WORKER'S COMPENSATION - WEAVING INFERENCE WITH PROOF

A DEEPER DIVE …..

START AT THE BEGINNING ……

Va. Tree Harvesters, Inc. v. Shelton, 62 Va. App. 524, 532-535, 749 S.E.2d 556, 560-561, 2013 Va. App. LEXIS 325, *9-13, 2013 WL *597996*

Virginia Tree Harvesters is a great case to jump to for the basics and long-standing precedent…

Here is a summary of the main holdings and precedent tied to each:

The commission's decision that an accident arose out of the claimant's employment is a mixed question of law and fact. Blaustein v. Mitre, 36 Va. App. 344, 348, 550 S.E.2d 336, 338 (2001).

However, by statute, the commission's factual findings are conclusive and binding on this Court when those findings are based on credible evidence. K & K Repairs & Constr. v. Endicott, 47 Va. App. 1, 7, 622 S.E.2d 227, 230 (2005).

The fact that there may be contrary evidence in the record is of no consequence, as long as credible evidence supports the commission's finding. Russell Loungewear v. Gray, 2 Va. App. 90, 95, 341 S.E.2d 824, 826 (1986).

Instead, the appellate court is bound by the Commission's findings of fact as long as 'there was credible evidence presented such that a reasonable mind *could* conclude that the fact in issue was proved.'" Perry v. Delisle, 46 Va. App. 57, 67, 615 S.E.2d 494, 497(2005) (quoting Westmoreland Coal Co. v. Campbell, 7 Va. App. 217, 222, 372 S.E.2d 411, 415, 5 Va. Law Rep. 423 (1988).

"W]here reasonable inferences may be drawn from the evidence in support of the commission's factual findings, they will not be disturbed… on appeal." Hawks v. Henrico County School Board, 7 Va. App. 398, 404, 374 S.E.2d 695, 698, 5 Va. Law Rep. 1131 (1988).

On appeal, the appellate court defers to the commission's assessment of the "probative weight" of the proffered evidence, and we recognize that the commission "is free to adopt that view 'which is most consistent with reason and justice.'" Georgia-Pac. Corp. v. Robinson, 32 Va. App. 1, 5, 526 S.E.2d 267, 269 (2000) (quoting C.D.S. Const. Servs. v. Petrock, 218 Va. 1064, 1070, 243 S.E.2d 236, 240 (1978)).

"The commission, like any other fact finder, may consider both direct and circumstantial evidence in its disposition of a claim. Thus, the commission may properly consider all factual evidence, from whatever source, whether or not a condition of the workplace caused the injury." VFP, Inc. v. Shepherd, 39 Va. App. 289, 293, 572 S.E.2d 510, 512 (2002). This is

accomplished when the "circumstantial evidence . . . takes the question beyond surmise or conjecture . . . ." Van Geuder v. Commonwealth, 192 Va. 548, 557, 65 S.E.2d 565, 571 (1951).

Under the Virginia workers' compensation statute, "[i]njury means only injury by accident arising out of and in the course of the employment." *See* VA. Code § 65.2-101. As such, in order for an injury to be compensable under the Workers' Compensation Act, the claimant must prove three elements by a preponderance of the evidence: "(1) that the injury was caused by an accident; (2) that the injury was sustained in the course of the employment; and (3) that the injury arose out of the employment." Southland Corp. v. Parson, 1 Va. App. 281, 283-84, 338 S.E.2d 162, 163 (1985). See also PYA/Monarch v. Harris, 22 Va. App. 215, 221, 468 S.E.2d 688, 691 (1996) ("The concepts 'arising out of' and 'in the course of' employment are not [*534] synonymous and both conditions must be proved before compensation will be awarded." (quoting Marketing Profiles, Inc. v. Hill, 17 Va. App. 431, 433, 437 S.E.2d 727, 729, 10 Va. Law Rep. 613 (1993) (en banc))).

The mere fact that an employee was injured at work is not enough to show that his injury arose out of his employment. County of Chesterfield v. Johnson, 237 Va. 180, 185, 376 S.E.2d 73, 75, 5 Va. Law Rep. 1545 (1989). Instead, the employee must show that his injury resulted from an "actual risk" of the employment. Id. This requirement can only be met "if there is a causal connection between the claimant's injury and the conditions under which the employer requires the work to be performed." R.T. Investments v. Johns, 228 Va. 249, 252-53, 321 S.E.2d 287, 289 (1984).

"When a claimant has no memory of how the accident occurred and there are no witnesses to the accident, that claimant often cannot fulfill his or her burden to show this vital causal nexus between the employment and the injury." City of Waynesboro v. Griffin, 51 Va. App. 308, 314, 657 S.E.2d 782, 785 (2008) (citing Mem'l Hosp. v. Hairston, 2 Va. App. 677, 679, 347 S.E.2d 527, 527-28, 3 Va. Law Rep. 281 (1986), which reversed an award of benefits when claimant did not remember how she fell, there were no witnesses, and claimant fell on a floor which had no conditions that could have caused her fall).

However, the lack of direct evidence either from the claimant's memory or an eyewitness account will not, by itself, preclude an award of benefits: "on the contrary, the commission may find an explanation for an accident based on circumstantial evidence, when that evidence 'allow[s] an inference that the claimant suffered an injury by accident arising out of . . . his employment.'" Id. at 314-15, 657 S.E.2d at 785 (quoting Marketing Profiles, 17 Va. App. at 433, 437 S.E.2d at 728).

"The commission may rely upon circumstantial evidence in finding that an injury was caused by a particular accident," Marriott Int'l v. Carter, 34 Va. App. 209, 215, 539 S.E.2d 738, 741 (2001), and once the circumstantial evidence "'takes the question beyond surmise or conjecture,'" it will support the commission's inference as to the cause of the claimant's injury, VFP, Inc., 39 Va. App. at 293, 572 S.E.2d at 512 (quoting Van Geuder, 192 Va. at 557, 65 S.E.2d at 570-71).

Seeking Balance

VIRGINIA TRIAL LAWYERS ASSOCIATION
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The Greenbrier or Virtual

11. Understanding Inferences, Persuasion, and Civility

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To Understand Persuasion

"Any fool can know. The point is to understand."
—Albert Einstein.

1. An overview.

Judges infer. It's unavoidable. Indeed, our decisions often center upon inferences drawn and those resisted. For advocates, this represents an entirely maddening state, perhaps more than any other in a dispute resolution context. Why? Because to infer is to take an intellectual leap (or perhaps a step). What's more, it's difficult to predict when or if they'll leap. So how can advocates move judges to accept or resist an inference? How can advocates help judges identify the line separating the edge of conjecture from the emergence of reason? How can advocates show the decision to accept or resist an inference represents a pragmatic, suitable course? In short, what influences judges, the associations they distinguish, the intellectual leaps they are willing or unwilling to take? I am referencing persuasion. But what is persuasive? Or better still, how can advocates become persuasive? To find an answer, we must understand persuasion as a process. And while I can't speak for others, I will share my observations as an administrative law judge and mediator, how I have come to understand persuasion.

2. How *inference* fits within our judicial process.

We rely on evidence. For those within the judicial process, evidence means "[s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact."[1] And evidence comes in two general forms—direct and indirect. ***Direct evidence*** "is based on personal knowledge or observation and that, if true, proves a fact ***without inference*** or presumption."[2] ***Indirect evidence*** or, more commonly, circumstantial evidence is "***based on inference*** and not on personal knowledge or observation."[3]

[*An aside: In my experience, the distinction between direct and indirect evidence stands as a binary artifice. It ignores subjectivity and relativism. For personal knowledge and observation—the cornerstones of direct evidence—exist only as subjective reflections. And we must accept this foundation, along with the inferences it sparks. From this perspective, we don't escape inference.*]

3. What it means to infer.

To infer is to resist or embrace a position using data as the foundation for a conclusion. It bears noting, the presented data represents only the foundation. A conclusion—the inference—springs from that foundation. In civil litigation,

inferences come through ***abductive reasoning***. Judges interpret the data, seeking the simplest, best available, most likely conclusion ***consistent with our experience***.[4] Not certainty, this yields ***plausible conclusions***. With reliance on subjective experience, abductive reasoning invites ***bias*** and ***psychological influence***. It attracts error. What's more, it also grants advocates an opening for ***persuasion***.

4. "Reasonable inference," a vague legal standard.

The legal framework supporting our decisions—leading precedent—reference "reasonable" inferences; judges can "reasonably infer" a conclusion.[5] But what is "reasonable"? As a legal standard, "reasonable" inferences ***fall within a range***. The floor: Reasonable inferences arrive when "the circumstantial evidence . . . takes the question ***beyond surmise or conjecture***."[6] It's ceiling: Reasonable inferences reflect "the combined force of many concurrent and related circumstances, each insufficient in itself," leading "a reasonable mind irresistibly to a conclusion."[7] To describe this range, precedent offers an entirely unhelpful guide: Judges will accept the invited inference "provided . . . the circumstantial evidence is sufficiently convincing."[8] But when "sufficiently convincing"—whatever that might mean—"there is no distinction in the law between the weight or value . . . given to [conclusion formed through] direct or circumstantial evidence."[9]

5. The problem with reason and reasonable.

Judges say "reason" and "reasonable" as if these terms offer an objective measure. They don't. When we use "reason" as our guide, we remain bound to our own experiences and biases, our unexplored subjectivity. For reason exists as "***nothing but a wonderful and unintelligible instinct in our souls***."[10] And reasonable for whom? Surely more than the individual. Or when identifying a "reasonable inference" are we reflecting our subjective experiences, an intuitive enterprise, trusting that others share this instinct? A famous assertion contained in a concurring opinion, Justice Potter Stewart's obscenity discussion applies equally to reason and reasonable. Justice Stewart wouldn't try to define "that [term's] shorthand description," believing he "could never succeed in intelligibly doing so." "But I know it when I see it."[11]

6. Enter persuasion (ethos, logos, and pathos).

Through persuasion we "enlighten the understanding," we "please the imagination," we "move the passions," we "influence the will."[12] So if all talk of objectivity—of reason and reasonable—exists as an artifice, if reason reflects subjectivity, how can you influence the trier-of-fact? Get her to draw or resist an

inference? In short, what do others find persuasive? How can you enlighten another's understanding, please their imagination, move their passions, influence their will? An ancient concern addressed by philosophers and rhetoricians, for Aristotle three artistic proofs offered answers. They are ***ethos***, ***logos***, and ***pathos***, persuasion's trinity.[13] Ethos "means convincing by the character of the author [or declarant]. We tend to believe people whom we respect."[14] Logos follows an appeal to reasoning, persuasion by the logic employed. Pathos stirs our emotions.

7. Ethos (messenger bias).

How others perceive us influences how willingly they embrace our message. This is ethos. If Aristotle's appraisal rings true, if we tend to believe people whom we respect, this suggests a cultivated, implicit bias. By our actions, by how we treat others, if we behave in a manner that engenders respect, we lend persuasiveness to our assertions.

So as advocates, can you influence inferences drawn and resisted? Are you cultivating bias? ***Does your message arrive with implicit associations about you, the messenger?*** Of course it does.

An example. I had to decide one issue: Did the injury arise out of his work? Now the worker didn't mention cause. And the medical evidence didn't discuss causation. So I denied the worker's claim for relief. But there existed an inescapable inference—a clear work-related risk triggering the accident. And my superiors accepted it, reversing my decision. When the reversal arrived months later, I stood confused by my failure. Why had I resisted what later seemed an obvious inferred conclusion. ***Then I remembered the messenger.*** Attending the hearing, the worker's attorney demonstrated an arrogance I found alarming. By their reports, he had acted badly with several members of our staff. Dismissive. Condescending. Raising his voice. What's more, at hearing, this same attorney failed to ask his client any questions concerning causation.[15] How could he display such arrogance while failing to ask a rather basic question? So is this the answer? Had I resisted an inference because of the messenger? Candidly, I made no conscious decision to punish the attorney. No purposeful act. Still, I must acknowledge a cultivated bias. The attorney's ethos likely influenced my decision?[16]

Yet another call for civility (the buried lead). Ethos exists as a reflection of demonstrated character. It guides persuasion. And respect drives ethos. So at least for me, civility remains paramount. For civility begets respect. Civility stands as the capacity to remain "[p]olitely circumspect . . . in personal interaction," to demonstrate "propriety and courtesy in conduct; the absence of

rudeness."[17] Politeness. Modesty. Decorum. Empathy. Patience. Decency. Courtesy. Professionalism. Do these words describe us? Or to this discussion, do they describe you as an advocate?

So how can advocates cultivate ethos? Here are three suggestions—

Watch how you write. Excoriating letters/motions detract from an advocate's ethos. Not intelligence, they reflect an immaturity. They lack civility. They don't engender respect. And they aren't persuasive. Ask yourself two questions. First, "For whom am I writing?" Second, "What do I want to accomplish?" Remember, "You're asking the judge to become empathetically aligned with your position, to walk with you. If you're excoriating the other side with emotional billingsgate . . . you are making it hard for the judge to adopt your position."[18] So litter that first draft with stinging gibes and your caustic, cutting wit. Let it be cathartic. Then delete it. Start again, guided by civility and professionalism.

Mind how you act. Acerbic tones, abrasive barbs, examinations laced with contempt—these are not persuasive measures. Confront witness recollection with facts, politely shepherded, not emotion. Most often, counsel need not challenge the witness's character, but the reliability of memory. What counsel thinks or intuits about a witness's poor character should remain a matter between counsel and her client. "A fool uttereth all of his mind."[19] Don't exude joy when demonstrating another's failures (of memory or character).

Consider a change. Civility engenders a persuasive ethos, a positive messenger bias. We see those demonstrating civility as "leaders," as "warm and competent," as "top performers at work," as "better connected to workplace networks," as people "sought out for advice."[20] But civility must be genuine. It must exist as the end (in itself) you pursue. So don't wait until a hearing to appear civil. In all communications, in all dealings, maintain civility. For we cultivate ethos with each word we choose to utter or withhold. With each act.

"[A] lawyer [can] try [a] case like a gentle[person] without giving up any portion of [their]energy and force."[21]

"[I]t is possible to 'disagree without being disagreeable.'"[22]

"[O]ne need not envision litigation as war, argument as battle, or trial as siege. Argument, for example, can be thought of as discourse. . . . A more persuasive technique is to present oneself as a reasonable person who wants to see justice done—it just so happens that justice is done by finding for your client, not

opposing counsel's. All too often attorneys forget that the whisper can be more dramatic (and more compelling) than the scream."[23]

8. Logos (an appeal to logic).

"You want to win with cool hard logic."[24] Of Aristotle's artistic proofs, logos carries the greatest intuitive influence. Appeal to logic. So understand the facts. See them as a composite, a means to understand the points that connect and those that don't. If your client faces the burdens of production and persuasion (that word again), understand where the supporting framework is strongest and where it fails. In all of this, avoid ***confirmation bias***. Before crafting a position, try to view the evidence without an agenda. And study the law, again without an agenda.

Two exercises to overcome confirmation bias.

We favor information that confirms our existing beliefs, our hopes, and our thoughts. This is confirmation bias.[25] And advocates—engaged to represent client's pursuing or resisting relief—remain distinctly vulnerable. They have a paid agenda. But this form of bias pushes advocates to overvalue information tending to aid their cause, while undervaluing competing assertions. Not a "logical" position, it prompts a slanted, perhaps distorted view.

So consider the case from a different view. For we cannot solve worthy problems within the plane of their original conception.[26] Indeed, at least two other participants share this dispute with your client: the judge and your adversary.

(1) Write a decision as if you're the judge.

Not as an advocate, before you reach the hearing/trial, consider writing or outlining a decision as if you are the judge. Consider how a neutral party might weigh the evidence. How that evidence animates precedent. Outline a decision that could withstand appellate review. So list the reasons supporting a conclusion. What's more, catalog the reasons why a competing holding fails. And commit this outline to writing. Don't simply conduct a thought exercise—too easy for confirmation bias to attach. And when doing this exercise, illumination rests in reviewing the evidence with no agenda. Be a stranger to the case. Then let logic guide you.

(2) Draft an appellate brief from your opponent's perspective.

Again, try this exercise before attending the hearing. And assume your side wins—on every contested issue. Then outline your opponent's appeal. List the factual concerns they should raise. From their view: identify those facts animating precedent, distinguishing factual differences from

competing decisions. Once again, commit to writing. This isn't a thought exercise. Understand, a unique force—steeped in logic— builds when you can shift your perspective.

Logic and reason are different. They share a relationship. They're connected. But logic is reason's voice. If reason is "nothing but a wonderful and unintelligible instinct in our souls," logic is the attempt to articulate that instinct through a sequential, open process. So if you're inviting an inference, set forth the framework. Show us how we can bridge the gaps between each step. But don't offer a general appraisal. And if you want us to resist an inference, dismantle that framework. But don't suggest "it's reasonable to conclude" if you haven't answered how and why. What's more, not a ***reasonable inference*** (an objective reference hiding a subjective nature), demonstrate a ***reasoned inference*** (a logical explanation setting forth what led us to a conclusion).

9. Pathos (influenced by emotion).

We cannot separate persuasion into three neat segments. Though we've tried. The trinity can work in harmony, with certain features leading the analysis. They overlap. So pathos often shapes logos. For jurists eschew emotional responses. Still, when influenced by emotion, we then call on logic to support a conclusion—a form of judicial confirmation bias. In our workers' compensation arena, jobs that help stir emotions can help trigger inferences.

Examples. In three cases decided by our Court of Appeals, a dangerous setting helped provoke the inference, an explanation otherwise absent. Perhaps the danger others face can prompt a vicarious emotional response. Did emotion spark an intellectual leap?

(1) *Virginia Tree Harvesters, Inc. v. Shelton*, **62 Va. App. 524 (2013).** The injuries he acquired left Mr. Shelton unable to explain what happened. No eyewitness. Noting the dangerous circumstances Mr. Shelton endured, the court endorsed the inferred conclusion. And their writing—describing the conditions—addresses the logic employed while also sparking empathy, even, in retrospect, fear, and compassion for Mr. Shelton:

> In this case, the [C]ommission properly relied on circumstantial evidence to conclude claimant's injury arose out of his employment and happened while he was on the skidder. Claimant's co-worker . . . testified

> claimant had been operating the skidder earlier in the morning. When [he] approached the machine after the accident, he saw claimant unconscious, slumped over the steering wheel. A tree had penetrated the back window opening of the skidder. . . [C]laimant's boss] confirmed that . . . testimony. Both men indicated the rear window had been removed several days earlier.
>
> Common sense tells us the logging business is a dangerous one. Claimant's work required him to move logs by grabbing the logs and placing them in a truck by use of the grabbers on a skidder. The plexiglass window of the skidder had been removed. Further, the grabber was not functioning properly, resulting in the logs swinging from side to side. The logs were approximately six to eight inches in diameter. The obvious hazard is that a tree might not be fully controlled. The log could then penetrate the skidder's cab. That hazard is evidenced by the fact that the plexiglass had scratches and gouges where logs had previously hit the window.[27]

(2) *Liberty Mut. Ins. Corp. v. Herndon*, **59 Va. App. 544 (2012).** Mr. Herndon couldn't explain what happened. But others placed him: He was working the second floor of a construction site, near an uncovered opening. And they found him severely injured "in the basement directly under the holes in the first and second floors."[28] So the court accepted an invited inference—Mr. Herndon "fell through a hole in a construction site and was injured as a consequence."[29] Indeed, they emphasized the job's "uniquely dangerous" setting.[30]

(3) *Basement Waterproofing & Drainage v. Beland*, **43 Va. App. 352 (2004).** While working, Mr. Beland fell from a ladder. Atop the ladder, he held a bucket filled with tar. It weighed between twenty and thirty pounds. While he held the bucket in one hand, he applied tar with the other, reaching as we worked. So he couldn't maintain "three points of contact" with the ladder. Inferring an explanation, the loss of balance without an opportunity for correction, the court called the work conditions "uniquely dangerous."[31]

So let the circumstances stir emotions. The facts should speak for themselves, don't help too much. When writing, avoid inflammatory words, "emotionally-laden language, and overt plays to a judge's emotions."[32] "In her confirmation hearing before the Senate Judiciary Committee, Justice Sotomayor stated: 'Judges can't rely on what's in their heart . . . It's not the heart that compels conclusions in cases, it's the law.'"[33] And Justice Antonin Scalia, in his legal-writing book with Bryan A. Garner, "advises attorneys not to 'make an overt, passionate attempt to play upon the judicial heartstring' as '[i]t can have a nasty backlash.'" Yet perhaps we too easily separate heart and mind? Emotion and law? Again, persuasion exists as a process marked by overlapping principles.

10. Final thoughts.

To be clear, these constructs represent an oversimplified, overly broad discussion on persuasion and inference. And while it holds a certain accessibility, at best it identifies part of the equation. These constructs focus on how others can persuade the trier of fact. The harder question, well beyond this discussion, lies in the associations the judge has already stored—the ***implicit bias*** that influences perception, shaping what we find persuasive.

Still, this hasn't been a purely academic exercise (at least I hope it hasn't). The framework should reveal hints when inviting judges to reach or resist an inference. The goal remains: help advocates understand persuasion. And part of that understanding—

(1) **Emphasize explanation and exactitude.** Though drawing and resisting inferences involves a subjective analysis, the exactitude of your explanation and the transparency of your "weighing" will lend persuasiveness to your assertion. So if you would like us to draw or resist, identify the circumstances leading to an invited inference and the reasons why we should embrace or reject the invitation. But always, explain your process: be exact; remain transparent. Allow others to thoroughly test your explanation.

(2) **Still, no guarantees.** Even a logical explanation, marked by exact steps, can fail. What some find persuasive, others will reject. Ethos, logos, and pathos help us understand persuasion in general terms. But we can't separate persuasion and subjectivity. To better understand this point, consider a decision issued by the Court of Appeals of Virginia, originating with the Virginia Workers' Compensation Commission. So it reached a third litigation tier (marked by two appeals of right). In this way, seven jurists considered an inference. We have the trial judge/deputy

commissioner. We have three reviewing Commissioners. And a three-person panel from the court. Of these seven, four jurists accepted the invited inference. They would award relief. But three rejected it. What's more, the rejection carried the day.[34] Amid this, I return to my belief: persuasion reflects an inherent relativism.

(3) **We're not identical.** What influences each of us, the associations we distinguish, the intellectual leaps we are willing or unwilling to take—they're ours. As advocates, understand that sometimes others will simply view the circumstances differently. But as advocates, you are better when you begin to comprehend how your actions can influence others, both intended and unintended influence. (Just as judges are far better when they begin to understand what influences their responses.)

(4) **We can't eliminate subjectivity.** Judges use words like examine, weigh, and measure, suggesting a scientific approach—evidence stacked on opposing sides of a balance. It is as if judges could quantify the precise relative mass associated with competing positions: A result awaits, revealed by immutable principles. Then we use quantitative terms like equipoise, greater weight, and insufficient measure. And these words represent the scale's independent reporting. Yet understand that what drives our conclusion (judges too) often begins with a feeling. So each of us gathers a subjective sense of what is persuasive and what lacks persuasiveness. (Borrowing from Justice Stewart, we'll know it when we see it. Or feel it.) Only by asking why can we begin to understand.

(5) **So maintain perspective.** Did you let civility guide you? Do these words describe your actions: Polite? Modest? Empathetic? Patient? Decent? Courteous? Professional? Do you resist filing excoriating letters/motions? Did you confront witnesses with competing facts, politely shepherded, questioning without emotion? Did you present yourself as a reasonable person wanting to see justice done? Did you emphasize the logic of your position, avoiding confirmation bias? Did emotion play a part? Ask yourself these questions. Consider the potential missteps, how you might wish to change. And if—after asking yourself these questions—you wouldn't change your manner of advocacy, perhaps it was simply a different view. Then move on. You've done all you could. Remember, judges issue opinions. Nothing more.

[1] *Evidence*, Black's Law Dictionary (10th ed. 2014).

[2] *Direct Evidence*, Black's Law Dictionary (10th ed. 2014) (emphasis added).

[3] *Circumstantial Evidence*, Black's Law Dictionary (10th ed. 2014) (emphasis added).

[4] *See* Alan White, "*Inference*," The Philosophical Quarterly, Vol. 21, No. 85 (Oct. 1971).

[5] *See O'Donoghue v. United Cont'l Holding, Inc.*, 70 Va. App. 95 (2019); *see also Paramount Coal Co. Va., LLC v. McCoy*, 69 Va. App. 343 (2018); *Layne v. Crist Electrical Contractor, Inc.*, 64 Va. App. 342 (2015); *Tyco Electronics v. Van Pelt*, 62 Va. App. 160, 175 (2013); *Virginia Tree Harvesters, Inc. v. Shelton*, 62 Va. App. 524 (2013); *Liberty Mutual Ins. Corp. v. Herndon*, 59 Va. App. 544 (2012); *United Airlines v. Hayes*, 58 Va. App. 220, (2011); *Green Hand Nursery, Inc. v. Loveless*, 55 Va. App. 134 (2009); *City of Waynesboro v. Griffin*, 51 Va. App. 308 (2008); *Turf Care, Inc. v. Henson*, 51 Va. App. 318 (2008); *Farmington Country Club v. Griffin*, 47 Va. App. 15 (2005); *Texas Tech Industries, Inc. v. Ellis*, 44 Va. App. 497 (2004); *Basement Waterproofing & Drainage v. Beland*, 43 Va. App. 352 (2004); *VFP, Inc. v. Shepherd*, 39 Va. App. 289 (2002); *Marriott International Inc. v. Carter*, 34 Va. App. 209 (2001).

[6] *See Virginia Tree Harvesters, Inc. v. Shelton*, 62 Va. App. 524, 533 (2013) (quoting *Van Geuder v. Commonwealth,* 192 Va. 548, 557 (1951)).

[7] *See Muhammad v. Commonwealth,* 269 Va. 451, 479 (2005), *cert. denied*, 547 U.S. 1136, 126 S.Ct. 2035, 164 L.Ed.2d 794 (2006) (applied in criminal proceeding – greater evidentiary burden).

[8] *See Basement Waterproofing & Drainage v. Beland*, 43 Va. App. 352, 357 (2004).

[9] *See Muhammad v. Commonwealth*, 269 Va. 451, 479 (2005), *cert. denied*, 547 U.S. 1136, 126 S.Ct. 2035, 164 L.Ed.2d 794 (2006).

[10] David Hume, *A Treatise of Human Nature*, § 3.12 (1739).

[11] *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Justice Stewart, P. concurring).

[12] *See "A Fireside Chat with George Campbell: Advice from an enlightened Scot about eloquence, analogies, and how to handle a hostile audience*" (A.B.A. J. Feb. 1, 2018). Mr. Campbell employed these phrases when discussing eloquence. Perhaps wrongly, I believe they aptly describe persuasive—the two concepts (eloquence and persuasiveness) remaining inextricably allied.

[13] *See* Ramage, John D. and Bean, John C., *Writing Arguments,* 4th ed. 1998, 81-82.

[14] *Id.*

[15] In Virginia workers' compensation matters, medical evidence is not essential when assessing causation. *See Lee County School Board v. Miller*, 38 Va. App. 253, 259-60 (2002). Causation "may be proved by either direct or circumstantial evidence, including medical evidence or 'the testimony of a claimant.'" *Farmington Country Club, Inc. v. Marshall*, 47 Va. App. 15, 26 (2005) (quoting *Dollar General Store v. Cridlin,* 22 Va. App. 171, 176 (1996)).

[16] Gratefully, my superiors reversed the decision, finding evidence supporting an inference. But the reversal came more than six months after the hearing date, more than five months after the opinion.

[17] *See Black's Law Dictionary* (10th ed. 2014).

[18] Bryan A. Garner, "*Make Motions More Powerful by Writing Openers that Focus on 'Deep Issues,'*" (A.B.A. J. Apr. 1, 2017).

[19] Proverbs 29:11 (King James Version, 2019).

[20] *See* Christine L. Porath, Alexandra Gerbasi and Sebastian L. Schorch, *The Effects of Civility on Advice, Leadership, and Performance*, Journal of Applied Psychology (Mar. 23, 2015).

[21] Justice Oliver Wendell Holmes, *Notices and Uncollected Letters and Papers*, 128-29 (Harry C. Shriver ed., 1936).

[22] Justice Sandra Day O'Connor, *Professionalism,* 76 Wash. U. L. Q. 5 (1998).

[23] *Id.*

[24] Bryan A. Garner, "*Make Motions More Powerful by Writing Openers that Focus on 'Deep Issues,'*" (A.B.A. J. Apr. 1, 2017).

[25] *See* American Psychological Association, *Confirmation bias*, APA Dictionary of Psychology.

[26] Paraphrasing a quote attributed to Albert Einstein: *see* David E. Rowe and Robert Schulmann, *Einstein on Politics*, 383 (2007).

[27] *See Virginia Tree Harvesters, Inc. v. Shelton*, 62 Va. App. 524, 538-39 (2013).

[28] *See Liberty Mutual Ins. Corp. v. Herndon*, 59 Va. App. 544, 562 (2012).

[29] *Id. at 561-62*.

[30] *Id. at 559*.

[31] *See Basement Waterproofing & Drainage v. Beland*, 43 Va. App. 352, 358-361 (2004).

[32] Joseph Regalia, "*Pulling at the judicial heartstrings: emotion-laden language in your legal writing*," (Appellate Advocacy Blog, May 5, 2018).

[33] Sarah Escalante, Ryan Black, Matthew Hall, Ryan Owens, and Eve Ringsmuth, *"An empirical analysis of emotional language in legal briefs before the Supreme Court,"* (SCOTUSblog, Dec. 22, 2015).

[34] *See Virginia Alcoholic Beverage Control Authority v. Blot*, No. 1395-21-2 (Va. Ct. App. Sep. 6, 2022).

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Annual Convention
March 23-26

The Greenbrier or Virtual

10. How and When to Include a Mental Health Expert or Evaluator

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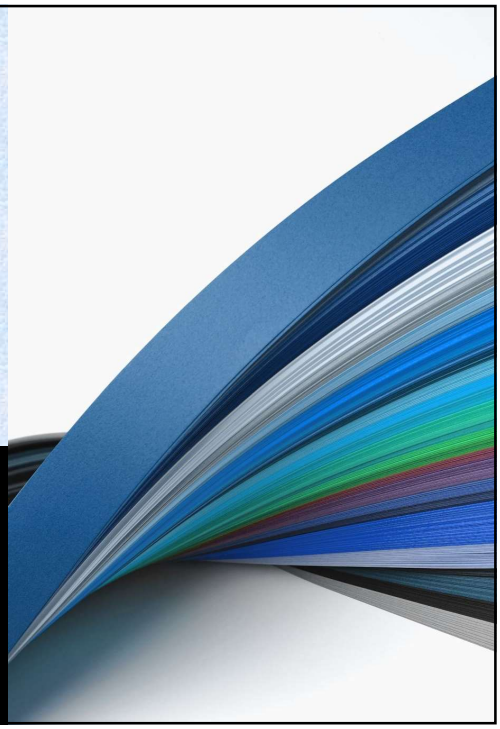
WHEN TO INCLUDE A MENTAL HEALTH EXPERT OR EVALUATOR



Finding a Court Competent Clinician

Elizabeth (Lisa) Bennett, Ph.D.
Founding Director, Child Custody Clinic PLLC

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DIVERSITY AMONG EXPERTS

Clinical and forensic psychologists have notably different areas of expertise. They can assist in a various legal proceedings but are ethically bound to practice within their "scope of competence."

- Criminal/Forensic
- Civil/Personal Injury
- Custody Proceedings
- Juvenile proceedings/Tender Years Exception

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TOPICS FOR EXPERTS IN CHILD CUSTODY CASES:

DEFINING PARENTAL FITNESS	PARENTAL ALIENATION	UNDERSTANDING PERSONALITY DISORDERS	ADDICTION AND RECOVERY
TYPES OF ABUSE & LEVELS OF ABUSE	CUSTODY PLANNING FOR INFANTS, TODDLERS & PRESCHOOLERS	CUSTODY PLANNING AROUND RELOCATION	CHILD NEEDS AND ATTACHMENT PREFERENCE

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FAMILY COURT EXPERTS: THE EVALUATORS

<u>The Evaluator May Conduct</u>

- Custody Evaluation
- IMHE/Psychological Evaluation
- Parental Fitness Evaluation
- Substance Abuse Assessment
- Child Psychological Evaluation or “Child Needs Evaluation.”
- Brief Focused Assessment/Parenting Plan Evaluations

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FAMILY COURT EXPERTS: THE PRACTICTIONERS

The Practitioner

- Adult Therapist/Child Therapist
- Parenting Coordinator
- Parenting Coach
- Addiction Specialist
- Reunification Therapist/Visitation Supervisor
- Content Expert: Forms of abuse, parental alienation etc.

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WHO IS COURT COMPETENT?

Consider experience, licensure, publications, and content knowledge

Ask about professional memberships:

American Psychological Association (various sections)	AFCC (Association of Family and Conciliation Courts)	AAFP (American Academy of Forensic Psychology)	PACE (Professional Academy of Custody Evaluators)

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DO THEY KNOW THEIR SPECIALTY GUIDELINES?

Your expert should be aware of APA/AFCC "specialty guidelines" and/or "practice standards" for such things as:

- Custody Evaluations
- General Forensic Evaluations
- Parent Coordination
- AFCC Brief Focused Assessments/Parenting Plans

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DON'T UNDERESTIMATE THE PRACTITIONER …

Finding a "court competent" provider can be essential in litigation.

The right provider knows how to balance confidentiality rules with litigation demands and court room protocol.

A practitioner may have a longstanding relationship with a client or family.

A practitioner can opine on severity of symptoms, progress or lack of progress, compliance with court orders, effects of trauma or abuse, the likelihood of cooperative coparenting, child attachment preference, and other variables.

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BEWARE OF THE FOLLOWING

- THE CLINICIAN WHO WILL GET SCARED AND QUIT THE CASE
- THE CLINICIAN WHO REFUSES TO APPEAR IN COURT
- THE PROVIDER WITH THE "TOO BIG" OPINION
- POOR BOUDARIES/DUAL ROLES
- ROGUE METHODS

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PROFESSIONAL ISSUES

Litigants and lawyers should know…

- Most services will not be covered by insurance
- Fees for court-informed providers are higher than average
- Expert designation deadlines/trial dates must be clear from the start
- Neutrality affects every step/every phone call
- The custody evaluator faces high risk (threats of harm, board complaints, "revenge ratings" online)

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NEW METHODS, NEW OPPORTUNITIES

- Virtual service/telehealth allows for long distance services
- Virtual parent coordination, adult therapy, teen therapy
- Evaluations require only one or two travel days
- Consultation/counter-expert work

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STAYING IN TOUCH

Questions and requests can be directed to:

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