

## Character Evidence

### FRE 404

#### (a.) Character Evidence

(1) Prohibited Uses: Past Character or character trait inadmissible to prove person acted in conformity on particular occasion. (i.e. day of crime or tort he's being prosecuted or sued for).

Example 1: Defendant ("D") on trial for reckless driving (RD). Prosecution ("P") attempts to offer evidence of D's prior RD's. Prior RD's (i.e. D's character trait) are inadmissible to prove D drove recklessly on date in question (i.e. in conformity with his previous RD events).

(2) Exceptions apply in criminal cases only: (i.e. past character or character trait can be used to prove conformity with character or trait on particular occasion to prove D is not guilty or guilty). Exceptions apply only to Defendant (D) or Victim (V). Proponent of the character evidence offers to prove D is either guilty or not guilty. Permitted under the exceptions but only after D first opens the door by introducing positive character evidence about himself (opinion or reputation) or negative character evidence about V.

#### (A). Mercy Rule:

(1). D may offer proof of his pertinent trait by calling character witness (CW) (e.g. peacefulness, honesty, etc.). D doesn't have to testify to call CW.

Note: "Pertinent" means "relevant" to case being tried (e.g. (1) D defends assault charge on self-defense – pertinent trait is peacefulness; D defends larceny charge – pertinent trait is honesty).

(B). D may call character witness to testify about V's pertinent trait (e.g. aggression, credibility, etc.). D doesn't have to testify to call CW.

(1). P may call a positive CW in rebuttal to rebut evidence offered by D about V's character trait (e.g. V is peaceful, honest, etc.) and

(2) P may call a CW in rebuttal to offer negative proof of D's same character trait that D offered proof on about V.

Example: D calls CW in D's case in chief to testify about V's negative character trait for violence in assault case. In rebuttal, P can call CW to testify about (1) D's negative character for violence (same trait) and (2) V's character for peacefulness to counter D's negative evidence of V's trait for violence.

\*Caveat: Positive or negative character trait evidence must be relevant. If, for example, D claims he was not present and did not participate in the assault, then arguably character trait evidence is not relevant on peacefulness or aggression because D's defense is not self-defense. But, it may be relevant if the character trait is truthfulness or untruthfulness.

(C). Homicide cases only:

(1). P may offer proof of V's trait for peacefulness to rebut evidence V was first aggressor.

Note: D doesn't have to call CW about aggression on the part of V to trigger P's right to rebut. P's right to rebut may be triggered, for example, by D's cross-examination of eye witness (EW) if D asks or suggests to EW V was first aggressor. Then P can rebut that suggestion by calling CW in case in chief.

(2). Exceptions for Witness.

- a. Witness here refers to all witnesses, including V and D if they testify (i.e. D can't be W unless D testifies).
- b. Exceptions in FRE 404 (a) (2) (A) (B) and (C) don't apply. Subsections A and B only apply to CW testifying about D or V, or CW testifying about V's trait for peacefulness in homicide case (Subsection C). FRE 608 or 609 apply to D as witness, V as witness, and all other witnesses, and then only the constraints set forth in FRE 608 and 609 apply.

c. Crimes, Wrongs or other Acts (Sometimes called “Prior Bad Acts Evidence”) (Prior Bad Acts includes subsequent bad acts which occur after the event on trial but which occur prior to trial of the event on trial); doesn’t have to be crime)). This is non-character evidence (not being offered to prove that D acted in conformity therewith).

1. Prohibited Uses: Same as FRE 404 (a) (1).
2. Permitted Uses: to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident (this is not an all-inclusive list).
  - Example 1: D steals gun. D later murders V with stolen gun. D is on trial for murder. Larceny of gun (prior bad act) admissible to prove, as relevant here, intent, opportunity, preparation, plan, and/or lack of accident, but not to prove D is a thief (bad guy) in the murder trial as opposed to a larceny trial, so he must have also committed the murder (conformity). Note: here larceny of gun would be admissible in P’s case in chief.
  - Example 2: D’s defense is entrapment (i.e. not predisposed to commit crime). P may admit prior bad acts (e.g. prior drug sales (prior bad act) in current prosecution for drug distribution) to rebut D’s claim of no predisposition. P’s evidence may be admissible in P’s case in chief after D cross-examines police about predisposition, if D does. Otherwise, P’s evidence inadmissible until P’s rebuttal after D offers evidence in his case in chief of no predisposition.

Note 1: Upon request by D, P must give D reasonable notice of FRE 404 (b) (2) evidence before trial.

Note 2: Admission of evidence under FRE 404 (a) (2) (A) (B) and (C) and FRE 404 (b) (2) is subject to balancing test under FRE 403 (i.e. probative value substantially outweighed by unfair prejudice; B/P on opponent of evidence; presumption in favor of admissibility) (passive voice).

Note 3: Upon receipt of notice, D should file motion in limine to exclude the prior bad act (e.g. under FRE 403) and schedule a hearing. If D loses the motion in limine, he should request court to give limiting instruction (i.e. an instruction

telling the jury that they can't consider the prior bad act evidence as evidence that D committed the crime or tort on trial).

Note 4: Evidence admissible under FRE 404 (b)(2) is not admissible to prove character (i.e. that on a particular occasion the person acted in conformity with his prior character or character trait); instead its admissible to prove that for the current event on trial there's intent, motive, opportunity, absence of mistake, etc. on the part of D (e.g. the theft of the gun used in the murder, the prior drug sale to counter no predisposition, etc. in the preceding examples)

Note 5: See People v. Michael Jackson, 128 Cal. App. 4<sup>th</sup> 1009 (2005) (prior child molestations admissible, including those alleged 15 years earlier)

- **VA. R. Ev. 2:404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES**

(a) Character evidence generally. Evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character trait of accused. Evidence of a pertinent character trait of the accused offered by the accused, or by the prosecution to rebut the same;

(2) Character trait of victim. Except as provided in Rule 2:412, evidence of a pertinent character trait or acts of violence by the victim of the crime offered by an accused who has adduced evidence of self defense, or by the prosecution (i) to rebut defense evidence, or (ii) in a criminal case when relevant as circumstantial evidence to establish the death of the victim when other evidence is unavailable; or

(3) Character trait of witness. Evidence of the character trait of a witness, as provided in Rules 2:607, 2:608, and 2:609.

(b) Other crimes, wrongs, or acts. Except as provided in Rule 2:413 or by statute, evidence of other crimes, wrongs, or acts is generally not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith. However, if the legitimate probative value of such proof

outweighs its incidental prejudice, such evidence is admissible if it tends to prove any relevant fact pertaining to the offense charged, such as where it is relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if they are part of a common Scheme or plan.

### **FRE 405. Methods of Proving Character under FRE 404 (a) (A) (B) and (C)**

(a) Reputation or opinion from CW about person whose character is in issue.

- Note: Party cross-examining CW may (FRE 403 balancing test applies) ask CW about relevant specific instances of the person's conduct on whose behalf the CW testified. Rationale: (i) to test CW's true knowledge of person's character or character trait CW testified about and (ii) to question CW's judgement about that person's character if he is aware of negative character evidence about that person but still gives positive character testimony.

(b) By specific Instances of Conduct.

1. If person's character or character trait is an essential element of a charge, claim or defense, a party may also prove character by specific acts in addition to reputation or opinion.

Example 1: Proof that Plaintiff in defamation case is a liar (specific instances of lying in the past are admissible) because truth of alleged defamatory statement is a defense.

Example 2: D in criminal case prosecuted for felon in possession of firearm. P must prove (1) D possessed firearm and (2) he was prior convicted felon. P may prove the specific act (i.e. the prior felony conviction) because it's an element of the offense now on trial.

Example 3: Proof that Plaintiff (P) is not a liar as alleged by tort defendant (D) as the basis of the defamation action. P may offer evidence of the defamatory statement because it's an element of the tort. P may also offer evidence that he's not a liar (by specific instances, reputation or opinion about his truthfulness)

because it too is an element of the tort (i.e. proof that defamatory statement is untrue).

- **VA. R. Ev. 2:405. METHODS OF PROVING CHARACTER TRAITS**

(a) Reputation proof. Where evidence of a person's character trait is admissible under these Rules, proof may be made by testimony as to reputation, but a witness may not give reputation testimony except upon personal knowledge of the reputation. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which a character trait of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of conduct of such person on direct or cross-examination.

- **Rule 412. Sex Offense Cases: The victim's Sexual Behavior or Predisposition (Rape Shield Law)**

(1) Prohibited Uses.

- Following are inadmissible:
  - (1) Evidence V engaged in other sexual behavior; or
  - (2) Evidence of V's sexual predisposition

Example: D's evidence of V's prior sexual trysts with other men inadmissible at D's trial for rape of V to prove V predisposed to sexual encounters and, thus, must have consented.

Note: This would be impermissible character evidence when offered to prove V acted in conformity therewith

(b) Exceptions to Character Evidence Bar about V

1. Criminal cases: Prior sexual conduct or predisposition admissible to prove:

- Someone other than D was source of semen, injury or other physical evidence (e.g. hair sample, DNA, etc.)

- Specific instances of V’s sexual behavior with D (the defendant now on trial for the rape of V) to prove consent or if offered by P
- Evidence whose exclusion would violate D’s constitutional rights (e.g. the 6<sup>th</sup> Amendment’s confrontation clause, impeachment, etc.).

(2) Civil Cases: V’s sexual conduct or predisposition admissible “if its probative value substantially outweighs the danger of harm to any victim or unfair prejudice of any party.” (Similar to a reverse FRE 403 balancing test; B/P on proponent; presumption against admissibility; active voice). Also, evidence of V’s reputation or W’s opinion of sexual conduct admissible if V placed it in controversy.

Example: V testifies for P and volunteers on direct she was a virgin at the time D raped her and that she’d never had sex before. Because V put her reputation for sexual conduct in controversy, prior sexual conduct and/or predisposition may be admissible. (FRE 403 balancing test applies) (Presumption in favor of admissibility; B/P on opponent; passive voice).

(c) Procedure to determine admissibility of V’s Sexual Behavior or Predisposition

(1) Proponent (usually D) must:

- File motion under seal describing the FRE 412 evidence and stating the purpose for which it is offered;
- At least 14 days before trial unless good cause exists for the court to set a different time;
- Serve the motion on all parties including V; and
- Notify V or V’s guardian (if she’s a minor or otherwise incompetent)(parent, etc.) of time, date and place of hearing.

(2) Hearing: court must conduct in camera hearing (closed hearing to the public) and give parties and V a right to attend and be heard. The motion, related materials

and the record of the hearing must remain sealed (i.e. closed to the public) unless court orders otherwise.

- **VA. R. Ev. 2:412. ADMISSIBILITY OF COMPLAINING WITNESS' PRIOR SEXUAL CONDUCT; CRIMINAL SEXUAL ASSAULT CASES; RELEVANCE OF PAST BEHAVIOR (derived from Code § 18.2-67.7)**

(a) In prosecutions under Article 7, Chapter 4 of Title 18.2 of the Code of Virginia (ed.-- sexual assault), under clause (ii) or (iv) of 18.2-48 (ed.-- abduction for prostitution), or under 18.2-370, 18.2-370.01, or 18.2-370.1 [ed.-- indecent liberties with a child), general reputation or opinion evidence of the complaining witness' unchaste character or prior sexual conduct shall not be admitted. Unless the complaining witness voluntarily agrees otherwise, evidence of specific instances of his or her prior sexual conduct shall be admitted only if it is relevant and is:

- 1. Evidence offered to provide an alternative explanation for physical evidence of the offense charged which is introduced by the prosecution, limited to evidence designed to explain the presence of semen, pregnancy, disease, or physical injury to the complaining witness' intimate parts;  
or
- 2. Evidence of sexual conduct between the complaining witness and the accused offered to support a contention that the alleged offense was not accomplished by force, threat or intimidation or through the use of the complaining witness' mental incapacity or physical helplessness, provided that the sexual conduct occurred within a period of time reasonably proximate to the offense charged under the circumstances of this case; or
- 3. Evidence offered to rebut evidence of the complaining witness' prior sexual conduct introduced by the prosecution.
- See *Neeley v Commonwealth*, 17 Va. App. 349 (1993) (holding that notwithstanding VCA 18.2-67.7 (VRE 2:412), the defendant is entitled to compulsory process, due process, and confrontation and cross-examination)



- (b) Nothing contained in this Rule shall prohibit the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused. If such evidence relates to the past sexual conduct of the complaining witness with a person other than the accused, it shall not be admitted and may not be referred to at any preliminary hearing or trial unless the party offering same files a written notice generally describing the evidence prior to the introduction of any evidence, or the opening statement of either counsel, whichever first occurs, at the preliminary hearing or trial at which the admission of the evidence may be sought.
- (c) Evidence described in subdivisions (a) and (b) of this Rule shall not be admitted and may not be referred to at any preliminary hearing or trial until the court first determines the admissibility of that evidence at an evidentiary hearing to be held before the evidence is introduced at such preliminary hearing or trial. The court shall exclude from the evidentiary hearing all persons except the accused, the complaining witness, other necessary witnesses, and required court personnel. If the court determines that the evidence meets the requirements of subdivisions (a) and (b) of this Rule, it shall be admissible before the judge or jury trying the case in the ordinary course of the preliminary hearing or trial. If the court initially determines that the evidence is inadmissible, but new information is discovered during the course of the preliminary hearing or trial which may make such evidence admissible, the court shall determine in an evidentiary hearing whether such evidence is admissible.

- **FRE 413. Similar Crimes in Sexual Assault Cases  
(Exception to Character Evidence Bar)**

(a) Permitted uses in Criminal Cases only: In sexual assault cases court may admit, subject to FRE 403, evidence that D committed any other sexual assault on V or another V and it may be considered on any matter to which it is relevant. Prior charge or conviction is not a condition to admissibility.

(b) Disclosure by P to D (i.e. V's statements or a summary of testimony): 15 days before trial or later time set by court for good cause.

(c) Effect on other Rules: Omitted.

(d) Definition of “Sexual Assault” (Criminalized under State or federal law):

- (1) Conduct prohibited by 18 U.S.C. chapter 109 A; (various sexual abuse offenses criminalized under federal law)
- (2) Non-censual contact between D’s body or an object and V’s genitals or anus;
- (3) Non-consensual contact between D’s genitals or anus and V’s body;
- (4) Sexual pleasure, or gratification from inflicting death, bodily injury or physical pain on V.
- (5) Attempt or conspiracy to engage in (1) – (4) above.

• **VA. R. Ev. 2:413. EVIDENCE OF SIMILAR CRIMES IN CHILD SEXUAL OFFENSE CASES (derived from Code § 18.2 67.7:1)**

- (a) In a criminal case in which the defendant is accused of a felony sexual offense involving a child victim, evidence of the defendant's conviction of another sexual offense or offenses is admissible and may be considered for its bearing on any matter to which it is relevant.
- (b) The Commonwealth shall provide to the defendant 14 days prior to trial notice of its intention to introduce copies of final orders evidencing the defendant's qualifying prior criminal convictions. Such notice shall include (i) the date of each prior conviction, (ii) the name and jurisdiction of the court where each prior conviction was obtained, and (iii) each offense of which the defendant was convicted. Prior to commencement of the trial, the Commonwealth shall provide to the defendant photocopies of certified copies of the final orders that it intends to introduce.
- (c) This Rule shall not be construed to limit the admission or consideration of evidence under any other section or rule of court.

- (d) For purposes of this Rule, “sexual offense” means any offense or any attempt or conspiracy to engage in any offense described in Article 7 (§ 18.2-61 et seq.) of Chapter 4 or § 18.2-370, 18.2-370.01, or 18.2-370.1 or any substantially similar offense under the laws of another state or territory of the United States, the District of Columbia, or the United States.
- (e) Evidence offered in a criminal case pursuant to the provisions of this section shall be subject to exclusion in accordance with the Virginia Rules of Evidence, including but, not limited to Rule 2:403.

• **FRE 414. Similar Crimes in Child-Molestation Cases  
(Exceptions to Character Evidence Bar)**

(a) Permitted uses in criminal cases only: Subject to FRE 403, other child molestations admissible in the current child molestation case and considered on any matter to which it is relevant. Prior charge or conviction is not a condition to admissibility.

(b) Disclosure to D: P must disclose V’s statements or summary to D 15 days before trial or later time set by the court for good cause.

(c) Effect on other rules: Omitted

(d) Definitions of “child” and “child molestation”:

1. “child”: under age 14; and

2. “child molestation” means crime proscribed by federal law or state law involving:

A. Any conduct criminalized under 18 U.S.C. chapter 109 (A) and committed with a child;

B. Any conduct criminalized under 18 U.S.C., Chapter 110.

C. Contact between any part of the defendant’s body or an object and a child’s genitals or anus.

D. Contact between the defendant's genitals or anus and any part of a child's body,

E. Sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child.

F. An attempt or conspiracy to engage in conduct described in subparagraphs (A)-(E).

Note: In FRE 413 and 414, the similar crime in the sexual assault or child-molestation cases may involve the same or different V. Nonetheless, it is still admissible subject to the Rules.

- **Rule 415. SIMILAR ACTS IN CIVIL CASES INVOLVING SEXUAL ASSAULT OR CHILD MOLESTATION**

- (a) Permitted Uses. In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation, the court may admit evidence that the party committed any other sexual assault or child molestation. The evidence may be considered as provided in Rules 413 and 414.
- (b) Disclosure to the Opponent. If a party intends to offer this evidence, the party must disclose it to the party against whom it will be offered, including witnesses' statements or a summary of the expected testimony. The party must do so at least 15 days before trial or at a later time that the court allows for good cause.
- (c) Effect on Other Rules. This rule does not limit the admission or consideration of evidence under any other rule.

- **Rule 608. Witness's Character for Truthfulness and Untruthfulness**

Note 1: Applies to witness (W) only (i.e. one who testifies at the current trial; a person can't be a witness unless she testifies). W includes both party and non-party witnesses.

Note 2: Applies only to character for truthfulness and untruthfulness of W. Reason: It's proper subject of cross-examination because every W who testifies puts his character in issue for truthfulness and untruthfulness.

(A) Reputation or Opinion Evidence: W's credibility may be attacked or supported by reputation or opinion evidence from testimony by CW. But, evidence of truthful character is inadmissible from CW about W until W's character for truthfulness is first attacked.

Example 1: W testifies for P. On cross-examination D attacks W's credibility for truthfulness ("you're a liar"). P can then call CW in its case in chief to testify W is truthful based on opinion or reputation because D attacked W's character for truthfulness on cross.

Example 2: W testifies for P. P rests case. D calls CW to testify about his opinion or about W's reputation (W testified for P earlier) for untruthfulness. On rebuttal P can call a positive CW to testify about his opinion of or W's reputation for truthfulness because W's reputation for truthfulness was attacked by D in his case in chief by calling CW to testify P's witness (W) is untruthful.

(B) Specific Instances of Conduct: Court may (FRE 403 balancing test applies) allow cross-examiner to question (i) the witness who is currently testifying (FRE 608 (b)(1)) or (2) CW who is currently on the stand testifying W is truthful (FRE 608 (b) (2)) about specific instances of misconduct on the part of W suggesting untruthfulness.

Note: Extrinsic evidence from another witness or document is inadmissible to prove that which W or CW denied on cross-examination about the specific instances of conduct unless its contradiction evidence. (See separate slide for example of contradiction).

Example 1: Arson investigator (AI) testifies for P that D torched his home. On cross D may ask AI if he was fired from his last job for stealing (specific instance of conduct) because stealing is probative of untruthfulness (FRE 608 (b) (1)). Here

it is the AI (i.e. the “W” referred to in FRE 608 (b) (1)) whose character for untruthfulness properly is being attacked by the allegation of stealing (specific instance of conduct) during cross. But, extrinsic evidence, for example, if from AI’s boss that he was fired for stealing (specific conduct) or a letter of termination (document), is inadmissible if AI denies prior theft (See FRE 608 (b), 1<sup>st</sup> sentence, second line: ...”extrinsic evidence is not admissible to prove specific instances of a witness’s conduct...”)

Example 2: Same facts as Example 1 above. AI denies he was fired for stealing. Because AI’s character has been attacked for truthfulness on D’s cross of AI, P may now call CW to testify AI is truthful (FRE 608 (a), last sentence). So, P calls CW to testify AI is truthful. Again, D on cross of CW may ask CW for AI if he (CW) was aware AI was fired for stealing to test his (CW’s) knowledge and judgment of AI’s character for truthfulness (FRE 608 (b) (2)) and judgment. The phrase “another witness” in FRE 608 (b)(2) is referring to AI and the phrase “witness being cross-examined has testified about” is referring to CW (FRE 608 (b)(2)). This is necessarily so from a grammatical standpoint because “another witness whose character” is being testified about has to refer to AI since “the witness being cross-examined” is the current witness on the stand (i.e. CW) that D is asking on cross if he is aware AI was fired for stealing.

**Note: Under FRE 608, all of these questions may be asked provided they bear on truthfulness and untruthfulness only and regardless of whether the person whose character is the subject of the inquiry was ever charged, convicted, acquitted, etc.**

**• 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.

- **Rule 609. Impeachment by Evidence of a Criminal Conviction**

Note: FRE 609 allows a cross-examiner to ask any W, including the criminal defendant, if he takes the stand, about certain convictions, not necessarily just those bearing on truthfulness and untruthfulness because they have a potential bearing on the witness's credibility. In other words, those convicted of crimes may be less likely to tell the truth and as noted earlier, every W puts his truthfulness and

honesty in issue but not until he first testifies. If W denies the conviction, extrinsic evidence (e.g. conviction order), unlike 608, is admissible.

1. Crime punishable in the jurisdiction by death or more than one year:

(A) Subject to FRE 403 (B/P on opponent; presumption in favor of admissibility) must be admitted: (i) civil case for witnesses, including civil D, and (ii) for all witnesses in criminal case except criminal D. Questioning criminal D about prior conviction in criminal case is governed by FRE 609 (a)(1)(B).

(B) W is D in criminal case: must be admitted “if probative value of the evidence outweighs its prejudicial effect to that defendant.” B/P on proponent of evidence (usually P); presumption against admissibility. This balancing test for criminal D is a reverse FRE 403 balancing test. (active voice).

- Note: “D in Criminal Case” means “criminal case” now on trial. If regular W in that case has been previously convicted of a crime, he is just a W like any other W; he’s not the criminal D on trial today. So, FRE 609 (1)(a) applies to him. (i.e. regular FRE 403 balancing test).

(2) All other crimes: All crimes regardless of punishment must be admitted “if the court can readily determine that establishing the element of the crime [i.e. crime of conviction] required proving – or witness admitting – a dishonest act or false statement.” These are known as “*crimen falsi*” crimes.

Example 1: D testifies in his current criminal trial. D previously convicted of petty larceny (punishable by less than one year) or grand larceny (punishable by more than one year) (i.e. FRE 609 (a) (2) says the length of punishment doesn’t matter if prior conviction involved dishonest act or false statement). P may properly cross-examine D about the prior conviction because the crime (petty or grand larceny) involves dishonest act (prior perjury conviction would be example of false statement prong of the Rule). The larceny conviction, whether petty or grand, must be admitted (trial judge has no discretion; no balancing test) because larceny involves “dishonest act.”

Note: No balancing test here (FRE 609 (a)(2) says “must” and not “may” be admitted), not even if the witness P is impeaching is the criminal defendant now on trial.



(a) Limitations on use of prior conviction (includes both those punishable by more than a year and those punishable regardless of the length of punishment if they involve dishonest act or false statement) after 10 years. (Generally inadmissible except as stated below).

Note. (1): 10 years dates from date of conviction or date of release, whichever is later **(no absolute bar if prior conviction older than 10 years) (FRE 609 (b)).**

Note. (2): Evidence of more than 10 year old conviction is admissible only if: (1) “probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect” (FRE 609 (b) (1)) (B/P on proponent of Evidence; presumption against admissibility)) and (2) proponent gives adverse party reasonable written notice before trial of his intent to introduce the more than 10 year old conviction (again, no automatic bar for conviction more than 10 years old). Again, the test for admissibility is a reverse FRE 403 balancing test.

b. Omitted

c. Juvenile adjudications (i.e. convictions of juveniles as if they had been adults)  
Admissible if:

(1) Offered in criminal case;

(2) Adjudication was of W other than D;

(3) An adult’s conviction would be admissible (i.e. refer back to FRE 609 (a) and (b) to see if prior conviction was for crime admissible against adult W (not criminal defendant)), and

(4) Admitting prior adjudication (conviction) is necessary to fairly determine guilt or innocence of D now on trial (similar to 403 balancing test; b/p on opponent; presumption in favor of admissibility).

Example: Juvenile Witness (JW) not the criminal defendant on trial has prior adjudication (conviction) for petty or grand larceny. JW is star witness for P at trial of D. JW’s prior adjudication (conviction) for petty or grand larceny can be used

by D to impeach JW provided D can meet four part test under FRE 609 (d) (1), (2), (3) and (4) set out above.

As to the third element of four part test, conviction for JW, had JW been an adult, grand larceny conviction would qualify under FRE 609 (a)(1), subject to FRE 403 (subparagraph A), because its punishable by more than a year. It would also qualify under FRE 609 (a) (2), regardless of punishment, because it involves a dishonest act. Further, if juvenile defendant (JD) has the prior conviction, unlike FRE 609 (a) (1) (B) its inadmissible under element 2 of the test. See FRE 609 (d) (2). This means that if JD takes the stand in his own defense, he can't be impeached by P under FRE 609.

If the conviction is for petty larceny (punishable for a year or less), it's admissible only under FRE 609 (a) (2) because it involves a dishonest act.

**Note: If the prior conviction qualifies under FRE 609 (a)(2) (i.e. it involves a dishonest act or false statement without regard to length of punishment), always try to admit it under FRE 609 (a)(2) because there's no 403 balancing test and the trial judge has no discretion like she does under FRE 609 (a)(1).**

**• VA. R. Ev. 2:609. IMPEACHMENT BY EVIDENCE OF  
CONVICTION OF CRIME (derived from Code § 19.2-269)**

Evidence that a witness has been convicted of a crime may be admitted to impeach the credibility of that witness subject to the following limitations:

- (a) Party in a civil case or criminal defendant.
- (i) The fact that a party in a civil case or an accused who testifies has previously been convicted of a felony, or a misdemeanor involving moral turpitude, and the number of such convictions may be elicited during examination of the party or accused. (ii) If a conviction raised under subdivision (a)(i) is denied, it may be proved by extrinsic evidence.

- (iii) In any examination pursuant to this subdivision (a), the name or nature of any crime of which the party or accused was convicted, except for perjury, may not be shown, nor may the details of prior convictions be elicited, unless offered to rebut other evidence concerning prior convictions.
- Compare to *Bush v. Commonwealth*, Va. App. 54\* (2019). (Holding that the Commonwealth is not required to accept a defendant's offer to stipulate that he's a prior convicted felon when that's an element in the case, contrary to VRE 2:403 and the Supreme Court's decision in *Old Chief v. United States*, 519 U.S. 173 (1997)).
- (b) Other witnesses. The fact that any other witness has previously been convicted of a felony, or a misdemeanor involving moral turpitude, the number, and the name and nature, but not the details, of such convictions may be elicited during examination of the witness or, if denied, proved by extrinsic evidence.
- (c) Juvenile adjudications. Juvenile adjudications may not be used for impeachment of a witness on the subject of general credibility, but may be used to show bias of the witness if constitutionally required.
- (d) Adverse Witnesses. A party who calls an adverse witness may not impeach that adverse witness with a prior conviction.

### **Contradiction**

Extrinsic evidence is NOT admissible to impeach a witness (W) who denies an act bearing on his truthfulness or untruthfulness under FRE 608; we're stuck with his answer on cross-examination. But, extrinsic evidence IS admissible if it involves true "contradiction." The example below illustrates contradiction.

There are three types of impeachment evidence: (1) Prior Inconsistent Statements (PIS) 😊, (2) Character impeachment (e. g. conviction of a crime under FRE 609), and (3) Case Data Impeachment (CDI) (i.e. the witness has an interest in the outcome of the case being tried either for or against one of the parties). A grudge against one of the parties would be an example of CDI.

Now to contradiction where extrinsic evidence is admissible. Assume we represent the defendant (D) in a murder trial. The prosecution calls witness (W) to testify that D told him (W) he (D) murdered the victim (V) (as we learned this morning, D's statement is admissible as an exclusion to the hearsay bar as a statement of a party under FRE 801(D)(2)(A)). D maintains W is lying and that W's motive for lying is because D had an affair with W's wife. D's lawyer during cross-examination of W asks, "You're making the story up about D's confession because you have a grudge against D inasmuch as you believe he (D) had an affair with your wife?" W denies that's the motive and claims that he's not lying. When D puts on his case in chief, he can call a witness (i.e. the extrinsic evidence) to testify that W told him about the affair between D and W's wife and that he (W) also told the witness that he (W) was "going to get even with D the first time he got the chance." In this scenario, D is not stuck with W's answer, as he would be under FRE 608, if the issue is contradiction.

This scenario presents a true example of extrinsic evidence being properly used to "contradict" W about his earlier denial on cross-examination. It goes to W's motive for fabricating the lie falsely implicating D in the murder of V. In this situation, we're not just attacking the credibility of W by effectively asking him whether he's dishonest under FRE 608, we're "contradicting" him by calling a witness to testify about his motive for his grudge against D and, thus, his motive to lie and falsely implicate D in V's murder.

This situation differs from the FRE 608 situation discussed earlier where we simply question a witness if he was ever fired for stealing. In the latter event, we're only trying to show that the witness has bad character for truthfulness negatively reflecting on his credibility as a witness. We're not trying to show that he has a motive to lie, as in the preceding example, to falsely implicate D in the murder of V. That's why extrinsic evidence is admissible in the former situation and not in the latter.