

ARTICLE IV. RELEVANCE AND ITS LIMITS

- Rule
 401. Test for Relevant Evidence.
 402. General Admissibility of Relevant Evidence.
 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.
 404. Character Evidence; Other Crimes, Wrongs, or Acts.
 405. Methods of Proving Character.
 406. Habit; Routine Practice.
 407. Subsequent Remedial Measures.
 408. Compromise Offers and Negotiations.
 409. Offers to Pay Medical and Similar Expenses.
 410. Pleas, Plea Discussions, and Related Statements.
 411. Liability Insurance.
 412. Sex Offense Cases: The Victim's Sexual Behavior or Predisposition (Not Adopted).
 413. Evidence of Immigration Status.

Rule 401. Test for Relevant Evidence.

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
 (b) the fact is of consequence in determining the action.

Comment

This rule is identical to F.R.E. 401.

Whether evidence has a tendency to make a given fact more or less probable is to be determined by the court in the light of reason, experience, scientific principles and the other testimony offered in the case.

The relevance of proposed evidence may be dependent on evidence not yet of record. Under Pa.R.E. 104(b), the court may admit the proposed evidence on the condition that the evidence supporting its relevance be introduced later.

Official Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 401 rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial page (317753).

Rule 402. General Admissibility of Relevant Evidence.

All relevant evidence is admissible, except as otherwise provided by law. Evidence that is not relevant is not admissible.

Comment

Pa.R.E. 402 differs from F.R.E. 402. The Federal Rule specifically enumerates the various sources of federal rule-making power. Pa.R.E. 402 substitutes the phrase "by law".

Pa.R.E. 402 states a fundamental concept of the law of evidence. Relevant evidence is admissible; evidence that is not relevant is not admissible. This concept is modified by the exceptions clause of the rule, which states another fundamental principle of evidentiary law—relevant evidence may be excluded by operation of constitutional law, by statute, by these rules, by other rules promulgated by the Supreme Court or by rules of evidence created by case law.

Examples of decisionally created rules of exclusion that are not abrogated by the adoption of these rules include: the *corpus delicti* rule, *Commonwealth v. Ware*, 459 Pa. 334, 329 A.2d 258 (1974); the collateral source rule, see *Boudwin v. Yellow Cab Co.*, 410 Pa. 31, 188 A.2d 259 (1963); the parol evidence rule, see *Yocca v. Pittsburgh Steelers Sports, Inc.*, 578 Pa. 479, 854 A.2d 425 (2004); and the rule excluding certain evidence to rebut the presumption of legitimacy, see *John M. v. Paula T.*, 524 Pa. 306, 571 A.2d 1380 (1990).

Official Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 402 rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial pages (317753) to (317754).

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons.

The court may exclude relevant evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Comment

Pa.R.E. 403 differs from F.R.E. 403. The Federal Rule provides that relevant evidence may be excluded if its probative value is "substantially outweighed." Pa.R.E. 403 eliminates the word "substantially" to conform the text of the rule more closely to Pennsylvania law. See *Commonwealth v. Boyle*, 498 Pa. 486, 447 A.2d 250 (1982).

"Unfair prejudice" means a tendency to suggest decision on an improper basis or to divert the jury's attention away from its duty of weighing the evidence impartially.

Official Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 403 rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial page (317754).

Rule 404. Character Evidence; Other Crimes, Wrongs, or Acts.

(a) *Character Evidence.*

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to limitations imposed by statute a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted the prosecutor may:

- (i) offer evidence to rebut it; and
- (ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness.* Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(4) *Exception in a Civil Action for Assault and Battery.* In a civil action for assault and battery, evidence of the plaintiff's character trait for violence may be admitted when offered by the defendant to rebut evidence that the defendant was the first aggressor.

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

(1) *Prohibited Uses.* Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

(3) *Notice in a Criminal Case.* In a criminal case the prosecutor must provide reasonable written notice in advance of trial so that the defendant has a fair opportunity to meet it, or during trial if the court excuses pretrial notice on good cause shown, of the specific nature, permitted use, and reasoning for the use of any such evidence the prosecutor intends to introduce at trial.

Comment

Pa.R.E. 404(a) differs from F.R.E. 404(a). There are two differences. First, F.R.E. 404(a)(2)(B) gives the defendant the right to introduce evidence of a pertinent trait of character of the alleged victim of the crime subject to the limitations in F.R.E. 412. The Pennsylvania Rule differs in that Pennsylvania has not adopted Rule 412. Instead, Pennsylvania recognizes statutory limitations on this right. In particular, 18 Pa.C.S. § 3104 (the Rape Shield Law) often prohibits the defendant from introducing evidence of the alleged victim's past sexual conduct, including reputation evidence. See Comment to Pa.R.E. 412 (Not Adopted), *infra*. Second, Pa.R.E. 404(a)(4), 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).

Pa.R.E. 404(a)(1) prohibits the use of evidence of a person's character or trait of character to prove conduct in conformity therewith on a particular occasion. The rationale is that the relevance of such evidence is usually outweighed by its tendency to create unfair prejudice, particularly with a jury. This does not prohibit 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 character or trait of character because it is an element of the party's claim or defense. See Pa.R.E. 405(b) and its Comment.

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.

Pa.R.E. 404(a)(2)(A) which deals with the character of a defendant in a criminal case, is identical to F.R.E. 404(a)(2)(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 (a)(2)(B), then subsection (a)(2)(B)(ii) 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.

Pa.R.E. 404(b)(1) is identical to F.R.E. 404(b)(1). It prohibits the use of evidence of other crimes, wrongs, or acts to prove a person's character.

Pa.R.E. 404(b)(2), like F.R.E. 404(b)(2), contains a non-exhaustive list of purposes, other than proving character, for which a person's other crimes, wrongs, or acts may be admissible. But it differs in that Pa.R.E. 404(b)(2) requires the probative value of the evidence to outweigh its potential for prejudice. 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. LaCava*, 666 A.2d 221 (Pa. 1995). When evidence is admitted for this purpose, the party against whom it is offered is entitled, upon request, to a limiting instruction. *See Commonwealth v. Hutchinson*, 811 A.2d 556 (Pa. 2002).

Notice pursuant to subdivision (b)(3) must be provided before trial in such time as to allow the defendant a fair opportunity to meet the evidence. *See* Pa.R.E. 609(b)(2) and 902(11). Notice should be sufficiently in advance of trial so the defendant and court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Pa.R.E. 403 have been satisfied notwithstanding that a final determination as to the admissibility of the evidence must await trial. *See, e.g., Commonwealth v. Hicks*, 91 A.3d 47, 53-54 (Pa. 2014). The court may excuse the pre-trial notice requirement upon a showing of good cause. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures to assure that the opponent is not prejudiced.

Official Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised November 2, 2001, effective January 1, 2002; rescinded and replaced January 17, 2013, effective March 18, 2013; amended December 2, 2021, effective April 1, 2022.

Committee Explanatory Reports:

Final Report explaining the November 2, 2001 revision of Subsection (a) of the Comment published with the Court's Order at 31 Pa.B. 6384 (November 24, 2001).

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Final Report explaining the December 2, 2021 amendment of paragraph (b) published with the Court's Order at 51 Pa.B. 7859 (December 18, 2021).

Source

The provisions of this Rule 404 amended November 2, 2001, effective January 1, 2002, 31 Pa.B. 6381; amended February 28, 2006, effective immediately, 36 Pa.B. 1213 (March 18, 2006); rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620; amended December 2, 2021, effective April 1, 2022, 51 Pa.B. 7858. Immediately preceding text appears at serial pages (406170) and (365865) to (365866).

Rule 405. Methods of Proving Character.

(a) *By Reputation.* When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation. Testimony about the witness's opinion as to the character or character trait of the person is not admissible.

(1) On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct probative of the character trait in question.

(2) In a criminal case, on cross-examination of a character witness, inquiry into allegations of other criminal conduct by the defendant, not resulting in conviction, is not permissible.

(b) *By Specific Instances of Conduct.* Specific instances of conduct are not admissible to prove character or a trait of character, except:

(1) In a civil case, when a person's character or a character trait is an essential element of a claim or defense, character may be proved by specific instances of conduct.

(2) In a criminal case, when character or a character trait of an alleged victim is admissible under Pa.R.E. 404(a)(2)(B) the defendant may prove the character or character trait by specific instances of conduct.

Comment

Pa.R.E. 405(a) differs from F.R.E. 405(a). The first sentence of Pa.R.E. 405(a) permits proof of character or a character trait by reputation testimony, as does F.R.E. 405(a). But the second sentence specifically prohibits opinion testimony about character or a trait of character. This prohibition is consistent with prior Pennsylvania law. *See Commonwealth v. Lopinson*, 427 Pa. 284, 234 A.2d 552 (1967), *vacated on other grounds*, 392 U.S. 647 (1968).

Pa.R.E. 405(a) also differs from F.R.E. 405(a) in that there are two subparagraphs, Pa.R.E. 405(a)(1) and Pa.R.E. 405(a)(2), dealing with cross-examination of a character witness. Pa.R.E. 405(a)(2) prohibits cross-examination of a criminal defendant's character witnesses regarding criminal conduct of the defendant not resulting in conviction. This is consistent with prior Pennsylvania law. *See Commonwealth v. Morgan*, 559 Pa. 248, 739 A.2d 1033 (1999). When a reputation witness is cross-examined regarding specific instances of conduct, the court should take care that the cross-examiner has a reasonable basis for the questions asked. *See Commonwealth v. Adams*, 426 Pa. Super. 332, 626 A.2d 1231 (1993).

Pa.R.E. 405(b) differs from F.R.E. 405(b). Unlike F.R.E. 405(b), Pa.R.E. 405(b) distinguishes between civil and criminal cases in permitting the use of specific instances of conduct to prove character.

With regard to civil cases, Pa.R.E. 405(b)(1) is similar to the Federal Rule in permitting proof of character by specific instances of conduct where character is an essential element of the claim or defense. This is consistent with prior Pennsylvania law. *See Matusak v. Kulczewski*, 295 Pa. 208, 145 A. 94 (1928); *Dempsey v. Walso Bureau, Inc.*, 431 Pa. 562, 246 A.2d 418 (1968). With regard to criminal cases, under Pa.R.E. 404(a)(2)(B), the accused may offer evidence of a pertinent trait of character of the alleged crime victim. Under Pa.R.E. 405(b)(2) the trait may be proven by specific instances of conduct without regard to whether the trait is an essential element of the charge, or defense. This is consistent with prior Pennsylvania law. *See Commonwealth v. Dillon*, 528 Pa. 417, 598 A.2d 963 (1991).

Official Note: Adopted May 8, 1998, effective October 1, 1998; amended July 20, 2000; effective October 1, 2000; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the July 20, 2000 amendment of paragraph (a) concerning allegations of other criminal misconduct published with the Court's Order at 30 Pa.B. 3920 (August 5, 2000).

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 405 amended July 20, 2000, effective October 1, 2000, 30 Pa.B. 3919; rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial pages (317757) to (317758) and (338879).

Rule 406. Habit; Routine Practice.

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or there was an eyewitness.

Comment

This rule is identical to F.R.E. 406. The concepts of "habit" and "routine practice" denote conduct that occurs with fixed regularity in repeated specific situations. Like the Federal Rule, Pa.R.E. 406 does not set forth the ways in which habit or routine practice may be proven, but leaves this for case-by-case determination. *See, e.g., Commonwealth v. Rivers*, 537 Pa. 394, 644 A.2d 710 (1994) (allowing testimony based on familiarity with another's conduct); *Baldrige v. Matthews*, 378 Pa. 566, 570, 106 A.2d 809, 811 (1954) (testimony of uniform practice apparently permitted without examples of specific instances).

Evidence of habit must be distinguished from evidence of character. Character applies to a generalized propensity to act in a certain way without reference to specific conduct, and frequently contains a normative, or value-laden, component (*e.g.*, a character for truthfulness). Habit connotes one's conduct in a precise factual context, and frequently involves mundane matters (*e.g.*, recording the purpose for checks drawn).

Official Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 406 rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial page (338879).

Rule 407. Subsequent Remedial Measures.

When measures are taken by a party that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible against that party 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.

Comment

Pa.R.E. 407 differs from F.R.E. 407. The rule has been modified to clarify that the rule only protects the party that took the measures. Though F.R.E. 407 is silent on the point, the courts have generally held that the federal rule does not apply when one other than the alleged tortfeasor takes the action because the reason for the rule (to encourage remedial measures) is not then implicated. *See, e.g., TLT-Babcock, Inc. v. Emerson Electric Co.*, 33 F.3d 397, 400 (4th Cir. 1994) (collecting cases).

Official Note: Adopted May 8, 1998, effective October 1, 1998; amended June 12, 2003, effective July 1, 2003; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the June 12, 2003 amendments published with the Court's Order at 33 Pa.B. 2973 (June 28, 2003).

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 407 adopted September 11, 1998, effective October 1, 1998; amended June 12, 2003, effective July 1, 2003, 33 Pa.B. 2973; rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial pages (338879) to (338880).

Rule 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.

(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.

Comment

Pa.R.E. 408(a) differs from F.R.E. 408(a) in that the federal rule in paragraph (a)(2) contains language that seems to permit the use in criminal cases of statements made to government investigators, regulators, or enforcement authority in negotiations in civil cases. That language has not been adopted because the use of such statements might conflict with the policies underlying Pa.R.Crim.P. 586 (relating to dismissal of criminal charges not committed by force or violence upon payment of restitution) or Pa.R.Crim.P. 546 (relating to dismissal upon satisfaction or agreement).

This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

Pa.R.E. 408(b) is identical to F.R.E. 408(b).

Admissibility of conduct and statements in mediations pursuant to the Mediation Act of 1996, 42 Pa.C.S. § 5949, is governed by that statute.

Pa.R.E. 408 is consistent with 42 Pa.C.S. § 6141 which provides, in pertinent part, as follows:

§ 6141. *Effect of certain settlements*

(a) *Personal Injuries.* Settlement with or any payment made to an injured person or to others on behalf of such injured person with the permission of such injured person or to anyone entitled to recover damages on account of injury or death of such person shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made, unless the parties to such settlement or payment agree to the contrary.

(b) *Damages to Property.* Settlement with or any payment made to a person or on his behalf to others for damages to or destruction of property shall not constitute an admission of liability by the person making the payment or on whose behalf the payment was made, unless the parties to such settlement or payment agree to the contrary.

(c) *Admissibility in Evidence.* Except in an action in which final settlement and release has been pleaded as a complete defense, any settlement or payment referred to in subsections (a) and (b) shall not be admissible in evidence on the trial of any matter.

Official Note: Adopted May 8, 1998, effective October 1, 1998; amended March 10, 2000; effective July 1, 2000; Comment revised March 29, 2001, effective April 1, 2001; amended September 18, 2008, effective October 30, 2008; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the March 10, 2000 amendments concerning the inadmissibility of evidence of conduct or statements made in compromise negotiations published at 30 Pa.B. 1643 (March 25, 2000).

Final Report explaining the March 29, 2001 revision of the Comment published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).

Final Report explaining the September 18, 2008 amendments published with the Court's Order at 38 Pa.B. 5423 (October 4, 2008).

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 408 amended March 10, 2000, effective immediately, 30 Pa.B. 1639; amended March 29, 2001, effective April 1, 2001, 31 Pa.B. 1993; amended September 18, 2008, effective October 30, 2008, 38 Pa.B. 5423; rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial pages (338880) to (338881).

Rule 409. Offers to Pay Medical and Similar Expenses.

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Comment

This rule is identical to F.R.E. 409.

As to the admissibility of a benevolent gesture made by a health care provider, *et al.*, see the Benevolent Gesture Medical Professional Liability Act, Act of October 25, 2013, P. L. 665, 35 P. S. §§ 10228.1—3.3.

Official Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised December 30, 2005, effective February 1, 2006; rescinded and replaced January 17, 2013, effective March 18, 2013; Comment revised July 30, 2015, effective October 1, 2015.

Committee Explanatory Reports:

Final Report explaining the December 30, 2005 revision of the Comment published with the Court's Order at 36 Pa.B. 384 (January 28, 2006).

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Final Report explaining the July 30, 2015 revision of the Comment published with the Court's Order at 45 Pa.B. 4759 (August 15, 2015).

Source

The provisions of this Rule 409 amended December 30, 2005, effective February 1, 2006, 36 Pa.B. 384; rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620; amended July 30, 2015, effective October 1, 2015, 45 Pa.B. 4759. Immediately preceding text appears at serial page (365870).

Rule 410. Pleas, Plea Discussions, and Related Statements.

(a) *Prohibited Uses.* In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

- (1) a guilty plea that was later withdrawn;
- (2) a *nolo contendere* plea;
- (3) a statement made in the course of any proceedings under Rules 311, 313, 409, 414, 424, 550 or 590 of the Pennsylvania Rules of Criminal Procedure.

ture, Rule 11 of the Federal Rules of Criminal Procedure, or a comparable rule or procedure of another state; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later withdrawn guilty plea.

(b) *Exceptions.* The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury, false swearing or unsworn falsification to authorities, if the defendant made the statement under oath, on the record, and with counsel present.

Comment

Pa.R.E. 410(a)(3) differs from F.R.E. 410(a)(3) in that it refers to the Pennsylvania proceedings to which the paragraph applies rather than the federal proceedings.

Pa.R.E. 410 does not prohibit the use of a conviction that results from a plea of *nolo contendere*, as distinct from the plea itself, to impeach in a later proceeding (subject to Pa.R.E. 609) or to establish an element of a charge in a later administrative proceeding. *See Commonwealth v. Snyder*, 408 Pa. 253, 182 A.2d 495 (1962) (conviction based on *nolo contendere* plea could be used to impeach witness in later criminal proceeding); *Eisenberg v. Commonwealth, Dep't. of Public Welfare*, 512 Pa. 181, 516 A.2d 333 (Pa. 1986) (conviction based on *nolo contendere* plea permitted to establish element of charge in administrative proceeding).

There is also a statute governing the admissibility of guilty pleas and pleas of *nolo contendere* in cases charging summary motor vehicle violations when offered in civil cases arising out of the same facts. *See* 42 Pa.C.S. § 6142 which provides:

(a) *General Rule.* A plea of guilty or *nolo contendere*, or a payment of the fine and costs prescribed after any such plea, in any summary proceeding made by any person charged with a violation of Title 75 (relating to vehicles) shall not be admissible as evidence in any civil matter arising out of the same violation or under the same facts or circumstances.

(b) *Exception.* The provisions of subsection (a) shall not be applicable to administrative or judicial proceedings involving the suspension of a motor vehicle or tractor operating privilege, learner's permit, or right to apply for a motor vehicle or tractor operating privilege, or the suspension of a certificate of appointment as an official inspection station, or the suspension of a motor vehicle, tractor, or trailer registration.

Pa.R.E. 410(b)(1) is identical to F.R.E. 410(b)(1).

Pa.R.E. 410(b)(2) differs from F.R.E. 410(b)(2) in that "false statement" has been omitted and replaced with "false swearing" and "unsworn falsification to authorities" to correlate with acts defined in the Pennsylvania Crime Code. *See* 18 Pa.C.S. §§ 4903, 4904.

Official Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised March 23, 1999, effective immediately; amended March 10, 2000, effective immediately; amended March 29, 2001, effective April 1, 2001; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the March 23, 1999 technical revisions of the Comment published with the Court's Order at 29 Pa.B. 1714 (April 3, 1999).

Final Report explaining the March 10, 2000 technical amendments updating the rule published with the Court's Order at 30 Pa.B. 1641 (March 25, 2000).

Final Report explaining the March 29, 2001 amendments published with the Court's Order at 31 Pa.B. 1995 (April 14, 2001).

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 410 amended March 23, 1999, effective immediately, 29 Pa.B. 1712; amended March 10, 2000, effective immediately, 30 Pa.B. 1639; amended March 29, 2001, effective April 1, 2001, 31 Pa.B. 1993; rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial pages (338882) and (276577).

Rule 411. Liability Insurance.

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

Comment

This rule is identical to F.R.E. 411.

Official Note: Adopted May 8, 1998, effective October 1, 1998; rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 411 rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial pages (276577) to (276578).

Rule 412. Sex Offense Cases: The Victim's Sexual Behavior or Predisposition (Not Adopted).

Comment

Pennsylvania has not adopted a Rule of Evidence comparable to F.R.E. 412. In Pennsylvania this subject is governed by 18 Pa.C.S. § 3104 (the "Rape Shield Law").

18 Pa.C.S. § 3104 provides:

§ 3104. Evidence of victim's sexual conduct

(a) *General rule.*—Evidence of specific instances of the alleged victim's past sexual conduct, opinion evidence of the alleged victim's past sexual conduct, and reputation evidence of the alleged victim's past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim's past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

(b) *Evidentiary proceedings.*—A defendant who proposes to offer evidence of the alleged victim's past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).

Official Note: Comment rescinded and replaced January 17, 2013, effective March 18, 2013.

Committee Explanatory Reports:

Final Report explaining the January 17, 2013 rescission and replacement published with the Court's Order at 43 Pa.B. 651 (February 2, 2013).

Source

The provisions of this Rule 412 rescinded and replaced January 17, 2013, effective in sixty days, 43 Pa.B. 620. Immediately preceding text appears at serial page (276578).

Rule 413. Evidence of Immigration Status.

(a) *Criminal or Delinquency Matters; Evidence Generally Inadmissible.* In any criminal or delinquency matter, evidence of a party's or a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the offense, to show motive, or to show bias or prejudice of a witness pursuant to Rule 607. This paragraph shall not be construed to exclude evidence that would result in the violation of a defendant's or a juvenile's constitutional rights.

(b) *Civil Matters; Evidence Generally Inadmissible.* In any civil matter, evidence of a party's or a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the action, or to show bias or prejudice of a witness pursuant to Rule 607.

(c) *Procedure.* Unless a party did not know, and with due diligence could not have known, that evidence of immigration status would be necessary, the following procedure shall apply prior to any such proposed use of immigration status evidence:

(1) The proponent shall file under seal and serve a written pretrial motion containing an offer of proof of the relevancy of the proposed evidence supported by an affidavit.

(2) If the court finds that the offer of proof is sufficient, the court shall order an *in camera* hearing.

(3) The court may admit evidence of immigration status pursuant to paragraph (a) or paragraph (b) if it finds the evidence is reliable and relevant, and that its probative value outweighs the prejudicial nature of evidence of immigration status.

(d) *Voluntary Revelation.* This rule shall not prohibit a person, or the person's attorney, from voluntarily revealing his or her immigration status to the court.

Comment

Pa.R.E. 413 has no counterpart in the Federal Rules. This rule is modeled, in part, after Washington Rule of Evidence 413.

In practice, the introduction of immigration status has received heightened consideration in terms of relevancy and prejudice. *See, e.g., Commonwealth v. Sanchez*, 595 A.2d 617 (Pa. Super. 1991) (reference to defendant as an "illegal alien" was irrelevant and prejudicial). This consideration is warranted to avoid potential intimidation of witnesses for fear of deportation. *See, e.g., 8 U.S.C. § 1227* (Deportable Aliens). This rule is intended to limit the admissibility of evidence of immigration status for purposes other than those stated in the rule. *See, e.g., Commonwealth v. Philistin*, 53 A.3d 1 (Pa. 2012) (discussing admissibility of immigration status for purpose of proving motive). Paragraphs (a) and (b) may serve as a basis for limiting discovery about immigration status.

This rule requires the proponent to seek pretrial approval prior to the introduction of evidence of immigration status. If evidence is admissible, the trial court may consider a cautionary jury instruction to ameliorate its prejudicial effect. *See, e.g., Commonwealth v. Hairston*, 84 A.3d 657 (Pa. 2014).

225 Rule 413

RULES OF EVIDENCE

Nothing in this rule prohibits a court from unsealing a motion.

The procedure set forth in paragraph (c) is unnecessary for immigration status voluntarily revealed pursuant to paragraph (d). However, all other Rules of Evidence remain applicable. *See, e.g.*, Pa.R.E. 402, 403.

Official Note: Adopted August 11, 2021, effective October 1, 2021.

Committee Explanatory Report:

Final Report explaining the August 11, 2021 adoption of Rule 413 published with the Court's Order at 51 Pa.B. 6140 (September 25, 2021).

Source

The provisions of this Rule 413 added August 11, 2021, effective October 1, 2021, 51 Pa.B. 6140.

[Next page is 5-1.]