.2d 100 (1975); *Boone v. Commonwealth*, 213 Va. 695, 194 S.E.2d 689 (1973). On computer records, see *McDowell v. Commonwealth*, 273 Va. 431, 641 S.E.2d 507 (2007) (inventory prepared using computer records on the day of a shoplifting crime); *Lee v. Commonwealth*, 28 Va. App. 571, 507 S.E.2d 629 (1998). Several modern cases hold that practical necessity creates substitutes for the personal knowledge of the recorder of the information. See *Joyce v. Commonwealth*, 56 Va. App. 557, 695 S.E.2d 555 (2010). On medical records see *Smith v. Commonwealth*, 280 Va. 178, 694 S.E.2d 578 (2010)(contemporaneous treatment records of sexual offender admissible as business records). The exception in Virginia covers records generated by the enterprise, but not items merely received by it. *Frank Shop, Inc. v. Crown Cent. Petroleum Corp.*, 261 Va. 169, 540 S.E.2d 897 (2001). See *Ford Motor Co v. Phelps*, 239 Va. at 276, 389 S.E.2d at 457. But see *1924 Leonard Road, L.L.C. v. Van Roekel*, 272 Va. 543, 636 S.E.2d 378 (2006) (communications received by real estate investor from bank, used by him in running his business, as his business records). Note that in *Frank Shop* and *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267 (1986), the exception was applied to documents in government offices. See generally *Cooper v. Commonwealth*, 54 Va.App. 558, 680 S.E.2d 361 (2009) (business and government records aspects of "NCIC" reports). See also exception (8); *McDonald v. National Enters.*, 262 Va. 184, 547 S.E.2d 204 (2001) (operative legal documents). On the issue of contemporaneous creation of the record, see *Jones v. Commonwealth*, 38 Va. App. 231, 563 S.E.2d 364 (2002). See *Stevens v. Commonwealth*, 44 Va. App. 122, 603 S.E.2d 642 (2004)(emergency room toxicology report received as business record) On the issue whether unavailability of the entrant of a business record must be shown as part of the foundation for admission under this exception, see *Riner v. Commonwealth*, 268 Va. 296, 327 n.14, 601 S.E.2d 555, 573 n. 14 (2004); *Parker v. Commonwealth*, 41 Va. App. 643, 587 S.E.2d 749 (2003). On Intoxilizer breath alcohol content test results as business records, see *Wimbish v. Commonwealth*, 51 Va. App. 474, 658 S.E.2d 715 (2008). Entries made without authority or contrary to an employer's instructions are not within the exception. *Simpson v. Commonwealth*, 227 Va. 557, 318 S.E.2d 386 (1984).

Exception (8). Code §§ 8.01-389 and 8.01-390 are among the most regularly used Virginia statutes providing for admission of government records. The Virginia Supreme Court has recognized the traditional public records exception but noted: “[T]he mere fact that a record or report qualifies as a public document does not

automatically overcome the hearsay objection unless the document relates facts or events within the personal knowledge and observation of the recording official to which he could testify should he be called as a witness.” *Williams v. Commonwealth*, 213 Va. 45, 189 S.E.2d 378 (1972); see also *Bond v. Commonwealth*, 226 Va. 534, 311 S.E.2d 769 (1984) (interpreting Code § 19.2-188 to admit facts but exclude opinions in reports filed by the Chief Medical Examiner); *Taylor v. Commonwealth*, 28 Va. App. 1, 502 S.E.2d 113 (1998). But as to use of these items at a preliminary hearing see the 2009 amendment adding Va. Code §19.2-188(B). The exception in Virginia covers records generated by the governmental office, but not items merely received by it. *Frank Shop, Inc. v. Crown Cent. Petroleum Corp.*, 261 Va. 169, 540 S.E.2d 897 (2001); *Decipher, Inc. v. iTRiBE, Inc.*, 262 Va. 588, 553 S.E.2d 718 (2001).

Accident reports are inadmissible. See generally *Acuar v. Letourneau*, 260 Va. 180, 531 S.E.2d 316 (2000). See also Code § 46.2-378.

In criminal cases, Rule 2:803(8)(B) indicates that matters observed by law enforcement personnel are excluded when offered by any branch of government. The exclusion avoids obvious confrontation clause problems. On the treatment of law enforcement breath alcohol content test results as business records, see *Wimbish v. Commonwealth*, 51 Va. App. 474, 658 S.E.2d 715 (2008).

Exception (9) (Records of vital statistics) covers records which may not qualify under exception (8) or under Code § 32.1-272.

Exception (10) Code § 8.01-390(B) sets forth this hearsay exception. for civil cases. Code § 19.2-188.3 sets forth the scope of this exception in criminal proceeding and is the source of this part of the Rule.

Exceptions (11), (12), and (13). The general pedigree exception is set forth in Rule 2:804, and unavailability of the declarant must be shown. However, the strict requirements applied to informal pedigree evidence have not been applied to the types of records addressed in exceptions 11, 12, and 13. In *Union Central Life Ins. Co. v. Pollard*, 94 Va. 146, 155, 26 S.E. 421, 423 (1896), the court stated: “The admissibility of an entry in a family Bible does not depend upon the handwriting or authorship of the entry, but upon the fact that it is in the family Bible. It is of the nature of a record, and, being produced from the proper custody, is itself evidence.” Similarly, the official records of a religious organization are admissible unless shown to be untrustworthy.

Exception (14). The contents of these documents are admissible under Code § 8.01-389. Since the document would not have been recorded unless there had been a showing of execution and delivery, it is proof of such facts.

Exception (15). Statements in the document, or that accompany it and characterize the possession of property, are admissible. An example is *Pocahontas Fuel Co. v. Dillion*, 161 Va. 301, 170 S.E. 616 (1933), where the court treated such statements as part of the *res gestae*. See also Code § 8.01-389.

Exception (16) sets forth the common law ancient documents rule. Virginia recognizes the ancient documents rule as it applies to proof of authenticity and use on the merits. *Keppler v. City of Richmond*, 124 Va. 592, 98 S.E. 747 (1919) (recognized the exception). Cf. *Robinson v. Peterson*, 200 Va. 186, 190-91, 104 S.E.2d 788, 791 (1958) (*dicta*).

Exception (17). Code § 8.2-724 provides this exception. See generally the advisory commentary in the Code of Virginia for this section of the U.C.C.

Exception (18). See Rule 2:707, where the learned treatise provision is set forth.

Exception (19) admits reputation as distinct from specific declarations in deeds, which are covered by exceptions 14 and 15. Virginia case law recognizes this exception. See *Bradshaw v. Booth*, 129 Va. 19, 38, 105 S.E. 555, 562 (1921); *Keppler v. City of Richmond*, 124 Va. 592, 606, 98 S.E. 747, 753 (1919).

Exception (20) recognizes the traditional acceptance of reputation evidence as a means of proving character. *Mitchell v. Commonwealth*, 141 Va. 541, 127 S.E. 368 (1925). This exception deals only with the hearsay aspect of character evidence. Other principles of evidence (see, e.g., Rules 404, 405, 608, and 609) address the permissible uses of character evidence. Reputation as to "unchaste" character of a witness is inadmissible under Rule 2:412 and the Rape Shield statute.

Exception (21) follows traditional Virginia law.

Exception (22) states the exception as recognized in Virginia law. *Martin v. Commonwealth*, 210 Va. 686, 173 S.E.2d 794 (1970); *Niblett v. Commonwealth*, 217 Va. 76, 225 S.E.2d 391 (1976). The hearsay exception does not alter the Sixth Amendment or due process requirements for pretrial identifications in criminal cases. See generally *Kirby v. Illinois*, 406 U.S. 682 (1972); *Manson v. Brathwaite*, 432 U.S. 98 (1977).

Exception (23). Code § 19.2-268.2 sets forth this hearsay exception. See *Jenkins v. Commonwealth*, 254 Va. 333, 492 S.E.2d 131 (1997); *Mitchell v. Commonwealth*, 25 Va. App. 81, 486 S.E.2d 551 (1997). On the promptness requirement, see *Castelow v. Commonwealth*, 29 Va. App. 305, 512 S.E.2d 137 (1999). See generally *Brown v. Commonwealth*, 37 Va. App. 169, 554 S.E.2d 711 (2001) (two-year delay in reporting the incident was within the rule under the particular circumstances presented).

Exception (24). This exception was recognized by the Supreme Court in *Robinson v. Commonwealth*, 258 Va. 3, 516 S.E.2d 475 (1999). The Court also noted in that case that a defendant could rely on evidence of reduced or sale prices as evidence of value as well. See also *McDowell v. Commonwealth*, 273 Va. 431, 641 S.E.2d 507 (2007) (inventory prepared using computer records on the day of a shoplifting crime).

Rule 2:804 HEARSAY EXCEPTIONS APPLICABLE WHERE THE DECLARANT IS UNAVAILABLE

Source Note

This section defines hearsay exceptions recognized in Virginia today that are conditioned upon a showing that the declarant is unavailable.

Subdivision (a) sets forth a general requirement of unavailability that applies to all the exceptions in Rule 804(b). Other than the obvious example that a dead declarant cannot be called to testify at the trial, the Rule does not attempt to define all of the circumstances that may be found to establish unavailability. See, e.g., *Morris v. Commonwealth*, 229 Va. 145, 326 S.E.2d 693 (1985); see generally *McDonnough v. Commonwealth*, 25 Va. App. 120, 486 S.E.2d 570 (1997). It must be shown that a missing witness was sought "diligently" before unavailability will be determined. See

Ayala v. Aggressive Towing & Transp., Inc., 276 Va. 169, 661 S.E.2d 480 (2008); Harris v. Commonwealth, 52 Va. App. 735, 667 S.E.2d 809 (2008); Morgan v. Commonwealth, 50 Va. App. 369, 650 S.E.2d 541 (2007); Bennett v. Commonwealth, 33 Va. App. 335, 533 S.E.2d 22 (2000). The law is firmly established in Virginia that a declarant is unavailable if the declarant invokes the Fifth Amendment privilege to remain silent. Paden v. Commonwealth, 259 Va. 595, 529 S.E.2d 792 (2000); Newberry v. Commonwealth, 191 Va. 445, 462, 61 S.E.2d 318, 326 (1950). *See also* Nowlin v. Commonwealth, 40 Va. App. 327, 579 S.E.2d 367 (2003) (valid claim of spousal privilege as unavailability). Other grounds lack extensive case law, but examples include declarants who are missing, or who are known to reside out-of-state. In general, before admitting hearsay under these principles, the court must be satisfied “that a sufficient reason is shown why the original witness is not produced.” Gray v. Graham, 231 Va. 1, 5, 341 S.E.2d 153, 155 (1986) (quoting Director General of Railroads v. Gordon, 134 Va. 381, 390, 114 S.E. 668, 670 (1922)). The proponent of the evidence under these exceptions generally bears the burden of satisfying the court that the declarant is unavailable. The Court of Appeals in Jones v. Commonwealth, 22 Va. App. 46, 51, 467 S.E.2d 841, 844 (1996) (lack of memory as unavailability), has adopted the following list of possible grounds to demonstrate unavailability:

- (1) The declarant is dead.
- (2) The declarant is too ill to testify.
- (3) The declarant is insane.
- (4) The declarant is absent from the state and the party is unable to obtain the declarant's deposition.
- (5) The party has been unable by diligent inquiry to locate the declarant.
- (6) The declarant cannot be compelled to testify.
- (7) The opposite party has caused the declarant's absence.

Upon persistent refusal to testify after judicial pressure and an order to testify, or demonstrated bona fide lack of memory, the testimony of a witness may be declared unavailable. Sapp v. Commonwealth, 263 Va. 415, 559 S.E.2d 645 (2002). Finally, note that the Supreme Court held in Smith v. Givens, 223 Va. 455, 290 S.E.2d 844 (1982), that failure to take a deposition of a witness living in Indiana meant that she was not shown to have been “unavailable” for purposes of the hearsay exception for pedigree statements. This list is not exclusive, and other grounds, such as lack of recollection, have been held sufficient to demonstrate unavailability. See Jones v. Commonwealth, 22 Va. App. at 51, 467 S.E.2d at 844 (“A witness' 'unavailability' is established if the court is satisfied that `a sufficient reason is shown why the original witness is not produced.'”). Cf. Sapp, 263 Va. 415, 559 S.E.2d 645 (discussion of fear and lack of memory as grounds for unavailability).

Exception (b)(1) states Virginia law as it presently exists. Sapp, 263 Va. 415, 559 S.E.2d 645; Longshore v. Commonwealth, 260 Va. 3, 530 S.E.2d 146 (2000); Gray v. Graham, 231 Va. 1, 341 S.E.2d 153 (1986); Director General of Railroads v. Gordon, 134 Va. 381, 114 S.E. 668 (1922). Former testimony meeting the requirements noted in this Rule is admissible, whether given a civil or criminal proceeding. Gray, 231 Va. at 5 n.3, 341 S.E.2d at 155 n.3. The former testimony must be accurately and reliably reported. See Saunders v. Commonwealth, 38 Va. App. 192, 562 S.E.2d 367 (2002) (report of preliminary hearing testimony using an interpreter); see also Code § 19.2-165. In accord with existing law, in a civil case the evidence may be used against a person who participated in the prior proceeding personally or through a privy. In this context, the terms “privy” and “privity” are not limited to their meaning in the field of

property law. *Gray*, 231 Va. at 6, 341 S.E.2d at 156. In *Nero v. Ferris*, 222 Va. 807, 284 S.E.2d 828 (1981), the court noted that “[w]hile privity generally involves a party so identical in interest with another that he represents the same legal right, a determination of just who are privies requires a careful examination into the circumstances of each case.” *Id.* at 813, 284 S.E.2d at 831. Virginia cases such as *Fisher v. Commonwealth*, 217 Va. 808, 232 S.E.2d 798 (1977), and *Director General of Railroads v. Gordon*, 134 Va. 381, 114 S.E. 668 (1922), speak of “substantial identity of parties,” which has meant that not all parties must be the same, so long as the party against whom the testimony would be used in the later proceeding was a participant in the earlier one. Virginia case law also follows the common law approach which requires “substantial identity of issues” at the former proceeding and the current trial. *Shifflett v. Commonwealth*, 218 Va. 25, 235 S.E.2d 316 (1977); *Fisher v. Commonwealth*, 217 Va. 808, 232 S.E.2d 798 (1977). The “substantially the same” test does not require that “all the issues (any more than all the parties) in the two proceedings must be the same, but at most that the issue on which the testimony was offered in the first suit must be the same as the issue upon which it is offered in the second.” *Gray*, 231 Va. at 6, 341 S.E.2d at 156; see also Rule 4:7; *Longshore v. Commonwealth*, 260 Va. 3, 530 S.E.2d 146 (2000) (cross-examination by former counsel sufficient); *Saunders v. Commonwealth*, 38 Va. App. 192, 562 S.E.2d 367 (2002). The Confrontation Clause operates as a restriction on admissibility of co-defendant and co-conspirator statements. See *Lilly v. Commonwealth*, 258 Va. 548, 523 S.E.2d 208 (1999); *Dearing v. Commonwealth*, 259 Va. 117, 524 S.E.2d 121 (2000); *Bass v. Commonwealth*, 31 Va. App. 373, 523 S.E.2d 534 (2000); *Cairns v. Commonwealth*, 35 Va. App. 1, 542 S.E.2d 771 (2001). See *Morgan v. Commonwealth*, 50 Va. App. 369, 650 S.E.2d 541 (2007)(opportunity for prior cross-examination).

Exception (b)(2) applies Virginia law in limiting the dying declarations exception to homicide prosecutions and, thus, effectively requires that the declarant die as a result of the injuries inflicted. See *Batten v. Commonwealth*, 190 Va. 235, 56 S.E.2d 231 (1949). The cases require a statement made by the person injured, addressing the cause of his death, while actually in extremis, and conscious that he is so, under a sense of impending death, and without any expectation or hope of recovery. See *id.*; *Satterwhite v. Commonwealth*, 56 Va. App. 557, 695 S.E.2d 555 (2010); *Bowling v. Commonwealth*, 12 Va. App. 166, 403 S.E.2d 375 (1991); see also *Compton v. Commonwealth*, 161 Va. 980, 985, 170 S.E. 613, 615 (1933) (“Mere belief in the possibility, or even the probability, of death is not sufficient; there must be a certainty of it eventually.”). *Taylor v. Commonwealth*, 33 Va. App. 515, 534 S.E.2d 373 (2000). See Code § 8.01-397, noted in Rule 2:804(6).

Exception (b)(3) reflects existing Virginia cases. See *Chandler v. Commonwealth*, 249 Va. 270, 455 S.E.2d 219 (1995); *Lilly v. Commonwealth*, 255 Va. 558, 499 S.E.2d 522 (1998), reversed on Confrontation Clause grounds, 527 U.S. 116 (1999); *Schmitt v. Commonwealth*, 262 Va. 127, 547 S.E.2d 186 (2001); *Ellison v. Commonwealth*, 219 Va. 404, 408, 247 S.E.2d 685, 688 (1978). See generally *Nowlin v. Commonwealth*, 40 Va. App. 327, 579 S.E.2d 367 (2003); *Tice v. Commonwealth*, 38 Va. App. 332, 563 S.E.2d 412 (2002); *Cairns v. Commonwealth*, 35 Va. App. 1, 542 S.E.2d 771 (2001); *Cooper v. Commonwealth*, 26 Va. App. 537, 496 S.E.2d 77

(1998); *Atlantic Coast Line R.R. v. Bowen*, 192 Va. 162, 63 S.E.2d 804 (1951). Where the statement exposes the declarant to criminal liability, case law expressly requires that reliability of the declaration against interest be shown. The finding of reliability is in the discretion of the trial judge considering all the circumstances. In the case of a confession by a third-party to a crime for which the defendant is charged, the determination “turns upon whether, in the words of *Hines v. Commonwealth*, 136 Va. 728, 748, 117 S.E. 843, 849 (1923), the case is one where `there is anything substantial other than the bare confession to connect the declarant with the crime.’” *Morris v. Commonwealth*, 229 Va. 145, 326 S.E.2d 693 (1985). Cases such as *Eppes v. Eppes*, 169 Va. 778, 195 S.E. 694 (1938) and *Pelletier v. Commonwealth*, 42 Va. App. 406, 592 S.E.2d 382 (2004), speak of the declarant's subjective awareness that the statement is against interest, though of course objective evidence is often used as a basis for inferring the declarant's subjective state of mind. A similar test for reliability could be applied under Rule 2:403 to statements exposing a declarant to civil liability or pecuniary loss. On the Confrontation Clause implications of prior statements and former testimony, see generally *Crawford v. Washington*, 541 U.S. 36 (2004). Evidentiary use of guilty pleas and admissions of a non-party are measured by the declarations against interest doctrine set forth in this section of the Guide. However, the evidentiary use in later civil proceedings of a party's own admissions in connection with a guilty plea to related criminal charges is governed by statute and rule. See Code § 8.01-418 (“Whenever, in any civil action, it is contended that any party thereto pled guilty or nolo contendere . . . in a prosecution for a criminal offense . . . which arose out of the same occurrence upon which the civil action is based, evidence of said plea . . . shall be admissible.” Rule 3A:8(c)(5) renders inadmissible certain withdrawn pleas but does not address the use of pleas that have not been withdrawn, or the use of pleas as evidence against a person other than the defendant who enters the plea. See generally *Ayala v. Aggressive Towing & Transp., Inc.*, 276 Va. 169, 661 S.E.2d 480 (2008).

Exception (b)(4) covers statements of personal and family history, commonly understood to cover family relationships and “pedigree” information. See *Marks v. Sanzo*, 231 Va. 350, 345 S.E.2d 263 (1986). Virginia case law has long recognized a statement of personal and family history exception. This exception requires that the declarant be unavailable, which is noted in several cases. Virginia case law also requires that “no better evidence can be obtained.” *Smith v. Givens*, 223 Va. 455, 290 S.E.2d 844 (1982) (paternity statements of deceased father inadmissible because the direct testimony of the mother was available). Some hearsay declarations of paternity are excluded by statute. E.g., Code §§ 64.1-5.1, -5.2. These statutes are not disturbed by the exception.

Exception (b)(5) invokes the statutory provisions of Code § 8.01-397. See generally *Williams v. Condit*, 265 Va. 49, 574 S.E.2d 241 (2003) (application of the corroboration requirement); *Diehl v. Butts*, 255 Va. 482, 499 S.E.2d 833 (1998) (heightened corroboration required in fiduciary relationships); *Bowman v. Commonwealth*, 28 Va. App. 204, 503 S.E.2d 241 (1998) (rule inapplicable where decedent is not party). The statute must be read in light of case law. See *Economopoulos v. Kolaitis*, 259 Va. 806, 528 S.E.2d 714 (2000); *Rice v. Charles*, 260

Va. 157, 532 S.E.2d 318 (2000); Johnson v. Raviotta, 264 Va. 27, 563 S.E.2d 727 (2002).

Rule 2:805 HEARSAY WITHIN HEARSAY

Source Note

The Rule embodies existing Virginia law.

The common law principle is that hearsay within hearsay is admissible if each statement conforms to the requirements of a hearsay exception. For example, in Eckhart v. Commonwealth, 222 Va. 213, 279 S.E.2d 155 (1981), the Supreme Court analyzed the trial court's ruling on multiple hearsay by separately considering each individual instance of alleged hearsay. The court found that each statement was non-hearsay and admissible. Virginia's government records exception is another example where the content of the record must be otherwise admissible, such that inadmissible portions of a record would not be received. Precisely the same approach is required under Rule 2:805. If one statement is contained within another, each statement must be admissible as non-hearsay or under an exception in order for the combination to be admitted.

The Supreme Court has held that where there are multiple layers of hearsay involved in proffered evidence the opponent must remind the court to rule on the admissibility of all levels of the multiple hearsay; thus, where a trial court ruled one iteration of a statement to be admissible it was the objector's burden to demand a ruling on the second layer or level of hearsay involved in the form of testimony as offered at trial. Failure to object and force a ruling waives the issue for appeal. See Riner v. Commonwealth, 268 Va. 296, 601 S.E.2d 555 (2004).

Rule 2:806 ATTACKING AND SUPPORTING CREDIBILITY OF HEARSAY DECLARANT

Source Note

Virginia, like the vast majority of American jurisdictions, recognizes that when the testimony of a witness is offered concerning an extrajudicial statement, the credibility of the declarant of that statement becomes crucial. Claud v. Commonwealth, 217 Va. 794, 796-97, 232 S.E.2d 790, 792 (1977). This Rule sets forth the holding in Virginia that when a hearsay statement has been admitted into evidence, "the credibility of the declarant may be attacked by any evidence which would be admissible for those purposes if the declarant had testified as a witness." Luck v. Commonwealth, 30 Va. App. 36, 515 S.E.2d 325 (1999).

Logically, implementation of these principles means that the normal requirement that the declarant have been afforded an opportunity to deny or explain the statement is inapplicable. Also, if the party against whom the hearsay statement has been admitted calls the declarant as a witness, under traditional Virginia practice the party is entitled to examine the declarant on the statement as if under cross-examination. No Virginia case has yet addressed the points in this context.

Rule 2:901 REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

Source Note

Virginia courts recognize that there are many ways to lay a foundation for the introduction of evidence. The important thing is that the trier of fact has a basis for accepting the proponent's representations about that evidence. *Foulkes v. Commonwealth*, 41 Va. (2 Rob.) 836 (1843) (non-author could authenticate document). Some common examples are:

Testimony of a witness with knowledge. Testimony of a witness with knowledge that a matter is what it is claimed to be is sufficient to satisfy this requirement. *Blair v. Commonwealth*, 225 Va. 483, 491, 303 S.E.2d 881, 887 (1983). This testimony can cover a wide range of topics such as the authenticity of a document that a witness actually saw being executed, the identification of a weapon as the one the witness found beside the body, or the identification of photographs, including ones taken by someone else, as fairly and accurately depicting an accident scene familiar to the witness. In *State Farm Mut. Auto. Ins. Co. v. Futrell*, 209 Va. 266, 163 S.E.2d 181 (1968), a state trooper who had been at the scene of an accident laid the foundation for the introduction of a photograph that had been published in a newspaper by testifying that it "actually portrayed the conditions as he recalled them." In *Adams v. Ristine*, 138 Va. 273, 288, 122 S.E. 126, 129 (1924), the court allowed testimony from a woman who was familiar with the handwriting of two men, saying: "it was competent to prove their genuineness by any witness who knew the fact." It also allowed a handwriting expert to testify based on several photographs. "The witness made the photographs himself and testified to their correctness." *Id.* at 294, 122 S.E. at 132-33.

The testimony of more than one witness may be necessary to establish a foundation, for example, that an object seized during an arrest is the same one being offered in evidence or was delivered to a chemist, tested, and determined to be a controlled substance. The object has not been authenticated until the required showing has been satisfied. If, for example, the item seized was one not subject to easy alteration, a person who saw it being seized might adequately authenticate it at trial without accounting for its whereabouts in the intervening weeks, months, or years. See *Whaley v. Commonwealth*, 214 Va. 353, 356-58, 200 S.E.2d 556, 558-60 (1973). Fungible commodities and those whose illegality must be determined scientifically, such as drugs, will require a more careful authentication from seizure to testing to introduction.

Expert testimony and comparisons by trier of fact. Comparison by the trier of fact of disputed writings with a genuine writing without the aid of expert testimony was first approved as a method of authentication in *Keister v. Philips*, 124 Va. 585, 98 S.E. 674 (1919), and that conclusion was assumed in *Adams v. Ristine*, 138 Va. 273, 287, 122 S.E. 126, 128 (1924), where the use of expert comparisons is also acknowledged.

Distinctive characteristics and the like. Of course, appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances, can be sufficient to authenticate. See *Whaley v. Commonwealth*, 214 Va. at 356-58, 200 S.E.2d at 558-59 (1973) (bloodstained shorts); *Bloom v. Commonwealth*, 34 Va. App. 364, 542 S.E.2d 18 (2001) (content of e-mail

communications establishing identity; circumstantial evidence and the "reply doctrine").

Ancient writings. Traditionally, an ancient document was authenticated by evidence that it (i) was in such condition as not to raise suspicions concerning its authenticity, (ii) was in a place where, if authentic, it would likely be, and (iii) had been in existence for 30 years. *Caruthers v. Eldridge*, 53 Va. (12 Gratt.) 670 (1855); *Wells v. New York Mining & Mfg.*, 137 Va. 460, 119 S.E. 127 (1923).

Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result is sufficient to satisfy this requirement. In *Ferguson v. Commonwealth*, 212 Va. 745, 747, 187 S.E.2d 189, 191 (1972), the court approved the introduction of a photograph taken by a Regiscope. No one could testify from personal knowledge that the photograph accurately depicted the man who passed the bad check. The store manager and a representative of the company that provided the Regiscope were able to describe the process sufficiently "to provide an adequate foundation assuring the accuracy of the process producing it." *Id.* at 747, 187 S.E.2d at 191. *Wilson v. Commonwealth*, 29 Va. App. 236, 511 S.E.2d 426 (1999) (video tapes); *Sabo v. Commonwealth*, 38 Va. App. 63, 561 S.E.2d 761 (2002) (audio recordings). *See also Meade v. Belcher*, 212 Va. 796, 188 S.E.2d 211 (1972) (discusses the admissibility of x-rays). *See generally Lee v. Commonwealth*, 28 Va. App. 571, 507 S.E.2d 629 (1998).

Chain of Custody. *See Hargrove v. Commonwealth*, 53 Va. App. 545, 673 S.E.2d 896 (2009); *Harris v. Commonwealth*, 261 Va. 185, 541 S.E.2d 547 (2001) (prima facie showing identifying apparent agents); *Vinson v. Commonwealth*, 258 Va. 459, 522 S.E.2d 170 (2000) (assurance that it's the same sample in the same condition is enough); *Washington v. Commonwealth*, 228 Va. 535, 323 S.E.2d 577 (1984) (reasonable certainty test); *Jeter v. Commonwealth*, 44 Va. App. 733, 607 S.E.2d 734 (2005) ("the purpose of the chain of custody rule is to establish that evidence obtained by the police is the same evidence tested"); Code § 19.2-187.01. *See also Herndon v. Commonwealth*, 280 Va. 138, 694 S.E.2d 618 (2010) (chain of custody involving drugs and certificates of analysis). The showing of a chain of custody is generally only required after the items have come to the attention of the police. *See Reedy v. Commonwealth*, 9 Va. App. 386, 388 S.E.2d 650 (1990).

Internet Communications. On the foundation for communications over the Internet, including identification of persons communicating under pseudonyms, see *Bloom v. Commonwealth*, 262 Va. 814, 554 S.E.2d 84 (2001) (identification of communicator under the preponderance of evidence standard was sufficiently supported by factual details and demonstrated knowledge of prior communications, brought to the trial court by direct and circumstantial evidence as well as avowal of counsel).

Digital Images. A proper foundation is laid for admission of electronic files containing digital images or motion pictures by testimony of the technician who copied the materials – without change – from a party's computer hard drives, and at trial identified the photographs and video clips offered as accurate representations of the digital reproduction she made of the hard drives. *Midkiff v. Commonwealth*, 280 Va. 216, 694 S.E.2d 576 (2010).

Medical bills. Regarding the authentication and admissibility of medical bills, see, e.g., *McMunn v. Tatum*, 237 Va. 558, 556-70, 379 S.E.2d 908, 913-14 (1989).

Other. Statutes may designate the forms of authentication, and case law may address the requirements for specific circumstances. For example, the General Assembly has enacted statutes bearing on treatment of signature requirements in the electronic age. See Code §§ 59.1-487 through 59.1-497, and §§ 2.2-4103; 6.2-1000, 6.2-2014, 8.1A-108, 8.7-103, 55-551.02, and 59.1-501.2, §§ 2.2-2007, 4.1-112.1, 17.1-258.4, 24.2-424, 38.2-1802, and Rule 1:17. A criminal code provision addressing a similar concern is § 18.2-186.3.

Rule 2:902 SELF-AUTHENTICATION

Source Note

The Rule follows existing Virginia law in all respects.

Subdivision (1). A large number of statute provide for admission of public records, including Code § 8.01-389 (judicial records as evidence; full faith and credit; recitals in deeds, deeds of trust, and mortgages; "records defined") and § 8.01-390 (nonjudicial records as evidence). Other statutes authorizing admission of government records upon specified forms of authentication include § 8.01 390.1 (school records as evidence); § 32.1-272 (certified copies of vital records; other copies). See *Taylor v. Commonwealth*, 28 Va. App. 1, 502 S.E.2d 113 (1998) (lack of a date stamp does not invalidate a certificate of analysis). See also *Williams v. Commonwealth*, 35 Va. App. 545, 546 S.E.2d 735 (2001) (hearsay and authentication issues). On the admissibility of government records, see *Frank Shop, Inc. v. Crown Cent. Petroleum Corp.*, 261 Va. 169, 540 S.E.2d 897 (2001).

Subdivision (2). This provision reflects the judicial notice of foreign laws provisions, Code § 8.01-386; the Uniform Recognition of Acknowledgments Act, Code §§ 55-118.1 to -118.9; and the provisions on laws, public records, and copies of original records as evidence, Code §§ 8.01-389 to -395.

Subdivision (3). There are numerous sections in the Virginia Code that provide for presumptive or prima facie genuineness or authenticity. This Rule simply cross-references those sections and makes clear their evidentiary impact. See, e.g., Code §§ 8.01-413 (hospital and doctor records), 2.1-190.1 (checks drawn by the Treasurer of Virginia), 19.2-187.01 (laboratory tests), 19.2-188 (reports of the Chief Medical Examiner), 32.1-272 (vital records).

Subdivision (4). See §8.01-413.01 (authenticity and reasonableness of medical bills; presumption); § 16.1-88.2 (evidence of medical reports or records; testimony of health care provider or custodian of records); §16.1 245.1 (medical evidence admissible in juvenile and domestic relations district court).

Subdivision (5). See §8.01-390.1 (school records); § 8.01-390.2 (reports by Chief Medical Examiner received as evidence); § 8.01-413.02 (admissibility of written reports or records of blood alcohol tests conducted in the regular course of providing emergency medical treatment); §18.2-268.7 (transmission of blood test samples; use as evidence); §18.2-268.9 (breath-test validity; use of test results as evidence); §19.2-70.3 (records concerning electronic communication service or remote computing

service); §19.2-187 (admission into evidence of certain certificates of analysis); §19.2-187.01 (certificate of analysis as evidence of chain of custody of material described therein); §19.2-187.02 (admissibility of written results of blood alcohol tests conducted in the regular course of providing emergency medical treatment); § 19.2-188 (reports by Chief Medical Examiner received as evidence); §19.2-188.2 (certificate of surgeon as evidence); § 20-49.3 (admission of genetic tests); See generally *Stroupe v. Commonwealth*, 215 Va. 243, 207 S.E.2d 894 (1974); *Harris v. Commonwealth*, 261 Va. 185, 541 S.E.2d 547 (2001) (discussing what is necessary for a prima facie showing that the evidence was delivered to an authorized agent of a laboratory). *See also* Code §§ 18.2-268.10, 19.2-187, 46.2-341.26:2, 46.2-341.26:9 (commercial licenses), 46.2-341.26:10, 46.2-882.

Certain other Virginia Code provisions make documents self-proving where they are executed in the manner provided in the Code sections. See, e.g., Code § 64.1-87.1 (self-proving will provisions). *See also* Rule 2:1005.

Rule 2:903 SUBSCRIBING WITNESS TESTIMONY NOT NECESSARY

Source Note

No change in Virginia law is made by this Rule. The Supreme Court held long ago that persons other than the subscribing party can authenticate a document. See *Foulkes v. Commonwealth*, 41 Va. (2 Rob.) 836 (1843). It is of course possible that the substantive law that controls the merits of a trial will require evidence from particular persons, but the evidence rules normally permit many alternative means of proof.

Rule 2:1001 DEFINITIONS

Source Note

Section 1001 is simply a definitional provision. It does not prescribe the effect to be given to the various definitions. Because it is not a provision dictating what evidence should be admitted or excluded, the paragraphs of the Rule begin with numbers rather than the letters that identify the subdivisions of the evidence Rules that deal with the admission and exclusion of evidence. This Rule must be read in conjunction with the remaining Rules of Article X. It is those provisions that address the question whether an original is required and when other evidence may be used.

Virginia cases have accepted as duplicate originals such items as carbon copies, whether made by typewriter, pen, or pencil (see *Chesapeake & O. Ry. v. F. W. Stock & Sons*, 104 Va. 97, 51 S.E. 161 (1905); *Virginia-Carolina Chem. Co. v. Knight*, 106 Va. 674, 56 S.E. 725 (1907)); printed copies (see *Burton v. Frank A. Seifert Plastic Relief Co.*, 108 Va. 338, 61 S.E. 933 (1908)). The legislature has adopted a broad statutory definition of a "writing." See Code § 1-257. In addition, certain copies - e.g., photocopies and printouts made by governmental agencies in the regular course of business - have been made as admissible as an original by statute in Virginia. See Code § 8.01-391.

Photographs, Digital Images and Video Recordings. Photographs, digital images and video recordings are not "writings" within the application of the best evidence Rule in Virginia. *Midkiff v. Commonwealth*, 280 Va. 216, 694 S.E.2d 576 (2010)

(approving admission of "reliable representations" of electronic files found on seized computer hard drives);

Rule 2:1002 REQUIREMENT OF PRODUCTION OF ORIGINAL

Source Note

Rule 2:1002 states the existing law of Virginia, which applies the best evidence rule only where it is the content of the document which is in issue. See, e.g., Butts v. Commonwealth, 145 Va. 800, 133 S.E. 764 (1926). See generally Brown v. Commonwealth, 54 Va. App. 107, 676 S.E.2d 326 (2009) (giving the background on this doctrine and concluding that "in Virginia the best evidence rule applies only to writings") (citing cases).

This doctrine does not prohibit a witness from testifying about actions or events which he or she has observed, as long as the testimony does not include a recitation of the actual language of the document. Thus, oral evidence of a confession by one who heard it is admissible even if the confession was later reduced to writing. *McDaniel v. Commonwealth, 183 Va. 481, 32 S.E.2d 667 (1945)*. Similarly, testimony as to the existence, execution, or delivery of a document does not constitute proof of the content of the document and is therefore not prohibited by this doctrine, as long as the testimony does not extend to a recital or description of the actual wording.

Rule 2:1003 USE OF SUBSTITUTE CHECKS

Source Note

Virginia Code § 8.01-391.1 is implemented in this Rule.

Rule 2:1004 ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

Source Note

This section sets forth the exceptions to the requirement of production of the original, in accord with existing Virginia law.

Subdivision (a). See *Randolph v. Commonwealth, 145 Va. 883, 134 S.E. 544 (1926)* (loss); *Pendleton v. Commonwealth, 31 Va. (4 Leigh) 694 (1834)* (destruction). Section 1004, summarizing the common law decisions, recognizes that the purpose of the best evidence rule is to compel the production of an original if production is possible. *Bennett v. Commonwealth, 182 Va. 7, 12, 28 S.E.2d 13, 15 (1943)* (oral testimony about record was properly barred where there was no reason for non-production given, and no effort to produce the document itself). When production is impossible, and the impossibility is not the product of bad faith, secondary evidence may be introduced.

Subdivision (b). Virginia law has recognized that a copy may be used when the original cannot be obtained by the proponent, e.g., when the original is out of the jurisdiction. See *Crist v. Fitzgerald, 189 Va. 109, 52 S.E.2d 145 (1949)*.

Subdivision (c). The intent of the Rule is to require whatever notice is reasonable under the circumstances of the case. This has been construed in the past to include notice before, at the beginning of, or during the trial, where the document is in court or

can be produced without undue delay. See *Burton v. Frank A. Seifert Plastic Relief Co.*, 108 Va. 338, 61 S.E. 933 (1908). The form of notice required has never been specified under Virginia law and is not specified in the Rules of Evidence.

Subdivision (d). See *McDaniel v. Commonwealth*, 183 Va. 481, 32 S.E.2d 667 (1945); *Taylor v. Peck*, 62 Va. (21 Gratt.) 11 (1871).

Rule 2:1005 ADMISSIBILITY OF COPIES

Source Note

Present Code § 8.01-391 is the source of this Rule. See generally *Williams v. Commonwealth*, 35 Va. App. 545, 546 S.E.2d 735 (2001).

There are numerous other statutes scattered throughout the Code providing for admissibility of copies in specific contexts. The opening lines of this rule recognize that various statutes may also warrant receipt of copies in those situations. Frequently encountered examples include: Code § 8.01-388, Code § 8.01-389, Code § 8.01-390, Code § 8.01-391, Code § 8.01-391.1, Code § 8.01-413, Code § 8.01-413.1, Code § 19.2-187.01, Code § 19.2-188, Code § 20-49.3, Code § 32.1-272, Code § 46.2-215, Code § 58.1-108.

Rule 2:1006 SUMMARIES

Source Note

This section sets forth existing Virginia law with respect to the use of summaries.

See *Lyric Theatre Corp. v. Vaughan*, 168 Va. 595, 604, 191 S.E. 600, 603 (1937); see also *Marefield Meadows, Inc. v. Lorenz*, 245 Va. 255, 264, 427 S.E.2d 363, 368 (1993); *Avocet Dev. Corp. v. McLean Bank*, 234 Va. 658, 667, 364 S.E.2d 757, 762 (1988) (approving introduction of exhibits that summarized voluminous documentary evidence that was not in dispute). Cf. *Norfolk & W. Ry. v. Puryear*, 250 Va. 559, 463 S.E.2d 442 (1995) (summaries of oral testimony usable as aids in presenting the case, but “clearly inadmissible into evidence as exhibits”).

Rule 2:1007 TESTIMONY OR WRITTEN ADMISSION OF A PARTY

Source Note

This Rule identifies admissions that obviate the need for production of the original. The principle expressed has long been recognized in the Virginia cases. See *Taylor v. Peck*, 62 Va. (21 Gratt.) 11 (1871). This doctrine sets forth an exception to the best evidence rule by providing that when a party has admitted the contents of a writing, that admission may be used by an opposing party to prove the contents of the writing without production of the original item.

Rule 2:1008 FUNCTIONS OF COURT AND JURY

Source Note

This Rule identifies the functions of judge and jury under the best evidence rule. In Virginia practice, the trier of fact resolves all disputed issues of fact. See generally

Gottlieb v. Commonwealth, 126 Va. 807, 101 S.E. 872 (1920); Atlantic Coast Realty Co. v. Robertson, 135 Va. 247, 116 S.E. 476 (1923); Woods v. Commonwealth, 171 Va. 543, 199 S.E. 465 (1938).

These principles are a more particular statement of the division of labor between judge and jury that is generally described in Rule 104. Most issues of best evidence, like most evidence questions, are for the judge to decide. Thus, the judge will decide under Rule 1008 whether a genuine question is raised as to the admissibility of a writing without accounting for the original. But there are some questions that go to the core of a case. For the judge to decide them would be to usurp the function of the jury in deciding a dispute. The more familiar examples that arise in conjunction with best evidence questions are the three set forth in the Rule. These questions are reserved for the trier of fact.

Rule 2:1101 APPLICABILITY OF EVIDENTIARY RULES

Source Note

Subdivision (a) summarizes the current practice in Virginia courts. Although the Virginia Code does not specifically state that the district courts shall use the rules of evidence, the district courts have interpreted the statutory requirement that they follow the rules in preliminary hearings (Code § 19.2-183(B)) as a signal that they generally should comply with the rules of evidence. Most jurisdictions do not apply the rules of evidence in summary contempt proceedings, and most Virginia courts have not applied them in such proceedings, although the rules are used in other contempt proceedings. See *Kidd v. Virginia Safe Deposit & Trust Corp.*, 113 Va. 612, 75 S.E. 145 (1912). The common law of evidence does not apply and hearsay is admissible in Workers' Compensation cases. See *Rios v. Ryan Inc.*, 35 Va. App. 40, 542 S.E.2d 790 (2001). Regarding General District Court proceedings, see Code § 16.1-122.5, and subdivision (b) of this Rule.

Subdivision (b) recognizes that rules of privilege apply at all stages of all cases in the courts covered by evidence rules. This is in accord with the common law. It is a logical necessity with respect to many privileges, since once there is disclosure, the privileges may be lost.

Subdivision (c) recognizes that in criminal proceedings other than trial, preliminary hearings, sentencing before a jury, and capital murder sentencing hearings, less formal evidentiary standards have governed in Virginia. See *Wolfe v. Commonwealth*, 37 Va. App. 136, 142, 554 S.E.2d 695, 698 (2001) (“In the sentencing phase of a case, the trial court may rely upon hearsay testimony”); Code § 19.2-264.4 (application of evidence rules at the punishment phase of capital murder cases); *but see* Code § 19.2-295.1. For example, the right to present hearsay evidence in probation revocation proceedings is established. See, e.g., *Commonwealth v. Pannell*, 263 Va. 497, 561 S.E.2d 724 (2002). Similarly, administrative proceedings should not be subject to mandatory application of the rules absent a statute or rule specifically requiring such application of evidentiary principles. See *Rios v. Ryan Inc.*, 35 Va. App. 40, 542 S.E.2d 790 (2001).