Best Practices in Civil Litigation

Family Feud

George Mason Inn of Court

11/18/2009

ITINERARY FOR THE NOVEMBER 18, 2009 MEETING OF THE GEORGE MASON AMERICAN INN OF COURT

Best Practices for a Civil Trial: Family Feud

JUDGE FAMILY:

Judge Stanley P. Klein
FAIRFAX CIRCUIT COURT
Fairfax, VA

Judge Michael Cassidy
FAIRFAX GENERAL DISTRICT COURT
Fairfax, VA

Judge Anthony Trenga
EASTERN DISTRICT OF VIRGINIA
Alexandria, VA

Judge Jeri K. Somers
CIVILIAN BOARD OF CONTRACT APPEALS
Washington, DC

GUESTS:

Svitlana Anatoliyivna Holub, Appellate Court of Kyiv Region
Mykola Petrovych Hryhorenko, Appellate Court of Rivne Oblast
Eduard Hennadiyovych Kaznacheyev, Petrovskiy District Court of Donetsk
Vadym Anatoliyovych Kopylyan, Head of Department of the State Execution Commission
Oleksandr Oleksandrovych Lytvynenko, Dnipropetrovsk Regional Appellate Court

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STUDENT PRESENTERS:

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Elizabeth Kohut
Richard Peterson
Amanda Stone

I. Best Practices Pretrial: ***Panel Discussion (7:30 pm – 7:50 pm)***
II. Best Practices Trial: ***Panel Discussion (7:50 pm – 8:10)***
III. Best Practices Post-Trial: ***Panel Discussion (8:10 pm – 8:30 pm)***

I. BEST PRACTICES PRETRIAL

A. Topics

1. Purpose of Discovery

a. Learn about your case

b. Learn about opponent's case

c. Limit factual disputes

d. Prepare for trial

e. Encourage settlement

2. Tools of Discovery

a. Interrogatories (Rule 4:8)

b. Requests for Production of Documents (Rule 4:9)

c. Requests for Admission (Rule 4:11)

d. Depositions (Rule 4:7)

e. Informal (witness interviews, fact gathering, internet research)

3. Motions in limine

a. Preparation

b. Timing

B. Resources

1. Purpose of Discovery

In federal court, a party may not serve discovery before the parties have met and conferred under Rule 26(d). Virginia allows service of Interrogatories "without leave of court . . . after commencement of the action and upon any party with or after service of the complaint upon that party." Rule 4:8. Rule 4:1(b)(1) of the Supreme Court of Virginia states that "[p]arties may obtain

discovery regarding any matter, not privileged, which is relevant to the subject matter."

The purposes of the discovery rules are "to aid in the dispatch of litigation, to encourage the settlement of cases, to reduce the issues so as to shorten time consumed in trial and to prevent surprise." *See City of Portsmouth v. Cilumbrello*, 204 Va. 11, 14 (Va. 1963). Discovery shall be limited by the court only if it determines that (1) the discovery sought is unreasonably cumulative or duplicative or obtainable from some other source that is more convenient, (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought, or (3) the discovery is unduly burdensome or expensive. *See* Supreme Court of Virginia Rule 4:1(b)(1).

In the "modern view," pretrial discovery exists "to prepare the parties for trial and to encourage out of court settlements of cases in which there is no substantial or irreconcilable dispute between the parties. A party can find out the existence of witnesses and the substance of their testimony." *Runions v. Norfolk & Western Railway Co.*, 51 (Va. Cir. Ct. 2000) (quoting Bryson, W. Hamilton, Bryson on Virginia Civil Procedure (3d ed.), The Michie Co., Charlottesville, 1997, at 327-28).

"The framers of the. . . rules intended that discovery would give each party rapid and low-cost access to the truth. The hope was that, as a result, cases would be settled or tried speedily and inexpensively. It is time for lawyers to remind themselves of what discovery is supposed to be about." *Id*. (quoting Schwarzer, William W., "Mistakes Lawyers Make in Discovery," The Litigation Manual: Pretrial (3d ed.), Section on Litigation, American Bar Association, 1999, at 137).

Ring v. Mikris, Inc., 1996 WL 1065660 (Va. Cir. Ct. 1996) (In arriving at its decision on the present motion, this court was mindful of the various purposes of discovery: clarifying the issues between the parties; ascertaining facts relative to those issues; and obtaining the fullest possible knowledge of the facts and issues before trial. *See Hickman v. Taylor*, 329 U.S. 495, 501 (1947). Given the importance of the discovery process and because work product protection hinders "the investigation of the truth by cloaking otherwise relevant information, [the privilege] should...be given the narrowest construction consistent with its purpose." *Pete Rinaldi's Fast Foods v. Great American Ins.*, 123 F.R.D. 198, 201 (M.D.N.C. 1988). The court therefore emphasizes that each case must be decided on its own particular facts, and any limitation of discovery should be granted only after thorough and critical analysis of the case.").

2. Tools of Discovery

Rule 4:8.[1] Interrogatories. Only thirty (30). Remember option to produce business records. 21 day response time.

Rule 4:9.[2] Production by Parties of Documents, Electronically Stored Information and Things; Entry on Land for Inspection and Other Purposes; Production at Trial. No numeric limit. 21 day response time.

Rule 4:11.[3] Requests for admission. 21 day response time, else "the matter is admitted . . ."

Rule 4:5.[4] Depositions upon Oral Examination. Remember (g) - Failure to attend or to serve subpoena; Expenses: "the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees."

3. Motions in Limine

"[T]he Court observes that a motion in limine aids the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial. Harward v. Comm., 5 VaApp. 468, 474, 364 S.E.2d 511, 514 (1988)(noting motions in limine narrow issues, prevent trial delay, avoid expense, and promote judicial efficiency);..." McCarthy v. Atwood, 67 Va. Cir. 237 (2005)(Portsmouth; Judge Davis).

Motions in limine are appropriate for the sort of issues that should be ruled upon determinatively before trial so the trial judge can insulate the jury from inadmissible and prejudicial evidence during opening statements and the examination of witnesses. See Park v. Robinson, 46 Va. Cir. 266 (1998)(Fairfax; Judge Klein).

Evidence that is irrelevant is inadmissible. See Bunting v. Commonwealth, 208 Va. 309, 314, 157 S.E.2d 204, 208 (1967)(holding that "[e]vidence of collateral facts or those incapable of affording any reasonable presumption or inference on matters in issue, because too remote or irrelevant, cannot be accepted in evidence"). A trial court has no discretion to admit clearly

[1] *Compare* Fed. R. Civ. P. 33 (Interrogatories).
[2] *Compare* Fed. R. Civ. P. 34 (Requests for Production).
[3] *Compare* Fed. R. Civ. P. 36 (Requests for Admission).
[4] *Compare* Fed. R. Civ. P. 30 (Depositions).

inadmissible evidence. See Riverside Hosp., Inc. v. Johnson, 272 Va. 518, 529, 636 S.E.2d 416, 421-422 (2006)(citations omitted).

"While evidence may be relevant in that it tends to establish the proposition for which it is offered, in order to be admissible, it must also be material, meaning that the evidence tends to prove a matter that is properly at issue in the case." Brugh v. Jones, 265 Va. 136, 139, 574 S.E.2d 282, 284 (2003). Furthermore, "otherwise admissible evidence may nonetheless be excluded based upon specific rule or other statutory or common law considerations." Id.

Even where a party could point to some remote relevance, such evidence or even the mention of such evidence can be far more prejudicial than probative. See Gamache v. Allen, 268 Va. 222, 227-228, 601 S.E.2d 598, 601 (2004); see also Coe v. Commonwealth, 231 Va. 83, 87, 340 S.E.2d 820, 823 (1986)("[W]hen relevant evidence is offered which may be inflammatory and which may have a tendency to prejudice jurors against the defendant, its relevancy 'must be weighed against the tendency of the offered evidence to produce passion and prejudice out of proportion to its probative value.'")(citation omitted).

Evidence that tends to provide a fact-finder with an improper basis for reaching its decision should be precluded. See, e.g., Shelby Ins. Co. v. Kozak, 255 Va. 411, 417, 497 S.E.2d 864, 868-869 (1998)(prohibiting a reference to alcohol history as being unduly prejudicial where alcohol played no role in the case).

Evidence that would likely mislead or confuse a jury should be excluded. See Holley v. Pambianco, 270 Va. 180, 185, 613 S.E.2d 425, 428 (2005)("The statistical evidence was so misleading...."; "We conclude that raw statistical evidence is not probative of any issue in a medical malpractice case and should not be admitted").

Opposing party may call witness X to offer lay opinion testimony in an attempt to evade the Scheduling Order requirements for expert testimony. In Virginia, lay opinion is generally inadmissible under Virginia law. See Bond v. Commonwealth, 226 Va. 534, 537, 311 S.E.2d 769, 771 (1984); see generally Davis v. Souder, 134 Va. 356, 114 S.E.2d 605 (1922)(opinions of witnesses are in general inadmissible and can only testify as to facts, not opinions or conclusions based upon facts).

Virginia Highlands Airport Authority v. Singleton Auto Parts, Inc., 277 Va. 158, 170, 670 S.E.2d 734, 741 (2009)(trial court erred in denying motion in limine and allowing party to present an inappropriate measure of damages).

II. BEST PRACTICES TRIAL

A. Topics

1. How to address bad facts.

a. Motions in Limine

b. Downplay

c. Inoculate

d. Ignore

2. Surprise answers.

a. Keep your poker face

b. Refresh recollection (Va. Code 8.01-403 and 8.01-404)

c. Consider treating witness as hostile

d. Create a distraction

3. Whether to waive trial by jury.

a. Complicated facts

b. Sympathy for opposing party

c. Unfavorable client appearance

d. Ugly facts

e. Save costs

B. Resources

1. Address Bad Facts

Quentin Brogdon, Admissibility of Criminal Convictions in Civil Cases, 61 Tex. B. J. 1112, 1118 (1998) (stating "[Y]ou can preemptively innoculate the jury against [the] impact [of a witness's criminal conviction] by mentioning it to the jury before the other party introduces the evidence."); Douglas S. Rice & Ellen L. Leggett,

Empirical Study Results Contradict Sponsorship Theory, Inside Litig., Aug. 1993, at 20 (referring to preemptive introduction of "case facts detrimental to [a party's] own side" as "inoculation").

2. Surprise Answers

Avoid with preparation. *See* 29828 NBI-CLE 1 ("Your witness should not be hearing the questions for the first time at trial. Surprise questions results in surprise answers").

Refreshing Recollection. *See* Charles E. Friend, *The Law of Evidence in Virginia* 76 (1993)

> Beyond the requirement that the opposing party must be given an opportunity to examine the material used to refresh recollection, there seems to be little or no restriction on its use, except that the courts repeatedly emphasize that the memory must in fact be refreshed, and that the witness must, after examining the material, be able to speak from his or her own refreshed memory, and not from the source of the refreshment. It appears that the witness need not even put aside the material, but may continue to refer to it while testifying.

Treat as Hostile. *See Teleguz v. Commonwealth*, 237 Va. 458 (2007)

With respect to the right to attack the testimony of an adverse witness, Code § 8.01-401(A) states, "[a] party called to testify for another, having an adverse interest, may be examined by such other party according to the rules applicable to cross-examination." This rule applies to any person who has an adverse interest, even if that person is not a party to the litigation. *****722*** *Hegwood v. Virginia Natural Gas, Inc.,* 256 Va. 362, 368, 505 S.E.2d 372, 376 (1998) (citing *Butler,* 186 Va. at 431-32, 43 S.E.2d at 4). In addition, a person may be considered a hostile witness if his testimony surprises the party who called the person to testify at trial. *See Butler,* 186 Va. at 434, 43 S.E.2d at 5. The rules of cross-examination apply to the examination of a witness who has been deemed hostile or who has an adverse interest. Code § 8.01-401(A); *Butler,* 186 Va. at 435, 43 S.E.2d at 6.

3. Waiver of Jury Trial

VA Const. Art. I sec. 11

Section 11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

Virginia Code § 8.01-336. Jury trial of right; waiver of jury trial; court-ordered jury trial; trial by jury of plea in equity; equitable claim.

> A. The right of trial by jury as declared in Article I, Section 11 of the Constitution of Virginia and by statutes thereof shall be preserved inviolate to the parties.
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> B. Waiver of jury trial. - In any action at law in which the recovery sought is greater than $100, exclusive of interest, unless one of the parties demands that the case or any issue thereof be tried by a jury, or in a criminal action in which trial by jury is dispensed with as provided by law, the whole matter of law and fact may be heard and judgment given by the court.
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> C. Court-ordered jury trial. - Notwithstanding any provision in this Code to the contrary, in any action asserting a claim at law in which there has been no demand for trial by jury by any party, a circuit court may on its own motion direct one or more issues, including an issue of damages, to be tried by a jury.
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> D. Trial by jury of plea in equity. - In any action in which a plea has been filed to an equitable claim, and the allegations of such plea are denied by the plaintiff, either party may have the issue tried by jury.
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> E. Suit on equitable claim. - In any suit on an equitable claim, the court may, of its own motion or upon motion of any party, supported by such party's affidavit

at the case will be rendered doubtful by conflicting evidence of another party, direct an issue to be tried before an advisory jury.

(Code 1950, §§ 8-208.21, 8-211, 8-212, 8-213, 8-214; 1954, c. 333; 1973, c. 439; 1974, c. 611; 1975, c. 578; 1977, c. 617; 2005, c. 681.)

Virginia Supreme Court Rule – 3:21

Jury Trial of Right.

(a) Jury Trial Situations Unchanged. The right of trial by jury as declared by the Constitution of Virginia, or as given by an applicable statute or other authority, is unchanged by these rules, and shall be implemented as established law provides. Established practice for the trial and decision of equitable claims by the judge alone shall be continued.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury in the complaint or by (1) serving upon other parties a demand therefore in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to the issue, and (2) filing the demand with the trial court. Such demand may be endorsed upon a pleading of the party. The court may set a final date for service of jury demands. Leave to file amended pleadings shall not extend the time for serving and filing a jury demand unless the order granting leave to amend expressly so states.

(c) Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. Absent leave of court for good cause shown, the failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury.

Virginia Supreme Court Rule – 3:22

Trial by Jury or by the Court.

(a) By Jury. When trial by jury has been demanded as provided in Rule 3:21, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury; or (2) the court upon motion or of its own initiative finds that a right of trial by jury on some or all of those issues does not exist under applicable law.

(b) By the Court. Except as otherwise provided in this Rule, issues not demanded for trial by jury as provided in Rule 3:21, and issues as to which a right of trial by jury does not exist, shall be tried by the court.

(c) Statutory Jury Rights in Certain Equitable Claims.

(1) In an equitable claim where no right to a jury trial otherwise exists, where impaneling of an advisory jury pursuant to Code § 8.01-336(E) to hear an issue will be helpful to the court concerning disputed fact issues, such a jury may be seated. Decision on such claims and issues shall be made by the judge.

(2) Where a jury trial on a defendant's plea in an equitable claim is authorized under Code § 8.01-336(D), trial of the issues presented by the plea shall be by a jury whose verdict on those issues has the same effect as if trial by jury had been a matter of right.

(d) Party Consent to Jury. As to any claim not triable of right by a jury, the court, with the consent of the parties, may (i) order trial of any claim or issue with an advisory jury or, (ii) a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

(e) Trial by Mixed Jury and Non-Jury Claims. In any case when there are both jury and non-jury issues to be tried, the court shall adopt trial procedures and a sequence of proceedings to assure that all issues properly heard by the jury are decided by it, and applicable factual determinations by the jury shall be used by the judge in resolving the non-jury issues in the case.

III. BEST PRACTICES POST TRIAL

A. Topics

1. Whether to file a Motion for Reconsideration?

2. Whether to appeal.

3. Other issues

a. Remittitur

b. Collection/Garnishment

c. Organization and file closeout

(i) Storage Policy

(ii) Closing Letter

(iii) Trust Account

B. Resources

1. Motion for Reconsideration

Virginia Supreme Court Rule 1:1.[5] Finality of Judgments, Orders and Decrees

All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits hereinafter prescribed for applying for a writ of error. The date of entry of any final judgment, order, or decree shall be the date the judgment, order, or decree is signed by the judge.

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[5] *Compare* Fed. R. Civ. P. 59(e).
(e) Motion to Alter or Amend a Judgment.
A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

2. Appeal

Virginia Code § 8.01-670. In what cases awarded.

A. Except as provided by § 17.1-405, any person may present a petition for an appeal to the Supreme Court if he believes himself aggrieved:

1. By any judgment in a controversy concerning:

a. The title to or boundaries of land,

b. The condemnation of property,

c. The probate of a will,

d. The appointment or qualification of a personal representative, guardian, conservator, committee, or curator,

e. A mill, roadway, ferry, wharf, or landing,
f. The right of the Commonwealth, or a county, or municipal corporation to levy tolls or taxes, or

g. The construction of any statute, ordinance, or county proceeding imposing taxes; or

2. By the order of a court refusing a writ of quo warranto or by the final judgment on any such writ; or

3. By a final judgment in any other civil case.

B. Except as provided by § 17.1-405, any party may present a petition for an appeal to the Supreme Court in any case on an equitable claim wherein there is an interlocutory decree or order:

1. Granting, dissolving or denying an injunction; or

2. Requiring money to be paid or the possession or title of property to be changed; or

3. Adjudicating the principles of a cause.

C. Except in cases where appeal from a final judgment lies in the Court of Appeals, as provided in § 17.1-405, any party may present a petition pursuant to § 8.01-670.1 for appeal to the Supreme Court.

(Code 1950, § 8-462; 1977, c. 617; 1984, c. 703; 1997, c. 801; 2002, c. 107; 2005, c. 681.)

Virginia Code § 8.01-383.1. Appeal when verdict reduced and accepted under protest; new trial for inadequate damages.

A. In any action at law in which the trial court shall require a plaintiff to remit a part of his recovery, as ascertained by the verdict of a jury, or else submit to a new trial, such plaintiff may remit and accept judgment of the court thereon for the reduced sum under protest, but, notwithstanding such remittitur and acceptance, if under protest, the judgment of the court in requiring him to remit may be reviewed by the Supreme Court upon an appeal awarded the plaintiff as in other actions at law; and in any such case in which an appeal is awarded the defendant, the judgment of the court in requiring such remittitur may be the subject of review by the Supreme Court, regardless of the amount.

B. In any action at law when the court finds as a matter of law that the damages awarded by the jury are inadequate, the trial court may (i) award a new trial or (ii) require the defendant to pay an amount in excess of the recovery of the plaintiff found in the verdict. If either the plaintiff or the defendant declines to accept such additional award, the trial court shall award a new trial.

If additur pursuant to this subsection is accepted by either party under protest, it may be reviewed on appeal.

(Code 1950, § 8-350; 1977, c. 617; 1994, c. 807; 1998, c. 861.)

3. Remittitur

Baldwin v. McConnell, 273 Va. 650, 655 (2007) ("When a verdict is challenged on the basis of alleged excessiveness, a trial court is compelled to set it aside if the amount awarded is so great as to shock the conscience of the court and to create the impression that the jury has been motivated by passion, corruption or prejudice, or has misconceived or misconstrued the facts or the law, or if the award is so out of proportion to the injuries suffered as to suggest that it

is not the product of a fair and impartial decision. Setting aside a verdict as excessive ... is an exercise of the inherent discretion of the trial court and, on appeal, the standard of review is whether the trial court abused its discretion.")

4. Garnishment

See Va. Code Ann. 8.01-511 - Institution of garnishment proceedings; Va. Prac. Family Law 10:26 (2008-09 ed.) (Garnishments, wage assignments, and payroll deduction orders).