GEORGE MASON AMERICAN INN OF COURT

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"I OBJECT" – MAKING & RESPONDING TO OBJECTIONS

Program Team

- *Hon. Stanley P. Klein (Ret.), Fairfax County Circuit Court*
- *Hon. Jonathan D. Frieden, Fairfax County Juvenile & Domestic Relations District Court*
- *Craig J. Franco, Esq., Odin, Feldman & Pittleman, P.C.*
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I. Generally

A. Should you object?

1. Are you right?

2. Do you care?

3. If either answer is no, you should not object.

B. Making Objections

1. "[A]n objection must be stated concisely and in a nonargumentative and nonsuggestive manner." Va. Prac. Civil Discovery § 6:37 (stating the rule applicable to both discovery and trial objections).

2. How To

a. Stand. *See* Kenneth J. Melilli, Objecting and Responding Effectively, 23 Am. J. Trial Advoc. 559, 564–65 (2000) [hereinafter "Objecting & Responding"] ("Whenever an attorney addresses the court, the attorney should stand. Because an objection or a response to an objection is an address to the court, all such communications should be made from a standing position. Even if local procedure is to conduct witness examinations while seated, counsel should rise to object or respond. Unless directed otherwise by the court, counsel should remain standing until the court has ruled, without regard to which attorney is addressing the court.").

b. Use some form of the word "objection." *See* Objecting & Responding at 577; Latour "LT" Lafferty, Trial Objections: The Way of Advocacy, 11 Suffolk J. Trial & App. Advoc. 1, 3 (2006) [hereinafter "Way"].

c. If the applicable rule of evidence is not readily apparent from the context, identify the applicable rule of evidence. Way at 4.

d. "If asked, or prompted, by the trial court, the advocate should succinctly explain why the trial objection is well-founded." Way at 4.

e. The trial court will either rule on the objection or require the proponent to respond.

f. Listen to the proponent's response, ready to respond if the trial court wishes.

C. Responding to Objections

1. How To

a. Withdraw or rephrase the question or wait for the trial court to rule or prompt a reply.

b. If prompted for a reply, reply succinctly.

c. Direct arguments to the judge, never addressing opposing counsel directly. *See* Objecting & Responding at 564 ("In the colloquy of the objection, there should be only two lines of discourse, one between the court and objecting counsel, and the other between the court and responding counsel. Objecting counsel and responding counsel should not address each other. This protocol signals respect for the court, minimizes the potential for unseemly exchanges between counsel, and avoids alienating the trial judge by excluding her from the process."); Way at 4.

d. If necessary, request permission to approach the trial court at "sidebar" to argue the objection. *See* Objecting & Responding at 568 ("A request to "approach the bench" or a request for a "sidebar" can be used in situations in which the resolution of an objection requires providing the court with information that, at least until the objection is overruled, should not be received by the jury. Most trial judges appreciate judicious use of such requests to avoid prejudicing one side or the other.").

e. If your argument prevails, repeat the question. *See* Objecting & Responding at 585.

f. Do not conclude your examination on a sustained objection. *See* Objecting & Responding at 586.

D. Special Considerations

1. Speaking Objections

a. Are prohibited in depositions (and, presumably, trial). See Va. Sup. Ct. R. 4:5(c)(2). *See also* May Law LLP, Supreme Court of Virginia Bans "Speaking Objections." https://maylawllp.com/supreme-court-of-virginia-bans-speaking-objections/; Peter Vieth, "High Court sets new rule on 'speaking objections,' Virginia Lawyers Weekly,

https://valawyersweekly.com/2013/01/10/high-court-sets-new-rule-on-speaking-objections/ (Jan. 10, 2013).

b. The failure to object to speaking objections does not automatically establish the prejudice prong of ineffective assistance of counsel. When the trial judge admonished the offending attorney and when the petitioner "fail[ed] to articulate how the speaking objection affected the victim's testimony or impacted the trial," the Virginia Supreme Court held the petitioner failed to establish the prejudice prong of ineffective assistance. *Nobrega v. Warden of the Greensville Correctional Center*, 2007 Va. LEXIS 147 at *11-12 (2007).

2. Continuing Objections

a. Requires some apparent likelihood that repetitious objections would otherwise be required to protect a party's interests

b. "[W]here evidence is introduced that departs from that avowed to the trial court and upon which the trial court ruled, the responsibility to contemporaneously object rests with counsel, not the trial judge." *Rodriguez v. Commonwealth*, 18 Va. App. 277, 286 (1994).

c. "Defense counsel's reference to his 'earlier objection,' and his expressed wish that it be 'continuing' failed to put the trial court on fair notice that a new ground of objection was being raised. . . . We hold that the defendant's 'continuing' objection was insufficient to meet the requirements of 'reasonable certainty' contained in Rule 5:25." *Fisher v. Commonwealth*, 236 Va. 403, 413–14, 374 S.E.2d 46, 52 (1988).

E. Preservation of Issues for Appeal

1. Failure to preserve an issue on the record at trial will preclude that issue from being argued on appeal, and is considered a waiver. *See Spitzil v. Minson*, 231 Va. 12, 18 (1986).

2. "Error may not be predicated upon admission or exclusion of evidence, unless: (1) As to evidence admitted, a contemporaneous objection is stated with reasonable certainty as required in Rule 5:25 and 5A:18 or in any continuing objection on the record to a related series of questions, answers or exhibits if permitted by the trial court in order to avoid the necessity of repetitious objections; or (2) As to evidence excluded, the substance of the evidence was made known to the court by proffer." Va. Sup. Ct. R. 2:103(a).

3. Rule 5A:18

a. "No ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review." Va. Sup. Ct. R. 5A:18.

b. Contemporaneous Objection Rule

(1) "Rule 5A:18 requires an 'objection [be] stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice.'" *Edwards v. Commonwealth*, 41 Va. App. 752, 760–61, 589 S.E.2d 444, 448 (2003) (citing Va. Sup. Ct. R. 5A:18).

(2) An objection will only be preserved if made when the objectionable evidence is offered. *Jones v. Commonwealth*, 32 Va. App. 30, 42 (2000) ("Objection made to the admissibility of evidence is timely only if raised when the questioned statement is made.").

(3) This allows "the circuit court to remedy the error, while also giving 'the opposing party the opportunity to meet the objection at that stage in the proceeding'" *Maxwell v. Commonwealth*, 287 Va. 258, 265 (2014).

(4) Bringing an objection on the admissibility of evidence during a motion to strike, objecting to evidence offered during an opposing party's case, is not timely. *Doherty v. Aleck,* 273 Va. 421, 426 (2007).

c. Specificity Requirement

(1) "Under this rule, a specific argument must be made to the trial court at the appropriate time, or the allegation of error will not be considered on appeal." *Edwards*, 41 Va. App. at 760–61, 589 S.E.2d at 448 (citing *Mounce v. Commonwealth*, 4 Va.App. 433, 435, 357 S.E.2d 742, 744 (1987)).

(2) The objection's legal basis must be specifically stated. A mere statement that a ruling is contrary to the law will not meet the specificity requirement to

preserve the objection. Rule 5A:18; *Townsend v. Commonwealth*, 270 Va. 325, 332 (2005).

(3) "A general argument or an abstract reference to the law is not sufficient to preserve an issue." *Edwards*, 41 Va. App. at 760–61, 589 S.E.2d at 448 (citing *Buck v. Commonwealth*, 247 Va. 449, 452–53, 443 S.E.2d 414, 416 (1994); *Scott v. Commonwealth*, 31 Va.App. 461, 464–65, 524 S.E.2d 162, 164 (2000)).

(4) "Making one specific argument on an issue does not preserve a separate legal point on the same issue for review." *Id.* (citing *Clark v. Commonwealth*, 30 Va.App. 406, 411–12, 517 S.E.2d 260, 262 (1999) (preserving one argument on sufficiency of the evidence does not allow argument on appeal regarding other sufficiency questions)).

4. Rule 5:25

a. "No ruling of the trial court, disciplinary board, commission, or other tribunal before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to preserve the issue for appellate review." Va. Sup. Ct. R. 5:25.

b. "Rule 5:25 exists to protect the trial court from appeals based upon undisclosed grounds, to prevent the setting of traps on appeal, to enable the trial judge to rule intelligently, and to avoid unnecessary reversals and mistrials." *Fisher v. Commonwealth*, 236 Va. 403, 414, 374 S.E.2d 46, 52 (1988) (citing *Woodson v. Commonwealth*, 211 Va. 285, 176 S.E.2d 818 (1970), cert. denied, 401 U.S. 959, 91 S.Ct. 990, 28 L.Ed.2d 244 (1971); *Norfolk So. R. Co. v. Lewis*, 149 Va. 318, 141 S.E. 228 (1928); *Keeney v. Commonwealth*, 147 Va. 678, 137 S.E. 478 (1927)).

5. Proffers

a. If an objection excludes evidence, the offering attorney should proffer the evidence to ensure that it is part of the appellate record. The proffer must contain all information necessary to resolve the issue at trial and to provide a

sufficient record for appellate review. *Smith v. Hylton*, 14 Va. App. 354, 357-358 (1992).

b. The burden is on the appellant to ensure the record is sufficient to enable the appellate court to identify and resolve the assignments of error. *Galumbeck v. Lopez*, 283 Va. 500, 554-555 (2012) ("As with excluded evidence, absent a transcript or written statement of the facts that captures the arguments made at trial, [the appellate court] has no basis upon which to review the trial court's ruling.").

c. When the trial court excludes documents or exhibits, request that the court mark the document "excluded" and include it within the record to avoid ambiguity on appeal.

6. Requested Relief

a. Request the specific remedy sought from the trial court, such as a cautionary instruction or a mistrial. *See example Maxwell v. Commonwealth*, 287 Va. 258, 267-268 (2014).

b. Do not merely "question[] the correctness" of the trial court, but "expressly indicate the action . . . the trial court [should] take." *Widdifield v. Commonwealth*, 43 Va. App. 559 (2004); *see also* Rule 5A:18.

7. Ruling

a. Parties must ensure that there is a ruling on the issue. Rule 5A:18; *Fisher v. Commonwealth*, 16 Va. App. 447, 431 S.E.2d 886 (1993).

b. The failure to renew an objection and obtain a ruling will waive the objection or argument. *See Green v. Commonwealth*, 266 Va. 81 (2003) (defendant's failure to renew a motion to change the venue or remind the trial court that it was still pending constituted waiver because there was no ruling).

8. Formal exceptions are unnecessary. It is sufficient "that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him on motion for a new trial or on appeal. No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again in order to preserve his right to appeal, challenge, or move for reconsideration of, a ruling, order, or action of the court. No party shall be deemed to have agreed to, or acquiesced in, any written order of a trial court so as to forfeit his right to contest such order on appeal

except by express written agreement in his endorsement of the order. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal." Va. Code Ann. § 8.01-384.

9. Preserving the Record Despite the Trial Judge

   a. If the judge cuts you off: State that you did not finish the objection and either keep talking or request permission to finish.

   b. If the judge rules before objection is finished: State that the judge ruled before you finished and you would like the judge to allow you to finish presenting your argument and reconsider in light of the full argument. Present the full argument even if the ruling was in your favor, to ensure a complete record on appeal.

   c. If the judge fails to make a ruling: Tell the judge that you need a ruling on the outstanding objection. "As I know your honor is well aware, the Rule requires that I request a specific ruling on the objection that I have made…" If the Judge still fails to make a ruling, state that explicitly for the record.

   d. If the judge outright refuses to make a ruling: Insist on articulating the basis for your objection at that time. Failure to do so may result in your objection being waived, even if the court itself suggests later articulation. *Maxwell v. Commonwealth*, 287 Va. 258, 264 (2014). If, after insisting on contemporaneous objection, the judge still refuses to rule, state that explicitly for the record.

   e. If the judge makes you approach or argue at sidebar without a court reporter: Request that the court reporter join you by the bench so that the reporter can transcribe what is said; request that the jury be excused so that you can make the objection on the record; if the judge persists, do the bench conference, but make sure to follow-up and put all of the arguments and ruling on the record.

   f. If the judge tells you to move along which prevents you from making your argument: Ask the judge, "May I be heard?" or "I must make my objection and argument now to ensure it is contemporaneous." Request that the jury be excused and state, "I need to make the record now while it is fresh in my mind otherwise I will forget to raise certain points to the detriment of my client." If the judge persists

in preventing you from making your objection, reiterate your continued request to be able to make contemporaneous objections on the record to protect your client's right to a fair trial.

g. If the judge rushes you: If you are taking too much time, try to be succinct but if you are moving at the right pace, ignore the judge or say "thank you, I will move it along" but continue to move at whatever pace you feel is appropriate.

h. If the judge becomes verbally abusive: If the judge is making a valid point, modify your behavior but if not, calmly wait for the judge to finish then calmly continue; tell the judge you would like to make a record but their conduct is making it impossible for your client to get a fair trial and is violating his constitutional rights to due process, effective counsel, etc. If the judge's abuse is occurring in the presence of the jury, it is objectionable in and of itself and you should contemporaneously object to the behavior; ask for a mistrial; describe the judge's tone and body language for the record.

i. If the judge threatens to find you in contempt: Know the judge so that you know how to deal with the judge when he resorts to threats; ignore the threat but be prepared to deal with the consequences; make a record on how the judge's threats are negatively affecting your client's ability to get a fair trial.

j. If the judge wants you to agree to a lesser remedy (curative instruction instead of a mistrial): First, make sure you get a ruling on the motion for a mistrial. If you agree to a curative instruction after having a mistrial motion denied, the appellate court will consider your motion for a mistrial argument waived.

II. Motions *in Limine*

A. Virginia Courts

1. In Criminal Cases

a. Rule 3A:9(b)(2) provides that "any defense or objection that is capable of determination without the trial of the general issue may be raised by motion before trial."

b. "A motion before trial raising defenses or objections must be determined before the trial unless the court orders that it be deferred for determination at the trial of the general issue." Rule 3A:9(b)(4).

c. "Thus, motions *in limine* are often used in Virginia courts for the Commonwealth to object to evidence that a defendant may seek to introduce as part of his defense." *Warren v. Commonwealth*, 76 Va. App. 788, 803–04, 883 S.E.2d 709, 717 (2023), appeal granted (Oct. 25, 2023) (citing *Long v. Commonwealth*, 23 Va. App. 537, 541, 478 S.E.2d 324 (1996)).

2. In Civil Cases

a. Basis

(1) "Although a Virginia trial court's authority to decide motions *in limine* in a civil case is not derived from either statute or rule, motions *in limine* have long served a salutary purpose in the litigation process." *Park v. Robinson*, 46 Va. Cir. 266 (Fairfax Co. 1998) (citing *Harward v. Commonwealth*, 5 Va. App. 468, 474 (1988) (motions *in limine* "serve worthwhile functions of narrowing issues, preventing trial delay, avoiding expense, and promoting judicial efficiency"); GUERNSEY, VIRGINIA EVIDENCE, ' 2-10 (1992)). *See also Virginia Nat. Gas, Inc. v. Colonna's Ship Yard Inc.*, 103 Va. Cir. 326 (Norfolk 2019).

b. When the Admissibility of Evidence Should be Ruled Upon Pretrial

(1) "Courts are generally presented with three different categories of evidentiary issues when considering motions in limine:

(a) Issues that cannot be ruled on pretrial (*see, e.g., Parker v. Elco Elevator Corp.*, 250 Va. 278, 281 (1995) (reversible error to preclude party tendering an expert witness from establishing the expert's qualifications during voir dire at trial));

(b) Issues that can be conclusively determined before trial (e.g. polygraph evidence; alleged ambiguity of a contract); and

(c) Issues that should be ruled on pretrial, preferably after the close of discovery, so that (a) the parties can reserve their trial preparation resources for matters that will be admissible at trial, and (b) trial judges can insulate juries from inadmissible and prejudicial evidence (e.g. prior bad acts;

post-incident remedial repairs) during opening statements and the examination of witnesses before the court has an opportunity to rule on the admissibility of such evidence." *Park v. Robinson*, 46 Va. Cir. 266 (Fairfax Co. 1998).

(d) "[I]f the evidentiary considerations before the trial court fall into either the second or third category, the court should rule on the motion pretrial so as to prevent prejudice, promote judicial economy, and reduce the expenses of the parties and prospective witnesses. When appropriate, a court should state in its order that the ruling is intended to be absolutely determinative at trial. In those cases where, based upon the proffers of counsel at a pretrial hearing, a judge believes that certain evidence will be inadmissible and prejudicial but should be subject to potential review by the trial judge upon consideration of the evidence actually presented at trial, the court should enter an order precluding the party tendering the evidence from mentioning the evidence in the party's opening statement or seeking to elicit testimony concerning the evidence without the express permission of the judge at trial." *Id. See also Virginia Nat. Gas, Inc. v. Colonna's Ship Yard Inc.*, 103 Va. Cir. 326 (Norfolk 2019).

III. Special Concern in Custody and Visitation Cases – The Effect of the "Best Interests" of the Child on Admissibility

A. "Generally, the admissibility of evidence 'is within the broad discretion of the trial court, and a[n] [evidentiary] ruling will not be disturbed on appeal in the absence of an abuse of discretion.'" *Surles v. Mayer*, 48 Va. App. 146, 177, 628 S.E.2d 563, 578 (2006) (citing *Blain v. Commonwealth*, 7 Va.App. 10, 16, 371 S.E.2d 838, 842 (1988); see also *Gonzales v. Commonwealth*, 45 Va.App. 375, 380, 611 S.E.2d 616, 618 (2005) (en banc)).

B. "However, when presiding over a hearing concerning the custody and care of a child, the trial court's paramount consideration is the child's best interests. . . . *All other matters are subordinate.*" *Florio v. Clark*, No. 2633-04-1, 2005 WL 1719093, at *3 (Va. Ct. App. July 26, 2005) (emphasis added) (citing *Toombs v. Lynchburg Div. of Soc. Servs.*, 223 Va. 225, 230, 288 S .E.2d 405, 407–08 (1982); *Farley v. Farley*, 9

Va.App. 326, 327–28, 387 S.E.2d 794, 795 (1990); *Mullen v. Mullen*, 188 Va. 259, 269, 49 S.E.2d 349, 354 (1948)).

C. "When exercising its discretion in the context of a custody dispute, the trial court must 'give primary consideration to the best interests of the child.'" *Id.* (citing Virginia Code § 20–124.2(B)).

D. "Accordingly, the trial court has broad latitude to admit any evidence that is relevant to the past, present, or future welfare of the child." *Id.* (citing *Keel v. Keel*, 225 Va. 606, 613, 303 S.E.2d 917, 922 (holding that "the trial court should consider the broadest range of evidence" so that it may "make a rational comparison between the circumstances of the two parents as those circumstances affect the children"); *Armistead v. Armistead*, 228 Va. 352, 357, 322 S.E.2d 836, 838 (1984); *M.E.D. v. J.P.M.*, 3 Va.App. 391, 407, 350 S.E.2d 215, 225 (1986)).

E. "When exercising its discretion to admit or exclude evidence during a child custody or visitation proceeding, the trial court must be cognizant of whether it is ruling upon the admissibility of evidence that may be a vital source of information relating to the child's best interests. Thus, a sanctions-oriented ruling that excludes evidence bearing directly on the child's best interests may, under certain circumstances, constitute an abuse of discretion." *Florio v. Clark*, No. 2633-04-1, 2005 WL 1719093, at *4 (Va. Ct. App. July 26, 2005) (citing *Armistead v. Armistead*, 228 Va. 352, 357, 322 S.E.2d 836, 838 (1984) (reversing and remanding custody decree where "the chancellor excluded evidence which may have been relevant to the determination of [the child's] best interests"); *M.E.D. v. J.P.M.*, 3 Va.App. 391, 407, 350 S.E.2d 215, 225 (1986) (reversing and remanding visitation order where the trial court "excluded evidence on a matter directly concerning the child's best interest," noting that the trial court erroneously "focus[ed] ... more upon the father's interests than upon the child's best interests"); *cf. Logan v. Fairfax County Dep't of Human Dev.*, 13 Va.App. 123, 132–33, 409 S.E.2d 460, 465 (1991) ("Mindful of the court's primary goal of ensuring [the children's] best interest, we cannot say the trial court abused its discretion by considering evidence of [mother's] neglect of her other children.")).

IV. Admissibility of the Otherwise Inadmissible Basis of an Expert Witness's Opinion

A. "In any civil action any expert witness may give testimony and render an opinion or draw inferences from facts, circumstances or data made known to or perceived by such witness at or before the hearing or trial during which he is called upon to testify. The facts, circumstances or data relied upon by such witness in forming an opinion or drawing inferences, if of a type normally relied upon by others in the particular field of expertise in forming opinions and drawing inferences, need not be admissible in evidence." Va. Code Ann. § 8.01-401.1.

B. The purpose of this statute "was to authorize the admission into evidence of the opinions of experts testifying in court, notwithstanding the fact that the opinions were based upon inadmissible information, provided such information is of the kind reasonably relied upon by other experts in the witness' particular field of expertise. The federal rules are silent, as is our statute, with respect to the admissibility of the otherwise inadmissible information upon which the expert's opinion is based, at least upon the expert's direct examination." *McMunn v. Tatum*, 237 Va. 558, 565, 379 S.E.2d 908, 912 (1989).

C. Evolution of the Law

1. *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908 (1989)

   a. The case involved an appeal from a plaintiff's judgment in an action for dental malpractice.

   b. The pertinent question was "whether it was error to preclude an expert witness from relating, as the basis for his opinion, the hearsay opinions of others."

   c. The plaintiff was treated by Dr. Ghulam Qureshi, a hematologist practicing at the Medical College of Virginia. During his treatment, Dr. Qureshi attributed the patient's continued bleeding to a platelet disorder known as von Willebrand's disease. At trial, however, he was called as an expert witness for the defendant dentist. He then testified that he had changed his opinion and had concluded that the plaintiff's bleeding was not caused by any organic disease but was self-induced.

   d. Plaintiff's counsel objected to this testimony. In a hearing outside the jury's presence, Dr. Qureshi said that his opinion was partially based upon a record of the plaintiff's treatment for iron deficiency anemia at the Mayo Clinic in 1981, where a physician had appended a note raising "the possibility of a factitious disease, you know, self-induced...." The physician at Mayo was quoted as having said, in his note, "There are patients who like to be patients." Dr. Qureshi also referred to an entry in the medical records at Duke, relating that a nurse there saw Mrs. Tatum insert her fingers into her mouth.

   e. The court ruled that Dr. Qureshi could state his opinion that the plaintiff's injuries were self-inflicted and could rely on the medical records from the Mayo Clinic and Duke with respect to factual matters, but that he could not express the opinions of other physicians because they were not available for cross-examination. He was specifically precluded from giving the opinion of the physician at the

Mayo Clinic to the effect that the plaintiff might have experienced "factitious disease" while there in 1981, and from telling the jury, in effect, that "other doctors agree with me." The defendant dentist appealed this ruling.

f. After noting that Virginia Code § 8.01-401.1 was based upon Federal Rules of Evidence 703 and 705, the court explained that "federal courts . . . have divided on the question whether traditional rules of evidence require the exclusion of hearsay offered on direct examination of an expert as the basis of his opinion; the majority hold that it should be excluded." *McMunn v. Tatum*, 237 Va. 558, 565, 379 S.E.2d 908, 912 (1989) (citations omitted).

g. Ultimately, the Court held that "Code § 8.01–401.1 does not authorize the admission in evidence, upon the direct examination of an expert witness, of hearsay matters of opinion upon which the expert relied in reaching his own opinion, notwithstanding the fact that the opinion of the expert witness is itself admitted, and notwithstanding the fact that the hearsay is of a type normally relied upon by others in the witness' particular field of expertise." *McMunn v. Tatum*, 237 Va. 558, 566, 379 S.E.2d 908, 912 (1989).

2. *Commonwealth v Wynn*, 277 Va. 92, 671 S.E.2d 137 (2009)

a. The case involved an appeal from a trial under the Civil Commitment of Sexually Violent Predators Act (the SVPA), Virginia Code §§ 37.2–900 through –920.

b. The pertinent question was whether the trial court erred in admitting pages from an expert witness's written report concerning the expert witness's examination of the respondent, where those pages contained hearsay.

c. The Commonwealth argued that the Court's holding in *McMunn* should be limited to "hearsay matters of opinion" upon which an expert relied and should not require the exclusion of hearsay matters of fact set forth in the expert witness's report.

d. The Court disagreed and explained that "[w]hether an expert relies upon the opinions of others or allegations of sexual misconduct in formulating an opinion, both constitute hearsay. While certain information may be of the type routinely used by experts in a given field of expertise when formulating their opinions, 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." *Commonwealth v. Wynn*, 277 Va. 92, 100, 671 S.E.2d 137, 141 (2009).

3. *Lawrence v. Commonwealth*, 279 Va. 490, 689 S.E.2d 748 (2010)

   a. The case involved an appeal from a trial under the Civil Commitment of Sexually Violent Predators Act (the SVPA), Virginia Code §§ 37.2–900 through –920.

   b. The pertinent question involved the admission of details of the allegations of unadjudicated sexual misconduct contained in police reports through a testifying expert witness. The trial court admitted the evidence but, unlike the trial court in *Wynn*, instructed the jury that "[t]estimony regarding allegations of behavior contained in police reports for which the Respondent has not been convicted was not offered or is not offered to prove that the behavior actually occurred, but only as the basis for the expert's opinion."

   c. The Court held that "[i] n this context, the improper admission of [hearsay evidence] evidence-which cannot effectively be restricted to proper use or purposes in the minds of the jury-cannot be remedied by the giving of a limiting instruction." *Lawrence v. Commonwealth*, 279 Va. 490, 497, 689 S.E.2d 748, 752 (2010) (citing *Coffey v. Commonwealth*, 188 Va. 629, 636, 51 S.E.2d 215, 218 (1949).