selected excerpts from

The Virginia and Federal Rules of Evidence

A Concise Comparison with Commentary

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Includes Virginia Rule Amendments Effective July 2015

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INTRODUCTION

Comparisons of federal and state evidence rules can be immensely helpful to attorneys, judges, and law students who are often well versed in one set of rules, but not the other. As a result, book-length federal-to-state rule comparisons exist for most major United States jurisdictions, including California, Florida, New York and Texas. Virginia has until now been a notable exception. This book fills that void.

Virginia replaced its common law of evidence with codified rules in 2012, adding welcome clarity and consistency to litigation in Virginia's courts. The 2012 codification provides a critical foundation for this project. By crystalizing its own evidence rules, Virginia allowed those rules to be contrasted with other codified evidence rules, such as the Federal Rules of Evidence, in a concise volume. Particularly helpful in this respect is the Virginia codifiers' adoption of the same numbering system employed in the federal rules.

The now-codified "Virginia Rules of Evidence" are styled as Part II of the "Rules of the Supreme Court of Virginia." Each Virginia evidence rule begins with the number 2 and a colon ("2:"), to differentiate these rules from other Supreme Court rules. Apart from this preface, the Virginia rule numbers generally track the Federal Rules of Evidence. For example, the prohibition of hearsay in Federal Rule of Evidence 802 appears in Virginia Evidence Rule 2:802; the rule governing "excited utterances" is Rule 803(2) in the federal rules and Rule 2:803(2) in Virginia. This pattern holds for the vast majority of the Virginia evidence rules.

In light of the symmetry of the Virginia and federal rules, the format of the book is straightforward. For each rule of evidence, the book sets out the full text of the federal rule, followed by the full text of the corresponding Virginia rule, followed by a section titled

"Comparison and Commentary." Consequently, anyone with a general knowledge of the federal rules (or conforming state analogues) can find Virginia's treatment of a particular evidence concept in this book by looking up the correspondingly numbered Virginia rule and vice versa. The "Comparison and Commentary" section that follows each Virginia rule: (1) analyzes salient distinctions between the text of the federal and Virginia rule; (2) describes how those textual distinctions operate in application; and (3) highlights distinctions between the rules and their respective application, that may not be apparent from the rules' text.

As Virginia Evidence Rule 2:102 makes clear, the Virginia codifiers were not authorized to change preexisting evidence law during the 2012 codification project. Consequently, departures from the pre-codification case law create uncertainty as to the content of the "real" Virginia evidence rule: is it the codified rule or the rule that appeared in the pre-codification case law? At a minimum, as the "Comparison and Commentary" to Rule 2:102 discusses, alert Virginia attorneys can argue that a rule that appears to go beyond mere codification is not, in fact, the law of Virginia. Given this opportunity for legal argument, the "Comparison and Commentary" section flags areas where the Virginia codifiers arguably went beyond Virginia case law in creating the codified rules. For example, Virginia's hearsay exception for "Statements for Purposes of Medical Treatment," Rule 2:803(4), is broader and, in at least one respect, inconsistent with pre-codification case law.

Further complicating matters, some federal rules of evidence have no Virginia analogue and vice versa. These rules are still set forth in full below, along with a "Comparison and Commentary" section discussing the resulting distinction between federal and Virginia evidence law.

In some instances, the Virginia and federal rules contain a similar provision, but the rule numbers do not align. In other circumstances,

federal and Virginia rules with the same number are completely unrelated (generally where there is no Virginia analogue to a federal rule and the Virginia codifiers give the federal number to an unrelated Virginia rule). These deviations are noted. Comparisons are structured as intuitively as possible, generally bringing similar rules together for comparison, even if the rules have different numbers. Lengthy rules, such as Rule 803, are broken up into subsections for ease of comparison.

A few patterns are worth highlighting. First, the Virginia codifiers often adopt the language of the federal rules of evidence for an analogous Virginia rule where the Virginia case law appeared consistent with (or parroted) the federal rule. It is generally clear in these circumstances that the Virginia and federal rules are the same. The similarity is not always apparent, however, because the Virginia courts and codifiers almost always adopted pre-2011 federal language. This language looks different from the current federal rules because the Federal Rules of Evidence were "restyled" in 2011. When the 2011 restyling is the sole reason for differences in the respective rules' language, the substance of the federal and Virginia rules is, in fact, identical. This is because the federal restyling project explicitly left the pre-restyling substance unchanged. In some cases, however, the Virginia codifiers and courts adopted federal rule language that the federal drafters later substantively amended. In these circumstances, Virginia is left with a rule that, while once identical to the federal rule, is now distinct. These distinctions can be critically important and are noted, as pertinent, in the "Comparison and Commentary" sections. Second, the Virginia rules deviate most drastically from the federal rules when the Virginia rule is the product of a statute. Such statutory derivations are generally flagged in the official title of the Virginia rules. The "Comparison and Commentary" sections also reference (and reprint) a number of Virginia statutes that touch on evidentiary principles, but are either not completely captured within the relevant evidence rule or are not referenced at all in the evidence codification.

Throughout the Comparison and Commentary sections, readers will find occasional reference to the brief explanatory notes by the Virginia codifiers available in *A Guide to the Rules of Evidence in Virginia* published by Virginia CLE Publications, and the more lengthy notes drafted by the Advisory Committee to the Federal Rules of Evidence available in a wide array of sources.

Finally, I should say a word about the book's limitations. First, it is intended for lawyers or law students with a sophisticated understanding of either Virginia or federal evidence law. This is a comparison of the two evidence codes, not a comprehensive analysis of either one. Non-lawyers or those with only a rudimentary understanding of evidence law will find many questions left unanswered. Second, the book is short, just over 200 pages. To keep the volume manageable required analytical triage. Only major distinctions are discussed and the analysis is brief. Those seeking to understand all the nuances of Virginia or federal evidence law should consult a treatise. I recommend *The Law of Evidence in Virginia*, by Charles E. Friend and Kent Sinclair, and *Federal Evidence* by Christopher B. Mueller and Laird C. Kirkpatrick. One of the key upshots of these two caveats is that this book is NOT INTENDED, NOR SHOULD IT BE USED, AS LEGAL ADVICE. As the saying goes, a person who represents himself has a fool for a client. The sentiment continues to apply even if the fool manages to obtain a 200-page evidence guide. Every case is different and the law changes day by day. Consequently, there is no substitute for a licensed attorney conducting up-to-date research on client matters.

As both the federal and Virginia rules change, revisions of this volume will become necessary. I encourage users of the book to contact me at jbellin@wm.edu to inform me of errors or omissions.

FED. R. EV. 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time.

VA. R. EV. 2:106. REMAINDER OF A WRITING OR RECORDED STATEMENT (Rule 2:106(b) derived from Code § 8.01-417.1)

(a) Related Portions of a Writing in Civil and Criminal Cases. When part of a writing or recorded statement is introduced by a party, upon motion by another party the court may require the offering party to introduce any other part of the writing or recorded statement which ought in fairness to be considered contemporaneously with it, unless such additional portions are inadmissible under the Rules of Evidence.

(b) Lengthy Documents in Civil cases. To expedite trials in civil cases, upon timely motion, the court may permit the reading to the jury, or the introduction into evidence, of relevant portions of lengthy and complex documents without the necessity of having the jury hear or receive the entire document. The court, in its discretion, may permit the entire document to be received by the jury, or may order the parties to edit from any such document admitted into evidence information that is irrelevant to the proceedings.

Comparison and Commentary

Both the federal and Virginia rules include a "rule of completeness" that permits the admission of the remainder of a recorded statement,

already partially entered into evidence, when fairness dictates. The Virginia provision adds an important codicil -- "unless such additional portions are inadmissible under the Rules of Evidence" -- to its rule. This codicil places Virginia firmly on one side of a longstanding federal circuit split on the question of whether Rule 106 is merely a proof-ordering provision or a powerful trump of other evidence rules. See Andrea N. Kochert, *The Admission of Hearsay Through Rule 106: And Now You Know the Rest of the Story*, 46 Ind. L. Rev. 499, 509 (2013) (cataloguing circuit split).

By its terms, Virginia's rule 2:106 is merely an ordering principle, permitting a party to introduce otherwise admissible portions of a document or recording "contemporaneously" with the portions introduced by the opposing party. For example, if the defendant's recorded confession stated, "I was angry, so I shot him … a dirty look" and the prosecution introduced just the portion before the ellipses, Rule 106 would allow the defense to compel introduction of the portion following the ellipses (if otherwise admissible) during the prosecution's case.

In the federal system, a substantial number of the circuits grant Rule 106 a more robust role than the mere order-of-proof principle codified in Virginia. Kochert, supra, at 507 (noting that the First, Second, Seventh, Tenth, Eleventh, and D.C. Circuits adopt the position that Rule 106 trumps other evidence rules); 2 Jones on Evidence § 11:39 (7th ed.) (recognizing as the "better view" that the "'rule of completeness' permits introduction of otherwise inadmissible evidence for the limited purposes of explaining or putting other, already admitted evidence, into context, or avoiding misleading the jury"). These courts read Rule 106 to permit the introduction of "otherwise inadmissible evidence" if fairness so dictates. United States v. Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986) ("Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be

considered contemporaneously.") Fourth Circuit decisions are inconsistent on the question. Kochert, supra, at 507.

While Virginia's codification takes this point on directly, Virginia's case law is less emphatic. In fact, there is a line of cases regarding defendant confessions that appears inconsistent with the codification. Compare Brown v. Com., 36 Va. 633, 634 (Va. Gen. Ct. 1838) ("When the confession of a party, either in a civil or criminal case (for the rule is the same in both) is given in evidence, the whole, as well that part which makes for him as that which is against him, must be taken together and go to the jury as evidence in the case.") with Codification Commentary to Rule 2:106 ("if a defendant provided police with a written confession to a crime, in which he also advanced certain mitigating circumstances regarding the crime, the self-serving portions of the statement would not necessarily be admitted simply because the portion confessing to the crime is admitted"); see also Pierce v. Com., 2 Va. App. 383, 391, 345 S.E.2d 1, 5 (1986) (recognizing principle announced in *Brown*, supra, but holding that it did not apply where a portion of the defendant's statement "does not bear on any element of the crime and, …, is not probative of any issue").

Neither the federal nor the Virginia rule applies beyond recordings or documents, to testimony about oral conversations or analogous evidence. See Advisory Committee Note to Fed. R. Evid. 106.

Subparagraph (b) of the Virginia rule reprints a Virginia Code provision that allows excerpts from larger documents to be admitted in civil trials. See Va. Code § 8.01-417.1. The federal evidence rules do not have a similar provision. See also Va. Sup. Ct. Rule 4:7(a)(5) (same rule for depositions).

FED. R. EV. 407. SUBSEQUENT REMEDIAL MEASURES

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or--if disputed--proving ownership, control, or the feasibility of precautionary measures.

VA. R. EV. 2:407. SUBSEQUENT REMEDIAL MEASURES (derived from Code § 8.01-418.1)

When, after the occurrence of an event, measures are taken which, if taken prior to the event, would have made the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct as a cause of the occurrence of the event; provided that evidence of subsequent measures shall not be required to be excluded when offered for another purpose for which it may be admissible, including, but not limited to, proof of ownership, control, feasibility of precautionary measures if controverted, or for impeachment.

Comparison and Commentary

The federal and Virginia rules generally bar admission of subsequent remedial measures. The respective rules are largely based on the

policy rationale that permitting such evidence creates a disincentive to mitigate dangerous conditions. Turner v. Manning, Maxwell & Moore, Inc., 216 Va. 245, 253, 217 S.E.2d 863, 869 (Va. 1975) (discussing "public policy underlying the rule"). The Virginia rule comes from a 1978 statute, Va. Code § 8.01-418.1. That statute generally tracks the language of the original Federal Rule 407. As the Federal Rule has been amended twice since its original enactment to clarify ambiguities, the Virginia rule continues to incorporate three ambiguities that have been ironed out of its federal cousin.

First, the Virginia rule uses "occurrence of an event" to describe the operative litigation-generating incident, but this phrasing is vague. The federal rule added "injury or harm allegedly caused by an event" in 1997 to "clarify that the rule applies only to [remedial measures] made after the occurrence that produced the damages giving rise to the [instant] action." Advisory Committee Note to 1997 Amendment; but see Raymond v. Raymond Corp., 938 F.2d 1518, 1523 (1st Cir. 1991) (recognizing even before amendment that "[t]he term 'event' refers to the accident that precipitated the suit"). The sparse Virginia case law on the topic does not address the issue.

Second, the text of the Virginia rule does not clearly indicate whether the "if controverted" qualification applies solely to the "feasibility of precautionary measures" or also to the earlier-listed permitted uses (e.g., ownership and control). Again, Virginia case law does not resolve the question. The restyling of the federal rules in 2011 clarified that the qualifier (recast as "if disputed") applies to feasibility, ownership and control.

Third, in 1997, the federal rule was "amended to provide that evidence of subsequent remedial measures may not be used to prove 'a defect in a product or its design, or that a warning or instruction should have accompanied a product.'" Advisory Committee Note to 1997 Amendment. As this language has not been added to the Virginia rule, the Virginia rule's applicability in products liability cases

might seem unclear. Indeed, the Virginia codifiers make this point explicit, stating: "This statute takes no position on product liability cases." Codification Commentary to Rule 2:407. (The Commentary cites Gordon Harper Harley-Davidson Sales, Inc. v. Cutchin, 232 Va. 320, 325, 350 S.E.2d 609, 612 (Va. 1986), a case which includes no reference to the remedial measures bar in affirming admission of a service bulletin objected to, in part, "on public-policy grounds.") In truth, however, there should be no question regarding the applicability of the statute to Virginia products liability cases (and the *Gordon* case cited by the codifiers probably just failed to realize the statute's potential applicability). The pre-amendment federal ambiguity arose because Rule 407 did not seem to apply where the substantive standard was "strict liability" (as opposed to negligence), and products liability actions in federal court were often governed by a strict liability standard. See Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 793 (8th Cir. 1977) ("Rule 407 is, by its terms, confined to cases involving negligence or other culpable conduct. The doctrine of strict liability by its very nature, does not include these elements."). Virginia does not recognize strict liability in products liability cases. See Sensenbrenner v. Rust, Orling & Neale, Architects, Inc., 236 Va. 419, 424 n.4, 374 S.E.2d 55, 57 n.4 (Va. 1988) ("Virginia law has not adopted § 402A of the Restatement (Second) of Torts and does not permit tort recovery on a strict-liability theory in products-liability cases.") Consequently, there should be no ambiguity about Rule 2:407's application to Virginia products liability cases, which are simply "negligence or culpable conduct" cases to which the rule by its terms applies. Ambiguity remains, of course, in Virginia cases premised on strict liability causes of action, but this is a narrow set of "ultrahazardous" activities in Virginia. See, e.g., M. W. Worley Const. v. Hungerford, Inc., 215 Va. 377, 381, 210 S.E.2d 161, 164 (Va. 1974) ("blasting").

FED. R. EV. 408. COMPROMISE OFFERS AND NEGOTIATIONS

(a) Prohibited Uses. Evidence of the following is not admissible--on behalf of any party--either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

> **(1)** furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and
>
> **(2)** conduct or a statement made during compromise negotiations about the claim--except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

VA. R. EV. 2:408. COMPROMISE AND OFFERS TO COMPROMISE

Evidence of offers and responses concerning settlement or compromise of any claim which is disputed as to liability or amount is inadmissible regarding such issues. However, an express admission of liability, or an admission concerning an independent fact pertinent to a question in issue, is admissible even if made during settlement negotiations. Otherwise admissible evidence is not excludable merely because it was presented in the course of compromise negotiations. Nor is it required that evidence of settlement or compromise

negotiations be excluded if the evidence is offered for another purpose, such as proving bias or prejudice of a witness or negating a contention of undue delay.

Comparison and Commentary

The Virginia and federal rules forbid the introduction of certain evidence regarding settlement negotiations. Both rules prohibit offers to settle if tendered to prove the validity or amount of a disputed claim. The Virginia rule is clearer that "responses thereto" are also covered; the federal rule implicitly covers such responses. Both rules are based on the public policy of promoting compromise.

The primary distinction between the two rules is that the federal rule also renders inadmissible any statement made during settlement discussions. Virginia, by contrast, provides no protection for an "express admission of liability, or an admission concerning an independent fact pertinent to a question in issue."

The Virginia rule comes straight from case law, although that case law is conclusory and provides little exposition. See Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp., 249 Va. 426, 438, 457 S.E.2d 28, 35 (Va. 1995) (stating general rule, but highlighting precedent for proposition that "an admission during settlement negotiations of an independent fact pertinent to a question in issue" and "an express admission of liability made during settlement negotiations" are admissible). The Virginia rule is best understood by tracing its origins to the general common-law rule that permitted the introduction at trial of "admissions of fact" even if made during settlement negotiations. This common-law rule is specifically disparaged in the federal advisory committee notes. See Advisory Committee Note to Fed. R. Evid. 408 (indicating departure from common-law rule's "inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be 'without prejudice,' or so connected with the offer as to be inseparable from it"). Given this pedigree, it

becomes clear that the "independent" facts referred to in the Virginia rule are simply facts stated without qualifying language (e.g., "without prejudice") and not otherwise directly tethered to the offer of compromise. See Hendrickson v. Meredith, 161 Va. 193, 204, 170 S.E. 602, 606 (Va. 1933) (quoting following discussion with approval: "confidential overtures of pacification, and any other offers or propositions between litigating parties, expressly stated to be made without prejudice, are excluded on grounds of public policy. *** But if it is an independent admission of a fact, merely because it is a fact, it will be received; and even the offer of a sum by way of compromise of a claim tacitly admitted is receivable, unless accompanied with a caution that the offer is confidential.'") Thus, a pertinent fact uttered during settlement discussions that is not carefully couched in qualifying language is potentially admissible under Rule 2:408.

The Virginia rule also carves out "explicit admission[s] of liability" from its protection. The meaning here is more obscure, but best understood as simply a particularly damaging subset of "independent" fact admissions. See City of Richmond v. A. H. Ewing's Sons, 201 Va. 862, 869-70, 114 S.E.2d 608, 613 (Va. 1960) ("The recognition of the existence of a binding contract was in the nature of an admission of an independent fact pertinent to the issue of the correctness of the claims…. Upon this principle an express admission of liability made during negotiations for a compromise is admissible.") Just as a statement of fact uttered during settlement negotiations will be admissible under the Virginia rule, so will an "explicit admission of liability" unless the admission is explicitly qualified or shown from the circumstances to be an integral part of the compromise offer itself.

The Virginia rule does not capture two changes made to the federal rule in a 2006 amendment. Most importantly, the 2006 amendment explicitly prohibits the use of settlement statements for "impeach[ment]." Fed. R. Evid. 408(a); Advisory Committee Note

to 2006 Amendment ("The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements.") In Virginia, the rule is otherwise. See Codification Commentary to Rule 2:408 ("Virginia law allows evidence relating to a compromise to be admitted for purposes other than concession of liability, such as to contradict a witness.") (citing Fielding v. Robertson, 141 Va. 123, 138, 126 S.E. 231, 236 (Va. 1925) (rejecting challenge to evidence about compromise negotiation where "the question put to Fielding was not to show an unaccepted offer of compromise, but to ... contradict the statement of Fielding")).

Second, the 2006 amendment provides an exception to the federal rule's protections for certain statements made during compromise negotiations with a government agency. Fed. R. Ev. 408(a)(2). Virginia's rule contains no such provision.

VA. R. EV. 2:503. CLERGY AND COMMUNICANT PRIVILEGE (derived from Code §§ 8.01-400 and 19.2-271.3)

A clergy member means any regular minister, priest, rabbi, or accredited practitioner over the age of 18 years, of any religious organization or denomination usually referred to as a church. A clergy member shall not be required:

(a) in any civil action, to give testimony as a witness or to disclose in discovery proceedings the contents of notes, records or any written documentation made by the clergy member, where such testimony or disclosure would reveal any information communicated in a confidential manner, properly entrusted to such clergy member in a professional capacity and necessary to enable discharge of the functions of office according to the usual course of the clergy member's practice or discipline, wherein the person so communicating such information about himself or herself, or another, was seeking spiritual counsel and advice relating to and growing out of the information so imparted; and

(b) in any criminal action, in giving testimony as a witness to disclose any information communicated by the accused in a confidential manner, properly entrusted to the clergy member in a professional capacity and necessary to enable discharge of the functions of office according to the usual course of the clergy member's practice or discipline, where the person so communicating such information about himself or herself, or another, was seeking spiritual counsel and advice relating to and growing out of the information so imparted.

Comparison and Commentary

The federal courts recognize a privilege that protects disclosure of "communications made (1) to a clergyperson (2) in his or her spiritual and professional capacity (3) with a reasonable expectation of

confidentiality." In re Grand Jury Investigation, 918 F.2d 374, 384 (3d Cir. 1990) (recognizing and sketching contours of privilege). Virginia also recognizes this privilege in Rule 2:503. Although federal case law is sparse, a significant distinction between Virginia and federal privilege law in this context concerns the holder of the privilege. In the federal system, the lay person (penitent) holds the privilege. Virginia law, by contrast, "plainly invests the priest with the privilege and leaves it to his conscience to decide when disclosure is appropriate." Seidman v. Fishburne-Hudgins Educ. Found., 724 F.2d 413, 416 (4th Cir. 1984). Virginia's privilege is also significantly narrowed in criminal cases, where the privilege only applies if the communication was made by the accused. Rule 2:503(b).

FED. R. EV. 608. A WITNESS'S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

> **(1)** the witness; or
>
> **(2)** another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

VA. R. EV. 2:608. IMPEACHMENT BY EVIDENCE OF REPUTATION FOR TRUTHTELLING AND CONDUCT OF WITNESS

(a) Reputation evidence of the character trait for truthfulness or untruthfulness. The credibility of a witness may be attacked or supported by evidence in the form of reputation, subject to these limitations: (1) the evidence may relate only to character

trait for truthfulness or untruthfulness; (2) evidence of truthful character is admissible only after the character trait of the witness for truthfulness has been attacked by reputation evidence or otherwise; and (3) evidence is introduced that the person testifying has sufficient familiarity with the reputation to make the testimony probative.

(b) Specific instances of conduct; extrinsic proof. Except as otherwise provided in this Rule, by other principles of evidence, or by statute, (1) specific instances of the conduct of a witness may not be used to attack or support credibility; and (2) specific instances of the conduct of a witness may not be proved by extrinsic evidence.

(c) Cross-examination of character witness. Specific instances of conduct may, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of a character witness concerning the character trait for truthfulness or untruthfulness of another witness as to whose character trait the witness being cross-examined has testified.

(d) Unadjudicated perjury. If the trial judge makes a threshold determination that a reasonable probability of falsity exists, any witness may be questioned about prior specific instances of unadjudicated perjury. Extrinsic proof of the unadjudicated perjury may not be shown.

(e) Prior false accusations in sexual assault cases. Except as otherwise provided by other evidentiary principles, statutes or Rules of Court, a complaining witness in a sexual assault case may be cross-examined about prior false accusations of sexual misconduct.

Comparison and Commentary

The Virginia and federal rules create an exception to the general ban on propensity evidence for attacks on a witness' character for

truthfulness. The federal rule permits testimony in the form of reputation or opinion, while the Virginia rule only allows testimony in the form of reputation. This same distinction between the federal and Virginia Codes repeats in Rule 405 and Rule 2:405.

Both federal and Virginia Rule 608 prohibit the introduction of evidence relating to specific instances of untruthfulness, permitting only cross-examination on such instances. The federal rule allows such cross-examination of both "the witness" – i.e., any person who testifies – as well as "another witness whose character [for truth-telling] the witness being cross-examined has testified about" – i.e., a character witness. The Virginia rule only permits cross-examination on specific instances of the character witness, with two exceptions. First, any witness may be cross-examined about "prior specific instances of unadjudicated perjury." Rule 2:608(d); see Lambert v. Com., 9 Va. App. 67, 71, 383 S.E.2d 752, 754 (Va. App. 1989) ("a witness's credibility may be attacked on cross-examination by inquiry into prior specific instances of unadjudicated acts of perjury"). (Adjudicated perjury resulting in a conviction would be admissible under Rule 2:609.) Second, under Rule 2:608(e), a complaining witness in a sexual assault case can be cross-examined about prior false accusations of sexual misconduct; and extrinsic evidence is permitted to substantiate a charge that a past accusation was false. See Clinebell v. Com., 235 Va. 319, 325, 368 S.E.2d 263, 266 (Va. 1988) ("in a sex crime case, the complaining witness may be cross-examined about prior false accusations, and if the witness denies making the statement, the defense may submit proof of such charges"). As indicated, both exceptions come directly from case law.

The second exception is curious and perhaps worthy of challenge. In jurisdictions where all witnesses can be impeached with prior false statements (as in the federal system), a similar rule that applies to complaining witnesses in sexual assault prosecutions seems defensible. (The courts generally agree that cross-examination or

evidence regarding prior *false* allegations of sexual misconduct is not prohibited by Rape Shield laws.) However, in a jurisdiction like Virginia that does not allow any other complaining witness to be cross-examined with a prior false charge, it is less obvious that sexual assault victims should be singled out for this type of cross-examination. The case from which the exception derives, justifies the rule as follows: "In sex offense cases, however, the weight of authority recognizes more liberal rules concerning impeachment of complaining witnesses." *Clinebell* at 265. However, much of the authority cited comes from the Rape Shield context, where the trend is quite the opposite. Modern courts are not, as in *Clinebell*, singling out sexual assault victims for "more liberal" cross-examination, but rather discerning the constitutional boundaries of the degree to which victims can be shielded from it.

Virginia includes a proviso that a witness testifying as to someone's character for truthfulness must have "sufficient familiarity with the reputation to make the testimony probative"; the proviso is absent from the federal rule and likely redundant to Rules 2:401 (relevance), 2:403 (balancing probative value against unfair prejudice, etc.) and 2:602 (personal knowledge).

FED. R. EV. 803(4) STATEMENT MADE FOR MEDICAL DIAGNOSIS OR TREATMENT. A statement that:

> **(A)** is made for--and is reasonably pertinent to--medical diagnosis or treatment; and
>
> **(B)** describes medical history; past or present symptoms or sensations; their inception; or their general cause.

VA. R. EV. 2:803(4) STATEMENTS FOR PURPOSES OF MEDICAL TREATMENT. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Comparison and Commentary

The Virginia and federal rules regarding statements for purposes of medical diagnosis or treatment are, on their face, identical. In fact, the Virginia rule uses the exact same language as the federal rule prior to restyling.

Importantly, however, while the Virginia Supreme Court's pronouncements on this exception are few, the extant Virginia case law seems significantly narrower than the codified rule. In the most recent case, the Court explained:

> "We have acknowledged that "a physician [may] testify to a patient's statements concerning his 'past pain, suffering and subjective symptoms' to show 'the basis of the physician's opinion as to the nature of the injuries or illness.'" Cartera v. Com., 219 Va. 516, 518, 248 S.E.2d 784, 785–86 (1978); accord Jenkins v. Com., 254 Va. 333, 339, 492 S.E.2d 131, 134 (1997)." Lawlor v. Com., 285 Va. 187, 243 (2013).

Lawlor and the two cases cited by *Lawlor* in the above excerpt are the

three cases cited in the Virginia codification commentary to support Rule 2:803(4). But note that the *Lawlor* Court's description of the "exception" does not suggest that qualifying statements are admissible as substantive evidence, the normal effect of a hearsay exception. Instead, the Virginia Supreme Court explains that such statements to a physician are admissible to "show the basis of the physician's opinion" – a nonhearsay use that would not necessitate a hearsay exception. Further, one of the cited cases, *Jenkins*, contains the following passage, which is far from an endorsement of the exception:

> "The Commonwealth contends that we should apply the hearsay exception extended in some jurisdictions to statements made by a patient to a treating physician. As the Commonwealth recognized on brief, 'many of these out-of-state cases are partially based on their state's adoption of rules equivalent to Federal Rule of Evidence 803(4).' Neither this Court nor the General Assembly has adopted any such rule." Jenkins v. Com., 254 Va. 333, 339, 492 S.E.2d 131, 134 (1997).

Thus, whether the Virginia courts have adopted a version of Federal Rule 803(4) is (at best) an open question. Whether the codification will succeed in its effort to answer that question remains to be seen.

Along these same lines, the federal rule applies beyond statements to a "treating physician," extending also to "statements to a physician consulted only for the purpose of enabling him to testify." Advisory Committee Note to Fed. R. Ev. 803(4). This extension appears as well in the Virginia rule ("or diagnosis"). Again, however, the Virginia Supreme Court's pronouncements cast doubt on the codification. In *Lawlor*, the Court endorsed a lower court's reasoning that statements made to a drug counselor should not fall under the exception because of doubts that "'a defendant who is incarcerated who talks to a drug counselor is going to be a hundred percent honest as one would who is seeking treatment from a physician.'" Lawlor v. Com., 285 Va. 187, 243, 738 S.E.2d 847, 879 (2013).