CHAPTER 9

TRIAL

PLAINTIFF'S PERSPECTIVE

9.1 STRATEGIC PLANNING

9.101 In General. Trying a medical malpractice case represents one of the greatest challenges for a plaintiff's personal injury lawyer. Most trials result in verdicts for the defense. To be successful, a plaintiff's attorney must understand why medical malpractice trials usually end unfavorably for the plaintiff and must engage in thoughtful preparation to address those factors.

9.102 Threshold Dilemmas for the Plaintiff. All jurors and judges have, at one time or another, ultimately placed their trust in the hands of physicians and other health care providers to treat an illness suffered by themselves or members of their family. This results in a belief that health care providers, including the defendant, are bright, well-trained, and diligent. Adverse publicity concerning purported deficiencies in the civil justice system and suggestions that tort litigation is the cause of America's health care woes further contribute to many jurors' wariness about a plaintiff's claim. Most jurors also will have a "knowledge gap" on the scientific and medical issues that arise during trial. The plaintiff, who has the burden of proof both legally and psychologically, must somehow overcome ignorance and confusion so the jurors have a clear understanding of the salient issues. Confusion is usually an ally of the defense.

9.103 Overcoming the Dilemmas.

A. Simplifying the Issues. The goal of the trial attorney is to win, not to impress the jury with one's own intelligence. Winning requires a fluency in the facts and medicine. Although plaintiff's counsel may have worked months to achieve this fluency, the jury will have but a few days, so the case must be stripped of anything non-essential to communicate a compelling case.

B. Educating the Jury. After stripping the case to essentials, the remaining key terms and concepts must be defined in simple language and by using metaphors and analogies familiar to the jury.

C. Using Charges of Malevolence Sparingly. The jury must realize that this is not a criminal or license revocation proceeding. The jury must also be made aware that a defendant may have been an outstanding practitioner at all other times in his or her career and still be deemed negligent on the occasion at issue. If the case has elements of greed, willful misconduct, slothfulness, or gross incompetence on the part of the defendant, counsel should make sure those elements emerge as the evidence is presented. Counsel should not present to the jury with righteous indignation but should instead guide the jurors through the evidence as they develop a disdain for the defendant's behavior.

D. Establishing Common Bonds. The jurors must understand the possibility that they or a member of their families could have suffered the same fate as the plaintiff. They should be shown that the plaintiff was a member of the community who acted in a manner that, if not completely reasonable, is at least understandable to the jury.

E. Universalizing the Plight of the Plaintiff. As the trial progresses, the jury should get the impression that more is at stake than whether the plaintiff will receive a monetary award and the amount of that award. The outcome of the trial will establish a standard for the quality of health care in the community of the jurors. What happened to the plaintiff during the events leading up to the trial and the outcome of the trial matter not just to the plaintiff but to everyone.

F. Trying the Employer Who Profits, Not the Employee Provider. In the current era of managed health care and ever larger health care conglomerates, an increasing number of trials concern either a systemic failure or a health care provider thrwarted from delivering quality care by profit-oriented restraints imposed by his or her corporate employer. Making this point can overcome the jury's reticence to return a verdict against a personable physician.

9.2 VOIR DIRE

9.201 In General. Both court and counsel have the right to ask prospective jurors any relevant question about whether they are related to any party, have any interest in the cause, have expressed or formed any opinion, or are sensible of any bias or prejudice.[1]

9.202 Goals. It is difficult to state with precision the profile of an ideal juror for a medical malpractice case. A few generalizations are all that can be offered. A juror must grasp the medical principles necessary to understand the plaintiff's theory. A juror should be someone who will not blindly accept what the doctor says simply because he or she is the doctor. Yet this healthy skepticism must not be so unbridled that it makes the juror cynical. Cynicism can be directed at the plaintiff and the plaintiff's expert as well. The ideal juror should also have had life experiences that foster empathy with the plaintiff's suffering. Voir dire must be targeted to eliciting clues about these traits.

9.203 Areas of Inquiry. The subjects listed below should be explored during voir dire. Counsel's specific questions on these subjects should cover not only the juror but also the juror's family and friends whenever appropriate.

1. Knowledge of a defendant;

2. Relationship with a defendant, such as prior treatment by the defendant, social ties, business relationships, and owning stock in a defendant entity;

3. Knowledge of the diseases, drugs, therapies, and procedures to be discussed during trial, including whether the juror or anyone he or she knows suffers from the disease or has undergone the specific therapy;

4. Employment, training, or experience in health care;

[1] Va. Code § 8.01-358.

5. Any noteworthy experiences, pleasant or unpleasant, in obtaining health care;

6. Any complaints ever made against a health care provider;

7. If the case involves a specific method of health care delivery, such as health maintenance organizations or teaching institutions, whether the juror has obtained health care by similar means and whether his or her experiences have been satisfactory;

8. Experience with events similar to what happened to the plaintiff; for example, if the case concerns a physician who failed to respond to a telephone call, counsel can inquire whether the juror has had a similar experience and ask about his or her reaction to it and then turn the question around and ask whether the juror has ever called a physician and received a satisfactory response;

9. Understanding of the significance of the plaintiff's disability; for example, if the case concerns foot pain, counsel can inquire whether the prospective juror has to stand while working;

10. Whether the juror has a tendency to accept blindly what a physician tells him. Counsel can ask if the juror has ever researched a medical matter via the Internet or sought a second opinion; and

11. Attitude toward personal injury claims and medical malpractice litigation in particular. Has the juror has ever worked in a job processing claims? What has the juror read or heard about malpractice claims and their impact on health care? Is the juror a member of any organization seeking to "reform" tort law or the civil justice system? Does the juror think it is wrong to seek money damages for harm believed to have been caused by malpractice? Would the juror pursue a claim against a physician if the juror suspected the physician had injured him or her?

9.204 Avoiding Mention of Insurance. In *Speet v. Bacaj*,[2] the court held that the trial judge properly refused to allow voir dire questioning of the jury panel about a medical malpractice insurance crisis. The examination should always be couched in broader terms than one calculated to engender a discussion of liability insurance. Focus on the "crisis" discussions on the cost of and access to health care and not the physician's liability insurance premiums to avoid a *Speet* objection.

9.3 OPENING STATEMENT

9.301 Goals. When crafting an opening statement, keep in mind the difficulties concerning possible juror attitudes and lack of medical knowledge discussed above.[3] Weave solutions to these problems into the opening statement. At the end of the plaintiff's opening statement, the jury should have heard and understood a well-told story about a person with at least some traits common to themselves who sought help from a health care provider who, in turn, caused serious harm. The jury should know the key medical terms and how and why the plaintiff got hurt.

9.302 Exploiting the Case's Drama. It is no accident that health care themes enjoy great popularity in the mass media. All people, rich or poor, get sick and look to health care providers to cure suffering and prolong life. A medical malpractice case enjoys an immediacy to the world of most jurors lacking in most other cases. The tragic result embodied in most medical malpractice cases readily commands the jury's attention. With a bit of enthusiasm and imagination, an enthralling opening statement can be delivered.

9.303 Using Visual Aids. Visual aids can be powerful adjuncts to the oral presentation, although counsel should select these aids judiciously to ensure that only something very critical to the case is used. Each visual aid has the potential to "break the spell" cast by effective eye contact and the cadence and rhythm of the speaker. Videos are especially prone to destroying these qualities. The visual aids must be easily visible to the jury. Uncluttered

[2] 237 Va. 290, 377 S.E.2d 397 (1989).

[3] *See supra* ¶ 9.2.

simplicity delivers the salient message. Useful visual aids in opening statements include illustrations of the key anatomy that the jury needs to comprehend, a medical record excerpt deemed to be the "smoking gun" of the case, or a time line informing the jury of important events.

9.4 WITNESSES AND OTHER PROOF

9.401 Deciding Which Witnesses to Call. As in all cases, the plaintiff must be certain to establish a prima facie case on each theory of liability. It is therefore imperative to analyze before trial what evidence to introduce and which witnesses to use to ensure that each fact necessary to prove the cause of action is in evidence when the plaintiff rests. Malpractice trials often require that critical facts be proved through professionals who provided care. These witnesses may resist making statements helpful to the plaintiff through the artifices of selective or nonexistent memory, evasive responses or even perjury. Some will be poised to volunteer testimony harmful to the plaintiff. For these reasons, counsel must carefully consider whether to call a treating health care provider as a witness.

9.402 Alternatives to Calling a Witness. In weighing whether to call a witness, consider whether the sought after facts can be proved by means other than oral testimony. Other sources of admissible evidence include admissions in pleadings and responses to requests for admissions, interrogatory answers, medical records and other documents admissible under hearsay exceptions such as business records and party admissions, and deposition excerpts.

9.403 Depositions. Depositions are a good alternative source of proof. Depositions of parties may be used by adverse parties for any purpose.[4] Depositions of physicians, surgeons, dentists, and nurses who treated a party may be used.[5] Counsel should remember that other parties will have the right to place into evidence other portions of the deposition.[6] However, juries greatly

[4] Va. R. 4:7(a)(3).

[5] Va. R. 4:7(a)(4).

[6] Va. R. 4:7(a)(7).

prefer a live witness to depositions, so using the deposition instead for impeachment may engage the jury's interest more. In pretrial discovery, counsel may wish to video record depositions of the leading candidates for trial use. Another alternative is to have a good presenter study the deposition and play the role of the deponent in the reading of the deposition into evidence.

9.404 Defendant as Adverse Witness. Several considerations govern whether to call the defendant as an adverse witness. First, must the defendant be called to prove a necessary fact? Beyond this limited use of the defendant, other factors come into play. Calling the defendant adverse and using him or her in an aggressive presentation of the plaintiff's perspective may generate sympathy for the defendant from the judge and may result in unfavorable evidentiary rulings. The jury may also view plaintiff's counsel as a predator savaging a presumed innocent. When the defendant voluntarily takes the stand in his or her own defense, the judge and jury are less likely to sympathize with the defendant during a rigorous cross-examination. In a wrongful death action, the plaintiff calling the defendant as a witness will lose the benefit of the requirement that adverse party testimony be corroborated under the Dead Man's Statute.[7] On the other hand, the jury's attitude toward the defendant is the deciding factor in many cases. Many experienced plaintiff's attorneys advocate calling the defendant as the first witness in the belief that if the jury does not like the defendant, little chance remains that the rest of the trial will go well for the defendant.

9.5 DIRECT EXAMINATION OF STANDARD OF CARE EXPERT

9.501 Qualification. In most medical malpractice cases, the plaintiff will be unable to establish a prima facie case without expert testimony that the defendant failed to comply with the standard of care. For this reason, qualification by the trial judge of the plaintiff's expert is often the pivotal event of trial. Whether a witness is qualified to testify as an expert is largely within the sound discretion of the trial judge.[8] This discretion is not unbridled. The

[7] Va. Code § 8.01-397. *See Economopoulos v. Kolaitis*, 259 Va. 806, 812, 528 S.E.2d 714, 718 (2000).

[8] *Holt v. Chalmeta,* 295 Va. 22, 32, 809 S.E.2d 636, 641 (2018).

trial judge is not entitled to ignore the witness' uncontradicted testimony about their qualifications.[9]

Qualifying to testify on the standard of care requires meeting two requirements embodied in Va. Code § 8.01-581.20: the "knowledge" requirement and the "active clinical practice" requirement.[10]

Preparing the expert intensively on both requirements for the qualification stage of his or her testimony is essential. Explain the process and the relevant criteria and brainstorm with the expert all the facts that may support qualification. When questioning during *voir dire*, counsel should not wait for the defendant to attack, but should bring out all the reasons the expert is qualified in the context counsel deems relevant before the defendant conducts voir dire of the expert.

The groundwork to qualify the expert should be laid throughout the pretrial phase of the litigation. Interrogate the defendant, treating health care providers and the defense experts about guidelines, training and certifications, literature and other facts your expert will be relying upon to corroborate your expert's qualifications. Inquire of the defense experts if they know your expert and endeavor to elicit an endorsement of your expert's good reputation. While arguing a defense objection to qualification, citing to the court what the defendant and defense experts have conceded will undercut defense counsel's assertions to the contrary.

9.502 Knowledge Requirement. A witness meets the knowledge requirement to testify as to the standard of care if the witness demonstrates sufficient knowledge, skill, or experience to make him competent to testify as an expert on the subject matter at issue.[11] Section 8.01-581.20 of the Virginia Code defines the standard of care and criteria governing the standard of care

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[9] *See Holt*, 295 Va. at 22, 35, 809 S.E.2d at 642 (2018).

[10] *Holt*, 295 Va. at 32-33, 809 S.E.2d at 641 (2018).

[11] *See Lloyd v. Kime*, 275 Va. 98, 109, 654 S.E.2d 563, 569 (2008); *Wright v. Kaye*, 267 Va. 510, 520, 593 S.E.2d 307, 312 (2004).

expert qualification. As discussed in detail below, the statute affords experts with the requisiste training and licensure a presumption that such experts are qualified to testify about the standard of care.

The standard of care specified by § 8.01-581.20 is the "degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth." However, the standard of care in the involved locality or similar localities shall be applied if any party proves by a preponderance of the evidence that the health care services and health care facilities available in the locality or similar localities give rise to a standard more appropriate than a statewide standard. Any issue regarding the standard of care to be applied will be determined by the jury. Although § 8.01-581.20 states that the standard of care will be that of a practitioner in Virginia, the Supreme Court of Virginia has recognized that this standard may be the same standard as a national standard of care, stating that "nothing . . . prohibits Virginia physicians from practicing according to a national standard if one exists for a particular specialty, even though neither the General Assembly nor this Court has adopted such a standard."[12]

9.503 Custom Does Not Equal Standard of Care. A defense attack on a proffered expert will focus on the expert's lack of knowledge of what others are doing in Virginia, particularly in the case of an out-of-state expert. But this line of attack is misguided. In *King v. Sowers*,[13] the court made it clear that *standard of care* is not synonymous with custom but is the classical negligence standard embodied in the "reasonable person" test.[14] *King* cited with approval *Nesbitt v. Community Health of South Dade, Inc.*,[15] which observed that "the fact that a person deviates from or conforms to an accepted custom or practice does not establish conclusively that the person was or was

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[12] *Black v. Bladergroen*, 258 Va. 438, 443, 521 S.E.2d 168, 170 (1999); *Accord Christian v. Surgical Specialists of Richmond, Ltd.*, 268 Va. 60, 596 S.E.2d 522 (2004).

[13] 252 Va. 71, 471 S.E.2d 481 (1996).

[14] *See also Wright v. Kaye*, 267 Va. 510, 527, 593 S.E.2d 307, 316 (2004) (evidence about the customary method of treatment would not be admissible on the issue of the standard of care).

[15] 467 So. 2d 711 (Fla. Dist. Ct. App. 1985).

not negligent."[16] Similarly, in *Grubb v. Hocker*,[17] the court equated qualification to testify not with knowledge of others' customs but with qualification to practice:

> We would be reluctant to hold that one who has demonstrated the requisite knowledge and skill to qualify for admission to practice a regulated profession in Virginia is nevertheless unqualified to give an opinion as to the degree of skill and diligence required of reasonably prudent Virginia practitioners in the field to which he has been admitted.

In structuring a qualification bid, counsel must discourage the trial judge from simply focusing on what, if any, contacts the expert has had with Virginia by emphasizing that the issue is not knowledge of the customs of Virginia practitioners but whether the expert is qualified to practice in Virginia. If qualified to provide care in Virginia, the expert is qualified to state how, in the opinon of the expert, care should be provided in Virginia.

9.504 Presumption That Expert Is Qualified. The validity of qualifying an expert based upon whether the expert is qualified to practice in Virginia rather than on the expert's contacts with Virginia is supported by the presumption found in section 8.01-581.20(A), which states:

> Any health care provider who is licensed to practice in Virginia shall be presumed to know the statewide standard of care in the specialty or field of practice in which he is qualified and certified. This presumption shall also apply to any person who, but for the lack of a Virginia license, would be defined as a health care provider under this chapter, provided that such person is licensed in some other state of the United States and meets the educational and examination requirements for licensure in Virginia.

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[16] *Id.* at 714 (citations omitted).

[17] 229 Va. 172, 177, 326 S.E.2d 698, 701 (1985).

This presumption is rebuttable. However, showing merely that the expert lacks contact with Virginia is inadequate to rebut the presumption. Instead, the defendant must produce evidence of practices and circumstances unique to Virginia with which the expert is unfamiliar. *Black v. Bladergroen*,[18] put to rest the notion that the statutory presumption can be rebutted by merely showing a lack of contact with Virginia or Virginia practitioners. Once it is shown that an expert witness is entitled to the statutory presumption, the burden shifts to the party opposing qualification to produce evidence that the Virginia standard differs from the standard elsewhere.[19]

9.505 Using the Presumption. Proving entitlement to the presumption is not difficult. The educational and examination requirements will depend on the health care provider's profession. Licensure requirements to practice medicine, osteopathy, chiropractic, and podiatric medicine are covered by section 54.1-2930 and are met if the expert is a graduate of an accredited medical school, has completed one year of post-graduate training in an accredited training program, and has passed a nationally recognized examination. The educational and examination requirements for most other health care providers are covered in section 54.1-2900 *et seq*. and the accompanying regulations in title 18 of the Virginia Administrative Code. A court should take judicial notice of the statutory and regulatory educational and examination requirements.[20] Once the expert has testified that he or she has met these requirements, the presumption should be accorded the expert.

Before trial, request the Virginia Board of Medicine[21] to review the credentials of the expert.[22] The Board will issue an attested letter certifying that the expert meets the educational and examination requirements for licensure. Consider serving a request for admission upon the defendant to elicit an admission that the expert meets the requirements. If the defendant fails to admit, plaintiff's counsel may wish to subpoena a representative of the Board.

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[18] 258 Va. 438, 521 S.E.2d 168 (1999).

[19] *Id.* at 445, 521 S.E.2d at 171. *See also Griffett v. Ryan*, 247 Va. 465, 443 S.E.2d 149 (1994).

[20] Va. Code § 8.01-386; Va. R. 2:202.

[21] 9960 Mayland Drive, Suite 300, Henrico, VA, 23233; 804-367-4600, www.dhp.virginia.gov/medicine.

[22] *See Poliquin v. Daniels*, 254 Va. 51, 486 S.E.2d 530 (1997).

The Attorney General will move to quash the subpoena, arguing that the letter is admissible and that the appearance of the Board witness is unnecessary. Before all this comes to pass, the defendant will probably concede that the witness meets the educational and examination requirements for licensure. If not, the letter from the Board may be presented to the trial court when the motion is made to qualify the expert.

9.506 Checklist for Out-of-State Expert. To facilitate qualifying an expert who has not practiced in Virginia, Demonstrate that the expert is qualified to practice in Virginia and that Virginia practitioners have the same training and certification and use the same methodologies as the expert. Although geographical nexus to Virginia is not a relevant factor because standard of care is not synonymous with custom,[23] some trial judges will, at least at the outset, feel such a nexus is significant. Bearing in mind these factors, it is a good idea for plaintiff's counsel to:

1. In depositions of the defendant and the defendant's experts, establish that their training, certification, professional organization affiliations, continuing medical education, journals, and texts and methodologies are the same as that of the defense expert. The transcripts should be furnished to the defense expert for review before trial;

2. Ascertain whether any persons with whom the expert trained, who were trained by the expert, who practiced with the expert, or with whom the expert has interacted professionally have practiced in Virginia. If feasible, have the expert discuss Virginia practices with these individuals before trial;[24]

3. Furnish the expert with depositions given by experts of the same specialty from other cases in which the experts

[23] *See supra* ¶ 9.503.

[24] *See Christian v. Surgical Specialists of Richmond, Ltd.*, 268 Va. 60, 596 S.E.2d 522 (2004); *Griffett v. Ryan*, 247 Va. 465, 443 S.E.2d 149 (1994); *Henning v. Thomas*, 235 Va. 181, 366 S.E.2d 109 (1988); *Daniel v. Jones*, 39 F. Supp. 2d 635 (E.D. Va. 1999), *aff'd*, 213 F.3d 630 (4th Cir. 2000).

have testified that the standard of care in Virginia is no different than in other parts of the United States;

4. If a Virginia statute or regulation has adopted national criteria (for example, accreditation of hospitals by a national accrediting organization granted authority by the Centers for Medicare and Medicaid Services per section 32.1-125.1 of the Virginia Code), inform the expert so that the expert can rely upon this to buttress his or her opinion that he or she is familiar with the standard of care in Virginia;

5. Search out any literature written by Virginia practitioners relevant to the issues in the case for use by the expert;[25]

6. Show there is no literature or continuing medical education relating to the involved specialty that is exclusively for the use of or targeted at Virginia specialists;[26]

7. If the expert is an examiner for candidates seeking board certification, bring out that he or she has examined Virginia practitioners seeking board certification for proficiency;

8. Show that the expert has reviewed other medical records documenting care provided in Virginia.[27] This may be the case if the expert has consulted on Virginia matters in the past or if he or she has been engaged in quality assurance or utilization reviews concerning Virginia care; and

[25] *See Daniel v. Jones*, 39 F. Supp. 2d 635 (E.D. Va. 1999).

[26] *See Henning*, 235 Va. 181, 366 S.E.2d 109.

[27] *See Black v. Bladergroen*, 258 Va. 438, 444, 521 S.E.2d 168, 171 (1999); *Griffett*, 247 Va. at 475-476, 443 S.E.2d at 155 (expert's review of medical records a basis for establishing knowledge of Virginia standard of care).

9. Demonstrate the expert's knowledge of the Virginia standard of care gained while attending seminars and meetings in Virginia regarding the procedure at issue.[28]

In *Black v. Bladergroen*,[29] plaintiff's counsel laid the foundation for the qualification of a board-certified thoracic surgeon who practiced in Wisconsin by eliciting testimony that (i) the expert had operated on a number of Virginia patients and reviewed their records and communicated with their Virginia doctors; (ii) all surgeons in the United States take the same national certification exam; (iii) no state has separate certification for any specialty; and (iv) Virginia thoracic surgeons take the same national board certification exam as the Wisconsin expert.

In *Daniel v. Jones*,[30] the court found that the expert established his knowledge of the Virginia standard of care by frequent referrals of Virginia patients from Virginia doctors, by reading articles from Virginia medical schools, and by consulting with former students teaching in Virginia to confirm that his understanding of the Virginia standard of care was correct.

9.507 "Active Clinical Practice" Requirement. Va. Code § 8.01-581.20 (A) requires an expert to have "had active clinical practice in either the defendant's specialty or a related specialty within one year of the date of the alleged act or omission forming the basis of that action." The statute does not specify any threshold percentage of time an expert must spend in clinical practice to be deemed "active," and the Supreme Court of Virginia has refused to engraft such a requirement onto the statute.[31]

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[28] *See Christian v. Surgical Specialists of Richmond, Ltd.*, 268 Va. 60, 596 S.E.2d 522 (2004); *Hinkley v. Koehler*, 269 Va. 82, 606 S.E.2d 803 (2005).

[29] 258 Va. 438, 521 S.E.2d 168 (1999).

[30] 39 F. Supp. 2d 635 (E.D. Va. 1999), *aff'd*, 213 F.3d 630 (4th Cir. 2000).

[31] *Jackson v. Qureshi*, 277 Va. 114, 125, 671 S.E.2d 163, 169 (2009). *Accord Holt v. Chalmeta,* 295 Va. 22, 38, 809 S.E.2d 636, 644 (2018).

Applying the statutory "active clinical practice" requirement requires an initial determination as to whether the proffered expert's specialty is the same as that of the defendant or a related field of medicine. If the expert's specialty is the same as that of the defendant, the expert's active clinical practice need not include performing the same procedure at issue in the case against the defendant.[32]

9.508 Using Experts from a Related Field of Medicine. An expert can qualify as a standard of care expert even if he or she is not in the defendant's specialty if the expert (i) demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards[33] and (ii) has had active clinical practice *in a related field of medicine* within one year of the date of the alleged negligence.[34] These statutory requirements are mandatory[35] and derived from *Ives v. Redford*.[36]

If the proffered expert has performed the procedure at issue and the standard of care for the procedure is the same in the expert's and defendant's respective specialties, the expert will be deemed qualified to testify on the standard of care governing the defendant.[37]

According to *Jackson v. Quereshi*, the purpose of the "active clinical practice" requirement is to prevent testimony by a physician who has not

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[32] *Holt v. Chemeta,* 295 Va. 22, 35-26, 809 S.E.2d 636, 642-643 (2018).

[33] *Christian*, 268 Va. 60, 596 S.E.2d 522 (2004); *Hinkley*, 269 Va. 82, 606 S.E.2d 803 (2005).

[34] Va. Code § 8.01-581.20; *See Fairfax Hosp. Sys. v. Curtis*, 249 Va. 531, 457 S.E.2d 66 (1995).

[35] *Perdieu v. Blackstone Family Practice Ctr., Inc.*, 264 Va. 408, 568 S.E.2d 703 (2002).

[36] 219 Va. 838, 252 S.E.2d 315 (1979).

[37] *Sami v. Varn*, 260 Va. 280, 535 S.E.2d 172 (2000); *Griffett v. Ryan*, 247 Va. 465, 443 S.E.2d 149 (1994) (qualifying an internist under this provision to testify against a gastroenterologist concerning the duty to review x-rays in the patient's medical records); *Daniel v. Jones*, 39 F. Supp. 2d 635 (E.D. Va. 1999) (permitting a neonatologist to testify about the standard of care for an obstetrician in the diagnosis and management of preterm labor). The court based its ruling upon the neonatologist's testimony that he regularly dealt with preterm delivery and taught obstetrical residents patient management in high risk deliveries and medical students how to do things the defendants should have done and was familiar with obstetrical standards due to a working parallel relationship with obstetricians.

recently engaged in the actual performance of the medical procedure at issue.[38] *Jackson* concerned qualification of a pediatric infectious disease physician on the standard of care applicable to the defendant pediatric emergency physician. The Supreme Court qualified this statement in *Holt v. Chameta* by holding the expert need not have performed the procedure within one year of the alleged negligence but only performed the procedure at some point in the past to establish the expert's specialty is related.[39]

Defense counsel will seek to constrict the contours of the procedure at issue to exclude the plaintiff's expert's experience. However, the phrase "actual performance of the procedures at issue in the case" must "not be given a narrow construction inconsistent with the terms of the statute."[40] Careful study of the Virginia Supreme Court cases discerning what is a "related field" or a "procedure at issue" will facilitate articulation of what is the procedure at issue in your case.

In *Perdieu v. Blackstone Family Practice Center, Inc.*,[41] the Virginia Supreme Court affirmed the trial court's decision to exclude three of the plaintiff's proposed experts on the grounds that each expert failed to meet the statutory requirements of section 8.01-581.20. This medical malpractice action involved the defendants' treatment of nursing home patients, including the diagnosing of fractures. The court found that none of the experts were recently engaged in the actual performance of the procedures at issue. Notably, Dr. Corrigan was excluded, although she dealt primarily with elderly, critical patients who came to the hospital from nursing homes. The court determined that because her specialty dealt with working with nursing home patients in hospitals, her experience was in an acute-care setting rather than in the relevant field of nursing home care.

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[38] *Jackson* , 277 Va. at 114, 125, 671 S.E.2d at 169 (2009).

[39] 295 Va. at 37-38, 809 S.E.2d at 644.

[40] *Holt v. Chalmeta*, 295 Va. 22, 36, 809 S.E.2d 636, 643 (2018) quoting *Wright v. Kaye,* 267 Va. 510, 524, 593 S.E.2d 593, 314 (2004).

[41] 264 Va. 408, 568 S.E.2d 703 (2002).

Wright v. Kaye[42] offers a broader interpretation of "the procedure at issue." In *Wright*, the defendant removed a cyst from the plaintiff's urachus using a surgical stapler. Approximately a year after the procedure another surgeon discovered six surgical staples in the plaintiff's bladder, allegedly left from the first procedure. The trial court struck the plaintiff's experts after holding that they lacked knowledge of the particular specialty at issue. While each expert was qualified in obstetrics and gynecology, the same field of medicine as the defendant, none of the experts had actually removed a urachal cyst.

The Supreme Court reversed the trial court's striking of the plaintiff's expert witnesses, finding that the experts were qualified as to the knowledge requirements on the subject matter at issue and that they had extensive knowledge of the standard of care in the defendant's field of medicine involving female pelvic laparoscopic surgery. In addition, each expert had experience in the removal of cysts around the bladder with a surgical stapler.

The defendant argued that to satisfy the active clinical practice portion of the statute, the witness "must have performed the same medical procedure with the same pathology in all respects as gave rise to the alleged act of malpractice at issue in order to have practiced the defendant's specialty."[43] The court determined that "in evaluating either statutory requisite, the term 'actual performance of the procedures at issue' must be read in the context of the actions by which the defendant is alleged to have deviated from the standard of care. In this case, as noted above, that is not excision of the urachal cyst, but injury to the bladder."[44] The court found the procedure at issue to be laparoscopic surgery in the female pelvic region near the bladder and was not circumscribed to the removal of a urachal cyst. Finally, the court cited *Perdieu*[45] in support of its position. In *Perdieu*, the experts were not excluded on the basis that they had treated a left versus a right hip fracture; rather,

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[42] 267 Va. 510, 593 S.E.2d 307 (2004).

[43] *Id.* at 523, 593 S.E.2d at 314.

[44] *Id.*

[45] 264 Va. 408, 568 S.E.2d 703.

they were excluded because they had not treated any fractures of any kind during the one-year window of the active clinical requirement.

Lloyd v. Kime[46] held that it was error not to qualify a neurologist expert to testify about the standard of care governing an orthopedic spine surgeon's post-operative assessment of a patient for neurologic injury. Although the neurologist would be precluded from offering standard of care opinions about the issue of intra-operative negligence since the expert did not have an active clinical practice performing surgery, the uncontradicted testimony of the expert that the standard of care for assessing neurologic injury was the same for neurologists, orthopedic surgeons, and neurosurgeons was sufficient to qualify the expert to render standard of care opinions on the surgeon's post-operative evaluation of the patient's neurologic symptoms.

In *Holt v. Chimeta*[47], a neonatologist who had never worked at a hospital without a Neonatal Intensive Care Unit was qualified to testify against a general pediatrician defendant whose hospital did not have a NICU because the core issue was the defendant's alleged negligence in assessing and determining treatment of a newborn with respiratory distress-a component of the expert's clinical practice.

These four cases illustrate the need to isolate the specific event material to the alleged standard of care breach and exclude extrinsic factors. Then, the clinical practice of the proffered expert can be scrutinized for experience with the "procedure at issue".

9.509 Using Other Testimony to Support Qualification. Plaintiff's counsel may attempt to elicit from the defendant and other witnesses facts proving that there is no difference between the standard of care in Virginia and elsewhere or between the expert's and defendant's specialties. *Sami v. Varn*[48] illustrates the effectiveness of this tactic. In holding that the trial court erred in refusing to qualify an obstetrician-gynecologist to testify on the

[46] 275 Va. 98, 654 S.E.2d 563 (2008).

[47] 295 Va. at 37-38, 809 S.E.2d at 644.

[48] 260 Va. 280, 535 S.E.2d 172 (2000).

standard of care for the performance of a pelvic exam by an emergency physician, the court relied upon the testimony of an obstetrics-gynecology resident who provided care to the plaintiff that there was no variation among medical professionals on the performance of a pelvic examination.

9.510 Using a Frequent Testifier. In instances where plaintiff's counsel calls someone as an expert witness who has extensive involvement in medical-legal matters, the cross-examination will invariably dwell at length on the witness' frequency of testifying. Because it will happen anyway, plaintiff's counsel should bring out this point on direct examination. This serves two purposes. First, the expert's background can be presented in a more positive light by suggesting that prior court appearances and judicial qualification validate the expert. If the expert is a highly regarded authority in the field, it should be emphasized that the expert is frequently consulted by physicians and medical organizations as well as attorneys. Second, the shock value of defense counsel unveiling, in the most sinister light possible, the expert's history as an expert witness is diminished and there is no risk of creating the perception that this history was "hidden" from the jury. If the expert has testified for the defense in the past, this should be brought to the jury's attention.

9.6 PROOF OF CAUSATION

9.601 In General. Recovery of damages requires evidence that the breach of the standard of care was a proximate cause of the claimed injury.[49] "Reasonable certainty" or "probability" is the standard for proving that a wrongful act was the cause of injury.[50] Generally, expert testimony will be required to establish the defendant's wrongful act to a reasonable degree of medical probability.[51] A causation question may be worded: "Do you have an opinion to a reasonable degree of medical certainty, what the probable cause of the [injury, condition] was?" Ask the expert at the outset of what may be a

[49] *E.g.*, *Summers v. Syptak*, 293 Va. 606, 801 S.E.2d 422 (2017) (discussing the need in most medical malpractice cases for expert testimony to prove causation).

[50] *See Vilseck v. Campbell*, 242 Va. 10, 405 S.E.2d 614 (1991).

[51] *Bitar v. Rahman*, 272 Va. 130, 630 S.E.2d 319 (2006).

lengthy discousrse if the expert understands that the standard of admissibility is a reasonable degree of medical probability or medical certainty and whether the expert agrees that all opinions offered will be opinions held to that degree. This phrase can then be dropped as the examination proceeds permitting the use of more succinct questions.

9.602 Causation in Fact. A critical component of proving causation is establishing by a chain of facts that "but for" the breach of the standard of care the harm likely would have been averted. This element requires forecasting how events would have unfolded if the defendant had complied with the standard of care. The following cases illustrate the importance of evidentiary requirement.

- *Fruiterman v. Granata.*[52] Judgment for plaintiff reversed for failure to introduce evidence of what would have been result if test required by standard of care had been performed.

- *Dixon v. Sublett.*[53] 295 Va. 60, 809 S.E.2d 617 (2018). Plaintiff's evidence struck where plaintiff alleged standard of care required consultation with general surgeon when bowel perforated but no evidence of what a general surgeon would have done.

- *Tashman v. Gibbs*.[54] Evidence struck of a plaintiff alleging negligent failure by her surgeon to obtain informed consent because the plaintiff did not testify that the alleged deviation from the standard of care would have affected her decision about the proposed surgery.

Proving causation in fact may be proved by direct evidence and by other means. In cases of dead and incapacitated persons, circumstantial evidence has supplied the necessary proof.[55] Proof of habit and routine practice may

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[52] 276 Va. 629, 668 S.E.2d 127 (2008).

[53] 295 Va. 60, 809 S.E.2d 617 (2018). *Dixon* was distinguished in *Tahboub v. Thiagarajah*, 298 Va. 366, 837 S.E.2d 752 (2020) where the Court found sufficient evidence to create a jury question as to what would have transpired if there had been compliance with the standard of care.

[54] 263 Va. 65, 76, 556 S.E.2d 772, 779 (2002).

[55] *Ford Motor Co. v. Boomer*, 285 Va. 141, 161, 736 S.E.2d 724, 734 (2013); *Hoar v. Great E. Resort Mgmt., Inc.*, 256 Va. 374, 388, 506 S.E.2d 777, 786 (1998). *But see Martin v. Lahti,* 295 Va. 77, 809 S.E.2d 644 (2018) (testimony of deceased's

also be probative of what would have happened if the defendant had complied with the standard of care.[56] A treating health care provider's testimony of what the provider would have done if information had been made known to the provider is admissible fact evidence.[57]

9.603 Other Possible Causes. The defense will suggest that other events may have been the cause of the subject injury. The plaintiff, however, is not required to exclude all other possible causes.[58] The defendant's efforts to suggest other possible causes can be blunted by requiring the defendant to prove to a reasonable degree of medical probability that the alternative cause was the proximate cause of the injury. A defense expert should be precluded from giving testimony simply to raise the specter of other possible causes.[59]

9.604 Loss of Possibility of Survival. In wrongful death actions, the causation issue will focus on whether the plaintiff's decedent would have survived if the defendant had complied with the standard of care in the course of treating the decedent. For years, it was assumed that Virginia permitted a jury to find proximate cause if the defendant's conduct destroyed a substantial possibility of survival.[60] Then, in *Blondel v. Hays*,[61] the court held that juries should not be instructed on the loss of the possibility of survival doctrine and that this doctrine only affords a standard to guide a court in ruling on a motion to strike and the propriety of submitting the causation question to the jury.[62] In light of *Blondel*, a plaintiff must present the causation evidence with an eye toward meeting the stock causation instructions given in personal injury

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sister and son about whether the deceased woul have undergone surgery if she had known the risk lacked sufficient foundation to be admissiable lay opinions per Va. R. Ev. 2:701).

[56] Va. R. Ev. 2:406.

[57] *See Toraish v. Lee*, 293 Va. 262, 272, 797 S.E.2d 760, 765 (2017.)

[58] *Reed v. Church*, 175 Va. 284, 8 S.E.2d 285 (1940).

[59] *See Fairfax Hosp. Sys., Inc. v. Curtis*, 249 Va. 531, 457 S.E.2d 66 (1995).

[60] *See Whitfield v. Whittaker Mem'l Hosp.*, 210 Va. 176, 169 S.E.2d 563 (1969).

[61] 241 Va. 467, 403 S.E.2d 340 (1991).

[62] *See Powell v. Margileth*, 259 Va. 244, 524 S.E.2d 434 (2000); *Griffett v. Ryan*, 247 Va. 465, 443 S.E.2d 149 (1994).

actions. Accordingly, to persuade a jury that the negligence was a proximate cause of death the expert testimony must establish that it was probable the decedent would have survived.[63]

9.7 MEDICAL RECORDS

9.701 Business Record. Medical records may be admitted into evidence under the business records (formerly known as the "shopbook rule") exception to the hearsay rule if the records contain facts or events that are within the personal knowledge or observation of the recorder or were transmitted to the recorder by someone with knowledge.[64] Opinions and conclusions in the records are not admissible under this exception.[65] It is often difficult to predict what the court will deem to be an opinion rather than the observation of a trained observer.[66]

9.702 Other Means of Introducing Medical Records.

A. In General. The business records exception is not the exclusive means of introducing medical records. Other exceptions to the hearsay rule may have the advantage of permitting the introduction of opinions contained in the records as well as facts. The following are some possible avenues for admission of medical records.

B. Admission of Party Opponent. Statements of an adverse party or its agent or employee during the term of agency or employment are not subject to the hearsay rule.[67] Opinions contained in a party admission are

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[63] *See Wagoner v. Commonwealth*, 289 Va. 476, 486, 770 S.E.2d 479, 485 (2015) (Loss of substantial possibility of survival will not be considered in determining, post verdict, the sufficiency of evidence on cause of death). *See also Murray v. United States*, 215 F.3d 460 (4th Cir. Va. 2000).

[64] Va. R. Ev. 2:803(6).

[65] *Neeley v. Johnson*, 215 Va. 565, 211 S.E.2d 100 (1975).

[66] *See Gaalaas v. Morrison*, 233 Va. 148, 353 S.E.2d 898 (1987) (discussing whether an Apgar score for a newborn is a factual observation or an opinion).

[67] Va. R. 2:803(0).

admissible.[68] Although not admissible as impeachment to contradict a witness's statement in a personal injury or wrongful death action,[69] party admissions can be used as substantive evidence in the case in chief.[70]

C. Past Recollection Recorded.[71] If a witness has no memory of an event, the contents of a statement made by the witness when he or she did have a clear and accurate memory may be read into evidence.[72] For example, if a nurse is called as a witness and claims to have no memory of the patient's treatment, the nurse's notes in the chart can be read into evidence.

D. Statement of Physical or Mental Condition.[73] This must be a spontaneous statement that refers to a presently existing physical or mental condition.

E. Present Sense Impression.[74] This is a declaration of the person's present sense of an event. The declaration must have been contemporaneous with the act; it must explain the act; and it must be spontaneous.

F. Impeachment of Experts. Experts who rely on medical records must disclose the facts or data in the records on cross-examination.[75] Some experts will seek to circumvent being cross examined about the contents of records by a disavowal of reliance upon a reviewed record. However, the

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[68] *Southern Passenger Motor Lines, Inc. v. Burks*, 187 Va. 53, 46 S.E.2d 26 (1948).

[69] Va. Code § 8.01-404; Va. R. 2:613(b)(ii).

[70] *Gray v. Rhoads*, 268 Va. 81, 597 S.E.2d 93 (2004).

[71] Va. R. 2:803(5).

[72] *See Scott v. Greater Richmond Transit Co.*, 241 Va. 300, 402 S.E.2d 214 (1991).

[73] Va. R. 2:803(3).

[74] Va. R. 2:803(1).

[75] Va. Code § 8.01-401.1; Va. R. 2:705.

cross examiner can then argue the expert's opinion basis is flawed because it ignored relevant data.[76]

9.703 Use of Records During Trial. After fashioning a strategy for admitting records and laying a foundation through either admissions or testimony, counsel must decide how best to communicate the contents of the records to the jury. It is usually best to provide individual copies of the records to the jurors so that they can follow the interrogation of witnesses and the arguments of counsel concerning the contents. Large blowups or screen projections of key records appropriately highlighted should also be used during witness examination and arguments to ensure that the message contained in the records makes an impression on the jury.

9.8 MEDICAL LITERATURE

9.801 In General. Virginia has adopted Rule 803(18) of the Federal Rules of Evidence permitting the use of treatises and other literature for impeachment and for admission as substantive evidence.[77] The literature can be introduced either by calling it to the attention of an expert witness upon cross-examination or through an expert who relies upon the literature on direct examination. If the literature is introduced on direct examination or the "reliable authority" foundation is laid on direct examination, copies of the statements sought to be introduced must be provided to opposing parties 30 days before trial unless ordered otherwise.[78] For the literature to be admissible, the expert must recognize it as reliable authority. It is not sufficient for the expert to acknowledge familiarity with the author and that

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[76] In *Holmes v. Levine*, 273 Va. 150, 165, 639 S.E.2d 235, 242-43 (2007) an expert who did not rely upon a death certificate could not be cross examined of the contents of a death certificate but this "does not mean that the [the plaintiff] was precluded from cross-examining [the defense expert] about whether he relied on the death certificate in formulating his opinions and, if not, why he discounted the information contained in the death certificate."

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[77] Va. Code § 8.01-404.1; Va. R. 2:706(a); *Weinberg v. Given*, 252 Va. 221, 476 S.E.2d 502 (1996). The court must determine the trustworthiness of the publication and not simply defer to what an expert says before admitting into evidence a statement from a proffered "reliable authority." *See Harman v. Honeywell Int'l, Inc.*, 288 Va. 84, 758 S.E.2d 515 (2014).

[78] *Budd v. Punyanitya*, 273 Va. 583, 643 S.E.2d 180 (2007).

the author is a reliable authority generally. The expert must be familiar with the particular item of literature.[79]

Section 8.01-401.1 of the Virginia Code is not satisfied by merely providing copies of the published literature that contain the statements relied upon; rather, the specific statements must be identified.[80] Pre-trial disclosure of the specific statements to be introduced during cross exam of the opposing expert and not just the authority title and author is required if you wish your expert to lay the foundation of reliability of the authority on direct examination. Otherwise, you must accept the risk that the cross examined expert, by refusing to concede the reliability of the publication, will thwart interrogation on the statements.[81]

An open controversy exists as to whether a pretrial scheduling order expert designation provision will require disclosure of the statements an expert on direct exam will opine are reliable authorities prior to the statutory 30 day requirement.[82]

9.802 Proving Reliability. An expert simply testifying a publication is "reliable" does not establish conclusively reliability. In the absence of a stipulation, the court must determine that testimony has established the reliability of the publication.[83]

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

[80] Section 8.01-401.1 further provides that "[i]f a statement has been designated by a party in accordance with and satisfies the requirements of this section, the expert witness called by that party need not have relied on the statement at the time of forming his opinion in order to read the statement into evidence during direct examination at trial." *See May v. Caruso*, 264 Va. 358, 568 S.E.2d 690 (2002); *see also* Va. R. 2:703(a), 2:705(a), and 2:706(a).

[81] *See Budd v. Punyanitya*, 273 Va. 583, 643 S.E.2d 180 (2007).

[82] *Cf. Emerald Point, LLC v. Hawkins*, 294 Va. 544, 808 S.E.2d 384 (2017) (Issue acknowledged but not decided).

[83] *See Harman v. Honeywell Int'l, Inc.,* 288 Va. 84, 94, 758 S.E.2d 515, 521 (2014) (Va. Code § 8.01-401.1 expressly requires that a report used on direct examination by a party's own expert be both "relied upon" and "established as a reliable authority by testimony or by stipulation.").

A common scenario is defense counsel extracting statements from the medical literature and having the expert who may have little or no familiarity with the publications or authors, endorsing on direct examination the reliability of the proffered statements. Request an opportunity to voir dire the expert about the statements and their source and then move to exclude the statements from evidence for lack of reliability.[84]

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9.9 DEMONSTRATIVE EVIDENCE

9.901 Uses. Demonstrative evidence can be quite useful in presenting a medical malpractice case. Medical illustrations effectively communicate the anatomy, surgical procedures, and injuries. Charts and graphs of laboratory values and vital signs can dramatically depict the change in and deterioration of a patient over time.

9.902 Sources. Professional medical illustrators can prepare custom illustrations and computer animations. Although expensive, these experts will have ideas for effective presentations and will prepare a customized product that has the advantage of leaving out extraneous details, thus focusing on what the jury needs to know. Other sources are medical texts, atlases, and videos prepared for continuing medical education. The internet (Youtube in particularly) provides ready access to videos of surgeries and other procedures.

9.903 Computers. Laptop computers and tablets can be useful tools. Microsoft PowerPoint® or other presentation graphics software can be helpful to present visual aids and key points. TrialPad and Sanction have proven their value in presenting exhibits, videos, and illustrations. It is also possible to "digitalize" all exhibits, video depositions, and illustrations and then use a computer with monitors to show the jury the desired image. The attorney should be certain that using a computer does not cause delays due to technical snafus. It may be advisable to engage the services of a technician to "wire" the courtroom and perform the visual presentation to prevent trial counsel from being diverted from the business of trying the case.

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[84] the author of literature is an absent expert whose hearsay opinions may be attacked to the same extent as if the author was testifying in court. Va. R. Ev. 806.

9.904 Admissibility. A summary of voluminous documentary evidence that is not in dispute is admissible into evidence as an exhibit.[85] If admitted as an exhibit, the summary can be taken into the jury room.[86] Summaries or charts of favorable oral testimony upon a contested issue will not be admitted into evidence.[87] However, such summaries or charts may be used as visual aids during testimony or argument.

9.10 CROSS-EXAMINATION OF DEFENSE EXPERTS

9.1001 In General. Cross-examination of a defense expert, as with all witnesses, serves only two purposes: (i) discrediting the direct testimony of the expert and (ii) eliciting testimony favorable to the plaintiff's theory of the case. Discrediting the direct testimony can be done by attacking the expert's qualifications or methodologies, attacking the factual basis of the opinion or the validity of the conclusion itself, or showing reasons the expert may be biased.

9.1002 Qualifications. Scrutiny of the expert's qualifications is a line of attack usually used in the opening stages of cross-examination to taint the jury's view of the expert. Wide ranging exploration of an expert's background will be permitted to assist the jury in assessing the weight to be accorded the expert's opinions.[88]

Interrogating an expert about the expert's qualifications is an excellent lead-in to impeachment of the expert's opinion. If the expert has little clinical experience with the procedure, drug, or pathology at issue, the expert must be relying on something he or she has read or been taught. This will set the stage

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[85] Va. R. 2:1006.

[86] Va. Code § 8.01-381.

[87] *Norfolk & W. Ry. v. Puryear*, 250 Va. 559, 463 S.E.2d 442 (1995).

[88] *See Gross v. Stuart,* 297 Va. 769, 831 S.E.2d 726 (2019) (expert's prior sanctioning by the Board of Medicine is relevant to assess weight to be assigned to expert's opinion that defendant complied with the standard of care).

to review with the expert what is either found in the literature or the absence of anything in the literature supporting what is espoused by the expert.[89]

9.1003 Bias. Anything tending to show an expert's bias, prejudice, or relationship with the defendant may be drawn out on cross-examination.[90] For example, in *Lombard v. Rohrbaugh*,[91] the plaintiff was permitted to intentionally mention liability insurance when cross-examining the defendant's expert, who had conducted a medical examination of the plaintiff, regarding the witness' past payments from the defendant's insurer.

It is often effective to start a cross-examination by eliciting facts from the expert showing bias. The jury may then be somewhat skeptical about the expert during the substantive phase of the cross-examination. Areas of inquiry include (i) relationship with the defendant (especially a pattern of referrals from the defendant); (ii) relationship with defense counsel; (iii) income derived from litigation, lobbying, or other activities promoting malpractice "reform"; and (iv) a pattern of frequently testifying for defendants and not for patients.

9.1004 Basis of Opinion. The facts or data relied upon by the expert must be disclosed on cross-examination.[92] A corollary of interrogating an expert on what he or she has relied on is examining the expert on what he or she has failed to consider in formulating the opinion. Questions about what the expert did and did not consider present an excellent opportunity to showcase to the jury the facts supporting the plaintiff's theory of the case.

9.1005 The Opinion Itself. Often, the expert's opinion itself will not be discussed on cross-examination. Why give the expert a chance to repeat an

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[89] If cross-examination reveals a lack of training, education, or clinical experience with a procedure or condition about which the expert has opined, a motion to strike the testimony of the expert may be granted. In *Dagner v. Anderson*, 274 Va. 678, 651 S.E.2d 640 (2007), the opinions of a witness qualified as an expert in emergency medicine about the cause of a patient's brain injury were held inadmissible because of concessions made by the expert during cross-examination.

[90] *Sawyer v. Comerci*, 264 Va. 68, 563 S.E.2d 748 (2002); *Henning v. Thomas*, 235 Va. 181, 366 S.E.2d 109 (1988).

[91] 262 Va. 484, 551 S.E.2d 349 (2001). *See also Graves v. Shoemaker,* No. 191500, 2020 Va. LEXIS 144 (Va. Sup. Ct. 2020) (*Lombard* applies even if defense counsel, and not the insurer, retains the expert).

[92] Va. Code § 8.01-401.1. For a discussion of cross-examination of an expert about documents reviewed by the expert and reliance, see *Holmes v. Levine*, 273 Va. 150, 158-59, 639 S.E.2d 235, 239 (2007).

unhelpful opinion? Once the expert's credentials, objectivity, methodology, and opinion foundation have been effectively called into question, there is no need to challenge the bottom line opinion itself.

9.11 OTHER EVIDENTIARY ISSUES

9.1101 Negligence of Nonparties. Defense counsel may attempt to introduce evidence that a nonparty health care provider was negligent during treatment provided concurrently with or subsequent to the treatment by the defendant. In most instances, this type of evidence should be excluded for lack of relevancy. Only when it can be shown that the nonparty's negligence alone caused the injury, without the defendant's negligence contributing in the slightest degree, will a court admit evidence of a nonparty's negligence.[93] When the defendant's alleged negligence unequivocally contributed to the outcome, granting a motion *in limine* to exclude evidence of a non-party's negligence is appropriate.[94]

9.1102 Habit Evidence. A recurring feature of medical malpractice litigation is a professed lack of memory of the salient events by defendant health care providers. Defense counsel instead elicits from the witness information about his or her "usual practice," a tactic calculated to suggest nothing untoward on this occasion and to thwart cross-examination about the occurrence itself. Virginia has adopted by statute Federal Rule of Evidence 406 permitting admissibility of habit evidence.[95] In order to be admissible, examples of habit must be sufficiently numerous and regular.[96]

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[93] *Atkinson v. Scheer*, 256 Va. 448, 508 S.E.2d 68 (1998).

[94] *See Jenkins v. Payne*, 251 Va. 122, 465 S.E.2d 795 (1996).

[95] Va. Code § 8.01-397.1; Va. R. 2:406. Section 8.01-397.1 of the Virginia Code provides:

> [E]vidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eye witnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Evidence of prior conduct may be relevant to rebut evidence of habit or routine practice . . . . A "habit" is a person's regular response to repeated specific situations. A "routine practice" is a regular course of conduct of a group of persons or an organization in response to repeated specific situations.

[96] *Kimberlin v. PM Transp., Inc.*, 264 Va. 261, 563 S.E.2d 665 (2002) (habit is "never to be lightly established" (quoting *Wilson v. Volkswagen of Am.*, 561 F.2d 494, 511 (4th Cir. 1977))). For example, where one or two tests were administered

Additionally, a diagnostic or therapeutic response to a patient's condition lacks the nonvolitional characteristic required for admissible habit evidence.[97] Therefore, counsel can often successfully block the defense tactic of relying upon "habit" evidence. When the objection is raised at the time the testimony is offered, counsel should ask to voir dire the foundation of the testimony out of the presence of the jury. If the "habit testimony" is excluded or limited, a defendant who previously claimed a lack of memory will have a difficult time communicating to the jury his or her version of the events.

9.1103 Dead Man's Statute. In wrongful death actions and cases where the injured patient is unable to testify, testimony of a defendant or an allegedly negligent employee of a defendant will often require corroboration because of the Dead Man's Statute.[98] A plaintiff who has spotted a Dead Man's Statute issue must decide whether to raise the objection pretrial by a motion in limine[99] or wait until trial, where it may be raised either as an objection contemporaneously with the testimony or as a motion to strike the testimony when the defendant has rested.[100] The decision will turn upon several factors. Can the defendant cure the objection with evidence of corroboration if given advance notice of the objection? What will be the effect of the jury hearing the testimony and then, after the defendant rests, being instructed to disregard the testimony?

9.1104 Evidence of Patient's Awareness of Risk. Defense counsel often seeks to inject evidence of a patient's awareness of the risks of the treatment that the plaintiff contends was negligently performed by the defendant. Absent a claim of lack of informed consent, evidence of the patient's knowledge of the risk of injury or complications attendant to the treatment is

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per day over a 10-year period and at least a dozen patients developed chest pain, the response of the physician to the chest pain would not be admissible habit evidence because the occurrences of chest pain were not numerous enough to establish a routine practice regularly used to a repeated specific situation. *Ligon v. Southside Cardiology Assocs., P.C.*, 258 Va. 306, 315, 519 S.E.2d 361, 365 (1999) (Kinser, J. concurring).

[97] *Weil v. Seltzer*, 873 F.2d 1453, 1460 (D.C. Cir. 1989).

[98] Va. Code § 8.01-397; Va. R. 2:804(b)(5). *See Williams v. Condit*, 265 Va. 49, 574 S.E.2d 241 (2003).

[99] *Diehl v. Butts*, 255 Va. 482, 499 S.E.2d 833 (1998).

[100] *Johnson v. Raviotta*, 264 Va. 27, 563 S.E.2d 727 (2002).

irrelevant.[101] Although a patient may consent to risks of the treatment, the plaintiff does not consent to negligence.[102] *Holley v. Pambianco*,[103] found it was error to have admitted into evidence a video that mentioned in an understated manner the possibility of complications and that was shown to the plaintiff before a colonoscopy, rebuffing the defense contention that it was relevant on the issue of mitigation of damages.

9.1105 Background of Defendant. In *Wright v. Kaye*,[104] the Virginia Supreme Court held that a defendant physician may present information about training and experience, apparently on the theory that the trier of fact is entitled to know the defendant's qualifications to provide the care at issue. The court has also held that a defendant cannot be cross examined on specific prior acts of misconduct and negligence when the plaintiff cannot show the prior acts are relevant to the issues before the trier of fact.[105] If a defendant places training and experience into evidence to bolster the defendant's position, the previously collateral "prior bad acts" evidence can then be argued to be material to the issue of the qualifications of the defendant.

9.1106 Complication Rates. Statistical evidence on the frequency of complications of a procedure is ordinarily not admissible. In *Holley v. Pambianco*,[106] it was deemed error to have admitted evidence about the rate of perforations occurring in colonoscopies and polypectomies. The court noted that the statistical evidence failed to delineate how many of the perforations were due to negligence, and, therefore, the data could not be probative of the defense argument that perforations may occur in the absence of negligence.

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[101] *Fiorucci v. Chinn*, 288 Va. 444, 764 S.E.2d 85 (2014).

[102] *Wright v. Kaye*, 267 Va. 510, 529, 593, S.E.2d 307, 312 (2004).

[103] 270 Va. 180, 613 S.E.2d 425 (2005).

[104] 267 Va. 510, 527-28, 593 S.E.2d 307, 316-17 (2004).

[105] *Stottlemyer v. Ghramm*, 268 Va. 7, 597 S.E.2d 191 (2004).

[106] 270 Va. 180, 613 S.E.2d 425 (2005).

The court concluded, "such raw statistical evidence is not probative of any issue in a medical malpractice case and should not be admitted."[107]

9.12 JURY INSTRUCTIONS

9.1201 In General. A party is entitled to have jury instructions that address the party's theory of the case if the theory is supported both by law and fact.[108] The Virginia Model Jury Instructions for medical malpractice litigation unfortunately fail to adequately address some of the issues unique to medical malpractice trials. For these reasons, instructions must sometimes be drawn from case law and statutes. Although many trial judges are hesitant to give instructions departing from the model instructions, an instruction constituting an accurate statement of the law applicable to the case cannot be withheld from the jury solely because it does not conform to the model instructions.[109]

9.1202 Supreme Court Scrutiny. When offering instructions other than model jury instructions, counsel should anticipate careful scrutiny of the instructions in any appeal predicated on the granting or refusal of an instruction. The Virginia Supreme Court has frequently disapproved of instructions drawn directly from the language of its own opinions.[110] Instructions commenting upon the evidence are frowned upon by the court.[111]

9.1203 Standard of Care.

A. In General. Standard of care instructions should be a straightforward recital of the statutory standard of section 8.01-581.20(A) of the Virginia Code. The Virginia Supreme Court has consistently rebuffed defense

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[107] *Id.* at 184-85, 613 S.E.2d at 427-28.

[108] *Honsinger v. Egan*, 266 Va. 269, 585 S.E.2d 597 (2003).

[109] Va. Code § 8.01-379.2.

[110] *Blondel v. Hays*, 241 Va. 467, 403 S.E.2d 340 (1991).

[111] *E.g.*, *Weinberg v. Given*, 252 Va. 221, 476 S.E.2d 502 (1996) (disapproval of instructing the jury about reliable authority admitted into evidence).

attempts to dilute the "reasonably prudent practitioner" standard of section 8.01-581.20(A). Accordingly, instructions suggesting that a physician can meet the standard of care by using medical judgment constituting "an acceptable and customary method of treatment" are inappropriate.[112] Terms such as "honest mistake" and "bona fide error" have no place in jury instructions.[113]

B. Expert Testimony. Model Jury Instruction No. 35.050 erroneously charges the jury that in determining the degree of care required of a defendant, it should only consider "the expert testimony on that subject." None of the cited cases in the instruction's accompanying memorandum discusses jury instructions at all, much less the propriety of giving an instruction such as No. 35.050. The cited cases simply state that in order to establish the appropriate standard of care, the existence of a deviation from it, and that the deviation was a proximate cause of injury, expert testimony is *ordinarily necessary*.[114] The defect in this instruction is that it seemingly requires the jury to disregard all evidence other than the expert testimony. Other testimony from lay witnesses, learned treatises, and documents such as medical records can appropriately be considered by a jury in reaching its decision on what the standard of care is, whether it was breached, and whether the breach was a proximate cause of injury. The memorandum itself belies the accuracy of such an instruction by acknowledging that there are instances when a jury can find a breach of the standard of care even in the absence of expert testimony.

9.1204 Proximate Cause. Perhaps no other issue of the trial creates as much confusion for the jury as proximate causation. An acute observation of this potential for confusion and analysis of concurring causation is found in *Etheridge v. Norfolk-Southern Railroad*:[115]

> It may readily be conceded that "proximate cause" is an unsatisfactory phrase. It has not only troubled the un-

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[112] *King v. Sowers*, 252 Va. 71, 471 S.E.2d 481 (1996).

[113] *Teh Len Chu v. Fairfax Emergency Med. Assocs., Ltd.*, 223 Va. 383, 290 S.E.2d 820 (1982).

[114] *E.g.*, *Beverly Enters.-Va., Inc. v. Nichols*, 247 Va. 264, 441 S.E.2d 1 (1994).

[115] 143 Va. 789, 799, 129 S.E. 680, 683 (1925) (citations omitted).

> learned, but has vexed the erudite. But by its use in unnumbered cases it has grown to be a part of the livery of the law of negligence and it is now too late to discard it.
>
> As a matter of primary definition it probably would not occur to the wayfaring man that an accident could be the result of more than one proximate cause, and it is reasonably clear that he would believe that such an expression was intended to designate that cause which in a major degree brought about the result under consideration. This, however, is not necessarily true. A cause without which something would not have happened is a proximate cause, but it is not necessary that such be the major cause. It is also true that there may be more than one proximate cause. Heat, moisture and springtime may stir a dormant bud; each would be a proximate cause, and this would not be changed even though it should appear that they contributed to that result in an unequal degree.

Model Jury Instruction No. 5.000 defines proximate cause as a "cause which in natural and continuous sequence produces the accident, injury, or damage. It is a cause without which the accident, injury, or damage would not have occurred." This instruction generates confusion when applied to many medical malpractice cases. In a case involving failure to diagnose and treat, the jury may conclude that, because the defendant did not cause the disease, the defendant's negligence was not what produced the damage or was not a cause without which the damage would not have occurred. As the court observed in *Coleman v. Blankenship Oil Corp.*,[116] the "brevity of this definition, valid as it is, invites explication." Offer instructions providing the necessary explication. One such supplemental instruction derived from the language of *Coleman* is an instruction stating that there may be more than one proximate cause of an injury. Refusal to give such an instruction has been held to be reversible error.[117]

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[116] 221 Va. 124, 131, 267 S.E.2d 143, 147 (1980).

[117] *Holmes v. Levine*, 273 Va. 150, 639 S.E.2d 235 (2007). *But see Harman v. Honeywell Int'l, Inc.,* 288 Va. 84, 103, 758 S.E.2d 515, 526 (2014) (failure to give instruction not error because plaintiff's experts excluded other possible causes).

9.1205 Concurring, Alternative and Supervening Causes. Where there are multiple defendants or where a defendant claims other actors or events were responsible for the injury, the doctrines of concurring and supervening causes will be potential sources of jury instructions. This problem is particularly acute in situations where the plaintiff has settled with a co-defendant who is then dismissed or some other nonparty has arguably been negligent. If the defendant seeks a supervening cause instruction, plaintiff's counsel must decide whether the evidence justifies such an instruction. A supervening cause instruction can only be granted if the defendant's alleged negligence did not contribute *in the slightest degree* to the claimed injury.[118]

If a jury could conclude from the evidence that two or more causes concurred to produce a single injury, consider offering an instruction drawn from *Ford Motor Co. v. Boomer.*[119] *Boomer,* an asbestos cancer case, held that where asbestos related cancer ensued after exposure to asbestos from the defendant's product and other sources, the jury should be instructed that the defendant is liable if its tortious conduct *was sufficient to have caused* the injury. According to *Boomer*, this causation standard applies whether other causes are tortious in nature or are innocent[120] or the other cause is characterized as either a concurring cause or an alternative cause.[121]

9.1206 Other Possible Causes. A common defense tactic is to raise the possibility that there are other possible causes for the complained-of injury. The following instruction should be offered to counter this tactic:

> In order to prove that any negligence of the defendant was the proximate cause of injury to the plaintiff, the plaintiff is not required to exclude the possibility that the injury to the plaintiff was caused by events and conditions for which the defendant was not responsible, but the plaintiff is required to show that the injury to the plaintiff was more probably

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[118] *Williams v. Cong Le*, 276 Va. 161, 662 S.E.2d 73 (2008).

[119] 285 Va. 141, 736 S.E.2d 724 (2013).

[120] 285 Va. at 158, 736 S.E.2d at 732.

[121] 285 Va. at 159, 736 S.E.2d at 733.

> due to the negligence of the defendant than events and conditions for which the defendant is not responsible.[122]

9.1207 Foreseeability of the Injury. The defense will often suggest that the plaintiff's ultimate injury was a "rare" disease or condition for which the defendant should not be held responsible. In such a case, the plaintiff should request the following instruction:

> The defendant is not required to have anticipated or foreseen the precise injury that occurred, but it is sufficient that a reasonably prudent person would have anticipated or foreseen that some injury might probably result from the negligent act.[123]

9.13 CLOSING ARGUMENT

9.1301 Planning. Planning the closing argument starts when counsel is retained. Throughout investigation, discovery, and the trial itself, counsel should be constantly thinking of key facts, analogies, and points to aid in "closing" the case with the jury. A useful tool is to maintain a file containing all closing argument ideas. During trial, a pad or notebook section should be reserved for jotting down closing argument ideas. These ideas should be discussed with co-counsel, staff, family, friends, and perhaps a focus group.

9.1302 Use of Instructions. In most cases, counsel for the plaintiff will want to use the instructions during argument to explain the application of the legal principles to the specific facts. Since counsel should assume that at least one juror will be reluctant to return a verdict against a physician, it should also be assumed that jurors of this ilk will use the instructions to

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[122] *See Honsinger v. Egan*, 266 Va. 269, 585 S.E.2d 597 (2003); *Wooldridge v. Echelon Serv. Co.*, 243 Va. 458, 461, 416 S.E.2d 441, 443 (1992); *Virginia Heart Inst., Ltd. v. Northside Elec. Co.*, 221 Va. 1119, 277 S.E.2d 216 (1981); *United Dentists v. Bryan*, 158 Va. 880, 164 S.E. 554 (1932); *Hunter v. Burroughs*, 123 Va. 113, 96 S.E. 360 (1918). *But see Harman v. Honeywell Int'l, Inc.*, 288 Va. 84, 758 S.E.2d 515 (2014), disapproving such an instruction because the plaintiff's evidence and theory only implicated the alleged breach of warranty by defendant as the sole cause.

[123] Virginia Model Jury Instructions - Civil Instruction No. 4.018 (2020). *See Blondel v. Hays*, 241 Va. 467, 403 S.E.2d 340 (1991).

support their position during jury deliberations. A powerful and clear exposition of how to apply the instructions will thwart the use of the instructions by a defense-oriented juror. Using the instructions as a framework for arguments also associates counsel with the judge, who will probably enjoy the jury's esteem.

9.1303 Counsel Should Not Get Ahead of the Jury Emotionally. Throughout trial, a lawyer representing a plaintiff in a medical malpractice case must appear credible, knowledgeable, and fair. A number of jurors will come to court reluctant to believe a lawyer's pitch that a physician committed malpractice, and may subconsciously be looking for signs that the lawyer is not to be trusted and can therefore be safely ignored. To win the case, counsel must become a trusted source of information by the end of the evidence. Counsel should not abandon an objective and fair demeanor in the closing argument. If the defendant has engaged in reprehensible behavior, the jury will have cultivated a level of revulsion commensurate with the egregious nature of the defendant's misconduct. Counsel must merely play the role of a knowledgeable guide leading the juror through the horrors manifest in the evidence.

9.1304 Discussing Money. Any party may mention the amount sued for in both the opening statement and the closing argument. The plaintiff is also permitted to request the award of an amount less than the ad damnum clause.[124] The plaintiff is also entitled to request specific amounts of money for items of non-economic damages.[125]

The amount sued often exceeds the medical malpractice cap.[126] However, a jury will not be instructed on the amount of the cap applicable to the claim. If the verdict exceeds the cap, the court will reduce the award to the cap and enter judgment in the reduced amount.[127]

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[124] Va. Code § 8.01-379.1.

[125] *Wakole v. Barber*, 283 Va. 488, 722 S.E.2d 238 (2012).

[126] Va. Code § 8.01-581.15.

[127] *See Etheridge v. Med. Ctr. Hosps.,* 237 Va. 87, 376 S.E.2d 525 (1989).