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Annual Survey of Virginia Law: Evidence

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EVIDENCE

*Charles E. Friend**

During 1986-1987, Virginia evidence law has been expanded and clarified. The Court of Appeals has proved to be an important source of evidentiary decisions, and the Supreme Court of Virginia has provided needed guidance in several areas.

I. IMPEACHMENT: PRIOR CONVICTIONS

The rule that a witness may be impeached by showing that the witness has previously been convicted of a crime is an ancient one; the current Virginia statute¹ has its roots in both English and Roman law. However, in modern times the exact nature of the rule has been both uncertain and controversial. Fortunately, recent cases have been of great assistance in clarifying it.

A. *What is "Moral Turpitude"?*

The Code of Virginia provides that a witness may be impeached by showing that the witness has been convicted of a "felony or perjury."² The Supreme Court of Virginia has declared that misdemeanors involving moral turpitude may also be shown.³ However, the question of what misdemeanors involve moral turpitude has been a troublesome one. For purposes of impeachment, where the sole issue is the veracity of the witness and not "morality" in the broader sense, our Supreme Court has limited the definition of "moral turpitude" to those crimes which involve dishonesty or lying. Indeed, the only misdemeanors which the court has to date permitted to be shown to impeach are (1) making a false statement⁴ and (2) petit larceny.⁵ The court has prohibited the showing

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1. VA. CODE ANN. § 19.2-269 (Repl. Vol. 1983).

2. VA. CODE ANN. § 19.2-269 (Repl. Vol. 1983).

3. *Hackman v. Commonwealth*, 220 Va. 710, 714, 261 S.E.2d 555, 559 (1980).

4. *Chesapeake & O. Ry. v. Hanes*, 196 Va. 806, 813, 86 S.E.2d 122, 126 (1955).

5. *Bell v. Commonwealth*, 167 Va. 526, 189 S.E. 441 (1937).

of convictions for such misdemeanors as drunkenness; illegal possession, transportation, or sale of liquor; gambling; and driving under the influence.⁶

In *Chrisman v. Commonwealth*,⁷ the Court of Appeals of Virginia was confronted with the question of whether a conviction for indecent exposure involved moral turpitude and could therefore be shown to impeach. In its opinion, the court noted that at common law a witness's veracity (or, originally, competency) was affected only by conviction of an "infamous" crime, i.e., treason, felony, or one of the crimes referred to as the *crimen falsi*—the latter being crimes which, today, are considered to be those which involve deceit or falsification. The court held that indecent exposure is not a crime of moral turpitude for purposes of impeachment.

Applying those rules to the present case, we hold that the crime of indecent exposure is neither a crime of treason nor a felony, nor is it a crime of the sort known as *crimen falsi*. . . . It does not involve deception, trickery, forgery, lying, cheating or stealing. It is not an infamous crime. It does not involve moral turpitude as that phrase has been applied at common law relating to incompetency or impeachment.⁸

Although a previous Supreme Court of Appeals opinion⁹ explored the subject at some length, the *Chrisman* decision provides a modern, helpful treatment, and clarifies the rule as it applies—or rather, does not apply—to misdemeanors which involve morals or morality in the broad sense, but do not touch upon "deception, trickery, forgery, lying, cheating or stealing."

B. *Impeachment of Witnesses: Can the Crime be Identified?*

As noted in the foregoing section, convictions of felony, treason, and misdemeanors involving moral turpitude may be shown to impeach a witness. A related but separate issue is the question of how much information about such convictions may be revealed to the trier of fact. In *Sadoski v. Commonwealth*,¹⁰ the Supreme Court of

6. See *Hackman*, 220 Va. at 715, 261 S.E.2d at 559.

7. 3 Va. App. 89, 348 S.E.2d 399 (1986).

8. *Id.* at 100, 348 S.E.2d at 405.

9. See *Bell*, 167 Va. 526, 189 S.E. 441.

10. 219 Va. 1069, 254 S.E.2d 100 (1979).

Virginia held that in a criminal trial where the witness is the accused in the case, the accused can be asked "the number of times he has been convicted of a felony, but . . . not the names of the felonies, other than perjury, and not the nature or details thereof."¹¹ In the same opinion, the court also noted that, where the witness was a person other than an accused, "the number and nature, but not the details" of the witness's felony convictions could be shown.¹² This rule, derived from earlier supreme court cases,¹³ was later specifically held in *Johnson v. Commonwealth*¹⁴ to apply to impeachment of *prosecution* witnesses by the defense.

This was a logical position, in view of the fact that the concern of the Supreme Court in *Sadoski* was the possible prejudicial effect upon the accused of a revelation to the jury that the accused had previously been convicted of a crime—a concern not present where it is the *prosecution's* witnesses who are being impeached. These cases left unanswered the question of whether the nature of the conviction could be disclosed where a *defense* witness (other than the accused) was being impeached.¹⁵

In the 1986 case of *Dammerau v. Commonwealth*,¹⁶ the Court of Appeals rejected a contention that the rule that witnesses other than the accused could be asked the names of the felonies of which they had been convicted should apply to prosecution witnesses only, and that defense witnesses should stand on the same footing as the accused for purposes of impeachment.

While it is true, as [the defense] states, that *Johnson* and *Hummel* involved the cross-examination of prosecution witnesses, we find nothing in the rule of law enunciated in those cases, nor in Code § 19.2-269, that limits that rule to witnesses for the Commonwealth.¹⁷

11. *Id.* at 1071, 254 S.E.2d at 101.

12. *Id.*

13. *See, e.g.*, *Hummel v. Commonwealth*, 217 Va. 548, 231 S.E.2d 216 (1977); *Harmon v. Commonwealth*, 212 Va. 442, 185 S.E.2d 48 (1971).

14. 224 Va. 525, 298 S.E.2d 99 (1982).

15. These cases have left other issues unresolved as well. For example, the cases have all dealt in terms of felonies. The question of what may be revealed about misdemeanors has been left open. Furthermore, the cases have all involved criminal trials; the applicability of these rules to civil cases has never been established.

16. 3 Va. App. 285, 349 S.E.2d 409 (1986).

17. *Dammerau*, 3 Va. App. at 290, 349 S.E.2d at 412. This result had already been signaled in the earlier case of *Johnson v. Commonwealth*, 2 Va. App. 447, 345 S.E.2d 303 (1986). In that case, the prosecution had questioned a defense witness about prior convictions without establishing that they were either felonies or misdemeanors involving moral

The state of the law as to the impeachment of witnesses in criminal cases by a showing of prior felony convictions therefore appears to be:

1. Where the witness is the accused, only the fact of conviction and the number of convictions may be shown. The nature of the crimes, or the details thereof, may not be shown.

2. Where the witness is any person except the accused, the fact of conviction, the number of convictions, and the nature of the crimes may be shown, and this applies whether the witness is testifying for the prosecution or the defense.¹⁸

C. *Naming the Crime for Reasons Other than Impeachment*

It is important to remember that the prohibition against naming the accused's crime applies only to *impeachment* of an accused. There are a number of instances in which, for purposes totally unrelated to impeachment, the prosecution may show that the accused has previously been convicted of a specific crime. Recent cases illustrating situations where the accused's prior crimes may be identified are discussed later in this article.¹⁹

II. CHARACTER EVIDENCE: SUPPORT OF WITNESSES

Virginia has been very liberal in permitting a party to introduce evidence in support of a witness's credibility. Although, in theory, supporting evidence is admissible only when a witness's credibility has been attacked by the opponent, in practice Virginia has placed a rather broad interpretation on this rule, and both trial and appellate courts have permitted such evidence whether the attack was direct or indirect, or, indeed, even where there has been no attack at all.²⁰

Nevertheless, the appellate courts have generally required that there be *some* showing that the witness's word has been called into

turpitude. The court reversed, saying: "Upon retrial, impeachment of witnesses, other than the accused, should be restricted to proof of felony and misdemeanor convictions involving moral turpitude, including evidence of the *number and nature*, but not the details of such convictions." *Id.* at 457, 345 S.E.2d at 308 (emphasis added).

18. The applicability of these rules to civil trials remains uncertain.

19. See *infra* notes 25-32 and accompanying text.

20. See C. FRIEND, *THE LAW OF EVIDENCE IN VIRGINIA* § 35 (2d ed. 1983).

question, even if this be no more than the introduction of contradictory evidence by the opponent,²¹ or that the witness's own testimony be "of such a character as to strain credulity."²²

There is some indication, however, that at the trial level such testimony is routinely allowed—indeed, even expected—as a matter of right, without any showing of any kind.

In some instances, this may be due to a blurring of the distinction between (a) character evidence for impeachment or support of witness credibility, and (b) character evidence as substantive evidence. This is especially true where the accused in a criminal trial has testified in his/her own behalf, and then immediately seeks to call witnesses to testify that the accused is a person of truthful character. Since the accused may "put his character in issue" for *substantive* purposes—i.e., to show that he/she is not the type of person who would commit the crime charged—it has become the practice in many courts to permit the accused to follow this procedure where only the accused's *veracity* is in issue, by virtue of the accused having taken the stand. This is apparently being done despite the fact that this is not substantive character evidence, but evidence in support of the witness/accused's truthfulness—and, as such, improper until the witness/accused's truthfulness has been attacked by the prosecution.

This is but one of many instances in which the failure to distinguish between character evidence for impeachment and character evidence for substantive purposes has led to the rules of one being applied to the other. In reality, of course, these are (or should be) two areas of evidence law which are quite distinct and which have entirely different rules.

Nevertheless, the practice of permitting the accused who has taken the stand to introduce witnesses immediately and automatically in support of his or her own credibility is widely accepted. Furthermore, once the practice is accepted and approved by our appellate courts, it then becomes a correct practice, regardless of its questionable origins.

A recent case which appears to approve the practice is *Byrdsong v. Commonwealth*,²³ in which the defendant announced *prior to*

21. See *Redd v. Ingram*, 207 Va. 939, 943, 154 S.E.2d 149, 153 (1967).

22. *Fry v. Commonwealth*, 163 Va. 1085, 1088, 177 S.E. 860, 861 (1935).

23. 2 Va. App. 400, 345 S.E.2d 528 (1986).

the trial that he was going to call four witnesses to testify that he had a reputation for truthfulness. The court of appeals upheld the right of the accused to follow this procedure, citing cases and principles of substantive character evidence. Since the court made no distinction in the case between character evidence for impeachment and character evidence for substantive purposes, it appears that the distinction has, in this particular area at least, been obscured, and that in the view of the court of appeals, at least, the rules normally restricting the use of character evidence to support veracity do not apply where the witness is the accused.

III. PRIOR CRIMES

Two familiar rules of Virginia evidence law are: (1) the rule that the Commonwealth may not attack the accused's character until the accused has put his or her character into issue, and (2) the rule, discussed in part I.B, that the Commonwealth may not show the specific nature of a felony conviction used to impeach an accused who has taken the stand to testify in his or her own behalf. Unfortunately, these rules have become so familiar that they tend to obscure one very important point: In certain instances, the Commonwealth *may* introduce evidence of the specific nature of prior convictions, and indeed, may introduce evidence of prior criminal acts which have not resulted in any conviction at all.

This may occur in, *inter alia*, the following situations:

A. *Where conviction of one crime is an element of another.*

An example of this arose in the case of *Glover v. Commonwealth*,²⁴ where the accused was charged with violating Code section 18.2-308.2(A),²⁵ which makes it unlawful for a person who has been convicted of certain named crimes to possess a handgun. The Commonwealth introduced evidence to show that the accused had previously been convicted of robbery, one of the crimes specified in the statute. The accused contended that this violated "the long established principle that evidence of specific prior criminal acts should be excluded because of its prejudicial effect on the defendant."²⁶ The court of appeals rejected this contention, stating:

24. 3 Va. App. 152, 348 S.E.2d 434 (1986).

25. VA. CODE ANN. § 18.2-308.2(A) (Cum. Supp. 1987). The specified crimes include class 1, 2, or 3 felony, rape, robbery, or a felony involving the use of a firearm.

26. 3 Va. App. at 161, 348 S.E.2d at 440.

The Commonwealth is entitled to prove the elements set forth in the indictment, and proof of the handgun charge under § 18.2-308.2(A) required proof of the previous conviction for robbery. The evidence was, therefore, offered and admitted for a legitimate purpose and not for the prohibited purpose of showing a predisposition on the part of the accused to commit crime.²⁷

Notice that in this situation, the evidence is not impeaching evidence, or is it character evidence; and it is admissible regardless of whether or not the accused takes the stand, or “puts his character in issue.”

B. *Where prior bad acts are relevant to prove elements or issues in the present trial.*

The so-called “prior crimes rule” permits a showing by the prosecution that the accused previously committed other crimes or “bad acts” where such evidence is relevant to prove an element or issue in the present trial.

[E]vidence which shows or tends to show the accused guilty of the commission of other offenses at other times is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense similar to that charged; but if such evidence tends to prove any other relevant fact of the offense charged . . . it will not be excluded merely because it also shows him to have been guilty of another crime.²⁸

In a more recent case, the Virginia Supreme Court stated that “[e]vidence of other offenses is admitted . . . if it tends to prove any relevant element of the offense charged.”²⁹

By these and other pronouncements, the court has made it clear

27. *Id.*

28. *Williams v. Commonwealth*, 203 Va. 837, 841, 127 S.E.2d 423, 426 (1962) (quoting *Day v. Commonwealth*, 196 Va. 907, 914, 86 S.E.2d 23, 26 (1955)).

29. *Donahue v. Commonwealth*, 225 Va. 145, 155, 300 S.E.2d 768, 773 (1983) (emphasis added); see *Scott v. Commonwealth*, 228 Va. 519, 323 S.E.2d 572 (1984); *Hawks v. Commonwealth*, 228 Va. 244, 321 S.E.2d 650 (1984); *Tuggle v. Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984), *vacated*, 471 U.S. 1096 (1985); *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371, *cert. denied*, 469 U.S. 873 (1984). This does not mean that such evidence is always admissible, however. Its admission is subject to the discretion of the trial court. *Collins v. Commonwealth*, 226 Va. 223, 307 S.E.2d 884 (1983). It is, of course, not admissible where not probative of the issues. *Strawderman v. Commonwealth*, 3 Va. App. 585, 352 S.E.2d 14 (1987). And its mention during the prosecution’s opening argument may be improper. *Fields v. Commonwealth*, 2 Va. App. 300, 343 S.E.2d 379 (1986).

that evidence of "prior crimes," like the conviction evidence discussed in the preceding paragraph, is not impeaching evidence, nor character evidence, but legitimate circumstantial evidence when offered on relevant issues. And, again, it is admissible regardless of whether or not the accused takes the stand, or "puts his character in issue."

C. *The sentencing phase.*

Recent cases have reemphasized that evidence of specific prior crimes may also be appropriate in the sentencing phase of the trial. For example, Code section 19.2-264.4 permits the showing of past criminal behavior to establish the "probability . . . that [the defendant] would commit criminal acts of violence that would constitute a continuing serious threat to society. . . ." ³⁰ This authorizes the introduction of evidence of past criminal acts to establish "future dangerousness." ³¹

IV. OBJECTIONS AND OFFERS OF PROOF

The appellate courts have again reminded us that objections to the evidence must be stated properly at the trial if the point is to be preserved for appeal. This is one of those ancient principles which, unfortunately, we sometimes forget.

An objection, to be effective, must be both specific and timely. ³² To be specific, it must set forth clearly the grounds of the objection. Stating that the objection is "for the record" is not enough. ³³ And, to be timely, the objection must normally be made at the time that the evidence is offered. ³⁴

Offers of proof have also received recent attention. If the opponent's objection is sustained, the failure to show for the record what the evidence would have been may be fatal on appeal. ³⁵

30. VA. CODE ANN. § 19.2-264.4(C) (Repl. Vol. 1983).

31. *Pruett v. Commonwealth*, 232 Va. 266, 351 S.E.2d 1 (1986), *cert. denied*, 107 S. Ct. 3220 (1987); *see also* *Beaver v. Commonwealth*, 232 Va. 521, 352 S.E.2d 342, *cert. denied*, 107 S. Ct. 3277 (1987).

32. *Marlowe*, 2 Va. App. 619, 347 S.E.2d 167.

33. *Royal v. Commonwealth*, 2 Va. App. 59, 341 S.E.2d 660 (1986).

34. *Marlowe*, 2 Va. App. 619, 347 S.E.2d 167.

35. *See* *Barrett v. Commonwealth*, 231 Va. 102, 341 S.E.2d 190 (1986); *Speller v. Commonwealth*, 2 Va. App. 437, 345 S.E.2d 542 (1986).

V. PRESUMPTIONS

The case law of the past year has included many references to presumptions, most of them "presumptions of fact," i.e., permissible inferences, not true presumptions.

One interesting case dealt with the famous "presumption" that a person in possession of recently stolen property is "presumed" to have stolen it. This is, of course, no more than a permissible inference—i.e., the jury may, if it sees fit to do so, convict the accused based solely upon the unexplained possession.

The possession referred to in this rule is normally actual physical possession. But in *Crews v. Commonwealth*³⁶ the court of appeals held that the inference could be drawn even where the accused was not found in actual physical possession of the property, but had merely asserted a possessory interest in it.

VI. POLYGRAPH EVIDENCE

Once again, the appellate courts of Virginia have resoundingly condemned the use of the polygraph for any evidentiary purpose. In two 1986 cases, the use of polygraph evidence was rejected by both the Virginia Supreme Court and the Virginia Court of Appeals. Perhaps the strongest statement was made by the supreme court in *Robinson v. Commonwealth*³⁷ when it said: "In a long line of cases, spanning almost thirty years, we have made clear that polygraph examinations are so thoroughly unreliable as to be of no proper evidentiary use whether they favor the accused, implicate the accused, or are agreed to by both parties."³⁸ Evidence of such tests is, therefore, inadmissible in Virginia.³⁹

Furthermore, evidence of a person's willingness or unwillingness to take a polygraph test remains inadmissible.⁴⁰

VII. HEARSAY

A number of cases decided during the past two years have broadened or clarified aspects of the hearsay rule.

36. 3 Va. App. 531, 537, 352 S.E.2d 1, 4 (1987).

37. 231 Va. 142, 341 S.E.2d 159 (1986).

38. *Id.* at 156, 341 S.E.2d at 167.

39. *Id.*; see also *Taylor v. Commonwealth*, 3 Va. App. 59, 354 S.E.2d 74 (1986).

40. *Gray v. Graham*, 231 Va. 1, 341 S.E.2d 153 (1986).

A. *Truth of the Matter Asserted*

Two 1986 cases illustrate the principle that the hearsay rule is not applicable (because the statement is "not hearsay") unless the statement is being offered to prove the truth of the matter asserted.

1. Conduct as Hearsay

In *Manetta v. Commonwealth*,⁴¹ the Virginia Supreme Court dealt with this principle in the context of conduct as hearsay. The court restated the rule thus: "Nonverbal conduct of a person intended by him as an assertion and offered in evidence to prove the truth of the matter asserted falls within the ban on hearsay evidence"⁴²

The principle itself is well-known; the difficulty, as always, lies in determining whether the statement is, in fact, being offered to prove that the assertion was true—in which, the testimony is hearsay—or for some other purpose—in which case, the hearsay rule has no applicability.

In *Manetta*, a sheriff testified that two persons had pointed out two geographical locations and described them to him as being related to the crime. The defense contended that this testimony was improper hearsay because it was offered to prove the truth of the witnesses' assertions. The court, rejecting this contention, said "manifestly, the sheriff could not describe the relationship between two points on the ground unless he identified them by some reference which pertained to the case He therefore properly described them as the place Fulcher had pointed out and the place Becky had pointed out, respectively."⁴³

Since this was relevant independent of the truthfulness of the witnesses' verbal or nonverbal assertions, the court held that the sheriff's testimony about what the witnesses had said and done was proper.

41. 231 Va. 123, 340 S.E.2d 828 (1986).

42. *Id.* at 126, 340 S.E.2d at 830 (quoting *Stevenson v. Commonwealth*, 218 Va. 462, 465, 237 S.E.2d 779, 781 (1977)).

43. *Id.* at 128, 340 S.E.2d at 831.

2. The *Other* "State-of-Mind" Exception

The so-called "state-of-mind" exception to the hearsay rule, which permits testimony about declarations which reveal the present state of mind of the declarant, is well-known. This is a true exception to the hearsay rule, for it permits such evidence to be admitted to show that the assertion made by the declarant was true. In *Johnson v. Commonwealth*,⁴⁴ the Virginia Court of Appeals reminded us that there is another state-of-mind "exception" to the hearsay rule. "[A] statement made by a declarant is [also] admissible for the purpose of showing the probable state of mind *thereby induced in the hearer*, such as being put on notice or having knowledge, or motive, or good faith . . . or anxiety"⁴⁵

Unlike the first "state-of-mind" rule, this latter situation is not a true exception; it is, rather, another example of the rule that statements, even though hearsay in form, are admissible when they are offered merely to show their effect upon the conduct of other persons. Such testimony is admissible because it is simply "not hearsay"; it is not the truth of the statement, but the effect that it has on the people who heard it, that matters.⁴⁶

B. *Dying Declarations—Knowledge of Impending Death*

The dying declarations exception, which permits testimony about statements made by dying persons, often presents problems of proof. Such statements are admissible only if the declarant knew that he or she was going to die, and proving this knowledge is sometimes difficult. The recent case of *Clark v. Commonwealth*⁴⁷ suggests several ways in which this knowledge can be established, to-wit; (1) by the character and nature of the wound (*e.g.*, gunshot wound in chest); and/or (2) by the declarant's appearance and conduct (*e.g.*, difficulty in breathing, etc.); and/or (3) by the absence of any statement manifesting expectation of recovery.⁴⁸

44. 2 Va. App. 598, 347 S.E.2d 163 (1986).

45. *Id.* at 602, 347 S.E.2d at 165 (emphasis added).

46. To be admissible, such statements must, of course, have some logical tendency to induce the claimed state of mind in the hearer. Otherwise, the statements are inadmissible, not because of the hearsay rule, but because they lack probative value. *See Johnson*, 2 Va. App. 598, 347 S.E.2d 163.

47. 3 Va. App. 474, 351 S.E.2d 42 (1986).

48. *Id.* at 482-83, 351 S.E.2d at 45-46.

This last suggestion is important, for such statements are very often lacking, and the admissibility of negative evidence in this respect may be of significant assistance in a case where positive evidence of belief in impending death is lacking.

C. *Business Records*

The advent of the computer age has created some uncertainties regarding the business records rule. The traditional formulation of the rule calls for "books of original entry" prepared "in the ordinary course of business." Do computer print-outs satisfy the rule? The "books of original entry" requirement has been very loosely interpreted in modern courts,⁴⁹ but is a computer print-out, especially one generated for use in court, within the business records exception? In *Frye v. Commonwealth*,⁵⁰ the Virginia Supreme Court concluded that reports generated by the Division of Motor Vehicles and National Crime Information Center computers qualified as business records within the meaning of the exception. This is a most helpful ruling, and a very sound one.

D. *Excited Utterances*

The excited utterances exception received scrutiny in the case of *Clark v. Commonwealth*.⁵¹ It is sometimes difficult to determine whether a particular statement will meet the exception's requirements as to time, excitement, and spontaneity. In *Clark*, the Virginia Court of Appeals noted several factors which will be considered in determining whether a given utterance is within the exception. According to the court:

(1) The lapse of time between the happening of the exciting event and the uttering of the statement is relevant, but not controlling.

(2) It is also relevant whether the statement was made impulsively, on the speaker's own initiative, or in response to a question.

(3) Further, it is relevant to consider whether the statement was against interest, or was self-serving.

49. See FRIEND, *supra* note 20, § 235.

50. 231 Va. 370, 345 S.E.2d 267 (1986).

51. 3 Va. App. 474, 351 S.E.2d 42 (1986).

Statements (1) and (2) are fairly standard comments about the excited utterances rule. No precise time limit has ever been imposed, although Virginia has traditionally been rather strict in this regard. And, of course, spontaneity is a requirement for this exception, because it supplies the "guarantee of trustworthiness" which is the basis of the exception. Formulations of the excited utterances exception do not usually include reference to the third factor—whether the statement was against interest or self-serving—and a superficial reading might lead one to conclude that the court was mixing elements of the "declarations against interest" exception into the excited utterances area. *In fact, although it is not usually stated expressly, virtually all hearsay exceptions are subject to the qualification that there must be no apparent motive to falsify, or the exception is inapplicable.* Thus, if a hearsay declaration of any kind is blatantly self-serving, and therefore suspect, it would be within the discretion of the trial judge to exclude it even though the statement otherwise fell within an exception.

It is interesting to note that in *Clark* the court concluded that the declaration, although made only five to ten minutes after the event, was not admissible.

E. Pedigree Exception

The Virginia Supreme Court in the case of *Marks v. Sanzo*⁵² held that the pedigree exception's requirement that the declarant be "unavailable" is satisfied when the declarant is out of state. This is noteworthy because in recent years the use of the pedigree exception has been severely limited by the rigid enforcement of the rule that the exception is not applicable unless no better evidence can be produced, and the Supreme Court has held that the hearsay statements are not admissible if there is another witness with first-hand knowledge, even if that witness is out of state.⁵³ The holding in *Marks* is helpful in clarifying the point that where there is no better evidence available, and the exception is otherwise applicable, the fact that the declarant who uttered the hearsay declaration is out of the state will be sufficient to satisfy the rule and make the out-of-state declarant's statements admissible.

52. 231 Va. 350, 345 S.E.2d 263 (1986).

53. See *Smith v. Givens*, 223 Va. 455, 459, 290 S.E.2d 844, 846 (1982).

VIII. SUMMARY

In short, the past two years have brought many evidentiary decisions, all of them helpful to our understanding of Virginia evidence law. The Virginia Court of Appeals' decisions have added a new dimension to this understanding, by providing appellate case law in areas where the Virginia Supreme Court has not had an opportunity to speak. The decisions of both courts with regard to the rules of evidence have been generally accurate, well-reasoned, and constructive, once again illustrating a point which the author feels can never be emphasized enough: *When it comes to the formulation of rules of evidence, the common-law system of judge-made rules, supplemented by a steady flow of case opinions from competent appellate courts, is far superior to any other system of evidence law.*