

# THE COURTS

## Title 207—JUDICIAL CONDUCT

### PART IV. COURT OF JUDICIAL DISCIPLINE

[207 PA. CODE CH. 21]

Internal Operating Procedures of the Court of  
Judicial Discipline; Doc. No. 1 JD 94

#### Order

*Per Curiam:*

And Now, this 28th day of February, 2006, the Court, pursuant to Article 5, Section 18(b)(4) of the Constitution of Pennsylvania, having adopted an amendment to Section 109 of the Internal Operating Procedures, as more specifically hereinafter set forth, *It Is Hereby Ordered:*

That Section 109 of the Internal Operating Procedures shall become effective immediately.

#### Annex A

### TITLE 207. JUDICIAL CONDUCT

#### PART IV. COURT OF JUDICIAL DISCIPLINE

#### ARTICLE IV. INTERNAL OPERATING PROCEDURES

#### CHAPTER 21. INTERNAL OPERATING PROCEDURES

#### GENERAL PROVISIONS

#### § 109. Confidentiality.

(A) The amendments of 1993 to Article V, § 18 of the Pennsylvania Constitution establishing this Court provide that this Court shall be a court of record, that formal charges filed with the Court shall be a matter of public record, and that all hearings conducted by the Court shall be public proceedings. Accordingly, all documents filed of record with this Court pursuant to our Rules of Procedure shall be available for public inspection upon reasonable notice to the Clerk of the Court. Copies of documents shall be provided in accordance with C.J.D.R.P. No. 112.

All other documents, such as, for example, internal memoranda, are confidential. Members have the responsibility to safeguard the confidentiality of such documents. This responsibility shall continue after a member completes his term or leaves the Court for any reason.

(B) All members of the Court, staff employees and any contractual employees shall at all times maintain strict confidentiality concerning proceedings before the Court, and shall refrain from discussing with persons not a member or employee of the Court the substance of deliberations concerning any matter. This provision applies to all matters involving the deliberative process regardless of whether the matter still is pending or has already been decided.

[Pa.B. Doc. No. 06-418. Filed for public inspection March 17, 2006, 9:00 a.m.]

## Title 225—RULES OF EVIDENCE

[225 PA. CODE ART. IV]

Order Amending Rule 404 and Revision of Comment; No. 387 Supreme Court Rules; Doc. No. 1

#### Order

*Per Curiam:*

Now, this 28th day of February 2006, upon the recommendation of the Committee on Rules of Evidence, and having been published for comment in *Pennsylvania Bulletin*, Vol. 35, No. 24, page 3287, and with a Final Report to be published with this Order:

*It Is Ordered* pursuant to Article V, Section 10 of the Constitution of Pennsylvania that Pa.R.E. 404 and the comment thereto are hereby revised in the following form.

This Order shall be processed immediately in accordance with Pa.R.J.A. 103(b), and shall be effective March 31, 2006.

Madame Justice Baldwin did not participate in the consideration or decision of this matter.

#### Annex A

### TITLE 225. RULES OF EVIDENCE

#### ARTICLE IV. RELEVANCY AND ITS LIMITS

#### Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes.

(a) *Character Evidence Generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except [ **as follows** ]:

(1) *Character of Accused.* In a criminal case, evidence of a pertinent trait of character of the accused is admissible when offered by the accused, or by the prosecution to rebut the same. **If evidence of a trait of character of the alleged victim of the crime is offered by an accused and is admitted under subsection (2), evidence of the same trait of character of the accused is admissible if offered by the prosecution.**

(2) *Character of [ Complainant ] Alleged Victim.*

(i) In a criminal case, **subject to limitations imposed by statute**, evidence of a pertinent trait of character of the [ **complainant** ] **alleged victim** is admissible when offered by the accused, or by the prosecution to rebut the same.

\* \* \* \* \*

(b) *Other Crimes, Wrongs, or Acts.*

\* \* \* \* \*

(4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the **general nature** of any such evidence it intends to introduce at trial.

Comment—2006

**[ The basic principle of Pa.R.E. 404 is consistent with F.R.E. 404 and prior Pennsylvania case law.**

Pa.R.E. 404, with certain enumerated exceptions, provides that character evidence cannot be used to prove conduct. Under this rule, evidence that an employee had a character trait of absent-mindedness would not be admissible to prove that on a particular occasion he or she failed to fasten the safety latch on a piece of equipment. The rule does not preclude the use of character evidence for other purposes, including where character is an element of a claim or defense. See, e.g., *Dempsey v. Walso Bureau, Inc.*, 431 Pa. 562, 246 A.2d 418 (1968) (negligent employment); *Commonwealth ex rel. Grimes v. Grimes*, 281 Pa. Super 484, 422 A.2d 572 (1980) (parental fitness).

The exceptions to the rule differ from F.R.E. 404 as indicated below.

*Subsection (a).* Subsection (a) of the rule differs from F.R.E. 404(a).

Paragraph (a)(1) has not been amended to conform with the December 1, 2000 amendments to F.R.E. 404(a)(1), which provide that the prosecution may respond to the accused's offer of evidence of the character of the alleged victim of a crime by offering evidence of the same trait of character of the defendant.

Subsection (a)(2) is consistent with prior Pennsylvania case law. See, e.g., *Commonwealth v. Dillon*, 528 Pa. 417, 598 A.2d 963 (1991); *Commonwealth v. Amos*, 445 Pa. 297, 284 A.2d 748 (1971); see also Pa. R.E. 405 (regarding means of proof of the complainant's character for violence).

The exception provided at Pa.R.E. 404(a)(2)(iii) does not appear in the federal rule. It is consistent with Pennsylvania decisional law. See *Bell v. Philadelphia*, 341 Pa. Super. 534, 491 A.2d 1386 (1985).

*Subsection (b).* This paragraph is similar to F.R.E. 404(b) in recognizing legitimate evidentiary purposes for the introduction of evidence of other crimes, wrongs or bad acts. Unlike the Federal rule, however, Pennsylvania law provides a distinct standard for balancing the inherent prejudice of such evidence against its probative value. Under federal law, if evidence of other crimes, wrongs or bad acts is offered for a legitimate evidentiary purpose, the evidence is admissible if it meets the general standard of F.R.E. 403. F.R.E. 403 provides that relevant evidence is admissible unless its probative value is substantially outweighed by prejudicial danger. Under Pennsylvania law, evidence of other crimes, wrongs or bad acts offered for a legitimate evidentiary purpose is admissible only if its probative value outweighs the potential for prejudice. See *Commonwealth v. Morris*, 493 Pa. 164, 425 A.2d 715 (1981). Pa.R.E. 404(b)(3) codifies Pennsylvania decisional law and is an exception to the general rule defined by Pa.R.E. 403. ]

Pa.R.E. 404 is an exception to the general rule set forth in Pa.R.E. 402 that all relevant evidence is admissible. Pa.R.E. 404 is, in principle, consistent with F.R.E. 404. However, the Pennsylvania rule uses more subdivisions to enhance clarity and readability. A few substantive differences accommodate Pennsylvania statutory and prior case law.

#### Section (a)

This section promulgates a general rule that evidence of a person's character or trait of character is not admissible to prove conduct in conformity

therewith on a particular occasion. The rationale is that the relevance of such evidence is usually outweighed by its potential for creating unfair prejudice, particularly with a jury.

This general rule of inadmissibility is consistent with prior Pennsylvania case law. See, e.g., *Greenberg v. Aetna Ins. Co.*, 427 Pa. 494, 235 A.2d 582 (1967) (error to permit the plaintiff to testify that he served in the United States Armed Forces in World War II and distinguished himself with a heroic record).

This section does not preclude the introduction of evidence of a person's character, or trait of character, to prove something other than conduct in conformity therewith. For example, a party must sometimes prove a person's characteristic because it is an element of the party's claim or defense. See, e.g., *Dempsey v. Walso Bureau, Inc.*, 431 Pa. 562, 246 A.2d 418 (1968) (alleged negligent employment of a violence-prone security guard); *Commonwealth ex rel. Grimes v. Grimes*, 281 Pa. Super 484, 422 A.2d 572 (1980) (parental fitness in a custody case); *Christiansen v. Silfies*, 446 Pa. Super. 464, 667 A.2d 396 (1995) (alleged negligent entrustment of a truck to a man with a poor driving record).

A person's trait of character is not the same as a person's habit. The distinction is discussed in the Comment to Rule 406, *infra*. If a person's trait of character leads to habitual behavior, evidence of the latter is admissible to prove conduct in conformity therewith on a particular occasion, pursuant to Rule 406.

Like the federal rule, section (a) has three subsections of exceptions. They should be read together with section (a) of Rule 405, which describes two methods of proving a person's character, or trait of character.

Subsection (1), which deals with the character of a defendant in a criminal case, is essentially the same as subsection (1) of F.R.E. 404(a). It allows the defendant to "put his character in issue," usually by calling character witnesses to testify to his good reputation for a law-abiding disposition, or other pertinent trait of character. If the defendant does so, the Commonwealth may (1) cross-examine such witnesses, subject to the limitations imposed by Rule 405(a), and (2) offer rebuttal evidence.

If a defendant in a criminal case chooses to offer evidence of a pertinent trait of character of an alleged victim under subsection (2)(i), then subsection (1) allows the Commonwealth to offer evidence that the defendant has the same trait of character. For example, in an assault and battery case, if the defendant introduces evidence that the alleged victim was a violent and belligerent person, the Commonwealth may counter by offering evidence that the defendant was also a violent and belligerent person. Thus, the jury will receive a balanced picture of the two participants to help it decide who was the first aggressor.

Subsection (2), unlike subsection (2) of F.R.E. 404(a), is divided into three subsections.

Subsection (i), like the federal rule, gives an accused the right to introduce evidence of a pertinent trait of character of the alleged victim of the crime with which the accused is charged. However, the Pennsylvania rule differs from the federal rule

by recognizing statutory limitations on this right. In particular, 18 Pa.C.S. § 3104 (the Rape Shield Law) often prohibits the accused from introducing evidence of the alleged victim's past sexual conduct, including reputational evidence thereof. See Comment under Rule 412 (not adopted), *infra*.

Subsection (ii), which is essentially the same as the federal rule, applies only in homicide cases in which the defendant offers evidence that the deceased was the first aggressor. It allows the Commonwealth to rebut the defendant's evidence by introducing evidence of the deceased's good reputation for peacefulness.

Subsection (iii), which applies only to a civil action for assault and battery, is not part of the federal rule. It is based on *Bell v. Philadelphia*, 341 Pa. Super. 534, 491 A.2d 1386 (1985).

#### Section (b)

While Pa.R.E. 404(b) uses the comprehensive word "acts," the vast majority of cases applying it, and its federal counterpart, are criminal cases that deal with bad acts, i.e., acts that are also either crimes or non-criminal wrongs. However, the rule applies in civil cases, too, and it applies to good acts as well. See *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 520 (3d Cir. 2003), interpreting the similar federal rule.

Evidence of other crimes, wrongs or bad acts, is powerful evidence. This is particularly so when it is offered against a defendant in a criminal case. By far the issue most often litigated under Rule 404(b) is whether such evidence can be introduced against an accused for some reason other than to prove that the accused acted in conformity with his (or her) prior bad conduct.

Section (b) is similar to section (b) of F.R.E. 404. Unlike the federal rule, it is divided into four subsections to enhance clarity:

Subsection (1), which uses the same language as the federal rule, treats evidence of other crimes, wrongs, or acts, the same as section (a) treats evidence of a person's character, or trait of character, i.e., it makes such evidence inadmissible to prove conduct in conformity therewith.

Subsection (1) is consistent with prior Pennsylvania case law. See *Commonwealth v. Fortune*, 464 Pa. 367, 346 A.2d 783 (1975) (in murder case, reversible error to admit evidence that the defendant participated in six robberies other than the one that culminated in the murder with which he was charged); *Commonwealth v. Seiders*, 531 Pa. 592, 614 A.2d 689 (1992) (in statutory rape case, reversible error to admit evidence that the defendant had previously been convicted of indecent assault and endangering the welfare of children).

Subsection (1) rejects an alternate holding in *Commonwealth v. Amos*, 445 Pa. 297, 284 A.2d 748 (1971), a murder case in which the defendant pled self-defense, that it was error to preclude the defendant from introducing the alleged victim's criminal record to prove that the victim was a man of "quarrelsome and violent character," and thus the aggressor.

Subsection (2), like the federal rule, contains a non-exhaustive list of purposes, other than proving character in order to show action in conformity therewith, for which evidence of other crimes,

wrongs, or acts committed by a person may be admitted. When the evidence is admitted for such a purpose, the party against whom it is offered is entitled, upon request, to a limiting instruction to the jury. See *Commonwealth v. Hutchinson*, 571 Pa. 45, 811 A.2d 556 (2002). See also Pa.R.E. 105.

Subsection (3) is an adjunct to subsection (2). However, subsection (3) applies only in criminal cases. Unlike the federal rule, it creates a special balancing test that makes it harder for a party, usually but not always the Commonwealth, to introduce relevant evidence of other crimes, wrongs, or acts committed by a person. Under Rules 402 and 403, most other evidence, as far as relevance is concerned, is admissible unless its probative value is outweighed by one or more of the six negative factors set forth in Rule 403. Under subsection (3), relevant evidence of other crimes, wrongs, or acts committed by a person is admissible only if its probative value outweighs its potential for prejudice. This is a codification of an evidential rule enunciated in *Commonwealth v. Morris*, 493 Pa. 164, 425 A.2d 715 (1981).

When weighing the potential for prejudice of evidence of other crimes, wrongs, or acts, the trial court may consider whether, and how much, such potential for prejudice can be reduced by cautionary instructions. See *Commonwealth v. Nolen*, 535 Pa. 77, 634 A.2d 192 (1993); *Commonwealth v. LaCava*, 542 Pa. 160, 666 A.2d 221 (1995); *Commonwealth v. Miles*, 545 Pa. 500, 681 A.2d 1295 (1996).

Subsection (4), which applies only in criminal cases, and only to the Commonwealth, requires that reasonable notice be given before evidence of other crimes, wrongs, or acts is introduced at trial. It is the same as the federal rule. Its purpose is to prevent unfair surprise, and to give the defendant reasonable time to prepare an objection to, or ready a rebuttal for, such evidence.

### FINAL REPORT

#### *Rule 404: Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes*

##### Rule Amendment and Revision of Comment

In Pa.R.E. 404(a)(2), the word "complainant" is changed to "alleged victim" to conform with the federal rule and the rules in other states. This subsection is subordinated to statutory limitations in order to accommodate the Rape Shield Law with which the current subsection conflicts.

Unlike F.R.E. 404(a)(1), the Pennsylvania rule fails to give the prosecution the right to counter defense evidence of a character trait of the victim. Thus, the defense could introduce character evidence of the victim but the prosecution could not counter with character evidence of the defendant. The proposed amendment allows for a balanced picture of the participants.

With respect to subsection (b)(4), the federal rule as well as the rule in other states requires only that the prosecution give notice of the "general nature" of other crimes evidence it intends to offer, whereas under the Pennsylvania rule "general nature" is not sufficient. The proposed change conforms our rule to the federal rule.

[Pa.B. Doc. No. 06-419. Filed for public inspection March 17, 2006, 9:00 a.m.]

# Title 25—LOCAL COURT RULES

## NORTHAMPTON COUNTY

### Administrative Order 2006-3—Child Custody Conference Procedure

#### Order of Court

And Now, this 27th day of February, 2006, Rule N1915.1, is amended as follows:

14. Following receipt of ordered evaluations and investigations, but prior to listing for trial, either party may praecipe the matter for conference with the custody conference officer who previously conferred the matter.

15. At least twenty-one days prior to non-jury trial, all custody matters shall have a pre-trial conference.

A. At least three days prior to the pre-trial conference, the parties shall file with the Prothonotary and exchange with each other pre-trial memoranda.

B. The parties shall provide the custody conference officer at the pre-trial conference copies of the pre-trial memoranda and all evaluations and reports.

C. The pre-trial memorandum shall include: (1) a brief narrative statement of the procedural history and relevant facts; (2) a summary of all legal and factual issues; (3) the names and addresses of all witnesses to be called at trial with a summary description of the witness=anticipated testimony; (4) a list of all exhibits to be used at trial; and (5) a statement of any requested stipulations of fact or admissibility of exhibits.

D. The parties shall be prepared to discuss settlement at the pre-trial conference. Counsel shall have the client available in person or by telephone.

E. After the pretrial conference, the conference officer shall file a written recommendation for disposition of the issues including reasons therefore. Said recommendation shall be filed at least seven days prior to the non-jury trial.

This order shall become effective April 3, 2006.

By the Court

ROBERT A. FREEDBERG,  
President Judge

[Pa.B. Doc. No. 06-420. Filed for public inspection March 17, 2006, 9:00 a.m.]

## WESTMORELAND COUNTY

### Rescinding Rule W1915.10 and Adopting New Rule W1915.10; No. 3 of 2006

#### Order

And Now, this 2nd day of March, 2006, It Is Hereby Ordered that Westmoreland County Rule of Civil Procedure W1915.10 is rescinded and new Rule W1915.10 is adopted. This change is effective 30 days after publication in the Pennsylvania Bulletin.

By the Court

DANIEL J. ACKERMAN,  
President Judge

### Rule W1915.10 Request for Custody Pretrial Conference. Pretrial Conference. Decision.

(a) A party may file a Request for a Custody Pretrial Conference in the Westmoreland County Prothonotary's office anytime within 30 days from the date of service of a Custody Order issued as a result of a Conciliation Conference. Prior to filing the Request, the moving party shall deliver the Request to the chambers of the assigned judge for the scheduling of a Pretrial Conference. When Custody Evaluations have been ordered, a Pretrial Conference is automatically scheduled and a Request need not be filed. (See: W1915.8(a).)

(b) The moving party must serve a copy of the Request and signed Scheduling Order on the other counsel/parties, and on the Family Court Administrator (Custody Office) within 3 days of receiving the signed Order. The Request For Custody Pretrial Conference and Scheduling Order shall be substantially as follows:

IN THE COURT OF COMMON PLEAS OF  
WESTMORELAND COUNTY, PENNSYLVANIA  
CIVIL ACTION—LAW (CUSTODY)

Plaintiff )  
v. ) No. \_\_\_\_\_ of 20 \_\_\_\_  
Defendant )

#### REQUEST FOR CUSTODY PRETRIAL CONFERENCE

I, \_\_\_\_\_, hereby request a pretrial conference before the Court of Common Pleas. This Request is being filed within 30 days of the date of Service of the Custody Order.

The issues to be considered are:

\_\_\_\_\_ Relocation \_\_\_\_\_ Time/Length/Number of Visits  
\_\_\_\_\_ Primary Residence

Other: \_\_\_\_\_

#### VERIFICATION

I verify that the statements made in this request are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsifications to authorities.

Date: \_\_\_/\_\_\_/\_\_\_  
Signature Petitioner or Petitioner's Counsel

Printed Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone No: ( ) \_\_\_\_\_

#### SCHEDULING ORDER

You are hereby ordered to appear in person on \_\_\_\_\_, 20 \_\_\_\_ at \_\_\_\_\_ .M. before the Honorable \_\_\_\_\_ in Courtroom \_\_\_\_\_ in the Westmoreland County Courthouse, 2 North Main Street, Greensburg, Pa. 15601 for a Pretrial Conference. Counsel or the parties, if unrepresented, shall file a Pretrial Narrative at least 10 days prior to the Pretrial Conference. The parties and any children over whom custody or visitation is sought are required to attend the Pretrial Conference pursuant to Westmoreland Rule W1915.10(d).

BY THE COURT:

Date: \_\_\_\_\_, J

CERTIFICATE OF SERVICE

I hereby certify that I will serve a copy of this Request and Order within 3 days of receiving the signed Order.

Date: \_\_\_/\_\_\_/\_\_\_\_\_  
Signature Petitioner or Petitioner's Counsel

(c) Ten days prior to the Pretrial Conference, each party or counsel shall file and submit a Pretrial Narrative to the chambers of the assigned judge. Copies shall be served on all parties. If no Pretrial Narrative is filed, the offending party may be fined or sanctioned otherwise by the Court. The Pretrial Narrative shall include:

- (1) Names and addresses of all witnesses, including experts;
- (2) Summary of each witness's anticipated testimony;
- (3) Copies of all exhibits;
- (4) Proposed custody arrangement;
- (5) Requested stipulation of facts.

(d) All parties, counsel, and any child for whom custody or visitation is sought shall be present at the Pretrial Conference unless otherwise provided by Order of Court. Failure of a party to appear at the Pretrial Conference may result in the entry of a custody/visitation order by the Court.

(e) Any agreement reached at the Pretrial Conference shall be reduced to writing and entered as an order of Court.

[Pa.B. Doc. No. 06-421. Filed for public inspection March 17, 2006, 9:00 a.m.]

**COMMONWEALTH COURT**

**Regular Sessions of Commonwealth Court for the Year 2007; 126 M.D. No. 3**

**Order**

*And Now*, this 6th day of March 2006, it is ordered that the argument sessions of the Commonwealth Court of Pennsylvania shall be held in the year 2007 as follows:

<i>Dates</i>	<i>Situs</i>
February 5—9	Pittsburgh
March 5—9	Philadelphia
April 9—13	Harrisburg
May 7—11	Pittsburgh
June 11—15	Philadelphia
September 4—7	Harrisburg
October 9—12	Pittsburgh
October 29—Nov. 2	Philadelphia
December 10—14	Harrisburg

JAMES GARDNER COLINS,  
*President Judge*

[Pa.B. Doc. No. 06-422. Filed for public inspection March 17, 2006, 9:00 a.m.]