Hearsay And Expert Witnesses – Creatively Applying The Rules

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VI. Hearsay and Experts

I. **Introduction/Roadmap**

II. **"New" Rules of Evidence in Virginia**

- Effective July 1, 2012
- Applicable to all civil and criminal cases pursuant to Rule 2:1101
- 27 pages long: see the Rules of the Virginia Supreme Court
- Clear and succinct

Rule 2:10 2(1) makes clear 3 important criteria about the new Rules of Evidence:

1. The rules are a restatement of traditional Virginia doctrine, without substantive change;
2. On various specific evidential issues that are not directly addressed by the Rules, prior case law or statutory authority applies; and
3. Even if the Rules address a certain topic, prior case law interpretations of the issue presented may be cited by counsel and relied upon by the court in interpreting and applying the Rules.
   (in other words, nothing has changed!)

A. Deposition Strategy

1. Plan for discovery; plan for deposition
2. Question Necessity; John Crane, Inc. v. Jones, 274 Va. 581, 650 S.E.2d 851 (2007)
3. Video tape: Why? How? When? Cost?
4. Expense of Expert fee for depo:
   VSC Rule 4:1 (4)(C)

(4) Trial Preparation: Experts; Costs - Special Provisions for Eminent Domain Proceedings. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this Rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

.....

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent and expenses incurred in responding to discovery under subdivisions (b)(4)(A)(ii), (b)(4)(A)(iii), and (b)(4)(B) of this Rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(iii) of this Rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this Rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert. (D) Notwithstanding the provisions of subdivision (b)(4)(C) of

5. Rules of the Road
6. Technique
7. Corporate Designee depositions: VSC Rule 4:5 (b)(6):

Rule 4:5. Depositions Upon Oral Examination.

...

(b) *Notice of Examination: General Requirements; Special Notice; Production of Documents and Things; Deposition of Organization.*

...

(6) A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these Rules.

B. Admissibility of Expert Testimony

1. Rule 2:702(a)(i):

Use of Expert Testimony.

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

2. Virginia Code Section 8.01-401.3 (A)

§ 8.01-401.3. Opinion testimony and conclusions as to facts critical to civil case resolution (Supreme Court Rule 2:701 derived from subsection B of this section, subdivision (a)(i) of Supreme Court Rule 2:702 derived from subsection A of this section, and subsection (a) of Supreme Court Rule 2:704 derived from subsections B and C of this section).

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 full force.

(1993, c. 909.)

3. Hearsay exceptions: Rule 2:803 exceptions 0,1,2,3,4, 18 pg. 118,

Rule 2:803 Hearsay Exceptions Applicable Regardless of Availability of the Declarant (Rule 2:803(10)(a) derived from Code § 8.01-390(C); Rule 2:803(10)(b) derived from Code § 19.2-188.3; Rule 2:803(17) derived from Code § 8.2-724; and Rule 2:803(23) is derived from Code § 19.2-268.2) The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(0) *Admission by party-opponent.* A statement offered against a party that is (A) the party's own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or employee, made during the term of the agency or employment, concerning a matter within the scope of such agency or employment, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

(1) *Present sense impression.* A spontaneous statement describing or explaining an event or condition made contemporaneously with, or while, the declarant was perceiving the event or condition.

(2) *Excited utterance.* A spontaneous or impulsive statement prompted by a startling event or condition and made by a declarant with firsthand knowledge at a time and under circumstances negating deliberation.

(3) *Then existing mental, emotional, or physical condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

(4) *Statements for purposes of medical treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(18) *Learned treatises. See* Rule 2:706.

3. **Rule 2:706 USE OF LEARNED TREATISES WITH EXPERTS** (Rule 2:706(a) derived from Code § 8.01-401.1)

(a) *Civil cases.* To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay. If admitted, the statements may be read into evidence but may not be received as exhibits. If the statements are to be introduced through an expert witness upon direct examination, copies of the specific statements shall be designated as literature to be introduced during direct examination and provided to opposing parties 30 days prior to trial unless otherwise ordered by the court. If a statement has been designated by a party in accordance with and satisfies the requirements of this rule, 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.

(b) *Criminal cases.* Where an expert witness acknowledges on cross-examination that a published work is a standard authority in the field, an opposing party may ask whether the witness agrees or disagrees with statements in the work acknowledged. Such proof shall be received solely for impeachment purposes with respect to the expert's credibility.

C. Attacking Credibility

1. Of Hearsay Declarant:

ATTACKING AND SUPPORTING CREDIBILITY OF HEARSAY DECLARANT (Rule 2:806)

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness.

2. Of Expert on Basis of Opinion

BASIS OF EXPERT TESTIMONY (Rule 2:703(a) derived from Code § 8.01-401.1)

(a) *Civil cases.* In a civil action an 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 the witness 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.

(b) *Criminal cases.* In criminal cases, the opinion of an expert is generally admissible if it is based upon facts personally known or observed by the expert, or based upon facts in evidence.

3. Of Expert on Ultimate Issue

OPINION ON ULTIMATE ISSUE (Rule 2:704(a) derived from Code § 8.01-401.3(B) and (C))

(a) *Civil cases.* In civil cases, no expert or lay witness 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. But in no event shall such witness be permitted to express any opinion which constitutes a conclusion of law. Any other exceptions to the "ultimate fact in issue" rule recognized in the Commonwealth remain in full force.

(b) *Criminal cases.* In criminal proceedings, opinion testimony on the ultimate issues of fact is not admissible. This Rule does not require exclusion of otherwise proper expert testimony concerning a witness' or the defendant's mental disorder and the hypothetical effect of that disorder on a person in the witness' or the defendant's situation.

4. Virginia Supreme Court Cases on Experts and Hearsay Evidence:

See McMunn v. Tatum, 237 Va. 558, 379 S.E. 2nd 908 (Va. 1989) (*expert cannot testify about the hearsay opinions of other persons in explaining the basis of his opinion*); Comm. V. Wynn, 277 Va. 92, 671 S.E.2d 137 (2009) (*the court set forth that experts cannot testify about the hearsay facts or opinions of others in explaining the basis of his or her opinion, as "a litigant, nevertheless, should not be required to contend with such hearsay information because the trier of fact cannot observe the demeanor of the speaker*

and the statements cannot be tested by cross examination."); Virginia Power v. Dungee, 258 Va. 235, 520 S.E.2d 165 (1999) (*an expert's testimony is inadmissible if it relates to matters about which the fact finder is equally as capable as the expert of reaching an intelligent and informed opinion, and in this case, Va Power's child psychologist who was called to testify that a child of similar age, intelligence, and experience to the plaintiff would have understood the dangers of an electrical substation but the plaintiff had already put on testimony that the minor had ADHD and other life circumstances that affected his development and intellectual skills so that he acted like a much younger child*); and CSX Transportation v. Casale, 247 Va. 180, 441S.E.2d 212 (1994) (*expert may not testify to hearsay opinions of others, and in this case, a physician repeated an opinion of another doctor during his direct examination and the medical records of that doctor were not in evidence, making the declaration of the opinion hearsay and not admissible).*

D. **Direct Examination** *rephrasing examples*

The following questions are phrased by the Plaintiff's lawyer in a car crash case. During the seminar, we will go over whether or not the questions are objectionable, and what would the basis of the objection be? Should it be overruled or sustained? And why? Lastly, rephrasing will be done by the audience at seminar!

1. Do you agree with Dr. Smith that Sallie had a fractured skull?
2. Do you agree with the Roanoke Hospital x-ray report that Sallie had a fractured skull?
3. What, if any, evidence of a fracture is in Sallie's record at Roanoke Hospital?
4. Did you review the medical records in her case? What did you review?
5. Do you have an opinion regarding Sallie's injuries?
6. What is your opinion?
7. What is the basis of that opinion?
8. Did you refer Sallie to Duke Medical Center in Durham, NC?
9. What treatment did she have a Duke?
10. What was the result of the MRI of Sallie's head taken at Duke Medical Center?
11. Have you seen the MRI film yourself? Do you review MRI films in the course of your treatments of patients?
12. What does the MRI scan show?

E. Expert Witness Reports

1. Rule 26(b)(4)(B). A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or 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.
2. What is hearsay within the report
3. Is the report admissible? Which portions are admissible and which aren't?

F. Hearsay Evidence at Trial

1. **Not admissible:** Testifying expert quotes medical opinions from medical records that are inadmissible (*See* CSX v. Casale, 247 Va. 180, 1994). Testifying expert's opinion regarding cause and origin of fire inadmissible given that the expert's opinion testimony was without a basis supported by the evidence, speculative and unreliable as a matter of law since no witnesses saw a cleaning crew smoking in store and there was no physical evidence of smoking in the store that burned (*See* Blue Ridge Serv. Corp of Virginia v. Saxon Shoes, Inc., 271 Va. 206, 624 S.E.2d 55, 2006). On direct examination, attempts to elicit testimony from expert regarding allegations of sexual misconduct that were made against the defendant by children other than the victim involved in the defendant's current convictions of aggravated sexual battery were deemed "factual hearsay" and rendered inadmissible, even though the expert relied on the facts in forming an opinion (*See* Comm. v Wynn, Id.).
2. **Hearsay within Hearsay Rule:**

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements (the hearsay, as well as the hearsay within the hearsay) conforms with an exception to the hearsay rule

3. **Attacking Hearsay Evidence Rule**:
When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness.

4. **Hearsay: Statements that are admissible as exceptions to the hearsay rule where the declarant is dead or otherwise unavailable as a witness:**
    - Former Testimony
    - Statement under Belief of Impending Death
    - Statement Against Interest
    - Statement of personal or family history
    - Statement by party incapable of testifying

5. **Hearsay: Statements not excluded by hearsay rule, even though the declarant is not available as a witness, include:**
    - Admission By Party Opponent
    - Present Sense Impression
    - Excited Utterance
    - Then existing mental, emotional, or physical condition
    - Statements for purposes of medical treatments
    - Recorded recollection
    - Business records
    - Public records and reports
    - Records of Vital Statistics
    - Records of Religious Organizations
    - Marriage, baptismal, and similar certificates
    - Family Records
    - Records of documents affecting an interest in property
    - Statements in documents affecting an interest in property
    - Statements in ancient documents

- Market quotations
- Learned treatises
- Reputation concerning boundaries
- Reputation as to character
- Judgment as to personal, family, or general history, or boundaries
- Statements of Identification by witness
- Recent Complaints of Sexual Assault
- Judicial and Nonjudicial records
- Price of goods

6. Must be contemporaneous objection, with basis clearly articulated

G. Character and competency

Rules of the Supreme Court of Virginia, Part Two, Rules of Evidence

ARTICLE IV.

RELEVANCY, POLICY, AND CHARACTER TRAIT PROOF

Rule 2:401 DEFINITION OF "RELEVANT EVIDENCE"
"Relevant evidence" means evidence having any tendency to make the existence of any fact in issue more probable or less probable than it would be without the evidence.

Rule 2:402 RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE
(a) *General Principle*. All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of Virginia, statute, Rules of the Supreme Court of Virginia, or other evidentiary principles. Evidence that is not relevant is not admissible.
(b) *Results of Polygraph Examinations*. The results of polygraph examinations are not admissible.

Rule 2:403 EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, MISLEADING THE JURY, OR NEEDLESS PRESENTATION OF CUMULATIVE EVIDENCE
Relevant evidence may be excluded if:
(a) the probative value of the evidence is substantially outweighed by (i) the danger of unfair prejudice, or (ii) its likelihood of confusing or misleading the trier of fact; or
(b) the evidence is needlessly cumulative.

Rule 2:404 Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes
(a) *Character evidence generally.* Evidence of a person's character or character trait is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: (1) Character trait of accused. Evidence of a pertinent character trait of the accused offered by the accused, or by the prosecution to rebut the same; (2) Character trait of victim. Except as provided in Rule 2:412, evidence of a pertinent character trait or acts of violence by the victim of the crime offered by an accused who has adduced evidence of self defense, or by the prosecution (i) to rebut defense evidence, or (ii) in a criminal case when relevant as circumstantial evidence to establish the death of the victim when other evidence is unavailable; or (3) Character trait of witness. Evidence of the character trait of a witness, as provided in Rules 2:607, 2:608, and 2:609. (b) *Other crimes, wrongs, or acts.* Except as provided in Rule 2:413 or by statute, evidence of other crimes, wrongs, or acts is generally not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith. However, if the legitimate probative value of such proof outweighs its incidental prejudice, such evidence is admissible if it tends to prove any relevant fact pertaining to the offense charged, such as where it is relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if they are part of a common scheme or plan.

Rule 2:405 METHODS OF PROVING CHARACTER TRAITS
(a) *Reputation proof.* Where evidence of a person's character trait is admissible under these Rules, proof may be made by testimony as to reputation; but a witness may not give reputation testimony except upon personal knowledge of the reputation. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
(b) *Specific instances of conduct.* In cases in which a character trait of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of conduct of such person on direct or cross-examination.
Rule 2:406 HABIT AND ROUTINE PRACTICE IN CIVIL CASES (derived from Code § 8.01-397.1)
(a) *Admissibility.* In a civil case, evidence of a person's habit or of an organization's routine practice, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion conformed with the habit or routine practice. Evidence of prior conduct may be relevant to rebut evidence of habit or routine practice.
(b) *Habit and routine practice defined.* A "habit" is a person's regular response to repeated specific situations. A "routine practice" is a regular course of conduct of a group of persons or an organization in response to repeated specific situations.

Rule 2:407 SUBSEQUENT REMEDIAL MEASURES (derived from Code § 8.01-418.1)
When, after the occurrence of an event, measures are taken which, if taken prior to the event, would have made the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct as a cause of the occurrence of the event; provided that evidence of subsequent measures shall not be required to be excluded when offered for another purpose for which it may be admissible, including, but not limited to, proof of ownership, control, feasibility of precautionary measures if controverted, or for impeachment.

Rule 2:408 COMPROMISE AND OFFERS TO COMPROMISE
Evidence of offers and responses concerning settlement or compromise of any claim which is disputed as to liability or amount is inadmissible regarding such issues. However, an express admission of liability, or an admission concerning an independent fact pertinent to a question in

issue, is admissible even if made during settlement negotiations. Otherwise admissible evidence is not excludable merely because it was presented in the course of compromise negotiations. Nor is it required that evidence of settlement or compromise negotiations be excluded if the evidence is offered for another purpose, such as proving bias or prejudice of a witness or negating a contention of undue delay.

Rule 2:409 EVIDENCE OF ABUSE ADMISSIBLE IN CERTAIN CRIMINAL TRIALS (derived from Code § 19.2-270.6)

In any criminal prosecution alleging personal injury or death, or the attempt to cause personal injury or death, relevant evidence of repeated physical and psychological abuse of the accused by the victim shall be admissible, subject to the general rules of evidence.

Rule 2:410 WITHDRAWN PLEAS, OFFERS TO PLEAD, AND RELATED STATEMENTS

Admission of evidence concerning withdrawn pleas in criminal cases, offers to plead, and related statements shall be governed by Rule 3A:8(c)(5) of the Rules of Supreme Court of Virginia and by applicable provisions of the Code of Virginia.

Rule 2:411 INSURANCE

Evidence that a person was or was not insured is not admissible on the question whether the person acted negligently or otherwise wrongfully, and not admissible on the issue of damages. But exclusion of evidence of insurance is not required when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

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Rule 2:412 ADMISSIBILITY OF COMPLAINING WITNESS' PRIOR SEXUAL CONDUCT; CRIMINAL SEXUAL ASSAULT CASES; RELEVANCE OF PAST BEHAVIOR (derived from Code § 18.2-67.7)

(a) In prosecutions under Article 7, Chapter 4 of Title 18.2 of the Code of Virginia, under clause (iii) or (iv) of § 18.2-48, or under §§ 18.2-370, 18.2-370.01, or 18.2-370.1, general reputation or opinion evidence of the complaining witness' unchaste character or prior sexual conduct shall not be admitted. Unless the complaining witness voluntarily agrees otherwise, evidence of specific instances of his or her prior sexual conduct shall be admitted only if it is relevant and is:

1. Evidence offered to provide an alternative explanation for physical evidence of the offense charged which is introduced by the prosecution, limited to evidence designed to explain the presence of semen, pregnancy, disease, or physical injury to the complaining witness' intimate parts; or
2. Evidence of sexual conduct between the complaining witness and the accused offered to support a contention that the alleged offense was not accomplished by force, threat or intimidation or through the use of the complaining witness' mental incapacity or physical helplessness, provided that the sexual conduct occurred within a period of time reasonably proximate to the offense charged under the circumstances of this case; or
3. Evidence offered to rebut evidence of the complaining witness' prior sexual conduct introduced by the prosecution.

(b) Nothing contained in this Rule shall prohibit the accused from presenting evidence relevant to show that the complaining witness had a motive to fabricate the charge against the accused. If such evidence relates to the past sexual conduct of the complaining witness with a person other than the accused, it shall not be admitted and may not be referred to at any preliminary hearing or trial unless the party offering same files a written notice generally describing the evidence prior to the introduction of any evidence, or the opening statement of either counsel, whichever first occurs, at the preliminary hearing or trial at which the admission of the evidence may be sought.

(c) Evidence described in subdivisions (a) and (b) of this Rule shall not be admitted and may not be referred to at any preliminary hearing or trial until the court first determines the admissibility of that evidence at an evidentiary hearing to be held before the evidence is introduced at such preliminary hearing or trial. The court shall exclude from the evidentiary hearing all persons except the accused, the complaining witness, other necessary witnesses, and required court personnel. If the court determines that the evidence meets the requirements of
subdivisions (a) and (b) of this Rule, it shall be admissible before the judge or jury trying the case in the ordinary course of the preliminary hearing or trial. If the court initially determines that the evidence is inadmissible, but new information is discovered during the course of the preliminary hearing or trial which may make such evidence admissible, the court shall determine in an evidentiary hearing whether such evidence is admissible

Rule 2:413. Evidence of similar crimes in child sexual offense cases (derived from Code § 18.2-67.7:1)
(a) In a criminal case in which the defendant is accused of a felony sexual offense involving a child victim, evidence of the defendant's conviction of another sexual offense or offenses is admissible and may be considered for its bearing on any matter to which it is relevant.
(b) The Commonwealth shall provide to the defendant 14 days prior to trial notice of its intention to introduce copies of final orders evidencing the defendant's qualifying prior criminal convictions. Such notice shall include (i) the date of each prior conviction, (ii) the name and jurisdiction of the court where each prior conviction was obtained, and (iii) each offense of which the defendant was convicted. Prior to commencement of the trial, the Commonwealth shall provide to the defendant photocopies of certified copies of the final orders that it intends to introduce.
(c) This Rule shall not be construed to limit the admission or consideration of evidence under any other rule of court or statute.
(d) For purposes of this Rule, "sexual offense" means any offense or any attempt or conspiracy to engage in any offense described in Article 7 (§ 18.2-61 et seq.) of Chapter 4 or § 18.2-370, 18.2-370.01, or 18.2-370.1 or any substantially similar offense under the laws of another state or territory of the United States, the District of Columbia, or the United States.
(e) Evidence offered in a criminal case pursuant to the provisions of this Rule shall be subject to exclusion in accordance with the Virginia Rules of Evidence, including but not limited to Rule 2:403.

H. Court Appointed Expert Witnesses

The Virginia Supreme court has published a wonderful chart of allowances for court appointed experts and even attorneys which I have attached as Exhibit __ to this outline. The Chart maybe found of the Supreme Court's website at www.courts.state.va.us/courtadmin/aoc/fiscal/chart2014_0701.pdf

For the Federal Court rule on Court appointed experts, the rule is below:

FRCP Rule 706. Court-Appointed Expert Witnesses

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the

parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs — and the compensation is then charged like other costs.

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1938; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 26, 2011, eff. Dec. 1, 2011.)

Notes of Advisory Committee on Proposed Rules

The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled. Levy, Impartial Medical Testimony—

Revisited, 34 Temple L.Q. 416 (1961), the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. *Scott v. Spanjer Bros., Inc.*, 298 F.2d 928 (2d Cir. 1962); *Danville Tobacco Assn. v. Bryant-Buckner Associates, Inc.*, 333 F.2d 202 (4th Cir. 1964); Sink, The Unused Power of a Federal Judge to Call His Own Expert Witnesses, 29 S.Cal.L.Rev. 195 (1956); 2 Wigmore §563, 9 *Id.* §2484; Annot., 95 A.L.R.2d 383. Hence the problem becomes largely one of detail.

The New York plan is well known and is described in Report by Special Committee of the Association of the Bar of the City of New York: Impartial Medical Testimony (1956). On recommendation of the Section of Judicial Administration, local adoption of an impartial medical plan was endorsed by the American Bar Association. 82 A.B.A.Rep. 184–185 (1957). Descriptions and analyses of plans in effect in various parts of the country are found in Van Dusen, A United States District Judge's View of the Impartial Medical Expert System, 322 F.R.D. 498 (1963); Wick and Kightlinger, Impartial Medical Testimony Under the Federal Civil Rules: A Tale of Three Doctors, 34 Ins. Counsel J. 115 (1967); and numerous articles collected in Klein, Judicial Administration and the Legal Profession 393 (1963). Statutes and rules include California Evidence Code §§730–733; Illinois Supreme Court Rule 215(d), Ill.Rev.Stat.1969, c. 110A, §215(d); Burns Indiana Stats. 1956, §9–1702; Wisconsin Stats.Annot.1958, §957.27.

In the federal practice, a comprehensive scheme for court appointed experts was initiated with the adoption of Rule 28 of the Federal Rules of Criminal Procedure in 1946. The Judicial Conference of the United States in 1953 considered court appointed experts in civil cases, but only with respect to whether they should be compensated from public funds, a proposal which was rejected. Report of the Judicial Conference of the United States 23 (1953). The present rule expands the practice to include civil cases.

Subdivision (a) is based on Rule 28 of the Federal Rules of Criminal Procedure, with a few changes, mainly in the interest of clarity. Language has been added to provide specifically for the appointment either on motion of a party or on the judge's own motion. A provision subjecting the court appointed expert to deposition procedures has been incorporated. The rule has been revised to make definite the right of any party, including the party calling him, to cross-examine.

Subdivision (b) combines the present provision for compensation in criminal cases with what seems to be a fair and feasible handling of civil cases, originally found in the Model Act and carried from there into Uniform Rule 60. See also California Evidence Code §§730-731. The special provision for Fifth Amendment compensation cases is designed to guard against reducing constitutionally guaranteed just compensation by requiring the recipient to pay costs. See Rule 71A(*l*) of the Rules of Civil Procedure.

Subdivision (c) seems to be essential if the use of court appointed experts is to be fully effective. Uniform Rule 61 so provides.

Subdivision (d) is in essence the last sentence of Rule 28(a) of the Federal Rules of Criminal Procedure.

Notes of Advisory Committee on Rules—1987 Amendment

The amendments are technical. No substantive change is intended.

Committee Notes on Rules—2011 Amendment

The language of Rule 706 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

I. Impeachment

Rule 2:607 IMPEACHMENT OF WITNESSES (Rule 2:607(b) derived from Code § 8.01-401(A); and Rule 2:607(c) derived from Code § 8.01-403)

(a) *In general.* Subject to the provisions of Rule 2:403, the credibility of a witness may be impeached by any party other than the one calling the witness, with any proof that is relevant to the witness's credibility. Impeachment may be undertaken, among other means, by:

(i) introduction of evidence of the witness's bad general reputation for the traits of truth and veracity, as provided in Rule 2:608(a) and (b);
(ii) evidence of prior conviction, as provided in Rule 2:609;
(iii) evidence of prior unadjudicated perjury, as provided in Rule 2:608(d);
(iv) evidence of prior false accusations of sexual misconduct, as provided in Rule 2:608(e);
(v) evidence of bias as provided in Rule 2:610;

(vi) prior inconsistent statements as provided in 2:613;
(vii) contradiction by other evidence; and
(viii) any other evidence which is probative on the issue of credibility because of a logical tendency to convince the trier of fact that the witness's perception, memory, or narration is defective or impaired, or that the sincerity or veracity of the witness is questionable.
Impeachment pursuant to subdivisions (a)(i) and (ii) of this Rule may not be undertaken by a party who has called an adverse witness.

(b) *Witness with adverse interest.* A witness having an adverse interest may be examined with leading questions by the party calling the witness. After such an adverse direct examination, the witness is subject to cross-examination.

(c) *Witness proving adverse.*

(i) If a witness proves adverse, the party who called the witness may, subject to the discretion of the court, prove that the witness has made at other times a statement inconsistent with the present testimony as provided in Rule 2:613.
(ii) In a jury case, if impeachment has been conducted pursuant to this subdivision (iii), the court, on motion by either party, shall instruct the jury to consider the evidence of such inconsistent statements solely for the purpose of contradicting the witness.

Rule 2:608 IMPEACHMENT BY EVIDENCE OF REPUTATION FOR TRUTHTELLING AND CONDUCT OF WITNESS

(a) *Reputation evidence of the character trait for truthfulness or untruthfulness.* The credibility of a witness may be attacked or supported by evidence in the form of reputation, subject to these limitations: (1) the evidence may relate only to character trait for truthfulness or untruthfulness; (2) evidence of truthful character is admissible only after the character trait of the witness for truthfulness has been attacked by reputation evidence or otherwise; and (3) evidence is introduced that the person testifying has sufficient familiarity with the reputation to make the testimony probative.
(b) *Specific instances of conduct; extrinsic proof.* Except as otherwise provided in this Rule, by other principles of evidence, or by statute, (1) specific instances of the conduct of a witness may not be used to attack or support credibility; and (2) specific instances of the conduct of a witness may not be proved by extrinsic evidence.
(c) *Cross-examination of character witness.* Specific instances of conduct may, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of a character witness concerning the character trait for truthfulness or untruthfulness of another witness as to whose character trait the witness being cross-examined has testified.
(d) *Unadjudicated perjury.* If the trial judge makes a threshold determination that a reasonable probability of falsity exists, any witness may be questioned about prior specific instances of unadjudicated perjury. Extrinsic proof of the unadjudicated perjury may not be shown.
(e) *Prior false accusations in sexual assault cases.* Except as otherwise provided by other evidentiary principles, statutes or Rules of Court, a complaining witness in a sexual assault case may be cross-examined about prior false accusations of sexual misconduct.

Rule 2:609 IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME (derived from Code § 19.2-269)

Evidence that a witness has been convicted of a crime may be admitted to impeach the credibility of that witness subject to the following limitations:

(a) *Party in a civil case or criminal defendant.*

(i) The fact that a party in a civil case or an accused who testifies has previously been convicted of a felony, or a misdemeanor involving moral turpitude, and the number of such convictions may be elicited during examination of the party or accused.

(ii) If a conviction raised under subdivision (a)(i) is denied, it may be proved by extrinsic evidence.

(iii) In any examination pursuant to this subdivision (a), the name or nature of any crime of which the party or accused was convicted, except for perjury, may not be shown, nor may the details of prior convictions be elicited, unless offered to rebut other evidence concerning prior convictions.

(b) *Other witnesses.* The fact that any other witness has previously been convicted of a felony, or a misdemeanor involving moral turpitude, the number, and the name and nature, but not the details, of such convictions may be elicited during examination of the witness or, if denied, proved by extrinsic evidence.

(c) *Juvenile adjudications.* Juvenile adjudications may not be used for impeachment of a witness on the subject of general credibility, but may be used to show bias of the witness if constitutionally required.

(d) *Adverse Witnesses.* A party who calls an adverse witness may not impeach that adverse witness with a prior conviction.

Rule 2:610 BIAS OR PREJUDICE OF A WITNESS

A witness may be impeached by a showing that the witness is biased for or prejudiced against a party. Extrinsic evidence of such bias or prejudice may be admitted.

Rule 2:611 MODE AND ORDER OF INTERROGATION AND PRESENTATION

(Rule 2:611(c) derived from Code § 8.01-401(A))

(a) *Presentation of evidence.* The mode and order of interrogating witnesses and presenting evidence may be determined by the court so as to (1) facilitate the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination.*

(i) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(ii) In a criminal case, if a defendant testifies on his or her own behalf and denies guilt as to an offense charged, cross-examination of the defendant may be permitted in the discretion of the court into any matter relevant to the issue of guilt or innocence.

(c) *Leading questions.* Leading questions should not be used on the direct examination of a witness except as may be permitted by the court in its discretion to allow a party to develop the testimony. Leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, a witness having an adverse interest, or a witness proving adverse, interrogation may be by leading questions.

Rule 2:612 WRITING OR OBJECT USED TO REFRESH MEMORY
If while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

Rule 2:615 EXCLUSION OF WITNESSES (Rule 2:615(a) derived from Code §§ 8.01-375, 19.2-184, and 19.2-265.1; Rule 2:615(b) derived from Code § 8.01-375; and Rule 2:615(c) derived from Code § 19.2-265.1)

(b) Where expert witnesses are to testify in the case, the court may, at the request of all parties, allow one expert witness for each party to remain in the courtroom; however, in cases pertaining to the distribution of marital property pursuant to § 20-107.3 or the determination of child or spousal support pursuant to § 20-108.1, the court may, upon motion of any party, allow one expert witness for each party to remain in the courtroom throughout the hearing.
(c) Any victim as defined in Code § 19.2-11.01 who is to be called as a witness may remain in the courtroom and shall not be excluded unless pursuant to Code § 19.2-265.01 the court determines, in its discretion, that the presence of the victim would impair the conduct of a fair trial.

Exclusion of Witnesses in civil cases: *See* Va Code Section 8.01-375:

§ 8.01-375. Exclusion of witnesses in civil cases (Subsection (a) of Supreme Court Rule 2:615 derived in part from this section and subsection (b) of Supreme Court Rule 2:615 derived from this section).

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.

Where expert witnesses are to testify in the case, the court may, at the request of all parties, allow one expert witness for each party to remain in the courtroom; however, in cases pertaining to the distribution of marital property pursuant to § 20-107.3 or the determination of child or spousal support pursuant to § 20-108.1, the court may, upon motion of any party, allow one expert witness for each party to remain in the courtroom throughout the hearing.

(Code 1950, § 8-211.1; 1966, c. 268; 1975, c. 652; 1977, c. 617; 1986, c. 36; 1987, c. 70; 2001, c. 348; 2006, c. 757.)

III. Conclusion

Hearsay evidence in context of an expert's testimony is frequently misunderstood. Reading the Rule of Evidence and the cases on the topic helps a practioner to distinguish what is and what is not permissible. Although I have included some case law, please read and perform your own research for litigation and shepardize all cases so that your client can be well represented and so that you can convince the judge and the trier of fact of your position.

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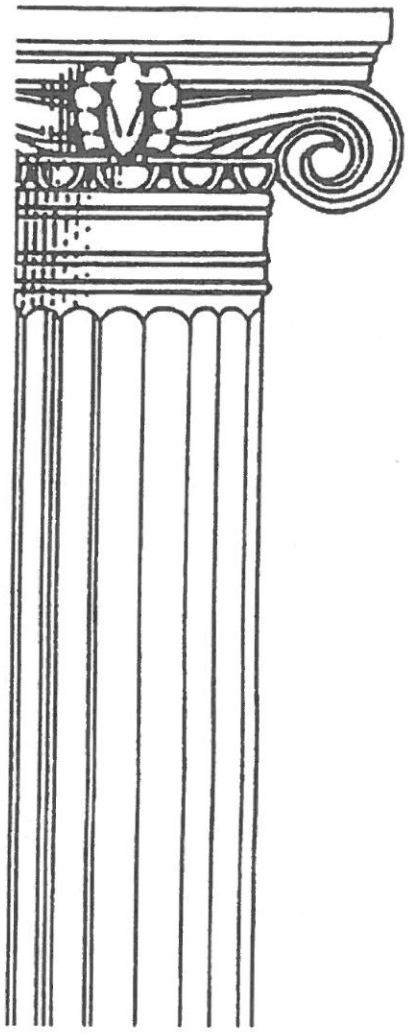
Supreme Court of Virginia

CHART OF ALLOWANCES

July 1, 2014



Supreme Court of Virginia
Office of the Executive Secretary
Department of Fiscal Services
804/786-6455
www.courts.state.va.us

Policy Requiring the Timely Submission of Payment Requests

Applicability:

This Policy applies to all requests for payment submitted to the Office of the Executive Secretary of the Supreme Court of Virginia, including, but not limited to, requests for payment submitted by special justices, guardians *ad litem,* interpreters, mediators, court-appointed counsel, court-appointed experts, substitute judges, retired judges and others.

Requirements:

All requests for payment of fees or for travel or other expenses must be submitted no later than thirty (30) days after the service or the travel is completed. For court-appointed counsel, each time limit is measured from the completion of all proceedings in the court for which the request is being submitted. See Va. Code § 19.2-163.

If a request for payment is submitted more than thirty (30) days after the service or the travel is completed, the Office of the Executive Secretary may require additional documentation.

All requests for payment, whether initially submitted to the court or, as appropriate, to the Office of the Executive Secretary, and any additional documentation required, must be received by the Office of the Executive Secretary within twenty-four (24) months of the date on which the service or the travel is completed. The person submitting the payment request is responsible for ensuring that the request is received by the Office of the Executive Secretary within the twenty-four (24) month period. If necessary, the person submitting the payment request should contact the Office of the Executive Secretary in writing before the end of the 24 month period. Any such inquiry may be sent to: Office of the Executive Secretary, Supreme Court of Virginia, Attn. Fiscal Department, 100 N. 9th Street, Richmond, Virginia 23219. NO PAYMENT WILL ISSUE AFTER 24 MONTHS FROM THE DATE ON WHICH THE SERVICE OR TRAVEL IS COMPLETED.

Waiver Funds:

Virginia Code § 19.2-163 provides that if at any time the funds allocated for the waivers are exhausted, the Executive Secretary is to certify that fact to the courts, and no additional waivers may be approved. Waiver funds are appropriated annually and typically are exhausted before the end of the year. Therefore it is important that applications for fee cap waivers be submitted in the same year the service is performed and as early as possible since payment is subject to the availability of funds appropriated for that year.

Hourly Rate for Court-Appointed Counsel

Unless otherwise specified, the Supreme Court of Virginia's established rate of up to $90 per hour (in and out of court) for court-appointed counsel shall apply.

Code Section	Description	Per Diem	Statutory Limit
8.01-9	Guardian ad litem for defendant under a disability in a civil action. **Note:** Payment out of the criminal fund of fees and expenses of a guardian ad litem for a defendant under a disability in a civil action is authorized only in certain, limited situations, specifically when: (1) in a civil action against an incarcerated felon for divorce where the felon is incarcerated as a result of a crime committed against the felon's spouse, child, or stepchild and involving physical injury, sexual assault, or sexual abuse (as set forth in the statute); (2) in a civil action against an incarcerated felon for damages arising out of a criminal act (as set forth in the statute); or (3) a court in a divorce action has made specific findings that both the plaintiff and the defendant are indigent and that the defendant is a person under a disability as defined in § 8.01-2, and based upon those findings, the court has determined that payment of the guardian ad litem out of the criminal fund is required as a matter of law. **Court order indicating that plaintiff and defendant are both indigent and that defendant is a person under a disability is required.** The Supreme Court of Virginia's established rate of up to $75/hour in court and $55/hour out of court for guardians ad litem applies.		
8.01-384.1	Interpreters for the speech-impaired or hearing-impaired in civil proceedings **Note:** Certified interpreters under contract with the Department for the Deaf and Hard-of-Hearing who provide services to any Virginia state court must submit the required paperwork directly to that Department. **DO NOT SUBMIT ON FORM DC-40. DEPARTMENT OF DEAF AND HARD-OF-HEARING WILL SUBMIT.**		