Getting a Handle on the Basics of 'Hybrid' Witnesses in Virginia Federal and State Practice

by Jon M. Talotta and Michael M. Smith

In many cases, a client's employee (or ongoing professional services provider, such as a treating physician) will possess the specialized knowledge, skill or experience to provide opinion testimony as well as be able to testify about relevant facts based on first-hand knowledge. The use of a so-called "hybrid" (i.e., fact and expert) witness can enhance the effectiveness of opinion testimony where the opinion was formed from first-hand knowledge rather than a subsequent review of the relevant facts. Hybrid witnesses also can reduce both the costs otherwise associated with retaining a litigation expert and the time required to bring the hybrid witness up to speed on the relevant facts and issues. With such attractive benefits, it is little wonder that the use of hybrid witnesses is growing.

Yet, the decision to designate an employee (or professional services provider) as a hybrid witness raises issues for both counsel and opposing counsel. For example, how do state and federal courts in Virginia treat hybrid witnesses? How should a witness be designated during pre-trial discovery (i.e., as a hybrid witness or a retained expert) if at all? What discovery should opposing counsel conduct? Answering these and other questions often involves some tricky forecasting.

Hybrid or Expert?

A "hybrid" witness is a fact witness who also happens to have the requisite knowledge, skill or expertise to provide opinion testimony, and whose opinion is formed as a result of the witness's involvement in the underlying relevant events. For example, a treating physician who proffers an opinion based on her/his personal observations as a participant in the treatment of a patient is the stereotypical hybrid witness. Businesses are relying more frequently on their own employees to provide opinion testimony as well as factual testimony. Common examples are engineers, software developers, and accountants with specialized knowledge, skill or expertise who are employed or retained by a litigant in the normal course of business.

The Federal Rules Require That Counsel Commit Early to a Specific Designation

In federal practice, there is a relatively clear distinction drawn between discovery of a retained expert and a hybrid witness. The admissibility of opinion testimony is governed by Federal Rule of Evidence 702. But, in pre-trial discovery, retained experts are subject to mandatory disclosure under Rule 26(a)(2), and must disclose specified information as well as a written report detailing the substance of and bases for an expert's proposed opinion testimony. Hybrid witnesses are not subject to these same disclosure requirements, and must only be identified as witnesses who may provide opinion testimony at trial.

Yet the distinction between retained expert and hybrid witness is not always easy to discern. Opinions formed in the course of a witness's employment (or, for example, in the course of treatment in the context of a treating physician) usually will not be deemed to require designation as a retained expert. Opinions formed in the context of litigation (i.e., outside the employment context or after treatment or other services have been provided) usually will be deemed to require designation as a retained expert and be subject to Rule 26(a)(2)'s disclosure requirements. Thus, the failure to appreciate the differences between a retained expert and a hybrid witness can be, as one district court observed, "a trap for the unwary."[1]

Because of the different disclosure requirements, it is important for counsel to determine in advance whether a proposed witness can qualify as a hybrid rather than a retained expert. This is particularly important where counsel does not want the witness to be bound by Rule 26(a)(2)'s disclosure requirements. If counsel concludes that a witness qualifies as a hybrid, he/she may choose not to follow the mandatory disclosure requirements for retained experts. If, however, the witness subsequently cannot qualify as a hybrid, but rather is deemed to be a retained expert, the witness may be barred from providing any opinion testimony.[2]

Opposing counsel also must be mindful of the hybrid/retained expert witness distinction. If opposing counsel fails to realize that the witness is a hybrid, and sits back waiting for mandatory disclosures, she/he may lose the opportunity to discover the witness's proposed opinions prior to trial.[3]

Virginia State Practice Appears to Require Similar Diligence

In Virginia state practice, the admissibility of opinion testimony is guided by §§ 8.01-401.1 and 401.3 of the Virginia Code. Unlike the Federal Rules, however, Virginia law does not require disclosures for retained experts.[4] Absent a court order, discovery of a retained expert is conducted much like discovery of a hybrid witness in federal practice (i.e., through deposition and interrogatories

to obtain the identity of the expert, the subject matter of the proposed testimony, the facts and opinions to be offered, and a summary of the grounds for those opinions).[5]

Nevertheless, a party who fails to identify an expert upon request during pre-trial discovery will usually be precluded from presenting that expert at trial.[6] Thus, counsel must decide up front whether the witness can qualify as a hybrid rather than a retained expert.

The same factors determining whether a witness can qualify as a hybrid rather than a retained expert in federal practice appear to apply in Virginia state practice. One recent Supreme Court of Virginia case seems to provide some guidance. In *Pettus*, a medical malpractice case, the defendant physician offered into evidence the deposition of another physician witness who had treated the plaintiff. The plaintiff objected, arguing that the deposition testimony was inadmissible because it was expert testimony. The Court disagreed, holding that the deposition was not expert testimony because it served only to explain impressions and conclusions reached while treating the plaintiff, rather than stating the physician witness's present opinions.[7]

Although *Pettus* dealt directly with a different set of issues regarding expert testimony, the Court's reasoning seems to acknowledge the distinction between a hybrid witness and a retained expert usually followed under the Federal Rules. A recent Virginia state circuit court case suggests that this is the accepted view in Virginia practice. The issue in *Villar-Gonsalvez* was whether a treating physician was a retained expert and therefore entitled to expert witness compensation. The court held that the physician was a retained expert rather than a hybrid witness (and thus entitled to payment), because the witness was asked to opine on issues not considered while the witness was actually treating the patient.[8]

Thus, whether in state or federal practice, counsel must consider carefully the type of opinion a witness will be offering in order to assess whether the witness can be deemed a hybrid.

ABOUT THE AUTHORS

Jon Talotta is a senior litigation associate in the McLean office of Hogan & Hartson L.L.P. He received his M.A. and J.D. degrees from the University of Virginia, his M.S. degree from American University, and his undergraduate degree from Pennsylvania State University. After law school, he served as a law clerk for The Honorable James C. Cacheris, U.S. District Court for the Eastern District of Virginia. **Michael Smith** is a student at the George Mason University School of Law, and worked as a summer associate at Hogan & Hartson in 2005.

Practical Considerations Concerning Pre-Trial Disclosure and Discovery

The decisions in *Pettus* and *Villar-Gonsalvez* are instructive because the courts distinguished between an expert witness effectively "retained" to provide opinion testimony and a witness who proffered opinion testimony based on first-hand experience as an actor in the underlying events. Yet, neither case resolves the issues of (a) whether a hybrid witness must be identified as an expert, and (b) the type of discovery applicable to a hybrid witness in Virginia state practice. Guidance on these issues may be found in cases construing Federal Rule 26(b)(4) prior to its amendment in 1993, which mirrored Virginia's current Rule 4:1(b)(4), as well as case law from states that have adopted expert witness rules with identical or very similar language.[9]

Pre-Trial Disclosure of Hybrid Witnesses

Several federal and state courts have addressed the issue of whether the language in or similar to Virginia's Rule 4:1(b)(4) requires the identification of hybrid witnesses during pre-trial discovery. Unfortunately, there appears to be no clear consensus. In one case, a Georgia federal district court held that a plaintiff's failure to identify her treating physicians as expert witnesses during pre-trial discovery precluded her from offering the physicians' opinion testimony at trial.[10] The Supreme Court of Alaska, however, reached the opposite conclusion in construing a rule with language similar to Rule 4:1(b)(4). In that case, the court held that a defendant was not required to identify as an expert witness the police officer who investigated a traffic accident and later offered opinion testimony at trial, because the policeman was "intimately involved" in the underlying facts giving rise to the litigation, and would reasonably be expected to form an opinion through that involvement.[11]

This lack of guidance makes it difficult for counsel to predict how a Virginia court will rule on pre-trial identification requirements for hybrid witnesses, and should caution counsel in most instances to take the safer route and elect to disclose.

Pre-Trial Discovery of Hybrid Witnesses

Fortunately, there appears to be a bit more guidance available on defining the contours of hybrid witness discovery. As noted, discovery of expert witnesses in Virginia state practice is limited to deposition and interrogatories requesting the identity of the expert, the subject matter of the proposed testimony, the facts and opinions to be offered, and a summary of the grounds for the proposed opinions. These limitations likely do not apply to hybrid witnesses. Several federal courts interpreting the pre-1993 Federal Rule 26 (which, as noted, was virtually identical to Virginia's current Rule 4:1) have concluded that hybrid witnesses are to be treated as ordinary fact witnesses for discovery purposes to the extent that the discovery pertains to facts acquired and opinions formed by the witness as an actor in connection with the subject matter of the litigation.[12]

For example, in *Duke Gardens*, a federal district court case in New York,

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the defendant sought to depose three employees of a company the plaintiff had hired before the commencement of the litigation to inspect structures at issue in the lawsuit. The plaintiff objected to the defendant's attempts to discover what the employees learned during their pre-litigation inspections, arguing that the employees were being called as expert witnesses and thus could not be deposed on those findings absent a court order. The court held that the pre-litigation inspections were discoverable by ordinary means, because the information requested was obtained by the employees in connection with the underlying subject matter of the litigation, rather than as experts retained for litigation purposes.[13]

The decision in *Duke Gardens* and other similar holdings appear aimed at preventing parties from using the label of expert to shield from ordinary discovery a witness with first-hand knowledge of underlying facts. It seems likely that a Virginia court faced with the same situation would follow such reasoning when assessing the scope of discovery on a hybrid witness.

Conclusion: Putting Your Designation Determination Into Context

The strategic considerations involved in handling a hybrid witness can have far-reaching consequences in Virginia federal and state practice. In federal practice, the motivations to treat a witness as a hybrid can be significant, because designation as a retained expert will trigger mandatory disclosure requirements (including the filing of a report). Yet, although counsel may be inclined to treat a witness as a hybrid in order to limit the amount of information disclosed and the costs of preparing an expert report, the nature of the witness's opinions may require that the witness be designated as a retained expert. Because Virginia state practice does not require written disclosures, and because treating a witness as a hybrid rather than a retained expert may affect the extent of discovery opposing counsel may obtain from the witness, there appear to be incentives to disclose an opinion witness as a retained expert, particularly because failing to disclose a retained expert can result in the exclusion of her/his testimony.

Thus, whether in federal or state practice, it is usually safer to designate an opinion witness as a retained expert rather than attempt to treat the witness as a hybrid. ***VBA***

NOTES

1. *Sullivan v. Glock*, 175 F.R.D. 497, 501 (D. Md. 1997).
2. For an illustrative discussion of these potential quandaries, and the parameters for assessing whether a witness can qualify as a hybrid, see *Sullivan*, 175 F.R.D. at 500-508.
3. *Id.*
4. Virginia courts do issue scheduling orders requiring disclosure of the identities of expert witnesses and information about experts otherwise available through interrogatories and depositions under Rule 4:1(b)(4).
5. See, e.g., *Flora v. Shulmister*, 546 S.E.2d 427, 430 (Va. 2001).
6. See, e.g., *City of Hopewell v. County of Prince George*, 397 S.E.2d 793, 797 (Va. 1990).
7. *Pettus v. Gottfried*, 606 S.E.2d 819, 824-25 (Va. 2005). Note, however, that the Court did not discuss in its opinion whether the physician witness was identified as an expert by the defendant.
8. *Villar-Gonsalvez v. Villar-Gonsalvez*, 65 Va. Cir. 96, 100-01 (2004).
9. The Virginia courts themselves have looked to such outside authorities for assistance. See, e.g., *Flora*, 546 S.E.2d at 430; *Villar-Gonsalvez*, 65 Va. Cir. 96.
10. *Chakales v. Hertz*, 152 F.R.D. 240, 242 (N.D. Ga. 1993); see also *Smith v. Paiz*, 84 P.3d 1272 (Wy. 2004) (similar reasoning and outcome).
11. *Getchell v. Lodge*, 65 P.3d 50, 55-56 (Ak. 2003); see also, *Kehr v. Knapp*, 136 S.W.3d 118 (Mo. Ct. App. 2004) (similar reasoning and outcome).
12. See, e.g., *Duke Gardens Found. v. Universal Restoration*, 52 F.R.D. 365 (S.D. N.Y. 1971); *Nelco Corp. v. Slater Electric*, 80 F.R.D. 411 (E.D. N.Y. 1978); *Keith v. Van Dorn Plastic Machinery Co.*, 86 F.R.D. 458 (E.D. Pa. 1980).
13. *Duke Gardens*, 52 F.R.D. at 366-67.