

2025-2026 EDITION

# A Guide to the Rules of Evidence in Virginia

**Professor Kent Sinclair**  
**Project Reporter for the Evidence Committee**  
**University of Virginia School of Law**  
**and**  
**Members of the Evidence Committee**  
**of the Boyd-Graves Conference**



Continuing Legal Education by the Virginia Law Foundation

# A Guide to the Rules of Evidence in Virginia

Professor Kent Sinclair  
Project Reporter for the Evidence Committee  
University of Virginia School of Law  
and  
Members of the Evidence Committee of the  
Boyd-Graves Conference

© 2012-2025 Virginia Bar Association on behalf of the  
Boyd-Graves Conference  
and published by  
Virginia Continuing Legal Education

2025-2026 Edition

 VirginiaCLE®  
Publications

Virginia CLE® is a non-profit educational division of the Virginia Law Foundation. The Virginia Law Foundation promotes through philanthropy the rule of law, access to justice, and law-related education.

THIS BOOK IS PRESENTED WITH THE UNDERSTANDING THAT THE AUTHORS AND THE PUBLISHER DO NOT RENDER ANY LEGAL, ACCOUNTING, OR OTHER PROFESSIONAL SERVICE. THE BOOK IS INTENDED FOR USE BY ATTORNEYS LICENSED TO PRACTICE LAW IN VIRGINIA. BECAUSE OF THE RAPIDLY CHANGING NATURE OF THE LAW, INFORMATION CONTAINED IN THIS PUBLICATION MAY BECOME OUTDATED. AS A RESULT, AN ATTORNEY USING THIS MATERIAL MUST ALWAYS RESEARCH ORIGINAL SOURCES OF AUTHORITY AND UPDATE INFORMATION TO ENSURE ACCURACY WHEN DEALING WITH A SPECIFIC CLIENT'S LEGAL MATTERS. IN NO EVENT WILL THE AUTHORS, THE REVIEWERS, OR THE PUBLISHER BE LIABLE FOR ANY DIRECT, INDIRECT, OR CONSEQUENTIAL DAMAGES RESULTING FROM THE USE OF THIS MATERIAL. THE VIEWS EXPRESSED HEREIN DO NOT NECESSARILY REPRESENT THOSE OF THE VIRGINIA LAW FOUNDATION.

Citations to statutes, rules, and regulations are to the versions in effect at the time the material was written, unless otherwise noted. An effort has been made to ensure the material is current as of July 2025.

Copyright © 2012-2025 Virginia Bar Association. All rights reserved.









history, such was properly excluded under Rule 2:404(b) as defendant was not aware of the acts at the time of the assault. *Griffin v. Commonwealth*, 78 Va. App. 116 (2023).

Evidence of other crimes may be admitted to impeach the credibility of the witness or criminal defendant. *Hackney v. Commonwealth*, 28 Va. App. 288, 293 (1998); see *Pearce v. Commonwealth*, 53 Va. App. 113 (2008) (proof of substance abuse at the time of the offense as impeachment).

Virginia Rule of Evidence 2:404(b) expressly directs that admission of evidence of other crimes committed by a defendant, under the exceptions to the general rule of exclusion of such proof, is subject to the further requirement that the legitimate probative value of the evidence must exceed the incidental prejudice to the defendant. *Kenner*, 299 Va. at 427; *Harvey v. Commonwealth*, 76 Va. App. 436 (2023); *Castillo v. Commonwealth*, 70 Va. App. 394, 417 (2019); *Pryor v. Commonwealth*, 276 Va. 312 (2008); see *McGowan v. Commonwealth*, 274 Va. 689 (2007); *Commonwealth v. Minor*, 267 Va. 166, 172 (2004); *Scates v. Commonwealth*, 262 Va. 757, 761 (2001); *Guill*, 255 Va. at 139; *Lewis v. Commonwealth*, 225 Va. 497, 502 (1983).

Although Rule 2:404(b) also requires the trial court to balance the probative value of the evidence against its potential prejudice, it does not use the “substantially outweighs” standard from Rule 2:403(a). Instead, Rule 2:404(b) permits the introduction of otherwise admissible prior-bad-act evidence only “if the legitimate probative value of such proof outweighs its incidental prejudice.” The difference in balancing tests makes it easier for a party to introduce relevant evidence generally than to introduce relevant prior-bad-act evidence. Prior-bad-act evidence that is otherwise admissible must be excluded whenever its probative value is merely outweighed by its incidental prejudice; the prejudice need not substantially outweigh the probative value. See *Williams v. Commonwealth*, Record No. 0545-24-2, 2025 Va. App. LEXIS 546, 2025 WL 2649516 (Va. Ct. App. Sept. 16, 2025).

Concerning the similarity of prior crimes used to show the identity of the perpetrator of the crime on trial, see *Rose v. Commonwealth*, 270 Va. 3 (2005); *Minor*, 267 Va. at 171; *Powell v. Commonwealth*, 267 Va. 107, 141 (2004); *Turner v. Commonwealth*, 259 Va. 645, 651 (2000); *Chichester v. Commonwealth*, 248 Va. 311, 326 (1994) (“Proof of modus operandi is competent evidence where there is a disputed issue of identity.”); *Spencer v. Commonwealth*, 240 Va. 78, 90 (1990). See also *Severance*, 67 Va. App. at 647.

Concerning the staleness of prior conduct, see *Turner*, 259 Va. 645.

On related crimes, see *Jackson v. Commonwealth*, 267 Va. 666 (2004); *Wolfe v. Commonwealth*, 37 Va. App. 136 (2001) (application of the doctrine in sentencing proceedings); *Robbins v. Commonwealth*, 31 Va. App. 218 (1999).

Where evidence of prior crimes or bad acts is appropriate under these principles, the court will allow the evidence if there is sufficient proof that the jury could reasonably find that the event took place. In determining whether to admit evidence of prior bad acts, the trial court cannot resolve questions of credibility unless the witness' testimony is inherently incredible. ***Boney v. Commonwealth*, 29 Va. App. 795 (1999); *Pavlick v. Commonwealth*, 27 Va. App. 219, 227 (1998); see *Stottlemeyer v. Ghramm*, 268 Va. 7 (2004)** (prior incidents of improper conduct in civil litigation).

Where a material element of the crime is the fraudulent intent of the accused, both the Commonwealth and the accused are allowed broad scope in introducing evidence with even the slightest tendency to establish or negate such intent. ***Brooks v. Commonwealth*, 220 Va. 405 (1979); *Mughrabi v. Commonwealth*, 38 Va. App. 538 (2002)**.

*Evidence of gang membership.* Subject to a limiting instruction in the court's discretion, evidence of gang membership may be admitted under Rule 2:404(b) where the legitimate probative value of such proof on issues in the case outweighs its incidental prejudice to the defendant. ***Lambert v. Commonwealth*, 70 Va. App. 740 (2019)** (upholding admission of proof defendant was a member of the Bloods gang and a "General" in its leadership, as relevant to a charge under Va. Code § 18.2-357.1(B) that he used intimidation to cause another person to engage in prostitution).

**Rule 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.

**NOTES**

*Subdivision (a).* This provision limits the kind of evidence that may be used to prove character when character evidence is admissible. Current Virginia law recognizes only reputation testimony. See *Argenbright v. Commonwealth*, 57 Va. App. 94 (2010); *Marable v. Commonwealth*, 142 Va. 644 (1925).

At common law, reputation testimony had to be based on knowledge of a person's reputation in the community where that individual lived. Virginia has long recognized, however, that a person may have a pertinent reputation in communities other than the one in which he lives. See *id.* A defendant may offer "negative" character proof, stating that the witness has not heard disparaging reputation about the defendant for the relevant trait. See *Jackson v. Commonwealth*, 266 Va. 423 (2003). On cross-examination, a witness's familiarity with the character she has testified to, as well as her standards for evaluating character, may be tested by asking her about specific instances of conduct that are relevant to the character trait testified to. See *Zirkle v. Commonwealth*, 189 Va. 862, 872 (1949); *Kanter v. Commonwealth*, 171 Va. 524 (1938).

*Subdivision (b).* Sometimes a person's character or trait of character is an essential element in the case. For example, damages in a defamation action are awarded for injury to reputation. When character or a trait of character are essential, they can be shown by specific instances of conduct as well as by reputation. Whether character or a trait of character is an essential element is a matter of substantive law and not evidence law. See *Jordan v. Commonwealth*, 216 Va. 768 (1976); *Barnes v. Commonwealth*, 214 Va. 24, 25-26 (1973).

Although, as a general rule, the Commonwealth may not rebut character evidence by proving specific acts of misconduct, other than by cross-examining the defendant's character witnesses as to their knowledge of those acts (*see Land v. Commonwealth*, 211 Va. 223, 225-26 (1970)), the Supreme Court has uniformly held that even in the guilt phase of a trial where a defendant attempts to present evidence which may mislead the fact-finder regarding his good character or history, the Commonwealth is entitled to rebut the false impression and misleading evidence. *See Roy v. Commonwealth*, 191 Va. 722, 726-28 (1951); *Zirkle v. Commonwealth*, 189 Va. 862 (1949); *Locke v. Commonwealth*, 149 Va. 447, 451-52 (1928); *Harris v. Commonwealth*, 129 Va. 751, 753-54 (1921); *see also Pughsley v. Commonwealth*, 33 Va. App. 640 (2000); *Lockhart v. Commonwealth*, 251 Va. 184 (1996). A single act of bad conduct does not establish one's unfavorable character. While evidence of a series of bad acts may collectively be admissible to establish poor character, the conduct in a single incident is insufficient. *See McMinn v. Rounds*, 267 Va. 277 (2004).

**Rule 2:406. HABIT AND ROUTINE PRACTICE IN CIVIL CASES** (derived from Code § 8.01-397.1)

(a) *Admissibility.* In a civil case, evidence of a person's habit or of an organization's routine practice, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion conformed with the habit or routine practice. Evidence of prior conduct may be relevant to rebut evidence of habit or routine practice.

(b) *Habit and routine practice defined.* A "habit" is a person's regular response to repeated specific situations. A "routine practice" is a regular course of conduct of a group of persons or an organization in response to repeated specific situations.

**NOTES**

*Subsections (a) and (b).* The Virginia Supreme Court's decision in *Ligon v. Southside Cardiology Associates, P.C.*, 258 Va. 306 (1999), addressing habit proof, predates the passage of Virginia Code § 8.01-397.1, which appears in large measure to displace that decision. "Habit under current law must be based on a sufficiently numerous set of regular incidents, and is never to be lightly established." See *Kimberlin v. PM Transp., Inc.*, 264 Va. 261 (2002); *Stottlemeyer v. Ghramm*, 268 Va. 7 (2004) (prior isolated incidents of improper conduct were not admissible as habit).

Prior to *Ligon*, it appeared that Virginia law on habit was in accord with the common law. The prior cases appeared to accept evidence of a specific habit but reject evidence of a general habit. Compare *Washington, Alexandria & Mount Vernon Ry. v. Trimyer*, 110 Va. 856 (1910), with *Jackson v. Chesapeake & Ohio Ry.*, 179 Va. 642 (1942). The distinction turns on the question of specificity: admissible habit is a regular or semi-automatic response to a particular repeated situation, such as always putting on the parking brake before getting out of a car. More general traits, like carelessness or aggressiveness, are matters of character, which are addressed elsewhere in the Guide. They are generally not admissible topics. See generally *Graham v. Commonwealth*, 127 Va. 808, 823 (1920).

The admission of the habit evidence even though there are eyewitnesses is consistent with *Alexandria & Fredericksburg Railroad v. Herndon*, 87 Va. 193 (1890), and no special corroboration of habit proof is required by the Virginia cases. Evidence admissible under this doctrine is not conclusive, but merely some

evidence on the issue of what happened. This evidence is also subject to review under Rule 2:403.

Evidence of custom or course of dealing in a particular trade is relevant to prove the intent of parties to a contract, on the issue of due care, or on the issue of whether an act is willful or wanton. See *Peacock Buick, Inc. v. Durkin*, 221 Va. 1133, 1138 (1981) (evidence of trade customs admissible to show that defendant's act was willful or wanton); *M.W. Worley Constr. Co. v. Hungerford, Inc.*, 215 Va. 377, 381 (1974) (the general usage of the business in a given situation is admissible as evidence of what is reasonable and proper to be done in that situation).

*Habit proof in criminal cases.* As adopted by the Supreme Court of Virginia, Rule 2:406 is limited to the use of habit proof in civil litigation. This reflects the fact that Virginia Code § 8.01-397.1(C), on which Rule 2:406 is based, specifies that this statute does not apply in criminal cases. Regarding habit proof in criminal cases, see *Hodges v. Commonwealth*, 45 Va. App. 735 (2005), *rev'd on other grounds*, 272 Va. 418 (2006) (discussing the Supreme Court's articulation of the law in *Ligon v. Southside Cardiology Assocs., P.C.*, 258 Va. 306 (1999) and its narrow treatment of the earlier criminal case involving habit proof, *Graham v. Commonwealth*, 127 Va. 808, 823 (1920)).