



Motor Vehicle Crash Data Recording Systems

Philip G. Gardner

Following almost all aircraft crashes there is the usual announcement that the matter is under investigation and that FAA flight investigators are looking for the flight data recorder. This familiar device, known as the “black box”, has a not so familiar motor vehicle counterpart known as the crash data recorder. The device goes by various names which will be discussed herein but the various components are often referred to as the vehicle crash data retrieval system. This is somewhat of a misnomer inasmuch as the data recording function of the system is secondary to its primary function which is to collect and interpret certain data about a vehicle’s behavior and make a decision whether to deploy the vehicle’s passenger restraint system (airbags and belt pre-tensioners).

The crash data retrieval system on many passenger vehicles provides highly accurate information about a vehicle’s activity for each of approximately five seconds before a crash and information about the crash itself. The data recording systems vary from manufacturer to manufacturer but the information retrievable includes speed, engine rpm, percentage of throttle and when the brakes were activated. The value of such information to the trial lawyer is readily apparent. This article will provide a basic introduction to the system, how it works, how the data is acquired and interpreted and issues relating to the admissibility of the data in court.

The development of the technology allowing pre-crash and crash data to be recorded and retrieved is an

outgrowth of airbag and computer technology. Early airbag technology was fairly primitive and the utilization of mechanical components did not create opportunities for data recording and retrieval. As airbags became accepted by the public and required by the government, there was a virtual explosion in the growth of the sophistication of the micro chips and availability of and mini processors. Suppliers to the automotive industry such as Delphi and Siemens were quick to recognize the benefit (and profit) of employing microcomputers for air-bag deployment.

By the mid 1990’s sophisticated and effective computer modules were in extensive use in the automobile industry not only for airbag deployment but for almost all motor vehicle functions. The central brain of most vehicles is the powertrain control module, a computer that controls many vehicle functions such as gear shifting, traction control, ride stability control and fuel to air ratios just to name a few. The powertrain control module also sends information to another module,

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Letter From The Chair

Vicki Hansen Devine, Esq.

Law in Society Essay Contest

By the time you read this message, the entries for the annual Law In Society Essay Contest will have been read and graded and most likely the winners will have been announced. As I write, the grading is just beginning.

It is my pleasure to report to you that the State Bar received 301 essays this year, a significant increase over last year. As you know, the Litigation Section has participated in the funding of the contest (including prizes), in assisting with the grading and, this year, spreading the word. I am told by Dawn Chase, Public Information and Contest Coordinator at the State Bar, that the increased interest may be attributable to several factors:

1. The assistance of Peggy Hays, a retired social studies teacher from Lexington, in promoting the contest at a conference of teachers last fall;
2. Your involvement in contacting principals, teachers and counselors in your locality in response to my plea for your help in publicizing the contest;
3. Doubling of the prize money; and
4. Efforts by the Virginia State Bar staff and Will Allcott of McGuire Woods who chairs the Publications and Public Information Committee of the Virginia State Bar who took steps to get the word out to more schools.

The topic this year was whether people with undocumented citizenship status should be allowed to attend state-supported universities. As Dawn remarked, "kids were energized by it, on different sides of the issue...and their arguments were so inspired."

Whatever you, I and the State Bar can do to continue to increase participation next year (and years to come), let's do it! The contest is a meaningful exercise in promoting creative thinking and legal analysis and deserves our active support.

Appellate Subcommittee

The next symposium on appellate practice will take place on May 10, 2007 from 1:15 to 3:15 p.m. at

Skyland Lodge in the Shenandoah National Park. The topic is Criminal Appeals and speakers will include Rosemary Bourne of the Attorney General's office, Scott Moore of the Chief Staff Attorney's office of the Supreme Court of Virginia and our own Appellate Subcommittee Chair, Steve Emmert. If you wish to register, you may get information from Steve's website, www.appeals-virginia.com or at the VSB Litigation Section website, www.vsb.org (go to Litigation Section "Meetings and Seminars").

VSB Summer Meeting

As I mentioned to you in the last issue of Litigation News, our section, in partnership with the Criminal Law section and the Bench-Bar Relations Committee will sponsor the Showcase Workshop at the summer meeting, featuring Bill Haltom, legal humorist, as well as local and distinguished panel members: David Baugh, Moderator, The Honorable Ann Hunter Simpson, 15th Judicial Circuit, Joe Condo, past president of VSB and Karen Gould, our current president. I hope you will make plans to attend the Summer Meeting, and, particularly, the Showcase Workshop.

Personal Note

Our Section has the potential to make a significant contribution in promoting the practice of law as the honorable profession it is. If you have an idea for a project that can serve not only the legal community, but also the community at large, please call, email or write to me. As the largest of the VSB sections, we have a huge pool of human resources (all of us members) just waiting to be involved in good works. I look forward to hearing from you. ☒

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View From the Bench*Michael F. Urbanski¹*

A Few Thoughts on Settlement Conferences

When I left the private practice of law a few years ago and began my new job as Magistrate Judge, I knew that conducting settlement conferences or mediations would be an important part of my responsibilities, but I have been amazed by both the volume of such proceedings and by the challenge they present.

Although I practiced law in Roanoke for twenty years before moving back to federal court, I had not had any experience in conducting mediations. Certainly, I had participated in dozens of them, both in proceedings conducted in federal court by the Fourth Circuit Mediator or Magistrate Judges and with private mediators, but I had not conducted any myself. Over the past three years, I have conducted well over one hundred settlement conferences and consequently have learned much about the process from the perspective of a neutral. I hope the following observations will help those who are preparing themselves and their clients for settlement conferences.

At the end of the day, the goal of any settlement conference is that justice be done. Because of the modern cost of litigation and the vagaries of trial, resolution of cases through mediation is far more prevalent than it was when I started practicing law. In the 1980s, mediation was unheard of, and if the lawyers could not get the case settled over the phone, the parties went to trial. These days, however, the cost of litigation is a much more significant factor for parties to consider when conducting a cost benefit analysis of any proposed resolution. Indeed, I believe that mediations are so popular these days in large measure due to the high cost of trying a case to verdict. The cost of litigation, therefore, is always an important factor in getting a case settled at mediation.

The Federal Judicial Center trains all new Magistrate Judges in mediation techniques, and annually conducts seminars for Magistrate and District Judges on the subject. While these excellent programs were certainly helpful in making the transition from mediation advocate to neutral, success as a mediator also depends on one's experience and practice. Having sent legal bills for more than twenty years, I can speak with some credibility to parties and their counsel about the cost of taking a deposition, writing a summary judgment brief, or trying a case. I think that is helpful in getting cases resolved. By the same token, the fact that I get to conduct settlement conferences in a federal courthouse also helps get parties motivated to settle cases.

In considering whether to seek a settlement conference in federal court, it goes without saying that it is of primary importance to know the practice of the District Judge trying your case. Here in the Western District, each District Judge approaches convening a settlement conference differently, and you have to investigate what each District Judge expects in that regard. Many District Judges address settlement conferences in their pretrial orders, so that is a good place to start. If the pretrial order does not address settlement conferences, here in the Western District you may request one by motion or by communicating with the District Judge assigned to your case. If the pretrial order already refers the case to the Magistrate Judge for mediation, counsel may communicate your interest in having a settlement conference scheduled by contacting that Magistrate Judge.

The timing of a settlement conference can be critical to a successful resolution. Depending on the amount in controversy and complexity of factual and legal issues, some cases cry out for settlement early in the case, even before any discovery is taken. Counsel should try to assess the goals of the litigation and the net cost of the litigation to the client early in the case. If the cost of litigation is significant in comparison to the likely outcome, it is often helpful to schedule a settlement conference early to avoid spending the client's

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known to the industry as the airbag control module. This unit is typically located under the driver's seat or the passenger's seat. In General Motor's vehicles the unit is known as an "SDM", an acronym for "sending", "diagnostic" "module." Access to the module in Ford and GM vehicles is not difficult and the information is easily downloaded using a program available publicly from Vetronix. The module used by Ford bears the name Restraint Central Module (RCM). Toyota's module may only be downloaded by the manufacturer. Vetronix sells (for about \$2,600) a CDR kit which allows a knowledgeable user to download the Ford and GM module. Below is an example of data downloaded from a Virginia State Police 2001 Impala involved in a serious crash.

yield the right of way case might well find the crash data retrieval system quite helpful. Likewise, a plaintiff seriously injured in a collision where he failed to yield the right of way can use the crash data to turn the case from a sure loser to a dead heat.

It is not the purpose here to take an in depth look at the components of the crash data retrieval system but an understanding of the basics is essential. Those desiring a deeper immersion can simply go on-line and search using the relevant words and a wealth of information is available.

As a result of a NTSB (National Transportation Safety Board) directive to manufacturers and to NHTSA (National Highway Traffic Safety Administration) (directive H-97-18), the majority of production vehicles sold in North America since 1997 have some sort of crash data recording capability.

2G1WF55K219259603 System Status At Deployment															
SIR Warning Lamp Status	OFF														
Driver's Belt Switch Circuit Status	UNBUCKLED														
Ignition Cycles At Deployment	3664														
Ignition Cycles At Investigation	3665														
Maximum SDM Recorded Velocity Change (MPH)	-34.22														
Algorithm Enable to Maximum SDM Recorded Velocity Change (msec)	97.5														
Driver First Stage Time Algorithm Enabled to Deployment Command Criteria Met (msec)	7.5														
Driver Second Stage Time Algorithm Enabled to Deployment Command Criteria Met (msec)	N/A														
Passenger First Stage Time Algorithm Enabled to Deployment Command Criteria Met (msec)	7.5														
Passenger Second Stage Time Algorithm Enabled to Deployment Command Criteria Met (msec)	N/A														
Time Between Non-Deployment And Deployment Events (sec)	N/A														
Frontal Deployment Level Event Counter	1														
Event Recording Complete	Yes														
Multiple Events Associated With This Record	No														
Time (milliseconds)	10	20	30	40	50	60	70	80	90	100	110	120	130	140	150
Recorded Velocity Change (MPH)	-1.86	-4.03	-8.37	-13.02	-17.67	-23.97	-29.78	-31.93	-33.17	-34.10	N/A	N/A	N/A	N/A	N/A
PRE-CRASH DATA															
Seconds Before AE	Vehicle Speed (MPH)	Engine Speed (RPM)	Percent Throttle	Brake Switch Circuit Status											
-5	94	3008	41	OFF											
-4	94	2880	18	OFF											
-3	94	2944	27	OFF											
-2	94	3072	68	OFF											
-1	80	2240	0	ON											

Only a cursory look at the table shows the tremendous impact such information can have on litigation. Considering that almost everybody drives significantly over the speed limit, and considering that many drivers when deposed insist they were not exceeding the speed limit, the downloaded data is like a vehicle lie detector—except that the results are admissible in court. In Virginia, a driver exceeding the speed limit forfeits the right of way. A lawyer defending what at first glance might appear to be a hopeless failure to

NHTSA estimates that as of model year 2004 between 65% and 90% of passenger vehicles have the capability. NHTSA reported that by 2004, Ford, GM and Toyota recorded what it considered a large amount of crash data and Honda and BMW recorded what it considered small amounts of information. The fact that the information is collected pursuant to official, governmental initiatives and the fact that the technology is widely employed in the industry helps the admissibility argument for those who seek to use the

data in court. While the exact method of recording crash data and the amount of data recorded varies from vehicle manufacturer to manufacturer, the airbag control module is the guts of the system.

The airbag control module controls the function of the vehicle's restraint system including the airbags and the safety belt pretensioners. The industry wide designation for this module is the "ACM" although GM uses the specific designation "SDM" which stands for "sensing", "diagnostic" "module". The term "SDM" refers to the functions of the module, being receiving and sensing data, the diagnosis and action upon the data and the recording of the data. (So why not "SDR"??). The airbag control modules are supplied to the automotive industry by such well known names as Siemens, Delphi and Bosch with Delphi being the leader, by far.

The airbag control module (SDM) has as its primary function the decision on whether to deploy the airbags and belt pretensioners. Its secondary function is to capture and record data. This distinguishes it from the aircraft flight data recorder which controls nothing and only records data. The airbag control module should not be confused with the powertrain control module (PCM). The PCM is an onboard computer which controls many of the vehicle's functions such as gear shifting, fuel mixture sensing, traction control, etc. The PCM is important for our purpose here because it sends data to the SDM, most significantly data relating to speed. The speedometer, however functions separately from the SDM and it is important to remember that the SDM is not a speedometer. The powertrain control module calculates the speed of the vehicle from speed sensors located on the transaxle and sends the data to the speedometer so the driver knows his speed. The data is also sent to the SDM which uses that information, together with other information, to make the airbag

deployment decision. Information from the powertrain control module is constantly fed to the SDM. The SDM never records that data, however, unless the data triggers what can be termed a "wake up call".

The SDM is like a sleeping dog-it senses information but does nothing about it unless the information rises to the "danger" level. That level of danger is primarily a certain amount of negative acceleration. If certain predetermined negative acceleration occurs within a predetermined time the SDM "wakes up" and gets ready to make the deployment decision if the neg-

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ative acceleration continues for the predetermined time. If in fact the negative acceleration continues then the SDM deploys the airbag and activates the pretensioners. If the "wake up call" information fails to meet deployment criteria the SDM goes back to sleep and there is no deployment. Vetronix claims that certain data is recorded in "near-deployment" events. That issue is not addressed here. If, however, there is a deployment, the SDM's secondary function, that of recording data, is activated. This event is known in the industry as "algorithm enable". Upon airbag deployment the SDM captures and records the

five seconds of data before the crash and certain data at the crash. Of course, all this is happening in thousandths of seconds. The foregoing is an oversimplification and any lawyer who wants to use the data in court must become more knowledgeable about the technology, particularly the details of the particular SDM or SDMs on the crash vehicles.

Obviously, the data can only be used in court if it is properly acquired. The airbag control module should, if possible, be downloaded while the module is in the vehicle, although this is not a strict requirement. The module can be downloaded after it is removed. It can be downloaded in court as a live demonstration. The vehicle must first be located-

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sometimes an arduous task especially if the vehicle is totaled and sold for salvage. Is the acquisition of the data by anybody other than the owner larceny? Probably. Care must be taken to determine the true owner of the vehicle before removing the module or the data. Some states are addressing the issue with legislation making it clear that the data belongs to the vehicle owner. Be aware that the SDM can not be reused after an airbag deployment. It must be replaced. If the vehicle is repaired the repair shop will probably discard the SDM. Obviously, counsel must act quickly to be sure the SDM is preserved if the facts indicate that it will or may be helpful. Potential issues of duty of disclosure and spoliation are not addressed here other than to mention them as things to consider. While no article such as this could possibly address the many variations of facts these cases present, if the decision is made to acquire the data, one should employ an expert immediately to supervise the access to the module and the download of the data. If time will not permit an expert to be hired, a knowledgeable layperson such as a mechanic should be employed to remove the SDM and deliver it to an expert for downloading. The ideal, of course, is to find the vehicle, have an expert do an on site download, purchase the vehicle and put it in secure storage. Expert resources are readily available and an on-line search quickly provides some choices.

An additional potential resource for Virginia practitioners may be found within the Virginia State Police. The Commonwealth is divided into divisions by the Virginia State Police for purposes of command and control. Each division maintains a crash team consisting of Virginia State Troopers specially trained in accident investigation and reconstruction. The team leader is typically an experienced senior trooper or first sergeant. The crash team may be deployed by

request from the division's first sergeant or "higher ups" may order deployment. Deployment may be requested by any interested party. Obviously the crash team is not routinely deployed. Serious crashes involving law enforcement vehicles or rescue or fire vehicles frequently involve crash team investigations. Cases involving fatalities sometimes involve the Virginia State Police crash team. The Virginia State

Police crash team leaders are well trained and equipped to acquire and download the SDM data.

No discussion of the admissibility of SDM data would be complete without mention of a leading expert in the field, W. "Rusty" Haight.² This article is neither an endorsement of Mr. Haight nor an advertisement for him. His name, however, is the most prevalent name in the field. He holds the Guinness Book of Records record for most crashes as a human crash test dummy. He has been the occupant of many controlled crashes

designed to test the reliability of the crash data retrieval systems. He has testified in civil and criminal cases all over the country on the matter and he teaches extensively on the subject. He is a particularly important name for Virginia practitioners because he is an instructor approved by the Virginia State Police to train State Troopers in the acquisition, download, interpretation, and use of crash data from airbag control modules. Not only does he teach the Virginia State Police this subject he also teaches the personnel of other law enforcement agencies.

To the extent that acceptance of the reliability of scientific evidence and data by other Courts is influential on another Court accepting the data, Mr. Haight has led the way. He is by no means the only resource available. In fact, his high demand makes his availability obviously limited. Virginia practitioners will find many resources, among them, Mike Sutton a professional engineer in the Raleigh area.³ Mr. Sutton is well connected in the field and can provide expert testimony and services in this area and the names and

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addresses and telephone numbers of others who understand the technology and have qualified as experts and provided the foundation and basis for the admissibility of this evidence.

Official recognition of the reliability of data is a factor which influences its admissibility in Court. The National Transportation Safety Board recognizes the data as reliable. State and Federal law enforcement agencies recognize the data as reliable. Use of the devices and the data by State and Federal agencies can affect a Court's decision on reliability. The Virginia State Police not only recognize the data as reliable but utilize the data in official ways such as accident and other reports which are required by Virginia State Police regulations and made a permanent part of the official records of the Virginia State Police. The data is used by law enforcement agencies to make personnel decisions such as disciplining Troopers. Prosecutors rely on the information in making prosecutorial decisions. The technology upon which the data is based is neither new nor novel and is widely accepted. The data is relied upon by the National Highway Transportation Board and by the industry in improving motor vehicle safety design. Perhaps most importantly, courts across the United States, including Virginia, have accepted the data as reliable and having a sufficient basis in science to be admissible in criminal and civil trials.

Unlike certain categories of scientific evidence admissible by statute, there is no specific statute providing for the admissibility of crash data retrieval system information. This means, of course, that not only must counsel establish the reliability and acceptability of the data but counsel must establish that the SDM on the vehicle in question was working and that it was functioning properly.

Expert testimony is necessary to establish this and it is established in two ways. First, experts understand the diagnostic functions of the powertrain control module and the airbag control module. Every time the vehicle is turned on, the diagnostic functions of the modules test the proper functioning of the module. Second, the expert must never ignore the empirical data surrounding the crash and reliable witness accounts.

For example, in a recent Henry County case, the

division six crash team investigated a serious accident and First Sergeant Cheek, crash team leader, downloaded the information from the vehicle's SDM. He testified that he had investigated thirty serious crashes where the SDM data was downloaded by either him or at his direction and in each instance the data supplied by the SDM was entirely consistent with the other available information about the crash. (Damage to vehicles, skid marks, position of vehicles after the crash, travel of the vehicles after the crash, etc.)

Judges seem to be very interested in accuracy and "calibration" arguments because Judges hear those arguments frequently in other contexts. For example, Judges will not allow evidence of speed as reported by a radar unit unless the unit has had at least one calibration verifying its accuracy before the reading. Further judges are accustomed to the requirement that devices such as radar units and breathalyzer machines be periodically tested for accuracy. No such calibration is possible (or necessary) for an airbag control module or a powertrain control module and there are no periodic examinations of such devices for accuracy and certification of their accuracy. So far, Courts across the United States have accepted the self-diagnosis capabilities of these systems to stand for their accuracy at the time of the crash. Of course, the fact that the airbag deployed is a strong argument that the systems were functioning properly.

The admission of expert testimony based upon crash data obtained from a crash data retrieval system is governed, at least in part, by Section 8.01-4013 of the Code of Virginia which provides that in a civil proceeding, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

While the Virginia Supreme Court has specifically declined to say whether the standards set forth by the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals 516 U.S. 869 (1995), is or is not the law in Virginia, the Virginia Supreme Court cases would seem to support a "threshold" determination by a trial court, as in Daubert, and an analysis of

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scientific reliability similar to that employed in Daubert. Prior to Daubert the Supreme Court had defined, in criminal cases, the trial court's role in making a threshold finding of scientific reliability when unfamiliar scientific evidence is offered. Spencer v. Commonwealth 240 Va 78, 97-98, 393 S.E. 2d 609, 621 (1990) and Satcher v. Commonwealth 244 Va 220, 244, 421 S.E. 2d 821, 835 (1992). By rejecting the "Frye" test (Frye v. U.S. 293 F.2d 1013, 1014 (D.C. Circuit 1923)), the Supreme Court of Virginia rejected general acceptance by the scientific community as a prerequisite to the admissibility of scientific evidence. The Virginia Supreme Court's rejection of Frye in Odell v. Commonwealth 234 Va 672, 364 S.E. 2d 491 (1988) persists to this day as does the Virginia Supreme Court's refusal, thus far, to embrace Daubert. The failure of the Virginia Supreme Court to adopt the "Frye" test does not mean that acceptance of scientific evidence by the scientific community is not a factor which militates in favor of admissibility. It simply means that acceptance by the scientific community is not a prerequisite. While Daubert has not been embraced in Virginia it is clear from reading the Spencer and Satcher cases that the trial court's threshold inquiry of scientific reliability is very similar to the analysis required by Daubert and its progeny. Under existing case law in Virginia crash data recording device evidence should be admissible. The device enjoys widespread industry use. The device is relied upon by the industry in making important design decisions concerning the safety of motor vehicles. The information is relied upon by governmental agencies in the analysis of crashes and the promulgation of standards. The generation of the data involves the use of microprocessors and computers that have wide-

spread application in the world for other important applications. The crash data is subject to verification by the collateral facts surrounding the crash. The reliability of the crash data retrieval systems has, in fact, been tested and the test results are within the public domain. The technology depends upon known principles of physics and mathematics. Courts around the country are finding that such evidence is reliable and such evidence is routinely admitted when the proper foundation is otherwise laid. The SDM has been found to meet the Frye standard for admissibility in a number of jurisdictions.

Under existing case law in Virginia crash data recording device evidence should be admissible. The device enjoys widespread industry use. The device is relied upon by the industry in making important design decisions concerning the safety of motor vehicles.

The Frye standard of admissibility is arguably more stringent than the Virginia standard. Testimony relating to SDMs was found admissible at trial after Frye hearings in Bachman v. General Motors Corp., 332 Ill. App 3d 760, 776 N.E. 2d 262, 267 (App. Ct. Ill., 4th Dist. 2002), People v. Christmann, 776 N.Y.S. 2d 437 (Justice Court of New York, Wayne County 2004), People v. Slade, 2005 N.Y. misc. LEXIS 3217 (Supreme Court of New York, Nassau County 2005). In John v. Im,

263 Va. 315 559 S.E.2d 694 (2000) wherein the Virginia Supreme Court specifically left open whether it would adopt a "Daubert" analysis to determine the scientific reliability of expert testimony the Court's opinion nevertheless provides a further roadmap of how scientific reliability can be established. While Circuit Court opinions are not binding they are certainly persuasive. Following an extensive threshold inquiry, Judge James Kulp, sitting by designation in the Henry County Circuit Court found such evidence to be reliable and admitted it. (See Commonwealth v. Hairston, Henry County Circuit Court No. CR04000886-00).

Finally, counsel need to be aware that the SDM does not itself record speed and miles per hour or engine speed and rpms or the likes. Raw data is trans-

mitted to the recording chip in the airbag control module and that raw data is then downloaded on a computer which runs the Vetronix software (for Ford and GM vehicles) which converts the raw data to traditional information such as rpms, miles per hour, etc. The accuracy of this software program would seem to be another source of attack by those opposing the admissibility of data retrieved from the airbag control module, but courts considering the matter have not been persuaded by such arguments and have admitted the evidence upon proof that the systems are reliable and produce reliable data. The extensive crash testing done by Mr. Haight and others, including NHTSA is widely available and published and enjoys a high degree of acceptance in vehicle safety circles and in Courts. This data, having been published and having gained widespread reliance maybe used by other experts and is, in fact, being used by other experts.

There are other limitations of the technology which limitations are readily available to those who know how to click a mouse. For example, if a vehicle is airborne before a crash the speed sensors on the transaxle will not accurately submit speed data. Likewise if the vehicle is skidding on its rooftop or on its side and the wheels are not in contact with the ground the speed information transmitted by the powertrain control module to the airbag control device will not indicate the actual ground speed of the vehicle. However, for the most part and in most crashes, a vehicle equipped with a General Motors, Ford or Toyota type SDM may provide a wealth of information critically important to a civil or criminal case. ☒

¹ For a more detailed view of the crash team concept in Virginia the deposition of First Sergeant Cheek in the Hairston case cited later is highly instructive. A copy may be obtained by contacting Mrs. Rigney at Phil Gardner's office at 276-638-2455. The cost for copying and mailing is \$25.00.

² Anyone desiring a transcript of Mr. Haight's direct and cross examination in the Hairston case referred to herein may obtain a copy by contacting Mrs. Rigney at Phil Gardner's office at 276-638-2455. The cost of copying and mailing will be \$25.00.

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Statutes of Limitation in Equity – If Equity Follows the Law, What is Left of Laches?

Robert E. Scully, Jr.

In Virginia, we vigorously follow the ancient maxim of equity jurisprudence that when a time-barred legal claim is pursued in equity, *Aequitas sequitor legem*, “equity follows the law” and bars the claim. This maxim experienced a renaissance in *Belcher v. Kirkwood*, 238 Va. 430, 383 S.E.2d 729 (1989), and reached its modern apotheosis in *Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity*, 266 Va. 455, 587 S.E.2d 701 (2003). Effective January 1, 2006, Virginia adopted a single form of civil action and eliminated its separate chancery side of the Court. See, e.g., Va. Code Ann. § 17.1-513 (deleting references to “in chancery” and “at law” from jurisdiction of courts of record); Va. Code Ann. § 26-52 (additional powers of court of equity enforcing a trust); Va. Code Ann. § 8.01-33 (enforcement of assignments no longer a subject of equity “jurisdiction.”) In light of these recent developments, is the statute of limitations now the sole occupant of the stale claims field? Has laches been reduced to a dead letter?

Professor Bryson has argued that Va. Code Ann. § 8.01-2(1) which defines “action” to include all civil proceedings “whether upon claims at law, in equity, or statutory in nature,” when read together with Va. Code Ann. § 8.01-228, makes the statutes of limitation applicable to all equitable and legal claims. W. Hamilton Bryson, *Bryson on Virginia Civil Procedure*, 285 (3d ed. 1997). Yet, against that proposition stands the “equitable relief” exception in Va. Code Ann. § 8.01-230. It defines the accrual rules in contract and

tort actions except where the relief sought is “solely equitable.” If the relief sought by the Plaintiff is “solely equitable,” the general statutory accrual rules in § 8.01-230, which are essential to the application of the statutes of limitation in Title 8.01, do not apply. Does that mean some other equitable accrual rules must be followed when applying the statutes of limitations to a claim for solely equitable relief? And if so, where do we find those equitable accrual rules?

Va. Code Ann. § 8.01-249.1, provides an accrual rule for actions for fraud or mistake and in actions for rescission of contract for undue influence. A rescission action would seem, therefore, to be governed by the catch-all statute of limitations in Va. Code Ann. § 8.01-248. But in *Gilley v. Nidermaier*, 176 Va. 32, 10 S.E.2d 484 (1940), the Virginia Supreme Court held that the catch-all statute has no application to purely equitable claims because they are not “personal actions” that seek a money judgment for damages to person or property. Va. Code Ann. § 8.01-228 defines a “personal action” as an action for money damages. That is an ancient concept. W.E. Grigsby, Joseph Storey, *Commentaries on Equity Jurisprudence*, § 642, 41 (1st Eng. ed. 1884) (“in cases of personal claims, [equity] also requires relief to be sought within the period prescribed for personal suits of a like nature.”). Paradoxically, Va. Code Ann. § 8.01-249.1 thus provides an accrual rule for rescission actions for which there is no corresponding general limitation period. Does the accrual exception require the Court to fall back on the traditional equitable doctrine of laches to decide whether a rescission claim is too stale to prosecute?² And in light of the substantial overlap between legal and equitable claims and remedies in the modern world, an overarching question remains: When is the relief the Plaintiff seeks “solely equitable?”

At common law, statutes of limitation only applied to enforcement of the forms of action recognized by the law courts. Laches was the sole bar to enforcement of equitable claims. However, early on, the English chancellors applied legal statutes of limitation “by analogy” to bar claims over which they had concurrent jurisdiction with the law courts. *Rowe v. Bentley*, 70 Va. 756, 760, 29 Gratt. 756, 760 (1878); *Sanford v. Sims*, 192 Va. 644, 649, 66 S.E.2d 495, 497-498 (1951) (right of entry enforceable at law by ejectment is barred by the statute of limitations if asserted in equity); 2 Pomeroy,

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Equity Jurisprudence § 419(a), 172-173 (5th ed. 1941). The major exception to the application of the statute of limitations “by analogy” was in suits by beneficiaries against trustees to enforce express trusts. No statute of limitations or laches barred equitable claims against trustees so long as they remained in office. *Wiglesworth v. Taylor*, 239 Va. 603, 608 391 S.E.2d 299, 303 (1990) (absent denial or repudiation of the trust, actually communicated to the beneficiary, a trustee cannot assert the statute of limitations or laches as a defense).³

In the majority of the states, the distinction between actions in law and suits in equity was abolished years ago. In most of those jurisdictions the application of statutes of limitation to equitable proceedings is unquestioned and an equitable claim not brought within the statutory limitation period is almost always barred. 2 Pomeroy, *Equity Jurisprudence* § 419(b), 174 (5th ed. 1941). Virginia’s recent, belated, adoption of a single form of action, Va. Sup. Ct. Rule 3:1, coupled with its extensive list of statutes of limitation applicable to traditional equitable claims⁴, seems to confirm the primacy, in Virginia, of the statutes of limitation as a time bar to both legal and equitable claims.

Yet rumors of the demise of laches have been greatly exaggerated. As Justice Brown observed in his oft-cited opinion in *Patterson v. Hewitt*, 195 U.S. 309, 318 (1904):

[I]t would seem to follow that in the code States, where there is but one form of action applicable both to proceedings of a legal and equitable nature, a statute of limitations, general in its terms, would apply to suits of both descriptions and the doctrine of laches become practically obsolete. This, however, is far from being the case, as questions of laches are as often arising and being discussed in the code States as in the others.

Clearly, some anomalies remain in cases controlled by the substantive law of equity and the application of statutes of limitation to equitable claims in Virginia is complicated by the mysterious “solely equitable relief” exception to the accrual rules in Va. Code Ann. § 8.01-228.

Virginia trial courts have struggled mightily to make sense of the “solely equitable relief” exception. In

Goodell v. Rehrig International, Inc., 683 F. Supp. 1051 (E.D. Va. 1988) Judge Spencer applied the exception to preserve an unjust enrichment claim from a statute of limitations defense on the grounds that it was an equitable claim. 683 F. Supp. at 1056. The following year the Virginia Supreme Court rejected that conclusion. In *Belcher v. Kirkwood*, 238 Va. at 432, 383 S.E.2d at 730-731, the Court concluded that unjust enrichment claims are also cognizable at law and therefore barred by the three year statute of limitations applicable to oral contracts. More recently, in *Bryan v. Nationwide Mutual Insurance Co.*, No. 3-12, 972 65 Va. Cir. 233, 2004 Va. Cir. LEXIS 134 (Charlottesville, Jul. 19, 2004) Judge Peatross ruled that a suit to reform a contract is a quintessential form of equitable relief available only in equity and is not barred by any statute of limitations available by analogy in a law action. 65 Va. Cir. at 236, 2004 Va. Cir. LEXIS 134 at ** 7. Conversely, in *Orantes v. Pollo Ranchero, Inc.*, 70 Va. Cir. 277, 2006 Va. Cir. LEXIS 52 (Fairfax, Mar. 9, 2006) Judge Thacher held that while the remedy sought by the Plaintiff was “equitable” the *cause of action* for fraud in the formation and operation of a restaurant corporation was a claim cognizable at law and therefore governed by the fraud statute of limitations. Judge Thacher distinguished *Bryan v. Nationwide Mutual Insurance Company* on the grounds that the claim in *Bryan* was a strictly equitable *cause of action* for reformation of a contract based on mutual mistake. 70 Va. Cir. at 279-280, 2006 Va. Cir. LEXIS 52 at ** 5-6 (emphasis in original).

The key to this mysterious “solely equitable relief” exception may lurk in a musty academic attack by Professor Pomeroy on Judge (later Justice) Story in the post-Civil War era. The clash occurred over the continued importance of the classification of equity jurisdiction as “Exclusive, Concurrent or Ancillary”. The immediate cause of the debate was the adoption of the Supreme Court of Judicature Act of 1873 by the English Parliament. The Act abolished the Court of Chancery as a separate court thereby ending the ancient division between common law and equity. Many states in the United States immediately followed suit. Professor Pomeroy believed that the adoption of this “reformed procedure” on both sides of the Atlantic rendered irrelevant the traditional tripartite classification of equity jurisdiction among Exclusive, Concurrent and

Statutes of Limitation — cont'd on page 12

Statutes of Limitations *cont'd from page 11*

Ancillary. 1 Pomeroy, *Equity Jurisprudence* §§ 123-124, 164-165. Yet, Judge Story and other scholars had enshrined the traditional classification system as a system of remedies:

Equity jurisprudence may, therefore, properly be said to be that portion of remedial justice, which is exclusively administered by a court of equity, as contra distinguished from that portion of remedial justice, which is exclusively administered by a court of common law.

W.E. Grigsby, Joseph Story, *Commentaries on Equity Jurisprudence*, § 25, 16.

Equitable remedies were subject to classification (the accuracy of which was widely and vigorously debated by commentators) as exclusively equitable (Specific Performance, Reformation, Cancellation and Rescission, Injunction, Bills of Peace and to Quiet Title, Enforcement of Trusts and Foreclosure or Redemption of Mortgages); concurrently legal and equitable (Accounting, Partition, Settlement of Partnership Matters, Decedent's Estates, Marshalling of Assets, Contribution and Exoneration) or ancillary to legal actions (Bills for Discovery, Perpetuation of Testimony and Examination of Witnesses Abroad). 1 Pomeroy, *Equity Jurisprudence* § 123, 164 n. 12 and 13. Professor Pomeroy was withering in his critique of this view:

Whenever some single feature or partial element of an extensive system is taken as the basis of classifying its component parts, the inevitable result must be an imperfect and even incorrect view of the system as a whole. The choice of the equitable remedies alone as the fixed points to which all doctrines and rules are referred, and the classification of these remedies solely according to their relations with the jurisdictions possessed by the two courts, have tended irresistibly to produce a confused and one-sided conception of the nature and functions of equity.

1 Pomeroy, *Equity Jurisprudence* § 125, 167. He

was prescient; lawyers remain confused about the subject to this day. See *Clarke v. Newell*, 2005 U.S. Dist. LEXIS 31053 (E.D. Va. 2005) (injunction, accounting, equitable trust and constructive trust are remedies not causes of action).

Although Pomeroy argued strenuously against retaining Story's old jurisdictional classification system, he devoted several hundred pages of his influential treatise to explaining that system of classification because he recognized that the classification system was ancient, powerful, and influential with the lawyers, jurists and legislators who had grown up under its sway. As he anticipated, it remained influential for decades. See *e.g.*, *Buchanan v. Buchanan*, 170 Va. 458, 475, 197 S.E. 426, 434 (1938) (equitable relief cannot be granted, even with consent of the parties, in a habeas corpus proceeding); *Nicholas v. Nicholas*, 169 Va. 399, 410, 193 S.E. 689, 693 (1937) (dissent) (administration of estates is a "cardinal subject of equity jurisdiction"); *Shield v. Brown*, 166 Va. 596, 600, 186 S.E. 33, 34-35 (1936) (accounting is a subject of concurrent jurisdiction between law and equity).

Thus, the "solely equitable relief" exception in Va. Code Ann. § 8.01-230 may best be explained as a legislative nod from the General Assembly in favor of the explanation of equity as primarily a system of remedies. That peculiar legislative language seems to mirror the view that a claim seeking only one or more of the "exclusively equitable" remedies does not "accrue" like a personal claim for damages cognizable at law, and, therefore, laches is the sole basis for barring such a claim on the grounds that it is stale. There does not seem to be any other rational and historically accurate meaning that can be ascribed to this otherwise enigmatic statutory phrase.

Interpreting the exception in this way has a practical advantage as well: it is consistent with the judicial opinions that have sought to apply the statute of limitations to equitable claims. Traditionally, equity was exclusive over properly stated claims (i.e., for which there was no adequate legal relief) seeking specific performance, reformation, rescission or cancellation, an injunction, enforcement of trusts, bills of peace and foreclosure or redemption of mortgages.⁵ All other claims were subject to the concurrent jurisdiction of both law and equity and it is as to those other claims that equity follows the law and applies the statute of

limitations. That is pretty much how Virginia Chancellors have seen things. *Culwell v. Huff*, 50 Va. Cir. 180, 183 (Bedford County, 1999) (statute of limitations applies to partnership accounting action but accrual occurs at the completion of the winding up of the dissolved partnership); *Primrose Development Corp. v. Benchmark Acquisition Fund I.L.P.*, 45 Va. Cir. 461, 463 (Loudoun County, 1998) (claim for rescission is solely for equitable relief and laches, not the statute of limitations, applies); *Milstead v. Bradshaw*, 43 Va. Cir. 428, 436 (Norfolk City, 1997) (same) (dicta). *But cf.*, *Digital Support Corp. v. Avery*, 49 Va. Cir. 324, 325 (Fairfax County) (specific performance claim for closely held stock is barred by the contract statute of limitations).

The historicity of Virginia Chancellors (now sadly just Judges) appears highly accurate even when applied without explicit reference to the “solely equitable relief” exception. Only time will tell if that venerable trend continues. ☒

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² In any event, the issue may be purely scholastic. There is a “duty of prompt action” when seeking rescission that, if violated, will bar the claim even in the absence of laches. *Link Assoc. v. Jefferson Standard Life Ins. Co.*, 223 Va. 479, 484, 291 S.E. 2d 212, 215 (1982) (quoting *United States v. Idlewild Pharmacy, Inc.*, 308 F. Supp. 19, 23 (E.D. Va. 1969)).

³ The Uniform Trust Code, effective July 1, 2006, created a general statute of limitations of five (5) years for a beneficiary’s action against a trustee for breach of trust which runs from the earlier of: (1) removal, resignation or death of the trustee; (2) the termination of the beneficiary’s interest in the trust; or (3) the termination of the Trust. Va. Code Ann. § 55-550.05.C. It also created a special one (1) year statute of limitations applicable to a beneficiary’s claims against a trustee “from the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.” Va. Code Ann. § 55-550.05.A.

⁴ Va. Code Ann. § 8.01-236 (15 years for action to recover land; 3 years for unlawful entry or detainer); § 8.01-237 (25 years for action to recover land by person under disability); § 8.01-238 (10 years to seek repeal of land grant by the Commonwealth); § 8.01-239 (10 years to sue for ground rents); § 8.01-241 (20 years to enforce deeds of trust, mortgages, and liens for purchase money); § 8.01-245 (10 years to sue on fiduciary bond or to surcharge or falsify a settled account); § 8.01-246.3 (five years from the cessation of the dealings in which they are interested together for partner to bring an action for settlement of partnership accounts); § 8.01-253 (5 years from discovery to avoid voluntary conveyances); § 8.01-254 (20 years to subject real estate to payment of a bequest or legacy); § 8.01-255.1 (10 years to sue for recovery of lands based on breach of condition subsequent); § 8.01-623 (6 months to file bill of review); § 43-17 (6 months to enforce mechanics lien); § 64.1-89 (1 year to impeach will admitted to probate); § 50-73.43.B (6 year limitation on action by limited partnership for wrongful return of contribution to a partner); § 50-73.103.C (right to a partnership accounting upon dissolution does not revive a claim barred by law); § 55-550.05 (limitation on beneficiary’s action against a trustee).

⁵ Va. Code Ann. § 8.04-241 imposes a twenty year limitation on enforcement of deeds of trusts and mortgages and thus removes those claims from the traditional regime of laches.

One Chance to Make a First Impression: The Primacy of the Opening Statement

Michael A. Cole

Have you ever sat watching a football game (or any other competition) without any particular reason whatever to root for one side as opposed to the other? That didn't last long, did it? Didn't you find yourself quickly taking sides, probably for reasons you couldn't quite pinpoint?

And no wonder: a state of indecision is alien and uncomfortable to the human psyche. Therefore, we look for reasons, irrational though they may be, to escape that state. The same applies to juries – after all, they're just collections of individuals. And those individuals, consciously or not, are looking for reasons to take one side or the other as quickly as possible, and as a trial lawyer, the opening statement is your first best opportunity to give them as many reasons to side with you as you possibly can. Therefore, do not stint in your effort to make the most of that opportunity.

Indeed, I maintain that the opening statement is without question *the* most important part of almost every trial. Most of us are familiar with the hoary “rules of primacy and recency”: people remember best what they hear first and last. But because the psyche looks to escape a state of indecision as soon as possible, primacy is by far the most important – what the jury hears first. Statistics bear this out. Most jury studies show conclusively that the majority of jurors have, after the opening statements, either made up their minds or are *strongly* leaning in one direction or the other.

And then there comes into play another factor of the human psyche – reinforcement. Once a person has

made up his mind, he doesn't like to be proved wrong. Therefore, he actively looks for facts (evidence) that support his/her initial impression, and discounts those that don't. Thus, studies also show that once jurors have made up their minds, a very small percentage are willing to change thereafter despite lofty exhortations from both the court and counsel to “keep an open mind,” and “reserve judgment until all the evidence is in.” (By the way, you'll never hear me say that to a jury; I want their minds to close like steel traps – in my favor – as soon as possible.)

But even if you still disagree with my fundamental premise about the primacy of the opening, some of the rules and tips laid out below – my recipe for an effective opening statement – you may still find helpful.

First, argue your case! You should do this at every opportunity, even in *voir dire*, but again, your first best opportunity is the opening statement. And yeah, yeah, I know: an opening statement is not argument – that comes at the end. Where that rule is found in any code or case law I don't know, but it has infected, I guess by osmosis, almost every court in the land, and Virginia certainly is no exception.

Early in my career, I'd stand for my opening statement and before I was three sentences into it I'd hear, “Your Honor, counsel is arguing his case in opening.” That almost invariably was followed by the judge intoning, “Mr. Cole, don't argue your case in opening; simply outline your case to the jury.”

Huh? I thought. What's the difference? I mean, I'd heard that argument is drawing inferences from the facts. Okay, but almost all inferences are opinions about facts. How can I talk about facts without “connecting the dots”? I was totally flummoxed, and for a while I resorted to the dry, boring, ultra-ineffective drone of drivel and dry detail that characterizes so many opening statements.

But then, at a seminar, my eyes were opened by these simple phrases: “We intend to prove ...,” and “The evidence will show” At last I was liberated, and my opening statements began to escape objection – and get a lot more compelling. For example, I told a jury in opening in a recent case that I intended to prove – that “the evidence would show” – that the plaintiff was a “pathetic liar, a cheat and a fraud, and his whole case

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[was] based on lies and deceit.”

After all, whether the plaintiff is, in fact, a liar, a cheat and a fraud is a factual issue, is it not? He is or he isn't – as a matter of *fact* – and that fact was supremely relevant to my case in that particular instance. I only use this by way of extreme example. If you don't have “the goods” to prove that the plaintiff is, indeed, a liar, then don't make the promise that you will. But if you do have the goods, you're not doing your job if you don't tell the jury so – early and often.

Second, be passionate. Show your emotions. Let the jury know you *believe* in your case. After all, if you don't appear to, how do you expect the jury to get riled up over the fact that “a pathetic liar” has dragged your unfortunate client into court to waste everyone's time – your's, theirs, the court's - with a frivolous – indeed fraudulent – claim? One old chestnut I love to hear from opposing counsel for the plaintiff in opening is that bit about how the burden of proof is like the scales of justice. You know: “If the evidence tilts the scales the slightest bit in his/her favor, you have to find for my client.” (Inspiring, impassioned stuff, that is!)

To which I respond: “What we intend to prove is that the reason counsel was talking to you about that scale is that his evidence is so thin he's got to rely on tiny movements of a scale to win. But we, ladies and gentleman, though we have no burden of proof, have no intention of hiding behind one either – we intend to undertake our own burden to show you that the plaintiff's case is a house of cards that won't stand up to the slightest scrutiny. Our evidence will bring that scale slamming down on our side.”

There's no reason to think that “rhetorical flourishes” and “fiery language” are not properly part of an opening statement – indeed, these are legitimate and time-honored techniques – as long as you talk about *what you intend to prove!* After all, part of your job is, like it or not, to entertain the jury – and to come across as, if not necessarily eminently likeable and a nice guy (which is good if you can), the purveyor and protector of truth.

That impression will be transferred from you to your client, because to the jurors *you* are their most visible and consistent manifestation of your client. If they don't like you – if you bore them – odds are they won't

like your client. Concede what you have to, admit that the other side has points in its favor. And never, *ever* try to mislead a jury. Your credibility is your only stock-in-trade before a jury. Once it's gone, the jury is not going to buy anything you have to sell.

And that's the reason I am amused by another old chestnut that often comes up during opening statement. The lawyer will say, “Nothing that either I or my distinguished colleague (opposing counsel) say to you is evidence; the only evidence will come from the witness stand.”

‘Oh, yeah,’ the jurors are probably thinking, ‘well then why should we listen to you at all?’ After all, nothing you say is fact, right? *The facts* are going to come from the witness stand! (Can you imagine the cheerleaders at a pep rally urging the crowd to “keep an open mind” as to whom to favor in the big game until it's over?)

I think this also betrays a certain insecurity on the part of counsel – a pre-emptive apology for anything counsel might misspeak, or just outright get wrong. Far better to forego this mealy-mouthed approach; if you make a mistake, admit it, apologize for it, and move on.

Third, *personalize* your case by putting it on your shoulders – you must fully become the embodiment of your client to the jury. One thing that will help right off the bat is to ban from your vocabulary, while with-in hearing of the jury, the term “my client”.

When you use that expression, what are you subconsciously conveying? That's right – that you're a hired gun being *paid* to convince a jury of something on behalf of “your client.” Before the jury, my client is always “Mr. X” or “Ms. Y”,² while the plaintiff of course remains “the plaintiff”, or better yet – “the complaining party.”

Far better still that you *become* your client. Your argument should include lots of “*we* intend to prove,” “*our* evidence will be,” and that the evidence will show that the plaintiff is trying to do this or that devious and dastardly thing “to *us*.”

Fourth, always, always, *always* make the case bigger than its facts. You must develop a theme that gives the jury a *cause* to promote or defend! Remember the ‘lying defrauder’ described above, looking to hoodwink the jury and pick up some undeserved cash on the cheap?

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Assignments and Other Hazards of the Litigation Breakfast: Document Production from Testifying Experts in Virginia Circuit Courts:

Kathleen Wright

Normally I bring my own coffee to work. This particular morning, though, I was running late for our firm's monthly Litigation Breakfast, so I went decaffeinated. This is dangerous behavior for an associate, and especially so on this day.

The breakfast started innocently enough with a discussion of taking and defending expert depositions. At some point, the discussion devolved into a debate over the types of documents and discovery available from expert witnesses in state proceedings. Could the expert's entire file be subpoenaed? Could one side force the other to produce draft reports and notes? Should we advise experts to bring their files or "key documents" with them to deposition, or not? If the other side wanted this information about our experts, should we object or produce it? Several lawyers weighed in with their opinions, habits, and personal rules for handling these issues.

Finally one of our firm's most distinguished and

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experienced trial lawyers, suggested (actual quote), "This anecdotal evidence is for the birds." Someone needed to report back to the group with some law about the permitted scope of expert discovery. In some fashion that is still not entirely clear, I ended up with this assignment. Again, I blame the lack of caffeine.

Va. Sup. Ct. R. 4:1(b)(4)

I started with the Rules¹. Rule 4:1(b)(4) sets out the scope and methods for expert discovery. It allows discovery of "facts known or opinions held" by experts, which are otherwise discoverable under 4:1(b)(1) ("any matter, not privileged" and relevant to any claim or defense in the case), *and* which were "acquired or developed in anticipation of litigation or for trial" *only* as follows:

- A) By interrogatories from one party to another *party* requesting: i) identification of experts the party expects to testify at trial; ii) the subject matter of each expert's testimony; and iii) the "substance" of the facts and opinions of the expected testimony with a summary of the grounds for each opinion.
- B) By deposition of a designated expert who is expected to testify at trial; and/or
- C) By other means, *if ordered by the court on motion*, subject to restrictions on scope, costs and fees.

If an expert has been retained or employed by a party, but is not expected to testify at trial, the facts he knows or opinions he holds are discoverable to another party only under "exceptional circumstances," where it is "impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."²

The Virginia Supreme Court, in Flora v. Schulmister,³ held that a litigant cannot obtain facts known to or opinions held by an expert through a request for production of documents under Rule 4:9.⁴ Under the facts in the Flora case, the defendants argued that an autopsy report should have been produced in response to a Rule 4:9 request to the plaintiff to pro-

duce medical records and reports.⁵ The plaintiff's attorney did not produce the autopsy report based on his belief that the report contained facts known and opinions held by an expert, and so could only be discovered through the methods listed in Rule 4:1(b)(4).⁶ The Court agreed and held that the methods listed in Rule 4:1(b)(4) were the "exclusive method ... for discovering expert opinions."⁷ The Court also stated that Rule 4:1(b)(4), as the rule specifically addressing discovery from experts, trumped the more general provisions of Rule 4:9.⁸

In light of this decision, some of the partners at the breakfast stated they did not believe the law supported sending a subpoena directly to a testifying expert for the expert's "file." This conclusion seems correct because Rule 4:9 also governs the issuance of subpoenas to third parties.⁹ If the more specific disclosure methods for experts in Rule 4:1 overcome the more general provisions regarding production in Rule 4:9, then a subpoena to the opposing party's expert should be off limits unless a court order is issued under 4:1(b)(4)(A)(iii). Rule 4:5(b)(1), which allows a subpoena *duces tecum* to accompany a deposition notice, would also be trumped by the more specific 4:1(b)(4) rule with regard to testifying experts whose opinions were developed in anticipation of litigation.¹⁰ Additionally, since 2002, Rule 4:1(b)(4)(A)(ii) has allowed a party to depose an expert designated to testify at trial, which significantly added to a party's ability to explore the expert's opinions and the bases for the opinions, if the party can bear the cost of the deposition.¹¹

As a practical matter, if a party requests permission from a court to subpoena documents from the opposing party's expert, judges may allow document production of facts known to or opinions held by an expert, because the information is clearly discoverable, although not in document form, as a matter of right.¹² Document production may be justified if the opposing party's expert is far away or charges particularly high fees for deposition.

Facts Known or Opinions Held, Not Developed in Anticipation of Trial

There is room in Rule 4:1 and in the Flora opinion

to subpoena a designated, testifying expert on matters *aside from* facts known and opinions held and developed for trial. The Rule 4:1(b)(4) language states that discovery as to an expert's facts and opinions developed for trial, and within the general scope of discovery, is only available by the listed methods. It does not explicitly address other information an expert may have that may be relevant to the issues of the case or the expert's testimony, such as bias or general opinions developed prior to any notice of the litigation.

The Circuit Court for the City of Alexandria seems to have recognized this distinction in Stanley v. Norfolk Southern Ry Co.,¹³ a case in which the plaintiff was allowed to subpoena the defense expert's records of income generated through forensic work, but not the "notes or documents made or reviewed" by the experts. The Virginia Supreme Court has held that experts may be cross-examined as to bias, including prior testimony and income previously earned as an expert witness.¹⁴ It seems reasonable that this information, not developed for trial or in anticipation of litigation, would be an appropriate subject for subpoena.¹⁵

However, the Northampton County Circuit Court quashed, in part, a subpoena to a plaintiff's proposed expert physician seeking bias information.¹⁶ The Court in Goodwyn v. Bowden based its decision on the harassing nature of the requests, and the idea that seeking the information through deposition would be less obtrusive.¹⁷ The Portsmouth Circuit Court also noted that no Virginia Supreme Court case had addressed pre-trial discovery of bias information.¹⁸

"Experts" who are not retained in anticipation of litigation may properly be subpoenaed. In Wagner v. Wagner,¹⁹ in a dispute that included a valuation of real property, the Prince Georges County Circuit Court required that two appraisers respond to subpoenas to produce information concerning prior appraisals of similar properties in the area and a prior appraisal of the disputed property, having determined that the appraisers were not retained in anticipation of litigation. The subpoena in Wagner was treated similarly to any subpoena to a third party with relevant, non-privileged information under Rule 4:9(c).

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Settlement Conferences *cont'd from page 3*

money on counsel and transcript fees that could be better spent resolving the case.

Occasionally, early settlement conferences are not successful for a number of reasons. First, there seems to be a natural tendency for counsel to be more bullish about a case early on, before discovery reveals cracks and nuances in your legal theory. Second, and often more significant, clients appear less willing to settle a case before experiencing a bit of the process. We have all experienced clients whose firmly held settlement position of "millions for defense and not a penny for tribute" changes after being subject to a deposition, attending an early motions hearing, or receiving a few months of legal bills. Sometimes it takes the reality check of a taste of the litigation process for certain clients to appreciate the benefits of a settlement conference. Certain cases may require resolution of a legal issue or some factual discovery before serious settlement negotiations can be entertained. Whether a settlement conference is going to be more successful early on or later in the case is going to depend on a variety of factors, including the projected cost of discovery, the mindset of your client, and the stakes involved in the litigation. Counsel ought to think long and hard about when it makes the most sense to schedule a settlement conference.

From my perspective, no time is too soon to try to get a civil case settled. The costs of litigation are so prohibitive to most clients that parties in federal court ought to be thinking about mediating a case from the outset. In my practice, if we do not get a case settled at the first face-to-face mediation session, we have met with some success by staying involved and continuing settlement discussions with counsel over the telephone, or even by convening a second settlement conference. Obviously, the former is much more efficient, and frankly, sometimes certain parties need a bit of time to think about what was learned at the settlement conference before they are prepared to resolve a case.

In cases that I am conducting settlement conferences, I always enter a Settlement Conference Order which sets forth what is expected of the parties attending the settlement conference. Counsel need to read and pay attention to that order as it imposes certain obligations on counsel and the parties.

First, it requires that parties negotiate in good faith. It serves no purpose to come to a settlement conference

if the parties have little or no interest in settling a case. Each of us have had clients who tell us that they refuse to settle, and counsel need to explore that refusal with your client to see whether it is a knee jerk response to a lawsuit, is emotional, or whether there is a well thought out reason for such refusal. In my experience, it is very rare that a case truly has no settlement value. Indeed, sometimes the mediation process itself helps to persuade clients that settlement is in their best interest. Many times I have had counsel tell me that there is no chance of settlement, yet somehow the case gets resolved. Perhaps it is the persistent drumbeat of billable hours that, at a settlement conference, turns adverse parties into strange bedfellows. All that being said, if you have fully considered the issue with your client and believe that it is truly not in your client's best interest to settle a case and that your client is unwilling to settle, don't mediate it.

Second, mediations don't work if persons with authority to settle the case are not physically present. Telephone mediations seldom work, and I think there are several reasons for this. First, unless you are present, you do not have the same level of investment in the settlement process. Second, there is no way to know whether the person on the phone is really paying attention to the arguments made by the other side or whether he has the phone on mute and is playing Tetris. Third, I believe that one of the principal advantages of a settlement conference is to give the parties the opportunity to look each other in the eye and speak freely about the case without it being used against them. In the same vein, another advantage to mediation is to allow the neutral direct access to the clients without the filter of counsel. Finally, it is not a good idea to play games with the authority issue by bringing a minion disguised as the master; such efforts are readily transparent and can cause the other side to believe that your side is not really interested in settling the case.

Third, I believe that lawyers ought to exchange written mediation statements and allow their clients to review them. If the parties want to address settlement expectations or strategy, they can do so in a separate, confidential letter to the neutral. Optimal written submissions are short and consider the pros and cons of each case. It is very often helpful to attach critical documents or photographs and to reference controlling precedent. Attaching large volumes of discovery or pleadings is seldom helpful as key points can be buried

in a mountain of paper. I require parties to include in their mediation statements the identity of the party representative attending the mediation and a representation that this person has full authority to resolve the case. I do so because the parties have had some dealings with each other prior to the settlement conference, and I want to make sure that any concerns about who the other side is bringing and their authority are resolved ahead of time. Further, if there are any unusual issues or concerns, it is often helpful to discuss them in advance of the session. Such calls can help save significant time and effort.

I have certain expectations of the parties coming to a settlement conference. First, I expect that counsel will have explained the process to their clients beforehand. While that may seem a bit obvious, I have had some mediations where it was obvious that counsel had not told his client what to expect. In that regard, it is helpful if counsel has had a frank discussion with the client about realistic settlement expectations. Second, I require the parties to have engaged in some settlement discussions beyond an opening demand and offer. That helps the parties to assess whether coming to a settlement conference is going to be fruitful. Third, plaintiffs in personal injury cases need to have a clear understanding and plan concerning lien issues. If there is a significant lien issue, the lienholder should be included in the settlement process. Finally, it bears repeating that the parties negotiate in good faith and that the party representative present at the settlement conference has the authority to settle the case without getting the approval of others who are not present. The court devotes substantial time and effort to conducting settlement conferences and expects the parties to do the same. A settlement conference is often the best opportunity parties have to talk directly to each other and settle a case, and these efforts can be frustrated when one side comes to the conference without the actual decision maker.²

On the day of the settlement conference, I suggest that you have a realistic outcome in mind and prepare your client for it. If either counsel or the client are not prepared for the settlement conference, delay or frustration is likely to result. By the same token, taking extreme or outrageous settlement positions only prolongs the process. You and your client should be prepared to advocate your case and to do your own negotiating; you ought not expect the neutral to do it all for you. In that vein, during the opening session, talk to

the other side. You should not address your argument and discussion to the neutral. An opening session at mediation is not oral argument on a motion for summary judgment. The neutral is not the decision maker in a mediation, so address the person who can help you get your case settled - the party on the other side. In that regard, remember that a heartfelt apology - client to client - can be effective in helping to bury the hatchet if it is done right. By the same token, a halfhearted effort can make matters worse. Sometimes parties feel the need to continue the litigation strategy of attacking the other side in the opening session of a settlement conference, calculated to scare the other side into settling. That strategy is almost always a disaster and does not help resolve cases. Instead, it generally causes folks to dig their heels in.

Settlement conferences can be very effective tools to resolve disputes, but only work when both sides bring persons who have the ability and willingness to resolve the case and when counsel and the client are prepared for the process. Rational people, facing the cost, distraction, pressure, and anxiety of a lawsuit, will nearly always choose to settle a case if each side is willing to listen to the other and explore realistic settlement opportunities. It is my privilege to help you try to do that. ☒

¹United States Magistrate Judge (W.D.Va.) The views expressed in this article are mine alone; thus, they may or may not be consistent with the philosophy and practices of other District and Magistrate Judges conducting settlement conferences in federal court in Virginia.

²It is for this reason that my Settlement Conference Order provides that if a party appears at a settlement conference without complying with the terms of the order, including the obligation to have the decision maker present, monetary sanctions representing the fees and expenses incurred by the other parties in attending the settlement conference may be awarded.

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Some experts in dual roles may be subject to different treatment for each role. For example, there was no debate over whether or not a treating physician who was also the designated plaintiff's expert should produce the injured plaintiff's medical records in response to subpoena in Goodwyn. The plaintiff conceded that the portion of the subpoena seeking medical records was proper. Again, the subpoena was quashed as to its requests for information related to possible bias.²⁰ The subpoena in Goodwyn is consistent with the idea that the limits of Rule 4:1(b)(4) apply only to facts and opinions formed in anticipation of trial. The treating physician's facts and opinions are usually developed during treatment, and apart from consideration of litigation or trial.²¹ Discovery of treating physicians is also controlled by Virginia Code § 8.01-399.

The Work-Product Doctrine

Parties have objected to discovery or subpoenas sent to their own expert on the basis of Rule 4:1(b)(3), which governs work product protection. In Wilson v. Rogers,²² the defendants moved to quash portions of a subpoena sent to the defense expert on the basis that some of the material was protected work product. The Court held that work product materials prepared by an attorney and given to an expert were no longer privileged *if the expert used the information as a basis for his or her opinions*.²³ The Court compelled production of engagement letters and letters transmitting materials to the expert. The Court held that the expert should not produce a letter from the expert to defense counsel discussing possible defense theories, because those statements did not relate to the expert's opinion.²⁴ Similarly, in Hodges v. Norfolk Southern Ry. Co.,²⁵ the Court held that a conversation between Plaintiff's counsel and Plaintiff's expert witness prior to the expert's deposition was protected work product, although the defendant was allowed to ask "what if any information he obtained from counsel for the Plaintiff that affected his expert opinion."²⁶

Rule 4:1(b)(3) might also apply to documents created by the expert. The Rule prevents the discovery of materials prepared in anticipation of litigation by or for

a party's representative, "including his attorney, consultant, surety, indemnitor, insurer or agent," unless the requesting party shows a substantial need and an inability to obtain the equivalent materials by other means without undue hardship. If the written documents prepared by an expert are considered protected work product, then the requesting party must meet a high burden to compel production.

Conclusion: Pay Attention

All in all, it appears that if the parties are paying attention, it should be difficult to obtain documents from the opposing side's testifying experts. This brings me back to the importance of coffee ...

¹ Rules of Supreme Court of Virginia.

² Rule 4:1(b)(4)(B).

³ 262 Va. 215, 546 S.E.2d 427 (2001)

⁴ Id. at 222, 546 S.E.2d at 430. Rule 4:9 deals with the "Production of Documents and Things and Entry on Land for Inspection and Other Purposes; Production at Trial."

⁵ Id. at 219, 546 S.E.2d at 429.

⁶ Id. at 221, 546 S.E.2d at 430.

⁷ Id. at 222, 546 S.E.2d at 430.

⁸ Id., 546 S.E.2d at 431.

⁹ Rule 4:9(C).

¹⁰ See Thomas W. Williamson, Jr., Discovery of Experts, in Civil Discovery in Virginia, §9, 219, ¶9.3 (Wyatt B. Durrette, Jr. ed., 2d ed., 2005). Mr. Williamson flatly states that Rule 4:5(b)(1) does not apply to testifying experts' opinions developed for trial.

¹¹ Rule 4:1(b)(4)(C).

¹² Note that Virginia Code §8.01-401.1 states that an expert may be cross-examined on the facts or data underlying his or her opinion.

¹³ Stanley v. Norfolk Southern Ry Co., Law No. CL99-0662, 2001 Va. Cir. LEXIS 17 (Alexandria City January 18, 2001).

¹⁴ See, Sawyer v. Comerci, 264 Va. 68, 563 S.E. 2d 748 (2002); Lombard v. Rohrbaugh, 262 Va. 484, 551 S.E. 2d 349 (2001).

¹⁵ Another example might be prior articles written by the expert that may touch upon the issues in the litigation.

¹⁶ Goodwyn v. Bowden, 32 Va. Cir. 330 (Northampton County 1994).

¹⁷ Id. at 333.

¹⁸ Young v. Food Lion Store No. 622, 70 Va. Cir. 313, 321 n.4 (Portsmouth City 2006).

¹⁹ 71 Va. Cir. 334 (Prince Georges County 2006).

²⁰ 32 Va. Cir. at 333. See, also, Pettus v. Gottfried, 269 Va. 69, 606 S.E. 2d 819 (2005), distinguishing between a treating physician's factual

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First Impression *cont'd from page 15*

Well, it's your job to make the jury understand that we (society, the community at large) need to make a stand against this sort of thing now, and this case is the place to start! Note: this is not a "send a message" argument, which is improper – rather it is a pitch to the jury to strike a blow for justice overall by putting a stop to such nefarious tactics *in this particular case*.

And finally, when Shakespeare said, "This above all; to thine own self be true, and it must follow, as the night the day, thou canst not be false to any man," he surely was talking to trial lawyers. Not everyone is loaded with personal magnetism, natural charm, flowing eloquence and an instantly incisive wit. So be it. Don't try to come off to the jury as something you're not. A jury will smell it every time, and it hurts your most valuable commodity – your credibility.

Be yourself, be prepared with a thorough knowledge of the facts and the law, be passionate, and develop your case in a way that allows you honestly to project an air of supreme confidence in what you are "selling."

Then, the winning will take care of itself. ☒

¹ Michael A. Cole is an attorney with Woods Rogers, PLC in Danville.

² A client such as, say, "Acme International Dynamics Corporation, Inc." of course becomes "Acme," "we" or "us".

Litigation Breakfast *cont'd from page 20*

and opinion testimony.

²¹ This construction is also consistent with the interpretation of the parallel Federal Rule of Civil Procedure, 26(b)(4), as it existed prior to the 1993 amendments to that rule. See, Williamson, Discovery of Experts, supra n.16.

²² 53 Va. Cir. 280 (Portsmouth City 2000).

²³ Id. at 281.

²⁴ Id. at 282. See also, Covington v. Calvin, 40 Va. Cir. 489, 493-494 (Spotsylvania County 1996) (quashed subpoena seeking accident reconstruction investigation materials on work product basis). As a side note, Judge John J. McGrath, Jr., in Shanholtzer v. Dean, 51 Va. Cir. 493, 494 (Rockingham County 2000), refused to compel the identification and production of documents a party defendant had reviewed and relied on to prepare for deposition based on work-product protection. The defense attorney stated that all items the defendant had reviewed had been produced in discovery to the plaintiff. Id. at 493. Therefore, the Court stated, "forcing [the defendant] to identify what specific items she looked over would only serve to invade defense counsel's work product." Id. at 493-94.

²⁵ 56 Va. Cir. 348 (Roanoke City 2001).

²⁶ Id. at 350. The opinion continues: "If the information divulged by the experts is information or documents already in the possession of counsel for Defendant, then the inquiry is concluded. To allow any further questioning would invade Plaintiff's counsel'

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