

# **PROFESSIONALISM & SANCTIONS**

## **Pupilage Group 1**

### **I'Anson-Hoffman Inn of Court**

#### **Norfolk Yacht Club**

#### **Norfolk, Virginia**

**November 16, 2016**

- 7:30 Introduction: Sandy Waterman
- 7:35 Inherent & Constitutional: Ann Larkin
- 7:40 Summary Contempt: Heather Lewis
- 7:50 Certification/Representation: Ben Hahn
- 8:15 Discovery Rules: Elizabeth Bircher
- 8:25 Questions: Sandy Waterman
- 8:30 Adjourn

# **PROFESSIONALISM & SANCTIONS**

## **I. INHERENT & CONSTITUTIONAL [PLENARY POWER SANCTIONS]**

### **A. Virginia Supreme Court:**

1. *In re Moseley*, 273 Va. 688, 694-99 (2007)(affirming independent inherent and constitutional authority to regulate lawyer conduct by revoking/suspending privilege to practice within circuit and adequacy of disqualification hearing notice).
2. *Nusbaum v. Berlin*, 273 Va. 385, 398-401 (2007) inherent power to supervise and discipline attorney misconduct does not include imposing sanction award of attorney's fees and party costs).
3. *Judicial Inquiry & Review Comm'n of Va. v. Peatross*, 269 Va. 428, 447-50 (2005)(inherent right to remove attorney from case for misconduct, legal errors are not canon violations, and substandard professionalism is not misconduct).

## **II. VA. CODE §18.2-456 [SUMMARY CONTEMPT POWER SANCTIONS]**

### **A. Statute:**

“The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:

1. Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;
2. Violence, or threats of violence, to a judge or officer of the court, or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court;
3. Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;
4. Misbehavior of an officer of the court in his official character; and/or
5. Disobedience or resistance of an officer of the court, juror, witness or other person to any lawful process, judgment, decree or order of the court.” (underscoring added).

B. Virginia Supreme Court:

1. *Ragland v. Scoggin*, 291 Va. 282, 289-90 (2016)(reversing monetary sanctions for erroneous jury instruction submission without intent).
2. *DRHI, Inc. v. Hanback*, 288 Va. 249, 254-55 (2014)(reversing judgment of civil contempt and compensatory fine predicated on indefinite order).
3. *Scialdone v. Commonwealth*, 279 Va. 422, 442-48 (2010)(reversing conviction for “indirect” contempt for denial of notice, hearing, and counsel).
4. *Petrosinelli v. People for the Ethical Treatment of Animals, Inc.*, 273 Va. 700, 706-09 (2007)(reversing monetary sanction for no violation of any “express” order).

**III. VA. CODE §8.01-271.1 [CERTIFICATION/REPRESENTATION SANCTIONS]**

A. Statute:

“The signature of an attorney or party constitutes a certificate by him that:

1. He has read the pleading, motion, or other paper;
2. 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
3. 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.

An oral motion made by an attorney or party in any court of the Commonwealth constitutes a representation by him that:

1. 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
2. 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, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or

parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper or making of the motion, including a reasonable attorney's fee.” (underscoring added).

B. Virginia Supreme Court:

1. *Ragland v. Scoggin*, 291 Va. 282, 289-92 (2016)(reversing monetary sanctions for “inadvertent mistake,” despite requesting erroneous jury instruction constituting “oral motion” under statute).
2. *Environment Specialist, Inc. v. Wells Fargo Bank Northwest, N.A.*, 291 Va. 111, 116-21 (2016)(reversing attorney’s fees and costs sanction for “unprofessional” refusal to extend opposition deadline).
3. *Kambis v. Considine*, 290 Va. 460, 466-69 (2015)(affirming attorney’s fees and costs sanction against lawyer and party for found and admitted primary intent to intimidate and injure by litigation for vengeful and vindictive reasons, despite all pleadings being well grounded in fact and law and despite intimidation and injury not being among the statute’s non-exhaustive enumerated examples of improper purpose).
4. *EE Mart v. F.C., L.L.C.*, 289 Va. 282, 285-87 (2015)(reversing attorney’s fees sanction predicated on conduct before sanctionable act, not in same action and/or not in same court).
5. *Norfolk So. Ry. Co. v. E.A. Breeden, Inc.*, 287 Va. 456, 468-69 (2014)(Lemons, J.)(affirming no violation where all filings grounded in fact and law and without any improper purpose, despite “trial strategy” not to call any defense witnesses and not to contest some affirmative defenses pleaded).
6. *Shebelskie v. Brown*, 287 Va. 18, 25-33 (2014)(reversing attorney’s fees and costs sanctions predicated on order “not express in definite terms,” “reasonable belief” under existing law, and oral argument without oral or written motion).
7. *Northern Virginia Real Estate, Inc. v. Martins*, 283 Va. 86, 102-18 (2012)(Lemons, J.)(affirming joint and several attorney’s fees and costs sanction against lawyer and party for pleading and prosecution of multiple frivolous wildly speculative claims without “reasonable belief” in fact or law, with moving party bearing proof burden of sanctions propriety, terms, and quantum; sanctioned party bearing proof burden of fault allocation; and court suspending nonsuit order to retain sanctions jurisdiction).
8. *Johnson v. Woodard*, 281 Va. 403, 408-13 (2011)(reversing attorney’s fees and costs sanction against non-party removal petition signatories, despite nonsuit order entered specifically reserving sanctions jurisdiction).

9. *McNally v. Rey*, 275 Va. 475, 480-82 (2008)(reversing sanctions of attorney's fees, expert fees, and litigation expenses predicated on state court filing of witness and exhibit list before federal court filing of bankruptcy petition).
10. *Williams & Connolly, L.L.P. v. People for the Ethical Treatment of Animals, Inc.*, 273 Va. 498, 509-22 (2007)(affirming sanctions of monetary award and *pro hac vice* admission revocation for no "reasonable belief" in fact or law re "frivolous" motion to recuse alleging unethical conduct and for improper purpose of deriding by gratuitous contemptuous language and distorted representations).
11. *Switzer v. Switzer*, 273 Va. 326, 331-34 (2007)(reversing "ultimate" sanction of dismissals of appeals of right predicated on non-payment violation of prior appellate sanctions order in another appeal).
12. *Ford Motor Co. v. Benitez*, 273 Va. 242, 249-53 (2007)(affirming monetary sanction for pleading affirmative defenses with no "reasonable belief" in fact after discovery during prior nonsuited action).
13. *Taboada v. Daly Seven, Inc.*, 272 Va. 211, 214-16 (2006)(imposing *sua sponte* fine and suspension for filing petition with improper purpose to ridicule and deride by repeated strong intemperate language).
14. *Williamsburg Peking Corp. v. Kong*, 270 Va. 350, 354-55 (2005)(finding jurisdiction to consider pending sanctions motion for *pro se* litigant discovery abuses within 21 days of nonsuit order entry).
15. *Flora v. Shulmister*, 262 Va. 215, 220-23 (2001)(reversing monetary sanction where "reasonable belief" autopsy report was discoverable only as expert report).
16. *Flippo v. CSC Assocs., III, L.L.C.*, 262 Va. 48, 65-67 (2001)(affirming monetary sanctions where no "reasonable belief" to plead fraud and mutual mistake).
17. *Gilmore v. Finn*, 259 Va. 448, 465-69 (2000)(reversing compensatory sanction where "reasonable belief" in "novel legal theory" of complaint, despite arguable political motivation by Governor).
18. *Payman v. Lee County Comm. Hosp.*, 2005 WL 735886, \*2 n.1 (W. D. Va. Mar. 31, 2005)(federal court can enforce §8.01-271.1 sanctions in removed action, and can impose FRCP 11 sanctions for state pleading advocated in federal court).

#### IV. VA. S. CT. RULE 4:12 [FAILURE TO MAKE DISCOVERY SANCTIONS]

##### A. Rules:

##### 1. *Rule 4:12(a)(4) Award of Expenses Motion.*

If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

##### 2. *Rule 4:12(b): Failure to Comply with Order.*

As sanctions, court “may make such orders in regard to the failure as are just, and among others the following:

- a. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
- c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
- d. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
- e. Where a party has failed to comply with an order under Rule 4:10(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination; and
- f. In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other

circumstances make an award of expenses unjust.” (underscoring added).

3. *Rule 4:12(c): Expenses on Failure to Admit.*

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 admissions 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.

4. *Rule 4:12(d): Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspections.*

As sanctions, the court “may make such orders in regard to the failure as are just, and among others:

- a. [I]t may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this Rule; and
- b. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust (underscoring added).

B. Virginia Supreme Court:

1. *Piney Meeting House Invs., Inc. v. Hart*, 284 Va. 187, 196-97 (2012)(reversing attorney’s fees sanction under *Rule 4:12(c)* predicated on movant’s underlying discovery request being improper under *Rule 4:11*).
2. *Nolte v. MT Tech. Enters., LLC*, 284 Va. 80, 92-95 (2012)(Lemons, J.)(affirming discovery abuse sanctions under *Rule 4:12(b)* of default judgment and of defense liability case-in-chief preclusion, and reversing prohibitions of defense cross-examination and damages evidence as too harsh).
3. *Landrum v. Chippenham & Johnson-Willis Hosps., Inc.*, 282 Va. 346, 349-56 (2011)(affirming exclusion of expert under *Rule 4:12(b)* for non-disclosure violating scheduling and hearing orders).
4. *James v. James*, 263 Va. 474, 479-84 (2002)(reversing monetary fine and jail sentence under *Rule 4:12(b)* awarded more than 21 days after nonsuit on motions pending before nonsuit and on hearing ordered within 21 days

of nonsuit, and implying no sanctionable contempt permitted for failure to submit to or produce for physical or mental examination).

5. *Tonti v. Akbari*, 262 Va. 681, 685-87 (2001)(reversing attorney’s fees award as sanctions not “routine matter” and *Rule* 4:12(a) not authority for sanctions for moving to quash non-party subpoena).
6. *Brown v. Black*, 260 Va. 305, 308-12 (2000)(Lemons, J., concurring) (reversing severe sanction of case dismissal under *Rule* 4:12(d) for lack of prior discovery order).
7. *Walsh v. Bennett*, 260 Va. 171 (2000)(Lemons, J., dissenting)(reversing “premature” sanction of striking expert under *Rule* 4:12(b) before court-ordered discovery deadline).