George Mason American Inn Of Court

November 24, 2014

AGENDA

TOPIC: Discovery Misconduct

1. Introduction of Speakers (Lindsay M. Jefferies)
2. Governing Rules (Alison Speaker, Zachary Deubler and Michael Bliley) (7:30-7:40 p.m.)
    a. Rule 4 of Rules of Supreme Court of Virginia
    b. Federal Rules of Civil Procedure
    c. Federal Rules of Criminal Procedure
    d. Virginia Rules of Professional Conduct (6 minutes Ethics)
    e. Disciplinary Board Cases
    f. Virginia and Federal Case Law
3. Discovery Misconduct in Action
    a. Criminal Law (John A. Kassabian, Gary Moliken & Zachary Deubler) (7:40 – 7:55p.m.)
        i. Ethics Hypothetical (7 minutes)
    b. Civil Litigation (Heather K. Bardot, Susan F. Pierce, Mary Ann Kelly and Alison Speaker) (7:55 p.m. to 8:10 p.m.)
        i. Ethics Rules Overview (10 minutes)
    c. Domestic Relations (Sandra L. Havrilak, Lindsay M. Jefferies & Michael Bliley) (8:10 – 8:25 p.m.)
        i. Ethics Hypotheticals (7 minutes)
4. Life Line – What To Do When You Encounter a Recalcitrant Responder & Best Practices
    a. Discovery Decision Synthesis provided by The Honorable Judge John E. Wetsel, Jr., Winchester Circuit Court/Frederick County Circuit Court
5. Q&A. (8:25 – 8:30p.m.)

DISCOVERY MISCONDUCT
Sources of Authority

1. Overview.

- Rules of Supreme Court of Virginia
- Federal Rules of Civil Procedure
- Federal Rules of Criminal Procedure
- Virginia Rules of Professional Conduct
- Legal Ethics Opinions
- Disciplinary Board Orders
- Virginia and Federal Case Law

2. **Rule 4 of Rules of Supreme Court of Virginia**

i. Generally - Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.

ii. Discovery Methods
   a. Parties may obtain discovery by one or more of the following methods:
   b. depositions upon oral examination or written questions;
   c. Written interrogatories;
   d. production of documents, electronically stored information, or things;
   e. permission to enter upon land or other property, for inspection and other purposes;
   f. physical and mental examinations; and requests for admission.

iii. What Can Limit the Scope of Discovery?
   a. The court
   b. The Nature of the Proceeding
   c. For example there is no discovery for a writ of habeas corpus or without prior leave of the court
   d. Privilege

iv. Timing and Sequence of Discovery
   a. "Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery."

3. **Federal Rules of Criminal Procedure**

Rule 16. Discovery and Inspection-Criminal Procedure

(a) Government's Disclosure.

(1) *Information Subject to Disclosure.*

(A) *Defendant's Oral Statement.* Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial.

(B) *Defendant's Written or Recorded Statement.* Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) any relevant written or recorded statement by the defendant if:

- statement is within the government's possession, custody, or control; and
- the attorney for the government knows—or through due diligence could know—that the statement exists;

(ii) the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent; and

(iii) the defendant's recorded testimony before a grand jury relating to the charged offense.

(C) *Organizational Defendant.* Upon a defendant's request, if the defendant is an organization, the government must disclose to the defendant any statement described in Rule 16(a)(1)(A) and (B) if the government contends that the person making the statement:

(i) was legally able to bind the defendant regarding the subject of the statement because of that person's position as the defendant's director, officer, employee, or agent; or

(ii) was personally involved in the alleged conduct constituting the offense and was legally able to bind the defendant regarding that conduct because of that person's position as the defendant's director, officer, employee, or agent.

(D) *Defendant's Prior Record.* Upon a defendant's request, the government must furnish the defendant with a copy of the defendant's prior criminal record that is within the government's possession, custody, or control if the attorney for the government knows—or through due diligence could know—that the record exists.

(E) *Documents and Objects.* Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers,

documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(F) *Reports of Examinations and Tests*. Upon a defendant's request, the government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the government's possession, custody, or control;

(ii) the attorney for the government knows—or through due diligence could know—that the item exists; and

(iii) the item is material to preparing the defense or the government intends to use the item in its case-in-chief at trial.

(G) *Expert Witnesses*. At the defendant's request, the government must give to the defendant a written summary of any testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) and the defendant complies, the government must, at the defendant's request, give to the defendant a written summary of testimony that the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

(2) *Information Not Subject to Disclosure*. Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. §3500.

(3) *Grand Jury Transcripts*. This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rules 6, 12(h), 16(a)(1), and 26.2.

(b) Defendant's Disclosure.

(1) *Information Subject to Disclosure.*

(A) *Documents and Objects*. If a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) *Reports of Examinations and Tests*. If a defendant requests disclosure under Rule Rule 16(a)(1)(F) and the government complies, the defendant must permit the government, upon request, to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or experiment if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial, or intends to call the witness who prepared the report and the report relates to the witness's testimony.

(C) *Expert Witnesses*. The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if—

(i) the defendant requests disclosure under subdivision (a)(1)(G) and the government complies; or

(ii) the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition.

This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications[.]

(2) *Information Not Subject to Disclosure*. Except for scientific or medical reports, Rule 16(b)(1) does not authorize discovery or inspection of:

(A) reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense; or

(B) a statement made to the defendant, or the defendant's attorney or agent, by:

(i) the defendant;

(ii) a government or defense witness; or

(iii) a prospective government or defense witness.

(c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery.

(1) Protective and Modifying Orders. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The court may permit a party to show good cause by a written statement that the court will inspect ex parte. If relief is granted, the court must preserve the entire text of the party's statement under seal.

(2) *Failure to Comply*. If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions;

(B) grant a continuance;

(C) prohibit that party from introducing the undisclosed evidence; or

(D) enter any other order that is just under the circumstances.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) *Initial Disclosure.*

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or

protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures—In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures—For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully

investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the

same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) *Pretrial Disclosures.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) *Form of Disclosures.* Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the

limitations imposed by Rule 26(b)(2)(C).

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) *Trial Preparation: Materials.*

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) *Trial Preparation: Experts.*

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial-Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) *Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) *In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one

or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) *Sequence.* Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) *In General.* A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties

during the discovery process or in writing; or

(B) as ordered by the court.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) *Expedited Schedule.* If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) *Signature Required; Effect of Signature.* Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for Improper Certification.* If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

4. **Are the Federal Rules applicable in Virginia trial courts?**

i. Where the Virginia Supreme Court has not addressed a particular discovery issue, federal case law interpreting the FRCP may be instructive. See, e.g., *Transilift Equipment, Ltd. v. Cunningham*, 234 Va. 84 (1987); *Rakes v. Fulcher*, 210 Va. 542 (1970).

ii. Nevertheless, it is incumbent upon this Court to construe Virginia's discovery rules in a manner consistent with the entire Virginia discovery framework. *The Staples Corp. v. Washington Hall Corp.*, 44 Va. Cir. 372 (Fairfax County Circuit 1998)

5. **Virginia Rules of Professional Conduct**

i. Rule 3.4(e): A lawyer shall not make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

ii. This provision is not limited to the pretrial period (unlike the *ABA Model Rules*, where there is such an explicit limitation).

iii. See also Criminal Law, Civil Litigation and Domestic Relations Outlines below for discussion on the following Rules:

a. Rule 1.1 Competence

b. Rule 1.3 Diligence

c. Rule 3.3 Candor Toward the Tribunal;

d. Rule 3.4 Fairness to Opposing Party and Counsel

e. Rule 4.1 Truthfulness in Statements to Others

f. Rule 3.8 Special Responsibilities Of A Prosecutor—Advocate.

g. Rule 8.4 Misconduct—Maintaining The Integrity Of The Profession

h. DR 1-102 Misconduct

i. DR 1-102 Representing a Client Within the Bounds of the Law

j. DR 7-105 Trial Conduct

Inn of Court Team Outline
Criminal Discovery Misconduct
November 24, 2014

Gary Moliken, Esquire
Law Offices of Gary Moliken, P.C.
3955 Chain Bridge Rd.
Second Floor
Fairfax, VA 22030
(703) 273-2030
gm@molikenlaw.com

John A. Kassabian, Esquire
Kassabian & Kassabian, P.L.C.
4201 Annandale Road
Annandale, Virginia
(703) 750-3622
John@kassabianlawyers.com

Zachary A. Deubler, Class of 2016
George Mason University School of Law
zdeubler@gmu.edu

---

1. SUP.CT.RULES, RULE 3A:11 (DISCOVERY AND INSPECTION)

(a) Application of Rule. This Rule applies to any prosecution for a felony in a circuit court and to any misdemeanor brought on direct indictment.

(b) Discovery by the Accused.
(1) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph any relevant (i) written or recorded statements or confessions made by the accused, or copies thereof, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the attorney for the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth.

(2) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (ii) of subparagraph (b)(1) of this Rule.

(c)Discovery by the Commonwealth. If the court grants relief sought by the accused under clause (ii) of subparagraph (b)(1) or under subparagraph (b)(2) of this Rule, it shall, upon motion of the Commonwealth, condition its order by requiring that:

(1) The accused shall permit the Commonwealth within a reasonable time but not less than ten (10) days before trial or sentencing, as the case may be, to inspect, copy or photograph any written reports of autopsy examinations, ballistic tests, fingerprint, blood, urine and breath analyses, and other scientific tests that may be within the accused's possession, custody or control and which the defense intends to proffer or introduce into evidence at trial or sentencing.

(2) The accused disclose whether he intends to introduce evidence to establish an alibi and, if so, that the accused disclose the place at which he claims to have been at the time of the commission of the alleged offense.

(3) If the accused intends to rely upon the defense of insanity or feeblemindedness, the accused shall permit the Commonwealth to inspect, copy or photograph any written reports of physical or mental examination of the accused made in connection with the particular case, provided, however, that no statement made by the accused in the course of an examination provided for by this Rule shall be used by the Commonwealth in its case-in-chief, whether the examination shall be with or without the consent of the accused.

(d) Time of Motion. A motion by the accused under this Rule must be made at least 10 days before the day fixed for trial. The motion shall include all relief sought under this Rule. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

(e) Time, Place and Manner of Discovery and Inspection. An order granting relief under this Rule shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

(f) Protective Order. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the Commonwealth the court may permit the Commonwealth to

make such showing, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court denies discovery or inspection following a showing in camera, the entire text of the Commonwealth's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal by the accused.

(g) Continuing Duty to Disclose; Failure to Comply. If, after disposition of a motion filed under this Rule, and before or during trial, counsel or a party discovers additional material previously requested or falling within the scope of an order previously entered, that is subject to discovery or inspection under this Rule, he shall promptly notify the other party or his counsel or the court of the existence of the additional material. If at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with this Rule or with an order issued pursuant to this Rule, the court shall order such party to permit the discovery or inspection of materials not previously disclosed, and may grant such other relief as it may deem appropriate.

2. MODEL RULES OF PROFESSIONAL CONDUCT

Rule 3.8 Special Responsibilities Of A Prosecutor—*Advocate*

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(b) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(c) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;
(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain

from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

(g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and

(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

(h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

Rule 3.3 Candor Toward The Tribunal—*Advocate*

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 8.4 Misconduct—*Maintaining The Integrity Of The Profession*

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

3. ETHICS HYPOTHETICAL

In this hypothetical, in a pending criminal prosecution, the prosecutor is aware of exculpatory evidence, in the form of witness statements accusing another individual of the offense with which the defendant is charged. The prosecutor is also aware that the primary inculpatory witness, an eyewitness to the offense, has died and therefore will not be available to testify in future proceedings in the case. There is an upcoming preliminary hearing scheduled in the case, although the prosecutor has offered a plea bargain in which the defendant would plead guilty to a lesser offense and waive the preliminary hearing. The prosecutor has not disclosed either the exculpatory evidence or the death of the primary witness[1]

4. TO ENTER OR NOT TO ENTER A DISCOVERY ORDER ?

a. Practical considerations

b. Cases

Boxley v. Commonwealth of Virginia, No. 0029-91-4 (1992)

Commonwealth v. Thasoonthorn, 55 Va. Cir 28 (2001)

---

[1] **excerpted from LEGAL ETHICS OPINION 1862

LEGAL ETHICS OPINION 1862 ”TIMELY DISCLOSURE” OF EXCULPATORY EVIDENCE AND DUTIES TO DISCLOSE INFORMATION IN PLEA NEGOTIATIONS

In this hypothetical, in a pending criminal prosecution, the prosecutor is aware of exculpatory evidence, in the form of witness statements accusing another individual of the offense with which the defendant is charged. The prosecutor is also aware that the primary inculpatory witness, an eyewitness to the offense, has died and therefore will not be available to testify in future proceedings in the case. There is an upcoming preliminary hearing scheduled in the case, although the prosecutor has offered a plea bargain in which the defendant would plead guilty to a lesser offense and waive the preliminary hearing. The prosecutor has not disclosed either the exculpatory evidence or the death of the primary witness.

QUESTION PRESENTED

1. Is the “timely disclosure” of exculpatory evidence, as required by Rule 3.8(d), broader than the disclosure mandated by *Brady v. Maryland*, 373 U.S. 83 (1963), and other case law interpreting the Due Process clause of the Constitution? If so, what constitutes “timely disclosure” for the purpose of Rule 3.8(d)?

2. During plea negotiations, does a prosecutor have a duty to disclose the death or unavailability of a primary witness for the prosecution?

APPLICABLE RULES AND OPINIONS

The applicable Rules of Professional Conduct are Rule 3.8(d)[1], Rule 3.3(a)(1)[2], Rule 4.1[3], and Rule 8.4(c)[4].

ANALYSIS

Pursuant to *Brady v. Maryland* and subsequent cases, a prosecutor has the *legal* obligation to disclose material exculpatory evidence to a defendant in time for the defendant to make use of it at trial. A number of cases interpreting this legal obligation have noted that the

---

[1] Rule 3.8 Additional Responsibilities Of A Prosecutor
A lawyer engaged in a prosecutorial function shall:
***
(d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court;

[2] Rule 3.3 Candor Toward the Tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal;

[3] Rule 4.1 Truthfulness In Statements To Others
In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of fact or law; or
(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

[4] Rule 8.4 Misconduct
It is professional misconduct for a lawyer to:
***
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer’s fitness to practice law;

prosecutor's *ethical* duty to disclose exculpatory evidence is broader than the legal duty arising from the Due Process clause, although they have not explored the contours of that ethical duty.[5]

Rule 3.8(d) does not refer to or incorporate, in the language of the Rule or its comments, the *Brady* standard for disclosure. The standard established by the Rule is also significantly different from the *Brady* standard in at least two ways: first, the Rule is not limited to "material" evidence, but rather applies to all evidence which has some exculpatory effect on the defendant's guilt or sentence; second, the Rule only requires disclosure when the prosecutor has actual knowledge of the evidence and its exculpatory nature[6], while *Brady* imputes knowledge of other state actors, such as the police, to the prosecutor. These differences from the *Brady* standard raise the further question of whether Rule 3.8(d) requires earlier disclosure than the *Brady* standard, which requires only that the evidence be disclosed in time for the defendant to make effective use of it. Thus, the prosecutor has complied with the legal disclosure requirement if the evidence is disclosed in the midst of trial so long as the defendant has an opportunity to put on the relevant evidence.[7]

Although the Committee has never definitively addressed the question, it opines today that the duty of timely disclosure of exculpatory evidence requires earlier disclosure than the *Brady* standard, which is necessarily retrospective, requires. This conclusion is largely based on the response to *Read v. Virginia State Bar*, in which the Supreme Court of Virginia reversed the Virginia State Bar Disciplinary Board's order revoking a prosecutor's license, finding that the prosecutor had complied with his legal obligations under *Brady* and therefore had complied with the correlative ethics rule in force at that time. The disciplinary rule in effect at that time was DR 8-102 of the Virginia Code of Professional Responsibility which read, "The prosecutor in a criminal case or a government lawyer shall . . . [d]isclose to a defendant all information required by law."

At the time of the conduct at issue, Beverly Read was a Commonwealth's Attorney. Read was conducting the prosecution of an arson case. During the investigation, the Commonwealth discovered two witnesses, Sils and Dunbar, who both identified the defendant at the scene of the crime. Sils had second thoughts after he identified the defendant in a line-up and later became convinced that the defendant was not the person Sils had observed at the scene of the crime. Sils disclosed to Read that the defendant was definitely not the man observed at the scene of the crime. Read told Sils that he would not be called as a witness and that his presence was no longer necessary. Read concluded his case and rested without disclosing that the two witnesses had changed their statements. When Sils went home and had further discussions with the other witness, Dunbar, both became convinced that the defendant was not the man they saw. They returned to the courthouse during the trial the following day and agreed to testify for the defense. Read then attempted to pass a message to defense counsel that would have disclosed the exculpatory information but defense counsel refused to accept the writing. Unsuccessful in passing this information to defense counsel, Read then read into the record that the two witnesses had recanted and would testify that the defendant was not the man they saw at the scene of the crime. After this exchange, defense counsel moved to dismiss for prosecutorial misconduct.

---

[5] *See* Cone v. Bell, 129 S. Ct. 1769, 1783 n. 15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations."), *citing* Rule 3.8(d); Kyles v. Whitley, 514 U.S. 419, 436 (1995) (noting that *Brady* "requires less of the prosecution than" Rule 3.8(d)).

[6] As Comment [4] to Rule 3.8 explains, "[p]aragraphs (d) and (e) address knowing violations of the respective provisions so as to allow for better understanding and easier enforcement by excluding situations (paragraph (d)), for example, where the lawyer/prosecutor does not know the theory of the defense so as to be able to assess the exculpatory nature of evidence…"

[7] *See e.g.*, *Read v. Virginia State Bar*, 233 Va. 560, 357 S.E.2d 544 (1987).

The motion to dismiss was denied. A complaint against Read was made with the Virginia State Bar and a disciplinary proceeding ensued.

Read's counsel argued that his client had complied with *Brady* because the information was available to use during trial, and therefore had disclosed "all information required by law." In spite of the Board's finding that Read had willfully intended to see the defendant tried without the disclosure that the two witnesses had recanted, the Supreme Court of Virginia agreed that Read had complied with the disciplinary rule, reversed the Disciplinary Board's decision, and entered final judgment that Read had not engaged in any misconduct. Following this decision, the Bar rewrote the relevant rule, replacing the *Brady* standard with the standard now found in Rule 3.8(d), clarifying that the prosecutor's ethical duty under that rule is not coextensive with the prosecutor's legal duty under *Brady.*

In light of the conclusion that Rule 3.8(d) requires earlier disclosure than the *Brady* standard, the Committee next turns to the meaning of "timely disclosure." In general, "timely" is defined as "occurring at a suitable or opportune time" or "coming early or at the right time." Thus, a timely disclosure is one that is made as soon as practicable considering all the facts and circumstances of the case. On the other hand, the duty to make a timely disclosure is violated when a prosecutor intentionally delays making the disclosure without lawful justification or good cause.

The text of the Rule makes clear that a court order is sufficient to delay or excuse disclosure of information that would otherwise have to be turned over to the defendant. Thus, where the disclosure of particular facts at a particular time may jeopardize the investigation or a witness, the prosecutor should immediately seek a protective order or other guidance from the court in order to avoid those potential risks. As specified by the Rule, however, disclosure must be "precluded or modified *by order of a court*" (emphasis added) in order for the prosecutor to be excused from disclosure.

Because this is not a bright-line rule, the Committee cannot give a definitive answer to the question of whether the prosecutor must immediately turn over the exculpatory evidence at issue in the hypothetical; however, the prosecutor may not withhold the evidence merely because his legal obligations pursuant to *Brady* have not yet been triggered.

As to the second question, assuming that the witness's unavailability does not come within the scope of Rule 3.8(d), other rules might obligate the prosecutor to disclose this information during plea negotiations or when the plea bargain is being presented to the court.

Specifically, Rules 3.3, 4.1, and 8.4(c) all forbid making false statements or misrepresentations in various circumstances. Rule 4.1(a) generally prohibits making a false statement of fact or law, and Rule 8.4(c) specifically forbids any misrepresentation that "reflects adversely on the lawyer's fitness to practice law." Both of these provisions would apply to any misrepresentation or false statement made in the course of plea negotiations with the defendant/his lawyer. Rule 3.3(a)(1) specifically forbids any false statement of fact or law to a tribunal, which includes any statements made in the course of presenting a plea agreement to the court for approval and entry of the guilty plea. Accordingly, the prosecutor may not make a false statement about the availability of the witness, regardless of whether the unavailability of the witness is evidence that must be timely disclosed pursuant to Rule 3.8(d), either to the opposing lawyer during negotiations or to the court when the plea is entered.[8]

This opinion is advisory only based upon the facts as presented, and not binding on any court or tribunal.

[8] See also Rule 3.8(a), which bars a prosecutor from filing or maintaining a charge that the prosecutor knows is not supported by probable cause.

5. YouTube Video (an "interesting" speedy trial waiver discussion between court, public defender and defendant)

a. https://www.youtube.com/watch?v=BCe8D3TSFGk

Inn of Court Team Outline
Discovery Misconduct - Civil Litigation
November 24, 2014

Heather K. Bardot, Esquire
Bancroft, McGavin, Horvath & Judkins, P.C.
3920 University Drive
Fairfax, Virginia 22030
(703) 385-1000
hbardot@bmhjlaw.com

Susan F. Pierce, Attorney at Law
Walker Jones, PC
31 Winchester Street
Warrenton, Virginia 20186
(540) 347-9223
Spierce@walkerjoneslaw.com

Mary Ann Kelly, Esq.
The Law Office of Mary Ann Kelly
3977 Chain Bridge Road, Suite 300
Fairfax, VA 22030
(703) 865-5032
makelly@kelly-firm.com

Alison Speaker, Class of 2015
George Mason University School of Law
aspeaker02@gmail.com

Three Discovery Misconduct Scenarios

1. Can an attorney unilaterally release a witness from a subpoena?
2. Spoliation.
3. May Counsel For A Deponent Confer With His Or Her Client During The Deposition?

Discovery Misconduct

Can an attorney unilaterally release a witness from a subpoena?

Code Sections Governing Issuance of Witness Subpoenas

Va. Code §§ 8.01-407, 16.1-265

§ 8.01-407. How summons for witness issued, and to whom directed; prior permission of court to summon certain officials and judges; attendance before commissioner of other state; attorney-issued summons.

A. A summons may be issued, directed as prescribed in § 8.01-292, commanding the officer to summon any person to attend on the day and at the place that such attendance is desired, to give evidence before a court, grand jury, arbitrators, magistrate, notary, or any commissioner or other person appointed by a court or acting under its process or authority in a judicial or quasi-judicial capacity. The summons may be issued by the clerk of the court if the attendance is desired at a court or in a proceeding pending in a court. The clerk shall not impose any time restrictions limiting the right to properly request a summons up to and including the date of the proceeding:

If attendance is desired before a commissioner in chancery or other commissioner of a court, the summons may be issued by the clerk of the court in which the matter is pending, or by such commissioner in chancery or other commissioner;

If attendance is desired before a notary or other officer taking a deposition, the summons may be issued by such notary or other officer at the instance of the attorney desiring the attendance of the person sought;

If attendance is sought before a grand jury, the summons may be issued by the attorney for the Commonwealth, or the clerk of the court, at the instance of the attorney for the Commonwealth.

Except as otherwise provided in this subsection, if attendance is desired in a civil proceeding pending in a court or at a deposition in connection with such proceeding, including medical malpractice review panels, and a claim before the Workers' Compensation Commission, a summons may be issued by an attorney-at-law who is an active member of the Virginia State Bar at the time of issuance, as an officer of the court. An attorney-issued summons shall be on a form approved by the Supreme Court, signed by the attorney and shall include the attorney's address. The summons and any transmittal sheet shall be deemed to be a pleading to which the provisions of § 8.01-271.1 shall apply. A copy of the summons and, if served by a sheriff, all service of process fees, shall be mailed or delivered to the clerk's office of the court in which the case is pending or the Workers' Compensation Commission, as applicable, on the day of issuance by the attorney. The law governing summonses issued by a clerk shall apply mutatis mutandis. When an attorney-at-law transmits one or more attorney-issued subpoenas to a sheriff to be served in his jurisdiction, such subpoenas shall be accompanied by a transmittal sheet. The transmittal sheet, which may be in the form of a letter, shall contain for each subpoena: (i) the person to be served, (ii) the name of the city or county in which the subpoena is to be served, in parentheses, (iii) the style of the case in which the subpoena was issued, (iv) the court in which the case is pending, and (v) the amount of fees tendered or paid to each clerk in whose court the case is pending together with a photocopy of the payment instrument or clerk's receipt. If copies of the same transmittal sheet are used to send subpoenas to more than one sheriff for service of process, then subpoenas shall be grouped by the jurisdiction in which they are to be served. For each person to be served, an original subpoena and copy thereof shall be included. If the attorney desires a return copy of the transmittal sheet as proof of receipt, he shall also enclose an additional copy of the transmittal sheet together with an envelope addressed to the attorney with sufficient first class postage affixed. Upon receipt of such transmittal, the transmittal sheet shall be date-stamped and, if the extra copy and above-described envelope are provided, the copy shall also be date-stamped and returned to the attorney-at-law in the above-described envelope.

However, when such transmittal does not comply with the provisions of this section, the sheriff may promptly return such transmittal if accompanied by a short description of such noncompliance. An attorney may not issue a summons in any of the following civil proceedings: (i) habeas corpus under Article 3 (§ 8.01-654 et seq.) of Chapter 25 of this title, (ii) delinquency or abuse and neglect proceedings under Article 3 (§ 16.1-241 et seq.) of Chapter 11 of Title 16.1, (iii) civil forfeiture proceedings, (iv) habitual offender proceedings under Article 9 (§ 46.2-351 et seq.) of Chapter 3 of Title 46.2, (v) administrative license suspension pursuant to § 46.2-391.2, and (vi) petition for writs of mandamus or prohibition in connection with criminal proceedings. A sheriff shall not be required to serve an attorney-issued subpoena that is not issued at least five business days prior to the date that attendance is desired.

In other cases, if attendance is desired, the summons may be issued by the clerk of the circuit court of the county or city in which the attendance is desired.

A summons shall express on whose behalf, and in what case or about what matter, the witness is to attend. Failure to respond to any such summons shall be punishable by the court in which the proceeding is pending as for contempt. When any subpoena is served less than five calendar days before appearance is required, the court may, after considering all of the circumstances, refuse to enforce the subpoena for lack of adequate notice. If any subpoena is served less than five calendar days before appearance is required upon any judicial officer generally incompetent to testify pursuant to § 19.2-271, such subpoena shall be without legal force or effect unless the subpoena has been issued by a judge.

B. No subpoena shall, without permission of the court first obtained, issue for the attendance of the Governor, Lieutenant Governor, or Attorney General of this Commonwealth, a judge of any court thereof; the President or Vice President of the United States; any member of the President's Cabinet; any ambassador or consul; or any military officer on active duty holding the rank of admiral or general.

C. This section shall be deemed to authorize a summons to compel attendance of a citizen of the Commonwealth before commissioners or other persons appointed by authority of another state when the summons requires the attendance of such witness at a place not out of his county or city.

(Code 1950, §§ 8-296, 8-297; 1952, c. 122; 1977, c. 617; 1992, c. 506; 2000, c. 813; 2002, c. 463; 2004, c. 335; 2007, c. 199; 2010, cc. 302, 486.)

---

§ 16.1-265. Subpoena; attorney-issued subpoena.

Upon application of a party and pursuant to the rules of the Supreme Court of Virginia for the issuance of subpoenas, the clerk of the court shall issue, and the court on its own motion may issue, subpoenas requiring attendance and testimony of witnesses and production of records, documents or other tangible objects at any hearing.

Subpoenas duces tecum for medical records shall be subject to the provisions of §§ 8.01-413 and 32.1-127.1:03 except that no separate fee shall be imposed. A subpoena may also be issued in a civil proceeding by an attorney-at-law who is an active member of the Virginia State Bar at the time of issuance, as an officer of the court. Any such subpoena shall be on a form approved by the Committee on District Courts, signed by the attorney as if a pleading and shall include the attorney's address. A copy, together with the attorney's certificate of service pursuant to Rule 1:12, shall be mailed or delivered to the clerk's office of the court in which the case is pending on the day of issuance by the attorney. The law governing subpoenas issued by a clerk shall apply mutatis mutandis, except that attorneys may not issue subpoenas in those cases in which they may not issue a summons as provided in § 8.01-407. When an attorney-at-law transmits one or more subpoenas or subpoenas duces tecum to a sheriff to be served in his jurisdiction, the provisions in § 8.01-407 regarding such transmittals shall apply. A sheriff shall not be required to serve an attorney-issued subpoena that is not issued at least five business days prior to the date production of evidence is required.

If the time for compliance with a subpoena issued by an attorney is less than 14 days after service of the subpoena, the person to whom it is directed may serve upon the party issuing the subpoena a written objection setting forth any grounds therefor. If objection is made, the party on whose behalf the subpoena was issued and served shall not be entitled to compliance, except pursuant to an order of the court, but may, upon notice to the person to whom the subpoena was directed, move for an order to compel compliance. Upon such timely motion, the court may quash, modify or sustain the subpoena.

(1977, c. 559; 2000, c. 813; 2004, c. 335.)

Sparse Caselaw

Dean v. Commonwealth of Virginia, 30 Va. App. 49, 515 S.E.2d 331 (1999) (criminal case in which the court held that the defendant was not denied a fair trial when the Commonwealth, without informing defendant, released witnesses who could have testified favorably to defendant).

SHANE EDWARD DEAN v. COMMONWEALTH OF VIRGINIA

Record No. 0422-98-4

COURT OF APPEALS OF VIRGINIA

30 Va. App. 49; 515 S.E.2d 331; 1999 Va. App. LEXIS 337

June 15, 1999, Decided

PRIOR HISTORY: [***1] FROM THE CIRCUIT COURT OF STAFFORD COUNTY. J. Peyton Farmer, Judge.

DISPOSITION: Affirmed.

COUNSEL: Elwood Earl Sanders, Jr., Appellate Defender (Public Defender Commission of Virginia, on briefs), for appellant.

Robert H. Anderson, III, Assistant Attorney General (Mark L. Earley, Attorney General, on brief), for appellee.

JUDGES: Present: Judges Annunziata, Bumgardner and Senior Judge Hodges. OPINION BY JUDGE WILLIAM H. HODGES.

OPINION BY: WILLIAM H. HODGES

OPINION

[*51] [**332] OPINION BY JUDGE WILLIAM H. HODGES

Shane Edward Dean (appellant) appeals his convictions for robbery and use of a firearm in the commission of a robbery. On appeal, he argues that the trial judge erred in refusing to admit certificates of analysis because one certificate was not filed with the circuit court in compliance with *Code § 19.2-187*; and appellant failed to prove a proper chain of custody for another certificate of analysis where, without notification to appellant, the Commonwealth released witnesses under subpoena who were necessary to prove the chain of custody. Assuming, without deciding, the trial judge erred in refusing to admit the certificates of analysis, we hold that the errors were harmless. [*52] *FACTS*

Appellant was convicted [***2] of robbing a Popeye's restaurant on September 1, 1995. Sidney Turner, the assistant manager of the restaurant at the time of the robbery, testified that appellant entered the restaurant at about 11:00 a.m., when no other customers were in the restaurant. Turner greeted appellant as he walked by the counter and entered the restroom. Turner testified that he got a "very good look" at appellant when appellant first entered the restaurant.

Appellant exited the restroom wearing a bandanna covering his face from the nose downward. Appellant held a gun, and he said to Turner, "This is a holdup. Get in the office, and get the safe open." Appellant removed cash from the safe and put it in his pants pockets. Appellant directed two other employees to bring him the cash drawers from the cash registers, and appellant removed cash from those drawers. Appellant ordered the employees into the freezer, and appellant shut the freezer door.

James Harris testified that he gave appellant a ride to Popeye's on the day of the robbery, and appellant asked Harris to wait for him as appellant entered the restaurant. Appellant exited Popeye's after he was in the restaurant for about five minutes. Appellant [***3] entered Harris's car wearing a bandanna around his neck, stuffing money into his pants, and carrying a gun. Appellant told Harris, "Just go ahead and drive." Harris sideswiped a car as they drove away. The driver of the sideswiped car later identified Harris as the driver of the car. The driver also stated that she saw a passenger in Harris's car, but she did not identify appellant as the passenger.

Appellant testified that he did not rob Popeye's, but he could not remember where he was on September 1, 1995.

Turner testified that he viewed appellant's face during the entire incident, which, according [**333] to Turner, lasted about seven to ten minutes. Turner also stated that he stood within arm's length of appellant during part of the incident. More than eight months after the robbery, Turner identified appellant's [*53] photograph from a photo array. Turner testified at trial that he was "absolutely" sure that appellant was the robber.

Detective William Bowler testified that another employee of Popeye's looked at the photo array after the incident. The employee thought appellant's eyes and nose looked like the robber's, but he did not positively identify appellant's picture as that of the [***4] robber.

Police investigators obtained fingerprint evidence from the crime scene, from Harris's car, and from some recovered cash. They submitted the evidence to a laboratory for analysis. A certificate of analysis dated March 14, 1997 ("March 14 certificate") was filed with the circuit court. This certificate indicated that the investigators recovered five latent fingerprints and four latent palm prints of value. None of the latent fingerprints matched the submitted fingerprints of appellant. The certificate further indicated that "inked palm prints" were needed to complete the examination. The certificate stated that "an automated fingerprint search was conducted," but no identification was made.

When appellant moved to admit the March 14 certificate into evidence, the Commonwealth objected on the ground that the chain of custody of the fingerprint evidence was not sufficiently proven. The trial judge ruled that the March 14 certificate was inadmissible based on the Commonwealth's ground for objection.

The laboratory performed further fingerprint and palm print analysis as reported in a certificate of analysis dated August 7, 1997 ("August 7 certificate"). This certificate also [***5] indicated that the latent fingerprints did not match appellant's fingerprints. The certificate reported that the latent palm prints were compared "insofar as possible" with the submitted palm prints of appellant. The certificate stated, "In order for a conclusive comparison to be made, [a] fully recorded set of inked palm prints . . . should be submitted." The August 7 certificate also indicated that no identification was made from an automated fingerprint search.

[*54] The August 7 certificate was not filed with the circuit court prior to the trial in accordance with *Code § 19.2-187*. When appellant moved to admit the certificate into evidence, the Commonwealth objected on the ground that it had not been timely filed with the circuit court. The trial judge ruled that the certificate was inadmissible based on the Commonwealth's ground for objection.

ANALYSIS

"The admissibility of evidence is within the broad discretion of the trial court, and a ruling will not be disturbed on appeal in the absence of an abuse of discretion." *Blain v. Commonwealth, 7 Va. App. 10, 16, 371 S.E.2d 838, 842 (1988)*. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v.* [***6] *United States, 344 U.S. 604, 619, 97 L. Ed. 593, 73 S. Ct. 481 (1953)*. "'An erroneous evidentiary ruling does not require reversal of a criminal conviction where the error is harmless.'" *Brown v. Commonwealth, 25 Va. App. 171, 182, 487 S.E.2d 248, 253 (1997) (en banc)* (citation omitted).

"In Virginia, non-constitutional error is harmless 'when it *plainly appears* from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached.' '[A] fair trial on the merits and substantial justice' are not achieved if an error at trial has affected the verdict. . . . An error does not affect a verdict if a reviewing court can conclude, without usurping the jury's fact finding function, that, had the error not occurred, the verdict would have been the same."

Id. at 183, 487 S.E.2d at 254 (quoting *Lavinder v. Commonwealth, 12 Va. App. 1003, 1005, 407 S.E.2d 910, 911 (1991) (en banc)* (alteration in original) (quoting *Code § 8.01-678*)).

Appellant claimed by way of defense that he did not commit the crime, and he challenged the identification evidence presented by the Commonwealth. [***7] Thus, identification of the robber was an issue in the case. However, the Commonwealth presented [**334] overwhelming evidence that appellant [*55] committed the crime. Therefore, assuming, without deciding, that the trial judge erred in refusing to admit the two certificates, we hold that the verdict would have been the same.

Even without the fingerprint evidence, the Commonwealth presented other direct evidence to prove that appellant was the criminal agent. Turner positively identified appellant as the robber. Harris's testimony placed appellant at the scene of the crime on the date the crime was committed. Furthermore, Harris saw appellant with a gun, a bandanna, and cash after appellant exited the restaurant. Thus, the certificates of analysis indicating that the recovered fingerprints "were not identified" with appellant's fingerprints were inconsequential in light of the other evidence presented.

Moreover, from the evidence presented, it appears that appellant may have only touched the freezer door or handle and the bathroom door in the restaurant. The objects would in all likelihood have contained fingerprints from numerous other persons. Indeed, with regard to the fingerprints analyzed **[***8]** from the restaurant, a business open to the public, one would expect to find fingerprints from many persons. The fact that the recovered fingerprints, which were found in a place of public access, were not identified as appellant's fingerprints does not tend to prove that appellant did not commit the crime.

Furthermore, the evidence showed that the employees opened the safe and handled the cash drawers, so it is possible that appellant left no recoverable fingerprints at the scene.

The two certificates of analysis also indicate that fingerprints were recovered and analyzed from some of the recovered cash. However, the same analysis applies to these prints--fingerprints from numerous other persons would be expected to be found on cash. The fact that appellant's fingerprints were not found on the cash was inconsequential.

In addition, the March 14 certificate indicated that a set of appellant's inked palm prints was needed to complete the examination. The August 7 certificate indicated that the laboratory was still unable to complete "a conclusive comparison" **[*56]** of the latent palm prints and that "a fully recorded set of inked palm prints" should be submitted. Thus, the certificates **[***9]** concerning the palm print analyses were actually inconclusive, not exculpatory, and "did not materially contradict the testimony of the Commonwealth's . . . witnesses, which alone provided evidence sufficient to support appellant's conviction." *Scott v. Commonwealth, 25 Va. App. 36, 44, 486 S.E.2d 120, 123 (1997).*

In addition, appellant was not prejudiced by the trial judge's refusal to admit the certificates because appellant argued to the jury in his closing argument that the Commonwealth presented no fingerprint evidence linking him to the robbery. Accordingly, it plainly appears from the record and evidence presented that appellant received a fair trial on the merits and substantial justice was reached.

Appellant also argues that he was denied a fair trial because the Commonwealth, without informing appellant, released witnesses who could have testified concerning the chain of custody of the evidence analyzed in the March 14 certificate. Appellant did not issue subpoenas for the witnesses.

"The defendant's right to compulsory process is the right to request subpoenas for witnesses and the right to have the requested subpoenas issued by the court. However, a defendant cannot **[***10]** claim that he was denied the right to compulsory process for obtaining witnesses on his behalf where he does not seek to subpoena the witnesses." *State v. Sepcich, 473 So. 2d 380, 386 (La. Ct. App. 1985).*

In *State v. Green, 448 So. 2d 782 (La. Ct. App. 1984)*, the state subpoenaed a witness. Prior to trial, the prosecutor released the witness from the subpoena. The defendant contended the trial court erred in allowing the prosecution to excuse from subpoena a material witness without the knowledge and consent of the defendant. *See id. at 786.* However, the Court of Appeals of Louisiana held that the defendant's failure to issue a **[**335]** subpoena for the witness prior to trial and after being granted a continuance did not show "an exercise of due diligence." *Id. at 787.* The Court further found that the **[*57]** defendant did not show that "the witness was made unavailable due to suggestion, procurement, or negligence of the state . . . ." *Id.* Therefore, the state's actions "did not contribute substantially to the witness's failure to appear." *Id. See also Meek v. State, 636 So. 2d 543 (Fla. Dist. Ct. App. 1994)* (state attorney has authority to release witnesses from a grand jury **[***11]** subpoena or investigative subpoena issued by the state).

Here, appellant made no showing that the witnesses were made unavailable due to any action by the Commonwealth. The attorney for the Commonwealth subpoenaed the witnesses prior to trial. The attorney for the Commonwealth had authority to issue the subpoenas pursuant to *Code § 19.2-267* and Rule 3A:12. However, at no time, either before or during the trial, did appellant issue subpoenas for these witnesses. Moreover, when the issue arose at trial, appellant did not ask for a continuance in order to obtain the presence of the witnesses at the trial. Therefore, appellant failed to exercise due diligence in obtaining the presence of the witnesses at trial. Accordingly, the release of the witnesses by the Commonwealth did not contribute to the witnesses' failure to appear and did not deprive appellant of any right to subpoena the witnesses as his own witnesses. Rather, appellant's failure to issue subpoenas for the witnesses resulted in their absence. *See Brame v. Commonwealth, 252 Va. 122, 133-34, 476 S.E.2d 177, 183 (1996)* (holding that where defendant had the opportunity to secure a witness' testimony, but made no effort to **[***12]** procure the presence of the witness, defendant had no standing to complain that he was denied the right to cross-examine the witness when the witness did not testify).

For the foregoing reasons, we affirm the convictions.

Affirmed.

Legal Ethics Opinions

LEO 1350 (1990)

Query whether the amendments to Rule 1:12 would impact the LEO

Query the difference between an attorney issued subpoena and court issued

LEO 1552 (1993)

LEO 1736 (1999)

LEO 1795 (2004)

LEGAL ETHICS OPINION 1350

REPRESENTATION WITHIN THE BOUNDS OF THE LAW – TRIAL CONDUCT: ATTORNEY FAILING TO FORWARD A COPY OF A PRAECIPE REQUESTING WITNESS SUBPOENAS TO OPPOSING COUNSEL.

You have informed the Committee that you represented a client in domestic relations litigation which was referred to a commissioner in chancery for a hearing on the issue of marital fault. You indicate that opposing counsel filed a praecipe with the circuit court clerk requesting the issuance of witness subpoenas returnable at the hearing. Finally, you allege that opposing counsel intentionally did not mail a copy of the praecipe to you resulting in the witnesses appearing at the hearing and testifying against your client without your knowledge.

You ask that the Committee consider the propriety of opposing counsel's actions.

The appropriate and controlling disciplinary rule to the circumstances you describe is DR:7-105(C)(5) which mandates that, in appearing in his professional capacity before a tribunal, a lawyer shall not intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings. Additionally, of relevance is DR:7-102(A)(3) which prohibits a lawyer from concealing or knowingly failing to disclose that which he is required by law to reveal, in the representation of a client.

It is the opinion of the Committee that the plain language of Virginia Supreme Court Rule 1:12 does not require that a copy of a Praecipe requesting witness subpoenas be served on each counsel of record. In the absence of a local rule or pre-trial order requiring such service, the Committee therefore does not find any ethical impropriety.

Committee Opinion
May 24, 1990

RULES OF SUPREME COURT OF VIRGINIA
PART ONE
RULES APPLICABLE TO ALL PROCEEDINGS

Rule 1:12. Service of Papers after the Initial Process.

All pleadings, motions and other papers not required to be served otherwise and requests for subpoenas duces tecum shall be served by delivering, dispatching by commercial delivery service, transmitting by facsimile, delivering by electronic mail when Rule 1:17 so provides or when consented to in writing signed by the person to be served, or by mailing, a copy to each counsel of record on or before the day of filing.

Subject to the provisions of Rule 1:17, service pursuant to this Rule shall be effective upon such delivery, dispatch, transmission or mailing, except that papers served by facsimile transmission completed after 5:00 p.m. shall be deemed served on the next day that is not a Saturday, Sunday, or legal holiday. Service by electronic mail under this Rule is not effective if the party making service learns that the attempted service did not reach the person to be served.

At the foot of such pleadings and requests shall be appended either acceptance of service or a certificate of counsel that copies were served as this Rule requires, showing the date of delivery and method of service, dispatching, transmitting, or mailing. When service is made by electronic mail, a certificate of counsel that the document was served by electronic mail shall be served by mail or transmitted by facsimile to each counsel of record on or before the day of service.

Last amended by Order dated March 1, 2011; effective May 2, 2011.

LEGAL ETHICS OPINION 1552

ZEALOUS REPRESENTATION – REPRESENTING A CLIENT WITHIN THE BOUNDS OF THE LAW - TRIAL CONDUCT - MISCONDUCT: ATTORNEY ISSUING SUBPOENA FOR DEPOSITION WITHOUT NOTICING OPPOSING COUNSEL, THEN INTERVIEWING WITNESS WITHOUT TAKING THE DEPOSITION.

You have presented a hypothetical situation in which a personal injury case is pending in a circuit court. You indicate that depositions were scheduled for a specific time and date for one of the parties and a witness and that those depositions took place as scheduled.

In addition, you further indicate that, following those depositions and after further investigating the facts, Attorney A discovers that Attorney B served a subpoena for deposition of another witness who was not noticed for his deposition and whose deposition was not taken on the time and date scheduled for the other depositions. Attorney A also discovers that the subpoena for that witness was issued through the clerk's office and that it required the witness to be present at Attorney B's office one hour before the scheduled time for the noticed depositions. Finally, you state that Attorney B spoke with, and then released, the subpoenaed witness and did not advise Attorney A that the witness had been subpoenaed for his deposition and then released without the taking of any such deposition.

You have asked the committee to opine, under the facts of the inquiry, (1) whether it was appropriate for Attorney B to issue a deposition subpoena for the witness whose deposition was not noticed pursuant to the Rules of Court; and (2) whether it was appropriate for Attorney B to use the subpoena power of the court for the purpose of interviewing a witness rather than taking the witness' deposition pursuant to the subpoena.

The appropriate and controlling Disciplinary Rules relative to your inquiry are DR:7-102(A)(1) which states that a lawyer shall not file a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or it is obvious that such action would serve merely to harass or maliciously injure another; DR:7-102(A)(3) which provides that a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal; DR:7-105(C)(5) which mandates that a lawyer not intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings; and DR:1-102(A)(4) which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law. Further guidance is available in Ethical Consideration 7-22 [EC:7-22] which exhorts, in pertinent part, that a lawyer is not justified in consciously violating rules of evidence and procedure and should be diligent in efforts to guard against unintentional violations of, those rules.

In the facts you present, the committee believes that Attorney B has improperly obtained information from the witness by a subpoena without notice to opposing counsel. Such information may only be properly obtained by a lawyer, acting on his client's behalf, in accordance with all required rules of procedure including those applicable to discovery. See Nassau County Bar Ass'n LE Op. 92-32 (11/18/92), ABA/BNA Law. Man. On Prof. Conduct, 1001:6259. Thus, the committee opines that Attorney B has

violated DR:7-102(A)(3) by concealing or knowingly failing to disclose to Attorney A that he had subpoenaed the witness for deposition prior to the other, scheduled depositions; and DR:7-105(C)(5) since the activities are in violation of the relevant Rules of Court.

Furthermore, the committee is of the opinion that the actions of Attorney B are also in violation of DR:7-102(A)(1) in that he has subjected the witness to a subpoena for a deposition which never took place. The committee is of the further opinion that the use of a subpoena to command the presence of a witness for a deposition or in court, with the knowledge that no deposition or court proceeding is scheduled, but for the sole purpose of interviewing the witness, is violative of the disciplinary rules cited herein.

Committee Opinion
October 20, 1993

LEGAL ETHICS OPINION 1736

ATTORNEY THREATENING NONPARTY OPPOSING WITNESS WITH "APPROPRIATE LEGAL ACTION" FOR WITNESS'S DEFAMATORY STATEMENT ABOUT ATTORNEY'S CLIENT.

You have presented a hypothetical situation in which an attorney is representing Plaintiffs in a discrimination claim. Plaintiffs contend that Defendants are attempting to force them to move from the neighborhood because of their race, and Defendants contend that the problem is Plaintiffs' disruptive behavior. Prior to the lawsuit, a resident of the neighborhood who is a nonparty witness wrote to the homeowner's association complaining of the Plaintiffs' behavior. Plaintiffs' attorney has written the nonparty witness, accusing the witness of making defamatory statements and indicating that if the witness stands by the statements, Plaintiffs' attorney will seek "appropriate legal action." Plaintiffs' attorney has now subpoenaed this witness for depositions and also subpoenaed witness's homeowner's insurance policy "just in case appropriate legal action is necessary."

Under the facts you have presented, you have asked the committee to opine as to whether this conduct by Plaintiffs' attorney is unethical in that it constitutes threatening and harassing a nonparty witness, or an attempt to intimidate the witness not to testify about the Plaintiffs' behavior as reported to the homeowner's association.

The disciplinary rules which appear to apply to your inquiry are DR:7-102(A)(1) and(2) prohibiting the assertion of frivolous claims or asserting positions to harass or maliciously injure another; DR:7-108(B) and EC:7-24 which prohibit a lawyer from causing a witness to secrete himself for the purpose of making himself unavailable as a witness; and DR:1-102(A)(3) which prohibits a lawyer from committing a deliberately wrongful act reflecting adversely on the lawyer's fitness to practice law.

The committee has previously opined that it does not see a distinction between advising or causing a witness not to testify on the one hand, and advising or causing a witness to hide or leave the jurisdiction, on the other hand. LE Op. 1678 (applying DR:7-108; EC:7-24). In any event, it is improper for a lawyer, directly or indirectly, to persuade an opponent's witness not to testify. *Id. See also North Carolina State Bar v. Graves*, 50 N.C. App. 450, 274 S.E.2d 396 (1981) (suspension of lawyer who attempted to influence a potential witness not to testify); Oregon State Bar Op. 1992-132 (lawyer may not attempt to dissuade either an adverse fact witness or an expert witness from testifying); *Harlan v. Lewis*, 982 F.2d 1255 (6th Cir. 1983) (defense attorney in medical malpractice case sanctioned for telling non-party physician who had treated plaintiff that he could be sued too, and that without his testimony, the plaintiff's suit would probably not be successful); Virginia Rules of Professional Conduct, Rule 3.4(a) (a lawyer shall not obstruct another party's access to evidence) and 3.4(g) (request a person other than a client to refrain from voluntarily giving relevant information).[1] In the facts you present, the committee believes that the answer to your inquiry depends upon the motivation and intent of the lawyer representing Plaintiffs. Such matters involve factual determinations beyond the purview of the committee. In *Attorney M v. Mississippi Bar*, 621 So. 2d 220 (Miss. 1992), the lawyer warned a witness who was a doctor that even though he "didn't do any thing wrong," the lawyer might be "forced" to join the doctor as a co-defendant in

[1] Comment [1] to Rule 3.4 states:

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

a malpractice case if the doctor was not willing to state that the plaintiff left his care in the same condition as when she arrived at the hospital. The court looked to Rule 3.1 noting that whether the lawyer viewed the doctor as blameless was irrelevant as long as the claim was colorable.

In the situation in your request, if the threatened legal action is without legal basis in law or fact, and the threatened suit is made merely to harass and intimidate the witness, or influence the witness not to come forward with truthful and relevant information, then the attorney for Plaintiffs would be in violation of the cited rules and opinions. On the other hand, if the lawyer for Plaintiffs has a well-founded belief that the threatened legal action is warranted based on the contents of the complaint letter sent to the homeowner's association, or that the letter gives rise to a colorable action, then such conduct would not be improper.

Committee Opinion
October 20, 1999

[1] Comment [1] to Rule 3.4 states:

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

LEGAL ETHIC OPINION 1795

IS IT ETHICAL FOR A CRIMINAL DEFENSE ATTORNEY TO DISCOURAGE A WITNESS FROM SPEAKING WITH THE COMMONWEALTH'S ATTORNEY?

I am writing in response to your request for an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics ("Committee").

You have presented a hypothetical situation involving a lawyer's representation of a criminal defendant. The defense attorney represented a client charged with felony unauthorized use of a vehicle. The defendant's mother reported the incident as victim of the crime. On the day of trial, the Commonwealth Attorney attempted to interview her in the hall of the courthouse, within earshot of the defense attorney. The defense attorney joined them and asked the victim/mother, in a terse fashion, if the defense attorney could speak with her. The defense attorney then told the mother that she did not have to speak to the Commonwealth Attorney.

The Commonwealth Attorney learned from this interview that the mother, while the primary driver of the vehicle, was not the owner. The titleholder of the vehicle was the defendant's father. The victim/father came to the courthouse to discuss the matter with the Commonwealth Attorney prior to the trial. The Commonwealth Attorney observed the defense attorney speaking with the two victims/parents. The defense attorney then announced that he planned to go to trial. The Commonwealth Attorney realized that while the mother was waiting in the courtroom, the victim/father was not. The mother told the Commonwealth Attorney that the father was in the hallway. This turned out not to be the case. The defense attorney admitted that he had instructed the father that he could leave as he was not under subpoena. The defense attorney had also told the father that as he was a necessary witness to prove ownership of the vehicle, if he left the courthouse, the Commonwealth would lose the case. The defense attorney later explained he had checked the court's file for the subpoena as the father had told him he did not know why he had to be there.

Under the facts you have presented, you have asked the Committee to opine as to whether it was a violation of the Rules of Professional Conduct when:

1) The defense lawyer asked the victim/mother if he could speak with her before she spoke with the Commonwealth Attorney;

2) The defense lawyer told the victim/mother that she did not have to speak with the Commonwealth Attorney;

3) The defense lawyer told the victim/father that he had checked the court's file and that as there was no subpoena, the father was free to leave; and

4) The defense lawyer told the victim/parents that if the father left the courthouse, the Commonwealth attorney would lose the case due to the absence of the father's necessary testimony.

These comments by the defense attorney should be analyzed in light of two provisions of the Rules of Professional Conduct. Rule 3.4(h) greatly restricts when an attorney may request that someone decline to provide relevant information to another party. Rule 4.3(b) restricts an attorney's communications with an unrepresented person, such as a witness. Those provisions state as follows:

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the information is relevant in a pending civil matter;

(2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

RULE 4.3 Dealing With Unrepresented Persons

(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

Rule 3.4(h) prohibits requesting a person other than a client to withhold information from another party, outside a narrow exception. The Committee notes that the exception only applies to *civil* proceedings and is, therefore, inapplicable in the present scenario. Thus, the communications between this defense attorney and the victim/parents must be reviewed in light of this particular prohibition.

Previous opinions of this Committee on this topic addressed other related provisions less on point than Rule 3.4(h); paragraph (h) was not in effect until January 1, 2000, subsequent to the issuance of those opinions. *See*, LEOs 1426, 1678, 1736. In considering the permissibility of an attorney requesting or encouraging a witness from providing information to the opposing side, Rule 3.4(h) is now the proper authority. The Committee therefore does not base its conclusions regarding this issue on its prior opinions issued before the adoption of Rule 3.4(h). Outside the parameter of the above-mentioned exception, Rule 3.4(h) presents a straightforward directive:

> A lawyer shall not...request a person other than a client to refrain from voluntarily giving relevant information to another party.

In the present scenario, the attorney's first comment to the victim/mother was to speak to him before speaking to the Commonwealth Attorney. That statement alone merely requested preferential treatment; it did not request that she not speak to the Commonwealth Attorney *at all*. Thus, that statement did not constitute an impermissible request under this rule.

The attorney's next statement was to inform the mother that she did not have to speak to the Commonwealth Attorney. That statement may involve the giving of advice, but it does not include a clear request that the mother withhold the information from the Commonwealth Attorney. While it is a possible motivation for that attorney's comments, his actual statement is not in the nature of a request. Therefore, this statement did not constitute an impermissible request under this rule.

The attorney subsequently told the father that as he had not been subpoenaed, he need not appear in court. This statement similarly does not on its face constitute a request to refrain from testifying. Thus, it did not constitute an impermissible request under Rule 3.4(h).

The final statement at issue of this attorney was his assessment that the father's testimony was essential to the Commonwealth's case. Again, this statement, while containing advice, did not

contain an impermissible request under Rule 3.4 (h). While the Committee can speculate as to the motives of the defense attorney in providing the advice he did to these individuals, the Committee sees no statement in those communications that went as far as an actual request to withhold information from the Commonwealth Attorney or at trial. Accordingly, the Committee opines that none of the defense attorney's statements violated Rule 3.4(h).

Whenever an attorney, on behalf of a client, is communicating with an unrepresented person, he must be mindful of the broad prohibition against providing advice found in Rule 4.3(b). Thus, in prior LEOs 1426 and 1589, this Committee applied Rule 4.3(b)'s predecessor, DR 7-103(A)(2), to prohibit a lawyer from advising a witness that he need not speak with opposing counsel. While not presenting a complete bar, Rule 4.3(b) does restrict communications with an unrepresented person in many instances. Communications with an unrepresented person are prohibited in a particular instance when each of the following characteristics is present:

1) The communication must be on behalf of a client;

2) The communication must include advice, other than the advice to secure counsel; and

3) The interests of the person must be or have a reasonable possibility of being in conflict with the interest of the client.

In applying Rule 4.3's prohibition to the communications in the present hypothetical, each prong must be considered. In each conversation with these victim/parents, the attorney's comments were on behalf of the attorney's client, a first prong of the prohibition.

In applying the second prong of this prohibition, the statements must each be reviewed to determine whether the attorney provided advice. The Committee notes that the rule is not triggered solely by *legal* advice. The attorney first spoke to the victim/mother by requesting that she speak with him prior to speaking with the Commonwealth Attorney. Even if such a request was made in a terse fashion, it remains a request, not advice of any sort. Rule 4.3(b) does not prohibit that request. However, the defense attorney did not stop at that point in his communication; rather, he went on to tell the mother that she was not required to speak with the Commonwealth Attorney. The Committee opines that this particular comment meets the second prong; the defense attorney was providing advice to the mother with that statement. The defense attorney then proceeded to inform the victim/father that the attorney had checked the file, there was no subpoena, and thus the father was not required to appear in court. The defense attorney's statement to the father that he was free to leave is a statement of advice and thus meets the second prong. Finally, the defense attorney told both parents that the father's testimony was necessary for the Commonwealth's case so that if he failed to appear, the Commonwealth would lose. Again, the Committee finds advice in that communication as the defense attorney is advising the parents as to the consequences of whether or not the father testified. Three of the four statements of this defense attorney were made on behalf of his client and provided advice.

The third prong of a Rule 4.3(b) violation is that the interests of the unrepresented persons "are or have a reasonable possibility of being in conflict with the interest of the client." Thus, the prohibition is broader than just actual adverse *parties*. Here, all of the defense attorney's statements at issue were made to the victims of the client's crime. Ordinarily, while crime victims are not the clients of the prosecutor, they do nonetheless have interests adverse to those of the defendant. However, in this particular hypothetical the true interest of the two crime victims is less clear cut as they are the parents of the defendant. The mother was the person who originally reported the incident and was the primary user of the vehicle, and the father, as titleholder of the car, may potentially have had civil remedies against the defendant. In communicating with these individuals, this defense attorney was speaking with people whose

interests were or possibly could have been in conflict with those of the defendant. The attorney therefore may not without further clarification provide advice to these individuals. However, given the family relationship between the "victims" and the defendant, it would not have been unreasonable for this attorney to ask these parents about their interest in the matter: did they want to pursue criminal charges regarding their vehicle or did they instead want to protect their son from prosecution? If the lawyer had obtained clear indication of the latter from the parents, he would no longer have had to treat them as persons whose interests "are or have a reasonable possibility of being in conflict with the interest of the client," and could have provided them the advice in question. The defense attorney needs to clarify the interests of these unrepresented persons before giving any advice.

The request to speak with the defense attorney before the Commonwealth Attorney was not in violation of Rule 4.3(b) as it did not provide any advice. However, under the limited facts provided, each of the other statements made by this defense attorney to the victim/parents were impermissible under that rule as the statements were made on behalf of a client and included advice to unrepresented people with interests that have a reasonable possibility of being in conflict with those of the client.

The Committee notes that the materials you provided with your request suggested authorities that do not form the foundation of this Committee's conclusions. Specifically, your materials suggest that the conversations between the defense attorney and these victim/parents qualify as an attorney/client relationship and therefore are the source of a conflict of interest for this defense attorney. The Committee did not find facts in the hypothetical to support the formation of an attorney/client relationship; accordingly, the Committee did not view these conversations from a conflicts perspective but rather from the perspective of conversations with unrepresented persons.

Your materials also raise the issue of whether these conversations constitute the crime of obstruction of justice under Va. Code §18.2-460 on the part of this attorney. Applying the Virginia Code is outside the purview of this Committee; therefore, this Committee declines to opine on that issue.

In resting its conclusions on application of Rules 3.4 and 4.3, this Committee notes that all such conclusions are limited to this hypothetical with an *individual* client. Were a similar scenario to involve an *entity* client, the analysis would need to extend to include the impact of Rule 1.13, which governs representation of organizations.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.

Committee Opinion
June 30, 2004

ORDER (Public Reprimand)

Jennings T. Bird (2008)

(2)

RECEIVED

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ROANOKE DEC 1 2008

VSB CLERK'S OFFICE

VIRGINIA STATE BAR EX REL
EIGHTH DISTRICT COMMITTEE,

Complainant

v.

Case No: CL08-1001
VSB Docket No.: 07-080-1397

JENNINGS T. BIRD

Respondent

1 cc to:
J. Bird
J. Geiger
K Montgomery
B. Lantry
Scan
11-26-08

ORDER
(PUBLIC REPRIMAND)

This matter came before the Three-Judge Panel consisting of The Honorable Coline R. Gibb of the Twenty-seventh Judicial Circuit, designated as Chief Judge, The Honorable James E. Kulp, Retired Judge of the Fourteenth Judicial Circuit, and The Honorable Marc Jacobson, Retired Judge of the Fourth Judicial Circuit, which was empanelled by designation of the Chief Justice of the Supreme Court of Virginia pursuant to §54.1-3935 of the Code of Virginia. The parties, the Virginia State Bar, by Assistant Bar Counsel Kathryn R. Montgomery, and the respondent Jennings T. Bird ("Respondent"), by counsel Jeffrey H. Geiger, appeared telephonically and presented for approval an Agreed Disposition for Public Reprimand pursuant to Part Six, Section IV, Paragraph 13.B.5.c of the Rules of the Supreme Court of Virginia. The proceedings were recorded by stenographic means by Chandler & Halaz, Inc., P.O. Box 9349, Richmond, VA 23227, (804) 730-1222.

The Court, having reviewed the Agreed Disposition and having considered the statements of counsel, hereby approves the Agreed Disposition of the parties and hereby finds by clear and convincing proof the following:

I. FINDINGS OF FACT

1. Respondent was admitted to practice law in the Commonwealth of Virginia in 1965 and was in good standing with the bar at all times relevant to this matter.

2. Complainants are David J. Damico, Kristen Konrad Johnstone, and Diana Perkinson. At all times relevant to this matter, all complainants were admitted to practice law in the Commonwealth of Virginia and were in good standing.

3. In 2006, Respondent represented the mother in a custody dispute pending in Roanoke City Juvenile & Domestic Relations Court. The mother had custody of the child, which the father sought to alter due to his concerns about the child's welfare while in the mother's care.

4. Complainant David J. Damico represented the father in the custody dispute. Complainant Diana Perkinson was guardian *ad litem* for the child.

5. Trial was set for September 1, 2006. Prior to trial, Respondent subpoenaed six witnesses to appear. Mr. Damico subpoenaed one witness to appear, Jennifer Ridgeway Wood. Respondent did not issue a subpoena for Ms. Wood's appearance.

6. The subpoena for Ms. Wood was issued on August 17, 2006, but not served until the morning of August 31, 2006. Ms. Wood was the child's teacher and was served by a private process server at her place of employment, an elementary school.

7. On August 31, 2006, after Ms. Wood had been served with the subpoena, Respondent arrived at the elementary school to interview her. At the time of the

interview with the Virginia State Bar investigator, Ms. Wood stated she did not know who had issued the subpoena for her appearance.

8. Ms. Wood's answers to Respondent's questions were not supportive of Respondent's client. Ms. Wood later told the Virginia State Bar investigator that she felt frazzled and intimidated by Respondent during the interview. The Respondent advised the Virginia State Bar investigator that Ms. Wood appeared composed and reserved, was openly and emphatically adverse to his client, but was not hostile.

9. At the conclusion of the interview, Ms. Wood asked the Respondent whether she would be required to appear in Court the next day. He responded that he would not call her as a witness. Ms. Wood then asked about the subpoena. The Respondent replied that she was released from any subpoena that he had served upon her and, at Ms. Wood's request, agreed to put that in writing.

10. Following the interview, Respondent went to his office. A short time later, he returned to the elementary school with a letter for Ms. Wood. The letter read:

> Dear Mrs. Wood:
>
> I appreciate the opportunity to talk with you this morning. Most of what you were able to tell me appears in the Custody Assessment report prepared by Alice Booker, and I see no need to interfere with your schedule any further.
>
> Please accept this note as a release of the Subpoena served on you. If you have any questions, please call.
>
> Very truly yours, THE BIRD LAW FIRM, P.C.
> Jennings T. Bird.

11. After Ms. Wood received this letter, she met with the school's principal to discuss the interview, the subpoena, and the letter. Ms. Wood later told the Virginia State

Bar investigator that at that time, she was confused about whether she would be required to testify in court the next day.

12. Complainant Kristen Konrad Johnstone was at the elementary school on personal business when Ms. Wood was meeting with the principal. The principal and Ms. Wood approached Ms. Johnstone and showed her the subpoena and Respondent's letter. Ms. Johnstone informed them that Respondent did not have the authority to release Ms. Wood from the subpoena because he did not issue it. Ms. Johnstone advised Ms. Wood that she was still under subpoena and should appear at trial the next day.

13. Ms. Johnstone then contacted the assigned social worker about the letter and learned that the guardian *ad litem* was Diana Perkinson. Complainant Diana Perkinson was then contacted and appeared at the elementary school that afternoon. Ms. Perkinson reviewed the subpoena and Respondent's letter and advised Ms. Wood that Respondent did not have authority to release her from the subpoena and that she should appear at court the following day.

14. That evening, complainant David J. Damico spoke with Ms. Wood by telephone and advised her that she was still under subpoena to testify at the trial the next day.

15. The following day, September 1, 2006, Ms. Wood appeared at the Roanoke City Juvenile & Domestic Relations Court and testified.

II. RULES OF PROFESSIONAL CONDUCT

Based upon the factual findings above, the Court finds by clear and convincing evidence that Respondent violated the following Rule of Professional Conduct:

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

III. DISPOSITION

Having reviewed and approved the proposed Agreed Disposition for a Public Reprimand and having heard the statements of counsel and of Respondent, and finding that is just and proper to do so, it is hereby ORDERED that Respondent receive a Public Reprimand and he is so reprimanded.

It is further ORDERED that this case is hereby DISMISSED.

It is further ORDERED that the Clerk of the Disciplinary System shall assess the appropriate administrative fees, and the Clerk of the Circuit Court of Roanoke County shall mail a certified copy of this Order to:

Jennings T. Bird, Esquire
The Bird Law Firm, P.C.
P.O. Box 2795
Roanoke, VA 24001-2795

Jeffrey H. Geiger, Esquire
Sands Anderson Marks & Miller
801 East Main Street
P.O. Box 1998
Richmond, VA 23218-1998

Kathryn R. Montgomery, Esquire
Assistant Bar Counsel
Virginia State Bar
707 E. Main Street
Ste. 1500
Richmond, VA 23219

Barbara S. Lanier, Clerk of the Disciplinary System
Virginia State Bar
707 E. Main Street

Ste. 1500
Richmond, VA 23219

ENTERED THIS 21st DAY OF November, 2008.

Chief Judge

WE ASK FOR THIS:

Jennings T. Bird, Esquire
Respondent

Jeffrey H. Geiger, Esquire
Respondent's Counsel

Kathryn R. Montgomery, Esquire
Assistant Bar Counsel
Virginia State Bar

A COPY TESTE: STEVEN A. MCGRAW, CLERK
CIRCUIT COURT, ROANOKE COUNTY, VA.
BY Rhonda O Perdue
DEPUTY CLERK

Real Life Abuse

In the Matter of: Pickering v. Tran, et al. (July 11, 2012)

In The Matter Of:

Pickering v.

Tran, et al.

Hearing

July 11, 2012

MDW Court Reporting, Inc.

10224 Sager Avenue

Fairfax, VA 22030

(703) 591-2341

Original File Pick0711.txt

Min-U-Script® with Word Index

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

LISA PICKERING,

Plaintiff,

vs. : Case No. CL 2011-8553

DANIEL TRAN, M.D. et al.,

Defendants.

Fairfax, Virginia

Wednesday, July 11, 2012

The hearing commenced at 11:39 a.m.

BEFORE THE HONORABLE JAN L. BRODIE

A P P E A R A N C E S

ON BEHALF OF THE PLAINTIFF:

GARY B. MIMS, ESQ.
ZACHARY DESMOND, ESQ.
Sickels Frei & Mims
3925 Chain Bridge Road
Suite 402
Fairfax, Virginia 22030
(703) 925-0500

ON BEHALF OF PAUL I. MILLER, M.D.:

HEATHER E. ZAUG, ESQ.
TRAVIS W. MARKLEY, ESQ.
Hancock, Daniel, Johnson & Nagle, P.C.
3975 Fair Ridge Drive
Suite 475 South
Fairfax, Virginia 22033
(703) 591-3440

I N D E X

P R O C E E D I N G S

(The court reporter was sworn.)

THE COURT: Good morning, counsel.

MR. DESMOND: Good morning, Judge.

MS. ZAUG: Good morning, Judge.

MR. MIMS: Good morning, Judge.

MR. MARKLEY: Good morning, Judge.

THE COURT: All right. I've done a quick review of the files to see what the issues are. And it appears that there are almost reciprocal motions here.

MR. MIMS: No, no, I don't belive so, Your Honor.

THE COURT: Okay.

MR. MIMS: Let me try to help the Court narrow this down.

THE COURT: Okay.

MR. MIMS: This all -- and if the Court will bear with me for a moment and let me give you the genesis of how we got here, I think the Court will understand better what the issues are before it right now.

Page 5

THE COURT: All right.
MR. MIMS: This arises out of a medical malpractice case that was filed by Lisa Pickering against Dr. Alfiler, who is an anesthesiologist, and Dr. Tran, who is a surgeon.
As a result of gastric bypass surgery and the anesthesiologist inflating a balloon in an orogastric tube while it was located within the esophagus, Lisa's esophagus was entire destroyed. She almost died. She underwent $700,000 worth of surgical repair, had to have her esophagus replaced by her colon.
Dr. Alfiler, who inflated this balloon which she wasn't supposed to inflate, testified that she inflated the balloon because Dr. Tran, the surgeon, told her to.
Dr. Tran, the surgeon, testified that the balloon was never supposed to be inflated in this procedure, "You have worked with me in the past. You've never inflated the balloon. And I never told you to inflate the balloon."
So what we had in the case was a case of

Page 6

clear malpractice, a case of significant damages, and one doctor saying, "I caused the injury, but I caused it because you told me to do it," and the other doctor saying, "No, I didn't."
So we were faced with somewhat of a conundrum in that regard. And in discovery we learned that -- from Dr. Alfiler that she had written a statement regarding what happened; and we learned from Dr. Alfiler that she had spoken with Dr. Miller at Potomac Hospital about what had happened.
So in an effort to try to learn who is telling the truth here, we've deposed everybody. We've deposed everybody that was in the operating suite that day to see what conversations they overheard. No one overheard a conversation between Dr. Tran and Dr. Alfiler regarding which port to use that resulted in the inflated balloon.
So still being confronted with who's telling the truth, we issued a subpoena to Potomac Hospital, where this occurred, asking for all statements that they may have regarding any party.
In response to that subpoena we were

Page 7

contacted by the law firm of Hancock Daniels (sic) who represents the hospital, saying that, in their opinion, our subpoena exceeded the scope of Virginia Code 581.17 because what we were seeking was the fruits of quality assurance.
We disagreed with them in that regard and ultimately reached a compromise which resulted in our a receiving statement that a Dr. Enjetti, who was the chief of anesthesiology, had provided to the hospital about what she says Dr. Tran told her.
Redacted from that statement was something that I think was opinion of Dr. Enjetti; and we were advised that that's redacted because under 581.17 we're not entitled to the opinions of quality assurance, only the facts. We said fine.
I still wanted to talk to Dr. Miller to see what he was told because, for example, if Dr. Alfiler said to Dr. Miller that, "Dr. Tran didn't tell me to do this," that would help break the tie between these two doctors about who is telling the truth.
So we contacted Hancock Daniels and said -- and I don't think we had to -- "Do you mind if we

Page 8

contact Dr. Miller directly?" We were advised by that law firm that they -- that Dr. Miller was not an employee of Potomac Hospital, they represented Potomac Hospital, they did not represent Dr. Miller, so go ahead.
So I called Dr. Miller, and Dr. Miller was kind enough to return my call. And in talking with Dr. Miller -- who, by the way, Your Honor, is the gentleman seated over here at counsel table.
THE COURT: Which one?
DR. MILLER: (Indicating).
THE COURT: All right, Doctor.
MR. MIMS: The one without the suit tie -- suit. I met her him earlier today.
I spoke with Dr. Miller briefly on the phone. And Dr. Miller, I think, in our conversation made it clear to me that he was uncomfortable speaking with me, being the plaintiff's lawyer in the case. I appreciated his situation; and I told him words to the effect of, "I don't want to put you in a position of answering questions you don't feel comfortable asking" -- "answering."

Page 9

So I said to Dr. Miller, "If the lawyers for Potomac Hospital authorize you to talk with me, will that make you more at ease?" And I think Dr. Miller said something to the effect of, "Yes, it would." I said, "Okay. Great. I will call them."

But before doing so, I asked Dr. Miller the question of whether or not he recalled the case of Lisa Pickering, to which he said, "Yes"; and I asked him, "Do you recall speaking with Dr. Alfiler about this?" and he said, "Yes"; and I said, "Do you recall the conversation?" and he said, "Yes," because if the answers to those questions were no, I would be barking up a tree --

THE COURT: Uh-huh.

MR. MIMS: -- for no purpose.

So I said, "Fine."

We then contacted the law firm of Hancock Daniels, who represents Potomac Hospital, and said, "Would you call Dr. Miller and tell him it's okay to speak with us? And if you'd like to, we'll have an informal conversation where all of us can sit down together; and if you think I'm getting too far afield,

Page 10

obviously you can perhaps stand and walk out."

They said no, they would prefer not to handle it that way and that they did not think I was entitled to ask Dr. Miller the questions I wanted to ask.

So Mr. Desmond in my office at that point said, "Look, let's pick a date for Dr. Miller's deposition," because we had two other law firms involved in the case, Wilson Elser and Susan Kimble from --.

MR. DESMOND: Goodman Allen.

MR. MIMS: -- Goodman Allen & Filetti in Richmond that had to be coordinated in the deposition.

So I said, "Look, find out what's a convenient time for Dr. Miller for the setting of a deposition. We'll set it off far enough in the future so that if you want to file some kind of motion with the Court saying I shouldn't be allowed to take the deposition, you'll have plenty of time to do that."

So our answer with regard to getting a date was, "No, we'd prefer not to give you a date for Dr. Miller," because they were under a belief that if

Page 11

they gave us a date, they might be conceding we're entitled to take his deposition and waiving some argument. So we said fine.

So I coordinated with the other law firms in the case a date for the deposition. And we issued a subpoena commanding Dr. Miller to appear for his deposition on June 20, I believe, of 2012.

We served, Your Honor, the subpoena on Dr. Miller on May 24, 2012, almost a month before the scheduled deposition, to give everybody an opportunity if there was an issue to bring it to the Court before the deposition.

We didn't hear anything about that until June 18, two days before the scheduled deposition; we received a motion to quash the deposition.

When I received the motion to quash the deposition on June 19, I called Hancock Daniels and said words to the effect of, "This is inappropriate. A subpoena is a command from the Court to appear at a date and time and place. A motion to quash is something you would file if there was an irregularity in the subpoena, something's wrong with the subpoena.

Page 12

But the motion to quash still needs to be heard before the deposition."

And I spoke with the lawyer from Hancock Daniels and said, "Look, his deposition is tomorrow. I don't think this is the appropriate vehicle. Let's just show up for the deposition. You are invited to attend as Dr. Miller's lawyer" -- because they told me they now represented Dr. Miller. "You're entitled to appear as Dr. Miller's lawyer; and if I ask an inappropriate question, you can object."

THE COURT: Uh-huh.

MR. MIMS: As the Court well knows, under Rule 4:1 -- I'm sorry -- under Rule 4:4(c) evidence objected to be shall be taken subject to the objection --

THE COURT: Uh-huh.

MR. MIMS: -- with regard to deposition. My thought very simply, Your Honor: That if they were going to object that what I seeking exceeded the scope of 581.17, it's much better to have the Court know what the question was before it rules on whether I'm entitled to ask the question so we should come to the

Page 13

Court with a record.
They advised me they disagreed, that they thought the motion to quash was sufficient, to which I said, "Well, it leaves me with no alternative but to file a motion to show cause why Dr. Miller should not be held in contempt for his failure to appear in response to lawful process."
I filed that motion to quash for the very next Friday, which was June 29, 2012. If the Court's wondering why there was some dispatch with regard to my handling of the case, we had a trial date that was set for July 23rd of this year.
THE COURT: Is that still the date?
MR. MIMS: Well, we resolved the case, Your Honor. I was going to get to that point when I got to issue of where we are.
THE COURT: Oh, okay.
MR. MIMS: So on June 29, 2012, we appeared before Judge Devine in response to our petition to show cause.
And our petition to show cause, Your Honor, asks for -- and I quote -- "Wherefore, the plaintiff

Page 14

moves this Court to issue a rule requiring Dr. Miller to appear before this Court and show cause why he should not be held in contempt pursuant to Virginia Code Section 18.2-456 for his failure to comply with lawful process; and that the plaintiff be awarded its reasonable attorneys' fees hereby expended and for such other relief as the Court deems appropriate."
Judge Devine heard argument on June 29. And Judge Devine entered an order, which should be in the Court's file, which reads, "This cause came on to be heard upon plaintiff's petition to compel Dr. Miller to show cause why he should not be held in contempt for his failure to comply with lawful process;
"And it appeared to the Court that process was lawfully issued pursuant to Virginia Code Section 8.01-407 commanding Dr. Miller to appear for a deposition on June 20, 2012, and that Dr. Miller refused to attend.
"It is ordered that Dr. Miller appear before this Court on July 20" -- I mean, "July 6, 2012, at ten o'clock a.m. and show cause why he should not be held in contempt and for the Court to order such other

Page 15

relief as it deems appropriate." That order was entered by Judge Devine on June 29, 2012.
So on the next Friday, which was July 6 of 2012, we appeared before Judge Williams. I'm sort of feeling like no one wants my case, Your Honor. But we appeared before --
THE COURT: Or everybody does.
MR. MIMS: We appeared before Judge Williams on July 6th, and at that time Dr. Miller did not appear. So the motion was continued to today for Dr. Miller to attend.
Judge Brodie, the case settled as to what I will call the primary defendant on Monday night of this week. It's going to be nonsuited as to Dr. Tran. But that does not render the issue before this Court moot.
It's twelve o'clock. I've been to court three times on this issue. And this issue is important. I could easily have asked the Court just to dismiss it and leave.
But it's important for this reason: Without commanding that people respect the rule of law and

Page 16

respond to subpoenas, a subpoena is meaningless. Without requiring people to comply with orders of this Court, that too is meaningless.
I'm here today primarily as an officer of the Court because I think this is an important issue; and I think this issue needs to be addressed. And the first witness I would call would be Dr. Miller.
MS. ZAUG: Good morning, Your Honor. Heather Zaug on behalf of Dr. Miller.
If I may, I just want to introduce to the Court Travis Markley, my associate on the case, and Dr. Miller, who I think has already been introduced.
I think I probably should start with one important clarification, which is Mr. Mims is correct that the plaintiff in this case issued a subpoena to Dr. Miller to have him come and testify about communications that he had with Dr. Alfiler, who is a defendant in the case.
THE COURT: Was proper service made?
MS. ZAUG: Yes, it was.
What Mr. Mims failed to bring to the Court's attention is that Dr. Miller's communication with

Page 17

Dr. Alfiler, as represented both by Dr. Miller directly to Mr. Mims and as represented to him by my office, both verbally and by email communications as well as in writing -- and those exhibits are attached as No. 4 and No. 5 to our memorandum in support of our motion to quash -- Dr. Miller's communications with Dr. Alfiler were in connection with his service as the quality improvement committee chair at Sentara Potomac Hospital.

Accordingly, as I explained to Mr. Mims and Mr. Desmond, the communication that they had was protected by the quality assurance privilege pursuant to Virginia Code Section 8.01-581.17.

THE COURT: Couldn't that have been raised as an objection in the deposition and cited for just that?

MS. ZAUG: Certainly. And I did an analysis of that. I mean, we certainly had two options here in light of --

THE COURT: We raise attorney-client privilege all the time in a deposition.

MS. ZAUG: Sure. And I realize that there

Page 18

were two options. I could, one, make him available for the deposition and assert the privilege and instruct him not to answer and tell all counsel to go home, because Mr. Mims had made very clear what he wanted to ask Dr. Miller about at the deposition, not factual testimony, but testimony that invaded the quality assurance privilege.

And because it's a privilege, I don't believe that it would have proceeded in the way that Mr. Mims suggests, where I make my objection and then allow the client to answer the questions subject to the objection. It's privileged --

THE COURT: Uh-huh.

MS. ZAUG: -- and it needs to be -- it has to be protected and it has to be resolved by the Court.

THE COURT: Right. And that --

MS. ZAUG: So it's --

THE COURT: Ma'am, when you are in the middle of a deposition and something like that comes up, we do have the facility to be able to call the Court and have that resolved immediately during the

Page 19

deposition.

MS. ZAUG: And I considered that. My concern was that a judge might not be available. And as Mr. Mims candidly shared with the Court, there were other lawyers involved at the time, there was a lawyer coming from the Richmond area, there was a lawyer for another defendant, there was Mr. Mims, myself.

And I was concerned about the cost and the time associated with the preparation for and attendance at a deposition in light of the fact that this issue would have to be resolved by the Court. I didn't know that the Court would be readily accessible.

So I figured I had one other option, which was to file a motion to quash, which is really in the nature of a motion to quash, a motion for a protective order, raising this issue for the Court; and that we would have that noticed and heard by the Court and resolved by the Court --

THE COURT: It also could have been brought on a Friday motions day.

MS. ZAUG: Right, which was our plan. I

Page 20

mean, that is the conversation that I had with Mr. Mims and Mr. Desmond; that in light of the nature of the deposition and the testimony that they sought, that that seemed to be to most reasonable approach.

And, frankly, at that time Mr. Desmond, when I spoke with him about this, indicated to me that that seemed to be a reasonable approach.

THE COURT: I meant before the scheduled deposition. You had a Friday. I'm looking at a calendar. Even if I gave you an extra week after he was served, you still could have gotten it on the 15th before the deposition was due.

MS. ZAUG: Well, we had not -- we didn't file the motion to quash until June 18th, several days before the deposition.

And the reason that we did is that Mr. Desmond and Mr. Mims had indicated to us that there was a strong possibility that the case would resolve, which ultimately it did, and that the deposition might not need to go forward. So we were waiting to hear from them to see if it was going to be resolved, in all fairness. That's honestly how we

Page 21

were proceeding, in the --
THE COURT: I understand that. But when you have a trial this close, ma'am, you have to just keep going as if the trial is going to go on.
MS. ZAUG: Yes, ma'am. And I totally -- I do understand. This is all I do for a living; all I do is medical malpractice defense. Mr. Mims certainly has been doing this a long time as well. And all I can say to the Court is, you know, I fall on my sword.
You know, we've gotten some guidance from the Court on these issues in the past. And it seemed between the two options, the deposition where I would be objecting and instructing my client not to answer and the motion to quash, the more reasonable approach was the motion to quash.
I had conversations with Mr. Desmond and Mr. Mims about that, making clear what our position was, that we intended to file the motion to quash.
They made representations to us about potential resolution of the case and that the deposition might not even need to go forward, which turned out to be case, you know, just recently. But

Page 22

that's where their head was; and that's, you know, what we were relying on in good faith.
And we had timely filed a motion to quash, you know; and I --
THE COURT: That's debatable, ma'am.
MS. ZAUG: Well, it was filed before the deposition and --
THE COURT: I know. But it can't be heard before the deposition the way you filed it. It's a discovery motion; it's a two-week motion. It should have been filed at least a week after he was served so that you could have gotten in here on June 15th to argue the motion before the deposition.
MS. ZAUG: I understand --
THE COURT: That is the way it should have been handled.
MS. ZAUG: I understand. And in hindsight, you know, I certainly would do things differently next time.
I will tell you that has been the practice of my office and others that, you know, practice within this community who do medical malpractice

Page 23

defense, to simply file a motion to quash, get that timely filed, and then deal with the scheduling.
There's a reasonable notice requirement for depositions. Okay? So depositions can be scheduled within five or six or seven days. And it's a two-week motion to get the motion to quash heard in this Court.
And so my thinking is: How can it be the rule that you have to have it actually, you know, heard by the Court and a ruling made before the deposition occurs? because it's just not always feasible, you know, as far as the timing.
And I really didn't think I was running afoul of, you know, the rules, the discovery rules, or doing anything that was intended to frustrate Mr. Mims' efforts at all. You know, I --
THE COURT: Can you tell me why he wasn't here before Judge William?
MS. ZAUG: It was our understanding that he was to appear by counsel. That said, I checked with him, Dr. Miller, regarding his availability to appear last Friday.
Keep in mind that the order of

Page 24

Judge Devine was on June 29th. And then we had the storms and the power outages, and we had the 4th of July holiday. On Thursday I was able to reach Dr. Miller; and I said, "What is your availability for Friday, June 6th?" He said, "I have a full day of patients on that day."
I sent a letter to Judge Devine's law clerk with a copy of our opposition to the rule to show cause and indicated in that letter, which I copied Mr. Mims on, that Dr. Miller was unavailable to appear that Friday.
THE COURT: Did you go to calendar control?
MS. ZAUG: And I asked in my letter -- I have a copy of it that I'm happy to hand up. But I asked in the letter that if he needed to be present in person, if we could appear for calendar control to --
THE COURT: I don't think there's a doubt when the rule says, "He shall be there in person." That's the Court's order, he should be there in person.
MS. ZAUG: Understood.
THE COURT: I think that going to calendar

Page 25

control would have been a proper way to go forward at least so that the Court is aware what your plans are.

MS. ZAUG: Well, like I said, in good faith I sent this letter -- if I could hand it up -- to the law clerk for Judge Devine, copied it to Mr. Mims, and said, "Please note that Dr. Miller will be unable to attend tomorrow's hearing in person, but instead will appear by and through counsel.

"If Judge Devine would like Dr. Miller to appear in person, please let me know as soon as possible so we can attend calendar control tomorrow morning to reset the hearing date."

So, you know, I made every effort to be candid with the Court and be candid with Mr. Mims regarding, you know, what the conflict was; and that if we needed to appear for calendar control, we certainly could do that.

And I didn't hear back. And, unfortunately --

THE COURT: Well, ma'am, you're writing on July 5th when you have a July 6th hearing.

MS. ZAUG: Right. And I may not --

Page 26

THE COURT: I mean, we're good here in court, but we're not that good sometimes to get through to.

MS. ZAUG: I appreciate that.

THE COURT: You can't count on that.

MS. ZAUG: I may not have been clear. But we had the storm on the 29th, and then we had power out. We weren't able to get on our Internet, we weren't able to get on our document management system which allows to create documents. We weren't able to make phone calls. And I'm trying to think; there was one other thing.

But there were a lot of things disrupted that Monday and Tuesday following the storm when we were back in the office. Then we were closed for the holiday.

On Thursday was the soonest I could reach out to Dr. Miller and find out his availability for Friday. And I got right on getting this over to the Court and getting a copy faxed and mailed to Mr. Mims so that he would understand what was going on as well.

You know, to me it's a bit of a perfect

Page 27

storm. And, you know, all I can do is fall on my sword and apologize to the Court and to Mr. Mims for any frustration that we have caused, any difficulty that we caused. Ultimately, the deposition wasn't needed.

And, you know, I'm here to answer for the rule to show cause. I know it's against Dr. Miller, but he acted on advice of counsel in not appearing for his deposition.

We filed a motion to quash that we felt was timely and was appropriate under the law because the quality assurance privilege, it's a safeguarded one, it's one that's very important to the hospital, as I think Mr. Mims understands and, you know, as a result advised him not to appear for the deposition. And he acted, you know, on the advice of counsel.

And so, you know, I would say that -- I would ask the Court respectfully not to hold him in contempt and not to impose any sanctions on Dr. Miller because it's not a problem of his making.

If I've made missteps here, like I say, in all sincerity I apologize to the Court and apologize

Page 28

to Mr. Mims. I have made every effort in the spirit of cooperation and professionalism and courtesy to be very candid and up front with him about what our position was from the very beginning, as early as May.

You know, if there's a better way to handle these things in the future, if I ought to do it with a deposition, I certainly will. I was concerned that that was not the more appropriate of the two options. I truthfully did.

And, like I say, all I can do is fall on my sword and learn from this and do differently next time.

But I would ask that the Court not grant the rule and deny it because, like I said, Dr. Miller, you know, has acted in good faith and on the advice of counsel.

THE COURT: All right. Last word, Mr. Mims.

MR. MIMS: Well, Your Honor, the rule has been granted. We're here to find out whether he should be held in contempt, and I'd like to call Dr. Miller to the stand.

THE COURT: Uh-huh.

Page 29

MS. ZAUG: Let me note an objection for the record, Your Honor, to calling Dr. Miller to the stand.

I'm concerned that Mr. Mims' questions -- and no disrespect to Mr. Mims -- to Dr. Miller are going to be in the nature of why he didn't appear for his deposition, which goes directly to attorney-client privileged communications. It's the most sacred of all of our privileges, and it hasn't been waived. And I don't want Dr. Miller to waive it.

THE COURT: Uh-huh.

MS. ZAUG: I have grave concerns about him being called to testify and to have that privilege infringed upon.

THE COURT: Well, I'm going to allow him to testify. But I'm also leaving it up to you to raise the objection in a timely manner. I've been alerted to it; I'm aware of it. So is Mr. Mims.

Whereupon,

PAUL I. MILLER, M.D.,

witness, was called for examination by counsel for the plaintiff, and after having been duly sworn, was

Page 30

examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFF

BY MR. MIMS:

Q Good afternoon, Dr. Miller.

A Afternoon.

Q Dr. Miller, would you please tell us your name and your occupation.

A I'm Paul Miller. I'm a physician.

Q What type of physician?

A Gastroenterologist, internist.

Q Are you in private practice?

A I am.

Q Are you an employee of Potomac Hospital?

A Not at the current time.

Q Were you employed this year?

A Yes, till December.

Q December of 2011?

A 2011, yes.

Q While all of this was taking the place about your subpoena and those things, you were not an employee of Potomac Hospital?

A Correct.

Page 31

Q Doctor, you received the subpoena for your deposition on June 20th; correct?

MS. ZAUG: Let me just note an objection. I think it infringes upon the attorney-client privilege.

THE COURT: The receipt of the subpoena, his service?

MS. ZAUG: It could go to communications that we had regarding service of the subpoena.

THE COURT: All right.

MS. ZAUG: I'll preserve my objection --

THE COURT: I understand your objection.

I'm going to allow him to respond to the date that he was served the subpoena, no discussions regarding the service. Just let me know when it was served.

MR. MIMS: It's in the court files. It has the date. I just want to know if he received it. It was actually just a prefatory question.

THE COURT: Was it served on counsel?

MR. MIMS: No.

THE COURT: All right. So when did you receive it?

Page 32

MS. ZAUG: Same objection.

THE WITNESS: I did receive it. I don't recall the date.

BY MR. MIMS:

Q Dr. Miller, what did you do when you -- and you understood it was asking you to appear for a deposition in my office on June 20; correct?

MS. ZAUG: Objection, attorney-client privilege.

THE COURT: Ask him what his understanding was.

BY MR. MIMS:

Q Well, you read the subpoena, didn't you, Doctor?

A I did.

MS. ZAUG: Objection.

THE COURT: Overruled, ma'am.

BY MR. MIMS:

Q And you understood the subpoena said that you were commanded to appear at my office, I think it was, at one o'clock on June 20 for your deposition; correct?

Page 33

A Yes.
MS. ZAUG: Objection, attorney-client privilege.
THE COURT: Overruled.
BY MR. MIMS:
Q Correct?
A Correct.
Q And why didn't you appear?
MS. ZAUG: Objection, attorney-client privilege. Judge, it goes directly to the communications that we had --
MR. MIMS: Let me withdraw the question --
(Proceedings participants speaking at the same time.)
THE COURT: All right.
MS. ZAUG: -- about whether or not --
BY MR. MIMS:
Q Dr. Miller, did you hire this firm to represent you at any time?
A I did not hire them.
Q Have you to this date hired them to represent you?
MS. ZAUG: Objection, attorney-client

Page 34

privilege.
MR. MIMS: That can't be attorney-client privilege.
THE COURT: I have to know if he's represented by counsel. You appear to have filed motions in his behalf, so it appears that you were retained by somebody.
MS. ZAUG: Correct, by Potomac Hospital.
MR. MIMS: Well, Your Honor, now she's testifying.
THE COURT: All right. All right.
MR. MIMS: I'm trying to establish whether the relationship exists, because I don't think it does.
BY MR. MIMS:
Q Did you ever retain this firm (indicating), sir, to represent you?
A I called Potomac Hospital, my superiors there, and told them what the situation was --
Q All right.
A -- and --
Q And who told you not to appear?

Page 35

MS. ZAUG: Objection, attorney-client privilege.
THE COURT: I'm going to sustain that.
BY MR. MIMS:
Q First of all, did an attorney tell you not to appear or did somebody at the hospital tell you not to appear?
MS. ZAUG: Objection, attorney-client privilege.
MR. MIMS: How can I get the foundation, Your Honor?
THE COURT: Sir, there is an issue here that if it is a conversation with this attorney --
MR. MIMS: I just asked did an attorney tell him. He can say yes or no. If it was somebody at the hospital who told him, that's not privileged.
MS. ZAUG: If he's going --
THE COURT: If he says yes, it's clearly the attorney privilege --
MR. MIMS: I'm just getting the foundation, yes or no, did he talk to -- did a lawyer tell him not to appear, and then we get to the question about

Page 36

whether it's privileged.
THE COURT: Let's move it to: Did you decide on yourself -- by your own whether you would appear or not?
THE WITNESS: No.
THE COURT: Okay. Next question.
BY MR. MIMS:
Q Did a lawyer tell you not to appear, or is it somebody at Potomac Hospital who told you not to appear?
MS. ZAUG: Objection, attorney-client privilege --
THE COURT: That I think is attorney-client privilege.
MR. MIMS: With all due respect, what if somebody from the hospital just said, "Don't appear"?
THE COURT: Let's step back here. I think we can do this -- what I need to know is: Did you discuss this with anyone -- did you discuss this with an attorney as to whether or not you would appear?
THE WITNESS: Yes.
THE COURT: All right. That's it.

Page 37

MR. MIMS: One question. And I beg the Court's indulgence.
BY MR. MIMS:
Q Was that an attorney with this law firm of Hancock Daniels?
A Yes.
THE COURT: Hasn't she stipulated to some extent that she's falling on her sword, that it was on her advice that he didn't come?
MR. MIMS: Judge, here's part of the problem: I can't say I represent somebody -- if Dr. Miller never retained this law firm to represent him but they just interceded in his name, I don't think the law -- I think there's a bigger problem than we see here. And I think that's what we're hearing.
THE COURT: But that's beyond this motion, sir.
MR. MIMS: But it's not beyond the motion when it gets to whether or not he relied upon the advice of counsel because if it wasn't his counsel, he can't rely upon that advice.
THE COURT: Well, the representation to me

Page 38

is that he called the hospital and told them about the situation.
MR. MIMS: Yes, ma'am.
THE COURT: That's what I've got so far. And subsequently -- is it Hancock Daniels?
MR. MIMS: Yes.
MS. ZAUG: It's Hancock Daniel Johnson & Nagle.
THE COURT: All right. -- filed the motion.
MR. MIMS: I understand. I think the Court --
THE COURT: I've got the picture.
MR. MIMS: -- understands.
BY MR. MIMS:
Q So on the advice of counsel, Dr. Miller, you declined showing up at the deposition on June 20th; is that correct?
A On advice of counsel.
Q All right. Doctor, when did you first learn that Judge Devine had entered an order commanding you to appear and show cause why you should not be held in contempt?

Page 39

MS. ZAUG: Objection, attorney-client privilege.
MR. MIMS: Well, somebody is not following the Court's order, Your Honor.
THE COURT: Ma'am, first of all, I have the doctor before me. There's a motion for contempt. I have to know whether or not he knew of the order because the defense would be whether he voluntarily violated the order.
MS. ZAUG: If I can clarify, the issue before the Court is the rule to show cause for failure to appear for a subpoenaed deposition --
THE COURT: Right.
MS. ZAUG: -- and our motion to quash.
There is no rule -- there was no rule issued by Judge Williams as to his failure to appear at the hearing on July the 6th pursuant to Judge Devine's order. So that issue is not before the Court
MR. MIMS: Your Honor, that is a speech that's --
THE COURT: Well, I've got an order here, ma'am, from Judge Devine ordering that he appear at 10

Page 40

a.m. and show cause why he should not be held in contempt. It sure sounds like a rule to me.
MS. ZAUG: We appeared on the 6th on Dr. Miller's behalf. And Judge Williams did not enter a rule --
THE COURT: I'm not talking about Judge Williams' order. I'm talking about the -- Judge Williams continued it. That's it. That's all I see from Judge Williams' order, that he did not appear and he's going to have it heard on July 11th.
MS. ZAUG: Right.
THE COURT: But to tell me that there was no rule --
MS. ZAUG: On June 29th Judge Devine ordered Dr. Miller to appear to answer for the rule.
THE COURT: Uh-huh.
MS. ZAUG: We appeared on July 6th pursuant to that order on his behalf. We had notified the day before the law clerk of Judge Devine that Dr. Miller could not appear in person; and if we needed to go to calendar control, please let us know.
When we appeared on July the 6th, Mr. Mims

Page 41

raised these issues with Judge Williams. Judge Williams did not issue a rule to show case --
THE COURT: No, because there was -- no, ma'am. I don't know. Maybe you and I --
MS. ZAUG: Judge Devine's rule to show cause goes to that he needs to answer for why he didn't appear for his deposition.
THE COURT: Right.
MS. ZAUG: That's the subject of today's motion.
We haven't briefed or are prepared to argue a rule because there's not been a rule issued as to his appearance this past Friday.
THE COURT: I'm not focusing on that.
MS. ZAUG: I think Mr. Mims --
THE COURT: What I'm focusing on --
MS. ZAUG: Maybe I misunderstood. I apologize.
MR. MIMS: Judge, it's always within the Court's inherent authority to find whether somebody has complied with an order of this court --
THE COURT: Well, I can sua sponte do that

Page 42

on a rule.
MR. MIMS: So the issue is that I'd like to know from the doctor is when you learned that Judge Devine on Friday, the 29th of June, ordered that you appear on July 6th.
MS. ZAUG: Objection, attorney-client privilege.
MR. MIMS: Well, if he never heard, it wouldn't be privileged at all.
MS. ZAUG: To the extent that he learned that information from me, it invaded the attorney-client privilege. I'm very concerned about --
THE COURT: I don't want to know --
MS. ZAUG: -- the waiver of a privilege.
THE COURT: I understand that. But I have to know when he became aware. I don't want to hear what your discussions were, but I need to know when he became aware of the order that he appear in this Court.
MS. ZAUG: Well, let me just note my objection to the attorney-client privilege. I think

Page 43

I've represented to the Court when we spoke with Dr. Miller. And I just --
THE COURT: Which confounds me a little bit since it's very clear to me from what you stated that you did inform him at a certain time prior and then filed the motion.
So we know that they informed him of Judge Devine's order.
MR. MIMS: How do we know that, Judge?
THE COURT: Basically because they filed the --
MR. MIMS: That doesn't mean that the doctor knew.
THE COURT: That's true.
MR. MIMS: That's all I want to find out, is when the doctor learned.
THE COURT: All right.
MR. MIMS: I think I know the answer because I'm --.
THE COURT: Sir, when did you learn about Judge Devine's order?
MS. ZAUG: Objection, attorney-client

Page 44

privilege.
MR. MIMS: Now she's objecting to the Court, Your Honor. I --
THE COURT: I need to know, sir, when you learned of this order.
THE WITNESS: I can't recall the date. It was after the date of the hearing.
BY MR. MIMS:
Q After the date of the July 6th hearing?
A After the original order was -- was determined, I guess.
Q That was on Friday, the 29th of June. Did you learn the 29th of June --
A No.
Q All right. Did you learn Monday --
A I don't remember.
MS. ZAUG: Objection, attorney-client privilege.
A It was several days later.
BY MR. MIMS:
Q Was it after the 4th?
A I'm --

Page 45

MS. ZAUG: Objection, attorney-client privilege.
THE COURT: Ma'am, I think we'll make this a lot easier if we have a continuing objection.
MS. ZAUG: Judge, I appreciate that. I'm concerned that the Supreme Court has made clear that a continuing objection is nonsufficient.
THE COURT: All right. All right.
BY MR. MIMS:
Q I'm sorry. I know you answered this question. But I don't remember.
Did you say before or after the 4th?
MS. ZAUG: Objection, attorney-client privilege.
A Before the 4th.
BY MR. MIMS:
Q So before you 4th you understood you were to appear before Judge Devine -- I mean before this Court on July 6th?
MS. ZAUG: Objection, attorney-client privilege.
A Yes.

Page 46

BY MR. MIMS:
Q And, Doctor, I don't want to invade the attorney-client privilege, but were you -- is the reason you did not appear on the 6th of July because your counsel advised you not to appear?
MS. ZAUG: Objection, attorney-client privilege. That goes to the heart of the substance of our communications.
THE COURT: Okay. I will sustain that. Move on.
BY MR. MIMS:
Q Why didn't you appear?
MS. ZAUG: Objection, attorney-client privilege.
THE COURT: The fact is he didn't appear.
MR. MIMS: And I'm trying to give him every piece of line I can to save himself.
THE COURT: I know. But if they're not going to take advantage of that, if there's no explanation for why he didn't appear, then I don't have one.
MS. ZAUG: Let me just clarify the record.

Page 47

I mean, I have represented to the Court that Dr. Miller did not appear for his deposition and did not appear on July the 6th on the advice of counsel.
MR. MIMS: Well, Your Honor, you can't have it both ways. That's not evidence. That's counsel saying something. She can't say, "Objection, attorney-client privilege; but let me tell you what I said."
So I respect the Court's ruling on that issue. He did not appear on July 6th.
I have no further questions at this time.
THE COURT: All right. Do you have any cross?
MS. ZAUG: I have no questions.
THE COURT: All right. Take a seat.
MR. MIMS: Your Honor, I do have argument.
THE COURT: Okay. Ma'am, did you have anything you wish to put on before argument?
MS. ZAUG: No, Your Honor.
THE COURT: All right.
MR. MIMS: Your Honor, Virginia Code Section 8.01-407 says, "A summons shall express on whose

Page 48

behalf and in what case or about what matter the witness is to attend. Failure to respond to any such summons shall be punishable by the Court in which the proceeding is pending for contempt." It can't be more simple than that.
Counsel argues before this Court such things as: Well, if it wasn't timely, we could file a motion to quash. What's interesting is 8.01-407 addresses that. It says, "When any subpoena is served less than five calendar days before the appearance is required, the Court may," "may after considering all the circumstances, refuse to enforce the subpoena for lack of adequate notice." So there's a provision if there wasn't adequate notice. I don't know why we're talking about notice. He had 24 days' notice in this case.
What we've heard, Your Honor, so far is that the reason that he failed to comply with a lawfully issued subpoena is because he was instructed not to comply with that. And for that I, frankly, don't fault Dr. Miller. Dr. Miller is probably an outstanding physician and a fine man and probably

Page 49

would not do anything on his own to jeopardize what the Court says.

But Virginia Code Section 18.2-409 says, "Every person acting jointly or in commission with any other person to resist or obstruct the execution of any legal process shall be guilty of a Class I misdemeanor. So it's unlawful to tell somebody not to comply with process.

There is an orderly way that these things are done. A motion to quash does not quash. A subpoena is actually issued by this Court. Attorneys have the authority and the right to prepare them, but it's a summons from the Court to appear. The only person that can relieve somebody from that requirement is the Court.

A motion to quash is a pleading filed by a lawyer and does not act to quash. Think of the havoc that would be caused if that was permissible.

Suppose I subpoenaed Dr. Miller for trial on Monday, and suppose Hancock Daniels does not think he should show up, and he was going be to my first witness on Monday morning. Could they just file a

Page 50

motion to quash on Friday and tell Dr. Miller not show up for trial? Of course not.

Suppose I subpoenaed a witness for trial in a case, and I serve everybody with a copy of my subpoena, and I decide during the trial I'm not going to call Witness X. Can I release that witness? Of course not.

Once the witness has been subpoenaed to Court, I can't even release him even if I'm not going to call him because he is now a witness at the Court's pleasure.

And the only way that witness gets released, if I say, "Judge Brodie, I do not intended to call Dr. X; I would like him released," at which point Judge Brodie would look at the other counsel and say, "Do you agree that he should be released?" because if they said, "I want to call him too," he's not released.

The point is a simple one, but the point is a fundamental one. There is a case that is actually right on point, and the case is Bellis v. Commonwealth of Virginia.

Page 51

In Bellis v. Commonwealth of Virginia, Dr. Bellis was subpoenaed by the Commonwealth on Friday to appear as a witness on Monday. The subpoena was served substituted process on Dr. Bellis.

Dr. Bellis decided that he didn't need to be there. He took a plane and flew down to Texas or something and came back late, had his office call the Commonwealth Attorney's office and say, "I'm not going to be here," because he ran into weather or something.

The Supreme Court in that case held -- and I quote -- and this is, by the way, since we're on the record, 241 Va. 257 at page 262.

THE COURT: Do you have a copy for the Court?

MR. MIMS: I certainly do, I think.

THE COURT: And opposing counsel.

MR. MIMS: I've cited it in my brief, so I'm sure counsel has seen the case.

I think all I have is one copy. I will hand it to the Court.

By the way, Judge, this was argued before Judge Devine as well.

Page 52

(Document presented.)

THE COURT: Thank you.

MR. MIMS: And it was decided at that time. I don't know whether I gave a copy to counsel then.

But at page 262 they give four elements to the finding of contempt. And as you'll see, all four of those elements have been met in this case.

What I think is also interesting, Your Honor, is at the top of that page 262 there is reference to the issue of whether or not service of a summons in that case was timely.

In that case the Supreme Court noted -- and I'm going off of memory. But I think the Supreme Court noted that if service isn't timely of the subpoena, a motion to quash can be filed.

But they go on to state that it's an order that relieves him from his obligation to attend, not the filing of a motion. So I think on two grounds that sort of hits the point.

What I find perhaps even more troubling in this case is the fact that Dr. Miller failed to comply

Page 53

with Judge Devine's order, because if this Court is not heard to speak through subpoenas and this Court is not heard to speak through its orders, then there's not enough respect given to this Court.

This is no longer about me; it's no longer about my case. This is about the rule of law, and it's an important rule.

Judge, I direct your attention to the letter that counsel has referred you to that was sent on July 5, 2011 (sic), to Judge Devine's law clerk, Mr. Cummings.

Putting aside the fact that one could argue that there's an ex parte communication and then they're asking for the Court's guidance as to whether or not the doctor has to attend, putting the burden on the Court to tell them what the Court meant by its order is wrong.

What they're saying is because Judge Devine did not answer their last-minute notice, Judge Devine, we'll just pretend you don't mean it. It's the same thing they did with me when they filed the motion to quash and they said it's my burden to compel the

Page 54

deposition, when it's their burden to stop the deposition; in this case it's Judge Devine's burden to tell him what his order means. And guess what: If they don't want to do what Judge Devine says, they don't do it. The reason we are here is because every aspect of this is heavy handed and in disregard to the law.

But, Judge, look at the letter. If you look at their letter of July 5, why didn't Dr. Miller attend on July 6th? Not because they didn't think he needed to attend, not because they didn't understand the order. He didn't attend because he was unable to attend.

Well, that ship can't possibly sail very far when the reason Dr. Miller wasn't able to attend was because he had office duties. Dr. Miller wasn't unable to attend because he was in Texas or in California. It was inconvenient for him to comply with Judge Devine's order. It was inconvenient for them to file and argue their motion to quash before.

I have been practicing law -- I've always wanted to say this, but I hate what happens with it --

Page 55

for 30 years. The first 20 years I did this, I represented defendants and doctors and insurance companies. For the last 10 or 12 years I've represented plaintiffs.

This is the first time in my career I have ever come to court on a show cause to be held in contempt. And when I began practicing law, I began as a young associate doing subrogation where we dealt with debtor's interrogatories. I never even served a show cause for a debtor who failed to come to court.

I don't do it lightly. But it was the only proper legal vehicle for me to get the issue before this Court. And the issue that I am concerned with, Judge -- the issue is how this law firm can tell a witness to disregard a subpoena and then how this law firm can tell a witness to disregard Judge Devine's order.

Consequences need to be made. Perhaps it's not Dr. Miller. I'm looking at Dr. Miller. I'm sure he's saying: I wish I could be 100,000,000 miles away from here; I was just acting a doctor. But somebody should be responsible.

Page 56

I've come to Court three times. I've filed two briefs, at least, maybe three -- I don't know -- in this case on an issue of a subpoena. And they stand before this Court and say things to the Court like I really didn't need the deposition. Well, that's not for them to decide, that's not for them to determine if I wanted to go forward with the deposition.

And to argue to this Court they thought the case was going to settle is an untruth to argue to this Court, because I spoke with Mr. Markley the day before the deposition and told him I wanted it to go forward on the 20th. I told Mr. Markley, "Please bring him. Note your objections. That's the proper way to do it. If you have to move for a protective order or if you have to do something, at least we come to court on a Friday and say, 'Here are the questions I was going to ask.'"

I don't know that there was a quality assurance investigation in this case. I know that Dr. Enjetti, who is the chief of anesthesiology and Dr. Alfiler's boss, testified under oath that there

Page 57

was no quality assurance investigation in this case.
I'm entitled to at least say:
"Dr. Miller, state your name. Are you the head of quality assurance?
"Yes, I am.
"Was there an investigation in this case?
"No.
"Was there an investigation in this case?
"Yes.
"Who did you talk with?"
I'm entitled to learn those facts, and their obligation is to object when they think I've gone beyond 8.01-571.1. I don't think we need to argue the applicability of that statute. I don't think it applies to facts; and if I ask him what Dr. Alfiler told him, those are facts.
But, Judge, taking it a step further, if you look at 581.17, there's a phrase in there that says even if the information I sought was protected by the statute, for good cause shown, the Court can order the person to answer the questions anyway.
I can't think of a better case where you

Page 58

would have good cause when you've got two doctor defendants saying each other is a liar and this doctor has access to one of the person's versions. I think the Court would show good cause. I don't think it's up to counsel to make that determination.
And I think at some point -- my case is over. I am here as an officer of the Court and a member of Bar.
THE COURT: What were you asking as far as sanctions?
MR. MIMS: Judge, I think counsel has put Dr. Miller in a sticky situation. And I don't want to be hypertechnical, but dr. Miller has been unable to explain why he wasn't here because it's at the advice of counsel.
Technically, without an explanation as to why he's here, he's in contempt. I think he should be found in contempt, but I wouldn't ask for a sanction against him. But that's up to the Court. It really isn't meaningful to me.
What I do think we should have is -- I think we have absolute evidence in this Court that counsel

Page 59

counseled Dr. Miller to disobey an order of the Court. And I think that's contemptuous, and I think that's sanctionable under any number of aspects of the law, including 8.01-271.1.
I would ask that a sanction be -- I would ask for attorneys' fees in the case, and I would -- I could only tell the Court what I would guess the time is I've put in this. I would guess that it's 25 hours, would be my guess. But that is guess. I'd ask for attorneys' fees.
But more importantly, I don't come to Court to make a living on sanctions. More importantly, I have to say that if this conduct isn't stopped, it will continue. And the reason is there's only one group in this room who gets paid for what's happened.
The Court and its law clerks don't get paid for what's happened, for taking the time. I don't get paid for the motions. I don't bill hourly in these cases.
But there is Hancock Daniels in this case, who's been paid for everything they've done. Every roadblock they've put in this case has been a profit

Page 60

margin for them. And that profit should be taken away.
Whatever is necessary as the Court thinks, I will certainly live with that. But whatever the Court thinks is appropriate to say, "I will not tolerate this; you can't act this way," is the message. If the Court doesn't do anything, it's condoned it. And I don't think the Court wants to do that.
But whatever message it should be, it should be a sufficient message that word gets around that you have to obey subpoenas and you have to obey orders of this Court.
MS. ZAUG: Judge, given what's at stake here for Dr. Miller and at this point it seems for me and Mr. Markley --
(Proceedings participants speaking at the same time.)
THE COURT: Take the podium, ma'am.
MS. ZAUG: -- I'd appreciate to be heard briefly.
THE COURT: All right.
MS. ZAUG: Let me just start by clarifying that -- if it wasn't clear for the Court or for the

Page 61

record, I just want to make sure that it's clear that Dr. Miller was an employee of Potomac Hospital at the time he served as the quality improvement committee chairperson.

For that reason our representation of Potomac Hospital in this Pickering case extended to Dr. Miller for purposes of responding to the subpoena and what has followed. There's a question about that. I just wanted to make sure that that was clear.

I just want to go back to the substance -- or the merits, I should say, of the motion to quash briefly and just say that in response to plaintiff's subpoena in this case, we filed a motion to quash.

We felt that that was an appropriate response to the subpoena for the deposition in light of the fact that Dr. Miller's communications with Dr. Alfiler were only in the context of the quality assurance privilege and, therefore, privileged pursuant to the 581.17.

I'm reading just from the relevant portions of the statute. This is in Subsection B, "The proceedings, minutes, records, and reports of any

Page 62

quality assurance, quality of care, or peer review committee, together with all communications, both oral and written, originating in or provided to such committees or entities are privileged communications which may not be disclosed or obtained by legal discovery proceedings unless a Circuit Court, after hearing and for good cause arising from extraordinary circumstances being shown, orders the disclosure of such proceedings, minutes, records, reports, or communications."

It goes on to say, "Oral communications regarding a specific medical incident involving patient care made to a quality assurance, quality of care, or peer review committee established pursuant to clause 3(i) shall be privileged only to the extent made more than 24 hours after the occurrence of the medical incident."

And, finally -- I appreciate the Court's indulgence -- "A person involved in the work of the entities referenced in this subsection shall not be made a witness with knowledge of the facts by virtue of his involvement in the quality assurance, peer

Page 63

review, and credentialing process."

And that's exactly what we have here. Dr. Miller only had knowledge about Lisa Pickering's medical incident at the hospital that was at issue in this case by virtue of the fact that he was the quality improvement committee chairperson. He spoke with Dr. Alfiler more than 24 hours after the event in connection with his investigation as the quality improvement committee chairperson.

So the motion to quash was absolutely an appropriate response to the subpoena for his deposition. If there was any misstep -- and I take full responsibility on my part -- it was the timing, not getting it filed sooner.

All I can say is that based on the representations that I received directly from Mr. Desmond, the case was potentially going to resolve and the deposition might not need to go forward. So we didn't immediately get a notice or file a notice.

And I have certainly learned from this experience; and, trust me, it will not happen again.

For Mr. Mims to suggest that he doesn't even

Page 64

know if there was a quality assurance review process in this case is a bit disingenuous given our representation to him there was one, his communications with Dr. Miller before he realized that we represented Dr. Miller, frankly, before we realized we represented Dr. Miller. And I have no criticism of Mr. Mims for that.

He represented to him, we represented to him that there was a quality assurance review process here and that Dr. Miller's communication with Dr. Alfiler was only in the context of that privileged communication.

Moreover, we had also received a subpoena in this case for some quality insurance documents, which as Mr. Mims indicated earlier on, we properly responded to.

So to suggest now that he's not even sure if there was a quality assurance review just seems disingenuous given the fact that we produced documents that indicate at the top, "QI Review Process". I mean, there clearly was a quality insurance review process in this case.

Page 65

He mentioned the Bellis case. And I wanted to just distinguish that briefly for the Court. In that case the doctor did nothing in response to a subpoena for a deposition.

Here Dr. Miller relied on the advice of counsel, who filed a motion to quash on his behalf. So he didn't ignore the subpoena; he didn't flagrantly disregard it. He relied on the advice of counsel who had filed a proper motion to quash in response to the deposition -- subpoena for the deposition. And, you know, he did something. It's distinguishable from Bellis in that instance. That's the motion to quash.

I want to briefly address the issue of Judge Devine's order from the 29th. And as I had indicated to the Court earlier, I don't believe that that issue is before the Court or has been before the Court up until this point.

But I take your point very seriously, not lightly at all, that the Court can address that sua sponte. And if we are addressing that, then let me just say this: We did not flagrantly disregard Judge Devine's order, and my client did not flagrantly

Page 66

disregard Judge Devine's order.

There was some question as to whether or not we could appear -- he could appear by counsel on the 6th. But in order to be safest, I reached out to Dr. Miller and said, "Can you appear on Friday, the 6th?" He could not appear; he had a full day of patients, which I had believe included some procedures.

I tried to balance the equities there and reached out to Judge Devine's law clerk to see if we could get the matter set for calendar control and reschedule if that was necessary.

I certainly am mindful of the fact that Mr. Mims has had to come to Court on this issue, and I did not want to further inconvenience him or the Court.

I take this Court's orders very seriously, I know Mr. Markley does, and my firm does. And, you know, again, all I can say is what I've said before: I fall on my sword. If he needed to appear on the 6th and we failed to do that in violation of Dr. Judge Devine's order, I have attempted to remedy

Page 67

that by making him available here this morning and to clarify that issue.

To suggest that we have acted in a way or manner that is in violation of the Court's orders or in violation of properly issued subpoenas in an effort simply to make money is false and is, frankly, offensive.

Mr. Mims knows that these quality assurance privileges are hotly contested in medical malpractice cases and has known from the very beginning what our position was with regard to the quality assurance privilege and that we would be filing a motion to quash and that the issue was going to have to be resolved by the Court.

And for the reasons I've said up until tbis point, I think I've made it very clear to the Court that Dr. Miller in not appearing for his deposition because a motion to quash had been filed and he had been advised by counsel that he did not need to appear, he acted in good faith -- he's a doctor, not a lawyer -- in reliance on our advice.

Likewise, when I spoke with him about his

Page 68

appearance for this past Friday, he relied on our advice.

He's here this morning. I've tried to remedy that issue. And I would ask that the Court -- in light of those circumstances and in light of the fact that Dr. Miller has acted appropriately and in reliance on the advice of counsel, I would ask that the Court not hold him in contempt and not impose any sanctions against him.

Additionally, I would just say Mr. Markley and I from the beginning, as I said earlier, attempted to work with Mr. Mims in the most professional and courteous way possible. I know he disagrees; I know he's very upset about it.

But I am certain that if I had submitted Dr. Miller to a deposition, allowed him to ask his preliminary question, then he would get into the substance of what he wanted to ask Dr. Miller about.

He wanted to -- I mean, let's be clear, let's be honest about what he wanted. He wanted Dr. Miller to be in a position to break the tie between these two physicians who were pointing fingers

Page 69

at each other.

And there was absolutely no way Dr. Miller was going to be able to do that in light of the fact that the only information he had was by virtue of his position on the quality assurance committee and his communication with Dr. Alfiler in that role. So I was going to have to assert the privilege and instruct him not to answer.

It's my understanding that with regard to depositions, we certainly can -- there is a category of objections you can make and allow your client to answer the questions subject to those objections. There's a certain category of objections that you make and you instruct your client not to answer, and that's privilege.

In my mind, 581.17 is a privilege. It's a quality assurance privilege. And the General Assembly has recently addressed this issue by amending the statute. There's Virginia Supreme Court case law on it. We cited a number of those authorities in our motion to quash.

And because of that I knew that if we had

Page 70

submitted him to a deposition and I conducted myself in that way in instructing him not to answer, that Mr. Mims would be frustrated by that effort and would, you know, pursue a path of getting this matter before the Court.

So it seems to me the most reasonable and logical, most effective, most professional and courteous way to address the subpoena was to alert him of my position and to file the motion to quash.

So I don't know that there's much more I can say other than to say we have made every effort to act reasonably; to act professionally; to follow the law; to protect our client's quality assurance privilege; to do right by our client, Dr. Miller; and to do right by Mr. Mims and his client.

And, you know, all I can say is, you know, I fall on my sword to the extent that it didn't work out the way I thought it would. I certainly have learned from it. And, you know, I'm just -- I'm sorry that we're all here having to, you know, incur the time and the cost and the effort associated with the hearing.

But it doesn't change the fact that from the very beginning we acted in good faith.

Page 71

MR. MIMS: Judge, just since it's my motion, if may I be briefly heard --

THE COURT: Mr. Mims, I need to alert you that I have to be at a judges' meeting and leave here at about seven minutes of. And the meeting is going to go from 1:00 to 2:20, not our normal 1:00 to 2:00.

MR. MIMS: I'll be three minutes.

I find it interesting the use of counsel's language, she balanced the equities. In response to Judge Devine's orders, she balanced the equities about whether the doctor should appear.

Every day this Court is confronted with people -- witnesses, people who have been given traffic violations, people for every reason we can think of -- that have to give up their daily schedule to appear in Court.

And if this Court orders somebody -- if you -- if this Court orders somebody to appear and I say, "I'm busy; I'm working that day," and I don't show up, I don't think the Court would have much tolerance for that. And I don't think they should.

Page 72

She said she balanced the equities, she decided the applicability of 8.01-581.1. That statute, Your Honor, I think entitles me to get the facts.

And what's interesting is while raising that statute about the facts, they gave me a handwritten report by Dr. Enjetti, which is Dr. Enjetti's statement. So they gave me facts of other witnesses. They said it wasn't covered by 581.17.

THE COURT: I think the statute is very clear that it doesn't cover facts.

MR. MIMS: I think it is as well, Your Honor.

Plus there's a show cause. We should be arguing this before the deposition. And for her to argue that she's done everything timely, 24 days they had to bring this to the Court. That date the Court said on June 15 was a date that was available, Mr. Desmond and I talked about that and said to their office that they could get this on the docket June 15 and we could have the deposition either go forward or not, depending on what the Court ordered.

Page 73

They decided on their own. And what's happening in these cases is they decide the law, they decide what they have to do, and it's for the rest of us to figure our way around it, just like it was up to Mr. Cummings to figure out whether or not Judge Devine really meant what he said.

THE COURT: All right. The issue today is not whether or not there is a privilege under 8.01-581.17. That is the not issue.

The issue here today is whether or not the defendant -- or Dr. Miller should be found in contempt for failing to attend a deposition on June 20th, 2012, after he was properly served.

He was served issuance of lawful process issued by this Court. There was valid service of the process. He had knowledge of the process, he knew of the deposition, and he did not attend. He made that decision not to attend. Whether it was on the advice of counsel or not, he did not attend.

I think the burden falls squarely on the shoulders of counsel in this case in that there were several options that could have been done.

Page 74

In the case cited by counsel, the Bellis vs. Commonwealth, it makes it very clear that it was burden of counsel to take such reasonable steps as would permit counsel to obtain an order quashing the subpoena. It's very straightforward in this case.

In this case there were a multitude of steps that could have been taken.

Counsel upon receiving service could have gone to calendar control to arrange a date for an expedited hearing. We knew we had a trial date coming up. They could have set the argument to a motion to quash for June 15th. They had ample time to do it within the two weeks.

They could have gone to the deposition, and should have gone to the deposition in accordance with the Court order, and raised the privilege. If there was a problem with the privilege or any discussion there, we make available here in court a judge to determine whether or not there is an issue there that needs to be resolved during the depositions.

Furthermore, if that cannot be resolved, there is always the option of continuing the

Page 75

deposition to another date and then going to calendar control, seeking a continuance perhaps based on the fact that you were unable to complete the deposition.

There is a myriad of experiences.

This letter to Judge Devine, you need to understand, ma'am, that when we have a rule to show cause signed -- sometimes we do these ex parte, we do them in chambers.

It does not mean that Judge Devine is going to hear the rule to show cause. All it means is that the Court has entered it and it's put on the docket. That's why you would go to calendar control.

You don't write to a judge, because they're not assigned to a judge. This is a one-week motion. We get a short notice on these. And so sending it to Judge Devine, especially on the day before, is inadequate.

So accordingly, having met all of the requirements and failing to attend the deposition -- which is the only issue that I am dealing with today, not the July 6th; I'm going to deal with the June 20th deposition -- I find that the doctor was in contempt

Page 76

of Court, whether it be on advice of counsel or not. Counsel should have made other efforts.

Accordingly, I'm finding both in contempt; and I'm granting as sanctions $2500 jointly and severally. Okay?

Please draft an order before you leave today.

MR. MIMS: Thank you, Your Honor.

MS. ZAUG: Please note my objection to the ruling.

THE COURT: Objection is noted, ma'am.

Thank you.

MR. MIMS: Thank you, Your Honor.

(The Court left the bench.)

(Off the record.)

THE COURT: Counsel, after I left, I gave it -- I thought about it again.

In light of Mr. Mims' requests, I think that this is a cost that should be borne by the law firm and not Mr. -- not Dr. Miller. I think in fairness to him, if he did rely on the advice of counsel, even though I think it's misplaced and wrong, I don't

believe that he should be subject to the sanction.

MS. ZAUG: Thank you for that clarification.

MR. MIMS: We can just scratch that through the order, Your Honor.

THE COURT: Please do.

MR. MIMS: Thank you.

(At 12:49 p.m. the proceedings in the above-entitled matter were concluded.)

CERTIFICATE OF REPORTER

I, Malynda D. Whiteley, RPR, do hereby certify that the foregoing proceedings were taken by me in stenotype and thereafter reduced to typewriting under my supervision; that said proceedings are a true record of the proceedings and testimony given by said witnesses; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and further, that I am not a relative or employee of any counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

Given my hand this 15th day of July, 2012.

Notary Public in and for the
State of Virginia
Notary Registration No. 247874
Registered Professional Reporter

My commission expires:
February 28, 2013

D

E

DISCOVERY MISCONDUCT
SPOLIATION

Susan F. Pierce, Attorney at Law
Walker Jones, PC
31 Winchester Street
Warrenton, VA 20186
540.347.9223
Spierce@walkerjoneslaw.com

SPOLIATION DEFINED: The term "spoliation" typically conjures thoughts of bad faith destruction of evidence, however spoliation issues also arise when evidence is **lost, altered, or cannot be produced**. *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 40 Va. App. 565, 581, 580 S.E.2d 467, 475 (2003) (citing *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188, 652 N.E.2d 267, 270-71 (Ill. 1995)), *Ward v. Texas Steak Ltd.*, 2004 U.S. Dist. LEXIS 10575 at 3-4 (W.D. Va. 2004) (applying Virginia law). Spoliation occurs when "a reasonable person in the defendant's position should have foreseen that the evidence was material to a potential civil action."

SANCTIONS FOR SPOLIATION: A range of sanctions is available to the Court to redress the fact of and the circumstances of the destroyed and altered evidence. A finding of intentional destruction of important evidence, when a litigant or his attorney has acted in bad faith, may justify severe sanctions, including default judgment as to liability, fines, remittitur, and investigation and punishment by the Virginia State Bar. The purpose of sanctions is to punish the offending party and deter others from acting similarly. See *Wolfe*, supra; *Allied Concrete Co., et al., v. Isaiah Lester, Individually and as Administrator of the Estate of Jessica Lester* 285 Va. 295, 736 S.E. 2d 699, (2013); *Gentry v. Toyota Motor Corp.,* 252 Va. 30, 34, 471 S.E.2d 485, 488 (1996). See also Rule 4:12(a) and Rule 4:12(b).

Evidence may be excluded: If "crucial" evidence is "lost while in the exclusive possession of the defendant" or the defendant's agents, the defendant's evidence on that subject must be excluded. This is the "appropriate remedy" for the prejudice that inures to the other party. *Delaney v. Sabella,* 39 Va. Cir. at 64.

In Delaney the issue was whether the defendant doctor should have recognized the plaintiff's ectopic pregnancy. After analyzing the pap smear slides and preparing a report,

defendant's expert lost the slides, thereby preventing plaintiff's experts from analyzing them. The defendant sought to have several experts testify that the defendant did not breach the standard of care based on the report prepared by the expert who analyzed the slides. Plaintiff moved to exclude "all such evidence" related to the Pap smear slides. The court agreed, holding that plaintiff was prejudiced as a result of her inability "to examine the slide, that the prejudice [was] not curable," and, because the slides were "crucial evidence," excluded "testimony related to the Pap smear" due to the inability of Plaintiff's experts "to examine this crucial evidence that was lost while in the exclusive possession of defendant and/or her experts."

Curative Instructions, Fines, Dismissal and Reversal: *Allied Concrete Co. v. Lester,* 285 Va. 295, 736 S.E.2d 699 (2013), a wrongful death case, also highlights issues with spoliation. The jury awarded Lester $6,227,000 for the wrongful death of his wife, however post trial the court ordered remittitur of $4,127,000 leaving Lester with an award of $2,100,000. The court held that the jury award was "grossly disproportionate" to the $1,000,000 awarded to the Scotts, decedent Jessica Lester's parents. Allied moved for a retrial stating the trial was tainted by Lester's dishonest conduct regarding his Facebook page and Murray's unethical conduct during the discovery process.

By Order entered October 21, 2011 the Court sanctioned and personally obligated Murray to remit to defendant the sum of $542,000 which was paid. The Court also ordered Lester to remit $180,000 to Defendant for his misconduct during the trial.

Spoliation occurred with regards to Lester's Facebook page. Lester communicated with one of the counsel for Allied Concrete via Facebook. The attorney was able to view Lester's Facebook page and subsequently sent a discovery request to Lester's counsel, Murray, seeking production of "screen print copies on the day this request is signed of all pages from Isiah Lester's Facebook page including, but not limited to, all pictures, his profile, his message board, status updates and all messages sent or received". Attached to the discovery request was a photograph from Lester's Facebook account which showed him in a T-shirt emblazoned with "I (heart) hot moms." Murray notified his client about the receipt of the discovery request and related photo and instructed his paralegal to tell Lester to "clean up" his Facebook. Lester informed the paralegal there were other pictures that should be deleted. Lester deleted his Facebook page. The following day Murray signed and served an answer to the discovery request,

which stated "I do not have a Facebook page on the date this is signed April 15, 2009". Allied subsequent filed a Motion to Compel Discovery and received copies of the Facebook page less 16 photos deleted by Lester.

After Lester testified he had never deactivated his Facebook page, Allied Concrete subpoenaed Facebook to verify Lester's testimony and hired an expert to determine how many pictures Lester deleted. Eventually Lester produced the missing 16 photos to Allied Concrete. Allied served a subpoena *duces tecum* on Murray's paralegal, Smith, for emails. Murray filed a privilege log on behalf of Lester, however he omitted any reference to a March 26, 2009 email. After the Court deemed the Privilege Log was inadequate, Plaintiff filed an amended one.

Allied Concrete knew of the spoliation issues and misrepresentations by Lester *before* trial and the Court gave an adverse jury instruction that included the language "You should presume that the photograph or photographs he [Lester] deleted from his Facebook account were harmful to his case". The Court read the adverse jury instruction twice, once while Lester was testifying and again before the closing arguments.

On appeal, the Supreme Court held that Allied Concrete received a fair trial on the merits, specifically noting that the trial court (1) allowed all of the spoliated evidence to be presented to the jury and (2) gave a jury instruction relating to Lester's misconduct. While this was good news for Lester, the Virginia State Bar held that Murray violated Rules of Professional Conduct – Rule 3.3 Candor Toward the Tribunal; Rule 3.4 Fairness to Opposing Party and Counsel and Rule 8.4 Misconduct. Murray agreed to a five year suspension of his license to practice law.

In *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 40 Va. App. at 569, Wolfe sought compensation for her child through the Birth-Related Neurological Injury Compensation Program. At delivery, baby Taylor was not breathing spontaneously, within two minutes hospital staff began ventilating and intubated baby Taylor four minutes after birth, but failed to record any measurements of baby Taylor's umbilical blood gasses. The nurses' flow sheets and records from the delivery doctor were also found to be "conspicuously absent.'" Baby Taylor began to exhibit signs of seizures and was later diagnosed with a "cerebral palsy." *Id.* at 572.

The issue was when and what caused baby Taylor's cerebral palsy. Wolfe's experts opined that it occurred during or before delivery, but the lack of records for the half-hour period immediately prior to the delivery made it difficult to determine when the injury occurred. Plaintiff's experts stated that the hospital staff should have measured umbilical cord gasses following birth and without those measurements, "'it is difficult if not impossible to be certain that the baby was not anoxic and acidotic at the time of delivery.'"

Wolfe argued before the deputy commissioner that she should be entitled to a spoliation "presumption.", but the Workers' Compensation Commission concluded that she was not entitled to benefits based on her inability to prove causation. The Court of Appeals reversed holding that Wolfe would be entitled to a spoliation inference in situations where "critical evidence" was missing as a result of *negligence or intentional misconduct*. The Court remanded the case to the Commission to determine whether the delivery doctor "was negligent in failing to preserve umbilical cord blood for cord blood gas testing" and also whether, with a spoliation inference, Wolfe would be able to meet her causation burden. In doing so, the Court determined that equitable principles required this result and that denying an inference under the appropriate facts would result in a benefit to negligent parties.

In *Gentry v. Toyota Motor Corp.,* 252 Va. 30, 471 S.E. 2d 485 (1996) Rosenbluth, one of plaintiff's experts, effectively destroyed the subject vehicle during his inspection, rendering it unavailable for testing by the defense. The Trial Court dismissed the plaintiff's case due to spoliation of evidence. The Supreme Court reversed, because plaintiff's expert, without permission from plaintiff or plaintiff's counsel, acted to destroy the vehicle. The Court held a sanction of dismissal was inappropriate considering that "the purpose of such a sanction is to punish the offending party and to deter others from acting similarly" and went on to hold that the trial court abused its discretion in dismissing with prejudice the plaintiffs' action for damages sustained while operating an allegedly defective pickup truck because of spoliation of evidence. Judgment was reversed and the case remanded for further proceedings.

Gentry relied on *Benitz v. Ford Motor Co., et al.* 69 Va. Cir. 323, *Ford Motor Co., et al. v. Benitz* 273 Va. 242; 639 S.E.2d 203, 2007 Va. Lexis 18. Benitz sued Ford to recover damages for injuries caused by a defective air bag. The court also denied Ford's Motion to Dismiss for Spoliation of Evidence holding that the owner of the vehicle was the person primarily

responsible for the destruction of the subject vehicle, an Escort, neither Benitez nor her attorney knew where the vehicle was located, and neither gave permission nor acted to have the Escort destroyed.

JURY INSTRUCTION FOR SPOLIATION

If the (plaintiff/defendant) acted intentionally with respect to destroying, concealing, altering, or otherwise failing to preserve evidence in this case, you shall infer that the evidence, if preserved,, would have been unfavorable to (plaintiff/defendant).

If the (plaintiff/defendant) acted negligently with respect to destroying, concealing, altering or otherwise failing to preserve evidence in this case, you may, but are not required to, infer that the evidence, if preserved, would have been unfavorable to the defendant.

MAY COUNSEL FOR A DEPONENT CONFER WITH HIS OR HER CLIENT DURING THE DEPOSITION?

I. APPLICABLE RULES

There is no statute or rule that directly answers this question under federal or state law. However, applicable case law refers to several rules of civil procedure and to professional rules regarding a lawyer's ethical duty to competently and zealously represent his or her client.

A. FEDERAL RULES OF PROCEDURE

RULE 30 (c) EXAMINATION AND CROSS-EXAMINATION; RECORD OF THE EXAMINATION; OBJECTIONS; WRITTEN QUESTIONS.

(1) *Examination and Cross-Examination.* The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) *Objections.* An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition—must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).

RULE 30 (d) DURATION; SANCTION; MOTION TO TERMINATE OR LIMIT.

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours. The court must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Sanction.* The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit.*

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) *Order.* The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) *Award of Expenses.* Rule 37(a)(5) applies to the award of expenses.

B. VIRGINIA RULES OF CIVIL PROCEDURE

Rule 4:5. Depositions Upon Oral Examination.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. If requested by one of the parties, the testimony shall be transcribed. All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Any objection must be stated concisely in a nonargumentative and nonsuggestive manner. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the county or city where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the

deposition as provided in Rule 4:1(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 4:12(a)(4) apply to the award of expenses incurred in relation to the motion.

C. VIRGINIA RULES OF PROFESSIONAL RESPONSIBILTIY

RULE 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

(c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

(b) Advise or cause a person to secrete himself or herself or to leave the jurisdiction of a tribunal for the purpose of making that person unavailable as a witness therein.

(c) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay:

(1) reasonable expenses incurred by a witness in attending or testifying;

(2) reasonable compensation to a witness for lost earnings as a result of attending or testifying;

(3) a reasonable fee for the professional services of an expert witness.

(d) Knowingly disobey or advise a client to disregard a standing rule or a ruling of a tribunal made in the course of a proceeding, but the lawyer may take steps, in good faith, to test the validity of such rule or ruling.

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

(f) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(g) Intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

(h) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the information is relevant in a pending civil matter;

(2) the person in a civil matter is a relative or a current or former employee or other agent of a client; and

(3) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

(i) Present or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

(j) File a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

II. CASE LAW

The case law on this issue is largely federal. Judge John Wetsel, circuit court judge in Winchester/Fredrick County, Virginia cites *Hall v. Clifton Precision,* 150 F.R.D. 525 (E.D. PA. 1993) in a compilation of citations he posted on that court's website to help litigants with discovery issues. Judge Wetsel's materials are provided at the end of this outline and may be found at www.winfredclerk.com/wetsel.htm. The *Hall* case is one of the first to engage in a comprehensive consideration of this issue. Its holdings have spurred much debate and disagreement with some courts choosing to follow *Hall*, and other courts rejecting some of its holdings after finding that they go too far.

In *Hall*, a dispute arose after the deponent and his counsel took a break to confer during the course of questioning -- once over the meaning of the word "document" and again when the deposing lawyer showed documents to the witness and his lawyer wanted to take a break to review the documents with the witness before the witness answered questions about them. The parties phoned the court during the deposition and then terminated it to seek the court's assistance with two issues: (1) to what extent may a lawyer confer privately with a client off the record; (2) does a lawyer have the right to inspect, before the deposition of a client begins, all documents which opposing counsel intends to show the client during the deposition, so that the lawyer can review them with the client before the deposition? As to a lawyer's right to confer with a client during the deposition, the *Hall* court found:

> Concern has been expressed as to the client's right to counsel and to due process. A lawyer, of course, has the right, if not the duty, to prepare a client for a deposition. But once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth. Under Rule 30(c), depositions generally are to be conducted under the same testimonial rules as are trials. During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony. Once a witness has been prepared and has taken the stand, that witness is on his or her own.
>
> * * *
>
> The same is true at a deposition. The fact that there is no judge in the room to prevent private conferences does not mean that such conferences should or may occur. The underlying reason for preventing private conferences is still present: they tend, at the very least, to give the appearance of obstructing the truth.

Hall, F.R.D. 150 at 528. The *Hall* court issued an order with deposition protocol that contains, among other things, some bright-line rules that: (1) counsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege; (2) that any such conference will not be protected by the attorney client privileged, but such to disclosure; and (3) that documents shall be provided by the deposing counsel to the witness before the deposition or during

it, and the witness and counsel have no right to discuss them privately before the witness answers questions about them.

The District of Nevada issued an opinion agreeing with the underlying concerns of the Hall court, but disagreeing with its holding that prohibited lawyer and client from conferring during breaks of a deposition or trial. *In re Stratosphere Corporation Securities Litigation*, 182 F.R.D. 614 (D. Nev. 1998) the Court explained:

> While this Court agrees with the *Hall* court's identification of the problem, it feels *Hall* goes too far in its solution.
>
> * * *
>
> It is this Court's experience, at the bar and on the bench, that attorney's and clients regularly confer during trial and even during the client's testimony, while the court is in recess, be it mid morning or mid afternoon, the lunch recess, are the evening recess. The right to prepare a witness is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during trial). What this Court, and the Federal Rules of Procedure seek to prevent is coaching the witness by telling the witness what to say or how to answer a specific question. We all want the witness's answers, but not at the sacrifice of his or her right to the assistance of counsel.
>
> Furthermore, consultation between lawyers and clients cannot be neatly divided into discussions about 'testimony' and those about 'other' matters.
>
> While this Court agrees with the *Hall* court's goals, it declines to adopt its strict requirements. This Court will not preclude an attorney, during a recess that he or she did not request, from making sure that his or her client did not misunderstand or misinterpret questions or documents, or attempt to help rehabilitate the client by fulfilling an attorney's ethical duty to prepare a witness. So long as attorneys do not demand a break in the questions, or demand a conference between question and answers, the Court is confident that the search for truth will adequately prevail.
>
> [Further] this Court disagrees with the [Hall] contention that any conference counsel may have with the deponent during a deposition waives the claim of privilege as to the communications between client and counsel during any conference or other break. . . . Accordingly, the Court will not give the

interrogating counsel carte blanche to invade the privileged communications between counsel and client.

Stratosphere, 182 F.R.D. at 621-22 (internal citations and quotations omitted).

Other courts, federal and state, have considered whether a lawyer-client conference during deposition or trial is misconduct with varying results. A number of other courts likewise do not agree with the bright line rule of Hall and held that it goes too far. *See e.g. Acri v. Golden Triangle Management Acceptance Corp.*, 1994 Pa. Dist. & Cnty., Dec LEXIS 150, *17 ("We need not turn the lawyer for the deponent into a fly on the wall in order to protect litigants' rights to obtain information from a witness in the witness's own language through depositions by oral examination," explaining reasons why such a rule would be unfair and could actually interfere with a search for the truth), *State of West Virginia v. King*, 520 S.E.2d 875, 882 (W.Va. 1999) ("An attorney should be able to ensure that his or her client did not misunderstand or misinterpret a question or a document. . . . Respondents have made no showing that Petitioner and her counsel have abused the discovery process"). In sum, there appears to be no controlling authority on point, and each case needs to be evaluated based on the circumstances at issue.

Mary Ann Kelly, Esq.
The Law Office of Mary Ann Kelly
3977 Chain Bridge Road, Suite 300
Fairfax, VA 22030
(703) 865-5032

Inn of Court Team Outline
Discovery Misconduct - Civil Litigation
Domestic Relations
November 24, 2014

Sandra L. Havrilak, Attorney at Law
The Havrilak Law Firm, P.C.
9868 Main Street
Fairfax, Virginia 22031
(703) 591-1515
slhavrilak@havrilaklaw.com

Lindsay M. Jefferies, Attorney at Law
Atwill, Troxell & Leigh, P.C.
50 Catoctin Circle, NE, Suite 303
Leesburg, Virginia 20176
(703) 777-4000
ljefferies@atandlpc.com

Michael Bliley, Class of 2016
George Mason University School of Law
Mike.Bliley@gmail.com

A. Special Discovery Rules for Domestic Relations cases.
B. Ethics Hypo: Advising a Client to Destroy Documents.
C. Hypo: Speaking Objections During Depositions.
D. Hypo: Objections at Deposition .
E. Hypo: Responding to Subpoena *Duces Tecum.*
F. Hypo: *Ex Parte* Communications With Physician.
G. Hypo: Reasonable Notice of Deposition.
H. Ethics Hypo: Failure to Propound Discovery.
I. Ethics Hypo: Failure of Counsel to Communicate and Consult With Expert Prior to Designation as Expert Witness.

A. Do Domestic Relations cases receive special treatment when it comes to discovery?

a. Scope of Discovery Limited in Divorce Cases

i. Rule 4:1(b)(5) Limitations on Discovery in Certain Proceedings.

In any proceeding (1) for separate maintenance, divorce, or annulment of marriage ... (a) the scope of discovery shall extend only to matters which are relevant to the issues in the proceeding and which are not privileged

b. Va Sup. Ct. Rule 8:15. Discovery

(a) Adult Criminal Case. In any cases involving adults charged with crime, the provisions of Rule 7C:5 shall govern discovery.

(b) Juvenile Delinquency Cases. In juvenile delinquency cases, when the juvenile is charged with an act that would be a felony if committed by an adult, or in a transfer hearing or a preliminary hearing to certify charges pursuant to § 16.1-269.1, the court shall, upon motion timely made by the juvenile or the Commonwealth's Attorney, and for good cause, enter such orders in aid of discovery and inspection of evidence as provided under Rule 3A:11.

In juvenile delinquency cases when the juvenile is charged with an act that would be a misdemeanor if committed by an adult, the court shall, upon motion timely made and for good cause, enter such orders for discovery as provided under Rule 7C:5.

(c) Other Cases. In all other proceedings, the court may, upon motion timely made and for good cause, enter such orders in aid of discovery and inspection of evidence as permitted under Part Four of the Rules, except that no depositions may be taken.

(d) In proceedings concerning civil support, the judge may require parties to file a statement of gross income together with documentation in support of the statement.

B. Hypothetical No. 1 – Advising a Client to Destroy Documents

Attorney represents a wife who recently separated from her husband. Wife has recently expressed an interest in another man and has told her attorney that she talks to him on the phone nightly. No divorce has been filed and no discovery has been propounded.

May the Attorney advise the wife to destroy her telephone bills?

- LEO 839: It is not improper for an attorney representing the wife in a divorce action to advise the wife to destroy phone bills which indicate she had placed calls to another man in whom she became interested four months after separating from her husband. The wife was no obligation to produce or provide the telephone bills. [EC:7-24] Committee Opinion October 9, 1986.

- ***BUT SEE* Legal Ethics Committee Notes.** – Under Rule 3.4(a), the lawyer cannot advise the client to destroy the telephone bills if it is foreseeable that the bills would be relevant evidence in the planned divorce action.

- *See also Allied Concrete v. Lester*, 285 Va. 295, 736 S.E.2d 699 (2013)(sanctioning attorney for advising client to "clean up" his Facebook account during pending wrongful death case).

LEGAL ETHICS OPINION 839

DIVORCE – DESTRUCTION OF TELEPHONE BILLS.

It is not improper for an attorney representing the wife in a divorce action to advise the wife to destroy phone bills which indicate she had placed calls to another man in whom she became interested four months after separating from her husband. The wife was under no obligation to produce or provide the telephone bills. [EC:7-24]

Committee Opinion
October 9, 1986

Legal Ethics Committee Notes. – Under Rule 3.4(a), the lawyer cannot advise the client to destroy the telephone bills if it is foreseeable that the bills would be relevant evidence in the planned divorce action.

C. Hypothetical No. 2 – Speaking Objections During Depositions

- Can an attorney object to a deposition question by arguing and speaking on the record?
- No.
- Rule 4:5(c) Amended in 2012 to provide that "speaking objections" are not permitted.
- Amended Rule 4:5(c)
- "Any objection must be stated concisely in a non-argumentative and non-suggestive manner."

  All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Any objection must be stated concisely in a nonargumentative and nonsuggestive manner. Evidence objected to shall be taken subject to the objections.

D. Hypothetical No. 3 – Objections at Deposition

During a deposition, counsel for the witness demands that the deposing attorney provide a response to his objections on the record.

Is it necessary for the attorney conducting the deposition to provide a substantive response to objections at the deposition?

Answer: No, neither Rule 4:5 nor any other rule imposes a duty on the attorney deposing a witness to provide a response on the record to an objection made at the deposition. Evidence objected to shall be taken subject to the objections.

E. Hypothetical No. 4 – Responding to Subpoena *Duces Tecum*

A third party in receipt of a subpoena *duces tecum* objects to a broad catchall provision in the subpoena and refuses to respond. Is his failure to respond misconduct?

Depends on the specificity of the catchall or the information it requests. Generally, the answer is no.

Catchall provisions in subpoena duces tecum not intended to produce evidentiary materials are merely a fishing expedition to see what may turn up and thus are invalid. *Bowman Dairy Co. v. U.S.* 341 U.S. 214 (1951).

A subpoena duces tecum should not be used when it is not intended to produce evidentiary materials but is intended as a "fishing expedition" in the hope of uncovering information material to the defendant's case. *Farish v. Com.*, 2 Va. App. 627 (1986) (citing *Bowman*).

F. Hypothetical No. 5 – *Ex Parte* Communications With Physician

Attorney represents Husband in divorce action where wife is seeking spousal support and claims that she cannot work due to medical condition. Attorney intends to issue subpoena *duces tecum* to Wife's doctor.

Attorney sends letter to doctor informing doctor of following:

- the attorney represents the patient's adversary in the lawsuit to which the physician's patient is a party;
- the physician will soon be served with a subpoena duces tecum for the patient's medical records;
- the subpoena (which has not yet been issued) will request the physician to produce the records at the defense attorney's office at a specific date and time;
- if the doctor has any questions, please do not hesitate to contact the lawyer or his paralegal at the given number.

Answer:

- Scope of permissible communication is governed by VA CODE § 8.01-399.
- Intentionally violating the law is unethical. However, sending a courtesy cover letter that is intended to *provide* information and not to *obtain* information may not be unethical. *See* LEO 1639 Ex Parte Communication With Opposing Party's Treating Physician To Advise Of Representation And Forthcoming Subpoena.
- Practice Tip: Send courtesy cover letter to non-physical employee of the practitioner and limit the content of the letter to information permitted by § 8.01-399(D)(3).

prev | next

§ 8.01-399. Communications between physicians and patients (Supreme Court Rule 2:505 derived from this section).

A. Except at the request or with the consent of the patient, or as provided in this section, no duly licensed practitioner of any branch of the healing arts shall be permitted to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.

B. If the physical or mental condition of the patient is at issue in a civil action, the diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action. In addition, disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice. However, no order shall be entered compelling a party to sign a release for medical records from a health care provider unless the health care provider is not located in the Commonwealth or is a federal facility. If an order is issued pursuant to this section, it shall be restricted to the medical records that relate to the physical or mental conditions at issue in the case. No disclosure of diagnosis or treatment plan facts communicated to, or otherwise learned by, such practitioner shall occur if the court determines, upon the request of the patient, that such facts are not relevant to the subject matter involved in the pending action or do not appear to be reasonably calculated to lead to the discovery of admissible evidence. Only diagnosis offered to a reasonable degree of medical probability shall be admissible at trial.

C. This section shall not (i) be construed to repeal or otherwise affect the provisions of § 65.2-607 relating to privileged communications between physicians and surgeons and employees under the Workers' Compensation Act; (ii) apply to information communicated to any such practitioner in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug; or (iii) prohibit a duly licensed practitioner of the healing arts, or his agents, from disclosing information as required by state or federal law.

D. Neither a lawyer nor anyone acting on the lawyer's behalf shall obtain, in connection with pending or threatened litigation, information concerning a patient from a practitioner of any branch of the healing arts without the consent of the patient, except through discovery pursuant to the Rules of Supreme Court as herein provided. However, the prohibition of this subsection shall not apply to:

1. Communication between a lawyer retained to represent a practitioner of the healing arts, or that lawyer's agent, and that practitioner's employers, partners, agents, servants, employees, co-employees or others for whom, at law, the practitioner is or may be liable or who, at law, are or may be liable for the practitioner's acts or omissions;

2. Information about a patient provided to a lawyer or his agent by a practitioner of the healing arts employed by that lawyer to examine or evaluate the patient in accordance with Rule 4:10 of the Rules of Supreme Court; or

3. Contact between a lawyer or his agent and a nonphysician employee or agent of a practitioner of healing arts for any of the following purposes: (i) scheduling appearances, (ii) requesting a written recitation by the practitioner of handwritten records obtained by the lawyer or his agent from the practitioner, provided the request is made in writing and, if litigation is pending, a copy of the request and the practitioner's response is provided simultaneously to the patient or his attorney, (iii) obtaining information necessary to obtain service upon the practitioner in pending litigation, (iv) determining when records summoned will be provided by the practitioner or his agent, (v) determining what patient records the practitioner possesses in order to summons records in pending litigation, (vi) explaining any summons that the lawyer or his agent caused to be issued and served on the practitioner, (vii) verifying dates the practitioner treated the patient, provided that if litigation is pending the information obtained by the lawyer or his agent is promptly given, in writing, to the patient or his attorney, (viii) determining charges by the practitioner for appearance at a deposition or to testify before any tribunal or administrative body, or (ix) providing to or obtaining from the practitioner directions to a place to which he is or will be summoned to give testimony.

E. A clinical psychologist duly licensed under the provisions of Chapter 36 (§ 54.1-3600 et seq.) of Title 54.1 shall be considered a practitioner of a branch of the healing arts within the meaning of this section.

F. Nothing herein shall prevent a duly licensed practitioner of the healing arts, or his agents, from disclosing any information that he may have acquired in attending, examining or treating a patient in a professional capacity where such disclosure is necessary in connection with the care of the patient, the protection or enforcement of a practitioner's legal rights including such rights with respect to medical malpractice actions, or the operations of a health care facility or health maintenance organization or in order to comply with state or federal law.

(Code 1950, § 8-289.1; 1956, c. 446; 1966, c. 673; 1977, c. 617; 1993, c. 556; 1996, cc. 937, 980; 1998, c. 314; 2002, cc. 308, 723; 2005, cc. 649, 692; 2009, c. 714.)

---

prev | next | new search | table of contents | home

LEGAL ETHICS OPINION 1639

EX PARTE COMMUNICATION WITH OPPOSING PARTY'S TREATING PHYSICIAN TO ADVISE OF REPRESENTATION AND FORTHCOMING SUBPOENA.

You have presented a hypothetical situation in which defense counsel, or a legal assistant at defense counsel's direction, during the course of a pending personal injury action, contacts *ex parte* (by phone or in writing) the plaintiff's treating physician, without the consent of the plaintiff/patient, to advise the treating physician that:

a. the attorney represents the patient's adversary in the lawsuit to which the physician's patient is a party;

b. the physician will soon be served with a subpoena *duces tecum* for the patient's medical records;

c. the subpoena (which has not yet been issued) will request the physician to produce the records at the defense attorney's office at a specific date and time;

d. if the doctor has any questions, *please do not hesitate to contact the lawyer or his paralegal at the given number*.

Under the facts you have presented, you have asked the committee to opine as to the propriety of the defense counsel's unauthorized *ex parte* communication with his adversary's treating physician, in advance of the physician's receipt of the subpoena, to the extent that such contacts might foster or encourage *ex parte* contact between the physician and attorney in violation of Virginia Code § 8.01-399, as amended and effective July 1, 1993. You are also concerned that such communication might cause the physician to produce the patient's records before the return date on the subpoena and before the patient's attorney can file or be heard on a motion to quash the subpoena, or move the court to require that the records be returned to the Clerk's Office, pursuant to Va. S. Ct. Rule 4:9(c), so that the patient's attorney may withdraw them for copying.

The pertinent statutory provision is Va. Code § 8.01-399(D) which states:

"Neither a lawyer, nor anyone acting on the lawyer's behalf, shall obtain, in connection with pending or threatened litigation, information from a practitioner of any branch of the healing arts without the consent of the patient except through discovery pursuant to the Rules of the Court as herein provided."

The appropriate and controlling disciplinary rule relative to your inquiry DR:7-105(C)(5) prohibiting an attorney from intentionally or habitually violating any established rule of procedure or evidence, where such conduct is disruptive of the proceedings.

The committee has previously opined in LE Op. 204, LE Op. 1042, LE Op. 1158 and LE Op. 1235 that the *ex parte* communication by defense counsel with the plaintiff's treating physician in order to obtain factual information as to the patient's treatment, physical condition, and anticipated future damages is not improper, *provided such communication does not violate the Rules of Court or trial court rulings regarding discovery*. These prior opinions were issued well before the 1993 amendment to Va. Code § 8.01-399 which now prohibits an attorney from obtaining nonconsensual *ex parte* informal discovery of information from an adversary's treating physician. It is the opinion

of the committee that LE Op. 204, LE Op. 1042, LE Op. 1158 and LE Op. 1235 are overruled by this material change in the law regarding discovery.

Given the cited statute, it is the opinion of the committee that it would be improper for an attorney to *obtain* information from an adverse party's treating physician in violation of § 8.01-399(D). Such conduct would violate the cited disciplinary rule. *See, e.g.*, ABA Formal Opinion 93-78 (November 8, 1993) (lawyers must abide by statutes prohibiting unauthorized *ex parte* communications with a party's treating physician); *Harlan v. Lewis*, 982 F.2d 1255 (8th Cir. 1993) (lawyer sanctioned for violating Arkansas law prohibiting unauthorized *ex parte* communications between defense counsel and a non-party treating physician).

The Committee would observe that under the facts presented it appears that the *ex parte* contacts with the plaintiff's physician initiated by defense counsel or his/her legal assistant were intended to provide information and as a courtesy rather than to obtain information from the physician. It is also not clear that defense counsel has obtained any information as a result of these letters. Whether the communications which are the subject of this request or any similar contacts between a lawyer (or his staff) and a practitioner of any branch of the healing arts constitute a violation of § 8.01-399 is a question of law beyond the purview of the committee.

Committee Opinion
April 24, 1995

G. Hypothetical 7 - Reasonable Notice of Deposition.

Attorney provides a third party steamboat captain with 12 hours' notice of his deposition to be taken the very next day prior to the Captain setting sail.

Is this short notice misconduct?

Answer: "A notice, given at 8 P. M. to take a deposition between 8 and 9 A. M. of the next day, in the city where both parties and their counsel reside, would generally be reasonable notice." *McGinnis v. Washington Hall Association*, 53 Va. 602, 12 Gratt. 602 (1855).

12 Gratt. 602
Supreme Court of Appeals of Virginia.

MCGINNIS
v.
THE WASHINGTON HALL ASSOCIATION.

Sept. 8, 1855.

Opinion

***602** A notice, given at 8 P. M. to take a **deposition** between 8 and 9 A. M. of the next day, in the city where both parties and their counsel reside, would generally be **reasonable notice**. And such notice given directly the plaintiff learned the witness would leave for a distant state on the next evening by 3 o'clock, and would not return again, is sufficient, though a court was in session in the city at the time, and though the defendant, who is an attorney, and his counsel, had been occupied as counsel in a cause on the day of the notice, and were to be and were so occupied on the next day, so that they could not attend to the taking of the deposition.

This was an action on the case in the Circuit court of Ohio county, brought by Dorrance McGinnis against the Washington Hall Association, for injury done to the wall of plaintiff's house, by digging on the adjoining lot. On the trial the plaintiff offered to introduce in evidence the deposition of Michael Keafe, which had been taken *de bene esse,* which was objected to by the defendant on the ground of the insufficiency of the notice. The court sustained the objection, and excluded the deposition; and the plaintiff excepted. The notice was given to M. Nelson, the president of the Washington Hall Association, at 8 o'clock P. M. on the 18th of November 1852, that on the next day between the hours of 8 and 9 o'clock A. M. the deposition would be taken at the office of Sherrard Clemens in the city of Wheeling. At the hour of 8 o'clock A. M. the deposition was commenced, when Fitzhugh, one of the counsel for the defendants, who was then present, objected to it, on account of the insufficiency of the notice, and the inability of the defendant and defendant's counsel to attend; but the deposition was taken.

***603** It appeared on the hearing of the objection, that M. Nelson was a practicing lawyer in the courts of Ohio county, and was, on the morning of the 19th of November 1852, required to be in court to attend to the business of his clients; but that the court did not meet until 9 o'clock A. M. And that Fitzhugh, who appeared for the defendant at the time and place of taking the deposition, informed the notary who took it, that the defendant's counsel were unable to attend to the taking at the time and place, on behalf of the defendant: And it was proved that the said counsel, including said M. Nelson, were on that day engaged in court in the trial of a case, and had been so engaged on the day previous.

On the other hand, it appeared that the witness Keafe was about to go to the state of Louisiana, and so informed the plaintiff's counsel; and that as soon as the counsel was informed of his intended removal, the notice was given. That he was absent at the time of the trial, and had been absent since the taking of the deposition; he having left Wheeling about 3 or 4 o'clock of the afternoon of the day it was taken, and having informed plaintiff's counsel that he had taken his passage on a boat, and would remain no longer.

There was a verdict and judgment for the defendant: whereupon McGinnis applied to this court for a *supersedeas,* which was awarded.

West Headnotes (2)

[1] Pretrial Procedure
Notice of taking

Where defendant objects to taking a deposition at the appointed time, on account of the insufficiency of notice, plaintiff is not bound to inform him that the witness is about to leave the state, and therefore his deposition cannot be postponed, provided he was guilty of no fraudulent concealment.

1 Cases that cite this headnote

[2] Pretrial Procedure
Notice of taking

Where plaintiffs, on hearing that a witness whose deposition was required would leave the city at 3 o'clock on a certain day, and take up his residence in a distant state, gave notice at 8 p.m. on the previous day that the deposition

would be taken between 8 and 9 a.m. on the day of such departure, such notice was sufficient, though defendant and his counsel were occupied on a case in court on the day of the notice, and were to be so occupied the day after, that they could not attend to the taking of the deposition.

2 Cases that cite this headnote

Attorneys and Law Firms

Jacob, for the appellant.

Russell, for the appellee.

MONCURE, J.

The only question in this case is, whether the Circuit court erred in excluding the deposition of Michael Keafe, on the ground of insufficiency of the notice under which it was taken?

The law requires that "**reasonable notice** shall be given to the adverse party of the time and place of ***604** taking every **deposition**." Code, ch. 176, § 30, p. 666. What is reasonable notice, is no where defined in the law, and cannot well be defined, but must depend on the circumstances of each case.

A notice served at 8 o'clock P. M. of the taking of a deposition, between the hours of 8 o'clock and 9 o'clock A. M. of the succeeding day, at a certain place in the same city in which both the parties and their counsel resided, (as in this case,) would ordinarily be sufficient.

But the deposition in this case was taken during a term of one of the courts of Ohio county, whose session was in the city of Wheeling. And Mr. Nelson, president of the Washington hall association, on whom the notice was served, and who is a practicing attorney in the said courts, and was one of the counsel of the association in this case, and Mr. Fitzhugh, another of said counsel, were engaged in court on the day on which the deposition was taken, and had been so engaged on the previous day, in the trial of causes; though the court did not meet before 9 o'clock A. M. And the said Fitzhugh attended at the commencement of the taking of the deposition, which was at 8 o'clock A. M. and objected to the reading of it, "on account of the insufficiency of the notice, and the inability of the defendant and defendant's counsel to attend at the taking thereof." Under these circumstances, if there had been no other materially affecting the case, it would have been proper to have postponed the taking of the deposition to a more convenient period.

But there were other most material circumstances. The witness was about to remove to a far distant state, had taken his passage on a boat, and would remain no longer; left the city about 3 or 4 o'clock P. M. of the day on which his deposition was taken. As soon as the plaintiff's counsel was informed by the witness of his intended removal, the notice was given. And ***605** about 8 o'clock A. M. of the next day, the plaintiff again notified the president of the association that he was about to take, and would take, the deposition.

The plaintiff, upon being informed that the witness was about to remove from the state, had a right to take his deposition before his removal. Otherwise, he might have lost the benefit of the evidence altogether, by the death of the witness or his removal to parts unknown; or at least, might have been subjected to much trouble and expense in ascertaining the place of his future residence, and taking his deposition there. It was obviously for the benefit of both parties to take the deposition in the city in which they and their counsel all lived. The plaintiff gave the notice as soon as he was informed of the necessity of taking the deposition, and gave the longest notice which it was then in his power to give. He fixed upon a time and place for taking it, as convenient as possible to the defendant, and did every thing in his power to enable the defendant's counsel to attend. If they could not attend, the defendant ought to have employed other counsel for that purpose, rather than the plaintiff should be subjected to the risk of losing his evidence, or at least to the trouble and expense of taking the deposition in a distant state. Other counsel could no doubt have been readily retained in the city of Wheeling; and the defendant had ample time for that purpose after the notice was served.

But it was argued by the defendant's counsel in this court, that the notice was not reasonable, if the defendant did not know that the witness was about to remove from the state; that it does not appear that the defendant had such knowledge; and that it devolved on the plaintiff to have given the information.

It does not appear that the defendant or its officers or counsel had not this information; and the fair presumption, I think, is, that they had. It does not appear ***606** that the fact was concealed, or that there was any conceivable motive for concealing it. It might have been reasonably inferred from the facts that the witness was probably neither aged nor infirm, that the trial was not to

take place for some time, and that there was no other apparent or plausible motive for taking the deposition. Can it be believed that Mr. Nelson did not enquire, when the notice was served on him, or when he was again notified the next day of the taking of the deposition, why it was taken at that time, or whether it could not be postponed? Can it be believed that Mr. Fitzhugh did not make such enquiries when he attended at the commencement of the deposition? Can it be believed that, if made, they were not truly answered by the plaintiff, or his counsel, or the notary? Or if not truly answered, that the fact would not have been stated in the exception taken at the time, or in the bill of exceptions taken on the trial? Mr. F. did not ask for a postponement of the time for taking the deposition, as he would undoubtedly have done if he had not known that the witness was about to leave the state, and that such postponement was therefore impossible. He placed his objection on the broad ground that the notice was insufficient, notwithstanding the circumstances under which the deposition was taken: And on that ground only the objection was taken at the trial. The purport of the objection was, that under no circumstances could the deposition be taken upon so short a notice, and during the term of a court in which the defendant's counsel were professionally engaged. The plaintiff had a right so to regard the objection, and was not called upon to show that the defendant had knowledge of the intended removal of the witness. The defendant certainly knew at the time of the trial that the deposition had been taken on account of the intended removal of the witness; and if it was intended ***607** to object to the sufficiency of the notice upon the ground that the plaintiff did not inform the defendant of that fact, the ground should have been stated specifically in the bill of exceptions. And then he might have removed it by proof, whereas he would be taken by surprise if the ground could be taken for the first time in this court.

But the plaintiff was under no obligation to give such information, provided he was guilty of no fraudulent concealment, which is not pretended. He was bound only to give **reasonable notice** of the time and place of taking the **deposition**; which, under all the circumstances, I think he did. If it can be necessary to cite authorities in support of the views I have expressed, I think the cases in *Vinal v. Burrill,* 16 Pick. 401, and *Allen v. Perkins,* 17 Id. 369, referred to by the counsel of the plaintiff, are sufficient for the purpose.

I am for reversing the judgment, setting aside the verdict, and remanding the cause for a new trial.

The other judges concurred in the opinion of MONCURE, J.

JUDGMENT REVERSED.

Parallel Citations

53 Va. 602, 1855 WL 3495 (Va.)

End of Document

H. Hypothetical 8 – Failure to Propound Discovery

Attorney represents a wife in a divorce action in Fairfax County. There is a Scheduling Order in place that provides that discovery shall be completed no later than 30 days before trial. Hopeful that the case will settle without litigation, Wife's attorney fails to propound discovery and took no affirmative steps on his client's behalf other than answering discovery and participating in depositions noticed by Husband's counsel. Fifteen days before the scheduled trial, Husband's counsel files his Exhibit and Witness List. Wife's counsel does not file an Exhibit or Witness List and moves to non-suit the case and does not discuss Nonsuit with Wife prior to taking it.

Did the Wife's counsel act improperly for failing to propound discovery?

Did the Wife's counsel act improperly for non-suiting the Wife's case prior to discussing it with her?

Answer: See In the matter of Arnold Reginald Henderson, V, VSB Docket No. 13-032-095270, October 24, 2014.

Lawyer's conduct violated the following Virginia Rules of Professional Conduct:

- Rule 1.3 Diligence
- Rule 1.4 Communication

VIRGINIA:

BEFORE THE DISCIPLINARY BOARD
OF THE VIRGINIA STATE BAR

IN THE MATTER OF
ARNOLD REGINALD HENDERSON, V VSB Docket No. 13-032-095270

STIPULATIONS AS TO FACTS AND NATURE OF MISCONDUCT AND JOINT RECOMMENDATION AS TO DISPOSITION

Renu Mago Brennan, Assistant Bar Counsel and Arnold Reginald Henderson, V, Respondent, and Claire G. Cardwell, Respondent's counsel, hereby enter into the following Stipulations as to Facts and Nature of Misconduct and Joint Recommendation as to Disposition.

I. STIPULATIONS OF FACT

1. At all times referenced herein Respondent Arnold Reginald Henderson, V (Respondent) was an attorney licensed to practice law in the Commonwealth of Virginia.

2. On July 9, 2009, client Marquise Jennings (Jennings) retained Respondent to represent him in a civil suit for injuries he sustained in a car accident.

3. On June 29, 2011, Respondent filed suit against defendants in Chesterfield Circuit Court (Case No. CL11-1749).

4. Trial was set for March 19, 2012.

5. Other than filing suit, answering defendants' discovery, and participating in some depositions noticed by defense counsel, Respondent took no affirmative steps on his client's behalf in the litigation. Respondent failed to propound discovery or to designate any experts. Respondent asserts that he did not propound discovery as he was aware of the facts necessary to try the case.

6. On March 5, 2012, defense counsel designated its exhibits and witnesses for trial.

7. That day, Respondent, who had failed to designate exhibits or witnesses, moved to nonsuit the case.

8. On March 12, 2012, the Court entered the Order granting the nonsuit of Case No. CL11-1749.

VSB EXHIBIT A

VSB EXHIBIT 1

ADMITTED W/OUT OBJECTION ✓
ADMITTED OVER OBJECTION
REFUSED
DATE 10/24/14
DOCKET NUMBER 13-032-095270
SIGNATURE

9. Mr. Jennings was not aware that Respondent intended to request a nonsuit, and Mr. Jennings did not authorize Respondent to seek a nonsuit. Mr. Jennings was unaware of the status of the case in March 2012 as Respondent had not communicated with Mr. Jennings about the case. Mr. Jennings was copied on the cover letter for the motion for nonsuit. Respondent asserts that he consulted with Mr. Jennings prior to requesting the nonsuit, and Mr. Jennings authorized the nonsuit so that Respondent could pursue settlement discussions.

10. On July 12, 2012, Respondent re-filed suit in Chesterfield County Circuit Court (Case No. CL12-2107).

11. Trial was set for March 27, 2013.

12. On July 24, 2012 defense counsel served Respondent with discovery. Respondent asserts that counsel agreed to adopt Mr. Jennings's discovery responses from the first suit, however, there was a disagreement about the sufficiency of the interrogatory attestation, and defense counsel tendered the interrogatories again.

13. By letter dated October 3, 2012, defense counsel requested Respondent provide discovery responses, which were overdue.

14. By letter dated October 3, 2012, defense counsel also served a proposed pretrial scheduling order setting forth pretrial deadlines, including designations of experts, exhibits, and witnesses, on Respondent.

15. By letter dated October 5, 2012, Respondent advised defense counsel that he did not agree with the proposed pretrial scheduling order. Accordingly, on October 23, 2012, defense counsel filed a motion for entry of the pretrial scheduling order with the Court and requested a hearing. Hearing was set for November 29, 2012.

16. Respondent did not file a written opposition to the motion nor did he file a written objection to the proposed pretrial scheduling order.

17. On November 28, 2012, a law clerk from the Court advised defense counsel that the Court had entered the pretrial scheduling order, and there was no need for a hearing. The law clerk advised defense counsel that she would contact Respondent.

18. On November 28, 2012, the law clerk left Respondent a voice mail, which Respondent acknowledges he received, in which the law clerk advised Respondent that the hearing on the motion for entry of the pretrial scheduling order had been removed from the Court's docket.

19. Respondent asserts that the law clerk did not advise him that the Court entered the pretrial scheduling order, and he did not receive the entered order.

20. Respondent did not follow up with the Court or opposing counsel or as to the status of the pretrial scheduling order. Respondent asserts he was waiting for the hearing to be rescheduled.

21. By letter dated December 20, 2012, defense counsel again requested Respondent provide responses to the discovery propounded in July.

22. Defense counsel scheduled a motion to compel hearing for February 21, 2013.

23. By letter dated February 14, 2013, one week before the motion to compel, Respondent served discovery responses on defense counsel. These responses identified Dr. Charles Sutton as Mr. Jennings's expert.

24. Pursuant to the pretrial scheduling order, the deadline to designate experts expired December 27, 2012. Respondent asserts he was unaware that the Court entered the pretrial scheduling order.

25. On February 22, 2013, defense counsel filed a motion in limine to exclude Dr. Sutton as an expert witness because Respondent did not timely identify Dr. Sutton. The motion in limine referenced the pretrial scheduling order and sought to exclude Dr. Sutton on the grounds that plaintiff failed to comply with the order.

26. Respondent acknowledges that he received the motion in limine.

27. Respondent did not file an opposition to the motion in limine

28. On March 11, 2013, defense counsel served the defense exhibit and witness lists on Respondent.

29. On March 12, 2013, defense counsel served Respondent, via mail and fax, with a notice of hearing to be held on March 20, 2013, on the motion in limine. While Respondent asserts he did not receive the fax, a copy of the letter attaching the notice of hearing and stating that the hearing was scheduled for March 20, 2013, at 9:30 a.m. before Judge McCallum, is in Respondent's file with a fax transmission of 10:16 March 12, 2013. Respondent asserts that his fax machine was not working properly at this time and that the fax transmission does not reflect that he received the fax on March 12, 2013. Respondent asserts that he did not receive the notice of hearing until March 18, 2013, two days before the hearing. Respondent also asserts that he did not receive the motion in limine filed February 22, 2013, until March 15, 2013, and he did not see the motion in limine until March 18, 2013, the same time he first saw the notice of hearing on the motion in limine.

30. Respondent did not appear at the March 20, 2013, hearing on the motion in limine and thus did not object in writing or otherwise to the motion in limine seeking to exclude his only expert. Respondent asserts that he could not attend the hearing on March 20 because he was scheduled to appear in two other courts and states that he

only learned on March 18, 2013, that the hearing on the motion in limine would be held March 20. Respondent did not contact the Court or opposing counsel on March 18, March 19, or March 20, to request a continuance and/or to advise that he could not attend the hearing due to a conflict in his schedule. Respondent did not advise his client of the motion in limine or of the hearing on the motion in limine or that he could not and did not attend the motion in limine.

31. By order entered March 25, 2013, the Court granted defense counsel's motion in limine and excluded Dr. Sutton as a witness because of Respondent's failure to timely identify Dr. Sutton in accordance with the pre-hearing order and because his designation of Dr. Sutton did not satisfy the disclosure requirements of Rule 4:1(b)(4)(A)(i) of the Supreme Court of Virginia.

32. On March 22, 2013, defense counsel filed objections to any exhibit and witness lists which might be filed by Respondent on the grounds that Respondent had not yet served any lists on defense counsel.

33. Also on March 22, 2013, defense counsel filed a motion to exclude Plaintiff's testimony on injuries, treatment, and medical bills, and defense counsel filed a notice of hearing setting its motion to exclude and pre-trial matters for hearing on March 27, 2013.

34. Defense counsel served Respondent with these motions by mail on March 22, 2013, and on that date defense counsel attempted to serve Respondent with these motions by fax. After five failed fax attempts, defense counsel's office unsuccessfully attempted to contact Respondent.

35. Respondent never filed any written oppositions to any of the motions by defense counsel.

36. On March 26, 2013, the afternoon before trial, and after defendants' motion to exclude Plaintiff's exhibits and witnesses, Respondent attempted to designate exhibits and witnesses and to serve these lists via facsimile to defense counsel. Defense counsel did not receive the lists. The transmission did not go through.

37. On March 27, 2013, Respondent appeared at trial and argued that a non-suit was appropriate because he objected to the entry of the pre-hearing order and was entitled to a hearing prior to the entry of the order. Respondent asserts that he preserved on the record his objections to the Court's entry of the pre-trial scheduling order and all subsequent orders.

38. On March 27, 2013, as reflected in the Order entered May 1, 2013, the Court dismissed the case with prejudice and entered judgment in favor of defendants. The Court sustained defendants' objections to the exhibit and witness lists because Respondent did not file the lists in accordance with the pre-hearing order. The Court denied Respondent's motion for a second nonsuit and excluded plaintiff from offering

his medical bills on the sole issue of establishing the amount of his damages proximately related to his accident, but the Court took under advisement whether any medical bills were admissible for another purpose.

39. Respondent advised Mr. Jennings that he could appeal or file a motion to reconsider.

40. On April 1, 2013, Mr. Jennings filed a bar complaint against Respondent.

II. NATURE OF MISCONDUCT

Such conduct by Respondent constitutes misconduct in violation of the following provisions of the Rules of Professional Conduct:

RULE 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

III. JOINT RECOMMENDATION AS TO DISPOSITION

Accordingly, Assistant Bar Counsel and the Respondent jointly recommend to the Disciplinary Board that a six-month suspension with terms represents an appropriate sanction if this matter were to be heard through an evidentiary hearing by a panel of the Disciplinary Board. The term with which the Respondent must comply is as follows:

1. Respondent shall pay, by certified, cashier's, or treasurer's check made payable to the order of Marquise Jennings, the principal sum of $10,000.00, on or before August 1, 2015. The payment shall be made by delivery of a check to Assistant Bar Counsel, Renu M. Brennan, at Virginia State Bar, Eighth and Main Building, 1111 E Main St. #700, Richmond, VA 23219.

2. Upon satisfactory proof that this term has been met, this matter shall be closed. If, however, Respondent does not make payment as set forth above on or before August 1, 2015, the Respondent agrees that the Disciplinary Board shall impose a suspension of one year and one day pursuant to Rules of Court, Part Six, Section IV, Paragraph 13-18.O.

If the Agreed Disposition is approved, the Clerk of the Disciplinary System shall assess an administrative fee.

THE VIRGINIA STATE BAR

By: _____
Renu Mago Brennan, Assistant Bar Counsel

_____
Arnold Reginald Henderson, V, Respondent

_____
Claire G. Cardwell,
Respondent's Counsel

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
ARNOLD REGINALD HENDERSON, V

VSB DOCKET NO. 13-032-095270

SUMMARY ORDER

On October 24, 2014, this matter was heard by the Virginia State Bar Disciplinary Board pursuant to Notice served upon the Respondent in the manner provided by the Rules of Supreme Court of Virginia.

WHEREFORE, upon consideration of the testimony, documentary evidence, and arguments of counsel, it is **ORDERED** that:

1. With respect to the disciplinary rule violations set out in the Notice, the Board finds that:

_____ No disciplinary rule violations have been proved by clear and convincing evidence, and accordingly all charges of Misconduct are hereby dismissed.

✓ the following disciplinary rule violations have been proved by clear and convincing evidence:

RULE 1.3(a)

RULE 1.4(a)

_____

_____, and

that the Board dismisses all other disciplinary rule violations charged against the Respondent in the Notice.

VSB EXHIBIT 4

2. The Respondent shall receive a:

_____ Suspension for _____ (not to exceed five years)

_____ Suspension for _____ (one year or less)

✓ Suspension with Terms ONE YEAR (one year or less).
PAYMENT OF 13,639.05 TO COMPLAINANT ON OR BEFORE 12/31/14

_____ Revocation AND A 3 YEAR SUSPENSION SHOULD SUCH PAYMENT NOT BE MADE BY 12/31/14.

3. This Summary Order is effective on:

_____ the date of this summary order

✓ OCTOBER 24, 2014

4. The Board notes that:

✓ The Respondent was present in person and was advised of the imposition of the sanction

_____ The Respondent was not present in person and the Clerk of the Disciplinary System is directed to forward a copy of this Summary Order to the Respondent

5. The Board shall issue a Memorandum Order in this matter.

6. The Board notes that concerning Paragraph 13-29 that:

✓ Respondent must comply with the requirements of Part Six, § IV, ¶ 13-29 of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail of the suspension or revocation of his license to practice law in the Commonwealth of Virginia, to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within 14 days of the effective date of the sanction, and make such arrangements as are required herein within 45 days of the effective date of the suspension or revocation. The Respondent shall also furnish proof to the Bar within 60 days of the effective day of the suspension or revocation that such notices have been

timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the suspension or revocation, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13-29 shall be determined by the Virginia State Bar Disciplinary Board.

_____ Respondent has complied with notice provisions of Rules of Court, Paragraph 13-29 dealing with appropriate notification of suspension to his clients, judges, and opposing counsel in pending litigation

7. The Clerk of the Disciplinary System shall comply with all requirements of Part Six, § IV, ¶ 13 of the Rules of the Supreme Court, as amended, including: assessing costs pursuant to ¶ 13-9 E. of the Rules and complying with the Public Notice requirements of ¶ 13-9 G.

8. A copy teste of this Order shall be mailed by Certified Mail to the Respondent, at his last address of record with the Virginia State Bar and mailed or hand-delivered to Bar Counsel in this matter.

ENTERED THIS 24th DAY OF October, 2014

VIRGINIA STATE BAR DISCIPLINARY BOARD

Whitney G. Saunders
1st Vice Chair

A COPY TESTE:
Barbara S. Lanier
BARBARA SAYERS LANIER
CLERK OF THE DISCIPLINARY SYSTEM

I. Hypothetical 9 – Failure of Counsel to Communicate and Consult With Expert Prior to Designation as Expert Witness.

Attorney represents a husband in a divorce action. Husband's wife is seeking spousal support. Husband cannot work due to a back injury. Husband saw an orthopedist, Dr. Lovejoy, who reviewed x-rays Husband brought to the appointment. Dr. Lovejoy recommended that Husband follow up with a specialist to perform surgery to repair a disc in his back.

Husband's attorney talks with Husband who tells him that Dr. Lovejoy reviewed his x-rays and recommended that he see a specialist for a surgical procedure. Husband's attorney never talks to Dr. Lovejoy to ascertain her opinions or referral for Husband.

Attorney files a Notice of Expert Designation and designates Dr. Lovejoy as an expert to testify on behalf of Husband. Attorneys' Notice summarizes the information he expects Dr. Lovejoy will testify to based on what Husband told him occurred at the appointment.

Is the Notice of Expert Designation proper?
Did Attorney violate any ethical rules?

Answer: See In the matter of David H. N. Bean, VSB Docket No. 02-070-1395 (December 20, 2004). Failure to consult with an expert prior to designating the expert as an expert witness violates Virginia Rules of Professional Conduct.

Lawyer's conduct violated the following Virginia Rules of Professional Conduct:

- Rule 3.1 Meritorious Claims and Contentions
- Rule 3.3 Candor Toward The Tribunal
- Rule 3.4 Fairness to Opposing Party and Counsel
- Rule 4.1 Truthfulness in Statements to Others
- Rule 8.4 Misconduct
- DR 1-102 Misconduct
- DR 1-102 Representing a Client Within the Bounds of the Law
- DR 7-105 Trial Conduct

VIRGINIA:

BEFORE THE VIRGINIA STATE BAR DISCIPLINARY BOARD

IN THE MATTER OF
DAVID H. N. BEAN

VSB DOCKET NO. 02-070-1395

ORDER OF SUSPENSION

This matter came on to be heard on December 10, 2004, before a panel of the Virginia State Bar Disciplinary Board (the "Board") composed of James L. Banks, Jr., Chair Designate, Bruce T. Clark, Glenn M. Hodge, Robert E. Eicher, and W. Jefferson O'Flaherty, lay member.

The Virginia State Bar ("VSB") was represented by Paul D. Georgiadis, Assistant Bar Counsel ("Bar Counsel"). David H. N. Bean (the "Respondent") appeared in person and represented himself. Valerie L. Schmit, Registered Professional Reporter, of Chandler & Halasz, Post Office Box 9349, Richmond, Virginia 23227, 804.730.1222, having been duly sworn by the Chair Designate, reported the hearing and transcribed the proceedings.

The Chair Designate inquired of the members of the panel whether any of them had any personal or financial interest or any bias which would preclude any of them from hearing the matter fairly and impartially. Each member of the panel and the Chair Designate answered the inquiry in the negative.

The matter came before the Board on an Amended Certification from the Seventh District Committee of the VSB and the Respondent's answer. On November 30, 2004, the Respondent filed a motion for continuance of the hearing in this matter. The Chair Designate denied the motion for continuance on December 1, 2004. The Respondent stated at the hearing that he was ready to go forward. Following opening statements by Bar Counsel and the Respondent, Bar Counsel offered VSB Exhibits A and A-1 through A-14, VSB Exhibit B, and VSB Exhibits C

and C-1 through C-10. The Respondent's pre-hearing objection to VSB Exhibit B and VSB Exhibits C and C-1 through C-10 was overruled by the Chair Designate in an order entered December 1, 2004. At the hearing the Respondent renewed his objection to VSB Exhibits C and C-1 through C-10. The Chair Designate overruled his objection, and all of the VSB Exhibits were admitted into evidence. Bar Counsel then called the following persons who testified as witnesses for the Bar: Ann G. Scher, Andrea H. Wynn, M.D., and William D. Cremmins. Bar Counsel rested the VSB's case-in-chief, and the Respondent then testified on his own behalf. The Respondent offered in evidence the transcripts of the deposition testimony of James R. Anderson and his wife, taken in the *Anderson* case, and audio tapes the Respondent represented to be a recording of his conversations with his client. Neither the transcripts nor the tapes had been pre-filed as exhibits as required by the Pre-Hearing Order entered on August 13, 2004. Bar Counsel objected, and the Chair Designate sustained the objection. The Respondent proffered the transcripts, which were then marked as Respondent's Proffered Exhibits 1 and 2, respectively, for the record in the proceeding. The Respondent then rested his defense, and Bar Counsel presented no rebuttal evidence. Bar Counsel and the Respondent presented closing argument.

I. FINDINGS OF FACT

Upon consideration of the foregoing, the Board finds that the following facts have been proved by clear and convincing evidence:

1. At all relevant times the Respondent has been a lawyer duly licensed to practice law in the Commonwealth of Virginia and his address of record with the Bar has been 258 West King Street, Strasburg, Virginia 22657. The Respondent has been licensed since 1968.

2. The Respondent was properly served with notice of this proceeding in accordance with Part Six, § IV, ¶ 13(E) and (I)(a) of the Rules of the Supreme Court of Virginia.

Anderson v. Winchester Surgical Clinic, Ltd., et al.

3. The Respondent was counsel of record for James R. Anderson in a medical malpractice action brought against Westchester Surgical Clinic, Ltd., and Thomas W. Daugherty, M.D., in the Circuit Court of Warren County, Virginia, Case No. L216-00.

4. Orthopedist Andrea H. Wynn, M.D. saw the Respondent's client, James R. Anderson, on September 2, 1999. Mr. Anderson complained of right shoulder pain. After examining Mr. Anderson and reviewing x-rays he brought, Dr. Wynn recommended that he see Dr. Neviaser, who was a shoulder specialist, to do a specialized procedure to rebuild the musculature of the shoulder.

5. Dr. Wynn saw Mr. Anderson on September 1, 2000, regarding an injury to his hand. She inquired about his shoulder. He replied that Dr. Naviaser had performed surgery, and that it was helping him regain some function.

6. Dr. Wynn never spoke with the Respondent, or anyone in his office, about her findings or any opinion regarding his client's medical condition or the cause of or prognosis for the client's medical condition.

7. Dr. Wynn never spoke with the Respondent, or anyone in his office, about serving as an expert witness for Mr. Anderson in the case.

8. On August 29, 2001, Respondent served a Notice of Designation of Experts on counsel for the defendants in which he designated Dr. Wynn as an expert witness to testify on behalf of Mr. Anderson and summarized her expected testimony that Mr. Anderson's shoulder surgery preceding her examination of him was below the standard of care for such surgery and

involved technical error, and that the surgeon who performed the surgery failed to elicit an informed consent from Mr. Anderson.

9. On October 4, 2001, before the commencement of her deposition, Dr. Wynn handed the Respondent a notarized writing in which she stated "I will not serve as an expert witness in this case."

10. The night before Dr. Wynn's deposition on October 4, 2001, the Respondent had his client's medical files delivered to Dr. Wynn with a request that she review them. Dr. Wynn testified that she did not review the files because she had not agreed to serve as an expert witness for Mr. Anderson.

11. Dr. Wynn's deposition on October 4, 2001, was the first occasion that she had seen or spoken with the Respondent.

12. At her deposition Dr. Wynn examined the portion of the Notice of Designation of Experts summarizing her expected testimony and testified that neither the Respondent nor anyone in his office spoke with her about the opinions summarized or whether she held those opinions. In fact, Dr. Wynn did not hold the opinions summarized in her expected testimony, and she had never authorized her designation as an expert witness.

13. At the deposition of Dr. Wynn, the Respondent said to her "Doctor, I realize that you were not apprized [*sic.*] of the fact that you were designated as an expert, . . . Sometimes the designation is done with or without permission. Usually you like to get permission."

14. The Respondent states that he designated Dr. Wynn as an expert witness based on what his client told him Dr. Wynn had said during his client's office visits with her. For her part, Dr. Wynn denies expressing any medical opinion to the Andersons regarding his prior surgery, a

deviation from the standard of care, or informed consent. Indeed, Dr. Wynn states that she could not form an opinion because she had not seen the medical records of the prior surgery.

15. The Respondent designated two other physicians as experts on behalf of Mr. Anderson in the Notice of Designation of Experts, David G. Urquia, M.D., and Thomas Neviaser, M.D., and included a summary of their expected testimony.

16. Dr. Urquia's deposition was taken on October 9, 2001. Dr. Urquia had agreed with the Respondent to review medical records that the Respondent was to send to him. Dr. Urquia received incomplete medical records and informed the Respondent that no review would be made until all of the medical records were received. Dr. Urquia did not receive any further medical records and never made a review.

17. Dr. Urquia never formed any medical opinions regarding Mr. Anderson and never agreed to serve as an expert witness or to be designated as an expert witness.

18. Dr. Neviaser's deposition was taken on October 18, 2001. He had not agreed to serve as an expert witness for Mr. Anderson. He did not know that the Respondent had designated him as an expert in the Notice of Designation of Experts until he received the portion of it pertinent to himself after it had been served on August 29, 2001. Contrary to the summary of Dr. Neviaser's expected testimony in the Notice of Designation of Experts, Dr. Neviaser testified that he would not give testimony regarding the prior surgeon's standard of care.

Mary Ann Carroll v. Winchester Regional Health Systems, Inc., et al.

19. The Respondent was counsel of record for Mary Ann Carroll in a medical malpractice action brought against Winchester Regional Health Systems, Inc., *et al.*, in the Circuit Court of Warren County, Virginia, Case No. 00-134.00.

20. On November 8, 2001, the Respondent served a detailed, ten-page expert witness designation in which he identified five physicians as standard of care witnesses and set forth the substance of their expected testimony that the defendant radiologist had violated the standard of care.

21. On December 17, 2001, the Court ordered the Respondent to require each of his designated expert witnesses to sign an endorsement of the expert witness designation stating "I have reviewed the Plaintiff's designation of my testimony, and I hereby affirm that the contents are true and correct to the best of my knowledge and belief, and that I hold the opinions therein expressed."

22. On January 17, 2002, the Respondent withdrew his previous designation of experts and filed a supplemental expert witness designation in which only two of the originally designated five physicians were named. None of the new designations contained any reference to any deviation from the standard of care by the radiologist-defendant. The Respondent non-suited Mr. Carroll's case.

23. The Honorable John E. Wetzel, Jr., was the presiding judge in both the *Anderson* case and the *Carroll* case and imposed sanctions on the Respondent in each case.

24. In *Anderson*, on November 20, 2001, Judge Wetzel ordered the Respondent to pay $11,192 to Winchester Surgical Clinic and Thomas W. Daugherty, M.D., and $11,192 to Warren Memorial Hospital in attorneys' fees. In addition, Judge Wetzel barred the Respondent and his firm from representing Mr. Anderson if the nonsuited case were to be re-filed. Judge Wetzel also ordered that any designated expert witness must endorse all of the Respondent's expert witness designations and interrogatories.

25. In *Carroll*, on April 3, 2002, Judge Wetzel ordered the Respondent to pay $7,165 in attorney's fees and costs to defendant-Dr. Miller. Judge Wetzel also ordered that the Respondent may not file a medical malpractice action in the Commonwealth of Virginia "unless prior to the filing of the action, he has retained an expert witness who has stated in writing that the health care provider has violated the standard of care."

Atkins v. John A. Spratt, M.D.

26. The Respondent was counsel of record for Ronnie Ray Atkins in a medical malpractice action brought against John A. Spratt, M.D., in the Circuit Court of the City of Richmond, Virginia, Case No. LX-1789.

27. On December 6, 1995, the Respondent served his Second Supplemental Designation of Expert and therein identified A. Robert Tucker, M.D., as an expert witness for Mr. Atkins and summarized Dr. Tucker's expected testimony. Dr. Tucker's counsel, Ann G. Scher, inquired of the Respondent for the specifics of any deviation from the standard of care on Dr. Tucker's part. The Respondent informed her that he could not give specifics because he had not yet talked with Dr. Tucker.

28. Dr. Tucker's deposition was taken on January 5, 1996. Dr. Tucker had agreed with the Respondent that he would review Mr. Atkins' medical records but informed the Respondent that because he did not consider himself an expert in Mr. Atkins' particular condition, he would not testify as an expert witness for Mr. Atkins. Contrary to the Respondent's summary of the expected testimony of Dr. Tucker, Dr. Tucker believed Mr. Atkins' surgical procedure was excellent, and that there was no malpractice on Dr. Spratt's part.

29. In the *Atkins* case the Respondent was sanctioned $4,010.80 for designating Dr. Tucker as an expert witness when the Respondent knew that Dr. Tucker had refused to testify as an expert witness for Mr. Atkins.

30. The Respondent has paid the monetary sanctions, imposed on him in *Anderson, Carroll,* and *Atkins*.

31. Rule 4:1(b)(4)(A)(i) of the Rules of the Supreme court of Virginia provides, as follows:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. . . .

32. Rule 4:1(e) of the Rules of the Supreme Court of Virginia provides, as follows:

> A party who has responded to a request for discovery is under a duty to supplement or correct the response to include information thereafter acquired in the following circumstances.
> (1) A party is under a duty promptly to amend and/or supplement all responses to discovery requests directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony, when additional or corrective information becomes available.

33. Code of Virginia § 8.01-271.1 (1950), as amended, provides as follows, in pertinent part.

> The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is

> not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, written motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

34. Bradley v. Poole, 187 Va. 432, 439, 47 S.E.2d 341, 344 (1948), states the following with respect to the relationship with an expert witness:

> When a litigant seeks the opinion and aid of an expert in a trial the relationship between the parties is different from that of an ordinary witness summoned to testify to some pertinent fact known to him. *In the former case the duty of the witness to attend the trial and give testimony, or otherwise aid the litigant, is created by contract.* In the latter case the duty of the witness to attend the trial and testify is a duty created by law and arises out of necessity in the administration of justice. . . .

(italics supplied.)

35. The Respondent's explanation of his conduct is that the "rules" did not require him to have personal communication with the physicians before his expert witness designations of them, that personal communication was prudent but not required, and that it was proper for him to rely on his clients, his examination of their medical records, and the texts he examined in serving his expert witness designations on opposing counsel.

II. DISPOSITION

The Board retired to a closed session to deliberate. Following its deliberation, the Board reconvened in open session and the Chair Designate announced it had unanimously found by clear and convincing evidence that the Respondent's conduct constitutes a violation of the following Virginia Rules of Professional Conduct, effective January 1, 2000, in the *Anderson* and *Carroll* matters, and the Disciplinary Rules of the Virginia Code of Professional Responsibility, effective before January 1, 2000, in the *Atkins* matter, to wit:

RULE 3.1 Meritorious Claims And Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RULE 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

RULE 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(e) Make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

RULE 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of fact or law; or

RULE 8.4 Misconduct

It is professional misconduct for a lawyer to:

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law;

DR 1-102. Misconduct.

(A) A lawyer shall not:

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation which reflects adversely on a lawyer's fitness to practice law.

DR 7-102. Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(5) Knowingly make a false statement of law or fact.

DR 7-105. Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

The Chair Designate then announced that the board had unanimously found that the VSB had failed to prove by clear and convincing evidence a violation of the following: Rule 3.3(a)(4), Rule 3.4(c), Rule 3.4(i), Rule 4.4, DR 7-102(A) (3), (4), or (6), and DR 7-105(C) (5) and (6).

III. SANCTION

Thereupon, the Board called for evidence in mitigation or in aggravation. Bar Counsel stated that the Respondent had no prior disciplinary record. Bar Counsel presented the testimony of Andrea H. Wynn, M.D. The Respondent presented his own testimony.

Thereupon the Board heard argument from Bar Counsel and the Respondent and retired to a closed session for deliberation of sanctions. Following its deliberation, the Board

reconvened in open session and announced it had unanimously determined that the Respondent's license to practice law in the Commonwealth of Virginia should be suspended for a period of two years, effective February 1, 2005.

Accordingly it is ORDERED that the license of the Respondent, David H. N. Bean, to practice law in the Commonwealth of Virginia be and hereby is SUSPENDED for a period of two years, effective February 1, 2005.

The Board notes that the Respondent's misconduct implicated and adversely affected innocent people, particularly Dr. Wynn who testified to her embarrassment and the strain on her professional relationships in her medical practice. The Board also notes that, but for the absence of a prior disciplinary record, the monetary sanctions previously imposed in Richmond Circuit Court and Warren County Circuit Court, and the Respondent's professed acceptance of the lesson from those courts, the sanction imposed would be more severe. The Board observes that a lack of candor and trustworthiness between opposing counsel, as well as with witnesses, ill-serves the profession and the adversary system of justice. The Board also observes that zealous representation of clients is inexorably circumscribed by the Virginia Rules of Professional Conduct.

It is further ORDERED that Respondent must comply with the requirements of Part Six, § IV, ¶ 13(M) of the Rules of the Supreme Court of Virginia. The Respondent shall forthwith give notice by certified mail, return receipt requested, of the suspension of his license to practice law in the Commonwealth of Virginia to all clients for whom he is currently handling matters and to all opposing attorneys and presiding judges in pending litigation. The Respondent shall also make appropriate arrangements for the disposition of matters then in his care in conformity with the wishes of his client. Respondent shall give such notice within fourteen days of the

effective date of the suspension, and make such arrangements as are required herein within forty-five days of the effective date of the suspension. The Respondent shall also furnish proof to the Bar within sixty days of the effective day of the suspension that such notices have been timely given and such arrangements made for the disposition of matters.

It is further ORDERED that if the Respondent is not handling any client matters on the effective date of the suspension, he shall submit an affidavit to that effect to the Clerk of the Disciplinary System at the Virginia State Bar. All issues concerning the adequacy of the notice and arrangements required by Paragraph 13 (M) shall be determined by the Virginia State Bar Disciplinary Board, unless the Respondent makes a timely request for hearing before a three-judge court.

It is further ORDERED that pursuant to Part Six, § IV, ¶ 13.B.8.c. of the Rules of the Supreme Court of Virginia, the Clerk of the Disciplinary System shall assess all costs against the Respondent.

It is further ORDERED that the Clerk of the Disciplinary System shall mail an attested copy of this order to the Respondent at his address of record with the Virginia State Bar, 258 West King Street, Strasburg, Virginia 22657, by certified mail, return receipt requested, and by hand to Paul D. Georgiadis, Bar Counsel, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

Enter this Order this 20th day of December, 2004.

VIRGINIA STATE BAR DISCIPLINARY BOARD

James L. Banks, Jr., Chair Designate

1106906v5

REMEDIES

- Discussing the scope of discovery with an opposing counsel prior to issuance.
- Motion to Compel.
- Motion for Discovery Sanctions.
- Motion for Protective Order.
- Call Chambers if available.
- Certify the Question.
- Report to Virginia State Bar.
- Consult The Honorable Judge Wetsel's synthesis of discovery decisions updated May 19, 2014. (Reproduced for the GMAIC with permission of Judge Wetsel.)

DISCOVERY (May 19, 2014)

This is a synthesis of discovery decisions which will govern the resolution of your discovery dispute, so read this memo carefully before appearing on a discovery motion. If you are advancing a proposition contrary to one expressed herein, you should have legal authority to support your argument.

1. Consultation among counsel. Counsel are encouraged to participate in pretrial discovery conferences to minimize the filing of unnecessary discovery motions. No discovery motion should be filed until counsel has discussed with opposing counsel the discovery in controversy. The Court will not consider any motion concerning discovery matters, unless the motion is accompanied by a statement of counsel that a good faith effort has been made between counsel to resolve the discovery matters in dispute.

All relationships are improved by courtesy. Former Virginia Code of Professional Responsibility, EC 7-35, provided that:

> A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client.

Courtesy is the foundation of all viable human relationships, and this rule still applies to the practice of law in Virginia.

2. Good Faith. Rule 4:1(g) provides that:

> The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these Rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose ...; and (3) not unreasonably burdensome or expensive, given the needs of the case ....

Despite this admonition, objections have been made to discovery on the sole ground that the attorney did not understand the meaning of the following words: "similar accidents, examine, paid, warranty claim, notify, respond, and medical treatment." These are words of common parlance and were used in their ordinary context. In each instance the objection was contrary to the rules of discovery and was overruled. A retreat into rubrics in discovery is usually the last gasp of the desperate.

3. Permissible scope. Rule 4:1(b) provides that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery, or to the claim or defense of the other party...." This is almost the same as Federal Rule of Procedure 26(b). Virginia has adopted the Federal Rules of Discovery "verbatim so far as consistent with Virginia practice ... to enable Virginia lawyers and circuit court judges to use federal precedents to guide Virginia practice in the field of discovery. W. H. Bryson, Handbook on Virginia Civil Procedure (2d ed. 1987), p. 319. See, e.g. Smith v. Nat'l. R. Passenger Corp., 22 Va. 348, 350 (Richmond 1991).

In personal injury cases, traumatic personal experiences which occurred more than a year before the accident or incident, except for past accidents and physical injuries, will not generally lead to admissible evidence, so questions about teenage abortions and suicide attempts, childhood physical or sexual abuse, and tempestuous past divorces are usually improper, and the party seeking to obtain such information must show good cause as to why such a line of inquiry may produce admissible evidence. Where a plaintiff is claiming damages for psychological treatment as a result of an accident making his or her past psychological condition an issue in a particular case, questions designed to elicit information about the plaintiff's past psychiatric and psychological treatment may be asked, such as when, where, and why for each such treatment, but personal questions like "how did that abortion or incident make you feel" are not proper. If such an inquiry is to lead to admissible evidence, it could only be through the vehicle of an independent psychological or psychiatric evaluation, so while the examining health care provider may ask such a question, a lawyer generally may not.

In a personal injury action, the plaintiff is usually required to respond to discovery about his prior medical history. As a general rule, all of the plaintiff's medical records and medical history with respect to that portion of the body which was allegedly injured are discoverable, so in a back case all records and history of the plaintiff's back from the time of birth to the present are discoverable. However, discovery inquiries about the plaintiff's general medical and psychological history and injuries to portions of the body, which are not alleged to have been injured, are generally limited to five years preceding the accident. However, even though they are discoverable, the Plaintiff only has to produce medical records which he actually has in his possession. See section 12 of this memo.

4. Interrogatories are limited to thirty including subparts. Rule 4:8(g). They should be concise not canned. Given the fact that number of issues which a Court is potentially required to consider in domestic cases (fault, equitable distribution (10), child support (18), custody (10), and spousal support (13)) exceeds thirty and the wide array of property issues, the interrogatory limit does not apply to subparts in domestic cases. An exception to this rule is usually granted in complex cases like professional negligence, products liability, and complex business litigation, where there is a multi-count complaint alleging conspiracy, tortious interference, breach of fiduciary duties, etc..

5. Limitations. Discovery limited in divorce suits to "matters which are relevant to the issues ...." Rule 4:1(b)(5).

6. Objections. Objections must be specific to allow opposing counsel to appropriately respond to cure the defect without the intervention of the court, and to permit the court to rule intelligently if so required. See generally Discovery: The Successful Advocate's Advantage Virginia CLE, pp. II-15-16 (1995). Objections to interrogatories must be specific and must be supported by a detailed explanation of why a particular interrogatory or class of interrogatories is objectionable. 23 Am. Jur. 2D Depositions and Discovery § 136. "Objections should be plain enough and specific enough so that the court can understand in what way the interrogatories are claimed to be objectionable. General objections such as the objection that the interrogatories will require the party to conduct research and compile data, or that they are unreasonably burdensome, oppressive, or vexatious, ..., or that they would cause annoyance, expense, and oppression to the objecting party without serving any purpose relevant to the action, or that they duplicate material already discovered, or that they are irrelevant and immaterial, or that they call for opinions and conclusions, are insufficient [where no specific factual statements supporting the objection accompany it]." 4A Moore's Federal Practice § 33.27 (2nd Ed.) The objection that an interrogatory is ambiguous is not available to one whose answer shows an understanding of its meaning, but a party may restrict or qualify its answer to ... ambiguous interrogatories. 23 Am. Jur. 2D Depositions and Discovery § 140.

Vague is an objection frequently encountered in discovery. Its etiology is unknown, but its synonym, ambiguous, is a term of legal art with a long genealogy in both the law of document construction and the law of evidence. A statement which may be understood in more than one way is ambiguous. In terms of the phraseology of a question or statement, ambiguity may arise from syntactical or semantical error. In document construction these errors would be called patent ambiguities, and in modern discovery practice, they are not common. Under the rules of court, the proper response to a truly ambiguous question is to describe the ambiguity, so your opponent can appropriately respond to your objection to cure the ambiguity, and the court can properly rule on your objection. If the question or statement is not patently ambiguous, but rather would produce a latent ambiguity when applied in the context of the case, such a question requires a qualified response, not an objection based on vagueness or ambiguity.

Supreme Court 4:11 governing responses to requests for admissions sets forth principles similar to those governing objections to interrogatories: "If objection [to a request for admissions] is made the reasons therefore shall be stated."

"Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time." Supreme Court Rule 4:7(d)(3)(A). The only objections that should be raised at a discovery deposition are those involving privilege against disclosure, some matter that may be remedied at the time, such as the form of the question (compound question, argumentative, asked and answered, or ambiguous, this latter objection is frequently improperly used, and it shall not be used as a foil to interrupt the flow of an examination or to alert the witness to a potential problem), or that the question is beyond the scope of discovery. All objections should concisely state the problem with the question so the defect may be readily cured and must not suggest answers or otherwise coach the deponent. For example, it is not proper for the attorney representing the deponent, to add the gloss, "If you know," to the interrogator's question. It is rarely proper to instruct a witness not to answer. See Rule 4:5(d). Save your argument for the court, do not spend deposition time sparring with opposing counsel.

A health care provider that has treated a plaintiff may not object, based on Virginia Code § 8.01-399, to a plaintiff's discovery request for information about the plaintiff's treatment that is contained in, or can be ascertained from, that treating health provider's records.[1] See, e.g., Archambault v. Roller, 254 Va. 210, 212-213 (1997).

7. Opinions and Conclusions of Law. An interrogatory or a question in a deposition or a request for admissions is not objectionable simply because the response involves an opinion or contention that relates to fact or the application of law to fact. See Rule 4:8(e). "The test of whether an interrogatory calling for matters of opinion, legal theories, or contentions is proper ... is whether or not the answer thereto would serve any substantial purpose, such as providing leads to evidence or clarifying issues in the case, avoiding wasteful preparation, eliminating unnecessary testimony, or generally expediting the fair disposition of the lawsuit and serving any other substantial purpose sanctioned by discovery." 23 Am. Jur. 2D Depositions and Discovery § 121. Frequently, such interrogatories are used as substitutes for a motion for a bill of particulars, or to learn whether the opposing party claims the negligence or breach of contract of any other person contributed to the plaintiff's injuries. Requests for admissions regarding the application of law to the relevant facts in the case are

---

[1] Virginia Code 8.01-399 expressly provides, in pertinent part, that:

> A. ***Except at the request or with the consent of the patient***, or as provided in this section, no duly licensed practitioner of any branch of the healing arts shall be permitted to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.
>
> B. ***If the physical or mental condition of the patient is at issue in a civil action, the diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court*** or through testimony at the trial of the action.
>
> D. Neither a lawyer nor anyone acting on the lawyer's behalf shall obtain, in connection with pending or threatened litigation, information concerning a patient from a practitioner of any branch of the healing arts without the consent of the patient, ***except through discovery pursuant to the Rules of Supreme Court as herein provided***.
>
> F. ***Nothing herein shall prevent a duly licensed practitioner of the healing arts, or his agents, from disclosing any information that he may have acquired in attending, examining or treating a patient in a professional capacity where such disclosure is necessary in connection*** with the care of the patient, ***the protection or enforcement of a practitioner's legal rights including such rights with respect to medical malpractice actions***, or the operations of a health care facility or health maintenance organization or in order to comply with state or federal law.

also proper. 23 Am. Jur. 2D Depositions and Discovery § 181. The editors of 4A Moore's Federal Practice § 36.04[4] state:

> In 1970 both Rule 33 [interrogatories] and Rule 36 [requests for admissions] were amended to liberalize the practice with regard to discovery of opinions, conclusions, and contentions. In both cases it was made explicit in the rule that discovery could be had of opinions related to fact or to the application of law to fact. The change made it possible to discover the contentions of the parties.

8. Lack of knowledge. If a party does not have the knowledge or information necessary to answer the interrogatory, he should not ignore the inquiry in part or in whole, but should state such lack of knowledge as an answer under oath. The party should also set forth in detail the efforts made to obtain the requested information. 23 Am. Jur.2d Depositions and Discovery § 127.

9. Corporations. A corporate party cannot avoid answering interrogatories by an allegation of ignorance if the information can be obtained from its agents, from persons who acted in its behalf, or from sources under its control, which includes its attorneys. 23 Am. Jur.2d Depositions and Discovery §§ 127 and 130. Individuals designated by a corporation to testify pursuant to Rule 4:5(b)(6) on its behalf must "testify to matters known or reasonably available to the corporation." See American Safety Cas. Ins. v. C. G. Mitchell Constr., 268 Va. 340, 352 (2004).

10. Request for Production of Documents. Rule 4:9(b) provides that "The Request shall set forth the items to be inspected by individual item or category, and describe each item with reasonable particularity." See also 23 Am. Jur. 2D Depositions and Discovery § 164. In most cases the place of production is the producing attorney's office or the clerk's office. In cases involving extensive business records, items should be produced, inspected, and copied at the producing party's office or place of business during reasonable business hours. **It is the producing party's responsibility to identify, segregate, and produce the documents responsive to each category of requested documents**, so that the document production will be as efficient as practical. See Rule 4:9(b)(iii)(A). The needle in the haystack response of simply opening the corporate records room and saying "look at anything you want" is not a response complying with the Rule. The requesting party is permitted to make copies of any records produced pursuant to the request. In the absence of a written agreement between the parties to the contrary, the requesting party shall be permitted to take a copier to the place of production and copy the documents or to have a mobile copy service enter the premises of the producing party to make the copies. If in response to the request, the producing party makes copies and produces them and there is no written agreement in advance with respect to the copying costs, the producing party shall pay the costs of copying the documents produced for the requesting party.

Electronically produced documents shall be produced in a readable format. Supreme Court Rule 4:9(b)(iii)(B)(2). If there is a disagreement as to the readability of the file format, the documents shall be produced in PDF format.[2]

---

[2] "[T]he presumption is that the producing party should bear the cost of responding to properly initiated disco]very requests." Thompson v. U.S. Dep't of HUD, 219 F.R.D. 93, 97 (D. Md. 2003); see also Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978) (the party responding to a discovery request ordinarily bears the expense associated with doing so). Also, "[a] party that seeks an order from the court that will allow it to lessen the burden of responding to allegedly burdensome electronic records discovery bears the burden of particularly demonstrating that burden and of providing suggested alternatives that reasonably accommodate the requesting party's legitimate discovery needs." Hopson v. Mayor & City Council of Baltimore, 232 F.R.D. 228, 245 (D. Md. 2005).

In any case in which the responding party elects to copy and produce documents and more than 50 pages of documents are copied and produced, all of the documents produced in discovery shall be Bates stamped, which means that each document page produced in discovery shall have a unique, identifying number stamped on it so that it can be readily identified both in discovery and at trial if the documents are introduced at trial. Where documents are copied and produced pursuant to a discovery request, they may be produced by responding as follows: "The documents requested in this Request for Production of Documents are attached as Document Request No. __, which contains Bates stamped documents _____ (set forth the Bates stamp page numbers).

Subpoena Duces Tecum on Third Parties. Rule 4:9A(c)(3) contemplates that the producing third party may be paid for the "reasonable costs of producing the documents ... and tangible things so designated." The party seeking production of the documents should ascertain in advance what the costs of producing and copying the documents will be, and if there is a dispute over the reasonableness of those charges that issue should be presented to the Court prior to the production of the documents.

Corporate Response to Subpoena Duces Tecum. The subpoena is served on the corporation by serving an appropriate officer, and the corporation then designates someone in its hierarchy to respond, the so called "custodian of the records." Supreme Court Rule 4:9A expressly provides that:

> (b) Content of Subpoena Duces Tecum; Objections. --Subject to paragraph (d) of this Rule, a subpoena duces tecum shall command the person to whom it is directed, or ***someone acting on his behalf, to produce the documents, electronically stored information,*** or designated tangible things (including writings, drawings, graphs, charts, photographs, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form) designated and described in said request, and to permit the party filing such request, or someone acting in his behalf, to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 4:1(b) which are in the possession, custody or control of such person to whom the subpoena is directed, at a time and place and for the period specified in the subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.
>
> Va. Sup. Ct. R. 4:9A (Emphasis added)

When a subpoena duces tecum is served on a corporate officer, the party served is the corporation, and the "person to whom it is directed" is the corporate officer, who was personally served with the subpoena, and that corporate officer has a duty to deliver the subpoena to the proper person in the corporate hierarchy to respond to the documents request, so to that extent the corporate duty to respond is like that of responding to a corporate deposition designation under Supreme Court Rule 4:5(b)(6), i.e, the corporation must designate a personal capable of appropriately responding to the document requests. Therefore, the "someone acting on his behalf [the officer served]" to respond to a document request on behalf of the corporation is whomever the corporation in the regular course of its business has designated as the person responsible to oversee the maintenance of their corporate records, which is the so called "custodian of the records" who may be the corporate secretary, or in more modern times, the head of the department of information technology for the corporation. The title of the person is not important, the function that they perform for the corporations with respect to its records is determinative of their responsibility. This person changes from time to time, but there is always someone in the corporate hierarchy who performs this function, so the respondent corporation is required to identify that person to respond to the subpoena for records.

11. Option to produce business records. "Where the answer to an interrogatory may be ...

ascertained from the business records [of the respondent] ..., it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived .... *A specification shall be in sufficient detail to permit the interrogating party to locate and identify, as readily as can the party served, the records from which the answer may be ascertained."* Rule 4:8(f). This "provision cannot be used as a procedural device for avoiding this duty [to provide all of the information requested] by shifting to the interrogating party the obligation to find out whether information is ascertainable from the records which have been tendered." 23 Am. Jur. 2D Depositions and Discovery § 134. This means that given the information in the answer, that a reasonable person in possession of the documents can look at the answer find the documents specified and identify the information requested in five-ten minutes, if this is not the case, then the respondent must answer the interrogatories and provide the names and other information requested rather than relying solely on the entries in the medical or business record. "As a general rule, neither the incorporation by reference of allegations of pleadings, nor a reference to a deposition or other documents, constitutes a responsive answer to an interrogatory." 23 Am. Jur.2d Depositions and Discovery § 128. Therefore, a broad statement that the information sought is in documents which are available for inspection is not a sufficient answer. Rather, the answering party must precisely identify which documents will provide the information requested and give the interrogating party a reasonable opportunity to examine and copy the records. 23 Am. Jur.2d Depositions and Discovery § 134. In medical malpractice cases, the plaintiff usually has a copy of his medical record and then files interrogatories seeking the names of persons who provided him treatment, and the Defendants answer that this information is equally accessible in the medical record. However, the names of nurses and doctors in medical records are frequently confirmed by handwritten initials or by signatures, which are often cryptic and/or illegible.

Generally, in an answer to an interrogatory, when the respondent refers to a specific part of the record or to a specific document as his answer, the document must have been provided to or be in the possession of the interrogating party; otherwise, the court cannot reasonably rule on the objection. Whenever a reference to documents is part of a discovery response, and a motion to compel is to be heard, ***both parties must bring the relevant records in question to the hearing, with a copy for the court, so that the court can review the documents and determine where the merits lie***.

12. Possession, Custody, or Control. "[R]ecords in the possession of a physician or person acting at his request are not in the possession, custody, or control of the party who has been examined by the physician ...." 23 Am. Jur. 2d Depositions and Discovery § 249. Accord 4A Moore's Federal Practice (2nd Ed) §34.17. While the Court has the power to order that a party obtain and produce such records, that is not the general rule or practice.

13. Equally Accessible. Discovery need not be ordered if the discovering party already has the documents in question, or if the discovering party can obtain the documents in question as readily as can the adverse party. Accordingly, discovery need not be required of documents of public record which are equally accessible to all parties. See Rakes v. Fulcher, 210 Va. 542, 547, 172 S.E.2d 751 (1970) (where evidence equally available to both sides discovery should not be granted). This objection is frequently incorrectly asserted by corporate defendants and defendants in medical malpractice cases. See discussion under item 11 option to produce business records.

14. Entry and Inspection of Property. Rule 4:9(a) provides for the right to enter and inspect premises that are material to the issues. Generally, the parties have a right to be present during this entry and inspection. Very frequently photographs or videos are taken during this process. The time and manner of the inspection is usually set by agreement to reasonably accommodate the parties' schedules. Where business premises are entered, the entry and inspection may be done before or after regular business hours so that the party's business will be disrupted as little as practically possible. Premises are regularly inspected and photographed in domestic and premises liability cases. If either party reasonably believes that the inspection poses a risk of violence, that matter should be brought to the Court's attention for a protective order, and local law enforcement authorities consulted to assist in the orderly entry and inspection.

15. Generally, inquiries about similar accidents or occurrences within three years of the accident are discoverable in premises liability, product liability, and nursing home negligence cases because they may lead to evidence admissible at trial. 23 Am. Jur.2d Depositions and Discovery § 43.

16. Defendant's financial condition. When a party's financial condition is relevant to a claim , such as lost income or punitive damages, it is a proper subject of discovery inquiry. 23 Am. Jur.2d Depositions and Discovery § 38. Defendant's tax returns are frequently requested documents. When discoverable the most recent three years usually covers the potentially relevant time. In domestic cases, the parties' tax records are always discoverable. In business cases, the tax returns or some portion thereof, such as the manner in which a party treated an alleged business transaction, are frequently discoverable, but if only a portion of the return is relevant, edited copies may be provided, e.g., the schedule of business loss deductions. A protective can be entered to protect the parties' privacy.

17. Experts.

a. Defendants and transaction witnesses are not experts within the meaning of the rules governing discovery of expert opinions.

23 Am. Jur. 2D Depositions and Discovery § 73 (earlier edition) stated:

> The rules governing the disclosure of facts and opinions in the possession of an expert do not apply to discovery requests directed at information acquired or developed by a deponent as an actor in transactions which concern the lawsuit, and the mere designation of a party of a trial witness as an "expert" does not thereby transmute the experience of that expert witness acquired as an actor into experience that he acquired in anticipation of litigation or for trial. Similarly, parties to litigation are not experts under these rules, even though they may be experts in their profession.

See Rodregues v. Hrinda, 56 F.R.D. 11 (W.D. Pa.) (doctors in malpractice action). Williams v. T. Jefferson U., 54 F.R.D. 615 (1972). "[I]t appears that the defendant in a medical malpractice action will be required to answer questions put to him in the course of pretrial discovery relating to his expert opinions, so long as the questions seek an opinion based upon the facts of the case, and are not based upon an entirely hypothetical set of facts for which there is no proof...." Annotation, Scope of Defendant's Duty of Pretrial Discovery in Medical Malpractice Actions, 15 A.L.R. 3rd 1446 § 3 (1967); accord, Annotation, 88 A.L.R. 2nd, 1186, § 4.

A Defendant or witness, who because of his training could be considered an expert, such as a defendant physician in a medical malpractice case, may be questioned in discovery about his professional opinions as they apply to the care which he rendered to the plaintiff, or in the case of a construction professional, about his opinions as they apply to the plaintiff's construction project. So long as the examiner does not use the phrase "standard of care" and the question expressly or implicitly makes it clear that the witness is being asked about his or her personal opinion on the circumstances surrounding the transaction in question, the question is proper. To remove any doubt the examiner should preface his or her examination of the witness by stating that "Any question which I may ask you about your personal professional opinions and practice apply specifically to your examination and treatment of the plaintiff and her condition when you saw her. None of my questions are intended to ask for your opinion about the 'standard of care' in general."

The Defendant's contact with the Plaintiff's treating physicians is limited by statute to "discovery pursuant to the Rules of Court." Virginia Code § 8.01-399.B. A letter which a physician writes to a plaintiff's attorney about the plaintiff's medical condition which is at issue in the case is discoverable, and it is not protected work product, because a treating physician is not a party's agent or representative. While treating physicians may be the source of expert testimony at trial about the plaintiff's medical condition and are

therefore subject to the discovery rules governing the disclosure of their opinions, Rule 4:1(b)(4), they are not "Trial Preparation Experts" in the pure sense, since they have not been retained by the parties solely for the purpose of performing a retrospective analysis of the facts to render an expert opinion at trial, and their files are subject to discovery by both parties. Since the Rules of Court require the defendant to give the plaintiff a copy of the medical report prepared by the defendant's expert who examines the plaintiff pursuant to Rule 4:10(c), by like logic, the defense should be entitled to see any report about the plaintiff which the treating physician prepares for the plaintiff's attorney.

b. Experts to be called at Trial. A party through interrogatories may require any other party to identify each person whom the other party expects to call as an expert at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and give a summary of the grounds for each opinion. Rule 4:1(b)(4)(a)(i). Supreme Court Rule 4:1(b)(4)(a)(2) provides that "upon motion, the Court may order further discovery by other means...," such as by depositions. It is a long standing practice for parties to agree to depose each other's experts. Upon a showing of good cause a subpoena duces tecum may issue against the opposing party's expert. See e.g., Sanford Constr. Co. v. Kaiser Aluminum & Chemical Sales, Inc., 45 F.R.D. 465, (E.D. Kentucky 1968) (Reports of plaintiff's expert, pipe material, and photographs taken by plaintiff ordered produced). However, this is a fairly extraordinary procedure, and it is preferable to proceed by interrogatory to obtain the information. When ordered the party seeking discovery must "pay the other party a fair portion of the fees and expenses reasonably incurred by the latter (responding) party in obtaining facts and opinions from the expert." Rule 4:1(b)(4)(c). Rule 4:10(c) provides that a copy of the written report of an IME must be provided to the other party.

Many cases turn on the experts' opinions. The answers to interrogatories about experts should be detailed, so that the opposing side knows what your expert will be testifying about from reading your answer. Your answer must include the subject matter, the substance of the facts and opinions to which the expert will testify, and a summary of the grounds of each opinion. If these required elements are not in your answer, then your answer is insufficient. John Crane, Inc. v Jones, 274 Va. 581, 591-93 (2007); see generally Handling Products Liability Cases in Virginia, Virginia CLE (1994), p. III-2. Parties very frequently fail to adequately state the "substance of the facts," the "opinions," and "a summary of the grounds of each opinion." While there is no talismanic form for an answer, in a typical personal injury action, the following would be an adequate answer with respect to an orthopedic surgeon who had treated the plaintiff (IF IN DOUBT, ERR ON THE SIDE OF INCLUSION):

Name and Address:

Substance of the Facts: Attached are the treatment records of Dr. X., who is a board certified orthopedic physician licensed to practice in Virginia, who treated the Plaintiff, and who will testify about his examinations and his treatment as shown on these records.

Summary and Grounds of Opinions: Based on his examination, consultations, and treatment of the Plaintiff, Dr. X will testify that:

1. In the accident of October 1, 2011, the Plaintiff sustained a comminuted fracture of his left tibia.

2. As a result of his injury, the plaintiff had to be off from work from October 1, 2011 - December 31, 2011.

3. The fracture resulted in a shortening by 5 mm of the Plaintiff's left leg, as a result of which he has suffered a 5% loss of use of the lower left leg. His physical restrictions caused by his injury are that he is restricted to walking not more than five miles a day, and has problems

walking on uneven surfaces.

4. The Plaintiff was charged $900.00 by Dr. X for his treatment as shown on the attached bills, which are reasonable in amount and were necessarily incurred as a result of the injury sustained in the October 1, 2011 accident. (If Dr. X will testify as to the need for future treatment and its cost, set it out in particular.)

A court may grant summary judgment on relevant claims because a party fails to identify expert witnesses as required by the pretrial order. Woodbury v. Courtney, 239 Va. 651, 654, 391 S.E.2d 293 (1990) (failure to identify expert witness five months prior to trial in medical malpractice case). Alternatively, the court may refuse to allow the witness to testify. See, e.g., Ashmont v. Welton, 20 Va. Cir. 181 (1990).

c. Experts consulted but not to be called at trial. In the course of educating themselves about the technical aspects of their case, attorneys frequently consult on both a formal basis and a casual basis with experts, e. g., they may informally discuss a medical issue with a physician friend. The rules do not contemplate that these experts who are consulted, but are not to be called at trial must be disclosed absent "a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means." Supreme Court Rule 4:1(b)(4)(B). Since a special exception is recognized under the rules for such non-trial experts, they need not be disclosed when an interrogatory is filed asking for the names of persons who have knowledge about the facts of the case.

18. Party Statements. A party may obtain a statement previously made by that party even if made in anticipation of litigation. Rule 4:1(b)(3).

19. Work Product and Anticipation of Litigation. As a general rule neither the work product privilege nor the attorney client privilege prevents the disclosure of facts or the identity of witnesses which the attorney has learned about during his investigation of the case. Attorneys are not permitted to use the work product doctrine as a curtain behind which they can hide factual data which should in all fairness be available to both parties. Thus, provable facts underlying the parties' contentions are not work product. See 23 Am. Jur. 2d Depositions and Discovery §§ 45-47. Trial preparation materials are discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Rule 4:1(b)(3). The work product privilege is a limited privilege provided to the party and to the attorney, who represents a party, and it is limited to "documents and tangible things ... prepared in anticipation of litigation." See generally Duplain Corp. v. Moulinage et Retorderie de Chavanez, 509 F.2d 730, 747-736 (4th Cir. 1974). It is both different from and narrower in scope than the attorney-client privilege.

A document "will be considered to have been prepared in anticipation of litigation only when 'the probability of litigating the claim is substantial and imminent' or where 'litigation was fairly foreseeable at the time the memorandum was prepared." Darnell v. McMurray, 141 F.R.D. 433, 435 (W.D. Va. 1992). Generally, where the memorandum was prepared after the cause of action accrued, was not prepared in the regular course of business or pursuant to regular habit of the author, and was prepared after the party had made the conscious decision to prepare a claim or to defend against a probable claim and in furtherance of that decision, then the document will be deemed to be prepared in anticipation of litigation and will be protected from discovery. The period of time between the cause of action and the writing of the memo and consulting with counsel are all factors to consider in determining whether the document was prepared in anticipation of litigation. Accordingly, a diary or journal began before the event in question is discoverable, because the entries cannot have been made in anticipation of litigation. See generally 23 Am. Jur. 2D Depositions and Discovery § 47. However, a journal or diary kept at the express instructions of a party's counsel after an event has occurred and the attorney consulted about the litigation is work prepared in anticipation of litigation. See 23 Am. Jur. 2D supra § 46.

To obtain written witness statements procured by a party's attorney or agent in anticipation of litigation, "the movant must show good cause." Rakes v. Fulcher, 210 Va. 542, 545-546, 172 S.E.2d 755 (1970) (Defendant's attorney took witness statements after notice of the action). The Virginia position is the minority rule. See 23 Am. Jur. 2D Depositions and Discovery § 45; and Dobbs v. Lamonts Apparel, Inc., 155 F.R.D. 650 (Alaska 1994). This is why it was necessary to promulgate Rule 4:1(b)(3) making a party's statements discoverable. While the witness statements themselves may not be discoverable, "the information [about the facts] gleaned ... [by a party's counsel] ... through his interviews with the witnesses ..." is discoverable. Hickman v. Taylor, 329 U.S. 495, 508-509, 91 L.Ed. 451, 461 (1947). Accordingly, a party may discover the identity of witnesses and a summary of the facts about which they have knowledge, even though that information is contained in a statement which itself is not discoverable under the present Virginia Rule.

Since Rakes v. Fulcher, supra is the minority rule, statements of persons other than parties taken by a party's insurance company after an accident are statements given to a party's agent in anticipation of litigation and are not discoverable. However, employee statements, accident reports, and other materials prepared in the ordinary course of business, other than by an insurance company, for nonlitigation purposes are not immunized under the work product rule or documents prepared for litigation and are discoverable. 23 Am. Jur.2d Depositions and Discovery § 47. "It is clear that the statements taken ... [the defendant's employees] ... were taken in the ordinary course of business of the defendant..." and are therefore discoverable. Whitehead v. Harris-Teeter, Inc., 28 Va. Cir. 367, 368 (Amherst 1992); cf. Dolan v. CSX Transp., Inc., 31 Va. Cir. 465 (Richmond 1993) (Reports about crossing accidents protected by 23 U.S.C. § 409); contra Smith v. Nat'l. Passenger Corp., 22 Va. Cir. 348 (1991) (Reports of accident investigation protected in FELA action). Reports prepared in the regular course of business by defendant's employees who are experts, but not within the control group of the corporation are discoverable. Virginia Elec. & Power Co. v. Sun Shipbuilding & D. D. Co., 68 F.R.D. 397 (E.D.Va. 1975).

Although pictures, surveillance films, and other tangible evidence relevant to the case may be procured in anticipation of litigation, they are usually discoverable because of their unique, objective character.

Letters from Counsel to their Expert. There is no appellate decision in Virginia on whether counsel's communications with an expert retained to testify at trial is protected work product, and the courts which have considered this question have reached varying results. See Intermedics, Inc. v. Bentrix, Inc., 139 F.R.D. 384 (N.D. Cal. 1991) (communications written and oral from counsel to an expert retained to testify at trial are discoverable); Abujaber v. Kawar, 17 Va. Cir. 398 (Loudoun County 1989) (production of certain documents between counsel and his expert real estate appraiser were denied; and Rail Intermodal Specialists v. General Elec., 154 F.R.D. 218 (N.D. Iowa 1994) (discovery of counsel's letters to experts were barred by the work product doctrine) There is a sea of authority on this question from which one may pluck a fish to suit one's taste. See Annotation, Protection from Discovery of Attorney's Opinion Work Product under Rule 26(b)(3), Federal Rules of Civil Procedure, 84 A.L.R. Fed. 779 § 14 (1987) and Annotation, Developments, since Hickman v. Taylor, of Attorney's "Work Product" Doctrine, 35 A.L.R. 3d, 412 (1971).

This court finds most palatable the analysis of the United States Court of Appeals for the Third Circuit in Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3rd Cir. 1984), in which that court ruled that the federal rules permitting discovery of opinions of expert witnesses and the facts upon which those opinions were based did not limit the rule restricting disclosure of attorney work product containing mental impressions and legal theories, where memorandum, containing the protected work product, were shown to the expert witness who was scheduled to testify. The Third Circuit reasoned as follows:

> [W]here the same document contains both facts and legal theories of the attorney, the adversary party is entitled to discovery of the facts. It would represent a retreat from the philosophy underlying the Federal Rules of Civil Procedure if a party could shield facts from disclosure by the expedient of combining them or interlacing them with core work product. Where such combinations exist, it will be necessary to redact the document so that full

> disclosure is made of facts presented to the expert and considered in formulating his or her opinion, while protection is accorded the legal theories and the attorney-expert dialectic. The advisory Committee Notes also recognize this need. They state, "In enforcing [the Rule 26(b)(3) protection of lawyers' mental impressions and legal theories], the courts will sometimes find it necessary to order disclosure of a document but with portions deleted." Id. at 595.

Virginia Code § 8.01-401.1 expressly provides that an expert testifying at trial may "be required to disclose the underlying facts or data on cross-examination" upon which his opinion is premised. Therefore, to the extent that any communication from counsel to its expert contains a statement of facts, then that material is discoverable, because the expert may be cross-examined on that subject at trial. See Discovery - The Successful Advocate's Advantage p. IV-32 (Va. Law Fd. CLE 1995). If the letter from defense counsel to its expert contains any statement of facts, then the letter must be edited and provided to counsel, with any portions of the letter that contain "mental impressions, conclusions, opinions, or legal theories" of the attorney edited out. Accord Lamonds v. General Motors Corp, VLW 098-3-246, (W.D.Va., Judge Michael, 1998). If a controversy develops about whether the letter has been properly edited, counsel shall send a copy of the original letter under seal to the Court to be compared to the edited copy provided to the other party's counsel.

20. Attorney-Client Privilege. "Parties may obtain discovery regarding any matter, not privileged ...." Supreme Court Rule 4:(b)(1). "Communications between lawyer and client are privileged to the end that the client be free to make a full, complete and accurate disclosure of all facts, unencumbered by fear that such true disclosure will be used or divulged by his attorney, and without fear of disclosure by any legal process." Seventh Dist. Comm. v. Gunter, 212 Va. 278, 286-87, 183 S.E.2d 713 (1971). The communication must be actually confidential and must relate to the matter about which the attorney was consulted. See generally, C. Friend, The Law of Evidence in Virginia § 7-3 (4th Ed. 1993). Supreme Court Rule 4:1(6) expressly provides that:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Each claim of privilege is document specific, and a party cannot reasonably respond to the objection nor the court reasonably rule, unless the existence and general nature of the document is disclosed. Supreme Court Rule 4:1(b)(6); see e.g., Fed.R.Civ.P. 26(b)(5); Anderson v. Torrington Co., 120 F.R.D. 82 (N.D. Ind. 1987); and In re Bieter Co., 16 F.3d 929, 940 (8th Cir. 1994). For, example, the following documents are protected by the attorney-client privilege: Letter dated, January 15, 2011, from John Doe to Edward Esquire; File memo, dated January 21, 2011, of conference between John Doe and Edward Esquire; etc.

Whether a communication is privileged is for the trial court to decide, after being apprised through preliminary inquiry, of the characterizing circumstances. 81 Am. Jur. 2D Witnesses § 363. Since the privilege drives from the inception of the attorney client relationship, "[n]o privilege attaches to an instrument by reason of its passage from an attorney to his client, or vice versa, where the instrument existed prior to the formation of the relation of attorney and client, or although coming into existence subsequently, did so from independent causes. ... It has been observed that the administration of justice could easily be defeated if a party and his counsel could -- by transferring from the one to the other important papers required as evidence in a cause -- thereby prevent the court from compelling the production of important papers on a trial. ... Although the delivery of a document by a client to his attorney may constitute a privileged communication to the attorney, records, papers, and documents which are not privileged cannot be made so by the simple expedient of delivering them to counsel." 81 Am. Jur. 2D Witnesses § 407. "Where the client is an organization, the attorney-client privilege extends to those communications between attorneys and all agents or employees of

the organization who are authorized to act or speak for the organization in relation to the subject of the communication [or the subject of the litigation]." 81 Am. Jur. 2D Witnesses § 410. On February 28, 1998, the Virginia Bar Council formally adopted the "control group" test for ex parte contacts with corporate employees. See generally Disciplinary Rule 4.2. Generally persons in authority in the corporation and persons with a lawyer may not be spoken to, whereas, low level employees, whose testimony would not be considered an admission by the corporation and all former employees may be interviewed ex parte. Virginia Law Weekly, "Making Contact" (March 9, 1998).

21. Peer Review and Quality Care Assurance Records and Treatment Protocols. "The proceedings, minutes, records, and reports of any medical staff committee, utilization review committee, or other groups described in § 8.01-581.16 together with all communications, oral and written, originating in or provided to such committees are privileged communications ...." Virginia Code § 8.01-581.17. This privilege is entity specific, so when the privilege is asserted the specific committee(s) or entities whose records are claimed to be privileged must be specifically identified, because the first question is whether the documents or communications in question originate in or were provided to a group whose activities are protected by the statute. As is the case in all privilege assertions, the documents claimed to be privileged must be identified, and in this case the group from which the documents derive must be specifically described. For example: Minutes of the medical staff executive, which is a committee created by Article IX, § 1 of the Medical Center Bylaws to review quality care issues and concerns, dated April 2, 2004.

There are differing opinions among the circuit courts as to what documents are protected by § 8.01-581.17. This court has taken an intermediate position and has held that "incident reports" and quality assurance review proceedings incident to a specific potential act of medical malpractice are protected from disclosure by the statute where made incident to an inquiry by an entity described in § 8.01-581.16. See Mangano v. Kavanaugh, 30 Va. Cir. 66 (Loudoun 1993). Such proceedings and investigations are internal, retrospective examinations undertaken to prevent a reoccurrence of a similar incident and to ensure future quality care. Such proceedings are not undertaken in the "ordinary course of business"; they are undertaken to "evaluate ... the adequacy or quality of professional services ...." If an incident report is not protected by the statutory privilege, it may still be a protected from disclosure if generated in anticipation of litigation, which requires an inquiry into the specific circumstances in which the document was generated. The documents generated by quality assurance committees, peer review committees, and entities which generally "review, evaluate, or make recommendations" about the matters categorically listed in § 8.01-581.16 (i)-(vi) are specifically given privileged status.

On the other hand, policy manuals or treatment protocols, which are generally distributed to employees and health care providers within an institution and which are intended to govern prospective conduct, are documents produced in the "ordinary course of business" and are not promulgated to "review evaluate or make recommendations" on the specific items listed in (i)-(vi); consequently, they are generally discoverable, even though their contents may not be admissible. See Johnson v. Roanoke Memorial Hospital, 9 Va. Cir. 196, 205-206 (Roanoke 1987).

22. Duty to Supplement. Rule 4:1(e) provides:

> (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness, at trial, the subject matter on which he is expected to testify, and the substance of his testimony.
>
> (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the

circumstances are such that a failure to amend the response is in substance a knowing concealment.

Seasonally generally means within at least twenty-one days.

23. Requests for Admissions. The purpose of requests for admissions is not to discover facts but rather to establish some of the material facts in a case without the necessity of formal proof at trial. Accordingly, they are regularly used to establish the authenticity of documents and background facts such as the contents of medical records, the substance of which is not in dispute. They are an excellent vehicle for limiting both the length and the issues of a trial

"A party may serve upon any other party a written request for admission ... of the truth of any matter within the scope of Rule 4:1(b) (parties may obtain discovery about any matter not privileged) set forth in the requests that relate to statements or opinions of fact or the application of law to fact." Supreme Court Rule 4:11. This language is lifted verbatim from Federal Rule of Civil Procedure 36, so the cases and discussions under the federal rule are instructive, since there are few Virginia cases on the point. The rule "eliminates the requirement that the matters be 'of fact.' This change [1970] resolves the conflicts in the court decisions as to whether a request to admit matters of 'opinion' and 'matters involving 'mixed law and fact' is proper under the rule.'" Advisory Committee Note of 1970 to Amended Rule 36, 4A Moore's Federal Practice § 36.01[5]. See generally 4A Moore's Federal Practice § 36.04[4] and Annot., Permissible Scope, Respecting Nature of Inquiry, of Demand for Admissions under Modern State Civil Rules of Procedure, 42 A.L.R.4th 489 (1985). A party may serve a request for admissions even though he has the burden of proving the matters asserted. 23 Am. Jur. 2D Depositions and Discovery § 184. "[W]hen a party is served with requests for admission regarding matters he considers 'in dispute,' the proper response is nonetheless an answer not an objection. The purpose of such a request is to determine whether the answering party is prepared to admit the matter or considers it a genuine issue for trial." 4A Moore's Federal Practice § 36.04[8]. "Under Rule 4:11(a) a party upon whom requests for admission are served has a 'good faith' duty to 'specify so much of [a request] as is true and qualify or deny the remainder.'" Erie Ins. Exchange v. Jones, 236 Va. 10, 14, 372 S.E.2d 126 (1988) (Defendant contested that the accident caused the injury). Requests for admissions as to issues such as the medical necessity of expenses and causation are permitted requests.

Rule 4:11(a) specifies in detail how a denial is made or a response qualified:

> The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made a reasonable inquiry and that the information known or readily available by him is insufficient to enable him to admit or deny.

See generally 23 Am. Jur. 2D Depositions and Discovery §§ 185-192.

"If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 4:11, and if the party requesting the admission thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees." Supreme Court Rule 4:12(c).

24. Deposition Procedure. If there is a dispute about the sequence of depositions, for example, which party will be deposed first, the defendant will first take the Plaintiff's deposition, and then the Plaintiff will take the Defendant's deposition. See 23 Am. Jur. 2D Depositions and Discovery § 8. If there is a dispute about

the length of a deposition, the deposition will begin at 9:00 a.m. and conclude at 5:00 p.m., with an hour break for lunch and recesses at mid-morning and midafternoon like in a trial. No deposition may last more than one day without leave of court (A day is 9 - 5 as set forth above). If a deposition starts after 10:00 a.m., and there is a dispute about when it will end, the deposition will conclude at 6:00 p.m.

Corporate Designations. When a deposition notice is served on a corporation, association, partnership, or government agency, to designate persons to testify "as to matters known or reasonably available to the organization," pursuant to Rule 4:5(b)(6). See American Safety Cas. Ins. v. C. G. Mitchell Constr., 268 Va. 340, 352 (2004). "If the persons designated by the corporation do not possess personal knowledge of the matters set forth in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation." U. S. v. Taylor, 155 F.R.D. 356, 361 (M.D.N.C. 1996). Producing a witness ignorant of the specific matters designated is tantamount to producing no witness, and can lead to sanctions. See Resolution Trust Corp. v. Southern Union Co., 985 F.2d 196 (5th. Cir. 1993). If no one in the organization has knowledge about the subject matters specified in the notice, say so in a written response to the notice. E.g., No one in the corporation has any knowledge about the conversation concerning the price of the grain auger, because John Smith, who was then vice-president of sales, left the corporation on July 1, 2007, and no one else has any knowledge of conversations between our company and your purchasing agent, and we cannot produce Mr. Smith. The last address that we have for Mr. Smith is ___.

Conduct. All counsel and the parties should conduct themselves with the same courtesy and respect for the rules that are required in the courtroom during a trial. If you have a problem with behavior, consider bringing both the transcript and a copy of the tape of the relevant portions of the deposition to court when you argue your motion. After a deposition has commenced, "conferences between the witness and [his] lawyer are prohibited both during the deposition and during recesses" except where the purpose of the conference is to decide whether to assert a privilege, in which case the conferring attorney shall state on the record the purpose of the conference, and the decision reached with respect to the assertion of the privilege. Hall v. Clifton Precision, 150 F.R.D. 525, 529 (E.D. Penn. 1993) (This is an excellent discussion of deposition practices, and a copy may be obtained from the Court). Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner.

Place. The locality where depositions are to be taken is governed by Supreme Court Rule 4:5(a1). The actual place in a locality at which the deposition is taken is usually selected and arranged by the person taking the depositions. However, as a matter of professional courtesy and longstanding local custom, the depositions of physicians who have been designated as expert witnesses are taken at the physician's place of business. Absent an agreement to the contrary, a plaintiff, who is not a resident of the jurisdiction in which he has filed a suit, must come to the jurisdiction in which he has filed the suit for his deposition, that is he must come to Winchester or to Front Royal.

Costs. Supreme Court Rule 4:1(b)(C) provides that: "Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent and his expenses incurred in responding to discovery ...." This means that the party seeking discovery pays the expert's reasonable costs incident to the expert's preparing for and attending the deposition. Where the reasonableness of the fee is an issue, such as how much to pay the witness per hour, that matter should be resolved in advance of the deposition pursuant to the rule, because generally after the deposition is taken the amount owed to the expert will be determined as a matter of contract law among the parties.

Objections. "Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time." Supreme Court Rule 4:7(d)(3)(A). The only objections that should be raised at a discovery deposition are those involving privilege against disclosure, some matter that may be remedied at the time, such as the form of the question

(compound question, argumentative, asked and answered, or ambiguous, this latter objection is frequently improperly used, and it cannot be used as a foil to interrupt the flow of an examination or to alert the witness to a potential problem), or that the question is beyond the scope of discovery. All objections should concisely state the problem with the question so the defect may be readily cured and must not suggest answers or otherwise coach the deponent. When depositions are introduced at trial the admissibility of the testimony is governed by the rules of evidence, so if the expert did not state his opinions to a reasonable degree of scientific probability at his deposition, if that objection is made at trial, the expert's opinion will be excluded. Impression and speculation testimony is permitted in discovery, but it is not admissible at trial, because it has no probative value and is not relevant. State Farm Mut. Ins. Co. v. Kendrick, 254 Va. 206, 208 (1997). The only reason to direct a witness not to answer is to preserve privileged information. See Rule 4:5(c).

De bene esse depositions are creatures of consent or court order, and they are taken because a witness, which is usually an expert witness, cannot attend the trial. There is no statute or Rule of Court specifically authorizing a de bene esse deposition. Since all depositions are governed by the Rules of Court, any deposition of a witness taken outside the Commonwealth may potentially be used at trial pursuant to Rule 4:7(a)(4); therefore, it is potentially a de bene esse deposition as that term has evolved.

25. Insurance agreements are clearly discoverable. Rule 4:1(b).

26. Effect of invocation of Fifth Amendment Privilege in Response to Discovery. There is no blanket Fifth Amendment right to refuse to answer questions in civil proceedings, so the privilege must be "must be specifically claimed on a particular question and the matter submitted to the court for its determination of the validity of the claim. North American Mortg. Investors v. Pomponio, 219 Va. 914, 918-920 (1979). Therefore, when the privilege is asserted in a deposition the pertinent questions should be asked of the witness, who may asset the Fifth Amendment to each pertinent question; then a transcript can be prepared so that the court can consider each question to determine whether the privilege against self-incrimination applies.

The first question to decide is whether the previous transaction is one that may potentially give rise to both criminal prosecutions and civil remedies. If it is determined that the previous transaction is one in which criminal charges could potentially arise, the second question to decide is whether the danger of prosecution is reasonable or so remote as to be speculative.

> To satisfy the Hoffman test and sustain the privilege, it is necessary: ". . . (1) That the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime . . . and (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case. It is in this latter connection, the credibility of the suggested connecting chain, that the reputation and known history of the witness may be significant. "United States v. Coffey, 198 F.2d 438, 440 (3d Cir. 1952).
>
> Pomponia, supra at 919..

If the Hoffman test is met, then the privilege should be sustained unless the statute of limitations has run on the potential criminal activity, in which case there is no reasonable fear of prosecution; therefore, the Fifth Amendment Privilege against self-incrimination may not be asserted. Burbach v. Hystad, 68 Va. Cir. 181, 183 (2005); and U. S. v. Aelitis, 855 F. Supp. 1114, 1119 (C.D. Cal. 1994) (5th Amendment Privilege did not attach to tax years on which the statute of limitations had run). The party asserting that the statute of limitations has run has the burden of proof on that issue.

Virginia Code § 8.01-223.1 provides that: "In any civil action the exercise by a party of any constitutional protection shall not be used against him." This statute has superseded the "sword and shield" doctrine, so invocation of the Fifth Amendment has no adverse effect on the invoker's affirmative claims.

Travis v. Finley, 36 Va. App. 189, 548 S.E.2d 906 (2001). See generally Barnes and Powers, Comments on the Fifth Amendment and its Use in Family Law Cases, Virginia Lawyer (Feb. 2002).

27. Independent Medical Examination. The costs of an independent physical or mental examination of a party pursuant Rule 4:10 is paid by the party requesting the examination. This includes the reasonable cost of transportation, which if by private vehicle is reimbursed at the rate of .56 per mile and meals (breakfast and lunch a maximum of $12.00 per meal per person and dinner a maximum of $20.00 per person necessary for the trip). Where the exam is not in Winchester, it is customary for a spouse to accompany a spouse and for a parent to accompany a child, and for the costs of the companion, which are usually just a meal or two, to be paid by the party requesting the examination. Absent a showing of good cause, a party's attorney may not be present at the physical or mental examination of a party. The presence of a lawyer for the examined party injects a partisan character into what should be a wholly objective inquiry, and an attorney's presence may interfere with the unimpeded communication required during a psychiatric or medical examination.

28. Identification of Scientific Authorities. When a party is required to identify written authorities upon which an expert is relying either pursuant to a discovery request or pursuant to Virginia Code § 8.01-401.1, each statement relied upon or to be read to the jury shall be specifically identified by providing the complete name of the article, the complete name and date of the publication in which the article or statement appears, and the pages on which the statement appears. Where the statement is to be read to the jury, a copy of each complete page containing the statements with the statements to be read indicated by underlining will be provided. If requested by the opposing party, a complete copy of the article or chapter in which the statement appears shall also be provided.