

*In the article below, Tom Williamson provides an overview of Virginia's Deadman's Statute which controls the type of statements that may be introduced into evidence at trial when one party to a lawsuit has died. For more information about Tom Williamson's background and legal experience, please go to his [biographical page](#) on our website or [email him directly](#).*

## ***The Deadman's Statute: Opportunities and Pitfalls***

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### **I. Introduction**

Death changes life for those who survive. Litigants are not spared from this dictate. When death (or incapacity) has claimed a party to a controversy in litigation, lawyers for all parties to the action must focus upon the consequences of the demise. One of the most important new realities of the case brought on by the death is the application of Va. Code §8.01-397-the Deadman's Statute.<sup>1</sup>

The Deadman's Statute imposes a new evidentiary regime in two important respects. The hearsay rule vanishes as an impediment to admitting statements made by the deceased. For surviving parties, a new obstacle has arisen to use of their testimony- corroboration is required before judgment can be founded upon the survivor's testimony.

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<sup>1</sup> § 8.01-397. Corroboration required and evidence receivable when one party incapable of testifying. In an action by or against a person who, from any cause, is incapable of testifying, or by or against the committee, trustee, executor, administrator, heir, or other representative of the person so incapable of testifying, no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony. In any such action, whether such adverse party testifies or not, all entries, memoranda, and declarations by the party so incapable of testifying made while he was capable, relevant to the matter in issue, may be received as evidence in all proceedings including without limitation those to which a person under a disability is a party. 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.

(Code 1950, § 8-286; 1977, c. 617; 1988, c. 426.)

The latter exclusionary branch of the Deadman's Statute creates a host of special considerations to be contemplated and agonized over by lawyers for both the survivor and the deceased. The time spent and decisions regarding the Deadman's Statute may spell out the difference between a *prima facie* case and no case at all. I have drafted this paper to hopefully alert you to the pitfalls and opportunities when death or incapacity brings the exclusionary branch of the Deadman's Statute into your case.

## **II. History and Purpose of the Deadman's Statute**

Decision making about the Deadman's Statute requires an understanding of the history and purpose of the Statute. Let's go back to the beginning.

Prior to 1866, Virginia followed the common law rule excluding the testimony of "every witness who had any manner of interest in the result of the litigation". *Epes Adm'r v. Hardaway*, 135 Va. 80, 115 S.E. 712, 713 (1923). This absolute prohibition was lifted in 1866 for most witnesses. However, the legislature continued the exclusion of testimony of a party in his own favor where one of the original parties to the contract or other transaction which is the subject of the investigation, is dead, or insane, or incompetent to testify by reason of insanity, or other legal cause, unless the party was first called to testify on behalf of the dead, incompetent or insane party. *Va. Code of 1873* Ch. 172, §22.

Between 1873 and 1919 a number of exceptions and qualifications were adopted to address perceived hardships manifested in judicial opinions. *Epes*, 135 S.E. at 714-16. In 1919, this tinkering culminated in adoption of the current Deadman's Statute.<sup>2</sup> The legislative revisions of witness competency rules which included the Deadman's Statute

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<sup>2</sup> The original version of the Deadman's Statute has been amended to two respects. Statements of the party incapable of testifying are admissible whether or not the surviving party testifies. Parties whose inability to testify stems from a self inflicted injury are exempted from the Deadman's Statute.

were “highly remedial” in nature. Their purpose was to remove qualifications, not to create them or impose burdens on witnesses already competent. *Robertson’s Ex’r v. Atlantic Coast Realty Co.*, 129 Va. 494, 106 S.E. 521, 524 (1921). For this reason, no corroboration is required of a witness who was competent before the Code of 1919 Deadman’s Statute became operative. *Epes*, 135 S.E. at 716.

As we will see later, this construction of the Deadman’s Statute means simply looking at the language of the statute is not conclusive. The pre-1919 law must be examined to ascertain whether it permitted the witness to testify. If so, the corroboration requirement of the Deadman’s Statute will not apply to the witness.

The purpose of the Deadman’s Statute is to prevent a litigant from having the benefit of his own testimony when, because of death or incapacity, the personal representative of another litigant has been deprived of the testimony of the deceased/disabled person.<sup>3</sup> It substitutes the corroboration requirement for the harsher common law rule which disqualified the surviving witness for interest. *Williams v. Condit*, 265 Va. 49, 52, 574 S.E.2d 241, 243 (2003); *Diehl v. Butts*, 255 Va. 482, 488, 499 S.E.2d 836 (1998). According to the Supreme Court of Virginia, the statute “is a wise one, and is designed to prevent fraud, and for that reason should not be whittled away.” *Timberlake’s Ad’mr v. Pugh*, 158 Va. 397, 163 S.E. 402, 403 (1932).

### **III. Breadth of Application**

The Deadman’s Statute, on its face, is sweeping in its application to the testimony of a surviving party. However, when the legislative history is considered, it is probably

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<sup>3</sup> “[T]he statute was designed to prevent...an opportunity for the survivor to prevail by relying on his own unsupported credibility, while his opponent, who alone might have contradicted him, is silenced by death.” *Hereford v. Pates*, 226 Va. 605, 608, 610, 311 S.E.2d 790, 792, 793 (1984).

limited to the survivor's testimony about the transaction or event in which both parties were observers or participants.

The 1866 legislation altering the common law rule of excluding interested witness testimony left intact the prohibition for surviving parties regarding "the contract or other transaction" to which both the deceased and surviving parties were parties. *Epes Adm'r v. Hardaway*, 135 Va. 80, 115 S.E. 712, 713 (1923) quoting *Va. Code of 1873* §22. A survivor therefore should only be required to corroborate testimony concerning a transaction or event which the deceased would have had personal knowledge and is possibly disadvantaged because of an inability to testify and contradict the survivor.

For example, a personal injury victim should not have to corroborate testimony about damages or pre-accident activities if these matters would not have been within the personal knowledge of the deceased.

#### **IV. Who Is An Interested Party?**

The Deadman's Statute corroboration requirement applies not only to parties to the litigation but to "any adverse or interested party". An interested party need not be a party to the action or suit. Analyzing the impact of the Deadman's Statute requires that you determine whether any witness to the case is an interested party.

An interested party is "one, not a party to the record, who is pecuniarily interested in the result of the suit." *Johnson v. Raviotta*, 264 Va. 27, 34, 563 S.E.2d 727, 732 (2002) quoting *Merchant's Supply Co., Inc. v. Ex'rs of the Estate of John Hughes*, 139 Va. 212, 216, 123 S.E. 355, 356 (1924). Blood relationship alone will not make a party an interested party. *Johnson*, 264 Va. at 36, 563 S.E.2d 733.

Examples of interested parties are:

- An employee of a defendant alleged to be vicariously liable if the entity would be entitled to indemnification from the employee. *Johnson*, 264 Va. at 37, 563 S.E.2d 734.
- A witness who owns stock in a party to the litigation. *Merchant's Supply Co., Inc.* 123 S.E. at 356.
- Beneficiary of a wrongful death claim. *Paul v. Gomez*, 118 F. Supp.2d 694 (W.D. Va. 2000).

If the witness is a the personal representative of the estate, the answer will vary depending on the estate's posture in the litigation. If the estate will be financially impacted by recovery or assessment of damages, the personal representative will be deemed to be an "interested party" notwithstanding the lack of personal consequences to the representative himself. *Johnson*, 264 Va. at 34-35, 563 S.E.2d at 733-34.

Conversely, if the estate itself will not be impacted financially by the litigation, the personal representative will not be deemed an "interested party" . *Coalter's Ex'r v. Bryan*, 42 Va. (1 Gratt.) 18 (1844).

## **V. What Is Sufficient Evidence of Corroboration?**

If the testimony of the adverse or interested party presents an essential element that, if not corroborated, would be fatal to the adverse party's case, corroboration is required. If corroboration is required, such corroboration must be supplied by evidence which tends in some degree to independently support the element essential to the adverse or interested party's case; the testimony, however, need not be corroborated on all material points. *Johnson v. Raviotta*, 264 Va. 27, 32, 563 S.E.2d 727, 731 (2002). Corroboration need not remove all doubt but only give more strength than was had before. *Hereford v. Pates*, 226 Va. 605, 608, 311 S.E.2d 790, 792 (1984).

Determining what is sufficient corroboration can be quite difficult. What is adequate corroboration depends on the circumstances of each case. *Vaughn v. Shank*, 248 Va. 224, 229, 445 S.E.2d 127, 130 (1994). It must not come from the mouth of the surviving witness sought to be corroborated nor be wholly dependent upon the credibility of the surviving witness. *Johnson v. Raviotta*, 264 Va. 27, 36, 563 S.E.2d 727, 733 (2002). It must be evidence which adds to, strengthens, confirms and corroborates the testimony of the surviving witness. *Varner's Ex'rs v. White*, 149 Va. 177, 185, 140 S.E. 128,130 (1927).

Corroboration can come from any source including documentary or physical evidence or surrounding circumstances. *Williams v. Condit*, 265 Va. 49, 56, 574 S.E.2d 241, 245 (2003) (J. Lacy concurring); *Brooks v. Worthington*, 206 Va. 352, 357, 143 S.E.2d 841, 845 (1965). Testimony of a witness that is inconsistent and contradictory will not be deemed sufficient corroboration. *Burton's Ex'r. v. Manson*, 142 Va. 500, 510, 129 S.E. 356, 359 (1925). Corroboration is determined not by looking at any single witness' testimony. Instead, it is determined by examining in the aggregate all of the evidence probative of corroboration. *See Varner's Ex'rs*, 149 Va. at 185, 140 S.E. at 130 (1927). Expert testimony can be used as corroborative evidence. *See Penn v. Manns*, 221 Va. 88, 267 S.E.2d 126 (1980). Testimony equally consistent with two different inferences will not be deemed corroborative. *See Vaughn*, 248 Va. at 230, 445 S.E.2d at 130.

In order to determine what must be corroborated, you need to look at the elements of the cause of action or defense. Then, frame the ultimate facts in issue for each element. This analysis should identify facts which are candidates for corroboration. *Rice v. Charles*, 260 Va. 157, 532 S.E.2d 318 (2000), a wrongful death case arising out of a

passenger's death in a vehicle operated by a surviving drunk driver, illustrates this approach. The pivotal question for the defense of contributory negligence was should the passenger have known the driver's ability to drive was impaired. Evidence about the passenger's knowledge about plans to purchase beer was not enough corroboration to create a jury issue. The corroborating evidence had to show that the passenger was aware of the driver's impaired ability to operate a vehicle.

Similarly, in *Johnson v. Raviotta*, a nurse's testimony that she checked the vital signs and intake and output as ordered by the physician was not corroborated by the documented care that she did provide because none of that care required taking vital signs or measuring urine output. 264 Va. at 38, 563 S.E.2d at 733. *Johnson* shows powerfully that uncharted care allegedly given according to a surviving adverse or interested party cannot be a defense to a claim of malpractice unless the allegedly negligent provider can produce evidence *specifically* corroborating that the care at issue was provided.

For an excellent review of Virginia case law concerning the corroboration requirement, see the Report to the Boyd Graves Conference, Appendix accompanying this paper.<sup>4</sup>

## **VI. Habit As Corroboration.**

One of the favorite stratagems employed in defending medical malpractice cases is the use of habit or regular practice testimony to substitute for an avowed lack of

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<sup>4</sup> The Report was presented to the 2003 Boyd Graves Conference. The Conference accepted the Report's recommendation to support legislative modification of the Deadman's Statute to codify the interested witness rule, abolish the corroboration requirement and permit hearsay by the deceased/disabled person only if the surviving party testifies. The Appendix was prepared by Professor Kent Sinclair with the assistance of Laura A. Williams, University of Virginia law student. I gratefully acknowledge the excellent work product of the Committee, its Reporter Professor Sinclair and Ms. Williams which is an asset to any practitioner grappling with the nuances of Deadman's Statute jurisprudence.

memory of the specific transaction at issue or the absence of charted facts necessary to establish compliance with the standard of care. This was the approach of the defendant physician in *Johnson v. Raviotta*, 264 Va. 27, 32, 563 S.E.2d 727, 731 (2002).

If the injured patient is dead or disabled, habit evidence emanating from the mouth of a defendant or interested party is still subject to the corroboration requirement. Accordingly, the defendant physician in *Johnson* could not obtain judgment in his favor based upon his own uncorroborated testimony about his habit in rechecking abnormal blood pressures. *Va. Code* §8.01-397.1 permitting introduction of evidence of habit and routine practice to prove conduct on a particular occasion does not dispense with the Deadman's Statute corroboration requirements.

#### **VII. Confidential Relationships Require Heightened Corroboration.**

In cases involving parties between whom a confidential relationship existed at the time of the transaction at issue, a higher degree of corroboration is required. *Diehl v. Butts*, 255 Va. 482, 489, 499 S.E.2d 833, 838 (1998). This rule is particularly significant in medical malpractice litigation because relationships between health care providers and patients are confidential relations.

Confidential relationship is synonymous with fiduciary relationship. *Black's Law Dictionary*, Fiduciary Relationship (7<sup>th</sup> Ed. 1999). *See also Economopoulos v. Kolatis*, 25 Va. 806, 812, 528 S.E.2d 714, 718 (2000). *Diehl* held a patient physician relationship was a confidential relationship. Similarly, a hospital or nurse should be deemed in a confidential relationship with a patient.<sup>5</sup>

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<sup>5</sup> *Va. Code* §32.1-17.1:03 recognizes a patient's right to privacy in the context of medical records prepared by any health care provider in the course of providing health services to a patient. *See also Fairfax Hospital v. Curtis*, 254 Va. 437, 492 S.E.2d 642 (1997). This argument was made in *Johnson v. Raviotta*,

### VIII. When Is Corroboration A Jury Question?

The sufficiency of corroborative evidence is usually a question for the jury. *Johnson v. Raviotta*, 264 Va. 27, 31, 563 S.E.2d 727, 731 (2002). When the corroborative evidence is more than a scintilla, the issue is usually for the jury. *Rice v. Charles*, 260 Va. 157, 167, 532 S.E.2d 318, 324 (2000); *Brooks v. Worthington*, 206 Va. 352, 357, 143 S.E.2d 841, 845 (1965).

Reviewing the Virginia Supreme Court cases reveals that the Court is quite vigilant in scrutinizing purported corroboration evidence. In numerous instances, the Court has found the evidence offered by the surviving party was insufficient as a matter of law. Conversely, the Court is quite reluctant to find, as a matter of law, the evidence is sufficient corroboration. As noted in *Taylor v. Mobil Corp.*, 248 Va. 101, 111, 444 S.E.2d 705, 710-11 (1994), credibility of witnesses and inferences to be drawn from the evidence are within the province of the jury.<sup>6</sup>

The issue for the judge is whether the evidence is sufficient to create a jury question. The Supreme Court of Virginia will likely conduct a sharp eyed, *de novo* review of the offered corroboration evidence. If you are representing the deceased/disabled party, you will almost always at least have the benefit of a jury question on corroboration and in many instances, will be in a position to argue a lack of sufficient corroboration as a matter of law thus requiring exclusion of the surviving

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264 Va. 27, 563 S.E.2d 727 (2002) with respect to a nurse. The Court did not expressly comment upon the issue but did hold no corroboration had been shown to permit the nurse to testify about her uncharted care.  
<sup>6</sup> *Taylor* sets out an example of a jury instruction on the issue of corroboration. The instruction was given by the *Taylor* trial court but was not the subject of review on appeal. *Taylor* involved malpractice by a physician. The plaintiff could have requested the jury be instructed that heightened corroboration is required. There is no case law on whether heightened corroboration is matter solely for the court to determine in deciding if a jury question exists or whether it will also be appropriate for the jury to weigh in deciding whether the evidence establishes corroboration.

party's testimony. This is especially true if you are able to establish a confidential relationship between the deceased/disabled party and the surviving party.

### **IX. If You Call the Adverse Party, You Waive.**

When the deceased/disabled party calls the surviving adverse or interested party as a witness, the Deadman's Statute will no longer apply so as to require corroboration of the survivor's testimony about the transaction at issue. This rule is based upon the long established principle that, when an adverse party is called and examined by an opposing party, the latter is bound by the all of the adverse party's uncontradicted and not inherently improbable testimony. *Economopoulos v. Kolatis*, 25 Va. 806, 812, 528 S.E.2d 714, 718 (2000).

This rule often forces hard choices upon us when mapping out trial plans. Do we give up our right to corroboration in order to get some important testimony of the adverse party into evidence? Is there any way to have it both ways?

If you do not need the adverse testimony to make a *prima facie* case, your decision making is probably much easier. The adverse party usually will be called during the defense case and the cross examination will elicit the sought after testimony.

Another approach is to address the matter in pretrial discovery. Serve interrogatories or request for admissions calculated to isolate out the substance which you want to introduce and then admit into evidence the interrogatory or request for admission response.

Use of the adverse party's deposition is a dicier proposition.<sup>7</sup> The principle of being bound by an adverse party's testimony does not apply with full force to the

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<sup>7</sup> Rule 4:5(a)(3) permits use of a party's deposition for any purpose. As discussed above, an interested party for purposes of the Deadman's Statute is a non party to the litigation. A interested non party's deposition may be used if the deponent meets some other criteria of Rule 4:5 such as being a managing

introduction of deposition testimony. *Horne v. Milgrim*, 226 Va. 133, 306 S.E.2d 893 (1983). However, there is no case law making it clear that the corroboration requirement remains intact when a surviving party's deposition testimony is admitted by the deceased/disabled party. Admitting deposition testimony also has the disadvantage of pouring all of the surviving party's version of events into your case in chief because, if you introduce part of the deposition, the opposing parties can introduce other portions of the deposition.<sup>8</sup> Use of an interrogatory or request for admission is a much safer way to get the good, leave out the bad and hopefully preserve the corroboration requirement.

#### **X. Corroboration Not Required If Interested Party Testifies For Deceased.**

The corroboration requirement vanishes if an interested party testifies on behalf of the deceased/disabled party about the transaction at issue.<sup>9</sup> *Johnson v. Raviotta*, 264 Va. 27, 34, 563 S.E.2d 727, 732 (2002).<sup>10</sup> However, mere availability of an interested party to testify to the deceased/disabled's version of the facts will not abrogate the requirement that the surviving party's testimony be corroborated. The interested party must actually testify. *Williams v. Condit*, 265 Va. 49, 55, 574 S.E.2d 241, 244 (2003) (J. Lacy concurring).

You must identify potential witnesses who are "interested parties" possessing knowledge about the transaction at issue. Then a decision needs to be made-should I call the witness and get the benefit of the testimony and lose the corroboration requirement.

Factors to consider include: is the interested party's testimony necessary for a *prima*

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agent, being a greater distance than 100 miles from the place of trial or out of the Commonwealth or is a treating physician.

<sup>8</sup> *Va. Sup. Ct. R.* 4:7(a)(5).

<sup>9</sup> For definition of "interested party", see Section IV *supra*.

<sup>10</sup> This exception to a literal application of the Deadman's Statute is because, prior to the 1919 enactment of the Deadman's Statute, a party was a competent witness to testify if an interested witness testified on behalf of himself or the deceased/disabled party. *Paul v. Gomez*, 118 F. Supp.2d 694 (W.D. Va. 2000).

*facie* case, is the interested party a good witness and is the survivor's testimony likely to be uncorroborated as a matter of law or will it simply be a jury question?

## **XI. When and How To Raise A Deadman's Challenge.**

When you suspect a surviving party's testimony may lack corroboration, you have to decide when and how to assert lack of corroboration. This gives plaintiff's counsel an opportunity to experience the joy usually reserved to defense lawyers of the surprise motion to strike.

The issue of corroboration is one of sufficiency of evidence. For this reason, the question may not be answerable until the close of evidence because only at that point can all evidence be surveyed to determine if sufficient corroboration exists to create a jury issue. *Johnson v. Raviotta*, 264 Va. 27, 33, 563 S.E.2d 727, 731-32 (2002). Prior to the case being submitted to the jury, the deceased/disabled party will move to strike the testimony of the survivor on the transaction at issue on the grounds it is uncorroborated as a matter of law.

There is an alternative path to travel. You can move *in limine* to exclude the testimony of the surviving party about the transaction. If the motion is successful, the court will prohibit any testimony by the surviving party about the transaction at issue from being admitted at trial. *See Diehl v. Butts*, 255 Va. 482, 491, 499 S.E.2d 833, 839 (1998). To lay the foundation for a motion *in limine*, serve an interrogatory and request for production calculated to elicit all facts, circumstances and documents which the surviving party contends corroborate the contested testimony.

Which path to take requires some thought. If raised pretrial, you will certainly spur an intensive search for corroboration evidence. On the other hand, waiting until the close of evidence will mean that the jury has heard the surviving party's testimony and the best result will be an instruction to disregard the testimony.

There is a third way. Raise lack of corroboration as an evidentiary objection at the moment the surviving party endeavors to testify about the transaction. At this point, it is more difficult for the surviving party's counsel to muster corroboration evidence if counsel has not already been considering the matter. Keep in mind that many trial judges would likely reserve the question until the close of evidence unless the surviving party's counsel concedes no corroboration exists.<sup>11</sup>

Deciding what to do depends on the likelihood of surprising the survivor at trial versus the possibility of a clean win pretrial which excludes the survivor's self exculpating version of the transaction at issue.

**For more information about Tom Williamson's background and legal experience, please go to his [biographical page](#) on our website.**

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<sup>11</sup> This approach enjoys support in the case law. . In discussing whether evidence sufficiently corroborates a surviving party's testimony, the Supreme Court observed the appropriate procedure is to admit the items of alleged corroborating evidence and if "after the evidence is in, it is found not to be of probative value, it should be stricken out and the jury should be clearly and distinctly instructed that it is not to be considered for any purpose." *Varner's Ex'rs v. White*, 149 Va. 177, 185-86, 140 S.E. 128, 130 (1927).

Similarly, in a case decided shortly after the enactment of the Deadman's Statute, the Court declared the "proper practice in such cases is for the court not to exclude the testimony of such interested adverse party, but to properly instruct the jury on the subject. If the jury disregard such instructions and return a verdict founded upon the uncorroborated testimony of such interested or adverse party, the remedy of the other party is a motion to set aside the verdict and grant a new trial, or enter a final judgment as shall seem right and proper." *Arwood v. Hill's Adm'r*, 135 Va. 235, 117 S.E. 603, 605 (1923).