The following book chapter was authored by Tom Williamson, senior trial attorney at Williamson & Lavecchia, L.C. Please visit our website for more information about Tom and the law firm of Williamson & Lavecchia, L.C.

The Expert Witness

Thomas W. Williamson, Jr.
Williamson & Lavecchia, L.C.
Richmond, Virginia

7.1 INTRODUCTION

> I keep six honest serving-men
> (They taught me all I knew);
> Their names are What and Why and When
> And How and Where and Who.
>
> — Rudyard Kipling
> "The Elephant's Child"
> Stanza 1.

Why should an expert be used?
Where can an expert be found?
Who is an expert?
When may an expert testify?
What testimony may an expert give?
How should an expert be examined and cross-examined?

These questions will serve for the most part to alert the trial lawyer to the practical problems that will be encountered in using or in opposing the use of an expert. Other questions will be suggested as the subject is discussed.

7.2 WHY USE AN EXPERT?

In this age of high technology, in many cases the trial lawyer must rely heavily upon the testimony of witnesses who have the requisite training, experience, skill, or special knowledge to perceive, know, or understand the matter about which the witness is to testify in order to establish causation in fact and medial causation.

Over 80 years ago, the Virginia Supreme Court stated in *Bowles v. Virginia Soapstone Co.*:[1]

> Expert testimony is a useful and necessary adjunct to the administration of justice, and a capable expert can often throw much light upon dark places; but the force of expert testimony must, after all, in large measure depend upon the reasons that the witness is able to give for the opinions which he expresses.[2]

Although experts have been used by trial lawyers in the past, their use as

[1] 115 Va. 690, 80 S.E. 799 (1914).

[2] *Id.* at 701, 80 S.E. at 80203.

witnesses has multiplied considerably in recent years. Likewise, new and varied types of experts are available. Specialization is the rule of the day, and there has been an explosive increase in the rate of accumulation of systematic knowledge. Trial lawyers have become increasingly aware of the availability of experts and of the need for the use of such experts. Upon being retained, the trial lawyer should give immediate consideration to whether an expert will be helpful in the preparation and trial of the case, and which category of experts should be selected.

In personal injury cases, in addition to medical specialists, such experts as metallurgists, chemists, economists, and engineers– civil, mechanical, electrical, and safety– may be needed. In wills cases there may be a need for a questioned documents expert; in criminal cases, a firearms identification examiner, a fingerprint expert, a toxicologist, and others; and in condemnation cases, a competent appraiser.

7.3 WHERE CAN AN EXPERT BE FOUND?

7.301 General. Searching for the right expert for a case is a critical key to a successful outcome. Unlike witnesses who have knowledge of facts of events and transactions germane to the case, the universe of potential experts is not limited by who happened to observe or participate in a certain occurrence. Instead, the industry and ingenuity of counsel (in addition to the financial resources available to compensate the expert) is the deciding factor on who will be the experts. Searching the scientific and technical literature, networking with friends and colleagues and talking with members of the relevant industry , profession or specialty are paths to the locating the right expert.

7.302 Sources. Appendix 7-1 of this chapter contains a list of sources that may be used in procuring an expert. Every effort should be made to select the most competent expert, one who organizes the data underlying his or her opinion and reflects on and analyzes the conclusions and their supporting bases.

7.303 When to Employ. It is highly recommended that an expert be employed early in the case. It is important that the expert commence study and make an analysis as soon as possible after the event that gave rise to the cause of action. It is equally important that the lawyer have the benefit of the expert's advice in order to prepare the case properly for presentation in chief, as well as for cross-examination. Delay may be costly– the opponent may corner the expert market, and a competent witness may not be available. Also, evidence that should be examined by the expert may be destroyed or lost, or the expert may not have sufficient time to make the necessary tests and studies in order to provide objective findings and opinions.

7.4 WHO IS AN EXPERT?

7.401 General. Determining who is a competent expert should not be difficult. The expert's education, knowledge, training, and actual experience with the particular details involved in the case should be checked. For example, a civil engineer should not be used as an expert in a case where everything depends on the testimony of a mechanical engineer. It may also be helpful to determine what experience the expert has had testifying in court.

7.402 Definitions of "Expert."

A. Certain Knowledge. In *Bird v. Commonwealth*,[3] the court found: "All persons who practice a business or profession which requires them to possess a certain knowledge of the matter in hand, are experts so far as expertness is required."

B. Federal Practice. Rule 702 of the Federal Rules of Evidence states that a person may qualify as an expert by knowledge, skill, experience, training, or education. According to the advisory committee's note to Rule 702:

> The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training, or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

7.403 Qualification of Witnesses.

A. Physicians.

1. General. The court in *Livingston v. Commonwealth*[4] stated that, "a practicing physician . . . [is an expert in medical science] in the absence of conflicting proof." A physician may be permitted to testify concerning a condition not normally treated by his or her specialty if it is shown that the physician has sufficient familiarity with the condition in question.[5]

2. Specialties. In *Wessells v. Commonwealth*,[6] the court affirmed the holding of the trial court that a practicing physician of many years was competent to testify to the sanity of the accused. However, it has been suggested that trial judges should be careful to qualify general practitioners who are brought forward to testify on special subjects as opinion experts, although they should always be allowed to testify on the basis of personal knowledge as to what they did, saw, and heard, and as to their opinion based upon personal attendance and treatment.[7]

---

[3] 62 Va. (21 Gratt.) 800 (1871)(headnote).

[4] 55 Va. (14 Gratt.) 592, 600 (1857).

[5] *Butler v. Greenwood*, 180 Va. 456, 23 S.E.2d 217 (1942).

[6] 164 Va. 664, 670-71, 180 S.E. 419, 421 (1935).

[7] Hubert W. Smith & Oscar E. Hubbard, *Doing Scientific Justice: Psychological Reactions to Traumatic Stimuli*, 1962 U. Ill. L.F. 190, 205 (1962).

3. Malpractice Actions. Section 8.01-581.20 of the Virginia Code governs qualification of expert witnesses in medical malpractice actions. This statute provides that health care providers' acts and omissions will be judged by a "statewide standard of care" in the absence of sufficient proof that it is more appropriate to apply a different standard of care for the locality or similar localities. An expert witness who is familiar with the statewide standard of care will not have his or her testimony excluded on the ground that he or she does not practice in Virginia. Any physician licensed to practice in Virginia will be presumed to know the statewide standard of care in the specialty in which he or she is qualified and certified. The statutory presumption also applies to a physician licensed in another state who meets the educational and examination requirements for obtaining a license in Virginia. Once the expert is shown to be entitled to the presumption and has given his opinion of what is the standard of care, the burden shifts to the defendant to produce evidence the standard of care is to the contrary.[8]

Prior to the 1989 amendment to the section 8.01-581.20 presumption, the Supreme Court of Virginia permitted testimony by qualified medical experts who did not practice in Virginia. In *Grubb v. Hocker*,[9] the court reversed the refusal of the trial judge to qualify a physician who had lived, taught, and practiced in Virginia in the past. The court in *Henning v. Thomas*[10] affirmed the qualification of an orthopaedic surgeon who had never practiced or been licensed to practice in Virginia upon a showing that the standard of care in Virginia was the same as in the states where the expert had practiced.

Section 8.01-581.20 requires a witness to have had an active clinical practice in the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission in order to qualify to testify as an expert on the standard of care.

The maxim of *Ives v. Redford*[11] permitting an expert in a specialty different from the defendant's specialty to testify as an expert in a medical malpractice action if the expert demonstrates expert knowledge of the defendant's specialty has been incorporated into section 8.01-581.20 of the Virginia Code. For an example of application of *Ives*, see *Lee v. Adrales*[12] in which the court permitted a pediatrician specializing in neonatology and perinatology to render opinions concerning the practice of obstetrics.

4. Examples. Examples of physicians found qualified or not qualified to testify in court include the following:

---

[8] Griffett v. Ryan, 247 Va. 465, 443 S.E.2d 149 (1994).

[9] 229 Va. 172, 326 S.E.2d 698 (1985).

[10] 235 Va. 181, 366 S.E.2d 109 (1988).

[11] 219 Va. 838, 252 S.E.2d 315 (1979).

[12] 778 F. Supp. 904 (W.D. Va. 1991).

a. A family physician who attended the patient during the period when the disease was supposed to have disabled his mind, was held qualified to testify as to the patient's competency.[13]

b. An orthopedist was qualified to answer a hypothetical question concerning the brain condition of a party.[14]

c. A physician was qualified to testify to the general effects of an ailment, including the suffering that usually follows.[15]

d. A physician was held not to be qualified as an expert on dynamics and therefore could not answer a question concerning the severity of a blow received by a passenger on a train from a door of a given size and weight after the application of air brakes when the train was running at a given speed.[16]

e. A medical expert was qualified to testify that the force used in beating a child that caused an external abrasion was the same force which caused the rupture of the bladder.[17]

B. Sufficient Special Knowledge. Although the witness need not be highly qualified, it is within the discretion of the trial court as to whether the witness has sufficient special knowledge to qualify as an expert on the particular subject.

The knowledge of an expert need not be acquired as a result of formal training. The "special knowledge" sufficient to qualify as an expert may be obtained in many ways as demonstrated by the following observations of Justice Duff in *Kern v. Commonwealth*:[18]

> It is well established that no formal training or education is necessary to qualify as an expert. Expertise may be acquired through an avocation or a hobby. C. Friend, *The Law of Evidence in Virginia*, § 215, at 461 (2d ed. 1983). Knowledge may be the product

---

[13] *Shacklett v. Roller*, 97 Va. 639, 648, 34 S.E. 492, 495 (1899).

[14] *Butler v. Greenwood*, 180 Va. 456, 462, 23 S.E.2d 217, 219 (1942).

[15] *Dreyfus & Co. v. Wooters*, 123 Va. 42, 47-48, 96 S.E. 235, 236 (1918).

[16] *Virginian Ry. v. Bell*, 118 Va. 492, 495-97, 87 S.E. 570, 572 (1916).

[17] *Johnson v. Commonwealth*, 111 Va. 877, 879-80, 69 S.E. 1104, 1105 (1911).

[18] 2 Va. App. 84, 341 S.E.2d 397 (1986).

> of home study or experience, or both. *Noll v. Rahal*, 219 Va. 795, 801, 250 S.E.2d 741, 745 (1979). All that is necessary for a witness to qualify as an expert is that he have "sufficient knowledge of his subject to give value to his opinion," *Norfolk & Western Railway Co. v. Anderson*, 207 Va. 567, 571, 151 S.E.2d 628, 631 (1966), and that he be better qualified than the jury to form an inference from the facts. C. Friend, *The Law of Evidence in Virginia* § 215, at 461 (2d ed. 1983).[19]

C. Examples of Experts.

1. Nurses. It has been suggested that nurses be employed as experts in child custody suits and child abuse cases, as well as in cases involving the rehabilitation needs of personal injury victims and the impact of a personal injury on the victim's family.[20] In *Cates v. Commonwealth*,[21] a nurse was held to be qualified to testify in a case involving rape upon a child. The court stated:

> It may be that the witness was not highly qualified to speak upon the subject as to which she expressed her opinion, but by her profession as a trained nurse, and her experience in caring for children, she had acquired sufficient knowledge to render her a competent witness as an expert.[22]

2. Psychologists. A psychologist can qualify to express an opinion on a person's mental condition if a proper foundation is laid as to the extent of the psychologist's training, experience, information, and personal observation of the subject.[23]

3. Economists. Competent expert testimony is admissible in proving damages recoverable in a wrongful death action by reasonably expected loss of income of the decedent and services, protection, and care by the decedent.[24] Economists are often qualified as expert witnesses for the purpose of testifying as to future economic losses in both wrongful death and personal injury actions.[25]

---

[19] *Id*. at 86, 341 S.E.2d at 398.

[20] Margaret S. Scholin, Comment, *The Use of Nurses as Expert Witnesses*, 19 Hous. L. Rev. 555 (1982).

[21] 111 Va. 837, 69 S.E. 520 (1910).

[22] *Id*. at 843, 69 S.E. at 522.

[23] *Compare Rollins v. Commonwealth*, 207 Va. 575, 151 S.E.2d 622 (1966) *with Landis v. Commonwealth*, 218 Va. 797, 241 S.E.2d 749 (1978).

[24] Va. Code Ann. § 8.01-52.

[25] N. Fayne Edwards, *The Economist as an Expert Witness in Personal Injury and Wrongful Death Cases*, 3 Va. B.A.J. 16

In *Cassady v. Martin*,[26] the Virginia Supreme Court disallowed the use of expert testimony of a decedent's lost lifetime income. The decedent, who was 21 years old at the time of his death, had a mental age of 9, and had been employed for only 8 weeks prior to death during which time he had missed 6 or 7 days of work. Under these particular circumstances, the court held evidence as to reasonably expected loss of income was too speculative to be admitted into evidence. On the other hand, in *Clark v. Chapman*,[27] the court admitted testimony by a clinical psychologist on the issue of lost future income and rehabilitation counseling.

4. Toxicologists. A toxicologist is permitted to testify as to the effect of ingestion of several varieties of drugs on the behavior of the individual ingesting the drugs.[28]

5. Lawyers. In legal malpractice actions and other cases where the practices and procedures of lawyers are germane on factual issues, expert testimony by attorneys may be helpful and necessary. However, lawyer expert witnesses will not be permitted to render opinions on questions of law.[29]

6. Engineers. Engineers are often permitted to testify about matters generally within the scope of their training or experience although they lack experience with the specific product or process involved in the litigation.[30] Mechanical engineers are often called upon to testify on the safety or defective nature of the design of machines in product liability actions. Mechanical engineers may be qualified to render opinions on the design of machines by virtue of their education and experience as mechanical engineers even though they have never designed a machine of the type that is the subject of the lawsuit.[31] In *Greater Richmond Transit Co. v. Wilkerson*,[32] an engineer who had familiarized himself with flexibus braking systems by studying the

---

(Fall 1977); *see also Clark v. Chapman*, 238 Va. 655, 385 S.E.2d 885 (1989).

[26] 220 Va. 1093, 266 S.E.2d 104 (1980).

[27] 238 Va. 655, 385 S.E.2d 885 (1989).

[28] *Fitzgerald v. Commonwealth*, 223 Va. 615, 292 S.E.2d 798 (1982).

[29] *Ortiz v. Barrett*, 222 Va. 118, 278 S.E.2d 833 (1981); *see* Note, *Expert Legal Testimony* 97 Harv. L. Rev. 797 (1984) (discussion of the propriety of lawyers testifying on legal issues).

[30] *See Wheeler v. John Deere Co*, 935 F.2d 1090 (10th Cir. 1991).

[31] *Inta-Roto, Inc. v. Guest*, 286 S.E.2d 61 (Ga. Ct. App. 1981).

[32] 242 Va. 65, 406 S.E.2d 28 (1991).

manufacturer's manuals was found qualified to render opinions on the operation of the braking system.

7. Contractors. An excavation contractor with over 25 years of experience was deemed qualified to testify as an expert concerning issues related to road construction including costs and meaning of contract specifications.[33]

8. DNA Experts. Molecular biologists, population geneticists, and similar specialists can testify to the results of deoxyribonucleic acid (DNA) testing in criminal cases (and presumably civil cases as well).[34]

9. Experts on Crops. In *Norfolk & Western Railway v. Anderson*,[35] the plaintiff sought to establish that damage to his tomato crop was caused by the spray operations of the defendant. The defendant asserted that the damage was the result of blight. The trial court allowed the plaintiff to submit into evidence both the opinion of a canner and grower of tomatoes with 55 years experience and that of a county supervisor for the Farmers' Home Administration. The Virginia Supreme Court, in ruling that the opinion testimony was permissible, stated:

> The knowledge necessary to qualify one to speak as an expert may be derived from study or experience, or both. The witness need not have all the knowledge possible for one in his class to entitle him to speak, but he may testify as an expert if it is shown that he has sufficient knowledge of his subject to give value to his opinion.[36]

10. Experts on Logging. In *Hot Springs Lumber Co. v. Revercomb*,[37] involving the floating of logs down mountain streams, a logger was qualified as an expert witness to testify on the particular stream, its volume of water, the height of the banks, the rapidity of the current, its tortuous course, frequency of high water, and the length of time during which it was likely to continue. The court, in commenting upon the rule that the qualification of a witness as an expert is for the trial court, stated:

> It is a question addressed to the sound discretion of the trial court, which may be reviewed by this court under the limitations applicable to the review of exercise of discretion; and, as the

---

[33] *Talbott v. Miller*, 232 Va. 289, 350 S.E.2d 596 (1986).

[34] See the various *Spencer v. Commonwealth* cases: *Spencer I*, 238 Va. 275, 384 S.E.2d 775 (1989), *cert. denied*, 493 U.S. 1036 (1990); *Spencer II*, 238 Va. 295, 384 S.E.2d 785 (1989), *cert. denied*, 493 U.S. 1093 (1990); *Spencer III*, 238 Va. 563, 385 S.E.2d 850 (1989), *cert. denied*, 493 U.S. 1093 (1990).

[35] 207 Va. 567, 151 S.E.2d 628 (1966).

[36] *Id.* at 571, 151 S.E.2d at 631.

[37] 110 Va. 240, 268, 65 S.E. 557, 561 (1909).

> facts . . . plainly establish his expertness with respect to the matter about which he testified, we might be justified in overruling the exception, upon the ground that the objection as to qualification had been removed to the satisfaction of the trial court, and that we are unable to say as a matter of law that its discretion had been improperly exercised.[38]

11. Experts on Speed of Trains. The following witnesses have been held to be qualified as experts and were permitted to testify as to the speed of a train at the time of the accident: (i) a section hand in the employment of the railroad and accustomed to travel on passenger trains; (ii) a person who had travelled very frequently as a passenger over that part of the road at which the accident occurred; (iii) a person who had been engaged in railroad service for 31 years as a foreman in shops, as a conductor of one of the trains of the defending company, and as a yardmaster;[39] (iv) an engineer of 9 years' experience who had also been a fireman on a passenger engine for 10 years, and who was familiar with the type of engine that caused the damage.[40]

12. Other Examples. Some examples of experts in other areas follow:

a. In *Powhatan Lime Co. v. Whetzel*,[41] a witness who had been a housebuilder and barnbuilder was held to be competent as an expert concerning the condition of a trestle.

b. In *Hill v. Commonwealth*,[42] the Virginia Court of Appeals held that an experienced drug user can qualify as an expert to identify a substance as cocaine.

c. In *Arminius Chemical Co. v. Landrum*,[43] plaintiffs introduced a witness for the purpose of controverting evidence that defendants could not operate their mines without polluting a creek. Defendants objected to the competency of the expert on the ground that he had no experience in mining iron pyrites

---

[38] *Id*. at 265, 65 S.E. at 560.

[39] *Norfolk & W. Ry. v. Tanner*, 100 Va. 379, 41 S.E. 721 (1902).

[40] *Chesapeake & O. Ry. v. Meyer*, 150 Va. 656, 670-71, 143 S.E. 478, 483 (1928); *see* Annotation, *Opinion Evidence as to Distance Within Which an Automobile Can Be Stopped*, 135 A.L.R. 1404 (1941); R.P. Davis, Annotation, *Admissibility of Evidence as to the Tracks or Marks on or Near Highway*, 23 A.L.R.2d 112, 140 (1952).

[41] 118 Va. 161, 171, 86 S.E. 898, 902 (1915).

[42] 8 Va. App. 60, 379 S.E.2d 134 (1989).

[43] 113 Va. 7, 73 S.E. 459 (1912).

or sulphur ore. Although the witness had been a member of the American Society of Mining Engineers for many years, he had no experience in filtering or purifying waters from mines and did not claim to be a mining engineer. He was a scientific and practical engineer of long experience, a city engineer, and had experience in filtering and cleansing water for drinking purposes. The court held that although the witness may not have been very highly qualified, "we cannot say . . . he was not a competent witness."[44]

d. In a case involving the explosion of an engine, the court held that the witness was not qualified as an expert since he had no familiarity with the particular type of engine, and his first trip on the engine covered only an hour in time and 18 miles in distance.[45]

e. In *Smith v. Commonwealth*,[46] a medical examiner was deemed qualified as an expert in ballistics based upon her training and study, and as a consequence, she was permitted to testify that the autopsy findings were consistent with a close gunshot wound.

f. In *Ravenwood Towers, Inc. v. Woodyard*,[47] an ophthalmologist was permitted to testify about the ability of the plaintiff to see at the time of her fall upon entering a misaligned elevator shaft.

D. Discretion of the Court. Whether a witness is qualified to express an opinion is a question largely within the sound discretion of the court.[48] A decision to exclude a proffered expert will be reversed on appeal only when it clearly appears that the witness possessed sufficient knowledge, skill, or experience to make the witness competent to testify as an expert on the subject matter of the inquiry.[49] In *Noll v. Rahal*,[50] the court affirmed the refusal to qualify a witness as an expert even though the decision suggests that some members of the court would have qualified the witness as an expert if they had presided at trial. The trial court's refusal to qualify an expert will not be disturbed in the absence of a showing of an abuse of discretion.[51]

---

[44] *Id.* at 20-21, 73 S.E. at 465-66.

[45] *Virginian Ry. v. Andrews*, 118 Va. 482, 488-89, 87 S.E. 577, 580 (1916).

[46] 239 Va. 243, 389 S.E.2d 871 (1990).

[47] 244 Va. 51, 419 S.E.2d 627 (1992).

[48] *E.g., Lane v. Commonwealth*, 223 Va. 713, 292 S.E.2d 358 (1982); *see supra* ¶ 7.403(C)(10).

[49] *Noll v. Rahal*, 219 Va. 795, 250 S.E.2d 741 (1979); *Maxwell v. McCaffrey*, 219 Va. 909, 252 S.E.2d 342 (1979).

[50] 219 Va. 795, 250 S.E.2d 741.

[51] *City of Fairfax v. Swart*, 216 Va. 170, 172, 217 S.E.2d 803, 805 (1975).

If the trial court rules that the expert witness is qualified to testify, its ruling will not be reversed unless it clearly appears that the witness was not qualified.[52] This is so even though the Virginia Supreme Court may have some doubt as to whether the witness has sufficient knowledge of the subject to be considered as an expert.[53] But if no facts are adduced showing the witness possessed sufficient knowledge, skill, or experience to make the witness competent to testify as an expert on the subject matter of the inquiry, the Virginia Supreme Court will reverse the trial judge's admission of the expert's opinion.[54]

7.5 WHEN MAY AN EXPERT TESTIFY?

7.501 General. If scientific proof is needed in a case, a lawyer should select the expert best qualified by special knowledge, training, experience, and skill to furnish the necessary proof. The lawyer should then proceed to enter into contractual arrangements with the expert witness. The distinction between the duty of an expert witness to attend the trial and that of an ordinary witness is based on contract.

At the preliminary conference with the expert, it should first be determined if there is any possibility of a conflict of interest. In addition, the expert must understand that all of the conferences and discussions will be held and maintained in the strictest confidence. It is necessary to impress upon the expert the obligation not to divulge, without the consent of counsel, any information that has been obtained by the expert from the client or counsel or any opinions that have been rendered by the expert to counsel or the client.

It should also be understood that the expert will not accept employment from any other party regarding any phase of the case in which he or she has been employed. This protects the client in the event that an expert witness decides after consultation with the client that he or she would not be of much help in the case. Furthermore, these precautions assist the lawyer in protecting work product within the bounds of judicially recognized and ethical rules.

After establishing a rapport with the expert, the lawyer should disclose to the expert the facts, information, and exhibits that are available concerning the case. The lawyer should discuss the results of the expert's investigation, analysis, conclusions, and opinions before having any written reports prepared by the expert. One should always assume a report will be discoverable. In most instances, prudence dictates foregoing

---

[52] *Avent v. Commonwealth*, 209 Va. 474, 476, 164 S.E.2d 655, 657 (1968); *Ames & Webb, Inc. v. Commercial Laundry Co.*, 204 Va. 616, 621, 133 S.E.2d 547, 550 (1963).

[53] *Clinchfield Coal Co. v. Wheeler*, 108 Va. 448, 453-54, 62 S.E. 269, 271 (1908).

[54] *Thorpe v. Commonwealth*, 223 Va. 609, 292 S.E.2d 323 (1982); *Virginia Elec. & Power Co. v. Lado*, 220 Va. 997, 266 S.E.2d 431 (1980).

preparation of a written report until circumstances require a report be prepared.[55] If the lawyer has not yet filed an action in the case, the advice of the expert will be helpful in deciding the grounds for the action.

7.502 Preparing the Case With the Expert.

A. Arranging an Appearance. The expert should be advised of the status of the case and the date the case has been set for trial as soon as possible. Experts should understand that they will receive a summons for their appearance in court and will be expected to be present in court at the designated time. If a client is forced to request a continuance of the trial in order to accommodate the expert's schedule, it may prove detrimental to his or her case. The trial court may also excuse a witness who has received a late summons thereby forcing a client to proceed in court without a key witness.

This difficulty was illustrated in *Bradley v. Poole*,[56] where the trial court excused the medical expert, and counsel had to proceed to trial without the benefit of the important testimony of this witness. The Virginia Supreme Court reversed on the ground that it was conclusively established that the expert witness would have been very helpful to counsel for the defendant in cross-examining the five medical experts who had been summoned by the plaintiff and in controverting their testimony.[57]

B. Framing Questions. In order to have an effective presentation of the expert's testimony and opinions on the witness stand, the lawyer will need to have a complete discussion with the expert of the points to be proven and how the testimony will be elicited at trial. The lawyer must be well-informed and completely prepared concerning the medical or scientific problems involved in the case. The lawyer must ask questions that will elicit answers from the expert that are crystal clear to the jury on the cause, the result, and the final opinion of the expert.

Prior to trial, the lawyer should discuss with the expert witness the major questions that will be asked in court and the exact form the questions will take. In addition, the lawyer should obtain the latest literature and publications on the subject under discussion and provide these materials to the expert for use in preparing for trial. The lawyer should suggest to the expert that if he or she has not had the time to read and study these materials, the lawyer would like for the expert to do so before trial.

C. Answers the Jury Can Understand. The lawyer should discuss with the expert the most effective manner to be employed in explaining and interpreting scientific or medical terms to the jurors. This should be done in language that will be best understood by the jurors. Counsel may invite the expert to do so at trial by asking the expert to translate his or her testimony "into language that *we* can understand," not "language that the jurors can understand." This avoids the suggestion that the jurors are the only uninformed persons in the courtroom.

---

[55] *See, e.g.*, Fed. R. Civ. P. 26(a)(2)(B).

[56] 187 Va. 432, 47 S.E.2d 341 (1948).

[57] *Id*. at 439-40, 47 S.E.2d at 344.

D. Cross-Examination. In preparing the expert for trial, the lawyer should alert the expert to the theories of the opposing party and any experts who will testify on behalf of the opposing party. The expert should review the reports and depositions of the adversary's experts so that he or she will be able to controvert any inconsistent findings of the other experts.

It is imperative to scrutinize closely all aspects of the expert's education, experience, and reputation that may be the subject of cross-examination. Morgan Ames, a noted trial attorney, offers the following suggestions for minimizing the possibility of opposing counsel successfully attacking the credibility of an expert on cross-examination:

1. Be sure the expert is completely objective and truly impartial, rather than serving as a surrogate advocate.

2. He should avoid inserting himself into the case, such as by communicating with the adverse party, his counsel, or his expert or other witnesses.

3. He should avoid any reference to the personalities of litigants or of counsel.

4. As to his fee, it should be no more than commensurate with the time and effort expended in the particular case, the difficulty of the case, and his usual professional charges.

5. He should simply answer the questions put, clearly and firmly, and not volunteer any extraneous matter (such as "You'll stop at nothing . . .").

6. The attorney calling the witness should review carefully the records of the witness' prior professional association and engagements, and seek to learn his peers' evaluation of the competence of the witness.

7. The witness' prior experience as an expert witness should be explored and the number and types of the litigations should be accurately ascertained, and his prior opinion testimony scrutinized.

8. He should be cautioned to avoid any public comment, and above all to the press, radio, TV or other publicity media.

9. Any and all books or articles written by the witness, or even for him, or under his name by free-lance writers, or others, should be carefully reviewed for inconsistencies with the witness' proposed testimony at the future trial.

10. The witness should not be privy to counsel's trial strategies, such as jury selection, lest he be regarded as more of an advocate

than an impartial expert witness.

11. Also, counsel calling the witness should ascertain if any derogatory materials exist about the witness, so counsel can carefully refrain from "opening the door" to such hearsay matters of opinion and speculation that would otherwise probably be excluded by the trial court.

12. Also, counsel might do well to ascertain all other names which the witness has used or has been known by, or under which he has written.

13. Further, the lawyer might warn the prospective witness that his entire prior life, and especially all his earlier professional career, may be subjected to intense, outside investigation, and in-court interrogation, so that he should reveal to the attorney calling him any earlier associations or experiences that might be invoked in an effort to discredit him on the stand.

14. The witness should be reminded of Harry Truman's oft-quoted remark, "If you can't stand the heat, stay out of the kitchen." The witness stand is no place for the fainthearted, however brilliant they may be, and however valid may be their opinions on the subject at hand.

15. Finally, the witness who chooses to run the gauntlet of possible severe cross-examination should be counseled and encouraged to keep his cool and "hang in there," and, while exhibiting all reasonable resiliency, to stick by the opinions he had developed as a result of years of professional training and experience and had stated under oath in answer to the attorney calling him to the stand and qualifying him as a true expert whose expressions of opinion were entitled to be received by the court.[58]

E. Furnishing the Facts. The expert will need all of the pertinent facts from the lawyer in order to support his or her opinions without equivocating, to differentiate and distinguish the case at issue, and to avoid being vulnerable to attack on cross-examination.

F. Form of Questions. Counsel should discuss with the expert the form and content of questions that will be used to prove his or her opinion. At the trial the expert should be asked: (i) whether he or she has an opinion; (ii) what is that opinion; and (iii) the reasons and bases for the opinion.

G. Certainty of Answers. The lawyer should explain to the expert the rule governing the degree of certainty with which he or she must testify when giving

---

[58] Morgan P. Ames, *Preparation of the Expert Witness for Trial*, Personal Injury Annual 569, 573-75 (1977).

opinion evidence. The expert should know that the term "possible" may not provide the court or jury with the degree of certainty required of opinion evidence. In Virginia, the standard is a reasonable degree of medical or scientific certainty. However, the degree of certainty may be described as "probable" or "likely" when it is impossible to prove definitely the future effects of an event.[59]

H. Fees. Counsel should caution the expert of the possibility that there may be questions asked about the fee being paid for his or her testimony. An appropriate response to such questions is, "My testimony and opinion are never for sale. I am merely charging a fee for my time."

I. Instruction. If this will be the expert's first experience as a witness, counsel should acquaint the expert with problem areas such as hearsay evidence, objections that counsel may interpose to the expert's testimony, and the fact that the court may not permit use of notes to refresh the witness's memory.[60] The witness should also be advised that there should be no reference to insurance, particularly if it is an action seeking damages for personal injuries.

7.6 WHAT TESTIMONY IS ALLOWABLE?

7.601 General. After the witness has qualified as an expert, it will be necessary to decide to what extent the expert will be permitted to testify. In many instances, opposing counsel will object to the rendering of an opinion by an expert on the grounds that the expert is "invading the province of the jury." This objection stems from two doctrines: (i) that opinions of experts on matters of common knowledge are inadmissible; and (ii) that experts cannot render opinions on ultimate issues of fact. Another often-voiced objection is that the opinion of the expert is "speculative."

7.602 Admissibility of Opinions on Matters of Common Knowledge.

A. General Rule. Where the trier of fact is confronted with issues that require scientific or specialized knowledge or experience in order to be properly understood and which cannot be determined intelligently merely from the deductions made and inferences drawn on the basis of ordinary knowledge, common experience, and practical experience gained in the ordinary affairs of life, expert opinion and testimony is admissible.[61] In *Neblett v. Hunter*[62] the Virginia Supreme Court approved the following excerpt from Michie's Jurisprudence:[63]

---

[59] *Norfolk Ry. & Light Co. v. Spratley*, 103 Va. 379, 386-88, 49 S.E. 502, 50405 (1905) (jury, in assessing damages, allowed to consider "probable" future effects of the injuries sustained by the plaintiff).

[60] *See Grady v. Fauls*, 189 Va. 565, 53 S.E.2d 830 (1949).

[61] *Compton v. Commonwealth*, 219 Va. 716, 726, 250 S.E.2d 749, 755-56 (1979).

[62] 207 Va. 335, 150 S.E.2d 115 (1966).

[63] 7B Michie's Juris. Va. & W. Va. *Evidence* § 170 (1985).

> When the question involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in the particular science, art, or trade to which the question relates are admissible in evidence. The general rule is that the opinions of experts or skilled witnesses are admissible in evidence in those cases in which the matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it, for the reason that the subject matter so far partakes of the nature of a science, art or trade as to require a previous habit of experience or study in it to acquire a knowledge thereof. An expert's testimony is admissible not only when scientific knowledge is required, but when experience and observation in a special calling give the expert knowledge of a subject beyond that of persons of common intelligence and ordinary experience. The scope of such evidence extends to any subject in respect of which one may derive special knowledge by experience, when his knowledge of the matter in relation to which his opinion is asked is such, or is so great, that it will probably aid the trier in the search for the truth. Whenever the facts stated, as well as knowledge of the facts themselves, depend on professional or scientific knowledge or skill not within the range of ordinary training or intelligence, conclusions may be testified to by an ordinary expert.[64]

Conversely, the Virginia Supreme Court has held opinions of experts are inadmissible on matters of common knowledge or those on which a jury is as competent to form an intelligent opinion as the expert witness.[65]

B. Virginia. In 1993, Virginia adopted by statute the language of Rule 702 of the Federal Rules of Evidence providing that an expert is permitted to render opinions if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."[66] This amendment will apparently have little impact on the traditional prohibition against expert opinions in areas of supposed common knowledge.[67] Federal courts frequently find that the

---

[64] *Neblett*, 207 Va. at 339-40, 150 S.E.2d at 118.

[65] *Brown v. Corbin*, 244 Va. 528, 423 S.E.2d 176 (1992); *Grasty v. Tanner*, 206 Va. 723, 726, 146 S.E.2d 252, 254 (1966).

[66] Va. Code Ann. § 8.01-401.3.

[67] For a review of federal decisions and a discussion of the extent to which Federal Rule of Evidence 702 varies from the common law, see 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence: Commentary on Rules of Evidence for the United States Courts and Magistrates* ¶ 702[01] (1994) [hereinafter *Weinstein's Evidence*].

requirements of Rule 702 for admissibility are not met when the proffered expert opinion concerns a matter of common knowledge.[68] In *David A. Parker Enterprises, Inc. v. Templeton*[69], the Supreme Court of Virginia demonstrated that the adoption of Federal Rule 702 would not relax the "common knowledge" admissibility standard by reversing a trial judge's decision to permit a physician to testify wounds were inflicted by a rotating propeller on the grounds a jury was capable of reaching it own conclusion.

C. Application. Determining whether an expert's testimony is within the range of common knowledge has, in practice, proved to be a difficult matter. Although certain subjects (such as medical causation) are obviously beyond the realm of the knowledge and experience of the average person, other areas in which experts are called to render opinions may be deemed by one court to be a matter of common knowledge and by another court to be a proper subject for expert testimony.

Contrasting *Venable v. Stockner*[70] with *Compton v. Commonwealth*[71] illustrates the divergent results produced by judicial application of the "common knowledge" limitation on expert testimony. In *Venable*, the plaintiff called as a witness an expert with 25 years of experience as a safety engineer and accident analyst to render an opinion as to the point of impact of a collision between an automobile and a tractor-trailer. The expert had examined the marks on the highway and photographs of the marks and the vehicles and testified he was able to determine the angle of the impact, the point of impact, and the manner in which the vehicles had collided. The Virginia Supreme Court held that such testimony concerned matters of common knowledge on which the jury was as competent to form an accurate opinion as the witness.

In *Compton*, a murder case, the issue was whether the shooting of the victim while she was across the table from the accused was accidental. The court affirmed admitting the opinion of a police officer who investigated the shooting. Based on the location of blood and reconstruction of the chair in which the victim had been seated on the evening of her death, the police officer opined that the victim had been sitting in the chair and could not have been standing up at the time she was shot as alleged by the accused. The court stated explanations of the absence of powder burns around the wound, the absence of any of the pellets in the face or body of the victim, the presence of powder burns around the hole in the ceiling, the spatter pattern of blood, the volume of blood on the front of the refrigerator, and the lesser amount of blood near the top of or above the refrigerator were all matters beyond the scope or knowledge of the average juror.

Justice Compton dissented in *Compton* and specifically commented on the seeming inconsistencies between the holding in that case and the *Venable* decision:

In *Venable v. Stockner*, 200 Va. 900, 108 S.E.2d 380 (1959), this court

---

[68] *E.g., Persinger v. Norfolk & W. Ry.*, 920 F.2d 1185 (4th Cir. 1990).

[69] 251 Va. 235, 467 S.E.2d 488 (1996).

[70] 200 Va. 900, 108 S.E.2d 380 (1959).

[71] 219 Va. 716, 250 S.E.2d 749 (1979).

> held that the trial judge had committed reversible error in allowing a "safety engineer, accident analyst" to reconstruct the scene of a motor vehicle collision and to state the position of the vehicles with reference to the center of the highway at the moment of a head-on collision. As the majority has pointed out, we said in *Stockner* that "where the facts and circumstances shown in evidence are such that men of ordinary intelligence are capable of comprehending them, forming an intelligent opinion about them, and drawing their own conclusions therefrom, the opinion of an expert founded upon such facts is inadmissible." 200 Va. at 904, 108 S.E.2d at 383. The *Stockner* court said that while a witness may describe tire marks, skid marks, or cuts which he observed on the road at or near the place of an automobile accident, the inferences to be drawn from such testimony are peculiarly within the province of the jury. 200 Va. at 905, 108 S.E.2d at 383.
>
> Likewise in this case, I believe that if a proper foundation is laid, the expert witness could properly testify as to the location of furniture at the scene, the usual pattern formed when blood is impelled by the force of a shotgun blast, the flow of spattered blood up or down the side of a refrigerator, and the time it takes blood to coagulate. But I do not believe that given these facts it is proper to allow the expert to give his opinion on the position of the victim when shot. The subject of such an inference is not so distinctly related to some science, profession, business or occupation as to be beyond the perception of the average layman.[72]

The Virginia Supreme Court has deemed the opinion of the expert to be touching on matters of common knowledge and thus inadmissible in the following cases:

1. Proffered evidence that in the opinion of a psychiatrist, the key witness of the prosecution in a murder trial "cannot determine the truth, when she's testifying."[73]

2. Opinion of state trooper as to what would have been a maximum safe speed at the crash scene under the conditions existing at the time of the collision, which was the subject of a wrongful death action.[74]

3. Opinion of an engineering professor of an automobile's speed at time of impact based upon the damage done to the vehicle, view of the scene, weight of the automobile and its occupants,

---

[72] *Compton*, 219 Va. at 733-34, 250 S.E.2d at 759-60 (citations omitted).

[73] *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979).

[74] *Peters v. Shortt*, 214 Va. 399, 200 S.E.2d 547 (1973).

and application to these facts of the conservation of energy principle.[75]

4. Testimony concerning the safety of using a "snatch block" to load lumber onto a building.[76]

5. Testimony on whether advertisements indicated a preference for one religious group.[77]

6. Opinion that the defendant newspaper reporter adhered to the standards for investigative reporting.[78]

7. Opinion concerning supervision of a resident of an adult home.[79]

8. Testimony on whether a hole in the ground in the vicinity of a merry-go-round was an unreasonably dangerous condition.[80]

The Virginia Court of Appeals has held that it is not a matter of common knowledge that notations contained in documents seized from a defendant represent record-keeping of drug transactions, nor was this a matter on which a jury would be as competent as an expert to form an intelligent and accurate opinion.[81]

D. Conclusion. Counsel must be prepared to counter the "common knowledge" objection by bringing out in the initial examination the special knowledge and experience held by the expert enabling the expert to express an opinion on what may appear to be a nontechnical subject to the untutored eye.

The occupations of the jurors may influence a court's determination on

---

[75] *Grasty v. Tanner*, 206 Va. 723, 146 S.E.2d 252 (1966).

[76] *Virginia-Carolina Chem. Co. v. Knight*, 106 Va. 674, 56 S.E. 725 (1907).

[77] *Commonwealth v. Lotz Realty Co.*, 237 Va. 1, 376 S.E.2d 54 (1989).

[78] *Richmond Newspapers, Inc. v. Lipscomb*, 234 Va. 277, 362 S.E.2d 32 (1987).

[79] *Commercial Distribs., Inc. v. Blankenship*, 240 Va. 382, 397 S.E.2d 840 (1990).

[80] *Kendrick v. Vaz, Inc.*, 244 Va. 380, 421 S.E.2d 447 (1992).

[81] *Nichols v. Commonwealth*, 6 Va. App. 426, 369 S.E.2d 218 (1988).

whether the expert's opinions are within the sphere of common knowledge. In *Hot Springs Lumber Co. v. Revercomb*,[82] the Supreme Court of Virginia suggested that the background of jurors may be a factor in considering admissibility of an opinion. The court sustained the admission of an opinion of a logger on the feasibility of floating logs down a certain stream and stated:

> Can it be doubted that the opinion of a witness who had made the floating of logs down mountain streams a part of the business of his life, who professed, and, as far as the question under consideration is concerned possessed, intimate knowledge of the stream with reference to which he testified before a jury composed of farmers and mechanics and men in the various avocations of life of ordinary experience and of average intelligence, would be of distinct value in enabling them to arrive at a correct conclusion?[83]

7.603 Admissibility of Opinions on Ultimate Issues of Fact.

A. Virginia. Historically, Virginia courts have refused to admit into evidence opinion testimony considered to be bearing on the precise or ultimate fact in issue.[84] However, this prohibition was largely eliminated in civil cases in 1993 by the adoption of section 8.01-401.3 of the Virginia Code[85] which provides:

> Opinion testimony and conclusions as to facts critical to civil case resolution.
>
> A. In a civil proceeding, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
>
> B. No expert or lay witness while testifying in a civil proceeding shall be prohibited from expressing an otherwise admissible opinion or conclusion as to any matter of fact solely because that fact is the ultimate issue or critical to the resolution of the case. However, in no event shall such witness be permitted to express any opinion which constitutes a conclusion of law.
>
> C. Except as provided by the provisions of this section, the exceptions to the "ultimate fact in issue" rule recognized in the Commonwealth prior to enactment of this section shall remain in

---

[82] 110 Va. 240, 65 S.E. 557 (1909).

[83] *Id*. at 268, 65 S.E. at 561.

[84] *See, e.g., Cartera v. Commonwealth*, 219 Va. 516, 519, 248 S.E.2d 784, 786 (1978).

[85] *R.K. Chevrolet, Inc. v. Hayden*, ___Va.___, ___S.E.2d___ (Jan. 10, 1997).

full force.

B. Application. In the following cases, the Virginia Supreme Court has held the subject of the expert's opinion to be an ultimate issue of fact and therefore inadmissible:

1. Doctor who examined and treated two girls alleged to have been raped stated his conclusion that the girls had been raped.[86]

2. Business consultant, called by the Commonwealth in an embezzlement trial, testified that the "effect" of two deposit slips prepared by the defendant, which contained unrecorded receipts on the books, was to replace funds from other customers that had been removed.[87]

3. Police officer rendered an opinion that the driver of an automobile was intoxicated.[88]

4. Expert opined that a given fire was of incendiary origin.[89]

5. In a personal injury action involving a head-on collision between a truck and an automobile, a "safety engineer, accidental analyst" sought to render an opinion on the angle and point of impact of the two vehicles.[90]

6. Medical expert testified that a person whose blood he had analyzed was "not fit to operate an automobile."[91]

C. Exception as to Medical Experts. In regard to permitting the

---

[86] *Id.*

[87] *Webb v. Commonwealth*, 204 Va. 24, 33, 129 S.E.2d 22, 29 (1963).

[88] *Dickerson v. Town of Christiansburg*, 201 Va. 342, 111 S.E.2d 292 (1959).

[89] *Ramsey v. Commonwealth*, 200 Va. 245, 248-51, 105 S.E.2d 155, 157-59 (1958); *Callahan v. Commonwealth*, 8 Va. App. 135, 379 S.E.2d 476 (1989).

[90] *Venable v. Stockner*, 200 Va. 900, 108 S.E.2d 380 (1959).

[91] *Newton v. City of Richmond*, 198 Va. 869, 875, 96 S.E.2d 775, 780 (1957). *But see Neblett v. Hunter*, 207 Va. 335, 150 S.E.2d 115 (1966) (court approved a medical examiner testifying as to the effect of certain levels of alcohol upon a person's ability to react and judge distances).

introduction of the opinions by medical experts on the ultimate issue of fact, one law review commentator had stated:[92]

> There are several Virginia cases where medical experts have given their opinion on matters which might be described as the ultimate issue of fact to be decided in the particular case. In the murder trial of *Johnson v. Commonwealth*, 111 Va. 877, 69 S.E. 1104 (1911), a doctor was allowed to testify that in his opinion a ruptured bladder caused death, and that the same force which caused an external abrasion in the region of the bladder caused the rupture. In *Lawson v. Darter*, 157 Va. 284, 160 S.E. 74 (1931), a doctor was allowed to testify, in answer to a hypothetical question, that under the facts assumed it was his opinion that the woman described was suffering from a displacement of the uterus, and that such displacement was caused by the automobile accident in which the woman had been involved. The case of *Neal v. Spencer*, 181 Va. 668, 26 S.E.2d 70 (1934), had as one of its principal issues the question of whether the death of plaintiff's decedent was caused by the particular automobile accident. Three doctors testified for the plaintiff that the injury was related to or caused by the accident.
>
> In each of these three cases, the doctors gave their opinions on a matter which might have been classified as an ultimate issue. The next question would be whether their answer would be an invasion of the province of the jury and thus inadmissible. In none of the three cases could the average layman have formed an intelligent opinion without the aid of scientific knowledge and testimony. Without such medical evidence the jury would have practically no scientific information to guide it in its deliberations. Therefore, it would seem that such evidence would not constitute an invasion of the jury's province. It should be noted, however, that in none of the three cases was the rule as to the ultimate issue of fact placed in issue.
>
> Whether or not medical testimony invades the province of the jury is discussed in the murder trial of *Livingston v. Commonwealth*, 55 Va. (14 Gratt.) 592 (1857). One doctor was asked what caused the decedent's death. He replied that it was peritonitis. He also said he had listened to all the testimony at the trial and it was his opinion that the beating administered by the accused caused the peritonitis. The Court stated that though it was proper to allow qualified physicians to give their opinion that a certain wound or blow would be or was the actual cause of death in a homicide case, "it would seem to be generally agreed that in such case the opinion of the witness is to be restricted to matters of science, and that he is not to be allowed to give an opinion on things

---

[92] Edward Parker, *Automobile Accident Analysis by Expert Witnesses*, 44 Va. L. Rev. 789 (1958).

with which a jury may be supposed to be equally well acquainted."

> The court further emphasized that the medical witness should not be allowed to state his opinion on matters which would reflect upon the truth or falsity of facts testified to by others. Therefore, the question and answer were not inadmissible since they would not give "simply the opinion of the witness as a man of science on a given or supposed state of facts, but an opinion necessarily involving his judgment as to the truth of evidence, not free from conflict."[93]

In *Bond v. Commonwealth*,[94] the Virginia Supreme Court strongly reaffirmed the prohibition on ultimate issue testimony (cause of death) by a medical examiner in a murder prosecution. The court specifically rejected the Attorney General's suggestion that the rule be abolished to bring Virginia in line with the "unmistakable trend of authority."

The issue of the court applying the exclusionary rule regarding opinion evidence on the ultimate issue in fact will be determined in each case on the particular scientific and medical facts upon which the jury must make its determination. As noted, the court in some instances has permitted the medical expert to give an opinion that seemingly usurped the jury's function because such evidence was pertinent and not generally known and was necessary for a proper determination of the issue by the jury.

In *Waitt v. Commonwealth*,[95] the Virginia Supreme Court stated the modern rule on medical opinions bearing on an ultimate issue of fact:

> The prevailing modern rule favors admission of expert opinion evidence as to the cause of death, disease, or other physical condition, at least when it is not a pure conclusion without reference to immediate and connecting causative factors and antecedents but is submitted rather with reference thereto and based upon supporting evidence in the record, even though controverted and having a bearing on the ultimate issue of fact, and when it is derived from either the personal observation of, or a proper hypothetical question put to the witness, where it can be seen with reasonable clarity, from the nature of the subject matter as either wholly scientific or in a measure beyond the scope of knowledge of the average juror, that it will help the jury reach a sound verdict and not tend to confuse them, and hence not invade their province of fact finding.[96]

---

[93] *Id.* at 802-03 (footnotes omitted).

[94] 226 Va. 534, 311 S.E.2d 769 (1984).

[95] 207 Va. 230, 148 S.E.2d 805 (1966).

[96] 207 Va. at 237 n.4, 148 S.E.2d at 810 n.4.

In malpractice cases, the Virginia Supreme Court has held expert testimony on the ultimate issue of fact (whether the health care provider met the standard of care of other like specialists) is not only permissible but necessary in order for the plaintiff to establish a prima facie case.[97]

D. Federal Practice. The Federal Rules of Evidence have abolished the "ultimate issue" objection. Rule 704 of the Federal Rules of Evidence provides testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Weinstein's Evidence[98] suggests that questions calling for an opinion upon an ultimate fact may be objectionable on other grounds. This treatise notes that Rule 403 of the Federal Rules of Evidence permits a trial judge to exclude a statement of opinion when its probative value is substantially outweighed by risks of prejudice, confusion, or waste of time.

The requirement of Federal Rules of Evidence 701 and 703 that an opinion be helpful to or assist the trier of fact could exclude an opinion on the ultimate issue if the trial judge believes the jury is just as capable as the expert of reaching a conclusion on the subject matter of the question. For example, in *El-Meswari v. Washington Gas Light Co.*,[99] a wrongful death action, the Fourth Circuit found that the trial court properly exercised its discretion in concluding that a physician could not testify as an expert witness on the issue of the mother's emotional reaction to the death of her child for the reason that the jury could assess the mother's inner grief without expert guidance. The court found that this decision "represented a reasonable exercise of the trial judge's broad discretion under Federal Rule of Evidence 702 to determine that a proposed expert will not significantly assist the arbiter of fact."[100]

E. Tactics in Criminal Cases. Although the ultimate fact in issue remains the law in Virginia criminal cases, a review of the pertinent decisions reveals this is not an absolute prohibition. Several factors appear to influence the judgment of the Virginia Supreme Court.

If the opinion of the expert is one within the common knowledge of the trier of fact, the court will readily find the opinion impermissible. For example, in *Cartera v. Commonwealth*,[101] the opinion of a physician that the two girls had been

---

[97] *Little v. Cross*, 217 Va. 71, 225 S.E.2d 387 (1976); *Bly v. Rhoads*, 216 Va. 645, 222 S.E.2d 783 (1976).

[98] 3 *Weinstein's Evidence* ¶ 704[1].

[99] 785 F.2d 483 (4th Cir. 1986).

[100] *Id.* at 487; *see* Debra T. Landis, Annotation, *When Will Expert Testimony "Assist Trier of Fact" So As to Be Admissible at Federal Trial Under Rule 702 of Federal Rules of Evidence*, 75 A.L.R. Fed. 461 (1985).

[101] 219 Va. 516, 248 S.E.2d 748 (1978).

raped was said to constitute testimony on the ultimate issue of the case. The court observed, "determination of this issue did not require special knowledge or experience."[102]

Professor Friend has noted in his treatise on evidence[103] the distinction between opinions embodying conclusions of fact and conclusions of law in proposing a test for admissibility:

> It has been argued frequently that a more desirable approach would be to hold that the witness may *not* state a conclusion of *law* (*e.g.*, one involving legal definitions and concepts), but *may* express an opinion as to any *fact*, however close to the "ultimate issue" that factual conclusion may be. The difference is the difference between saying that "the accused shot the deceased" and saying that "the accused is guilty of murdering the deceased." The first is a conclusion of fact; the second is a conclusion of law. Many observers feel that the former should be permitted, the latter prohibited. This is reflected in the approach taken by Virginia Code § 8.01-401.3, enacted in 1993, which modifies the rule in civil cases in Virginia.[104]

In order to overcome the "ultimate issue" objection, the lawyer should demonstrate to the court that the subject matter of the expert's opinion is one requiring the special knowledge of the expert and is a scientific or technical opinion and not merely an endorsement by the expert on the legal merits of your case. If the court is so convinced, the opinion probably will be admitted even though it focuses upon the critical issues of the case.

7.604 Expert's Opinion Cannot Be Speculative.

A. Probability Is Admissible, Possibility Is Not. An expert's opinion that the theory or position espoused by the party calling the expert as a witness is "possible" is not admissible.[105] The opinion of the expert must be brought into the realm of reasonable probability in order to be admitted into evidence.[106]

The legal significance of the distinction between *probability* and *possibility* must be reviewed with the expert who may not fully appreciate the critical difference between the two terms. It is equally important that the expert understand that *certainty* is not required but that the expert is entitled to opine on the "probable cause" of a

---

[102] *Id*. at 519, 248 S.E.2d at 748.

[103] 2 Charles E. Friend, *The Law of Evidence in Virginia* (4th ed. 1993).

[104] *Id*. § 17-3, at 8.

[105] *Spruill v. Commonwealth*, 221 Va. 475, 479, 271 S.E.2d 419, 421 (1980).

[106] *Id*.

condition or "probable effect" of an occurrence. For example, a physician may testify as to "the future effects likely to result from an injury."[107]

B. Expert Must Have Complete Factual Basis for Opinion. If the expert's opinion is based upon assumptions unsupported by the evidence, the opinion will be "mere inadmissible speculation."[108] For example, in *Swiney v. Overby*,[109] the court found that it was impermissible for an expert to testify on the stopping distance of a vehicle when the subject vehicle's brake condition was not in evidence.[110]

Section 8.01-401.1 of the Virginia Code, which permits an expert to rely upon inadmissible data, doesn't sanction the admission of expert testimony based on assumptions lacking evidentiary support.[111] The Virginia Supreme Court is exacting in its scrutiny of the factual underpinning of an expert's opinion to determine whether the opinion should be admitted into evidence. In *Tittsworth v. Robinson*[112], the court held it was error to admit the opinions of a biomechanical engineer that the force of the motor vehicle accident at issue was not enough to cause any injury because the opinions were speculative, founded on assumptions lacking sufficient factual basis and contained to many disregarded variables and the expert's reliance upon dissimilar tests.

Very little appellate deference will accorded the decision of a trial judge to admit the opinion of an expert. The Virginia Supreme Court has evinced for many years a skepticism bordering on hostility towards opinions of experts hired in anticipation of litigation. It is therefore imperative to examine carefully the opinion of the expert and ascertain whether the necessary factual predicate upon which the opinion is grounded will be supplied by the evidence admitted during the course of trial.[113]

A common practice of lawyers opposing the admission of expert testimony is to argue that certain salient facts are absent from the evidence. Often, the expert, if asked, will testify that the missing facts are not germane to the opinion formed by the expert. It is therefore important for counsel confronted with such an objection to

---

[107] *Norfolk Ry. & Light Co. v. Spratley*, 103 Va. 379, 387, 49 S.E. 502, 504 (1905).

[108] *Thorpe v. Commonwealth*, 223 Va. 609, 292 S.E.2d 323 (1982).

[109] 237 Va. 231, 377 S.E.2d 372 (1989).

[110] *See also Runyon v. Geldner*, 237 Va. 460, 377 S.E.2d 456 (1989); *accord*, *Mary Washington Hosp. v. Gibson*, 228 Va. 95, 319 S.E.2d 741 (1984).

[111] *Lawson v. Doe*, 239 Va. 477, 391 S.E.2d 333 (1990).

[112] 252 Va. 151, 475 S.E.2d 261 (1996).

[113] *See Gilbert v. Summers*, 240 Va. 155, 160, 393 S.E.2d 213, 215 (1990) ("An expert's opinion which is neither based on facts within his knowledge nor established by other evidence is speculative and possesses no evidential value.").

interrogate the expert on the irrelevance of the "missing facts" and request the expert to explain fully why these facts play no role in the determination of the scientific or technical issue that is the subject of the expert's testimony.

C. Expert May Furnish Data for Use of Jury. An opinion is not speculative merely because it furnishes abstract scientific data for use of the jury in assessing the probability of an alleged event or condition. In *Cantrell v. Commonwealth*,[114] a murder conviction was reversed due to the exclusion of a pathologist's testimony that some head injuries caused by blows to the head exhibit no evidence of external injury. The court held this evidence was admissible because it tended to establish the probability of the defendant's testimony that he had received blows to his head causing a loss of consciousness notwithstanding the lack of significant external injuries on his head.

D. Scientific Reliability of Expert's Opinion. Is it the function of the judge or jury to determine the reliability of the scientific propositions espoused by an expert? *Frye v. United States*,[115] created a threshold requirement that testing on a scientific principle must be shown to be sufficiently established to have gained general acceptance in the germane field or discipline prior to being admitted into evidence. Virginia has refused to adopt the *Frye* rule.[116] In *Spencer v. Commonwealth*,[117] the Supreme Court of Virginia described the role of the trial judge in determining the reliability of expert testimony:

> When scientific evidence is offered, the court must make a threshold finding of fact with respect to the reliability of the scientific method offered, unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis, *Avent v. Commonwealth*, 209 Va. 474, 478, 164 S.E.2d 655, 658 (1968); or unless it is so unreliable that the considerations requiring its exclusion have ripened into rules of law, such as "lie detector" tests, *Robinson v. Commonwealth*, 231 Va. 142, 156, 341 S.E.2d 159, 167 (1986); or unless its admission is regulated by statute, such as blood-alcohol test results, Code §§ 18.2-268(O), 268(Y).
>
> In making the threshold finding of fact, the court must usually rely on expert testimony. If there is a conflict, and the trial court's finding is supported by credible evidence, it will not be disturbed on appeal. Even where the issue of scientific reliability is disputed, if the court determines that there is a sufficient

---

[114] 229 Va. 387, 329 S.E.2d 22 (1985).

[115] 293 F. 1013 (D.C. Cir. 1923).

[116] *Spencer v. Commonwealth*, 240 Va. 78, 393 S.E.2d 609 (1990); *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988).

[117] 240 Va. 78, 393 S.E.2d 609 (1990).

> foundation to warrant admission of the evidence, the court may, in its discretion, admit the evidence with appropriate instructions to the jury to consider the disputed reliability of the evidence in determining its credibility and weight. *See O'Dell*, 234 Va. at 696-97, 364 S.E.2d at 505.
>
> If admissibility were conditioned upon universal acceptance of forensic evidence, no new scientific methods could ever be brought to court. Indeed, if scientific unanimity of opinion were necessary, very little scientific evidence, old or new, could be used. Wide discretion must be vested in the trial court to determine, when unfamiliar scientific evidence is offered, whether the evidence is so inherently unreliable that a lay jury must be shielded from it, or whether it is of such character that the jury may safely be left to determine credibility for itself.[118]

In 1993, the United States Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals*,[119] stated that the so-called *Frye* rule requiring "general acceptance" of a new technique before its results would be admissible in evidence has been supplanted by the Federal Rules of Evidence, which, solely, govern the admissibility of expert opinion testimony. While some courts had already interpreted the federal rules to be less stringent in their requirements for admissibility than the "general acceptance" test of the *Frye* case, that conclusion is in some doubt as a result of the *Daubert* opinion. The Court charged trial judges with the role of becoming "gatekeepers" to prevent the admission of testimony by experts that would not be "helpful" to the fact finder.

In terms of exercising this gatekeeping role, the Court in *Daubert* suggested four factors trial judges may consider: (i) whether the proffered testimony has been tested by a scientific methodology; (ii) whether there has been peer review of the procedure and publication in professional journals; (iii) what the potential rate of error is; and (iv) the "general acceptance" factor. The court found that "general acceptance" can still have a bearing on the inquiry and that a "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community."[120]

The *Daubert* opinion was rendered in the context of a civil case– one in the series of "Bendectin" cases– but it applies to criminal cases as well. While this decision may influence state courts that have evidence rules similar to the Federal Rules of Evidence, its ultimate impact in the states remains to be seen. One certain result of *Daubert* will be more frequent and lengthy pretrial hearings on motions *in limine* to exclude scientific evidence than the relatively infrequent *Frye* hearings of the past.

The Fourth Circuit Court of Appeals has indicated that *Daubert* will not

---

[118] *Id*. at 97-98, 393 S.E.2d at 621.

[119] 113 S. Ct. 2786 (1993).

[120] *Id*. at 2796.

change dramatically it jurisprudence concerning admission of expert testimony. In *Cavallo v. Star Enterprise*[121], the court observed that *Daubert* represented a liberalization not a tightening of the rules controlling expert testimony. In *Benedi v. McNeil-PPC, Inc.*[122], a *Daubert* attack on the admission of medical opinions that Tylenol had caused liver damage was rebuffed by simply noting that the testifying experts had relied upon the same data and methodologies used by the medical community daily in the clinical practice of medicine.

7.605 Expert May Explain Basis of Opinion. An expert is permitted to give reasons for his or her opinion. Accordingly, an expert may testify to information received from other extrajudicial sources. This information may be considered only for the purpose of determining what weight should be given to the expert's testimony.[123] However, the expert witness will not be permitted to express the opinions of other experts that he or she has relied upon in forming an opinion.[124]

7.7 HOW SHOULD AN EXPERT BE EXAMINED AND CROSS-EXAMINED?

7.701 Qualifications of Expert. The qualifications of the expert should not be taken for granted but should be proven before the examination of the witness. The voir dire of the expert should include questions concerning education, training, background, professional experience, specialty, honorary societies, hospital affiliations, specialty board, teaching experience, contributions to professional literature, and miscellaneous background, such as any professional record in the armed services, research work, and the like.

Any offer of concession by the adversary that the expert witness is a qualified specialist should be rejected, since it would deprive the court and the jury of an opportunity of knowing just who the witness is in the particular field of inquiry. Counsel should politely reject any such offer of concession, and state the desire to place the expert's qualifications in the record and to have the jury hear them. It has been suggested that if the medical witness is not a specialist, the trial lawyer should consider accepting a concession that the witness is qualified.

In some cases, the expert witness should be asked to explain and to enlarge upon conclusory statements about qualifications. For instance, the medical expert should be asked what a residency means, how a specialist becomes a diplomat of the specialty boards, what is required of a specialist in order to become a Fellow, and the years of study and training involved in the expert's specialty. On cross-examination, a lawyer may want to bring out that the expert witness of the adversary is claiming greater qualifications than he or she actually possesses or is rendering an opinion in an area in which the expert does not specialize.

7.702 Direct Examination and Use of Hypothetical Question.

---

[121] 100 F.3d 1150 (4th Cir. 1996).

[122] 66 F. 3d 1378 (4th Cir. 1995).

[123] *Foley v. Harris*, 223 Va. 20, 286 S.E.2d 186 (1982).

[124] *Todd v. Williams*, 242 Va. 178, 409 S.E.2d 450 (1991); *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908 (1989).

A. General. Prior to 1982, an expert could render an opinion based upon facts within his or her personal knowledge or based upon information presented to the expert in the form of a hypothetical question that the expert could assume to be correct. In 1982, Virginia adopted Rule 703 and Rule 705 of the Federal Rules of Evidence by enacting section 8.01-401.1 of the Virginia Code which states:

> In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence.
>
> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

The intent of this modification of the common law strictures of the foundation necessary for an expert's opinion was "to remove stereotyped, long, belabored and nonsensical, hypothetical questions from the arena of trial."[125] As a consequence, an expert has four possible bases for the rendition of an opinion:

1. The expert may base an opinion upon facts within the expert's personal knowledge. For example, a treating physician may state a diagnosis of a patient's condition or disease based upon his or her physical examination of the patient.

2. The expert may render an opinion based upon facts or data perceived by or made known to the expert at or before the hearing. For example, a medical expert who has never examined an individual could render an opinion concerning the individual's medical condition based upon a review of medical records.

3. An expert may base an opinion on assumed facts presented to the expert in the form of a hypothetical question.

4. An expert, if permitted to be present in the courtroom during testimony of other witnesses, can base an opinion on such testimony.

In most instances, counsel will probably choose to avoid use of the hypothetical question because of the awkward and difficult task of composing a complete hypothetical question. However, some lawyers advocate its use believing a good

---

[125] 3 *Weinstein's Evidence* ¶ 705[01], at 705-10 (quoting *Twin City Plaza, Inc. v. Central Surety & Ins. Corp.*, 409 F.2d 1195, 1201 (8th Cir. 1969)).

hypothetical question can be utilized to argue one's case to the jury and to remind the jury of the salient facts introduced into evidence. A hypothetical question may also be used when the opponent interjects previously unknown facts that could affect the relevancy of the expert's opinion testimony. By asking the expert to assume these facts, the lawyer can ensure that the expert's opinion takes into account such facts.

B. Application. The Supreme Court of Virginia has not construed or discussed section 8.01-401.1 of the Virginia Code. Federal decisions exploring the effect of Rule 703 of the Federal Rules of Evidence (the source of section 8.01-401.1) establish that the rule is to be liberally construed in favor of admitting into evidence expert testimony grounded on information traditionally deemed "hearsay." Some examples of this emerging trend follow:

1. A bio-mechanical engineer was entitled to give an opinion on the defective design of an infant car seat based in part on his reading, attendance at seminars, and special articles in the field considered by the expert.[126]

2. An auto safety engineer who was an accident reconstruction expert was permitted to render an opinion on the cause of the plaintiff's injuries sustained in a vehicular accident that was formulated by use of facts, data, and conclusions expressed by physicians.[127]

3. A civil engineer was held to be entitled to support his opinion that a gasoline venting system was hazardous by referring to the National Fire Protection Association Code.[128]

4. In a pre-section 8.01-401.1 decision, the Supreme Court of Virginia approved the admissibility of a mechanical engineer's testimony that a transmission's design was "dangerous and unsafe," an opinion that was based in part upon the expert's review of data compiled by the National Highway Transportation Administration.[129]

C. Preparation of a Hypothetical Question.

1. Definition. A hypothetical question has been defined as "[a] combination of assumed or proved facts and circumstances, stated in such form as to constitute a coherent and specific situation or state of facts, upon which the opinion of

---

[126] *Mannino v. International Mfg. Co.*, 650 F.2d 846 (6th Cir. 1981).

[127] *Seese v. Volkswagenwerk, A.G.*, 648 F.2d 833 (3d Cir. 1981).

[128] *Frazier v. Continental Oil Co.*, 568 F.2d 378 (5th Cir. 1978).

[129] *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 297 S.E.2d 675 (1982).

an expert is asked, by way of evidence on a trial."[130]

2. Material Facts. A hypothetical question must embody all of "the material facts which the evidence tends to prove, affecting the question upon which the expert is asked to express an opinion."[131] This principle must be reasonably and sensibly applied with reference to the status of the proof. For instance, the omission of certain details that might properly have been included in a question did not require a rejection of the question which otherwise contained all other material facts, when it was apparent that the witness was familiar with these details and his answer was predicated thereon.[132]

An attorney should not attempt to use a hypothetical question if the hypothesis assumed is not supported by any evidence in the case.[133]

3. Preparation. A hypothetical question should be carefully prepared to include all of the material facts the evidence tends to prove that will affect the answer to be given by the expert. The question should be properly framed, clearly stated, and sufficiently specific so that the jury may know with certainty upon what state of facts the expert bases his or her opinion. It should not contain any statement that the evidence does not prove, and it should not be based on mere conjecture.

If counsel for the plaintiff plans on submitting a hypothetical question to a medical expert for the purpose of establishing medical causation, all of the material facts concerning this question will usually have already been introduced into evidence. However, if the hypothetical question involves the issue of due care, such as whether a floor was properly waxed, the plaintiff may not have introduced all the material facts necessary for such an opinion in the case in chief unless the defendant or one of the defendant's employees was called by the plaintiff as a witness.

The plaintiff, therefore, may have to anticipate some of the material facts that have been uncovered either from answers to interrogatories, discovery depositions, or other pretrial statements. While a hypothetical question may not be objectionable because it did not include material facts subsequently brought out during the trial of the case, these facts, when finally proven, may greatly affect or destroy the weight of the expert's opinion.

If the hypothetical question fails to include material facts,[134] or if it

---

[130] Black's Law Dictionary 877 (4th ed. 1968).

[131] *Lester v. Simpkins*, 117 Va. 55, 68, 83 S.E. 1062, 1066 (1915).

[132] *Ames & Webb, Inc. v. Commercial Laundry Co.*, 204 Va. 616, 621-22, 133 S.E.2d 547, 551 (1963).

[133] *Stonegap Colliery Co. v. Hamilton*, 119 Va. 271, 89 S.E. 305 (1916). *See also Swiney v. Overby*, 237 Va. 231, 377 S.E.2d 372 (1989).

[134] *L.J. Upton & Co. v. Reeve*, 123 Va. 241, 249, 96 S.E.

contains a fact not in evidence,[135] it will be rejected, and if allowed it may be held to be defective and prejudicial. The omission of any material fact may be supplied by previous questions,[136] or by subsequent questions propounded to the witness in cross-examination by counsel for the adverse party that validate the original question.

It is not necessary for the plaintiff to include inconsistent or contradictory contentious facts submitted by the defendant. The hypothetical question may be based upon a statement of facts detailed by the witnesses for one of the parties. The theories supported by the opposition can be brought out on cross-examination of the same expert witness, by the use of a hypothetical question, or by amending or adding to the questions used on direct examination.

D. Facts Based on Hearsay. In forming an opinion, may an expert consider inadmissible hearsay evidence that was introduced without objection? This question has not been discussed in any Virginia case. However, in an early Minnesota case, the court in *Crozier v. Minneapolis St. Ry.*[137] held that where such evidence was received without objection and was not thereafter stricken from the record, it was in the case and had probative value and could be considered by the expert witness in reaching an opinion. In federal court, an expert is entitled to base an opinion on inadmissible evidence if it is of a type reasonably relied upon by experts in the field.[138]

E. Form of Question. In most instances, counsel should prepare a draft of the hypothetical question before trial in anticipation of the facts that may be proven, and should go over the question with the expert witness. The question should be in a sufficiently elastic state so that it can readily be amended or additional facts added that may be presented at the trial. Counsel should avoid the use of a lengthy and involved question. Several short hypothetical questions are preferable, and the questions may be varied to present different theories of the case. Some trial lawyers memorize the question and suggest that it is a better practice to state the question to the witness rather than read it.

F. Objections to Hypothetical Questions. A general objection to a hypothetical question is of little aid to the trial court. For instance, to say that a statement of facts is too brief and calls for an opinion not founded on sufficient facts is, as a practical proposition, not very helpful.[139]

277, 280 (1918).

[135] *Virginian Ry. v. Bell*, 118 Va. 492, 496-97, 87 S.E. 570, 572 (1916).

[136] *Hogan v. Miller*, 156 Va. 166, 180-81, 157 S.E. 540, 545 (1931).

[137] 118 N.W. 256 (Minn. 1908).

[138] Fed. R. Evid. 703.

[139] *Flannagan v. Northwestern Mutual Life Ins. Co.*, 152 Va. 38, 70-71, 146 S.E. 353, 362-63 (1929).

If matters are stated that ought to be excluded, or if matters are excluded that ought to be stated, the objection should set forth the specific problem. If material facts are omitted, then they should be called to the attention of the trial court. The court then should require the propounder of the question to supply such omissions of facts in the questions as are material to enable the expert to answer the question after being fully and definitely informed of all of the material facts.[140]

G. Examples.[141] For examples of Virginia cases involving hypothetical questions, see *Hogan v. Miller*,[142] *L.J. Upton & Co. v. Reeve*,[143] and *Neal v. Spencer*.[144]

7.703 Cross-Examination.

A. General. In preparing a case for cross-examination, the lawyer should procure as much information as possible about the opponent's expert. If counsel's own expert is unable to supply leads to his or her background, one of the trial attorneys in the expert's area should be contacted. The lawyer should attempt to read all books, papers, articles, and reported talks about or by the opponent's expert. Prior testimony in a similar case may prove invaluable in supplying impeachment material and information or in pointing out weak spots in the case being prepared.

In cross-examining the expert, counsel may want to question the expert's qualifications; contradict his or her opinions by the use of certain books or treatises on the particular subject; or attack the expert's opinions relating to causation, diagnosis, and prognosis. In the cross-examination of a doctor, the trial lawyer may use one or more of the following familiar approaches: the diagnosis was based on purely subjective complaints; the doctor did not have the complete and accurate case history; the doctor did not know that the plaintiff had a prior injury because the plaintiff or the plaintiff's attorney did not tell the doctor about the prior injury; the doctor did not give any tests to rule out malingering; and the symptoms are due to causes other than trauma.

B. Use of Literature. Federal Rule of Evidence 803(18) and Code of Virginia Section 8.01-401.1 permit the use of treatises, periodicals or pamphlets in the cross examination of experts provided the literature is shown to be a reliable authority.

---

[140] *Bowen's Ex'r v. Bowen*, 122 Va. 1, 5, 94 S.E. 166, 167 (1917).

[141] *See generally*, 6 Am. Jur., *Proof of Facts* 159 (1960).

[142] 156 Va. 166, 180-81, 157 S.E. 540, 545 (1931) (medical hypothetical question approved).

[143] 123 Va. 241, 246-47, 96 S.E. 277, 278-79 (1918) (hypothetical question disapproved for failure to include material facts).

[144] 181 Va. 668, 673-74, 26 S.E.2d 70, 72 (1943) (hypothetical question on cause of death of 21-year-old person one month after automobile accident approved).

This foundation may be laid by either a concession from the expert being cross examined or by other experts. The federal rule also provides that judicial notice may in some instances furnish foundation for admission of the contents of an item of literature.

C. Prior Inconsistent Statement. An expert may be cross-examined on a prior inconsistent expert opinion given at a prior trial, on some other prior occasion, or in an article for a professional periodical.

D. Hypothetical Question. A hypothetical question asked on cross-examination is improper where it is speculative or pointless or repetitious. Most courts hold that even on cross-examination, a hypothetical question must be pertinent to the inquiry. The courts are divided as to whether in asking a hypothetical question on cross-examination, the interrogator is or is not limited to the subject matter of the direct examination. The authorities are divided as to whether on cross-examination, a hypothetical question may assume facts not in evidence.[145]

7.704 Substitute Expert Evidence.

In a law review note "Malpractice & Medical Testimony"[146] the author makes the following comment:

> Substitute evidence, supplying the jury with the data it might get from an expert, has become a more prominent part of plaintiff's arsenal as courts modify the rules of evidence in malpractice to enable plaintiff to establish the crucial standard of care. The most effective substitute is the learned text or treatise, but to date only one state has, by judicial decision, permitted the use of such materials as direct evidence. *Stoudenmeier v. Williamson*, 29 Ala. 558 (1857). The most frequently cited objection appears to be that the introduction of books violates the hearsay rule, the statements being unsupported by oath and the author being unavailable for cross-examination. However, the general reliability of such treatises, in the sense of impartiality, is unquestioned; while cross-examination might aid defendant by exposing weaknesses in the author's reasoning or obsolescence through medical progress, a similar result can be obtained by the defendant's calling of witnesses who can criticize the author's position by showing that the author is unqualified, out of line with the trend in medical thought, or at least opposed by substantial authority. Also the possibility of a directed verdict on a strong showing by the defendant makes the danger of truly unreliable expert testimony sustaining a verdict for the plaintiff minimal. Other objections to

---

[145] *See* E.H. Schopler, Annotation, *Propriety of Hypothetical Question to Expert Witness on Cross-Examination*, 71 A.L.R.2d 6 (1960); Henry W. Rogers, *The Law of Expert Testimony* 120 (3d ed. 1941).

[146] Note, *Malpractice and Medical Testimony*, 77 Harv. L. Rev. 333 (1964).

> textbook testimony– the dangers of quotation out of context, and confusion of the jury by technical language– can similarly be met in part by an alert defense.[147]

The author also notes:

> A . . . North Carolina case, *Stone v. Proctor*, 259 N.C. 633, 131 S.E.2d 297 (1963), permitted plaintiff to introduce a publication entitled "Standards of Electro-Shock Treatment" prepared by the Committee on Therapy and approved by the Council of the American Psychiatric Association. Massachusetts and Nevada have by statute permitted the use of treatises. Mass. Gen. Laws Ann. ch. 233, § 79C (1959) (now Cum. Supp. 1981); Nev. Rev. Stat. § 51.040 (1961) (now 51.255 (1979)). Both the Uniform Rules of Evidence Rule 63(31) (1953) (now Rule 803(18) (1979)), and the Model Code of Evidence Rule 529 (1942), recommended allowing learned treatises.[148]

It would appear that under such statutes as have been enacted by Massachusetts and Nevada, books and treatises may be introduced in evidence to contradict an expert witness even though the expert may not be familiar with the writing or does not recognize it as an authority. Similarly, the Federal Rules of Evidence provide that statements contained in a treatise admitted into evidence under Federal Rule of Evidence 803(18) are substantive evidence and not limited to use for impeachment purposes only.

7.8 USE OF EXPERT IN *RES IPSA LOQUITUR* CASES

The modern trend of decisions is to permit the use of expert evidence to establish a foundation, or the lack thereof, for the application of the doctrine of *res ipsa loquitur*.[149] Expert testimony has also been allowed to prove lack of proper care, to strengthen the inference of negligence in order to convince the court that the doctrine of *res ipsa loquitur* is properly applicable, or to help convince the jury of the defendant's negligence. The defendant may produce expert proof that the occurrence could not have resulted from his or her lack of due care.[150]

7.9 DISCOVERY OF ADVERSARY'S EXPERTS

7.901 General. The Virginia Supreme Court has enacted rules governing pretrial discovery of the factual findings and opinions of experts that are virtually identical to the pre-December 1, 1993 provisions of the Federal Rules of Civil Procedure (Federal

---

[147] *Id.* at 341-42 (footnotes omitted).

[148] *Id.* at 341 n.54.

[149] *See infra* ¶ 13.703 of Chapter 13.

[150] Note, *The Use of Expert Evidence in Res Ipsa Loquitur Cases*, 106 U. Pa. L. Rev. 731, 737 (1958).

Rules).[151] Under Rule 4:1(b)(4) of the Rules of the Supreme Court of Virginia (Virginia Rules) a litigant may pursue a varying degree of discovery of facts known and opinions held by experts retained or employed by an adversary in anticipation of litigation. Virginia Rule 4:1(b)(4) is a verbatim incorporation of former Federal Rule 26(b)(4).[152]

In the absence of Virginia decisions interpreting the provisions of Virginia Rule 4:1(b)(4), counsel should examine cases decided under the pre-December 1, 1993 version of Federal Rule 26(b)(4) as a guide in determining what procedure to follow and what problems may be encountered when seeking pretrial discovery of experts under Virginia Rule 4:1(b)(4).

7.902 Policy.

A. Two Views. In grappling with the problem of pretrial discovery of experts, two countervailing principles operate. The modern view favors liberal discovery practices to allow for a shaping and narrowing of issues prior to trial and the prevention of unfair surprise. In opposition is the view that the procuring of helpful expert testimony is an integral part of good advocacy and to permit discovery of such information, in effect, would reward the lazy and nonresourceful opponent.

B. Rationales for Restrictive Views. Three rationales have been advanced for the prohibition of the discovery of an expert:

1. The knowledge of an expert is privileged by virtue of his or her status as an expert.

2. The expert is an assistant or agent of the attorney and is thus protected under the "work product" doctrine.

3. It is "unfair" for one party to develop expert information at considerable expense only to have the other side obtain without cost the benefit of the expert's work.

C. 1970 Federal Solution. The advisory committee, in drafting the 1970 version of Federal Rule 26(b)(4), rejected the first two rationales. It stated that provision (b)(4)(C) of Federal Rule 26 would remedy any "unfairness." This provision directs or authorizes the issuance of protective orders, including the payment of fees and expenses

---

[151] *See* Chapter 8 of this handbook.

[152] For discussion of the federal rule and cases interpreting it, see Comment, *A Practitioner's Guide to the Federal Rules of Evidence*, 10 U. Rich. L. Rev. 169 (1975); Michael H. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. Ill. L.F. 895, and *Part Two, An Empirical Study and a Proposal*, 1977 U. Ill. L.F. 169; David M. Connors, *A New Look At An Old Concern, Protecting Expert Information From Discovery Under the Federal Rules*, 18 Duquesne L. Rev. 271 (1980).

by the inquiring party to the expert and possibly the party employing the expert.[153]

D. Virginia Solution. The Supreme Court of Virginia has adopted the federal approach by enacting Virginia Rule 4:1(b)(4).

7.903 Application of Virginia Rule.

A. Four Categories of Experts. In determining the allowable degree of discovery, the first question to be resolved is how did the expert become involved in the case and what is the nature of that involvement. The answer to this question will determine what provision of Virginia Rule 4:1(b)(4) governs or whether this rule is applicable at all. Professors Wright and Miller have established four categories in which an expert may fall under this rule:

1. Experts a party expects to call as a witness at trial.

2. Experts retained or specially employed in anticipation of litigation or preparation for trial but not expected to be used for trial.

3. Experts informally consulted in preparation for trial but not retained.

4. Experts whose information was not acquired in preparation for trial. This class includes both regular employees of a party not employed in anticipation of the litigation and also experts who are actors in or viewers of the occurrences and events that are the subject of the litigation.[154]

1. Category One. Discovery of experts in this category is controlled by Virginia Rule 4:1(b)(4)(A). Under section (b)(4)(A)(i) of this rule, by means of interrogatories a party may obtain the identity of the expert whom the other party expects to call at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert will testify, and a summary of the grounds for each opinion.

Section (b)(4)(A)(ii) of Virginia Rule 4:1 provides that any further discovery is a matter of discretion for the court and that if such discovery is allowed, it will be subject to such restrictions as the court deems necessary. Furthermore, the court will require the inquiring party to pay a fee to the expert for any time spent responding to such discovery, and it *may* require payment to the other party of a fair portion of the

---

[153] Fed. R. Civ. P. 26(b)(4) advisory committee's note (1970). *See also*, Note, *Discovery of Experts: A Historical Problem and A Proposed FRCP Solution*, 53 Minn. L. Rev. 785 (1969).

[154] 8 Charles A. Wright et al., *Federal Practice and Procedure* § 2029, at 428-29 (1994) [hereinafter Wright, *Federal Practice and Procedure*].

fees and expenses reasonably incurred in the obtaining of facts and opinions from the expert.[155]

2. Category Two. The scope of permissible discovery is severely narrowed as to the second class of experts– those retained in anticipation of litigation but who will not testify at trial. Under section (b)(4)(B) of Virginia Rule 4:1, a party may discover facts known and opinions held by such experts only "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means." It is unclear whether section (b)(4)(B) even allows a party to discover the identity of such experts without a showing of exceptional circumstances.[156]

Exceptional circumstances that permit discovery under section (b)(4)(B) may arise when there is only one known expert available on a given subject and the other party has retained that expert, or when the other party's expert has made an examination or inspection that, due to a change of circumstances cannot now be made by another expert. Whenever discovery is allowed under (b)(4)(B), the inquiring party is required to pay the expert for any time spent and the court will require payment to the other party of a fair portion of the expenses reasonably incurred in retaining the expert.[157]

3. Category Three. No discovery may be had of the names or views of experts who are in the third category, that is, those experts who are informally consulted in preparation for trial, but not retained.[158]

4. Category Four. Experts in this category, experts whose information was not acquired in preparation for trial, are not included in Rule 4:1(b)(4). Facts and opinions of these experts "may be freely discoverable as with any ordinary

---

[155] Va. R. 4:1(b)(4)(C).

[156] *See* Monty L. Preiser & Gregory B. Chiartas, *Non-Testifying Experts, Are Their Identities and Opinion Protected?* 20 Trial 58 (July 1984); Note, *Discovery of Retained Non-Testifying Experts' Identities Under the Federal Rules of Civil Procedure*, 80 Mich. L. Rev. 513 (1982); Douglas A. Emerick, Note, *Discovery of the Non-Testifying Expert Witness' Identity Under the Federal Rules of Civil Procedure: You Can't Tell the Players Without a Program*, 37 Hastings L.J. 201 (1985). In support of the discovery of the names of such experts, see 8 Wright, *Federal Practice and Procedure* § 2023; *Sea Colony, Inc. v. Continental Ins. Co.*, 63 F.R.D. 113 (D. Del. 1974). *Contra*, *Perry v. W.S. Darley & Co*, 54 F.R.D. 278 (E.D. Wis. 1971); *Ager v. Jane C. Stormont Hosp. & Training Sch. for Nurses*, 622 F.2d 496 (10th Cir. 1980).

[157] Va. R. 4:1(b)(4)(C).

[158] 8 Wright, *Federal Practice and Procedure* § 2029, at 428-29.

witness."[159]

B. Determining Appropriate Category. In determining whether either section (b)(4)(A) or (b)(4)(B) of Virginia Rule 4:1 is applicable, the question is, "Was the information of the retained expert acquired in anticipation of litigation?" There is no short, definitive answer to this question. Data and conclusions prepared by an expert well before the filing of suit may be protected by section (b)(4) if the expert was retained in anticipation of litigation to perform the labors producing the data and conclusions. Yet the same expert may hold opinions or be privy to knowledge relevant to the subject matter of the case prior to being retained. Such opinions would not be protected from disclosure by section (b)(4).

As a result, the focus of counsel seeking discovery should be on when the expert acquired information and not simply whether or not the expert was retained in anticipation of litigation. The same expert may fit into two or more categories. The expert could have been an observer of certain events relevant to the subject matter prior to being retained in anticipation of litigation. This knowledge would not be precluded from disclosure.[160] Similarly, the expert may be retained by a party to analyze and render opinions on more than one aspect of the case and, as trial approaches, counsel will decide on certain limited subjects to which the expert will testify. Counsel may assert that section (b)(4)(B) protects from discovery the expert's opinions on the subjects about which he or she will not testify even though (b)(4)(A) requires disclosure of the opinions the expert will render during trial.

An expert, by virtue of being an expert, will hold opinions, have experience, and possess knowledge relating to the subject matter of the litigation prior to being retained by a party to the litigation. Opposing counsel will, on occasion, seek discovery from the expert *not* about the specific research performed or opinions prepared subsequent to retention by the party *but* of the knowledge held by the expert prior to being retained.[161]

In construing Federal Rule 26(b)(4), the courts have resolved such dilemmas by separating the various roles of the individual expert and issuing an order allowing discovery but limiting its scope in accordance with the guidelines of section (b)(4). As a result, discovery possibly will be allowed concerning the issues on which the expert is expected to testify, on the expert's role as an actor or observer of events leading to the litigation or on information acquired prior to being retained by the opposing party. Discovery will not be allowed on other subjects upon which the expert was retained to make an analysis, absent some special showing of need for such

---

[159] *Id*. at 429. This treatise also notes that courts have provided protection to some "unaffiliated" experts.

[160] *See Inspiration Consol. Copper Co. v. Lumberman's Mut. Casualty Co.*, 60 F.R.D. 205 (S.D.N.Y. 1973).

[161] *See Grinnell Corp. v. Hackett*, 70 F.R.D. 326 (D. R.I. 1976); *Nelco Corp. v. Slater Elec*, 80 F.R.D. 411 (E.D.N.Y. 1978); *Barkwell v. Sturm Ruger Co*, 79 F.R.D. 444 (D. Alaska 1978).

discovery.

A corporate party may assign an employee of the corporation who is an expert to develop certain opinions or gather certain facts to assist the corporation in a lawsuit. One court has held that the opinions held by such employee-experts are not subject to the provisions of section (b)(4) of Virginia Rule 4:1.[162] Other courts apply section (b)(4)'s discovery limitation to the information gathered by the corporation's employee-expert.[163]

C. Substantial Need. An additional possible restraint upon the discovery of expert information is section (b)(3) of Virginia Rule 4:1, which requires a showing of "substantial need" as a prerequisite to discovering documents prepared in anticipation of litigation by or for a party or a representative. Thus, when attempting to procure an expert's report, the inquiring party may have to satisfy the provisions of both sections (b)(3) and (b)(4) of Virginia Rule 4:1.

However, most courts have held that when an expert is expected to testify at trial, documents prepared by the expert in the course of forming an opinion are discoverable.[164] Section (b)(3) of Virginia Rule 4:1 is expressly subject to the provisions of the expert discovery rules of section (b)(4). The majority view is that when an expert will be called as a witness at trial, the less stringent requirements of section (b)(4)(A) of Virginia Rule 4:1 will govern the permissibility of discovery of documents from an expert instead of the "work product" rule memorialized in section (b)(3).[165]

7.904 Amendments to Federal Rules. As a part of an extensive revision of federal discovery practice adopted effective December 1, 1993, the timing and nature of the discovery of opposing experts was significantly altered.

A. Under the 1993 revision to the Federal Rules of Civil Procedure (revised Federal Rules), without any discovery request, a party will disclose the identity of experts.[166] If the expert has been retained, specially employed to provide testimony,

---

[162] *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975).

[163] *Seiffer v. Topsy's Int'l, Inc.*, 69 F.R.D. 69 (D. Kan. 1975); *Breedlove v. Beech Aircraft Corp.*, 57 F.R.D. 202 (N.D. Miss. 1972). For a discussion of this issue, see Sheila E. McDonald, Comment, *The In-House Federal Expert Witness: Discovery Under the Rules of Civil Procedure*, 33 S.D. L. Rev. 283 (1987-88).

[164] *E.g., Beverage Mktg. Corp. v. Ogilvy & Mather Direct Response, Inc.*, 563 F. Supp. 1013 (S.D.N.Y. 1983); *Carter-Wallace, Inc. v. Hartz Mountain Indus., Inc.*, 553 F. Supp. 45 (S.D.N.Y. 1982).

[165] *See, e.g., County of Suffolk v. Long Island Lighting Co.*, 122 F.R.D. 120 (E.D.N.Y. 1988).

[166] Revised Fed. R. Civ. P. 26(a)(2)(A); *see infra* ¶ 8.302

or is an employee of a party whose duties regularly involve giving expert testimony, a report prepared and signed by the expert must be furnished to the other parties unless otherwise stipulated or directed by the court.[167] Reports need not be prepared for other experts such as treating physicians whose opinions were not formed in anticipation of litigation.[168] The report will contain:

1. a complete statement of all opinions and the basis of and reasons for the opinions;

2. the data or other information considered by the expert in forming the opinions;

3. any exhibits to be used as a summary or in support of the opinions;

4. the qualifications of the expert including a list of all publications authored within the preceding ten years;

5. the compensation to be paid to the expert; and

6. a listing of any other cases in which the expert has testified at trial or by deposition within the preceding four years.[169]

B. A party is required to disclose all data and information considered by an expert who may be called as a witness at trial. A party cannot object to disclosure on the grounds the data or information considered by the expert is privileged or otherwise protected from disclosure.[170]

C. The disclosures required by revised Federal Rule 26(a)(2) will be made at least 90 days before trial or, if the evidence is intended solely for rebuttal or contradiction of expert evidence disclosed by another party, within 30 days of such disclosure. These disclosure requirements may be altered by the court. An affirmative obligation is imposed upon the parties to supplement the response as required by revised Federal Rule 26(e)(1).[171]

---

of Chapter 8 (disclosure of expert testimony in the Eastern and Western Districts).

[167] Revised Fed. R. Civ. P.26(a)(2)(B).

[168] Fed. R. Civ. P. 26(a)(2) advisory committee's note (1993).

[169] Revised Fed. R. Civ. P.26(a)(2)(B).

[170] Fed. R. Civ. P. 26(a)(2) advisory committee's note (1993).

[171] Revised Fed. R. Civ. P.26(a)(2)(C).

D. A party may depose any person who is identified as an expert whose opinions may be presented at trial. However, if a report from the expert is required under revised Federal Rule 26(a)(2)(B), the deposition will not be taken until after the report is provided.[172] Unless manifest injustice would result, a party deposing the expert is required to pay the expert a reasonable fee for time spent in giving the deposition.[173]

E. Facts known or opinions held by an expert retained or specially employed in anticipation of litigation who is not expected to be called as a witness at trial may be discovered only upon a showing of exceptional circumstances under which it is impracticable to obtain facts or opinions on the same subject by other means.[174] When discovery of the nontestifying expert is permitted, a party will normally be required to pay a fair portion of the fees and expenses reasonably incurred by the party who hired the expert in obtaining the facts and opinions from the expert.[175]

7.10 CONTACT WITH OPPONENT'S EXPERTS

7.1001 General. The propriety of ex parte contact with experts retained or consulted with by an opposing party has been the subject of some controversy. The concern that an expert may be privy to confidential information has led a number of courts to frown upon the practice of counsel communicating outside the bounds of court-sanctioned discovery with an expert retained or consulted with by an opposing party.

7.1002 Disqualification of Expert. Some courts have held that an expert may be disqualified from testifying as a result of prior consultation with an opposing party. A two-part analysis has been employed by some judges:

1. Was it objectively reasonable for the first party consulting the expert to conclude that a confidential relationship existed?

2. Was any confidential or privileged information disclosed by the first party to the expert?

If the answer to both of these questions is "yes," the expert will be disqualified.[176] In *Paul v. Rawlings Sporting Goods Co.*,[177] the court added a third requirement that it

---

[172] Revised Fed. R. Civ. P.26(b)(4)(A).

[173] Revised Fed. R. Civ. P.26(b)(4)(C).

[174] Revised Fed. R. Civ. P. 26(b)(4)(B).

[175] Revised Fed. R. Civ. P.26(b)(4)(C).

[176] *Wang Lab., Inc. v. Toshiba Corp.*, 762 F. Supp. 1246 (E.D. Va. 1991); *Mayer v. Dell*, 139 F.R.D. 1 (D.D.C. 1991); *Great Lakes Dredge & Dock Co. v. Hardischfeger Corp.*, 734 F. Supp. 334 (N.D. Ill. 1990).

[177] 123 F.R.D. 271 (S.D. Ohio 1988).

must be shown that the expert has used or may use the confidential information to the advantage of the adverse party.

Under some circumstances, an expert may not be completely disqualified from testifying at trial. For example in *Wang Laboratories, Inc. v. CFR Associates Inc.*,[178] the expert was still permitted to testify as a fact witness at trial.

7.1003 Disqualification of Counsel. Where an expert is privy to confidences of the party or counsel who initially consulted with the expert and there is a danger this information has been made known to opposing counsel who has subsequently conferred with the expert, disqualification of counsel may be deemed an appropriate remedy.[179]

7.1004 Impact of Rules of Discovery. Courts have disagreed over whether the rules restricting formal discovery are relevant to informal ex parte contact with experts retained in anticipation of litigation. In *Campbell Industries v. M/V Gemini*,[180] the court held that it was a "flagrant abuse" of the discovery process to contact an expert, and as a consequence the expert was disqualified from testifying at trial. Conversely, *Riley v. Dow Chemical Co.*,[181] found that Federal Rule 26(b)(4) did not limit the right of a party to call as its witness at trial a person consulted by the opponent.

7.1005 Contact With Treating Physicians. Courts have disagreed over whether defense counsel is permitted to have ex parte communications with a health care provider who has treated the plaintiff. Section 8.01-399 of the Virginia Code prohibits a lawyer or anyone acting on behalf of the lawyer from obtaining information from a treating health care provider without the patient's consent except through discovery pursuant to the Rules of the Virginia Supreme Court.

7.1006 Ethics. The Virginia Code of Professional Responsibility does not prohibit ex parte communications with an adverse party's expert.[182]

7.11 COMPELLING AN EXPERT TO TESTIFY AT TRIAL

7.1101 When Necessary. The issue of whether an expert can be compelled to testify at trial on an opinion that the expert is qualified to make by reason of his or her expertise arises in several different settings. For instance, a party may employ an expert whose study of the case produces information unfavorable to the employing party's cause. Opposing counsel then will seek to subpoena the expert and to procure testimony adverse to the party who originally hired the expert. In medical malpractice actions, plaintiff's counsel sometimes will seek to elicit expert testimony from the defendant physician.

---

[178] 125 F.R.D. 10 (D. Mass. 1989).

[179] *See Nat'l L. J.* 3 (Oct. 4, 1993).

[180] 619 F.2d 24 (9th Cir. 1980).

[181] 123 F.R.D. 639 (N.D. Cal. 1989)

[182] LEO 1076 (1980).

7.1102 Divergent Court Rulings.

A. Majority View. The majority of jurisdictions hold that an expert may be subpoenaed to give a professional opinion based upon facts observed and opinions arrived at *prior* to being ordered to testify, even though the expert is not compensated with an expert witness fee. However, the expert may not be required to engage in additional study or preparation. Another view allows the expert to refuse to testify except to facts the expert has personally observed. A third group of cases holds that an expert, even an opponent's expert, may be required to testify to facts and opinions in all circumstances even when compensated only as an ordinary witness.[183] Virginia has no clear authority on this point.

B. *Bradley v. Poole*.[184] The courts that have considered this issue have reached divergent results.[185] Although the Virginia Supreme Court has never ruled directly on this matter, it has indicated on several occasions that the expert is not subject to subpoena to the same extent as a lay witness. In *Bradley v. Poole*, the court stated:

> When a litigant seeks the opinion and aid of an expert in a trial the relationship between the parties is different from that of an ordinary witness summoned to testify to some pertinent fact known to him. In the former case the duty of the witness to attend the trial and give testimony, or otherwise aid the litigant, is created by contract. In the latter case the duty of the witness to attend the trial and testify is a duty created by law and arises out of necessity in the administration of justice. A witness of either class when properly served with a subpoena must attend the trial or be subject to punishment for contempt of court.[186]

C. *Cooper v. Norfolk Redevelopment & Housing Authority*.[187] In *Cooper v. Norfolk Redevelopment & Housing Authority*, the expert had made his report available to both parties by prior agreement between counsel. The court recognized the rule of not permitting a party to call and examine the adversary's expert at the trial, but it held that, under the special circumstances of the case, either party had a right to put a neutral expert's testimony in evidence. The court observed that:

---

[183] *See* Andre A. Moenssens et al., *Scientific Evidence in Criminal Cases*, § 1.07 (3d ed. 1986) (also citing civil case authorities).

[184] 187 Va. 432, 47 S.E.2d 341 (1948).

[185] J.A. Connelly, Annotation, *Right to Elicit Expert Testimony from Adverse Party Called as Witness*, 88 A.L.R.2d 1186 (1963); C.R. McCorkle, Annotation, *Compelling Expert to Testify*, 77 A.L.R.2d 1182 (1961).

[186] *Bradley*, 187 Va. at 439, 47 S.E.2d at 344.

[187] 197 Va. 653, 90 S.E.2d 788 (1956).

1. there was no secret about the opinion of the expert;

2. there was nothing confidential about it;

3. knowledge of it was imparted to both sides;

4. there was no understanding about its use in evidence; and

5. there was no restriction or limitation placed upon the opinion.[188]

In commenting upon the right of an expert to decline to give an expert opinion, the court stated:

> There is a conflict among the decisions as to the right of an expert to decline to give his expert opinion when called to testify on matters under judicial inquiry. Apparently a majority of courts which have dealt with this question hold that the expert may be compelled to testify as to an opinion he is qualified to give by reason of his prior training and experience and without having to make any special preparation to qualify to do so. Many of the cases taking that view have involved the right of the expert to demand extra compensation for testifying.[189]

After reviewing cases from Alabama, Pennsylvania, New York, New Jersey, and Indiana, the court added:

> The reasoning of the authorities . . . is persuasive with respect to the situations dealt with, particularly as preventing the unfairness that could result from an unlimited right of a litigant to get evidence for himself from an expert employed by his adversary on ascertaining that the expert had given an opinion to his adversary which was unfavorable to the latter's case.
>
> We limit our decision now, however, to the particular facts of the present case, which do not allow the application of an expert privilege rule so as to permit Mr. Baldwin to refuse to testify.[190]

D. Experts Who Have Developed Opinions Independent of Litigation. Cases arise where an expert has performed research or otherwise gained expertise on a given subject in the course of performance of normal academic or professional duties and litigation later arises that concerns the subject of the expert's opinions. Can this expert be subpoenaed and compelled to give testimony for use at trial? The current trend

---

[188] *Id*. at 658, 90 S.E.2d at 791.

[189] *Id*. at 655, 90 S.E.2d at 789.

[190] *Id*. at 657, 90 S.E.2d at 791.

appears to permit a party to compel such testimony by use of a subpoena if there is no other means to obtain the information held by the expert and the party pays the expert a reasonable fee for his or her time.[191]

7.12 PERMITTING EXPERT WITNESSES TO REMAIN IN COURTROOM DURING TRIAL

7.1201 General. Would permitting an expert to remain in the courtroom to assist counsel during trial in a case involving matters of a highly technical nature be within the procedural parameters of a fair trial? With the presence of an expert, there is a greater chance of certain relevant testimony being elicited from expert witnesses that otherwise may not have been brought to the attention of the court and jury.

7.1202 Sequestration Rule. The common law rule pertaining to exclusion of expert witnesses from the courtroom was stated by the Virginia Supreme Court in *Elizabeth River Tunnel District v. Beecher*:[192]

> *The question of whether or not an expert witness will be permitted to remain in the courtroom during the testimony of an expert called by an adversary rests in the sound discretion of the trial court.* While in most instances trial courts properly permit medical experts to remain in the courtroom on the ground that medical witnesses do not come within the rule requiring the separation of witnesses on proper motion, it is only when there is an abuse of discretion that such would be reversible error (emphasis added).[193]

Section 8.01-375 of the Virginia Code, originally enacted in 1966 and subsequently amended, provides:

> The court trying any civil case, may upon its own motion and shall upon the motion of any party, require the exclusion of every witness. However, each named party who is an individual, one officer or agent of each party which is a corporation or association and an attorney alleged in a habeas corpus proceeding to have acted ineffectively shall be exempt from the rule of this section as a matter of right. When expert witnesses are to testify in the case, the

---

[191] *Kaufman v. Edelstein*, 539 F.2d 811 (2d Cir. 1976); *Wright v. Jeep Corp.*, 547 F. Supp. 871 (E.D. Mich. 1982); *see* Note, *Discovery of Retained Nontestifying Experts' Identities Under the Federal Rules of Civil Procedure*, 80 Mich. L. Rev., 513 (1982); Preiser & Chiartas, *supra* note **Error! Bookmark not defined.**, at 58-64.

[192] 202 Va. 452, 117 S.E.2d 685 (1961).

[193] *Id*. at 461, 117 S.E.2d at 69192; *see also*, B. Finberg, Annotation, *Exclusion from Courtroom of Expert Witnesses During Taking of Testimony in Civil Cases*, 85 A.L.R.2d 478 (1962).

> court may, at the request of all parties, allow one expert witness for each party to remain in the courtroom.

The last sentence was added to the statute in 1987.

Under Rule 615 of the Federal Rules of Evidence, the trial court has the discretion to permit "a person whose presence is shown . . . to be essential to the presentation of the party's cause" to remain in the courtroom.[194]

7.13 WEIGHT ATTACHED TO EXPERT TESTIMONY

7.1301 General. The jury generally is not bound to accept the opinion of expert witnesses as conclusive. It considers the facts upon which the opinions are based and determines from all the evidence in the case whether the conclusions given by the witness are sound and substantial.[195] It is the function of the jury to assess the validity of the reasoning process by which an expert reaches an opinion.[196]

The general rule is stated as follows:

> [W]hen an attending physician is positive in his diagnosis of a disease, great weight will be given . . . to his opinion. However, when it appears . . . that the diagnosis is shaded by doubt, and there is medical expert opinion contrary to the opinion of the attending physician, then the trier of the fact is left free to adopt that view which is most consistent with reason and justice.[197]

Similarly, in *Opanowich v. Commonwealth*,[198] the court stated:

> It was for the jury to determine the weight to be given the testimony of the expert witnesses, whose opinions differed. It was for them to decide, considering the ability and character of the witnesses, their actions upon the witness stand, the weight and process of the reasoning by which they supported their opinion, their possible bias in favor of the side for which they testified, their relative opportunities for study or observation of the matters about

---

[194] Fed. R. Evid. 615.

[195] *Chesapeake & O. Ry. v. Barger*, 112 Va. 688, 692, 72 S.E. 693, 695 (1911).

[196] *Addison v. Commonwealth*, 224 Va. 713, 299 S.E.2d 521 (1983).

[197] *Bristol Builders Supply Co. v. McReynolds*, 157 Va. 468, 471, 162 S.E. 8, 9 (1932); *accord*, *Ellis v. Commonwealth*, 182 Va. 293, 303, 28 S.E.2d 730, 735 (1944); *Baltimore v. Benedict Coal Corp.*, 182 Va. 446, 453, 29 S.E.2d 234, 237-38 (1944).

[198] 196 Va. 342, 83 S.E.2d 432 (1954).

> which they testified, and any other matters which serve to illuminate their statements. 20 Am. Jur., Evidence, § 1206, page 1056, and § 1208, page 1059; 32 C.J.S., Evidence, § 567, page 378, *et seq*.[199]

7.1302 Virginia. In Virginia a limitation on the probative value of expert evidence is recognized. In *Marvin v. Penn*,[200] the plaintiff introduced as witnesses five automobile mechanics with various years of experience ranging from 12 to 34 years. They testified, without any objection from the defendant, that they had examined the broken steering mechanism and found that the break was caused by excessive wear. They testified that because of the wear on the mechanism there would have been an abnormal or excessive amount of play in the steering wheel which would have indicated to the driver that the steering apparatus was defective.

The defendant and his witnesses testified that shortly before the accident the vehicle had been inspected, had been found to be in proper shape and free of defect, and that no defect in the steering mechanism was evident to the defendant until immediately before the accident. Defendant argued that "the jury should, as a matter of law, have accepted the evidence adduced by the defendant rather than the expert evidence adduced by the plaintiff."[201]

In rejecting this contention, the court stated:

> It is true that in this jurisdiction we have recognized a limitation on the probative value of expert evidence. In *Lawson v. Darter*, 157 Va. 284, 293, 160 S.E. 74, we held that while expert testimony "should be scrutinized with care," its weight is for the jury. See also, *Neal v. Spencer*, 181 Va. 668, 673, 26 S.E.2d 70, 72. In these two cases the jury accepted such expert evidence and we affirmed.
>
> In *Beale v. King*, 204 Va. 443, 446, 132 S.E.2d 476, 478, we held that opinion evidence of expert witnesses as to the value of an attorney's services, though uncontradicted, was not conclusive or binding on the court or the jury. There the jury rejected such expert evidence and we affirmed that finding.
>
> In *Hitt v. Smallwood*, 147 Va. 778, 789, 133 S.E. 503, we held that opinion evidence based on observation of the outside of a wall that no cement had been put in the foundation should not override the positive testimony of the mason who built the wall that he had put sufficient cement in it. There, again, the commissioner in chancery– the trier of the facts– rejected the expert evidence and we affirmed.

---

[199] *Id*. at 354-55, 83 S.E.2d at 439.

[200] 204 Va. 822, 134 S.E.2d 305(1964).

[201] *Id*. at 825, 134 S.E.2d at 307.

> It is clear from our prior decisions that we have adhered to the general rule that it is for the jury, or the court trying the case without a jury, to determine the weight to be given the testimony of expert witnesses. *Ford v. Ford*, 200 Va. 674, 679, 107 S.E.2d 397, 401 and authorities there cited.[202]

7.1303 Conclusion. Positive expert testimony will prevail over negative. Expert opinion may be ignored where it is in conflict with other facts or substantial evidence. Personal contact as a predicate for testimonial evidence will carry greater weight than opinions predicated upon hypothetical facts only.[203]

7.14 APPOINTMENT OF EXPERT BY COURT

7.1401 General. It is generally accepted that the trial court has the power to select and call as a witness an expert of its own choosing.[204] Such a witness is not a substitute for experts called by the parties but supplements the testimony of additional experts selected and called by the parties. The Supreme Court of Virginia has not passed upon the propriety of a trial court's appointing of experts.

Proponents of such a practice view court appointment of experts as a remedy to the dilemma of a trier of fact being baffled by divergent opinions presented by experts retained by the parties. Opponents of judge-appointed experts fear the jury will attach greater weight to the testimony of the expert than to other witnesses merely because of his or her selection by the judge. The assumption that an expert will be impartial due to the expert's selection by the court as opposed to a party to the litigation is questioned by some legal observers.[205]

7.1402 Federal Practice. Rule 706 of the Federal Rules of Evidence permits court appointment of experts. The expert is required to advise the parties of his or her findings, and the parties have the right to depose the expert and cross-examine the expert if the expert is called as a witness. Under Federal Rule of Evidence 706, court appointed experts are entitled to reasonable compensation as determined by the court. In civil cases, the parties will bear the expense in the proportion determined by the court.

The court has the discretion to authorize disclosure to the jury of the fact that the

---

[202] *Id*. at 825-26, 134 S.E.2d at 307.

[203] Rogers, *supra* note **Error! Bookmark not defined.** , at 786-87.

[204] 1 Charles T. McCormick, *McCormick on Evidence* § 17 (4th ed. 1992); R.E. Barber, Annotation, *Trial Court's Appointment, in Civil Case, of Expert Witness*, 95 A.L.R.2d 390 (1964).

[205] *See Hearings Before the Special Subcomm. on Reform of Fed. Crim. Laws of the Comm. on the Judiciary, House of Representatives*, 93d Cong. 1st Sess., on Proposed Rules of Evidence, Serial No. 2, 296-97 (1973).

court appointed the witness.

7.15 CONCLUSION

7.1501 Use of an Expert.

A. General. As used in the law, an expert is not a person 25 miles removed from his or her home base, but rather, a person who has the requisite skill, training, and experience to be accepted as qualified by a court.

Even though the expert may be qualified, this is not an admission ticket to the witness stand to expound on theories, findings, and opinions. If the opinion of the witness is one of common knowledge or if the triers of fact are as capable as the expert of drawing an inference of negligence or lack of due care or the absence of safety, then the expert is not permitted to share his or her expertise with the jury for they must decide the issues without the expert's distillation.

The exclusionary rule states that the testimony of an expert is not admissible where it invades the province of the jury. An exception to the rule is made when the opinion of medical experts is needed on medical causation. This is true even though this is often an ultimate fact in issue. For example, did the trauma cause cancer, epilepsy, or diabetes? The reason for this exception is that the court and the jury are dependent for proper guidance on expert evidence and without it the jury could not be expected to render a correct finding. Does this lend credence to the contention that in nonmedical areas the jury and the court also need the guidance of competent expert testimony?

B. Arguments Against Use. Some trial lawyers assert that it is not necessary to use an expert to prove causation in fact or to controvert such evidence except in unusual cases of a complex nature. They contend that it puts a heavy burden of expense on the plaintiff who usually cannot afford to pay an expert, and where inferences can be drawn from the data by the jury, the plaintiff should not be required to employ an expert to render inferential opinions or to refute the opinions of the adversary's expert.[206] Some trial courts have suggested a similar reason for excluding expert testimony.

C. Arguments for Use. Effective litigation has always been and will continue to be expensive. If the scientific approach is to be used in cases involving automobile accidents, products liability suits, and other cases, expert proof must be utilized to its fullest and proper extent. Results of research and development in science and medicine are so vast that the average jury cannot be expected to have the necessary knowledge to understand the complicated and involved facts and problems and to arrive at a correct decision without the assistance of those who are learned in the particular art, skill, or science.

7.1502 Hypothetical Question. Some trial lawyers are of the opinion that a

---

[206] Robert Klonsky, *Expert Testimony Unnecessary to Recover For Unseaworthiness or Negligence in Maritime Cases*, 1963 NACCA 17th Annual Convention 311.

hypothetical question should be asked only when absolutely necessary. It has been suggested that for a problem that falls within a class where it is easy for the doctor to testify that there was or is a causal connection, then a hypothetical question is not usually needed (case involving a broken leg and osteomyelitis sets in) since simple logic points to the conclusion that it resulted by reason of the fracture. In such a case it is routine for the doctor to say that there was and there is, in his or her opinion, a causal connection between the initial trauma and the present physical condition.[207]

One authority has stated:

> It is significant however to note that the proposed Uniform Laws of Evidence, Rule 58, provide that questions put to expert witnesses need not be in hypothetical form unless the court in its discretion so requires. This really is an intention to do away with the practice of submitting hypothetical questions to expert witnesses. It is true that hypothetical questions have been denounced by many writers because they tend to "clamp the mouth of the expert so that his answer to a complex question may not express his actual opinion on the actual case" and tend to confuse and mislead the jury as to the import of the actual opinion of the expert (2 Wigmore on Evidence Art. 686). There may be certain instances wherein the discarding of a hypothetical question, as a means of stating personally observed data, seems sound; however, where it is necessary to arrive at ultimate facts on the basis of prior facts in evidence, it does seem logical that the hypothetical question can be discarded.[208]

7.1503 Admitting Expert Testimony. In *Hanriot v. Sherwood*,[209] the Supreme Court of Virginia, in reviewing the history of the practice of admitting the evidence of expert witnesses, stated:

> And we are told by the historian of the law that the practice of admitting the evidence of witnesses, who have become qualified by study and experience to express opinions upon questions of science and art, was authorized by the Roman law. And in the case of *Buckley v. Rice*, 1 Plowden, decided in 1553, Mr. Justice Saunders is reported as saying: "If matters arise in one law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns, which is an honorable and commendable thing in one law."[210]

---

[207] Leo S. Karlin, *The Hypothetical Question—Could or Might and Pro-Problems of Causation*, 1963 NACCA 17th Annual Convention 925.

[208] Alfred Lubin, *Invading the Province of the Jury*, 3 Trial Lawyers Guide 115, 14445 (1959).

[209] 82 Va. 1 (1884).

[210] *Id*. at 6-7.

Over the years some criticism has been lodged by the courts against expert evidence in general. In *Adams v. Ristine*,[211] the Virginia Supreme Court stated:

> There has been a great difference of opinion among the courts as to the weight and value of expert testimony. This difference is well expressed in 11 R.C.L. 587, with a full citation of authority. It is there said: "In some cases the courts have severely criticized expert evidence in general as biased, mercenary, and almost worthless, such evidence as to handwriting having been considered as particularly untrustworthy. In other cases instructions that such evidence should be received with great caution have been approved. In still other cases expert testimony is commended and held not properly subject to deprecating remarks in the court's instructions, or else is declared to be entitled to the jury's unbiased consideration, free from the court's prejudicial remarks either in its favor or against it. The discredit so often attached to expert testimony is traceable particularly to the fact that it consists of conclusions and opinions which are often uncertain at best, and in which one may be swayed one way or the other by bias or interest, without conscious dishonesty, and that by our existing practice the experts are selected and paid by one of the parties and their use as witnesses necessarily depends on their forming an opinion favorable to that side."[212]

In *Neal v. Spencer*,[213] the court stated:

> We have time and again accepted this character of testimony and held it to be competent, safeguarding it by a warning to the jury that it should be scrutinized with care.[214]

The court in *Lakeside Inn Corp. v. Commonwealth*,[215] also stated that the law requisitions the expert in every field of human endeavor to assist in arriving at just conclusions. In most instances the expert witness gives his or her opinion after studying the science of the subject and correlating it with the particular facts of the case. The correctness of the expert's premises and opinion can be fortified or assailed by careful examination at trial, and the expert's conclusions and findings may then be accepted or rejected by the jury, upon proper instructions of the court, in the total consideration of the case.

---

[211] 138 Va. 273, 122 S.E. 126 (1924).

[212] *Id*. at 299, 122 S.E. at 133-34.

[213] 181 Va. 668, 26 S.E.2d 70 (1943).

[214] *Id*. at 673, 26 S.E.2d at 72.

[215] 134 Va. 696, 114 S.E. 769 (1922).

> Always those who are consecrated to professional idealism and those who are searching for the facts will follow sound medical principles when evaluating disability. The physician should never assume the prerogatives of the advocate. It is his responsibility to measure the extent of personal injury and to evaluate the permanent physical impairment. There is no place for sentimental, emotional or paternalistic influences. Close adherence to the principles of thorough investigation of the claimant's history, a complete examination, and an impartial weighing of all significant medical facts will lead to a highly respected medical opinion.[216]

This is also the goal of the conscientious, energetic and imaginative trial lawyer– the seeking of scientific truth in the determination of legal controversies and the "reaching of the right result at the end of the judicial process."

[216] Earl G. McBride, Virginia Law Weekly, *DICTA*, Vol. XI, No. 24 (1959).