
THE VIRGINIA RULES OF EVIDENCE

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The Virginia Rules of Evidence have a long history, beginning in 1983 when the Virginia State Bar appointed a committee to investigate the possibility of developing Rules of Evidence.¹ At that time, the Federal Rules of Evidence were only a few years old and a number of states were developing codes of evidence of their own.² The Committee reviewed the growing nationwide reexamination of evidence law, and recommended that Virginia establish a code of evidence.³ At the same time, the Boyd-Graves Conference of the Virginia Bar Association also recommended the creation of a code of evidence for Virginia.⁴

The Virginia Supreme Court responded to these initiatives by appointing a committee to draft evidence rules to be submitted to the Court.⁵ The committee, chaired by Professor Stephen Saltzburg of the University of Virginia and John M. Oakey, Jr., a prominent Richmond litigator, consisted of representatives from the trial bar, including both plaintiffs' and defendants' civil attorneys, the Attorney General's and the Commonwealth's Attorneys' offices, criminal defense lawyers, judges of the Circuit and General District Courts, and four law professors.⁶ This committee deliberated for over a year, and in late 1985 submitted a recommended draft of the Rules of Evidence to the Virginia Supreme

¹ EVIDENCE COMM., RULES OF EVIDENCE FOR VIRGINIA 1 (2008), *available at* <http://216.230.13.18/section/civil/civil/BG08/11.%20TAB%205%20CODE%20OF%20EVIDENCE.pdf>

² *Id.*; Deborah Elkins, *The Long and Winding Road*, VA. LAWYERS WEEKLY, Oct. 4, 2011, *available at* www.valawyersweekly.com/2011/10/04/the-long-and-winding-road/; Jessica Golden, *The Virginia Rules of Evidence*, KALBAUGH PFUND & MESSERSMITH NEWSLETTER, Oct. 2011, *available at* http://www.kpmlaw.com/_literature_102438/October_2011_-_The_Virginia_Rules_of_Evidence. See Josh Camson, *History of the Federal Rules of Evidence*, LITIGATION NEWS: AMERICAN BAR ASSOCIATION (2012), *available at* http://apps.americanbar.org/litigation/litigationnews/trial_skills/061710-trial-evidence-federal-rules-of-evidence-history.html.

³ EVIDENCE COMM., *supra* note 1, at 1.

⁴ *Id.*

⁵ *Id.* at 2.; Elkins, *supra* note 2; Golden, *supra* note 2.

⁶ EVIDENCE COMM., *supra* note 1, at 2; Golden, *supra* note 2. Professor Bacigal was one of the law professors who served on that committee. (He maintains that he was only twelve years old at the time).

Court.⁷ Unlike the Rules finally adopted in 2012, the committee recommended changes to Virginia law based on the committee's view of the "best" of the federal rules and the rules adopted by various states. The Supreme Court then submitted the draft rules for public comment and deliberation, but ultimately decided not to proceed with a code of evidence and did not submit the draft to the Code Commission.⁸

Despite the Supreme Court's rejection of the proposed Code of Evidence, the Boyd-Graves Conference continued its efforts to create such a code. In 1997, the Boyd-Graves Conference published "A Guide to Evidence in Virginia."⁹ Unlike the previously proposed rules of evidence, this guide merely stated the current Virginia law on evidence, and did not recommend adoption of any changes to existing law.¹⁰

The Guide's approach of disdaining any proposed changes,¹¹ while creating "a single, organized body of principles for the convenience of judges and practitioners alike,"¹² ultimately overcame objections from most of those who had opposed an evidence code. The Guide also proved to be one of the primary sources of reference in subsequent efforts to develop a code of evidence. After years of study by various groups, draft Virginia Rules of Evidence were distributed for public comment three times by the Judicial Council of Virginia: first in 2005, again in 2006, and yet again in February, 2007.¹³ The Rules finally were adopted and went into effect on July 1, 2012.¹⁴

Initial reaction to the Rules has been mixed. Some have lauded the Rules as a major aid to trial practice,¹⁵ while others have warned that the Rules

⁷ EVIDENCE COMM., *supra* note 1, at 2; Golden, *supra* note 2,

⁸ EVIDENCE COMM., *supra* note 1, at 3.

⁹ BOYD-GRAVES CONFERENCE, VA. BAR ASS'N., A GUIDE TO EVIDENCE IN VIRGINIA (1997); EVIDENCE COMM., *supra* note 1, at 3; Elkins, *supra* note 2.

¹⁰ See Elkins, *supra* note 2.

¹¹ EVIDENCE COMM., REP. OF COMM. ON EVIDENCE 1 (2009), available at <http://216.230.13.18/section/civil/bg09/04.pdf> (the opening paragraph of the Guide states that it "is not intended to change any aspect of Virginia law").

¹² *Id.*

¹³ EVIDENCE COMM., *supra* note 1, at 4.

¹⁴ Lee Hoyle, *Virginia Rules of Evidence*, KALBAUGH PFUND & MESSERSMITH NEWSLETTER, Aug. 2012, available at http://www.kpmlaw.com/_literature_110079/August_2012_-_Virginia_Rules_of_Evidence.

¹⁵ See, e.g., *Will There Finally Be a Virginia Rules of Evidence?*, BUCCI & DIX (last visited Sept. 12, 2012), <http://www.buccidix.com/library/will-there-finally-be-a-virginia-rules-of-evidence.cfm>.

will precipitate “a ‘sea change’ for trial practice.”¹⁶ If such a “sea change” were to come about, it would not be based upon any new approaches to Virginia evidence law because the rules “state the law of evidence in Virginia. They are adopted to implement established principles under the common law and not to change any established case law rendered prior to the adoption of the Rules.”¹⁷ Thus, any major changes in trial practice could only arise if the rules alert trial counsel to a seemingly obscure evidence principle stated in a long-forgotten case. Such a change would be all for the good because enhancing counsel’s greater awareness of existing evidence law was the prime goal of efforts to adopt rules of evidence; i.e., “the goal is to develop a volume that allows easy access – in one place – to the governing principles which at present are embedded in 200 years of case law, several statutes, and rules of court.”¹⁸

The battle to adopt the Virginia Rules of Evidence took almost thirty years.¹⁹ The battle to embrace the rules should go much smoother if the bench and bar keep in mind a few fundamentals: Virginia has not adopted the Federal Rules of Evidence;²⁰ the Virginia Rules do not change existing law; all case precedent²¹ and existing statutes remain the governing law.²²

¹⁶ Peter Vieth, *Rules of Evidence a “Sea Change” for Virginia Trial Practice*, VA. LAWYERS WEEKLY, July 11, 2012.

¹⁷ VA. R. EVID. 2:102.

¹⁸ EVIDENCE COMM., REP. OF COMM. ON EVIDENCE

1-2 (2009), <http://216.230.13.18/section/civil/bg09/04.pdf> (describing *A Guide to Virginia on Evidence*, the collection of the common-law rules of evidence in Virginia, to the Boyd-Graves Conference. The description of this piece also holds true for the codified Rules of Evidence.). See EVIDENCE COMM., *supra* note 1 (describing that efforts to codify the Virginia Rules of Evidence began in 1983 and 1984).

¹⁹ See Golden, *supra* note 2 (describing that efforts to codified the Virginia rules of evidence began in 1983 and 1984).

²⁰ Significant differences remain. For example, Federal Rule 405(a) allows a criminal defendant’s character to be proved by either reputation or opinion testimony, whereas Virginia Rule 405(a) permits only reputation testimony to prove the defendant’s character. FED. R. EVID. 405(a); VA. R. EVID. 2:405(a).

²¹ Rule 2:102 of the Virginia Rules of Evidence provides: “Common law case authority, whether decided before or after the effective date of the Rules of Evidence, may be argued to the courts and considered in interpreting and applying the Rules of Evidence.” VA. R. EVID. 2:102.

²² Virginia 2012 Va. Adv. Legis. Serv. 815 (LexisNexis) (annotation to amended Virginia Code. § 8.01-3, authorizing Clause 9: “That in the event of any conflict between any enactment of the General Assembly and any rule contained in the Rules of Evidence, the enactment of the General Assembly shall control.”).

