

#### 4.13. Habit

**Habit of a person or routine practice of an organization is a deliberate and repetitive practice by a person or organization in complete control of the circumstances under which the practice occurs (as opposed to conduct however frequent yet likely to vary from time to time depending on the circumstances). Evidence of a person’s habit or an organization’s routine practice is admissible to prove that the person or organization acted in conformity with that habit on a particular occasion.**

##### Note

This rule sets forth New York’s habit and routine practice rule as established by Court of Appeals decisions.

The definition of habit of a person and regular practice of an organization contained in the first sentence is derived from *Halloran v Virginia Chems.* (41 NY2d 386, 389, 392 [1977] [mechanic’s practice of heating cans of Freon before transferring the gas to automobile air conditioning systems constituted admissible habit evidence as proof showed it was “a deliberate and repetitive practice” by a person “in complete control of the circumstances” as opposed to “conduct however frequent yet likely to vary from time to time depending upon the surrounding circumstances”]); *Ferrer v Harris* (55 NY2d 285, 294 [1982] [evidence that mother had told her daughter not to cross the street without looking for cars was not admissible as habit evidence because the plaintiff made no showing of “a persistent habit or regular usage by one in control of the circumstances in which it is employed”]); and *Rivera v Anilesh* (8 NY3d 627, 635-636 [2007] [dentist’s pre-extraction injection procedure which would not vary from patient to patient constituted admissible habit evidence as the record established it was a “ ‘deliberate and repetitive practice’—the mundane administration of a local anesthetic prior to a relatively routine tooth extraction—by a trained, experienced professional ‘in complete control of the circumstances’ ”]).

The rule’s second sentence, as derived from several Court of Appeals decisions, provides that evidence of a person’s habit or an organization’s routine practice is admissible to prove that the habit or routine practice was followed on the occasion in issue. (E.g. *Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 508-509 [2015] [billing company’s regular office practices and procedures in handling no-fault claims to prove claims had been mailed]; *Rivera*, 8 NY3d at 635; *Halloran*, 41 NY2d at 392; *Beakes v DaCunha*, 126 NY 293, 298 [1891] [habit of being home on a specific day of the month to transact a specified

business]; *Matter of Kellum*, 52 NY 517, 519-520 [1873] [attorney's routine practice regarding execution of wills to prove proper execution of will].) As stated by the Court in *Halloran*: "[E]vidence of habit has, since the days of the common-law reports, generally been admissible to prove conformity on specified occasions" because "one who has demonstrated a consistent response under given circumstances is more likely to repeat that response when the circumstances arise again" (41 NY2d at 391).

Of note, the Court of Appeals initially appeared disinclined to accept habit evidence in negligence cases. (See *Eppendorf v Brooklyn City & Newton R.R. Co.*, 69 NY 195, 197 [1877] [evidence of a plaintiff's habit of jumping on streetcars was not admissible to prove he was negligent on the day of the accident]; *Zucker v Whitridge*, 205 NY 50, 58-66 [1912] [proof that the deceased had usually looked both ways before crossing railroad tracks was not admissible to establish his care on the particular occasion].) *Halloran*, however, found that a "statement that evidence of habit or regular usage is never admissible to establish negligence is too broad" (41 NY2d at 392; see also *Ferrer v Harris*, 55 NY2d 285, 294 [1982] [acknowledging that *Halloran* "indicated support for less dogmatic adherence" to the exclusion of habit evidence in negligence cases]).

Rather, as explained in *Halloran*, "[W]here the issue involves proof of a deliberate and repetitive practice, a party should be able, by introducing evidence of such habit or regular usage, to allow the inference of its persistence, and hence negligence on a particular occasion. Far less likely to vary with the attendant circumstances, such repetitive conduct is more predictive than the frequency (or rarity) of jumping on streetcars or exercising stop-look-and-listen caution in crossing railroad tracks" (*Halloran*, 41 NY2d at 392 [citations omitted]; accord *Rivera v Anilesh*, 8 NY3d 627 [2007]).

Thus, in *Halloran*, a personal injury products liability action brought by a mechanic who sustained an injury in the use of the product, the Court authorized habit evidence of the plaintiff mechanic's habit in the use of that product which permitted an inference that he was negligent in its use. In *Rivera*, a patient sued her dentist in a malpractice action, and the Court allowed the dentist to offer habit evidence relating to her "routine procedure for administering injections of anesthesia" to show that she had not committed malpractice (8 NY3d at 635).

Before proof of habit or routine practice is admitted, the party offering the proof must "show on *voir dire* . . . that [the party] expects to prove a sufficient number of instances of the conduct in question" (*Halloran*, 41 NY2d at 392). In *Halloran*, for example, "[i]f defendant's witness was prepared to testify to seeing *Halloran* using an immersion coil [in servicing automobile air conditioner units] on only one occasion, exclusion was proper. If, on the other hand, plaintiff was seen a sufficient number of times, and it is preferable that defendant be able to fix, at least generally, the times and places of such occurrences, a finding of habit or regular usage would be warranted and the evidence admissible for the jury's consideration"

(*id.* at 392-393). And, while at one point decision law was unclear whether habit evidence was admissible only when there were no eyewitnesses to the conduct in issue (*see e.g. Zucker*, 205 NY at 58), recent decisions permit habit evidence regardless of whether eyewitnesses are available (*Rivera*, 8 NY3d at 635; *Halloran*, 41 NY2d at 390-391).