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## Annual Survey of Virginia Law: Evidence

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## EVIDENCE

*Charles E. Friend\**

### I. LEGISLATIVE CHANGES

In terms of evidence legislation, the most significant development of the past year may be what did *not* happen in Virginia. In late 1987 the Supreme Court of Virginia, following a long period of careful study, recommended against the adoption of a statutory code of evidence for Virginia. In announcing the court's conclusion, Chief Justice Carrico cited a passage from the *1987 Annual Survey of Virginia Law*, which stated: "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."<sup>1</sup> Virginia will therefore apparently retain its traditional common-law system of evidence law for the immediate future.

The General Assembly has, however, added some new individual provisions to our rules of evidence during the past months. For example:

#### A. *Expert Witnesses in the Courtroom*

A 1987 amendment to Virginia Code section 8.01-375 provides that "[w]here expert witnesses are to testify in the case, the court may, at the request of all parties, allow one expert witness for each party to remain in the courtroom."<sup>2</sup>

The practice of permitting experts to remain in the courtroom for the purpose of hearing evidence was permitted at common law; after listening to the testimony of other witnesses, the expert was then permitted to take the stand and express an opinion based upon the evidence heard. This basis for expert opinion, although

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1. Friend, *Evidence: Annual Survey of Virginia Law*, 21 U. RICH. L. REV. 775, 788 (1987). See *Statutory Codes of Evidence: A Bad Idea Whose Time Has Fortunately Not Yet Come*, VA. EVIDENCE REP., January 1988, at 8.

2. VA. CODE ANN. § 8.01-375 (Repl. Vol. 1984 & Cum. Supp. 1988).

recognized by the common law, was eliminated in Virginia by earlier statutory enactments which rendered the exclusion of virtually all witnesses mandatory upon motion of either party.<sup>3</sup>

The new amendment to section 8.01-375 now makes it possible for this basis of expert opinion to be utilized in Virginia. Note, however, that:

1. The amendment applies only to civil cases.<sup>4</sup>
2. All parties must request that the expert be allowed to remain.
3. The judge is not compelled to honor the request. The statute says only that the judge "may" allow experts to remain in the courtroom.

Despite these limitations, the amendment does at least reintroduce this basis of expert opinion to our law.

### B. *Copies of Employment Records*

The 1987 General Assembly also added section 8.01-413.1 to the Code. This section provides that in any case where original employment records are or would be admissible, copies of the records are also admissible, provided that they are authenticated "by the individual who would have authority to release or produce in court the original records."<sup>5</sup>

Note that, like many other statutes dealing with the admissibility of documents,<sup>6</sup> this section makes the copies admissible *only if the originals would be admissible under some existing rule of evidence*. The statute is, in effect, a best evidence rule exception; it does not make the original documents themselves admissible.<sup>7</sup>

### C. *Dead Man's Statute*

The much-amended and ever-confusing "dead man's statute" received some additional attention from the 1988 General Assembly.

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3. VA. CODE ANN. §§ 8.01-375, 19.2-265.1 (Repl. Vol. 1984). The named exceptions did not include expert witnesses.

4. The amendment refers in terms to "any civil case." No equivalent provision was added to § 19.2-265.1.

5. VA. CODE ANN. § 8.01-413.1 (Cum. Supp. 1988).

6. *E.g.*, VA. CODE ANN. § 8.01-413 (Repl. Vol. 1984) (copies of medical records); VA. CODE ANN. § 8.01-391 (Repl. Vol. 1984) (copies of official and business records).

7. The business records and/or official records exceptions to the hearsay rule may, of course, make the originals admissible even in the absence of a statute.

The statute provides that “[i]n an action by or against a person who, from any cause, is incapable of testifying,” (a) no judgment may be rendered in favor of “an adverse or interested party” founded upon such party’s uncorroborated testimony, and (b) the hearsay statements of the party incapable of testifying are admissible, whether the other party testifies or not.<sup>8</sup>

The 1988 amendment added a final sentence to the statute, as follows: “The phrase ‘from any cause’ as used in this section shall not include situations in which the party who is incapable of testifying has rendered himself unable to testify by an intentional self-inflicted injury.”<sup>9</sup>

This language may require some judicial interpretation. For example, what constitutes “injury”? Would this term include, e.g., disabilities induced by consumption of drugs or alcohol? And could such an “injury” be considered to be “intentional”? It will be interesting to see what construction the courts will put upon the amendment.

## II. JUDICIAL DECISIONS

There have been many decisions during the past year which have addressed evidentiary questions. Hearsay and impeachment and support of witnesses are areas which have received special attention from our appellate courts in 1987-88.

### A. *Hearsay: Excited Utterances*

Among the most significant developments are those which have affected the excited utterances exception to the hearsay rule.

This exception began life in Virginia as one variant of the infamous “*res gestae*” exception, and some of the early perplexity over the nature of the hearsay exception for excited utterances is traceable to this unfortunate ancestry.

Shorn of its Latin label and re-christened as “the excited utterances exception,” the rule itself is fairly simple. Essentially, it provides that testimony about the statement of *any* person, whether that person is available at the trial or not, is admissible if the

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8. VA. CODE ANN. § 8.01-397 (Repl. Vol. 1984).

9. VA. CODE ANN. § 8.01-397 (Repl. Vol. 1984 & Cum. Supp. 1988).

statement is uttered while the declarant is in a state of excitement caused by the occurrence of a startling event.<sup>10</sup>

The rationale of the exception is that such unguarded, unpremeditated statements, uttered in the heat of the moment, are more reliable than other types of hearsay because the statements are uttered without conscious thought or preparation, and before there is any opportunity to fabricate. The focus is (or at least ought to be) on one issue: At the time of the making of the statement, was the declarant still in such a state of excitement that the utterance was still "the facts talking through the party" and not "the party talking about the facts"?<sup>11</sup>

However, Virginia's appellate courts have also consistently fastened their attention upon two other elements: spontaneity and lapse of time. Thus, admissibility in Virginia has, historically, depended upon (a) whether the declaration was made spontaneously or in response to questioning, and (b) how much time had elapsed between the startling event and the utterance of the statement. On both questions, the Virginia courts have traditionally taken a very strict position. However, two recent cases have cast these elements in a new light.

### 1. Spontaneity

The Supreme Court of Virginia has in the past rejected utterances made in response to even the most abbreviated or casual questioning. Even such a normal and natural inquiry as the question "What happened?" has, in the view of earlier justices, rendered the response inadmissible.<sup>12</sup>

The Court of Appeals was the first to depart from this pattern of exclusion. In the 1987 decision in *Martin v. Commonwealth*<sup>13</sup> the court held that the fact that the utterance was made in response to the question "What happened?" did not render the statement inadmissible, saying: "The natural reaction of any person arriving to aid one exposed to a startling event is to inquire, 'What happened?' To pivot the admissibility of a subsequent statement, how-

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10. *Kuckenbecker v. Commonwealth*, 199 Va. 619, 101 S.E.2d 523 (1958).

11. *Upton v. Commonwealth*, 172 Va. 654, 657-58, 2 S.E.2d 337, 339 (1939). This is probably the most-quoted statement about the excited utterances rule.

12. *See, e.g., Kuckenbecker v. Commonwealth*, 199 Va. 619, 620, 101 S.E.2d 523, 525 (witness spoke to declarant and "asked him what had happened"—held inadmissible).

13. 4 Va. App. 438, 358 S.E.2d 415 (1987).

ever spontaneous, on the question of whether it was prompted by an equally spontaneous inquiry would serve no useful purpose . . . ."<sup>14</sup>

When rendered, this decision appeared to be contrary to much of the existing Virginia case precedent. However, on April 22, 1988, the Supreme Court of Virginia handed down its decision in *Clark v. Commonwealth*,<sup>15</sup> in which the victim of a shooting had responded to the question "What happened, Mac?" with a statement which the trial court admitted into evidence. The Supreme Court held that, under the circumstances of the case, the statement was in fact admissible as an excited utterance despite the question.

This does not mean that the "spontaneity" requirement has been abolished, however. As the Court of Appeals noted in *Martin*, "[i]f the question or questioner suggested or influenced the response, then the declaration may lack the necessary reliability to be admitted. [In this case, the witness's] inquiry did not suggest the content of [the declarant's] response or corrupt its reliability."<sup>16</sup>

## 2. Time Lapse

The Virginia courts have also traditionally been very strict as to the length of time which may elapse between incident and utterance before the utterance becomes disqualified for admission under the exception. Sample holdings:

1. *Doe v. Thomas*<sup>17</sup> (18 hours, rejected).
2. *Brown v. Peters*,<sup>18</sup> (statement made the next morning rejected).
3. *Leybourne v. Commonwealth*,<sup>19</sup> (4 hours, rejected).
4. *Portsmouth Transit Co. v. Brickhouse*,<sup>20</sup> (20 minutes, rejected).

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14. *Id.* at 442, 358 S.E.2d at 418 (1987) (quoting *People v. Edwards*, 47 N.Y.2d 493, 498-99, 392 N.E.2d 1229, 1232, 419 N.Y.S.2d 45, 48 (1979)).

15. No. 870187, slip op., (Va. April 22, 1988).

16. *Martin*, 4 Va. App. at 442, 358 S.E.2d at 418.

17. 227 Va. 466, 318 S.E.2d 382 (1984).

18. 202 Va. 382, 117 S.E.2d 695 (1961).

19. 222 Va. 374, 282 S.E.2d 12 (1981).

20. 200 Va. 844, 108 S.E.2d 385 (1959).

5. *Goins v. Commonwealth*,<sup>21</sup> (10-15 minutes, rejected).

6. *Nicholaou v. Harrington*,<sup>22</sup> (6-7 minutes, rejected).

7. *Clark v. Commonwealth*,<sup>23</sup> (5-10 minutes, rejected (although admissible under another theory)).

In some of these cases, factors other than time were operating—e.g., the statements were in response to some form of questioning—but the cases indicate the attitude of Virginia's appellate courts as to the importance of the passage of time in evaluating the admissibility of these utterances.

The result of these cases has been an invisible "five-minute barrier." Excited utterances made more than five minutes after the event have consistently been held inadmissible in Virginia, and it was in part on this basis that the Court of Appeals, when it was considering the *Clark* case, held that the statement in that case was not admissible as an excited utterance.<sup>24</sup>

Despite this apparent "five-minute barrier," however, no "official" or absolute time limit has ever been set by our courts as a maximum beyond which no statement will be considered. This is, of course, due to the fact that the time element does not stand in isolation, but must be considered in conjunction with other factors—questioning, self-serving nature, capacity of the declarant to fabricate, etc. This led at least one commentator to observe that:

[I]t seems safe to say that counsel will encounter resistance in most courts to the admission of any statement uttered more than five minutes or so after the event. Statements uttered after longer periods will probably be inadmissible *unless the lack of questioning, the incapacity of the declarant to fabricate, the degree of excitement, or other factors strongly support the spontaneity, and therefore the trustworthiness, of the statement.*<sup>25</sup>

The importance of these elements in breaking the unofficial "five-minute barrier" was borne out when the Supreme Court in

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21. 218 Va. 285, 237 S.E.2d 136 (1977).

22. 217 Va. 618, 231 S.E.2d 318 (1977).

23. 3 Va. App. 474, 351 S.E.2d 421 (1986).

24. *Clark v. Commonwealth*, 3 Va. App. 474, 351 S.E.2d 42 (1986) (the statement was admitted on another basis, however).

25. C. FRIEND, *VIRGINIA EVIDENCE LAW—THE FIVE KEYS TO SUCCESS* 62 (1988) (emphasis added).

*Clark v. Commonwealth*,<sup>26</sup> referred to above, unexpectedly found a statement made more than five minutes after the event to be admissible as an excited utterance. Said the court:

Here, the trial judge properly concluded under the evidence that the statement was made "within as little as five minutes" after the shooting and "quite probably not more [than] ten minutes after he was shot." In addition, the trial judge accurately decided that the state of the victim's physical condition and emotional stability "must be considered along with the time frame . . . .

Considering all the circumstances surrounding the statement, we hold that the trial court properly exercised its discretion in admitting the declaration as an excited utterance. The victim had been mortally wounded, he was suffering from the trauma, he was in or approaching a state of shock, and his emotional stability was tenuous at most. The statement was . . . part of the instinctive reaction to a horrifying event."<sup>27</sup>

Thus it appears that there is in reality no "five-minute barrier," and that, in a proper case, utterances made more than five minutes after the event can and will be admitted.

### B. *Hearsay: State-of-Mind Exception*

The state-of-mind exception provides that hearsay testimony about statements which are probative of the declarant's state of mind is admissible.<sup>28</sup> The requirements of this exception are usually stated to be:

1. The statement must refer to the declarant's *present* state of mind,<sup>29</sup>
2. The statement must refer to the declarant's *own* state of mind,<sup>30</sup> and

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26. No. 870187, slip op., (Va. April 22, 1988).

27. *Id.* at 8-9.

28. *United Constr. Workers v. Laburnum Constr. Corp.*, 194 Va. 872, 75 S.E.2d 694 (1953); *Johnson v. Commonwealth*, 2 Va. App. 598, 347 S.E.2d 163 (1986).

29. For an excellent and thorough discussion of the requirements of the state-of-mind exception, see the opinion of Koontz, C.J., in *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 361 S.E.2d 436 (1987).

30. Evidence of out-of-court statements is also admissible to show the state of mind which the statement induced in the *hearer*. See, e.g., *Wynn v. Commonwealth*, 5 Va. App. 283, 362 S.E.2d 193 (1987). Technically, these statements are not hearsay at all since they are not introduced to prove that what was said was true, but rather to show their effect

3. There must be no obvious indication of falsity.<sup>31</sup>

There is, however, another requirement—one which is often overlooked in treatises and articles, but which causes great difficulty for the courts in practice. The requirement is that, in addition to meeting the foregoing conditions, *the declaration must be relevant and material to the case.*

The state-of-mind declaration, to be admissible, must be both relevant and material—that is, (a) the words used by the declarant must have some tendency to show the declarant's state of mind, and (b) the declarant's state of mind must be material to the case. This requirement seems obvious enough, since all evidence, to be admissible, must be relevant to a material issue. Yet it is this principle which gives rise to the most complex and difficult questions when the state-of-mind exception is invoked during a trial.<sup>32</sup>

The first question to be dealt with is the relevance of the statement to show the declarant's state of mind. We must determine whether the words used by the declarant do in fact tend to show what the declarant's state of mind was.<sup>33</sup> If we cannot justifiably make that inference, then the declaration is inadmissible. In other words, the "state-of-mind" exception does not apply unless the words do in fact reveal, or at least have some tendency to reveal, the declarant's state of mind.

However, even if we find that the words do indeed reveal the declarant's state of mind, we must still determine whether the declarant's state of mind is material to the case, for the statement is still not admissible if the state of mind which the statement reveals has no bearing on the case at bar.

In some instances, the state of mind of the declarant is directly in issue, because it is itself an element of the case; in such situa-

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upon another person. See C. FRIEND, *THE LAW OF EVIDENCE IN VIRGINIA*, § 225 (2d ed. 1983).

31. See C. FRIEND, *supra* note 30, § 238.

32. C. FRIEND, *supra* note 25, at 69-70.

33. For example:

When Scrooge says "I hate Christmas", this clearly reveals Scrooge's state of mind, since he has expressly stated an emotion. However, if Scrooge's only statement is "Bah, humbug!", the court must decide whether these words do in fact show—or tend to show—the underlying state of mind. The question is might we justifiably infer from the words "Bah, humbug" that Scrooge hates Christmas? If so, then the declaration is relevant, and, if otherwise admissible, may be admitted.

C. FRIEND, *supra* note 25, at 70.

tions, the materiality of the state-of-mind declaration is obvious. In other cases the state of mind of the person is not directly at issue, but is offered into evidence in an attempt to establish some other issue in the case.<sup>34</sup> It is this second situation—state of mind not directly in issue, but probative of some other matter which is at issue—which poses the most perplexing problems for lawyers and judges.

Curiously, these principles are very seldom discussed in the appellate opinions. However, in the recent case of *Evans-Smith v. Commonwealth*,<sup>35</sup> the Court of Appeals considered this problem at some length in a very helpful opinion which deserves mention here. In *Evans-Smith*, the court was considering the admissibility of evidence of the homicide victim's fear of the accused, her husband. The court said:

Whether [the victim] feared her husband was probative of neither his motive or intent nor of the ultimate issue in the case, namely, whether [the accused] murdered [the victim]. . . .

A victim's state of mind would be relevant in cases where the defense contends that the death was the result of suicide, accident or self-defense. In those cases, hearsay statements made by the victim illustrating his or her state of mind would be relevant, material and admissible . . . . Here, however, the defense did not contend that [the victim's] death was the result of suicide, accident or self-defense. Therefore, these statements were immaterial and inadmissible . . . .<sup>36</sup>

The court went on to point out that:

Even if we were to hold that [the victim's] fear of her husband was material, we find that this evidence was not probative of fear, and therefore not relevant. The victim's statements that her husband was becoming testier and more violent may have indicated a strained and disagreeable relationship, but that did not tend to prove her fear of him.<sup>37</sup>

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34. See, e.g., *Church v. Commonwealth*, 230 Va. 208, 211, 335 S.E.2d 823, 825 (1985) (child's statement that child believed sex was "dirty, nasty, and it hurt" offered as circumstantial evidence that the child had been molested).

35. 5 Va. App. 188, 361 S.E.2d 436 (1987).

36. *Id.* at 198, 361 S.E.2d at 442. (citations omitted).

37. *Id.* at 198-99, 361 S.E.2d at 442.

Thus, the court held that the evidence offered to show the victim was in fear of the accused failed on both counts: It did not show that she was in fear of him, and, in any event, her fear, if it existed, was not material to the case. This two-pronged test—relevance of the evidence to show state of mind, and materiality of the state of mind to the case—must be satisfied whenever state-of-mind declarations are offered. Otherwise, the declaration, although it meets all other requirements of the exception, will be inadmissible.

### C. *Hearsay: Business Records Rule*

The business records exception to the hearsay rule generates considerable appellate case law. It is a complicated exception, and not many years go by without one or the other of our appellate courts being called upon to interpret its requirements. Among its many requirements:

1. The records must be business records.<sup>38</sup>
2. The entry must have been made routinely, in the ordinary course of business.<sup>39</sup>
3. The entry must have been made at or near the time of the transaction.<sup>40</sup>
4. The entry must have been made by a person whose duty it was to make the entry.<sup>41</sup>
5. The entry must be authenticated by some witness, such as the supervisor or custodian responsible for maintaining the records.<sup>42</sup>
6. The documents must be records of the type which are relied

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38. C. FRIEND, *supra* note 30, § 235 (cited in *Simpson v. Commonwealth*, 227 Va. 557, 567, 318 S.E.2d 386, 392 (1984)). However, the business may be non-profit or charitable.

39. *Id.* It is the routine nature of the transactions which give this exception its "guarantee of trustworthiness." Therefore, the entry must be made by one whose duty it is to make such entries; an entry made by an unauthorized person is not a routine entry.

40. *Id.* There is no set time limit. However, entries made after an unusually long time are inadmissible because, among other things, they can no longer be considered routine. See *Ratliff v. Jewell*, 153 Va. 315, 149 S.E. 409 (1927).

41. *Simpson*, 227 Va. at 557, 318 S.E.2d at 386. Entries made without authority, or contrary to the employer's instructions, are not admissible under this exception. An entry made by someone who is not the proper person to make that entry may be regarded as unauthorized.

42. *Id.*

upon by those who prepare them or for whom they are prepared.<sup>43</sup>

One question which occasionally arises in connection with this exception is: Must the party offering the records into evidence be able to identify the persons who made the entries in question? This is a serious consideration, for such identification may not always be easy. However, in *Avocet Development Corp. v. McLean Bank*,<sup>44</sup> the Supreme Court of Virginia answered that question in the negative.

In *Avocet*, the document at issue was a bank ledger sheet. The opponent objected to its admissibility as a business record because the custodian produced by the proponent to authenticate the document (as required by the rule) could not name the various employees who posted the ledger. The court said:

The bank proved that the document came from the proper custodian, that it was a record kept in the ordinary course of business, that it was made contemporaneously with the event by persons having the duty to keep a true record, and that it was relied upon by those for whom it was prepared. This was sufficient foundation for admission of the ledger in evidence.<sup>45</sup>

The decision is an important one, not only because it comports with the spirit and purpose of the business records rule, but also because a contrary finding would almost certainly have had an extremely adverse effect upon the business records exception in Virginia. It is often difficult and burdensome to identify a particular entrant; in a large modern business it may be impossible. Furthermore, the business records rule was developed, at least in part, to lighten the burden of proving business transactions. Had the Supreme Court ruled that the exception is inapplicable unless the proponent can identify by name the persons who made the entries at issue, the rule's usefulness would have been severely curtailed.

It is, of course, always open to the opponent to establish that the entrant was in fact a person who was not authorized to make the entry, etc. This has historically been considered to be a matter for the opponent to raise, and so the ruling in *Avocet* in no way

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43. *Automatic Sprinkler Corp. of Am. v. Coley & Petersen*, 219 Va. 781, 250 S.E.2d 765 (1979).

44. 234 Va. 658, 364 S.E.2d 757 (1988).

45. *Id.* at 667, 364 S.E.2d at 762.

reduces the opponent's traditional ability to oppose the admission of the record in an appropriate case.

D. *Prior Inconsistent Statements of a Party's Own Witness*

1. Impeachment of a Witness Who Proves "Adverse"—Virginia Code Section 8.01-403

Despite the old cliché that one may not "impeach his own witness," the common law permitted limited impeachment of one's own witness when a witness unexpectedly changed stories in mid-stream. Under such circumstances, the party who called the witness was entitled to introduce evidence of the witness's prior inconsistent statement. This provision of the common law has been codified in Virginia Code section 8.01-403,<sup>46</sup> which applies in both civil and criminal cases. The section provides that "in case the witness shall in the opinion of the court prove adverse," the calling party may show the prior statement.<sup>47</sup>

However, *Brown v. Commonwealth*,<sup>48</sup> a 1988 court of appeals case, reminds us that it is not enough that the witness testifies in a manner that is inconsistent with a prior statement. Citing earlier Virginia cases, the court said:

In order to impeach one's own witness . . . it is not sufficient merely that the witness gave a contradictory statement on a prior occasion. Nor is it sufficient that the testimony of the witness fails to meet the expectations of the party calling him. *In order to be impeachable, the testimony offered must be injurious or damaging to the case of the party who called the witness.*<sup>49</sup>

In *Brown*, a prosecution witness testified that he did not know either the victim or the accused, and did not see the attack upon the victim. This was in direct contradiction of his prior statement to authorities that he knew both men and had seen the attack. The

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46. VA. CODE ANN. § 8.01-403 (Repl. Vol. 1984).

47. "A party producing a witness . . . may, in case the witness shall in the opinion of the court prove adverse . . . prove that he has made at other times a statement inconsistent with his present testimony . . . In every such case the court, if requested by either party, shall instruct the jury not to consider the evidence of such inconsistent statements, except for the purpose of contradicting the witness."

*Id.*

48. 6 Va. App. 82, 366 S.E.2d 716 (1988).

49. *Id.* at 85, 366 S.E.2d at 718 (emphasis added).

Commonwealth, over defense objection, introduced evidence of the prior statement. The Court of Appeals reversed, saying: "If the testimony sought to be impeached is of a negative character and has no probative value, there is no statutory basis for impeachment."<sup>50</sup>

The court noted that the witness's testimony—that he did not see the attack and did not know the men involved—was of this character and therefore had no probative value: "It could not have assisted the trier of fact in determining [the accused's] guilt or innocence. Having no probative value, it was not damaging or injurious to the Commonwealth's case."<sup>51</sup>

The court concluded that it was therefore improper to allow the introduction of evidence of the prior inconsistent statement.

Thus, before section 8.01-403 can be invoked to permit counsel to impeach his/her own witness, counsel must persuade the trial judge that the testimony of the witness has been "damaging or injurious" to counsel's case. Further, it appears that to be "damaging or injurious," the testimony must have had "probative value," i.e., some tendency to establish some material issue in the case, such as the guilt or innocence of the accused, or the liability, or lack thereof, of the defendant in a civil case. Since purely negative testimony by definition has no probative value,<sup>52</sup> such evidence can never be the basis for invoking the statute and showing the witness's prior statement.

However, it should be remembered that there is a distinction between "negative-negative" evidence and "positive-negative" evidence. If a witness testifies that "I did not see the fight," that is "negative-negative" evidence; the witness is saying, in effect, "There may have been a fight, but I didn't see it." On the other hand, if the witness testifies that "I was standing right there watching the two men and I didn't see either of them strike a blow," that is "positive-negative" evidence, for the witness is saying in effect "there was no fight because I was right there and if there had been a fight I would have seen it."<sup>53</sup> The distinction is

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50. *Id.* (citing Virginia Elec. & Power Co. v. Hall, 184 Va. 102, 34 S.E.2d 382 (1945)).

51. 6 Va. App. at 86, 366 S.E.2d at 719.

52. See C. FRIEND, *supra* note 30, § 143.

53. The terms "positive-negative evidence" and "negative-negative evidence" are the inventions of the author; they are not officially sanctioned by our courts.

important, for while "negative-negative" evidence does not have probative value, "positive-negative" evidence does; had the witness in *Brown* given "positive-negative" evidence of the type described in the example above, this (a) would have had probative value, (b) would (presumably) have been "damaging or injurious" to the Commonwealth's case, and therefore (c) would have made it possible for the Commonwealth to introduce evidence of the witness's prior inconsistent statement.

## 2. Refreshment of Witness's Memory by Use of Prior Statement

The common law also permits the use of prior statements to "refresh the memory" of a witness who has developed memory problems. Refreshment of memory is not usually thought of as impeachment, and there is no requirement that the witness "prove adverse" before refreshment can occur.<sup>54</sup> However, the 1987 case of *Royal v. Commonwealth*<sup>55</sup> illustrates the very fine line between refreshment and impeachment.

In *Royal*, the witness's testimony conflicted with a prior statement which she had given to the police. Because of the disclosure of the prior statement to the jury, the defense asked for an instruction cautioning the jury that the prior statement was to be considered for impeachment purposes only and was not proof that what the witness said was true. The trial court refused the instruction and the court of appeals affirmed, noting that the prior statement was not admitted for the purpose of attacking the witness's credibility, but rather for the limited purpose of refreshing the witness's memory.<sup>56</sup> However, the Supreme Court of Virginia reversed, saying:

[W]hile the prosecutor used the prior statement ostensibly to "refresh" the witness' memory, the content of the statement was revealed to the jury. The effect of the revelation was to present to the jury the earlier conflicting assertion . . . a crucial fact in the case. . . . Under these circumstances, the court had a duty to give the cautionary instruction . . . .<sup>57</sup>

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54. See *supra* text accompanying notes 46-53.

55. 234 Va. 403, 362 S.E.2d 323 (1987).

56. *Royal v. Commonwealth*, 2 Va. App. 59, 341 S.E.2d 660 (1986), *rev'd*, 234 Va. 403, 362 S.E.2d 323 (1987).

57. 234 Va. at 406, 362 S.E.2d at 324.

Although other factors in the case contributed to the Supreme Court's view that the failure to give the instruction was reversible error, the decision must be regarded as a warning that, even when a prior inconsistent statement is offered under the appellation "refreshment of memory," a cautionary instruction may be necessary to avoid (or at least reduce) the possibility that the jury will consider the "refreshment" as substantive evidence.

#### E. *Supporting Witness who Has Not Been Impeached*

One of the more troublesome problems in Virginia evidence law has been the confusion over the supposed right of a party—usually the accused in a criminal case—to introduce evidence of his or her own veracity when there has been no attempt to impeach his/her credibility. This confusion, which usually can be traced back to a failure to differentiate between character evidence for impeachment and character evidence for substantive purposes, often results in an accused being permitted to offer evidence in support of his own credibility when no impeachment has occurred, and often even before the accused has testified.

It is therefore always a pleasure to see cases like *Reed v. Commonwealth*,<sup>58</sup> a 1988 Court of Appeals case in which the defense contended that the trial court denied him the right to call for evidence in his favor when it excluded the evidence of several witnesses who were prepared to testify that the accused's prior conviction was based on perjured testimony. The accused had not testified at the time that these witnesses were offered, and indeed, did not testify at any time during the trial. However, the accused claimed that the trial court's action prevented him from testifying due to his fear that the prior conviction would be shown against him.

It is well established that a witness whose testimony is impeached by evidence of prior convictions has the right to offer a brief explanation of the convictions shown.<sup>59</sup> In this instance, had the accused been impeached by such evidence, the accused would, as the court of appeals noted, have had a right to show that the convictions were obtained on the basis of perjured testimony.<sup>60</sup>

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58. 6 Va. App. 65, 366 S.E.2d 274 (1988).

59. See C. FRIEND, *supra* note 30, § 27.

60. 6 Va. App. at 68, 366 S.E.2d at 276 (citing *Smith v. Commonwealth*, 161 Va. 1112, 172 S.E. 286 (1934)).

However, a witness cannot be impeached until the witness has testified, and until the witness has been impeached by a showing of prior convictions, the accused has no right to explain those convictions. As the Court of Appeals put it: "When [the accused] failed to testify, evidence of his prior conviction was irrelevant, immaterial and thus inadmissible. Likewise, evidence tending to explain the conviction was irrelevant, immaterial and inadmissible. Thus, [the accused] was not denied his right to call for relevant, admissible evidence in his favor."<sup>61</sup>

The point is an important one. Virginia decisional law is liberally sprinkled with cases in which criminal defendants who have not taken the stand have sought to introduce evidence to support their own credibility. All too often, this has been permitted.<sup>62</sup> In fact (or, rather, in law) it is impermissible, and the opinion in *Reed* may help Virginia's trial judges in their efforts to prevent it from occurring.

### III. CONCLUSION

In the course of a year there are, of course, many decisions on points of evidence law, and they are all important. The foregoing is only a selection of cases (and statutes) that have been added to our law during 1987-88. Once again, however, the wisdom of the common-law system has been demonstrated "by a steady flow of case opinions from competent appellate courts,"<sup>63</sup> whose efforts continue to illuminate and perfect Virginia evidence law.

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61. 6 Va. App. at 69, 366 S.E.2d at 277.

62. See *Supporting Your Witness With Character Evidence*, VA. EVIDENCE REP. November 1987, at 6.

63. Friend, *Evidence: Annual Survey of Virginia Law*, 21 U. RICH. L. REV. 775, 778 (1987).