



Who Holds the Physician-Patient Privilege in Virginia?: The Astounding Answer to an Unlikely Enigma

Professor James J. Duane

Every lawyer in Virginia knows at least a little bit about the statutory privilege entitled “Communications Between Physicians and Patients,” Code § 8.01-399. The statute is not a model of clarity or simplicity. It is over 900 words long, and probably no lawyer on earth is thoroughly conversant with its labyrinth of exceptions to exceptions. Just the same, if you are a trial lawyer in Virginia, you presumably imagine that you understand at least the most fundamental features of this law and its operation. Before you finish this essay, however, you will learn something quite unexpected about this statute that is sure to astound you.

The most fundamental issue involving the interpretation of § 8.01-399, like any other privilege, is the question of who controls the privilege. In the jargon of evidence law, we might ask: who is the *holder* of the privilege? Probably the most “distinctive attribute of a privilege is that it has a holder,” and “only the holder has the ultimate authority to assert or waive the privilege,”¹ although others may also be authorized to assert it on his behalf. If the physician and the patient disagree over whether the patient’s secrets should be disclosed in court, whose preference will prevail?

Try your hand at the following simple multiple-choice question. Let us assume that a civil case involves a confidential communication by a patient to his physician that is clearly privileged under Virginia Code § 8.01-399 (that is, we assume the case does not fall

within any of the exceptions in the statute). Under that statute, when may the physician testify at trial and disclose privileged medical information that he obtained in confidence from the patient?

- A. Only if the patient consents; it is up to the patient, who is the holder of the privilege, no matter what the physician wants to do.
- B. Only if the physician does so willingly; it is up to the physician, who is the holder of the privilege, no matter what the patient wants.
- C. Only if *both* the patient and the physician consent to the disclosure, since the privilege is held jointly by both.
- D. He may testify if *either* the patient or the physician consents to the disclosure; either one may unilaterally waive the privilege, even over the objection of the other, and neither one may assert the privilege if the other wishes to waive it.

Sounds simple, doesn’t it? At least, it *should* be ridiculously simple, since it involves the most basic aspect of the statute. Circle what you think is the correct answer before you read any further. As it turns out, the answer to this question is certain to amaze you. In fact, the more you know about evidence law, the less likely you are to get this question right!²

In any state but Virginia, the answer would be too obvious to deserve even a one-paragraph explanation. Here in Virginia, as it turns out, the matter is much more complicated.

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Letter From The Chair

Are We Merely Camels?

By Robert E. Scully, Jr.

In twenty-five years of trial practice, I have been called many things, some not mentionable in print. Recently, a close friend from college derided me as “a camel.” He pointed out that I have worked for the same law firm for over twenty years; I never took part in the entrepreneurial opportunities of the tech boom; and I have spent my adult life advocating the interests of others rather than pursuing my own “will.”

The insult, which probably sounds odd to the reader, was familiar to me. It invoked “Thus Spake Zarathustra”, a quirky personal “scripture” written by the 19th century philosopher Fredrich Nietzsche.

Nietzsche, who famously declared: “God is dead” and coined the phrases: “The Will to Power” and “the Übermensch” (“The Superman”) had his prophet Zarathustra argue that Judeo-Christian men behave like camels. They kneel down to take upon themselves whatever is heavy, believing that bearing the load of another man is their natural function. Zarathustra scorned as weakness the pursuit of knowledge for the sake of truth and the love of those who despise us. Zarathustra preached that the camel follows a false god named: “Thou Shalt” when the name of the true god is: “I Will.” The Superman he extolled transformed himself into a lion because the lion’s world responds to his will alone.

Like many American undergraduates (most infamously Leopold and Loeb), my friend and I enjoyed Nietzsche’s frontal assault on Christian morality. Maybe our Christianity really was a “slave religion” that enshrined humility as the highest virtue, justified the eventual submission of the proud and powerful to the meek and powerless, and inverted the just social order in which the “best” men and women should exercise power. (Sophomoric graffiti in my dorm read: “Nietzsche is peachy”).

The claims of Nietzsche, and other egoist ethicists like Ayn Rand, harmonized powerfully with the principles of the Law and Economics movement that became influential after we left law school. Ronald Coase theorized that efficient markets composed of perfectly rational self-interested actors are better suited than governments to adjust among themselves the “external transaction costs” of commerce (like air pollution). Richard Posner’s seminal “The Economics of Law” spawned the amoral theory of “efficient breach of contract” that sought to replace, as outmoded, the notion that the duty to strictly perform contractual covenants was “sacred” (because they were modeled after the original Abrahamic covenant between God and man).

The profound expansion of personal freedoms and free markets that animated the American business and legal culture of the 1980s and 1990s surely found its moral foundation in egoist ethics and “Chicago School” economics.

We never imagined that in the twenty-first century Allah would demonstrate that while the Judeo-Christian god might be dead, *He* was alive and well in the Muslim nation states of the Middle East. We failed to realize that millions of young men and women in those countries never heard the Nietzschean message that the submission of the self to the will of god is antediluvian, irrational, and the slave master’s moral code.

So, what has this camel insult and its allusion to Nietzsche’s moral philosophy got to do with the Litigation Section of the Virginia State Bar? Perhaps everything. Perhaps nothing.

Thinking about ethical philosophy is essential for trial lawyers. Philosophy is sometimes defined as the rediscovery of the lost original wisdom of mankind. Justice is a large part of that original wisdom. Justice is what we trial lawyers claim to be about. We should think seriously about that claim.

We live in a world of dramatically different claims about the nature of justice. We modern Americans increasingly see justice as the protection of our “natural right” to exercise our personal political, economic and moral freedoms. Much of the rest of the world understands justice as surrendering to the revealed will of God. That is what the word “Islam” means. For many centuries the Judeo-Christian west thought of justice in the very same way. Job’s demand that God explain himself, in particular his infliction of miseries which Job perceived as unjust, was unthinkable. It is what makes the Book of Job such a radical text and justifies William Safire’s claim that Job was “The First Dissident.”

There is a powerful but often forgotten theory of justice that preceded ethical egoism, theocracy, Immanuel Kant’s categorical imperative and John Rawl’s thought experiments. I think it is relevant to our time and circumstances. In Plato’s “The Republic,” Socrates describes justice as harmony, both internal and external. Internal justice is a proper balance in the soul. External harmony is the pursuit of harmony within the state. Plato argued that in order to live a good life, the just individual must live in a just society. In fact, the just individual and the just society depend upon one another. Neither one can exist alone.

I am convinced that in our stridently secular society, in which law has become a kind of substitute civic religion, trial lawyers have a powerful opportunity to advance the Platonic ideals of personal justice and the just society. We are servants,

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Ghostwriting: A Violation of Ethics Rules

Christopher L. Spinelli, Esquire

Consider the following hypothetical:

Attorney Alice is meeting with the potential client who merely wants her to review a Motion for Judgment that he has drafted *pro se* for court filing. The potential client wants Alice to add necessary details to the pleading so as to survive demurrer, but he doesn't want to retain Alice for full representation in the litigation matter. "I just want to pay you for a little legal editing," he says. Such assistance is known as "ghostwriting" and, under Virginia's Code of Professional Responsibility, must be declined.

Assuming the client has a bona fide cause of action, what should Alice do? Hungry for business, she reviews the law and ethics in favor of this particular unbundled representation. Rule 1.2 of the Rules of Professional Conduct states in part that "a lawyer shall abide by a client's decisions concerning the objectives of representation..." Comment 4 under Rule 1.2 states in part, "The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client." Alice considers, that in some contexts, unbundling of services makes attorneys more affordable for clients who need legal help.

However, she looks to Virginia Legal Ethics Opinions for further guidance. In Legal Ethics Opinion 1592 (1994), the attorney for one codefendant ghostwrote related discovery responses for a *pro se* codefendant. Conflicts aside, the Opinion held that attorneys who draft documents for *pro se* litigants would likely be deemed counsel of record, and would therefore be making misrepresentations to the court. Because the attorney is allowing the *pro se* codefendant to represent to the court that he is still *pro se*, the attorney may be violating Rule 3.3 of the Rules of Professional Conduct disallowing misrepresentation to the court.

Upon reflection, Attorney Alice declines representation of the potential client. While she appreciates the value of unbundling legal services, she concludes that the risk to her integrity and reputation is too great to ghostwrite in a litigation context.

Assume instead that the case could be heard in federal court. Although the Rules of Professional Conduct still apply in federal court, does Alice have a broader range of discretion to unbundle litigation services? The simple answer is no. In *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*, 968 F. Supp. 1075 (E.D.

Va. 1997), attorneys anonymously drafted complaints for the *pro se* plaintiff. Upon discovery of this practice, the Court noted that ghostwriting skews the playing field, and issued a rule to show cause why the attorneys should not be held in contempt. *Id.* See also *Clarke v. United States*, 955 F. Supp. 593 (E.D. Va. 1997) (holding that ghostwriting pleadings for a *pro se* litigant is "unethical and contemptuous").

A more recent federal case dealing with ghostwriting is *Washington v. Hampton Roads Shipping Assoc.*, No. _____, 2002 WL 32488476 (E.D. Va. date 2002). In that case, the defendants called for sanctions under Rule 11 of the Federal Rules of Civil Procedure against an attorney who was accused of ghostwriting the *pro se* plaintiff's pleadings. While the Court found no evidence of ghostwriting, it commented in *dicta* that "Ghost-writing is in violation of Rule 11." *Id.* at 5 n.6.

As a result of her research, Attorney Alice concludes that, without being fully retained for the entire litigation matter, she is unable to assist the potential client regardless whether the pleadings should be filed in federal or state court.

Later that same day, Attorney Alice's supervising attorney, Partner Patrick, asks Alice to proof-read and ghostwrite a *pro se* Motion for Judgment drafted by Confident Cal, a non-attorney professional and friend of Partner Patrick. While Cal's *pro se* claims are clearly frivolous, Cal indicates that he would withdraw the pleadings once Cal got what he wanted from the prospective defendant. "I just want to scare the defendant a little bit," he says. However, Rule 3.1 of the Rules of Professional Conduct states that "[a] lawyer shall not bring ... a proceeding ... unless there is a basis for doing so which is not frivolous..." Comment 2 of Rule 3.1 states that "The action is frivolous ... if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person..."

Ethically, Attorney Alice cannot ghostwrite any pleadings. Moreover, she cannot become involved in a plaintiff's frivolous or harassing lawsuits, even anonymously. What's more, once Cal's frivolous lawsuit is dismissed in court, who will Cal most likely blame for the dismissal? Why, the associate attorney assigned to the impermissible task. Accordingly, Alice tactfully and discretely advises Partner Patrick of her analysis.

With certain legal services, however, ghostwritten documents can serve clients well because the clients may only request limited legal services or legal services for which they can or are willing to pay. Retaining an attorney to review and edit a simple contract prior to execution is a typical example. However, when an attorney works on a pleading to be submitted to a court, even a brief editing job potentially renders the attorney the client's attorney of record for the entire matter although that lawyer may have no further control over the outcome of the case. Moreover, that lawyer may not have any intention to represent the client for the duration of the litigation, and the client may not have the financial resources to compensate the attorney for her continued, albeit involuntary, representation. Attorneys should avoid ghostwriting as it is impermissible and only conjures trouble. ☒

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The Most Sensible Reading of the Statute

To anyone who knows anything about evidence law, but not much about the Virginia statute, the “obvious” answer would be “A” – it all depends on what the patient wants, since he holds the privilege. That would be the correct answer under the law of probably every other state, including all those that have adopted Uniform Rule of Evidence 503(b), which provides that the “*patient* has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications” made to his physician for the purpose of diagnosis or treatment. Even the leading reference work on Virginia evidence law categorically asserted just last year (although without any explanation or supporting authority) that the privilege created by § 8.01-399 “may be waived by the patient, and only by the patient.”³

If that were true, of course, it would be typical of virtually every American privilege. Whenever a privilege is created for confidential communications between a layman and a professional (such as a physician, lawyer, therapist, or rabbi), the laws of every state almost invariably make the *layman* the holder of the privilege.⁴ That is no surprise, since any other rule would be impossible to reconcile with the purpose of the privilege. For centuries, courts have reasoned that privileges are justified either by the need to encourage people to speak with candor in certain important settings, or else by the intrinsic value of protecting the secrecy of certain extremely sensitive matters. Under *either* of those theories, the privilege naturally belongs only to the patient or the client. After all, he is the only one at the meeting who is supposed to be disclosing sensitive secrets about his medical or legal or spiritual problems (at least there is no good reason for them to be talking about his *doctor's* medical problems) — not to mention that he is the one paying for the meeting. The “humanistic values of autonomy and privacy” amply justify the creation of a physician-patient privilege,⁵ which has been codified in 42 out of 50 states.⁶

Moreover, that is precisely how the Supreme Court of Virginia once interpreted this same law. Just seven years ago, in *Fairfax Hospital v. Curtis*, the Supreme Court held that § 8.01-399 reflects a health care provider’s “obligation to preserve the confidentiality of information about the patient,” who often “must reveal the most intimate aspects of his or her life to the health care provider during the course of treatment.”⁷ Admittedly, the court was resolving the scope of a physician’s duty of confidentiality under state tort law, and not the reach of the privilege. Still, the Court held that this very statute, § 8.01-399, defines and limits when a physician is “permitted” to disclose a patient’s medical records,⁸ and creates a legal duty to not release the patient’s records without first obtaining “permission from either a court or the patient.”⁹ That language plainly suggests that the privilege belongs to the patient – as it does in probably every other state – and may be waived only with her consent.

The Most Literal Reading of the Statute

Unfortunately, the matter is not nearly that simple, because there is a radical deviation between the purpose and the language of the statute. Contrary to what the court asserted in *Fairfax Hospital v. Curtis*, the literal language of Virginia Code § 8.01-399 does not limit or define the circumstances under which a physician is “permitted” to disclose privileged secrets while on the witness stand. On the contrary, the statute actually specifies when a physician may or may not “be *required* 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.”¹⁰ That language, taken literally and in isolation, imposes limits only on the physician’s *involuntary* testimony, and sets no limits on when the physician can freely testify to things that he is willing to disclose. The statute requires the patient’s consent only if the physician is to be *required* to disclose privileged information (presumably over the physician’s futile “objection”); no such consent from the patient is explicitly required before the physician is *permitted* to make a voluntary disclosure.

Under a literal reading, therefore, the patient actually has no privilege of any kind, and no right to preclude the physician from voluntarily disclosing anything he wishes in court.¹¹ That stingy reading of the statute is obviously consistent with a decision by the United States Court of Appeals for the Fourth Circuit, which relied on similar language in Virginia’s priest-penitent privilege to conclude that only the clergyman holds that privilege and has standing to decide whether to disclose confidences related to him by a parishioner. The court concluded that because Virginia Code § 8.01-400 provides only that a priest may not be “required” to make disclosure of certain confidences, the law “plainly invests the priest with the privilege” and is therefore “his alone to claim.”¹²

Moreover, well-settled principles of statutory construction furnish substantial precedent for that sort of narrow interpretation. The appellate courts of Virginia have repeatedly announced their preference for interpreting all privileges strictly and narrowly, and for enforcing all laws according to their plain language. When those two principles coincide – that is, when the literal reading of a privilege statute is also the reading that is more restrictive of the privilege – the Virginia courts never hesitate to summarily adopt that interpretation without any explanation or analysis.¹³ That approach is applied with special force in the context of § 8.01-399, since the common law recognized no physician-patient privilege at all, and the Virginia courts therefore do not recognize any such privilege beyond the protection created by the statute.¹⁴

The Problems with the Literal Reading of the Statute

But all this does not mean that the literal reading of Virginia’s physician-patient privilege is the only proper interpretation, or even that it is the most natural. The Supreme Court of Virginia has said that a statute must be interpreted in accordance with its plain and unambiguous language “unless a literal interpretation would result in a manifest absurdity.”¹⁵ There is ample room for a pow-

erful argument that the narrow and literal reading of § 8.01-399(A) would indeed render the law “a manifest absurdity.” In every state other than Virginia, it is unheard of to place a so-called privilege outside the control of the very party whose confidential disclosures are supposedly protected by the privilege. Not one of the privileges set forth in the Uniform Rules of Evidence or the proposed Federal Rules of Evidence is written that way.

Moreover, it must be remembered that this lengthy statute begins with the statement that physicians may not be required to testify to privileged medical information “[e]xcept at the request or with the consent of the patient.”¹⁶ These words, the very first words in the statute, make it plain that the statute never gives a physician any absolute privilege to refuse to testify (at least not without the concurrence of the patient), and clearly confirm that the General Assembly was interested in giving the patient some sort of important say in the matter. (No similar reference to the “consent” of the layman, by the way, is contained in § 8.01-400, which the Fourth Circuit interpreted as giving a privilege only to the priest and not to the penitent.) This suggests that perhaps the General Assembly really meant to define when a physician is *permitted* to disclose confidences without the consent of the patient — as privilege statutes almost invariably do — and that its unfortunate use of the word “required” in this context was an awkward oversight. Indeed, you need not take my word for it. That is precisely how the Supreme Court of Virginia read this same language in *Fairfax Hospital v. Curtis*, when it declared that this statute “*permitted* disclosure” by the physician only when the case fell within one of the exceptions set forth in the statute!¹⁷

Besides, a literal reading of the first line of this clumsily worded statute would flagrantly violate “the settled principle of statutory construction that every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary.”¹⁸ If the plain language of § 8.01-399(A) is taken out of context and examined in isolation, as I have said, it would seem to define only when a physician may be *required* to involuntarily disclose medical secrets over his objection, but would never give the patient any right to stop him from making a voluntary disclosure any time he pleases. But that reading would make superfluous most of subsection (F) of that same law, which spells out exceptions for several specific situations in which the physician is “permitted” to make a *voluntary* disclosure even without the patient’s consent — for example, to protect himself from malpractice accusations.¹⁹ There would be no need for those exceptions if the statute had been intended to give a privilege only to the physician, and to give patients no rights to prevent a physician from

making a voluntary disclosure of privileged communications.

The unfortunate truth is that Code § 8.01-399 was very clumsily drafted, and there is no interpretation of that law that does not conflict with at least one of the most well settled principles of statutory interpretation.

What Difference Does It Make?

Some may respond to this discussion of the privilege statute by pointing out that Virginia tort law already imposes a duty on physicians to refrain from at least certain kinds of extrajudicial disclosures of medical confidences without the consent of the patient, as the court held in *Fairfax Hospital v. Curtis*. And so, some may argue, there is no need for the statutory privilege to give the patient any rights at all, because the physician is already under a pre-exist-

ing duty to assert the privilege when he can. But the matter, unfortunately, is not nearly that simple.

First of all, the *Fairfax Hospital* case based its reading of state tort law largely on its assumption that § 8.01-399 imposes limits on when a physician is “permitted” to disclose privileged information, an assumption that would fall if the courts ever adopt a literal reading of the statute.²⁰ Moreover, in *Fairfax Hospital*, the court specifically noted that the forbidden disclosure in that case was “extrajudicial,” so it did not decide whether the duty of confidentiality applies to a physician who is invited to relate what he knows about relevant and unprivileged medical information during pretrial discovery proceedings or at trial.²¹ And it is unclear whether anything of the common law rule

announced in *Fairfax Hospital* survived the subsequent enactment of Virginia’s extremely detailed statutory provisions regulating the privacy of a patient’s medical records, codified under the title of “Health Records Privacy.”²² That elaborate legislative scheme regulates in minute detail all of the same privacy concerns identified by the court in *Fairfax Hospital*, but specifically provides that it imposes *no* limitations on “testimony in accordance with § 8.01-399,”²³ so that Act gives a patient no greater rights than he enjoys under the privilege statute to stop his physician from revealing medical secrets through testimony in a judicial proceeding.

A physician is normally obligated to safeguard patient confidences and privacy only “within the constraints of the law,”²⁴ whatever that means. In the absence of a valid privilege, it is quite likely that physicians, just like lawyers, have no ethical duty to refrain from answering questions about even “confidential” (but unprivileged) matters that are relevant to a pending lawsuit.²⁵ That is why, even when a witness has a professional ethical obliga-

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The most fundamental issue involving the interpretation of § 8.01-399, like any other privilege, is the question of who controls the privilege.....

If the physician and the patient disagree over whether the patient’s secrets should be disclosed in court, whose preference will prevail?

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tion of confidentiality to refrain from unauthorized extrajudicial disclosures, “complete confidentiality can generally be guaranteed only if an evidentiary privilege also applies.”²⁶

For all these many reasons, it is likely to make a great deal of practical difference in the long run whether the statutory privilege of § 8.01-399 should be interpreted as giving the patient any rights to prevent her physician from making a voluntary disclosure of her medical history on the witness stand.

The Tragic Holding in *Wright v. Kaye*

As we have seen, the proper interpretation of this important privilege requires the delicate balancing of the most fundamental principles of statutory interpretation, which point to two conflicting interpretations of the law and its reach. Tragically, however, the Supreme Court of Virginia has now resolved this critical issue in a passing comment so cursory as to be almost accidental, and with no indication that the court even realized the intricacy of the matter at all.

Just last year, in *Wright v. Kaye*,²⁷ a case involving a most unusual set of facts, the Supreme Court had to decide whether § 8.01-399 could be used by a personal injury plaintiff to preclude a physician from testifying as a paid expert witness for the defense, even though he had never seen or treated her, merely because she had been treated by *another* physician who was employed in the same medical group. The court held that she could not, reasoning that the law is limited to physicians who have treated a patient or have acquired confidential information about her in that capacity, and there was no evidence that the expert witness had ever done either in that case.²⁸

That should have been the end of the matter. There was no need for the court to give any other reason for its holding, in keeping with the cardinal axiom that appellate courts should always refrain from attempting to decide a case on any broader grounds than necessary. (Indeed, it is surprising the Court even went *that* far, since her objection presumably could have been overruled simply on the grounds that she had waived any claim of privilege she might have had by electing to become the plaintiff in a personal injury action, although the court gave no indication that it considered that possibility.²⁹)

Unfortunately, however, the court did not stop there. Not nearly. As an alternative and independent basis for its holding — indeed, the *first* of the three reasons given by it — the Supreme Court also concluded that her privilege objection had to be overruled simply because:

First, Code § 8.01-399 states that no practitioner of the healing arts “shall be required” to offer testimony. Dr. Krebs agreed to testify voluntarily — his testimony was in no way “required.”³⁰

That’s it. In the span of two short sentences, with no indication that it was aware of the conflicting arguments that can be made on both sides of this vital question, the Supreme Court decided to read the statute narrowly and literally so that it has no applicability to physicians who “agree to testify voluntarily.” With all due respect, this passage is reminiscent of the sort of analysis one frequently sees near the very end of a bluebook written by a law student who is rapidly running out of time on a final examination.

That dubious reasoning sweeps far too broadly, since it cannot be logically limited to expert witnesses who never treated the patient. If the statute only prevents physicians from being “required” to testify and therefore does not apply to physicians “who agree to testify voluntarily,” as the court held in *Wright*, then *any* physician — even a patient’s *treating* physician — can *always* testify and disclose privileged information about her health and treatment any time he wishes without violating this statute, even if the patient was not a party to the case and had never placed her medical condition at issue, as long as the traitorous physician was not required to testify but did so *voluntarily*, perhaps for pay. Moreover, the same conclusion presumably also must follow for confidential communications with one’s counselor, social worker, or psychologist, since the privilege for communications with those professionals contains the same operative language, declaring only that they may not be “required” to disclose such confidences unless the client consents.³¹

Under the holding in *Wright v. Kaye*, therefore, the astounding answer to the multiple-choice question at the beginning of this article is “D”: disclosure is proper as long as *either* the physician or the patient consents, no matter how strenuously the other one objects.

That is nothing short of bizarre. I have not read every privilege statute written in America (I am not being paid to write this, after all), but I have read a *great* number of them, and I have never seen any other statutory privilege that works that way. I ran this question past Professor Edward Imwinkelried, the author of the nation’s preeminent reference work on privilege law, and he told me that he has never seen one either.³²

I will be the first to concede that the holding in *Wright v. Kaye* is perfectly consistent with a literal reading of the first sentence of Code § 8.01-399, at least if that line is wrenched out of context and interpreted with no regard for the obvious conflicting implications of subsection (F) of the same law. But I for one have no hesitation in pronouncing that result “a manifest absurdity.” That logic obliterates the main purpose behind the privilege by completely eliminating the ability of the patient to decide when his sensitive and confidential statements to his physician would be kept out of evidence. It would render most of subsection (F) a futile and meaningless nullity. And it would also seem to overrule much of the court’s reasoning in *Fairfax Hospital v. Curtis*, at least *sub silentio*.³³

I acknowledge that Virginia’s physician-patient privilege is riddled with so many exceptions that the patient would often be unable to prevent disclosure of his medical records no matter *who* is given standing to assert the objection. But the holding in *Wright v. Kaye* seemingly eliminates any possibility that the patient could

ever use this statute to prevent his physician from giving voluntary testimony in *any* case. It is difficult to believe that the General Assembly could have intended to write a law with so many words and so little value.

Perhaps the most bizarre implication of the holding in *Wright v. Kaye* is that it means that this statute is not a true “privilege” at all. Every privilege from every other American jurisdiction always has at least one *holder* – a person who has the right to decide whether to assert the objection and thereby prevent others from disclosing the information in court. (A few privileges sometimes have more than one holder; for example, the privilege for confidential marital communications typically is held by both spouses, *either* of whom may assert the privilege with or without the concurrence of the other.)

Under the literal reading of § 8.01-399 adopted by the Supreme Court of Virginia in *Wright*, however, *neither* the physician nor the patient may be fairly described as the holder of this so-called privilege. The patient cannot refuse to answer questions about what he told his physician, and cannot prevent his physician from doing so voluntarily. The physician, likewise, can neither prevent the patient from disclosing those details, and cannot even refuse to do so himself if the patient consents to the disclosure. As construed in *Wright*, all this maladroitness “privilege” statute supposedly does is give the physician the right to refuse to answer such questions if and only if *neither* the patient nor the physician consents to the question. *Neither* party is given an absolute unilateral right under this law to object to any question to *either* one of them about what passed between them in private. No legal “right” is a true privilege (or even a genuine right, for that matter) if it can only be exercised with the consent of someone else.³⁴

I am in no position to proclaim with confidence that the holding in *Wright* was wrong. It is faithful to the literal language of at least part of this terribly worded statute, on the one hand, and that is no small matter. On the other hand, it produces several results that are manifestly absurd, which is the one time that courts should refuse to interpret a law in accordance with its literal terms. All I can say with confidence is that this issue is close enough, and important enough, that it never should have been resolved in a two-sentence “drive-by decision,” especially in a case that easily could have been decided on incomparably narrower grounds. ☒



1. CHRISTOPHER MUELLER AND LAIRD KIRKPATRICK, EVIDENCE 291 (3rd ed. 2003).
2. On May 12 and 14, two months after the Supreme Court of Virginia decided this question in *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004), I put this same multiple-choice question to hundreds of Virginia lawyers at a CLE evidence seminar sponsored by the Virginia CLE Foundation and conducted in Tysons Corner and Richmond. Fewer than 5% of the lawyers guessed the answer chosen by the Supreme Court – and many of them by that point in my talk had simply figured out that all of my questions, by design, involved the most surprising and unlikely aspects of Virginia evidence law, so that the “right” answer was usually the one that seemed to make the least sense.
3. CHARLES E. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA 260 (6th ed. 2003); accord CRAIG D. JOHNSTON, TRIAL HANDBOOK FOR VIRGINIA LAWYERS §18:14 (2004) (“The physician-patient privilege belongs to the patient, and only the patient may invoke or waive it.”) Oddly, neither reference work cites any authority for this asser-

tion about the operation of the statute.

4. MUELLER & KIRKPATRICK, *supra* note 1, at 291 (“With respect to professional services, the holder is usually the recipient of the professional services rather than the provider. It is ... the patient[,] not the psychotherapist, who decides whether the privilege will be waived or asserted.”)
5. EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 6.2.6, at 497 (2002).
6. *Id.* at 490.
7. *Fairfax Hosp. v. Curtis*, 254 Va. 437, 442, 492 S.E.2d 642, 644 (1997).
8. *Id.* at 443, 492 S.E.2d at 645. Indeed, in that case the court went so far as to hold that a hospital that had already received a notice of claim by a plaintiff intending to sue the hospital because of its alleged negligence in the delivery of her baby could not, without court permission or the consent of the patient, privately disclose her medical records to its attorney and to one of its nurses named as a codefendant. *Id.* It is surprisingly unclear how much of that narrow holding is still good law after *Archambault v. Roller*, 254 Va. 210, 213, 491 S.E.2d 729, 731 (1997), which held that Code § 8.01-399(F) allowed a nonparty physician preparing for a deposition to disclose medical records to her lawyer for the protection of her unspecified “legal rights,” even though she was not even a potential party to the case and “could not have been drawn into the litigation because all applicable statutes of limitations had run.” Although *Fairfax Hospital* was decided first, it was based on events from an earlier point in time, before the enactment of § 8.01-399(F). Unfortunately, *Fairfax Hospital* never even cited, much less distinguished, its holding several weeks earlier in *Archambault*, leaving it for the bar to only guess how those holdings are to be reconciled in cases arising since the enactment of § 8.01-399(F).
9. *Id.* The court was interpreting the statute as it was worded before its 1993 amendment, but the earlier version contained the same language that now appears in Code § 8.01-399(A), the portion of the law that is critical to our inquiry here.
10. Code § 8.01-399(A) (emphasis added).
11. To be precise, under a strict literal reading, the only right this bizarre law reserves to a patient is the right to *force* his physician to testify to what the patient told him, even if the physician would rather not do so. That is not what any objective observer would call a “privilege.” Moreover, the patient would have *that* right even if this statute had never been enacted.
12. *Seidman v. Fishburne-Hudgins Educational Foundation, Inc.*, 724 F.2d 413, 416 (4th Cir. 1984).
13. As I observed several years ago, “In the four most recent cases where a literal reading of a statute yielded a result that was more restrictive of the scope of some privilege, the Virginia appellate courts have summarily adopted that interpretation, often with little or no discussion of whether that conclusion was the most sensible one.” James J. Duane, *The Bizarre Drafting Errors in the Virginia Statute on Privileged Marital Communications*, 12 REGENT UNIV. L. REV. 91, 95 (1999-2000) (citing cases). For two subsequent cases in which the supreme court has done it again, see *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004), and *Burns v. Commonwealth*, 261 Va. 307, 332-33, 541 S.E.2d 872, 889-90 (2001).
14. *Gibson v. Commonwealth*, 216 Va. 412, 414, 219 S.E.2d 845, 847 (1975).
15. *Horner v. Department of Mental Health*, 268 Va. 187, 192, 597 S.E.2d 202, 204 (2004).
16. Code § 8.01-399(A).
17. 254 Va. at 443, 492 S.E.2d at 645 (emphasis added). Admittedly, to say that no physician “shall be required” to disclose information without a patient’s consent (as the statute reads) is not the same as saying that he is not “permitted” to do so, as the court concluded in *Curtis*, but that is how the court read this very language. The court gave no indication of any awareness that it was actually departing from the plain language of the law, much less did it explain why it was doing so.
18. *Sansom v. Board of Supervisors of Madison County*, 257 Va. 589, 595, 514 S.E.2d 345, 349 (1999).
19. The statute affirmatively declares that it does not prevent a physician “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 protection or enforcement of the 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 § 8.01-399(F). *None* of those exceptions would be necessary if the statute had been intended to give the privilege entirely to the physician and to place no limits on his ability to make voluntary disclosures when it suits him to do so. This list is not exhaustive, by the way, and includes other “legal rights” not listed there, including a physician’s right to the assistance of counsel in preparation for a deposition.

Physician-Patient Privilege footnotes — cont’d on page 8

Who Holds the Physician-Patient Privilege in Virginia? *cont'd from page 7*

- tion, even when the physician is neither an actual nor a potential party to any malpractice suit. *Archambault v. Roller*, 254 Va. 210, 213, 491 S.E.2d 729, 731 (1997).
20. Indeed, as we shall see, the state supreme court unwittingly overturned that very assumption in *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004).
 21. *Fairfax Hospital v. Curtis*, 254 Va. 437, 445, 492 S.E.2d 642, 646 (1997).
 22. The "Health Records Privacy" Act, Code § 32.1-127.1:03(A), was enacted pursuant to the policies reflected in the federal Health Insurance Portability and Accountability Act ("HIPAA"), Public Law 104-191. The Virginia version of the act was enacted in 1997 and went into effect in 1998, after the decision in *Fairfax Hospital*.
 23. Virginia's Health Records Privacy Act declares that "There is hereby recognized an individual's right of privacy in the content of his health records," Code § 32.1-127.1:03(A), but then adds in subsection (D)(3) that "health care entities may disclose health records ... in testimony in accordance with §§ 8.01-399 and 8.01-400.2."
 24. AMERICAN MEDICAL ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS, Principle IV (2001)
 25. See AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT 1.6(b).
 26. MUELLER & KIRKPATRICK, *supra* note 1, at 291.
 27. 267 Va. 510, 593 S.E.2d 307 (2004).
 28. *Id.* at 526-27, 593 S.E.2d at 316.
 29. See Code § 8.01-399(B).
 30. *Id.*
 31. Code § 8.01-400.2.
 32. Professor Imwinkelried, who teaches at UC Davis Law School, is the author of the two volumes on Evidentiary Privileges in *The New Wigmore* (Aspen Publishing 2002). He gave me his written consent to quote him on this point.
 33. This is actually the *second* time in the last several years that the state supreme court, in an almost casual adoption of a narrow and literal reading of a statutory privilege, gave no indication of any awareness that it was essentially overruling an earlier case in which it had adopted a broader reading of the statute that was inconsistent with its language but perfectly consistent with its obvious purpose. See James J. Duane, *The Virginia Supreme Court Takes a Big Bite Out of the Privilege for Marital Communications*, 29 THE VIRGINIA BAR ASSOCIATION NEWS JOURNAL 8 (March 2003).
 34. Imagine rewriting the Fifth Amendment to provide "You have an absolute right to remain silent — unless your wife gives us her consent to make you talk."



Letter from the Chair *cont'd from page 2*

but not slaves. We serve our clients' desires without abandoning our own ethical norms. We engage our intellect, energy and rhetorical skill in the service of the ends they choose. Yet, in doing so, we remain constrained by the essential personal virtues of the just man: loyalty, courage, truthfulness, proportionality and piety.

Our trial work does not manifest our personal "will to power" in the world. Our efforts are of interest only to the parties involved. Few of us will ever handle a case, like *Brown v. The Board of Education*, which redesigns the very fabric of social justice. Yet, if we develop the proper balance in ourselves and seek true excellence in our courts, we can rightly claim to be the hand maidens of Platonic justice. When we do it well, our work is neither slave labor nor the grunt of a beast of burden. It is, instead, the essence of personal and civic virtue — the practice of Justice. ☐

One Bad Actor Spoils the Case: Dismissal as a Sanction for Spoliation of Evidence

Mandi M. Smith
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Both Virginia and federal law recognize the application of the affirmative defense of spoliation of evidence. "The textbook definition of 'spoliation' is 'the intentional destruction of evidence [...] . . . However, spoliation issues also arise when evidence is lost, altered or cannot be produced.'"¹ "Spoliation 'encompasses [conduct that is either] . . . intentional or negligent.'"² "A spoliation inference may be applied in an existing action if, at the time the evidence was lost or destroyed, 'a reasonable person in the [possessor's] position should have foreseen that the evidence was material to a potential civil action.'"³ This article will examine the divergent treatment by the Virginia state courts and the federal courts when presented with a claim of spoliation of evidence seeking the ultimate defensive sanction: dismissal of the civil action.

Dismissal of Claims for Spoliation of Evidence in Virginia Courts

The primary case on spoliation of evidence as an affirmative defense to claims in a pending civil action is *Gentry v. Toyota Motor Corp.*⁴ In *Gentry*, the driver of a motor vehicle was injured as a result of a single-vehicle accident following circumstances under which the engine of the motor vehicle began "racing" and the motor vehicle accelerated.⁵ The driver brought an action against the manufacturer and the sales dealer of the motor vehicle under a causal theory of "sudden acceleration." An expert retained by the driver examined the subject vehicle and concluded that a temperature control cable impinged on the accelerator pedal rod and caused the sudden acceleration.⁶ The expert then "without authorization or permission from anyone," used a hacksaw on the vehicle's instrument panel and removed the temperature control cable.⁷ The defendants in *Gentry* moved to dismiss for spoliation of evidence under a theory that removal of the temperature control cable deprived the defendants of their right to inspect the vehicle for any evidence of defect and that their ability to defend was severely prejudiced.⁸ After a hearing, the plaintiff moved for a stay of the spo-

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liation motion.⁹ The plaintiff then retained and designated a new expert who offered an opinion that a defect existed also in the design or manufacture of the vehicle's carburetor which caused the sudden acceleration.¹⁰ The defendants' expert had the opportunity to examine the carburetor and concluded that the carburetor functioned properly.¹¹ The defendants renewed their spoliation motion, and the trial court dismissed the action with prejudice. The plaintiff appealed.

The Supreme Court of Virginia reversed. The *Gentry* Court applied a five-pronged test to determine whether the sanction of dismissal was warranted under the facts of the case. A party seeking dismissal for spoliation of evidence must establish:

1. that evidence existed that was relevant to pending or reasonably foreseeable litigation;
2. that modification, alteration, or destruction of the evidence occurred;
3. that an adverse party or its agent made the modifications or alterations;
4. that the modifications or alterations were made in bad faith; and
5. that the modifications or alterations unfairly prejudice the moving party's ability to prosecute or defend a case.¹²

The Court's ultimate decision in *Gentry* turned on application of the fourth and fifth prongs.

First, the Supreme Court reasoned that the "wrongful act" in removing the temperature control cable was not committed by the plaintiff or her counsel; rather, the removal was effected by an expert acting without the permission or authority of either the plaintiff or her counsel. Thus, there was no direct act of "bad faith" on the part of the plaintiff or her counsel.¹³

Secondly, the *Gentry* Court ruled that the removal of the temperature control cable by plaintiff's first expert was not prejudicial to the defendants because the plaintiff subsequently sought to recover under a theory arising from alleged malfunction of the carburetor – a theory unrelated to the part of the vehicle destroyed by the plaintiff's first expert. Thus, the *Gentry* Court concluded that dismissal of the plaintiff's action was too severe a sanction considering the lack of prejudice suffered by the defendants.¹⁴

By contrast, in a recent case decided by the Circuit Court of Rockingham County, the court found that dismissal of claims was warranted by the facts presented. In *Elizabeth A. Beard v. Climate Control of Harrisonburg, Inc.*,¹⁵ the plaintiff sought to recover damages for loss of personal property destroyed by fire occurring in a rental house in which the plaintiff resided. The plaintiff alleged that the subject fire originated in the basement of the rental unit and was caused by a malfunction in the liquid propane (LP)-fueled furnace in service at the residence.¹⁶ Specifically, the plaintiff characterized the subject malfunction as "delayed ignition."¹⁷ The plaintiff alleged that "delayed ignition" occurred when there was a delay in the ignition of gas delivered to the burners of the furnace, which delay allowed gas to accumulate at or near the burners of the furnace.¹⁸ The subsequent delayed ignition of the accumulated gas allegedly resulted in sudden ignition characterized as a "low-order" explosion.¹⁹ The plaintiff brought her claim against defendant

alleging that the defendant negligently serviced the subject furnace approximately seven weeks prior to the fire when the defendant installed a replacement burner assembly in the furnace.²⁰

On the morning immediately following the fire, the plaintiff suspected that the furnace was the cause of the fire.²¹ The plaintiff's insurance carrier retained an expert in the field of cause and origin to inspect the furnace and residence in its undisturbed condition within four days following the fire.²² The plaintiff's insurance carrier retained an expert in the field of mechanical engineering to inspect the furnace in its undisturbed condition within twelve days following the fire.²³

Within a month following the fire, the plaintiff consulted an attorney.²⁴ The plaintiff's counsel retained an expert in the field of mechanical engineering to inspect the furnace in its undisturbed condition within eight weeks following the fire.²⁵ The plaintiff's expert concluded that the furnace had experienced "delayed ignition" at the inception of the fire and that certain omissions by the defendant contributed to cause the "delayed ignition."²⁶

Within seven to ten months following the fire, the plaintiff substantially cleaned the house of all fire debris.²⁷ The fire debris was collected in a dumpster located at the house and was ultimately removed from the property.²⁸ In addition, the subject furnace was removed from its original placement within the residence and was relocated to an unsecured barn located across the public highway from the house.²⁹ The plaintiff testified that she coordinated her clean-up activities with her counsel.³⁰

More than three months following the clean-up activities, and thirteen months following the fire, the plaintiff initiated her action against the defendant. In its Grounds of Defense, the defendant raised the affirmative defense of spoliation of evidence based upon the suspicion that the furnace had remained at the property unsecured and unprotected from additional degradation.³¹

Approximately six months following the initiation of plaintiff's action, the defendant retained experts in the fields of fire cause and origin, and mechanical engineering, each of whom inspected the property and the furnace. The defendant's inspection revealed that the residence had been cleaned of fire debris; that the floor joists immediately above the furnace had been removed from the premises; and that the basement floor in the area surrounding the furnace had been swept clean. The furnace was not in its original placement within the residence at the time of the inspection. The defendant's experts discovered the furnace in the barn located across the highway, but discovered that the internal functional components had been removed from the furnace's cabinet. At her subsequent deposition, the plaintiff testified that at some time prior to the defendant's inspection she had been instructed to remove the components from the furnace to prevent theft of the components because the barn could not be locked.³²

At a subsequent inspection of the missing components, a significant number of the components remained missing. The defendant's experts determined that the missing components which would have been encased in fire-resistant materials would not have been destroyed by the fire. The defendant's expert in mechanical engineering concluded that "the loss and/or destruc-

One Bad Actor — cont'd on page 10

One Bad Actor *cont'd from page 9*

tion of physical evidence that was recovered after the fire preclude a complete investigation of the furnace." At the deposition of the plaintiff's expert in the field of mechanical engineering, the expert testified that he had examined several furnace components during his inspection and that the condition of such components was a factor upon which he relied in reaching his conclusions.³³ In regard to alternative causes of possible furnace malfunction, the plaintiff's expert testified at deposition that certain components were no longer available to permit an analysis of alternate scenarios of cause.³⁴

One month prior to the scheduled trial, discovery elapsed. The defendant then moved the court to dismiss the plaintiff's claims against the defendant on the basis of spoliation of evidence.³⁵ In addition, the defendant moved *in limine* to exclude the proposed expert opinions of the plaintiff's expert in mechanical engineering on the basis that the expert's opinions were speculative and conjectural, and that the plaintiff's expert had failed to consider all variables that factor into the cause of "delayed ignition," which variables could not longer be considered due to the loss of the internal components of the furnace.³⁶

The court conducted hearings on the defendant's pre-trial motions. At the hearings, the court heard testimony of the plaintiff, the plaintiff's mechanical engineering expert, and the defendant's experts in the fields of fire cause and origin, and mechanical engineering.³⁷ The evidence introduced at the hearings included prototypes of the components missing from the furnace to demonstrate the likelihood that the components would have survived the fire.³⁸

The circuit court dismissed the plaintiff's claim.³⁹ There was no question that the first, second, and third factors of the *Gentry* test were resolved in favor of the defendant: (1) the furnace components were relevant to pending or reasonably foreseeable litigation; (2) modification and destruction of the furnace components occurred; and (3) the plaintiff, with concurrence of her counsel, caused the modifications to and destruction of the furnace components. In *Beard*, as in *Gentry*, the court's determination turned on application of the fourth and fifth prongs.

First, on the issue of "bad faith," the *Beard* court found that plaintiff had suspected as early as the day following the fire that the furnace had contributed to the fire.⁴⁰ The plaintiff's insurance carrier and the plaintiff's experts were provided the opportunity to inspect the furnace in an undisturbed condition. The plaintiff argued that there was no proof of "bad faith" because the plaintiff did not intentionally remove the components with the specific motive to deprive the defendant of the opportunity to inspect the missing components. The *Beard* court rejected the plaintiff's assertion that "bad faith" requires a finding of intentionality coupled with improper motives. Indeed, the *Beard* court found evidence sufficient to constitute "bad faith" notwithstanding its express finding that plaintiff did not act intentionally with improper motives; rather, the *Beard* court adopted a negligence standard in finding facts sufficient to establish "bad faith."⁴¹ The court found that the plaintiff suspected the furnace was a cause of the fire; that plaintiff

then knew or should have known that the furnace components would be relevant and material to her claim against the defendant; and that plaintiff then had a duty to preserve the furnace components.⁴² Because the plaintiff negligently failed to preserve the furnace components, the plaintiff acted in "bad faith."

Second, the *Beard* court distinguished the *Gentry* case on the "prejudice" factor. In the *Beard* case, the plaintiff's theory remained throughout the litigation that the furnace experienced "delayed ignition." The missing components were relevant to the plaintiff's sole theory of "delayed ignition." Because the defendant was entitled to inspect the furnace with its components and to defend against plaintiff's claims with alternate theories of causation, the defendant suffered prejudice warranting dismissal of the plaintiff's claims.⁴³

In addition, the *Beard* court reached an essential determination which justified application of the ultimate sanction of dismissal. The circuit court concluded that any less drastic yet appropriate sanction would ultimately produce the same result of dismissal of the plaintiff's claims. Because the defendant had moved also to exclude the opinions of plaintiff's experts,⁴⁴ the court found an appropriate less drastic sanction would be to exclude the expert opinions of any of plaintiff's experts who had an opportunity to inspect the furnace in its undisturbed condition. Because application of the less drastic sanction of excluding the plaintiff's experts would render plaintiff unable to prove that malfunction of the furnace caused the fire, then the court would be presented with the certain issue of dismissal on defendant's motion to strike plaintiff's evidence at the trial of the plaintiff's claims.⁴⁵

Dismissal of Claims for Spoliation of Evidence in Federal Courts

Not often do federal courts in the Fourth Circuit find themselves bound by Virginia's law on spoliation. Most recently in *Hodge v. Wal-mart Stores, Inc.*, the Fourth Circuit reaffirmed that spoliation is "not a substantive claim or defense but a rule of evidence administered in the discretion of the trial court."⁴⁶ Thus, whether sanctions are appropriate in a federal case is governed by the "federal law of spoliation," which arises from the court's inherent power to control the judicial process and litigation.⁴⁷ The Fourth Circuit's law on spoliation recognizes several sanctions as a means of "leveling the playing field and sanctioning the conduct of [the spoliator]": dismissal, summary judgment, exclusion of testimony relating to the lost or destroyed evidence, and an adverse inference.⁴⁸ In formulating the appropriate remedy and punitive action for spoliation in an individual case, a federal court will consider the degree of culpability of the spoliator and the prejudice suffered by the moving party.⁴⁹ Under the "federal law of spoliation," the ultimate sanction should be the least severe sanction that will most effectively avoid substantial unfairness to the moving party and deter spoliation.⁵⁰

Although Fourth Circuit courts list dismissal as an available sanction under the "federal law of spoliation,"⁵¹ reported cases primarily involve motions for adverse inference jury instructions rather than motions to dismiss.⁵² In the Fourth Circuit, the adverse inference sanction for spoliation is appropriate only where

(1) the spoliator knew the evidence was relevant to some issue at trial (2) and by his willful conduct, *not mere negligence*, such evidence was lost or destroyed.⁵³ However, proof of bad faith is expressly not required for an adverse inference instruction as a sanction under the “federal law of spoliation.”⁵⁴ In *Vodusek v Bayliner Marine Corp.*, an explosion on a boat led to a personal injury and products liability suit which was filed in federal court based on diversity jurisdiction.⁵⁵ During his examination of the allegedly defective boat, the plaintiff’s expert “employed destructive methods,” which rendered the boat useless for any subsequent examination by the defendants or their experts.⁵⁶ Relying generally on federal law for its approach to spoliation,⁵⁷ the Fourth Circuit affirmed the Maryland trial court’s adverse inference instruction based on the plaintiff’s expert’s destructive examination of the boat.⁵⁸ The Fourth Circuit held that while bad faith is sufficient to justify sanctions for spoliation, bad faith is not required for an adverse inference instruction.⁵⁹

Notwithstanding the “evidentiary rule” approach to spoliation, two Fourth Circuit cases have confronted spoliation claims by analyzing the issue under Virginia law. In *Cole v. Keller Industries, Inc.*, the plaintiff was injured when rivets broke in a ladder manufactured by the defendant.⁶⁰ The ladder collapsed as the plaintiff descended.⁶¹ As in *Vodusek*, the plaintiff’s products liability suit was filed in federal court, presumably based upon diversity. The plaintiff’s first expert removed parts from the ladder, including a step and the allegedly defective rivets.⁶² The first expert then lost the allegedly defective rivets before any other experts had opportunities to evaluate the ladder, although ultimately three more experts (one for the plaintiff and two for the defendant) were able to evaluate the ladder — albeit without the rivets — and reach useful conclusions.⁶³

In *Cole*, the district court granted the defendant’s motion for summary judgment, holding that the plaintiff’s destructive testing “substantially prejudiced [the defendant] and justified imposing a sanction.”⁶⁴ Using a rationale similar to the rationale subsequently employed by the Rockingham County Circuit Court in *Beard*, the district court reasoned that dismissal (by grant of summary judgment) was functionally equivalent to the “lesser sanction” of excluding all evidence concerning the condition of the allegedly defective but lost product, as exclusion of such evidence would preclude the plaintiff from establishing a prima facie case for products liability under Virginia law.⁶⁵

The Fourth Circuit reversed the grant of summary judgment, which it deemed “too severe” under the circumstances.⁶⁶ The court began by noting that spoliation of evidence rules are “rules of evidence to be administered in the discretion of the trial court,”⁶⁷ but then expressly applied Virginia law on spoliation.⁶⁸ Relying on the purposes of the *Erie* doctrine, as elucidated in *Guaranty Trust Co. of New York v. York*⁶⁹ and *Hanna v. Plumer*,⁷⁰ the *Cole* court looked to Virginia’s spoliation law as a means of avoiding different outcomes on a state law claim depending on whether the case is pending before a federal court or a state court.⁷¹ Reversing the district court, the Fourth Circuit interpreted *Gentry v. Toyota Motor Corp.*⁷² as requiring bad faith before any case could be dismissed for spoliation of evidence.⁷³ Because the plaintiff did not

“intentionally destroy the evidence or act with intent to prevent the defendant from inspecting and testing” the allegedly defective product, the court did not find bad faith sufficient to justify dismissal of the case.⁷⁴ According to the court, under Virginia law, in the absence of bad faith, exclusion of the plaintiff’s evidence and the grant of summary judgment was “excessive and ... an abuse of discretion.”⁷⁵ However, though dismissal was too severe under the circumstances of *Cole*, the court noted that a jury instruction permitting an adverse inference, as in *Vodusek*, might have been appropriate because the plaintiff *did* destroy evidence that was relevant to foreseeable litigation.⁷⁶

In the more recent case of *Green v. Ford Motor Co.*,⁷⁷ the district court refused to dismiss claims based on alleged spoliation, following *Cole*’s narrow definition of bad faith. In *Green*, a single-vehicle accident and fire led to a products liability action brought by and on behalf of occupants of a rental vehicle against the rental company and the vehicle’s manufacturer.⁷⁸ The plaintiffs alleged that a defective design caused a rupture in the fuel tank, which allowed fuel to leak and ignite, causing serious injuries and death to the passengers of the vehicle.⁷⁹ Before the products liability suit was ever filed, experts for the plaintiff and for the defendant rental company inspected the burned vehicle.⁸⁰ Thereafter, the vehicle was released from storage and had been partially destroyed at the time the plaintiffs filed the suit against the rental company and the manufacturer.⁸¹ The defendant manufacturer, apparently unaware of the accident until the suit was served, sought to have all claims dismissed against it based on spoliation of evidence.⁸² Specifically, the defendant manufacturer argued that the “inability of its experts to inspect the subject vehicle [had] severely hampered their analysis of several critical aspects of this case.”⁸³

The district court noted that various sanctions, including dismissal of claims, are available when a party fails to fulfill its duty to preserve evidence, which duty arises once a party has been served with a complaint or when litigation is foreseeable.⁸⁴ However, according to the court, “dismissal is considered an extreme sanction, and thus is reserved for the most flagrant abuses.”⁸⁵ The court noted that the defendant rental company was aware of pending litigation at the time it authorized the release and destruction of the vehicle and thus had a duty to preserve the physical evidence.⁸⁶ However, because the defendant rental company was only “careless,” and its actions “did not rise to the level of bad faith” as defined in *Cole*, dismissal of the claims against the defendant manufacturer was inappropriate.⁸⁷ Moreover, according to the court there was no clear prejudice against the defendant manufacturer, as the theory of the case was defective design and identical exemplar vehicles were available for testing inspection.⁸⁸

A lesser sanction was applied in *Ward v. Texas Steak Ltd.* The plaintiff, a customer at the defendant’s steakhouse, was injured when a wooden chair provided by the defendant suddenly collapsed while the plaintiff was sitting in the chair.⁸⁹ In *Ward*, unlike in *Cole*, *Gentry*, and *Beard*, the defendant (rather than the plaintiff) destroyed evidence by placing the collapsed chair in a dumpster allegedly not realizing the chair might be relevant to a later law suit.⁹⁰ In response to the defendant’s motion for summary judgment,

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One Bad Actor *cont'd from page 11*

ment, the plaintiff argued that the court should impose sanctions in the form of an adverse inference on the defendant for spoliation of the evidence.⁹¹

As in *Cole*, the district court began by noting that imposition of sanctions for spoliation of evidence is an inherent power of federal courts and as such is governed by federal law.⁹² The “inherent power” is available to sanction litigation abuse, and federal courts are not bound by state law in fashioning sanctions.⁹³ However, the *Ward* court noted that if the alleged spoliation occurs *before* a suit is filed and a federal court is not bound by state law, there is a possibility that the outcome of a state-created cause of action would differ depending upon whether the suit is ultimately filed in state court or in federal court, and consequently that forum shopping will be encouraged based upon the divergent spoliation rules.⁹⁴ As the court noted in *Cole*, this is one concern underlying the *Erie* doctrine as clarified in *Guaranty Trust* and *Hanna*.⁹⁵ Thus, the court held that when the alleged spoliation occurs *before* the filing of a suit, the federal court does not have “inherent power” and instead must apply the spoliation rules of the forum state in fashioning and imposing an appropriate sanction.⁹⁶

The *Ward* court then noted that Virginia recognizes an adverse inference for spoliation of evidence,⁹⁷ and that such inferences can be outcome determinative in litigation.⁹⁸ Because “spoliation ‘encompasses conduct that is either intentional or negligent,’”⁹⁹ and the defendant negligently failed to preserve the chair, the plaintiff was entitled to an inference that the chair, had it been preserved, would have provided some evidence unfavorable to the defendant.¹⁰⁰ Thus, the defendant’s motion for summary judgment asserting that the plaintiff was not able to establish a prima facie case for negligence against a premises owner was denied.¹⁰¹

Practice Considerations: How to Best Posture your Spoliation Claim

Dismissal is certainly the ultimate defensive sanction for spoliation of evidence.¹⁰² Overall, federal courts – whether applying the “federal law of spoliation” or Virginia law – are much less likely to dismiss a claim for spoliation. On the other hand, Virginia courts, after *Beard*, may be more likely to dismiss cases for spoliation of evidence. Comparison of case law from Virginia state courts and federal courts sitting in Virginia suggests that two factors primarily influence the outcome of a motion to dismiss for spoliation: (1) who engaged in the conduct which resulted in the loss or destruction of the evidence, and (2) how the court defines “bad faith.”

Where the conduct occurs by the hands of or under the direction of a party to the case, it is clear that “bad faith” is required before dismissal is an appropriate sanction. However, Virginia courts and federal courts seem to diverge on the meaning of “bad faith” under Virginia law. Virginia courts have granted dismissal upon a finding of mere negligence in failing to preserve the integrity of physical evidence.¹⁰³ However, federal courts employ a more narrow definition of “bad faith,” requiring that a party “intentionally destroy the evidence or act with intent to prevent the defendant from inspecting and testing” the evidence before

dismissal is a justified sanction.¹⁰⁴ Upon a showing that a party merely acted negligently in failing to preserve evidence, only lesser sanctions will be granted in federal court, whereas a Virginia court might grant dismissal.

When the conduct occurs at the hands of a third party without the knowledge and consent of a party litigant or her attorney, courts seem to agree that only lesser sanctions, such as an adverse inference, are appropriate.¹⁰⁵

As a practical matter, when a spoliation issue arises, it is important to evaluate the facts underlying the spoliation claim before selecting a litigation strategy. When the alleged spoliation can be cast as “at the hands or direction of the plaintiff,” a plaintiff may prefer to file in federal court, where dismissal of the case is rarely granted. Once in federal court, the plaintiff must be careful to present facts showing that any spoliation was “merely negligent” or accidental, rather than intentional. On the other hand, a defendant facing spoliation directly by the plaintiff may find that keeping a case in state courts is advantageous as dismissal for spoliation is a more likely possibility in Virginia courts. If dismissal is not desired or if the alleged spoliation occurred entirely at the hands of a third party, a motion for lesser sanctions such as exclusion of expert testimony or an adverse inference instruction, or both, may be more beneficial. ☒



1. *Wolfe v. Virginia Birth-Related Neurological Injury Compensation Program*, 40 Va. App. 565, 581, 580 S.E.2d 467, 475 (2003) (quoting Steven E. Couch, *Spoliation of Evidence: Is One Man's Trash Another Man's Treasure*, 62 TEX. B.J. 242, 243 & n.4 (1999)).
2. *Id.* (quoting Karen Wells Roby & Pamela W. Carter, *Spoliation, The Case of the Missing Evidence*, 47 LA. B.J. 222, 222 (1999)).
3. *Id.* (quoting *Boyd v. Travelers Ins. Co.*, 166 Ill. 2d 188, 652 N.E.2d 267, 270-71 (Ill. 1995), quoted in, Robert L. Tucker, *The Flexible Doctrine of Spoliation of Evidence: Cause of Action, Defense, Evidentiary Presumption, and Discovery Sanction*, 46 DEF. L.J. 587, 603 (1997)).
4. 252 Va. 30, 471 S.E. 2d 485 (1996).
5. *Id.* at 31, 471 S.E.2d at 486.
6. *See id.*
7. *See id.* at 32, 471 S.E.2d at 486.
8. *See id.* at 32, 471 S.E.2d at 487.
9. *See id.*
10. *See id.* at 33, 471 S.E.2d at 487.
11. *See id.*
12. *See id.* at 34, 471 S.E.2d at 488; see also Leo J.M. Boyd & Deborah M. Russell, *Living and Dying by the Sword: Failed Spoliation Motions in Virginia Courts*, JOURNAL OF CIVIL LITIGATION, Vol. XV, No. 3, 273, 277 (Fall 2003).
13. *See id.* at 34, 471 S.E.2d at 488.
14. *See id.*
15. CL02-13142 (Rockingham Co., Feb. 6, 2004)
16. *See id.* Motion for Judgment ¶11.
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.* ¶¶12-13.2.
21. *See* Transcript of Proceedings, Dec. 11, 2003.
22. *See* Defendant's Motion to Dismiss, Exhibit “A.”
23. The mechanical engineer's conclusions were inconclusive. The mechanical engineer found in relevant part:

Examination of the furnace did not reveal any conclusive physical evidence of a malfunction or defect other than the severe melting and consumption of control components and the outward bowing deformation of the front covers which could be suggestive of a mild or low order explosion, detonation or pressure release.

...

Because of the severity of fire damage, we cannot rule out some type of subtle malfunction or failure that might have been obscured by the subsequent severe fire damage.

...

Because of the severely degraded condition of the furnace, it is difficult to determine at this time what, if any, of [the defendant's] activities may have had to do with this fire.

See Defendant's Motion to Dismiss, Exhibit "B."

24. See Transcript of Proceedings, Dec. 11, 2003.
25. See Defendant's Motion to Dismiss, Exhibit "C."
26. See *id.*
27. See Defendant's Motion to Dismiss, Exhibit "E."
28. See *id.*
29. See *id.*
30. See Defendant's Motion to Dismiss, Exhibit "F" at 58.
31. See Grounds of Defense ¶36.
32. See Defendant's Motion to Dismiss, Exhibit "F" at 64-65.
33. The components included the burner compartment panel, the ignition module, the temperature limit switch, and the fan relay.
34. See Defendant's Motion to Dismiss, Exhibit "L" at 68-69.
35. See Defendant's Motion to Dismiss.
36. See Defendant's First Motion in *Limine*.
37. See Transcript of Proceedings (Dec. 11, 2003) & Transcript of Proceedings (Dec. 17, 2003).
38. See *id.*
39. See Final Order (Feb. 6, 2004).
40. See Transcript of Proceedings (Dec. 17, 2003).
41. See *id.*
42. See *id.*
43. See *id.*
44. See *Delaney v. Sabella*, 39 Va. Cir. 64 (Fairfax Co., Oct. 5, 1995). In *Delaney*, a plaintiff filed a medical malpractice action against her gynecologist for failure to diagnose an ectopic pregnancy. The defendant took a Pap smear for evaluation and sent the Pap smear slide to an expert for analysis. The expert prepared a written report but lost the actual slide. The slide was never produced or made available to the plaintiff for inspection and analysis by her experts. The contents of the slide became a crucial issue in the case. At trial, the defendant sought to call his expert, the only witness who actually examined the slide. Seeking to exclude the expert's testimony, the plaintiff argued that it would be "unfair and unjust" for the defendant to be able to introduce any evidence or testimony relating to the slide which was lost while in the exclusive possession and control of the defendant's expert. The Fairfax County court cited with approval *American Family Ins. Co. v. Village Pontiac GMC, Inc.*, 223 Ill. App. 3d 624, 585 N.E.2d 1115, 1118 (1992): "an expert should not be permitted intentionally or negligently to destroy such evidence and then substitute his or her own description of it." Noting its power to sanction a party for failure to provide discovery, the court held that it need not go through the "useless exercise of compelling production" of physical evidence the defendant conceded was lost. *Id.* at 67. Rather, the court determined that exclusion of all testimony about the misplaced slide is "the appropriate remedy for the prejudice suffered by the plaintiff due to the inability of her experts to examine this crucial evidence that was lost while in the exclusive possession or control of the defendant and/or his experts." *Id.* at 67.
45. See Transcript of Proceedings (Dec. 17, 2003).
46. 350 F.3d 446, 450 (4th Cir. 2004), citing *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 155 (4th Cir. 1995). Though the *Hodge* court did not find spoliation under the facts of the case, *Hodge* is the most recent exposition of the "federal law of spoliation" in the Fourth Circuit.
47. *Id.* at 449-50, citing *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001); see also *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 285 (E.D. Va. 2001).
48. *Trigon*, 204 F.R.D. at 285.
49. See *id.* at 286.
50. *Id.* at 288, 291.
51. *Id.* at 285; see also *Vodusek*, 71 F.3d 148, 156 (4th Cir. 1995) ("the trial court has discretion to pursue a wide range of responses [to loss or destruction of the evidence]"); *Rambus, Inc. v. Infineon Technologies North America Corp.*, 222 F.R.D. 280, 299 (E.D. Va. 2004) (noting that "sanctions [range] from so-called 'adverse spoliation inferences' to outright dismissal of the complaint").
52. No cases were found in which a federal court sitting in Virginia, facing a motion to dismiss, applied the "federal law of spoliation" and dismissed the case as a sanction for spoliation.
53. See *Hodge*, 350 F.3d at 450, citing *Vodusek*, 71 F.3d at 155-56.
54. See *Trigon*, 204 F.R.D. at 286; see also *Vodusek*, 71 F.3d at 156.

55. See *Vodusek*, 71 F.3d at 151.
56. *Id.* at 155.
57. See *id.* at 156, citing *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); *Welsh v. United States*, 844 F.2d 1239, 1246 (6th Cir. 1988); *Nation-Wide Check Corp. v. Forest Hills Dist., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982).
58. See *Vodusek*, 71 F.3d at 157.
59. See *id.* at 156.
60. 132 F.3d 1044, 1045 (4th Cir. 1998).
61. See *id.*
62. See *id.* at 1046.
63. See *id.* at 1045-46.
64. *Cole v. Keller Industries, Inc.*, 872 F. Supp. 1470, 1473 (E.D. Va. 1994).
65. See *id.* at 1473.
66. *Cole*, 132 F.3d at 1047.
67. *Id.* at 1046, citing *Vodusek*, 71 F.3d at 155-57.
68. See *id.* at 1047, n.1.
69. 326 U.S. 99 (1945).
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71. *Cole*, 132 F.3d at 1047, n.1.
72. 252 Va. 30, 471 S.E.2d 485 (1996).
73. *Cole*, 132 F.3d at 1047.
74. *Id.*
75. *Id.*
76. See *id.*
77. *Green v. Ford Motor Co.*, Civil Action No. 3:00CV00049 Mem. Op. (W.D. Va. Nov. 3, 2001), cited in and attached to *Florists Mutual Ins. v. Ludvig Svensson, Inc.*, 2003 U.S. Dist. LEXIS 7337 (W. D. Va. Feb. 13, 2003) at *42.
78. See *id.* at *45.
79. See *id.* at *45-46.
80. See *id.* at *48.
81. See *id.* at *49.
82. See *id.* at *68-69.
83. *Id.* at *69.
84. See *id.*
85. *Id.* at *69.
86. See *id.*
87. *Id.* at *70.
88. See *id.*
89. 2004 U.S. Dist. LEXIS 10574 (May 27, 2004).
90. See *id.*, 2004 U.S. Dist. LEXIS 10575 at *2-3.
91. See *id.*, 2004 U.S. Dist. LEXIS 10575 at *4.
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93. See *id.*, 2004 U.S. Dist. LEXIS 10575 at *6.
94. See *id.*
95. See *id.*, 2004 U.S. Dist. LEXIS 10575 at *6-7; see also *Cole*, 132 F.3d at 1047, n.1.
96. See *id.*, 2004 U.S. Dist. LEXIS 10575 at *7.
97. See *id.*
98. See *id.*, 2004 U.S. Dist. LEXIS 10575 at *5.
99. *Id.*, 2004 U.S. Dist. LEXIS 10575 at *8.
100. See *id.*, 2004 U.S. Dist. LEXIS 10575 at *9.
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102. See *Gentry v. Toyota Motor Corp.*, 252 Va. 30, 34, 471 S.E.2d 485, 488 (1996); *Cole v. Keller Industries, Inc.*, 132 F.3d 1044, 1047 (4th Cir. 1998); *Green v. Ford Motor Co.*, Civil Action No. 3:00CV00049 Mem. Op. at 69 (W.D. Va. Nov. 3, 2001), cited in and attached to *Florists Mutual Ins. v. Ludvig Svensson, Inc.*, 2003 U.S. Dist. LEXIS 7337 (W. D. Va. Feb. 13, 2003) at 42.
103. See *Beard v. Climate Control of Harrisonburg*, CL02-13142 (Rockingham Co., Feb. 6, 2004).
104. See *Cole v. Keller Industries, Inc.*, 132 F.3d 1044 (4th Cir. 1998).
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Litigation News is published by the Virginia State Bar Litigation Section.

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