

Virginia Rules of Evidence

On September 12, 2011 the Supreme Court of Virginia approved and adopted the Virginia Rules of Evidence. This handout describes the general background on adoption of evidence rules in America, and the genesis of the Virginia Rules that have been submitted to the Commission. On October 4, 2011 the Rules were formally presented to the Code Commission of Virginia, and a draft Bill has been prepared by the Division of Legislative Services of the General Assembly which will implement the Rules by amending or repealing sections of the Code which are now to be set forth in the Rules of Evidence, and amending the rules enabling statute, making the Rules effective on a set date, and confirming that the Rules of Evidence will be treated as rules of court, subject to the normal amendment process by the Court in the future.

BACKGROUND

Evidence law is one of the most common subjects for appellate opinions, and has been since Virginia was founded. The leading treatise, THE LAW OF EVIDENCE IN VIRGINIA, discusses and cites 3,200 cases as the sources for evidence doctrine, with a table of cases running 80 pages with 40 citations per page. Evidence issues arise in virtually every trial or hearing, and often require arguments by counsel *on the spot* and rulings from the bench immediately. Thus accessibility of a clear understanding of the governing evidence doctrines is important in the operation of our trial courts.

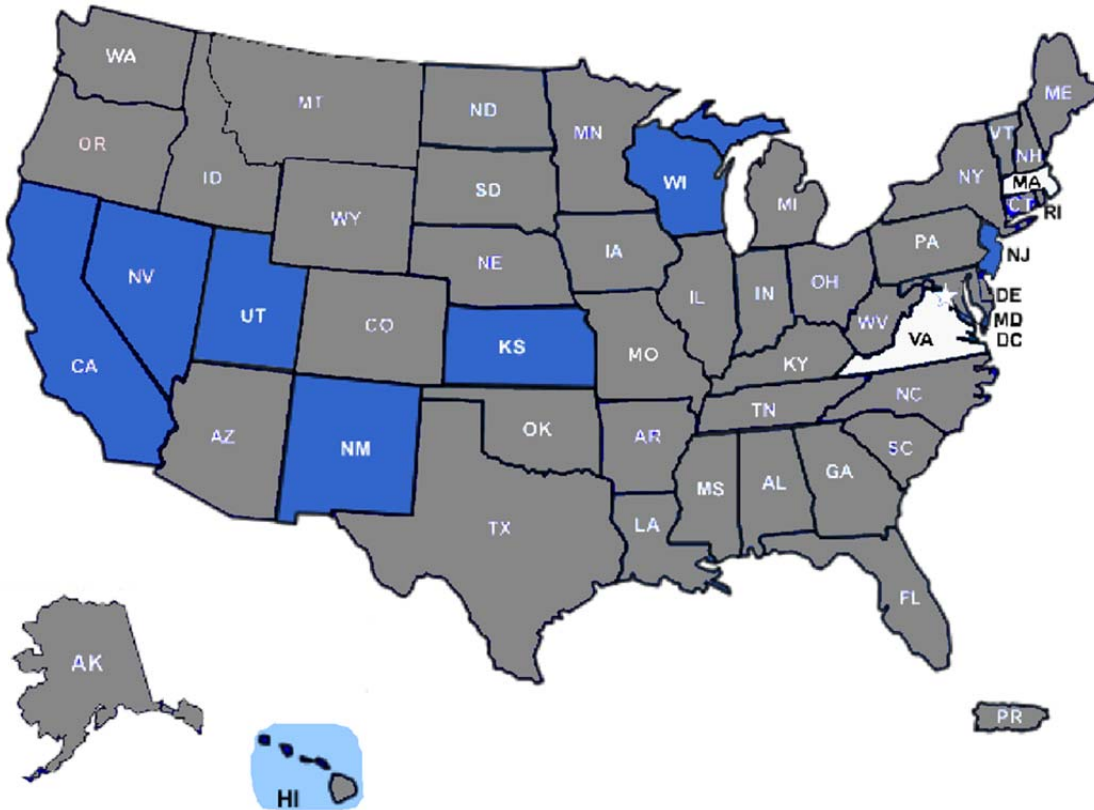
Every American jurisdiction faced a growing mountain of evidence case law during the 20th Century. To make sense of this large body of law, distillation into an organized set of Rules was undertaken.

The **Model Code of Evidence**, a project of the American Law Institute, was a state-focused set of rules proposals, completed in the **early 1940's**. The **Uniform Rules of Evidence**, a project of the National Conference of Commissioners on Uniform State Laws, was initially **completed in 1953**. The Federal Rules of Evidence, adopted in 1975, have similar coverage, and organize the issues addressed in all jurisdictions into 10 subject categories, with an 11th section setting forth details of the "coverage" of the rules (i.e., specifying which proceedings are governed by evidentiary rules and which are not). The standard 10 subject areas for rules of evidence, with a separate "coverage" article, are:

- I General Provisions (including offers of proof, objections and the like)
- II Judicial Notice
- III Presumptions
- IV Relevancy and Related Policy Rules (including insurance, settlement)
- V Privilege
- VI Witnesses, Testimony and Impeachment
- VII Lay and Expert Opinion
- VIII Hearsay
- IX Foundations for Proof (authentication)
- X Best Evidence
- XI Coverage (to which proceedings do evidence rules apply)

In the 1950s and 1960s several states codified their rules of evidence. Some followed extant model codes while others adopted different organizations. As of 1975, on the eve of the adoption of Federal Rules of Evidence for all of the federal courts in 1977, fewer than 10 states had distilled their evidence principles into discrete rules.

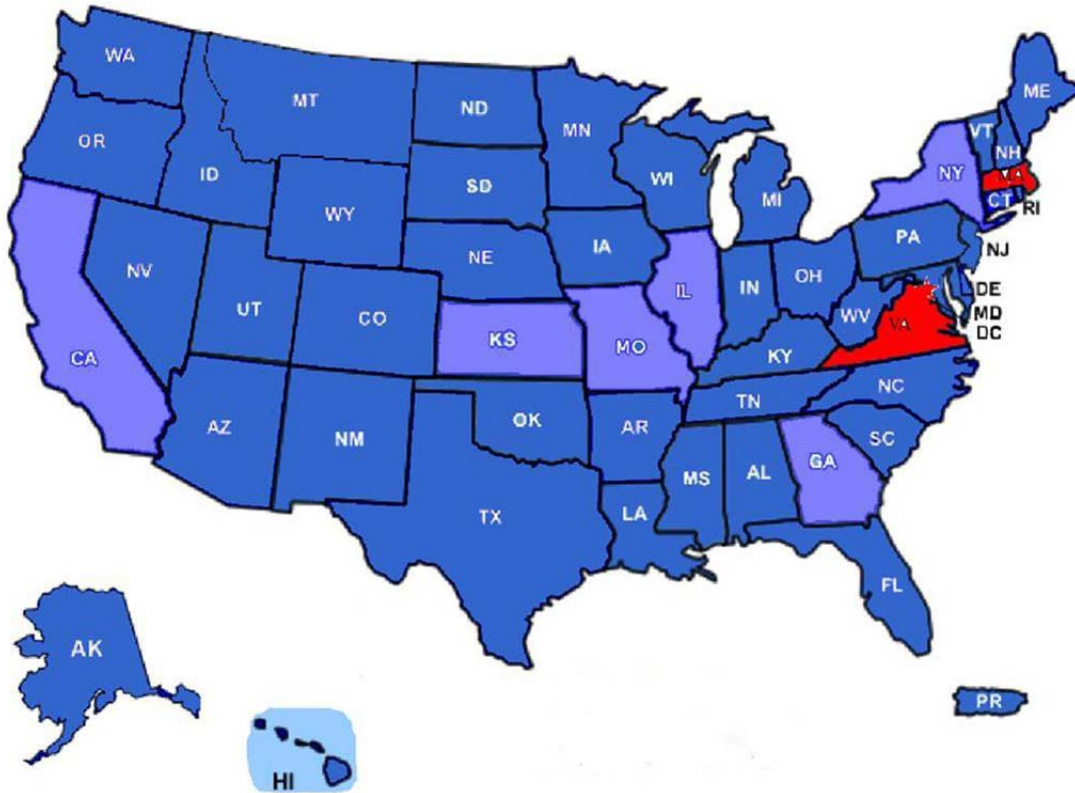
Promulgation of Evidence Rules in the United States circa 1970:



During the first 15 years after the federal courts moved to a codified system of evidence law, a large majority of the United States adopted sets of evidence rules. The enactment of the Federal Rules of Evidence led to a near revolution in state evidence law. In some states drafting projects were undertaken even before the U.S. Supreme Court even sent the rules to Congress for approval. In 1971, Nevada adopted rules based on the Preliminary Draft. New Mexico and Wisconsin adopted rules based on the 1972 version, even though it was being debated in Congress at the time. Eleven more states followed suit in the first years after the Federal Rules were enacted.

By 1990, some 34 states had implemented formal evidence rules. Today, in addition to the entire federal court system, all of the military courts, and numerous other specialized courts, 48 states have distilled their evidence law principles into a comprehensive set of easily-accessible sections. This total includes 42 states following the same 10-topic organization of the draft Virginia Rules, and 6 states which have each enacted 80 or more evidence code provisions using different organizational motifs. **Almost all jurisdictions distill evidence rules in the form of rules promulgated by the highest court of the State, subject to modification by the State Legislature.** States adopting the 10-article organization for their Rules of Evidence usually modify a large number of the model rules to reflect the state's existing law. That is the path taken with the Virginia Rules of Evidence, which do not change any existing case law or statutory doctrine, but set forth existing Virginia law in a coherently organized and carefully expressed body of Rules.

TODAY:



Some 42 states have Rules of Evidence organized in the 10-topic structure listed above: this is a convenient, easily understood and completely logical organization of evidence doctrine. This organization is used in every Evidence casebook and evidence class in American law schools today. Six other states have evidence rules adopted in the 1950's and 1960's with idiosyncratic organizations, covering the same 10 subject areas in different sequences.

Only Virginia and Massachusetts do not presently have a full-fledged set of evidence rules organizing the principles in one form or another. Both of these states have scattered evidence-related provisions in parts of the State Code. Recently, the Massachusetts State Bar and its statewide judicial body have endorsed a Resolution calling for the drafting of Rules of Evidence for the Commonwealth of Massachusetts, and the trial Judge in Massachusetts spearheading that effort has been in contact with our own Advisory Committee on Rules of Practice and Procedure.

This table illustrates the pattern today:

"Standard Organization" of 10 "Articles" dividing up Evidence Law into Subject Areas, and specifying the proceedings governed	Eclectic Organization, but codified with 80 or more sections addressing the principal evidence topics	Two states with no rules and only a small number of isolated evidence-related Code sections
Alabama	California	Massachusetts
Alaska	Georgia	Virginia
Arkansas	Illinois	
Colorado	Kansas	
Connecticut	Missouri	
Delaware	New York	
Florida		
Hawaii		
Idaho		
Indiana		
Iowa		
Kentucky		
Louisiana		
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Oregon		
Pennsylvania		
Rhode Island		
South Carolina		
South Dakota		
Tennessee		
Texas		
Utah		
Vermont		
Washington		
West Virginia		
Wisconsin		
Wyoming		

Survey of Evidence Provisions – What's NOW Codified & What's Not in Virginia

Chapter 14 of Title 8.01 of the Code of Virginia is entitled "Evidence." It contains only 35 provisions that relate to the admission of proof as a matter of Evidence Law, *and of this limited coverage, large proportion of the current provisions simply deal with use of copies in lieu of originals.* Most of the topics addressed in the formal evidence rules of other jurisdictions are not addressed at all.

Existing Code Sections Addressing Evidence Topics:

- § 8.01-385 Definition of governmental bodies
- § 8.01-386 Judicial Notice of law
- § 8.01-387 Noticing the signature of the Governor
- § 8.01-388 Official government publications
- § 8.01-389 Judicial Records as evidence
- § 8.01-390 Government Records
- § 8.01-390.1 School records (use of copies)
- § 8.01-390.2 Chief medical examiner reports (use of copies)
- § 8.01-391 Copies of government records (use of copies)
- § 8.01-396 Parties as witnesses
- § 8.01-396.1 Child's age not source of incompetence
- § 8.01-397 Deadman's Act
- § 8.01-397.1 Habit (adopting the federal rule)
- § 8.01-398 Spousal privilege
- § 8.01-399 Physician-patient privilege and records
- § 8.01-400 Clergy-penitent privilege
- § 8.01-400.1 Privilege using interpreters for the deaf
- § 8.01-400.2 Privilege for counselors and others
- § 8.01-401 Adverse witnesses
- § 8.01-401.1 Experts (adopting Federal Rules 703, 705 and 803(18) for civil cases)
- § 8.01-401.2 Chiropractors as experts
- § 8.01-401.3 Experts (adopting Federal Rules 702 and part of 704)
- § 8.01-403 Impeaching one's own witness; Witnesses proving adverse
- § 8.01-404 Contradiction with a writing
- § 8.01-406 Interpreters to be sworn
- § 8.01-413 Medical records copies (use of copies; discovery procedure)
- § 8.01-413.01 Authentication of some medical bills
- § 8.01-413.1 Employment records copies (use of copies)
- § 8.01-416 Affidavit admissible on car damage
- § 8.01-417.1 Use of portions of voluminous document
- § 8.01-418 Guilty and nolo plea records
- § 8.01-418.1 Subsequent remedial measures (adopting Federal Rule 407)
- § 8.01-418.2 Polygraph evidence
- § 8.01-419.1 Table of car values (not hearsay)
- § 8.01-420.2 Use of recorded conversations as evidence

If one lumps together the various sections in the list above that relate only to *use of copies of documents as evidence*, and the privilege sections, there are only a handful of other topics addressed in the entire Chapter 14 of the Code.

The Code of Virginia today deals with about 1/4 of the primary evidence doctrines in the law:

1. General provisions on Offering Proof at Trials
Covered: almost nothing beyond use of part of a document in a complex case
Not addressed: making objections, offers of proof, offers for a specific purpose
2. Judicial Notice
Covered: notice of law (rarely an issue), and official publications
Not addressed: judicial notice of fact (by far the most commonly used aspect)
3. Presumptions
Nothing is included.
4. Relevance and Related Policy Rules
Covered: only habit and subsequent remedial measures are addressed.
The rape shield provision is in place re character proof. Nolo pleas are covered.
Not addressed: Basic relevancy, the balancing or exclusion for prejudicial, confusing or time-wasting proof, character proof, settlement discussions, insurance, sexual assault provisions other than the rape-shield rule.
5. Privilege
All recognized privileges are codified except the attorney-client privilege.
6. Witnesses, Testimony and Impeachment.
Covered: some impeachment issues; deadman's act, child witnesses, prior statements
Not addressed: personal knowledge, juror or judge as witness, character of witness for truth-telling, impeachment by prior conviction, showing bias.
7. Lay and Expert Opinion
Covered: Expert opinion in civil cases.
Not addressed: Lay opinion testimony; expert testimony in criminal cases
8. Hearsay
Covered: nothing but affidavits on car repairs and books on car value
Not addressed: everything else (i.e., none of the other 25 hearsay exceptions and many issues)
9. Foundations and authentication
Covered: Authentication of some medical bills, numerous isolated provisions.
Not addressed: basic standards, chain of custody problems, physical evidence, voice, telephone and 10 other illustrative situations; calling the signer of a document.
10. Best evidence
Covered: many specific forms of records can be used in copy form
Not addressed: general principles of preferring the original document, the situations where secondary evidence of the contents is permissible, use of duplicates, what is the role of judge and jury, admissibility of summaries
11. Specification of proceedings where evidence rules are applicable: Nothing is spelled out.

Isolated "Federal Rules" are incorporated in the Virginia Code, which now codifies seven of the 75 federal-style rules of evidence:

- Habit – Federal Rule 406 – codified in Virginia Code § 8.01-397.1
- Subsequent Repairs – Federal Rule 407 – codified in Code § 8.01-418.1
- Experts – Federal Rules 702, 703, 704, 705 – codified in Code §§ 8.01-401.1, -401.3
- Hearsay – Federal Rule 803(18) (learned treatises) – codified in § 8.01-401.1

These federal provisions are out of context in the Code of Virginia, in that – in the federal system and every other state adopting the similar numbering pattern – Rules 406 and 407 are set in the context of other provisions, such as 102, 106, 401, and 403, which provide balancing provisions that could also be brought to bear on an issue. These specific rules have been adopted in isolation, without the context of other provisions that might address the same situation. In a coherent set of Rules, general principles accompany these specific rules, to provide context and fall-back principles. In the Article Four examples, the habit and subsequent repairs Rules (406 and 407) are accompanied by general principles on probative value (401), relevancy (402) and balance of prejudice, waste of time and other competing considerations (403).

Highlights of the development of the Virginia Rules of Evidence

1993: The Supreme Court rejected a proposal to adopt the Federal Rules of Evidence in Virginia.

1993-2003: the Boyd-Graves conference prepared and approved draft Rules of Evidence for Virginia based on Virginia case law and statutes, and "source notes" documenting the basis for each Rule in Virginia law. The premise of these drafting efforts was that Virginia evidence law should be clearly stated – not changed, modified, or federalized – but stated clearly and accurately in a logically organized presentation of the principles. The "GUIDE TO EVIDENCE IN VIRGINIA" prepared by the BG Evidence Committee was circulated to all statewide bar groups, and dozens of local bar organizations, free of charge for several years, and then published by Virginia CLE. *It became, and is today, the largest selling publication in VA CLE history. Its contents have been used in dozens of bar CLE programs across the state, it is used in the annual training program for newly elected Virginia judges, and 600 copies were obtained by the Court last year to assure that this distillation of evidence doctrine can be available on every judicial bench in the Commonwealth.*

2004-2005: the Advisory Committee on Rules of Court developed draft Virginia Rules of Evidence, using the BG Guide sections as a basis. **These are "policy neutral" rules, making no change in the law.**

2005-2007:

- the Draft Rules of Evidence were published by the Supreme Court for comment three times, and each time printed copies were mailed to the leadership of 100 bar groups statewide, and provided in "PDF" electronic form to dozens of state and local bar groups and individuals for use in CLE programs and for solicitation of comments.
- Lexis Law Publishing also printed and distributed 1,700 copies of the draft rules and source notes to Virginia lawyers and law offices in 2005 and again in 2007, as part of its Code of Virginia "advance rules service."
- The Virginia Lawyers Weekly printed the entire set of draft rules as a supplement for all subscribers, and later ran articles on the subsequent publication of revised drafts. During two lengthy periods VLW posted electronic copies of the revised drafts its website as they were issued, for free downloading.
- The Supreme Court posted the evidence rules drafts on its website for two years.
- Several local bar-sponsored informational programs on the draft Rules were held in Northern Virginia, and others were held in Charlottesville, Roanoke, Richmond/Henrico Bar, Williamsburg/James City County Bar, and the Norfolk/Portsmouth Bar.
- the 2006 Annual Meeting of The Virginia Bar Association held a featured program on the Draft Rules.
- Comments were received by the Advisory Committee from several organizations – none of which noted any opposition to the Rules – and editorial corrections were made based on study of these suggestions. Those submitting comments were notified about the consideration of their suggestions.

● The Commission on Virginia Courts in the 21st Century (the "Futures Commission"), after several years of studying the needs of the Virginia legal system, filed its Final Report in 2007, which found:

Virginia should improve the administration of justice at the trial level by * * * *

● **Adopting Rules of Evidence for civil and criminal proceedings.**

Id. at p. 23. ("Recommendation 4.6") In the supporting reports published in connection with this final Futures Commission finding, the need for a set of Rules of Evidence is explained: "The law of evidence is now set forth in over one thousand published decisions from the Supreme Court and Court of Appeals and scattered sections of the Code of Virginia."

● The Advisory Committee on Rules of Court, which prepares rules proposals for the court system and is composed of plaintiffs' and defense lawyers, criminal and civil practitioners, and sitting judges from the general district, circuit court, and Court of Appeals, unanimously approved the revised draft rules in the fall of 2007. After two years of study, the motion for approval was made by a plaintiff's lawyer and seconded by a defense lawyer.

2008-2011:

● The Judicial Council of Virginia, with representatives of the bar, several judicial members, and representatives of the Legislature participating, unanimously approved the draft Rules of Evidence in March, 2008.

● All case decisions and statutory developments through 2011 have been reviewed by the Supreme Court to assure that the draft Rules accurately reflect existing law.

● The Rules have been edited for gender-neutral phrasing.

● No substantive or doctrinal changes have been made since the Rules were repeatedly published in the 2005-2007 period.

● the Supreme Court of Virginia specifically considered the Rules from June through August of 2011, discussed them in detail at its annual Retreat, and then unanimously approved the Rules on September 12, 2011.

● after adoption by the Court, the Rules of Evidence were submitted to the Code Commission of Virginia as required by statute. The Commission held its first discussion of the Rules on October 4, 2011.

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>>> No judge, individual lawyer, or organization in Virginia has ever communicated opposition to the adoption of these Rules – either during the several comment periods while the drafting of the Rules was in progress, or at the numerous Bar and educational programs offered about the Rules.
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