George Mason Inn of Court

October 18, 2023 7:30-8:30 PM

All Things Experts CLE

Presenters:

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Topics and schedule:

1. Revisions to FRCP 702 (5 minutes)
2. Federal v. Virginia rules (20 minutes)
3. Emerging issues with experts in criminal cases (15 minutes)
4. Damages experts (15 minutes)
5. Questions (5 minutes)

Revisions to FRCP 702 (Testimony by Expert Witnesses)

Proposed modifications to Rule 702. Testimony by Expert Witnesses

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if **the proponent demonstrates to the court that it is more likely than not that:**
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the ~~expert has reliably applied~~ **expert's opinion reflects a reliable application of** the principles and methods to the facts of the case.

Take aways:

1) The preponderance of the evidence standard [Rule 104(a)] applies to all four elements. Courts were not uniformly requiring this. Courts were not uniformly applying this standard. For example, many Courts were not referencing this standard but instead citing to the "liberal thrust" language in *Daubert* to permit testimony.

    a. *See e.g. Kristensen ex rel. Kristensen v. Spotnitz,* No. 3:09-CV-00084, 2011 WL 4380893, at *2 (W.D. Va. Sept. 21, 2011) ("In its cases interpreting the Federal Rules of Evidence, the Supreme Court of the United States has reiterated that the Rules exhibit a 'liberal thrust,' and undertake a 'general approach of relaxing the traditional barriers to 'opinion' testimony." *Daubert,* 509 U.S. at 588. . . . Moreover, the Court noted that the adversary process and parties' traditional means of attacking shaky testimony resting on inadmissible evidence, including "vigorous cross-examinations, presentation of contrary evidence, and careful instruction on the burden of proof" would continue to be sufficient.)

2) Rule 702(d) now emphasizes that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology. This is reiterating that Court must take an active gatekeeper role and not simply rely on "weight" or cross examination to fix questionable reliability.

Virginia v. Federal Rules on Expert Witnesses

What is Required in the Expert Designation for each Jurisdiction:

1. **Federal Requirements:**
    a. Governed by Rule 26(a)(2):
        i. A party must disclose to the other parties the identity of any witness it may use at trial to present evidence under FRoE 702, 703, or 705.
        ii. This disclosure must be accompanied by a written report-prepared and signed by the witness-if retained to provide expert testimony. The report must contain:
            1. A complete statement of all opinions the witness will express, and the basis and reasons for them;
            2. Facts or data considered by the witness;
            3. Exhibits that will be used to summarize the opinion;
            4. Witness qualifications, including all publications authored in the past 10 years; and
            5. A statement of compensation for study and testimony in the case
        iii. If no report is required, the subject matter of the evidence, as well as a summary of facts and opinions to which the expert is expected to testify, must be provided
        iv. The court may order disclosure. By default, disclosure must take place:
            1. At least 90 days before the date set for trial, or
            2. 30 days after the other party's disclosure, if the evidence is intended solely to contradict or rebut evidence on the same subject matter
        v. Parties must supplement disclosure when required under 26(e)
            1. (information in the report and information given during expert testimony fall under this rule.
            2. Changes must be disclosed by the time pretrial disclosures under 26(a)(3) are due.)
    b. EDVA cases where designation was not sufficient:
        i. *Roop v. Desousa*, 2023 U.S. Dist. LEXIS 40247 (E.D.V.A. 2023). Treating physician not listed as an expert witness could not opine as to complex causation lying outside the scope of direct treatment; VA courts do not require experts to prove causation where lay testimony is sufficient, but do require experts to establish complex causation, including medical costs (when objected to), medical malpractice, and product liability.

        ii. *Daedalus Blue, LLC v. Microstrategy Inc.*, 2023 U.S. Dist. LEXIS 111009 (E.D.V.A. 2023). Special Master's Report: In a software patent dispute, the recommendation was to strike the source code exhibit as untimely if not disclosed in the expert report, or if the defendant's theory regarding this exhibit was not disclosed in the expert report. Untimely failure to disclose an expert witness may be deemed substantially justified or harmless (was there

surprise to the opposing party, could the surprise be cured, was it important evidence, would it disrupt the trial, was there sufficient explanation for failure to disclose); here, the failure was not justified or harmless, and the recommendation was for exclusion.

iii. *Rivera v. Seaworld Parks & Entm't LLC*, 2022 U.S. Dist. LEXIS 82065 (E.D.V.a. 2022). Opining about "how reasonable security officers conduct security tops," is insufficient without explaining a reasonable process; "security industry practices and practices and procedures related to security work," is insufficient without actually discussing those procedures; the "security team violated industry standards and protocols" is insufficient where those protocols are not discussed. **Motion to exclude testimony was granted**.

iv. *Ricks v. Huynh*, 2021 U.S. Dist. LEXIS 97204 (E.D.V.a. 2021). Plaintiff disclosed expert 1 month after date required by the Scheduling Order (first expert dropping out is insufficient excuse); plaintiff failed to meet and confer regarding late disclosure; report failed to articulate opinion on standard of care, how surgery had breached that standard, no exhibits or facts specifications were included, and statements of failure were conclusory (not explanatory); list of prior cases in which the expert testified were insufficient in that they did not list the jurisdiction or case numbers. These deficiencies were neither justified nor harmless; **motion to permit late expert witness identification denied.**

c. Distinction: No discovery request required.

2. State Court Requirements:

a. Discovery and pretrial order language

i. Uniform Pretrial Order states in relevant part:
If requested in discovery, plaintiff's, counter-claimant's, third party plaintiff's, and cross-claimant's experts shall be identified on or before 90 days before trial. If requested in discovery, defendant's and all other opposing experts shall be identified on or before 60 days before trial. If requested in discovery, experts or opinions responsive to new matters raised in the opposing parties' identification of experts shall be designated no later than 45 days before trial. If requested all information discoverable under Rule 4:1(b)(4)(A)(1) of the Rules of Supreme Court of Virginia shall be provided or the expert will not ordinarily be permitted to express any non-disclosed opinions at trial. The foregoing deadlines shall not relieve a party of the obligation to respond to discovery requests within the time periods set forth in the Rules of Supreme Court of Virginia, including, in particular, the duty to supplement or amend prior responses pursuant to Rule 4:1(e).

b. Key cases on designation requirements:
    i. *John Crane, Inc. v. Jones*, 274 Va. 581 (2008) (under Rule 4:1(b)(4)(A)(i), the substance of opinions to be rendered must be disclosed. The court has discretion to exclude testimony that does not comply with this rule. Disclosure is required even when the opposing party previously had the opportunity to depose the expert through prior litigation.).

    ii. *Emerald Point, LLC v. Hawkins*, 294 Va. 544 (2017) (Rule 4:1(b)(4)(A)(i) requires not just the topic, but the substance of the testimony to be provided. This includes scholarly studies upon which the expert relies (under Virginia Rule of Evidence 2:706(a), studies or other scholarly material must be disclosed 30 days prior to a civil trial)).

    iii. *Mikhaylov v. Sales*, 291 Va. 349 (2016) (the litigant offering expert testimony has the duty of ensuring that any opinions the expert provides at trial are disclosed by the pretrial scheduling order cutoff date).

Sufficiency of the Expert Foundation:

1. **Federal Seminal Case:** *Daubert v. Merrell Dow Pharms., Inc*, 509 U.S. 579 (1993). Expert testimony is admissible when the foundation for that testimony is based in scientific knowledge that assists the trier of fact in determining or understanding an issue. Non-exclusive factors to consider include whether the theory or technique:
    a. Can be (and has been) empirically tested;
    b. Has been subjected to peer review and publication;
    c. Has a known or potential rate of error; and
    d. Has a general level of acceptance within the relevant community.

2. **Federal Rules:** Fed. R. Civ. P. 703 and 705

3. **EDVA Examples**: Expert Struck or not Permitted to Testify Based on Insufficient Foundation Issues:
    a. *Georges v. Dominion Payroll Servs., LLC*, 2018 U.S. Dist. LEXIS 76112 (2018). Expert's testimony and opinions were struck pretrial, because her report failed to set forth the methodology for her conclusions, her experience was not linked to a basis for her opinions, and the industry standards citations she referenced were pulled from uncredentialed websites.

    b. *Lee v. City of Richmond*, 2014 U.S. Dist. LEXIS 139366 (2014). Nuclear engineer's testimony was wholly excluded pretrial because under *Daubert*,
        i. Credentials in nuclear engineering and physics (and experience generally) were not relevant to the ballistics testimony in question;
        ii. No methodology was used. Instead, ballistics and trajectory analyses were performed as though they were simple math problems;

iii. No known error rates or variables analysis were provided;
iv. The simplistic method used to analyze ballistics, trajectories, and scene reconstruction did not account for available real-world facts. The analysis was therefore not sufficiently relevant under Rule 702.

4. Virginia Case Law:

a. The decision as to whether an expert is qualified is largely a question within the sound discretion of the trial court. *Wood v. Brass Pro Shops, Inc.*, 250 Va. 297 (1995).
b. Counsel for the proponent of the expert must be allowed to establish the expert's qualifications through *voir dire* at trial, and deposition excerpts cannot solely form the basis for excluding the potential expert. *Parker v. Elco Elevator Corp*., 250 Va. 278, 281, 462 S.E.2d 98, 100 (1995); *Lloyd v. Kime*, 275 Va. 98, 106-7, 654 S.E.2d 563, 568 (2008).
c. Expert testimony is admissible in civil cases to assist the trier of fact, if the testimony meets certain fundamental requirements, including the requirement that it be based on an adequate factual foundation. *Countryside Corp. v. Taylor*, 263 Va. 549, 553 (2002).
    i. Expert testimony is inadmissible if it is speculative or founded on assumptions that have no basis in fact. *Id.*; *see Gilbert v. Summers*, 240 Va. 155, 159-60 (1990) (Virginia Supreme Court held that expert testimony about a boundary designation was inadmissible because it was based on the expert's speculation about prior land ownership and the existence of a landmark); *Cassady v. Martin*, 220 Va. 1093, 1100 (1980) (Virginia Supreme Court held that the expert witness's projection of decedent's lost income was too speculative because of the decedent's mental impairment and lack of a stable work schedule).
    ii. Expert testimony is inadmissible if the expert fails to consider all the variables that bear upon the inferences to be deduced from the facts observed. *Griffin v. The Spacemaker Grp., Inc.*, 254 Va. 141, 146 (1997) (Virginia Supreme Court reversed the trial court's exclusion of expert testimony discussing the cause of a forklift's malfunction based on variables considered such as structure and design that "are not matters of common knowledge").
d. Expert testimony must be relevant and comply with the expert disclosure requirements of Va. Sup. Ct. R. 4:1. *John Crane, Inc. v. Jones*, 274 Va. 581, 591-93 (2007).
e. An expert opinion based on an assumption not supported by the facts is not admissible at trial. *Vasquez v. Mabini*, 269 Va. 155, 160 (2005).
f. Expert testimony must also be sufficiently probable. Specifically, the standard requires reasonable certainty, rather than a mere possibility. Opinions and reports speaking in terms of impression, feeling, supposition, and suggestion, including what "may" be needed, are expressions of possibility, not probability. *Vilseck v. Campbell*, 242 Va. 10 (1991).

5. Other interesting cases:

a. *Coleman Co., Inc. v. Team Worldwide Corp.,* No. 2:20-CV-351, 2021 WL 5045067, at *2 (E.D. Va. Oct. 18, 2021)

i. scheduling order that provides for a separate close for expert discovery—"[a]ll discovery of experts ... shall be concluded on or before August 23, 2021"—permitted interrogatories and document requests to be served related to experts after the close of fact discovery.

b. *Saphilom v. USAA*, No. CL-2021-992, January 11, 2023 (Judge Oblon)(case making clear expert time spent preparing for deposition is recoverable):

i. "No Virginia authority explains the boundary of Rule 4:1(b)(4)(C) despite the frequency of expert witness depositions. The Court holds a litigant who chooses to depose an opposing expert witness must pay a reasonable fee for the expert's time spent and expenses incurred, absent a resulting manifest injustice. This fee may include the time spent in the deposition, reasonable time spent traveling to the deposition, and reasonable time preparing for the deposition."

6. **Virginia Rules**: *See generally*, Va. Code. Ann. §§ 8.01-401.1, 8.01-401.3.

a. Virginia Rules of Evidence:

i. Rule 2:702. Testimony by Experts
ii. Rule 2:703. Basis of Expert Testimony
iii. Rule 2:704. Opinion on Ultimate Issue
iv. Rule 2:705. Facts or Data Used in Testimony
v. Rule 2:706. Use of Learned Treatises with Experts

Emerging issues with Expert Witnesses in Criminal Cases

I. Particularized Need

a. Ex parte requests- Va. Code § 19.2-266.4
   i. In 2020 the General Assembly enacted this statute to create a process where indigent defendants can request expert assistance in an ex parte proceeding
   ii. The process is outlined in the statute, but you need to file a motion for an ex parte proceeding and if granted you file the substantive motion.
   iii. This permits indigent defendants to obtain expert assistance without needing to provide their entire defense to the Commonwealth.
   iv. It also prevents situations where the government gets to dictate, in part, what expert assistance indigent defendants get. It is important because people with money never have to worry about the government knowing their defense.
   v. This does not end the importance of showing your particularized need.

b. Lumpkin v. Commonwealth, Rec. No. 0129-22-3 (July 18, 2023)
   i. This is a recent case that highlights the importance of really laying out particularized need.
   ii. Using this case because it seemed clear to me that there was a particularized need demonstrated, but the Court of Appeals disagreed.
   iii. This was a sexual assault case. The complainant alleged that the defendant committed acts of sodomy, object sexual penetration, and aggravated sexual battery.
   iv. The allegations were that the defendant was erect and could ejaculate. The defendant could not be eliminated as a contributor to a YSTR DNA analysis in the complainants' anorectal sample.
   v. The defendant filed a motion for expert funds to obtain the assistance of urologist. The defendant had a medical condition that rendered him impotent and unable to become erect since 2004.
   vi. During the argument on particularized need, the defendant could not remember the doctor who treated him and did not have any of his medical records available to show that he had been diagnosed. The incident alleged had occurred about two years prior to the hearing on the motion.
   vii. The defense argued that a urologist could 1) show that he was impotent and could not become erect or ejaculate and 2) analyze a urine sample of the defendant to show that sperm was present in his urine to provide an alternative explanation for the presence of sperm.
   viii. The trial court denied the motion because "medical conditions are dynamic" and the defense could not show that the defendant was currently impotent. [Note- this is the whole point of why they wanted the expert]

ix. The Court of Appeals found that the defense did not present a particularized need and it was no more than a hope. They stated "a mere hope or suspicion that favorable evidence may result from an expert's services does not create a constitutional mandate."
x. The court focused on the lack of medical records, the fact that they did not specifically state that the defendant was still impotent, and the fact that that the testing would be two years after the fact, so it was not contemporaneous with the offense.
xi. This is troubling reasoning. Charges are often not brought at the time of the offense. People who are poor often do not have the ability to keep medical records or even know their doctor's names if they go to clinics. It also seems clear that the defense was saying the defendant was still impotent, but because they did not expressly state that the court held it against them.
xii. Also- the defendant was sentenced to 120 years in prison. He was too poor to afford his own expert to help him prove he was physically unable to commit these offenses.

c. PRACTICE POINTER- you need to be really explicit when asking for expert assistance, especially if it looks like you are going to lose. Explain that your indigent clients are being punished for being poor. Make it clear that all of this is an equal protection issue. Also argue that this violates your clients right to call for evidence in his favor under Article I, Section 8 of the Virginia Constitution.

II. Expert Disclosures

a. The 2021 revisions to Supreme Court Rule 3A:11 mandated, for the first time, that the parties in criminal cases provide expert disclosures before trial.
   i. Criminal attorneys are not use to doing this. There are still growing pains and the question of what is a sufficient disclosure is still up in the air.
   ii. For witnesses from the Department of Forensic Science, the Certificate of Analysis can serve as a disclosure, but it is not clear how far the experts can testify past what is expressly stated in that certificate.

b. Newberger v. Commonwealth, Rec. No. 0677-22-2 (June 27, 2023)
   i. Recent case showing pitfalls of discover violations on appeal
   ii. In this case the commonwealth did not timely disclose an expert witness for trial. The defense was told on the morning of trial and objected to the witness testifying.
   iii. The trial court permitted the expert to testify because the witness had testified at a pretrial hearing. Importantly, the pretrial hearing was about whether the complainant should be permitted to testify over closed-circuit television under Va. Code 18.2-67.9. In a sexual assault case. The issues at

trial were related, but obviously the base opinions were different because the trial was not about closed-circuit testimony.

iv. The Court of Appeals found that the trial court did not abuse its discretion by permitting the expert to testify as the defense had not shown any prejudice.

v. "To show prejudice, the defendant must demonstrate how timely disclosure would have changed his trial strategy or affected the outcome of the trial."

vi. The Court found that the defense did not explain prejudice in its brief. The defense did not ask for a continuance or ask to question the expert outside the presence of the jury (the court did not explain under what theory this would have been permitted).

vii. The court found that the defense was permitted to cross the expert, but did not cross her about the basis for her opinion at trial. (Note- this may have been because the defense attorney was afraid that his blind cross of an expert would have ended up strengthening her credibility in front of the jury as he had no way to prepare for the examination).

c. NOTE- the court did not address the issue of having a client incarcerated pretrial and needing to make the impossible choice between waiving your constitutional right to a speedy trial and your right to have effective assistance of counsel.

d. PRACTICE NOTE 1- every time you lose an objection, especially one this big, you need to talk about prejudice. You need to come up with things you would have done differently, witnesses you would have called. It can be easy in a case with an expert because if the government has an expert an indigent defendant needs to at least consult with an expert to know how to attack the other side. It is also clear here that the trial lawyer was, rightly, afraid to cross the expert when he was going in blind the morning of trial.

e. PRACTICE NOTE 2- YOU NEED TO CONSTITUTIONALIZE EVERYTHING. It moves the harmless error analysis to a more favorable standard and it can result in a different standard of review on appeal. Here, the case (should) look a lot different if the question is about the constitutional right to confront the witnesses against you or have effective assistance of counsel instead of just a discovery violation.

III. Expert Qualifications

a. Moore v. Commonwealth, Rec. No. 0724-22-3 (June 20, 2023)

i. At trial the Commonwealth called an outreach prevention specialist at the Southside Survivor Response Center with fourteen years of experience in counseling victims of domestic violence, to testify as an expert witness in

"**victimology**" and the pattern of "female victim responses to domestic assault and abuse."

ii. The only objection from the defense attorney appears to have been that the witness did not have the correct expert qualifications as she was not a licensed therapist.

iii. There was no objection to this being testimony as to the ultimate issue, the fact that the testimony was not the proper subject of expert opinion, or even that it was called VICTIMOLOGY.

iv. Under Rule of Evidence 2:702, expert testimony is admissible in a criminal 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," the witness is "qualified as an expert by knowledge, skill, experience, training, or education,"

v. This is an incredibly low bar. Attorneys often focus on voir dire and the question of whether the person can be qualified as an expert, but this is often not the most fruitful objection for appeal. You should still do this for the jury to have them question the weight from the beginning, but appeals require more work.

b. PRACTICE POINTER- remember that OPINIONS are qualified, not PEOPLE. Focus on the opinion. Find a way to show it is within the ken of a lay juror or that it goes to the ultimate issue.

c. NOTE- here the lawyer did not object to this testimony being about the credibility of a witness, even though it is called victimology and presumably means that the person behaving like this is a victim. COMPARE this decision with Welch v. Commonwealth discussed below. There the trial court excluded a scientific expert of the defense because it would have commented on the credibility of the government expert. How is this expert any different than the expert in Welch?

IV. Presenting expert testimony

a. Welch v. Commonwealth, 78 Va. App. 287 (2023)

i. During the defense case, the defense attempted to call an expert witness to rebut the testimony of the toolmark expert. For some reason the defense was forced to proffer what the expert's testimony would be.

ii. The court ended up finding this this was harmless error.

iii. Because the objection was not constitutionalized, this case was subject to a regular harmless error analysis.

iv. If your case is getting regular harmless error analysis you are going to lose.

v. The defense attorney was also offered the ability to make a fourth proffer in the case after hearing the judge's ruling, but didn't do that.

b. PRACTICE POINTER- Again, need to constitutionalize objections. If a judge is preventing you from calling a witness, you need to object that the judge is violating the right to call for evidence in your favor, due process, right to present a defense, etc.

c. NOTE- the opinion is very unclear how we get to the procedural posture at issue in this case. For some reason, before the defense has called the witness, the defense is being forced to proffer what its expert's testimony will be. This is far outside the norm in a criminal case. The defense should not be forced to reveal its strategy at all. Courts certainly do not force the Commonwealth to proffer what the witnesses' testimony will be before they are called to testify.

i. This is a troubling trend I have seen in several cases where the defense is forced to justify being able to call witnesses before they actually take the stand.
ii. This flies in the face of the right to call for evidence in one's favor under Article I, Sec. 8 of the Virginia Constitution and the right to present a defense under the Sixth and Fourteenth Amendments to the Federal constitution.
iii. If a judge is making you justify why you are putting on a witness, you should also object to that.
iv. Also, if a judge is going to prevent you from calling a witness, always put the witness on the stand and ask them every question you can think of and get all of the answers you can think of. That is the only way to have a really good proffer for the court of appeals.

V. Cross examination of Expert

a. Welch v. Commonwealth, 78 Va. App. 287 (2023)
   i. During the trial, the defense attorney was using the information in the 2009 National academy of sciences report on forensic science and the 2016 President's Council of Advisors on Science and Technology Report on Forensic Science to cross examine the commonwealth's expert on firearm and toolmark.
   ii. During cross, the trial court, *sua sponte*, prevented the defense from crossing using information from the reports as the expert had taken issue with these reports at a pretrial hearing.

iii. The Court of Appeals held that this was not an abuse of discretion because the expert did not acknowledge these reports as learned treatises under Rule 2:706.
iv. The defense did not object to, or assign error to, the trial court's sua sponte involvement in cross. The defense did not argue that this was a constitutional error violating the right to confront and cross examine witnesses against him under the Sixth and Fourteenth Amendments.

b. PRACTICE POINTER- Again, you need to constitutionalize your objections. Again, this can create a different standard of review and a different harmless error standard. It is not so easy to dismiss a constitutional claim.

Damages Experts

1. Do you need one?

a) How complicated is the calculation and theory? Who will testify on the calculation?

b) Courts have permitted owners or officers to testify on the value or projected profits of a business without qualifying as an expert when it is based on their knowledge and participation in the day-to-day affairs – not litigation created calculations. *See* FRE 701 Advisory Committee notes.

c) Non-retained experts are typically limited to testifying about opinions formed through direct observation.

d) If testimony exceeds direct observation - still must provide a disclosure of subject matter and summary of facts and opinions under FRCP 26(a)(2)(C). *See Timpson by & through Timpson v. Anderson Cnty. Disabilities & Special Needs Bd.,* 31 F.4th 238, 253 (4th Cir. 2022) (prohibiting hybrid witness's testimony when summary of facts and opinions not disclosed).

e) Cases

i. *Nichols Const. Corp. v. Virginia Mach. Tool Co., LLC,* 276 Va. 81, 91, 661 S.E.2d 467, 472–73 (2008) (trial court did not err in awarding damages based on expert's opinion when do rebuttal evidence was presented)

1. *"*At trial, Nichols Construction offered no evidence to rebut the accuracy or reasonableness of Howard's [expert's] testimony regarding the cost to remedy Nichols Construction's breach of the contract.. . . Nichols Construction was required to proffer competent evidence either that the cost of replacement of the roof was less than Virginia Machine Tool contended, or that an award of cost damages would be grossly disproportionate and result in economic waste. In the absence of such evidence, the circuit court as the trier of fact would have been required to resort to speculation and conjecture in order to find that cost damages in accord with Howard's estimate was not the appropriate remedy."

ii. *Advanced Training Grp. Worldwide, Inc. v. Proactive Techs. Inc.,* No. 19-CV-505, 2020 WL 4574493, at *2 (E.D. Va. Aug. 7, 2020) (granting motion in limine to prohibit evidence related to any claimed damages) (on appeal)

1. "The result of this protracted litigation of plaintiffs damages expert designation is that ATG is precluded from offering expert testimony on damages at trial. But importantly, ATG's counsel represented throughout the litigation of the inadequate expert designation issue that damages expert testimony was not necessary to ATG's case and that ATG could and would provide damages evidence through lay witnesses and documentary evidence."

2. "Of course, it is true that in appropriate circumstances ATG *could* have presented damages testimony through lay testimony in this case.[19] But here ATG has not met its discovery obligations (i) to provide ProActive with a proper damages computation with supporting documentation as required by Rule 26(a)(1), Fed. R. Civ. P., and (ii) to identify lay witnesses that would testify at trial as to the damages computation provided to ProActive as required by Rule 26(a)(1), Fed. R. Civ. P. Because ATG has not met either Rule 26(a)(1) requirement, ProActive remains in the dark about the specific damages ATG intends to assert at trial. Accordingly, this factor weighs strongly in favor of the exclusion of any damages evidence at trial because ATG has offered no explanation for its failure to meet its requirements under Rule 26(a)(1)."
3. Note 19 - Whether ATG actually has sufficient evidence to prove damages without an expert is neither reached nor decided here. It is unnecessary to reach or decide that question because ATG has failed to meet its discovery obligations pursuant to Rule 26(a), Fed. R. Civ. P., for the reasons set forth *infra.*

iii. *MGMTL, LLC v. Strategic Tech.,* No. CV 20-2138-WBV-MBN, 2022 WL 474161, at *8 (E.D. La. Feb. 16, 2022)

1. "The Court agrees with STI that MGMTL has failed to establish that Menes is qualified to offer an expert opinion regarding the "fair market value or reasonable exclusive licensing fee for all rights to SMART…for a period of five years as $7,650,000 as a minimum and likely $89,870,000."[86] While there is evidence before the Court indicating that Menes has experience in the field of security management,[87] which STI does not appear to dispute,[88] that experience does not automatically qualify him to provide expert testimony regarding the fair market value or reasonable exclusive licensing fee for software in a copyright infringement case. Likewise, the fact that Menes is the co-creator of SMART and has personal knowledge about the development costs and field-testing of the software reveals nothing about Menes's knowledge or experience in calculating a reasonable licensing fee for a software application. There is no evidence before the Court indicating that Menes has any professional or significant experience-based background, experience, training, or education in valuing software licensing or that Menes or MGMTL have ever sold a software license.[89] As STI points out, Menes testified during his deposition that he has never sold a

software license to anything he has created, and also confirmed that MGMTL has never sold a software license to anyone."

2. "Thus, while Menes may offer testimony regarding MGMTL's discussions with the Marine Forces Reserve to sell a one-year license of the SMART software application for $30,000, as such testimony was likely "formed as a result of [his] knowledge of the case gained through direct observation,"[95] any opinions regarding the fair market value or reasonable exclusive licensing fee for SMART would "stray into opinions that [he] may have developed in preparation for the litigation of this matter."[96] Any such testimony would be subject to the expert report requirement of Fed. R. Civ. P. 26(a)(2)(B).[97] MGMTL has not directed the Court to any expert report prepared by Menes."
3. "Menes admitted, however, that he did not know how much STI was willing to pay to license SMART,[141] that MARFORRES never actually licensed the SMART software for $30,000,[142] and that MGMTL has never sold technical services or a software license to anyone.[143] More importantly, however, Menes further testified that the price of a one-year license for the SMART software application was set at $30,000 because that "seems to be the threshold that could be charged on a government charge card by, of course, an authorized approved agent with -- you know, with those charge cards."[144] Thus, the evidence before the Court suggests that Menes valued a one-year license at $30,000 based upon the credit card limit of its potential customer, rather than actual information regarding its fair market value."
4. "The Court finds that Menes's calculations of the fair market value or reasonable exclusive licensing fee for SMART as "$7,650,000 to $89,870,000" were based solely upon unreliable methodologies, including assumptions made from conversations he had with Steve McMurtry and Whit Himel, a credit card limit, and an unconsummated sale of a one-year license to MARFORRES. Menes very plainly stated that he performed no market analysis to verify the reasonableness or accuracy of his calculations. In fact, it is clear to the Court that Menes performed no independent research, beyond his discussions with Steve McMurtry or Whit Himel, regarding the numbers he used to calculate the fair market value or reasonable exclusive licensing fee for SMART."

iv. *See also Echo, Inc. v. Timberland Machines & Irrigation, Inc*., 2011 WL 148396 (N.D.Ill. 2011) (striking president's affidavit, granting summary

judgment, and holding "a layperson lacking knowledge of accounting principles could not arrive at such complicated determinations….would circumvent the restrictions on expert testimony…"); aff'd 661 F.3d 959 (7th Cir. 2011)

v. *James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207 (10th Cir. 2011) (lay opinion of plaintiff's principal as to value of plaintiff's real estate, impacted by depreciation and deterioration, improperly admitted as requiring technical or specialized knowledge.)

f) Bias issues?

i. *Keystone Transportation Sols., LLC v. Nw. Hardwoods, Inc.,* No. 5:18-CV-00039, 2019 WL 1756292, at *3 (W.D. Va. Apr. 19, 2019)

1. "Regardless of the basis, the court concludes that Steffens should not be permitted to testify as an expert because of the clear bias he has as a result of his direct financial incentives in the outcome of this case. While his testimony as a fact witness is obviously appropriate despite that bias, allowing him to offer "expert" opinions under these circumstances would be confusing and potentially misleading to the jury."

2. If you have options, then pick the right one.

a) Are they truly an expert by education or experience?

b) Do they know more than you do about the subject matter?

c) Have they been admitted as an expert at trial before <u>in that area</u>?

d) Has their report or testimony ever been struck? (Run your own search)

e) Appreciate the difference between the plaintiff and defense expert. The plaintiff expert may have to make assumptions that are tied to other experts. Be careful. The defense expert simply assumes liability.

f) Don't use a consumer perception expert for damages. *See New Look Party Ltd. v. Louise Paris Ltd.*, 2012 WL 251976, *10 n.8 (S.D.N.Y. Jan. 11, 2012)

i. The much-ballyhooed report by plaintiff's expert Thomas Maronick, (Pl.'s Br., Ex. G (the "Maronick Report")), is given no weight to the extent it purports to evidence lost sales. Under Federal Rule of Evidence 702, we do not believe that those conclusions of his report are "based on sufficient facts or data" or that they "will help the trier of fact to understand the evidence or to determine a fact in issue." (*See* Decl. of Louis S. Ederer, Ex. A, Dep. of Thomas J. Maronick 79:20–81:16 (testifying that he had no evidence of lost sales, had not tried to calculate lost sales through sales trend data, and based his conclusion on "[j]ust logic" that if a person buys a product, she probably will not buy that same product from another source).)

3. **Make sure they opine on damages <u>for each count</u>.**
    a) *Collelo v. Geogrpahic Services, Inc.*, 283 Va. 56, 74-75 (2012) (Significantly, however, Riley stated at trial that she would not testify regarding any damages related to GSI's tortious interference with a contract claim); *id.* ("Additionally, Kace G. Clawson ("Clawson") testified for GSI as an expert in the field of business valuation. Clawson stated, however, that he would testify solely regarding trade secret misappropriation.").
        i. "Accordingly, after viewing the evidence on appeal in the light most favorable to GSI, we hold that the evidence was insufficient to: (1) prove, with any reasonable certainty, the amount of damages incurred as a result of Collelo's alleged breach of contract; and (2) prove that GSI incurred damages as a result of Autometric's and/or Boeing's tortious interference with a contract. As a result, we hold that the trial court did not err in striking GSI's breach of contract and tortious interference with a contract claims."

4. **Pressure test the methodology; make sure inputs are reliable**
    a) *Lyle, Siegel, Croshow & Beale, P.C. v. Tidewater Capital Corp.*, 249 Va. 426, 436-37 (1995):
        i. On voir dire, however, Walston stated that this was the first time that he had been engaged to testify as an expert. He also stated that he had had little experience in collecting on contracts similar to those in the present case. Further, in reaching his conclusions, he intended to rely on certain statistics, issued by a national collectors association, but he admitted that he was not sure whether the statistics were based upon the collection of contracts similar to those in the present case.
        ii. The trial court acknowledged that Walston may be an expert in certain types of collections. However, the court refused to qualify him as an expert in relation to the contracts involved in the present case.
        iii. The decision whether a witness is qualified as an expert is within the discretion of the trial court, and the trial court's decision in the matter will not be reversed unless it clearly appears that the court abused its discretion. *City of Fairfax v. Swart,* 216 Va. 170, 172, 217 S.E.2d 803, 805 (1975); *see Town & Country Properties, Inc. v. Riggins,* 249 Va. 387, 398, 457 S.E.2d 356, 364 (1995) (this day decided). We do not think the trial court abused its discretion in refusing to qualify Walston.