



LITIGATION NEWS

VSB

PUBLISHED BY THE LITIGATION SECTION OF THE VIRGINIA STATE BAR FOR ITS MEMBERS.

VOLUME IX NUMBER 2

SPRING 2002

Few Limits on *Limine*

by Samuel W. Meekins, Jr.

As litigators we are sometimes frustrated by Virginia's built-in aversion to the summary judgment process. We take depositions and uncover evidentiary jewels that could end the case in our client's favor but are precluded from taking full advantage due to limitation on the use of depositions found in Rules 2:21 and 3:18 of the *Virginia Rules of Civil Procedure*. Even if we could somehow avoid the implications of those *Rules*, in Virginia summary judgment, along with being difficult to obtain, is really an invitation for reversal, and all trial judges know it. Fortunately, to coin a gruesome phrase, there is more than one way to skin a cat. Or, put differently, if it quacks like a duck, etc....

The duck in this instance is the motion *in limine*. Traditionally used as a protective order, its purpose was to prevent the asking of a question in front of a jury regarding a topic that is so prejudicial that the question alone will deny the other side a fair trial. 75 Am Jur 2d Trial § 94 n 12-15. Plaintiff's counsel questioning a defendant about his insurance coverage is an obvious example of what a *limine* motion is designed to prevent. The motion *in limine* replaces the questionable practice of issuing a limiting instruction which a jury may or may not heed. It is designed to speed up, simplify and purify the trial process. *Id.* at § 98.

A review of legal encyclopedias demonstrates that, among other topics, motions *in limine*

have been used to test the admissibility of evidence relating to:

- subsequent remedial measures;
- statements made during compromise negotiations;
- use of alcohol or drugs;
- violation of statutes, ordinances or regulations;
- existence or use of trade secrets;
- mental status of family relationships;
- other pending cases;
- insurance coverage or payment;
- admissibility of expert testimony; and,
- measurement of damages.

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Letter from the Chair

The "Crime" of Virginia's Court-Appointed Defense Pay System

Virginia essentially pays court-appointed criminal defense lawyers less than any other state in America for comparable work. This is unfair — both to the criminal defense bar, as well as to the accused defendants whom they represent.

Approximately one-third of Virginia's jurisdictions have public defenders who represent indigent defendants. When these public defenders have a conflict, and in those jurisdictions without a public defender, courts rely upon court-appointed counsel to provide a defense. In capital cases, the pay for representation can be reasonable. But in felony cases involving sentences of twenty years to life, the pay is shockingly low. By statute, Va. Code § 19.2-163, the maximum pay for representing a client facing life imprisonment is \$1,235.00. That is the "good" news; the fund from which such payments are drawn is underfunded. The maximum sum a court-appointed attorney *actually* receives for representing a defendant facing life imprisonment may be less. Multi-count indictments can net somewhat (but not significantly) higher sums. Of course, fees for lesser felonies and misdemeanors are much lower. The maximum pay for defending a garden-variety felony is \$445.00; for a misdemeanor, the maximum fee is a sum not to exceed \$158.00.

The time involved in handling a major felony trial is massive. The meager lump sum payment is the same whether the trial lasts two days, two weeks, or two months. Thus, the system requires

a court-appointed attorney to lose money when involved in a lengthy trial — and the more zealously he represents his client, the more he loses. The small sum received does not compensate for the actual work; meanwhile, time is lost from paying clients. Overhead bills continue to mount while the non-paying trial proceeds. It is not surprising that this guarantee of financial doom has

The *Washington Post* reported recently that Virginia's fees are "the lowest in the nation" and that, as a consequence, in some regions of the Commonwealth, criminal defendants suffer much lengthier sentences when represented by court-appointed attorneys.

chased many accomplished criminal defense lawyers out of the court-appointed arena. The *Washington Post* reported recently that Virginia's fees are "the lowest in the nation" and that, as a consequence, in some regions of the Commonwealth, criminal defendants suffer much lengthier sentences when represented by court-appointed attorneys. *Washington Post*, December 18, 2001, "Appointed Counsel, Prison Time Linked in Virginia."

Although the Commonwealth is not alone in its frugality toward appointed counsel, it is one of the few states not to offer a "waiver" of the maximum available fee in appropriate cases. Other states that lack the waiver at least offer compensation to account for the attorney's lost overhead while toiling on appointed cases. Virginia's payment scale offers none of these options, and changes need to be considered. Although these are budget-conscious times, the fact that Virginia offers the lowest pay in the country for court-appointed defense counsel casts a shadow on our entire justice system.

Frank K. Friedman
Chair, Litigation Section

The Use and Misuse of the "Opening the Door" Theory of Evidentiary Admissibility

by Philip G. Gardner

Every trial lawyer frequently hears trial judges make rulings on the admissibility of evidence by saying "you opened the door on that." Because nobody really knows exactly what "you opened the door on that" means, a trial judge's pronouncement of such usually ends the matter, and the trial lumbers on. Appellate judges in Virginia are particularly fond of summarily dismissing assignments of error to rulings on the admissibility of evidence by simply saying a party "opened the door to this evidence." Rarely do appellate or trial judges cite any authority whatsoever for the invocation of the "opening the door" theory, and rarely do trial or appellate judges explain "opening the door" rulings in terms of traditional notions of evidentiary admissibility.

It is not the function of trial lawyers to bring theoretical and philosophical consistency to the rulings of the judiciary. An understanding of and knowledge of the law relating to the concept of "opening the door" justification for the admissibility of evidence is a necessary weapon in the trial lawyer's arsenal. There is, indeed, a body of law that deals with what is sometimes commonly known as the "opening the door" theory of the admissibility of evidence. Professor Wigmore loosely refers to the concept as "curative admissibility." *1 Wigmore on Evidence*, Section 15 (3rd ed. 1940). Professor McCormick called it simply "fighting fire with fire." John W. Strong, *McCormick on Evidence*, Section 57, at 229 (4th ed. 1992). There are differences, however, between the

"opening the door" theory of the admissibility of evidence and the theory of "curative admissibility." Complicating the matter is less than precise use of the terms by trial judges and lack of consistency and precision in the use of the terms by appellate judges. The matter is even further complicated upon consideration of rules of appellate practice. For example, in Virginia, the lack of a timely objection bars later complaint at the appellate level. Further, lawyers having a split second to decide what to do when improper evidence is interjected into the trial must always consider the opportunity of a motion to strike the evidence and a cautionary instruction from the judge and, in extreme cases, a motion for a mistrial. Federal Rule of Evidence 103 specifically provides that error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right is affected and a timely objection or motion to strike appears of record, stating the specific ground of objection.

The fact situations giving rise to considerations of curative admissibility and "opening the door" admissibility are widely varied. There are cases that deal with the spontaneous declaration by a witness who is not fairly responsive to the question, and the declaration inserts matter prejudicial to the other party. There are also cases that deal with the situation where the interjection of the improper matter is, in fact, responsive to a question. In these cases, there is a subset of cases in which the witness declaration responsive to a question comes at such a time when the adverse party had no time to object; and there are cases dealing with situations where the adverse party did have time to object but failed to do so. Some cases focus on whether the party interjecting the improper evidence did it accidentally or on purpose.

In Virginia, the appellate courts have not hesitated to invoke the "opening the door" theory of admissibility to routinely sustain trial court rulings on the admissibility of evidence. For exam-

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ple, in *Santmier v. Commonwealth*, 217, Va 318, 228 S.E.2d 318 (1976), the defendant stated at trial, "I don't use drugs." He made this statement in response to a question put to him by the defense attorney. The Commonwealth, on cross-examination, elicited from the defendant, over objection, that in 1972 he and another individual were convicted in Yuma, Arizona, of an offense "dealing with marijuana." This is an appropriate and proper use of the general concept of "opening the door" to the admissibility of evidence. In *Santmier*, the only permissible question the Commonwealth could have asked the defendant concerning his record would have been if he had been convicted of a felony, but the name of the felony or the details could not have been shown absent Santmier's statement, "I don't use drugs." See *Harmon v. Commonwealth*, 212 Va 442, 445, 185 S.E.2d 48, 51 (1971). In *Santmier*, the Supreme Court went a little further and made a finding that the question propounded on direct examination that led to the statement, "I don't use drugs," was intentionally calculated to mislead the jury into believing that he knew nothing about marijuana and that he had not had any dealings in drugs. As will be illustrated later, this "extra ingredient" of calculated misleading also invokes the more narrow doctrine of curative admissibility. In fact, *Santmier* is not only illustrative of how courts tend to use the theory of "opening the door," but it is a good example of a case where the application of the doctrine of "curative admissibility" would have better fit the facts.

Another example of use of the "opening the door" theory by the Virginia Supreme Court is in *Bell v. Real Estate Corporation*, 206 Va 853,

147 S.E.2d 277 (1966). In *Bell*, the plaintiff sued to recover a real estate commission. The issue in the case was not so much whether the plaintiff should receive the commission, but from whom. The broker who had allegedly breached the fiduciary duty had vanished, and the plaintiff was attempting to recover the commission from a real estate corporation with which the plaintiff claimed the broker was affiliated. The plaintiff had scant proof of the broker's affiliation with the corporation. Counsel for the corporation, in vigorously cross-examining the plaintiff, asked the following question: "Mr. O'Brien, and let me again ask a simple question. Do you have any evidence of any kind,

written or oral, of Mr. Baker's involvement in the corporation other than the articles of incorporation, which have been previously introduced in evidence?" Mr. O'Brien indeed had some evidence of the agent's involvement with the corporation, consisting of numerous papers that appeared to be the broker's personal notes of his attendance at meetings of the corporation, which were in long hand and bore the signature of the broker. Of course,

counsel for the defendant corporation vigorously objected to the admission of the broker's notes, claiming there had been no proper foundation laid for the admissibility of the instrument. The trial court made the following observation:

I don't think the proper foundation has been laid for the admissibility of this instrument, but I think when you asked the question as to whether or not Mr. O'Brien had any evidence, any tangible evidence, I believe you said, of Mr. Baker's interest in the corporation, I think that that, in effect, did open the door for the introduction of it.

In Virginia, the appellate courts have not hesitated to invoke the "opening the door" theory of admissibility to routinely sustain trial court rulings on the admissibility of evidence.

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Initial Disclosures Under Federal Rule of Civil Procedure 26: A Primer for the Rocket Docket Attorney

by Mark D. Dix

In 1993, Rule 26 of the *Federal Rules of Civil Procedure* was amended to require parties to make certain initial disclosures. The Eastern District of Virginia, like many other jurisdictions, opted out of these requirements by local rule so as not to interfere with the Rocket Docket's fast pace. In 2000, Rule 26 was amended again and the district courts' ability to opt out taken away, forcing the Eastern District and those who practice before it to familiarize themselves with a new set of disclosure requirements. The failure to meet these requirements can have drastic consequences, including the exclusion of evidence and the imposition of sanctions.

There are three initial disclosure events under Rule 26: (1) the Rule 26(f) Conference; (2) the Rule 26(f) Report; and, (3) the Rule 26(a)(1) Initial Disclosures themselves.¹ The most important piece of information for understanding these events is the Order Setting Pretrial Conference sent to all parties at the onset of litigation.² However, depending upon which Division of the Eastern District you are in, each judge may have his or her own unique timing and content requirements for the disclosures, making it imperative to carefully analyze the Order issued in every case. By referring to the Order and Rule 26, though, the Rocket Docket attorney can successfully navigate Rule 26's seemingly murky waters.

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The Rule 26(f) Conference

The first event in the Rule 26 initial disclosure timeline is the Rule 26(f) Conference between the parties. All attorneys of record and unrepresented parties are required to attend. The conference need not be a face-to-face meeting, unless the court orders otherwise. The parties are jointly responsible for arranging this conference and for attempting in good faith to agree on a proposed discovery plan.

To determine when the Rule 26(f) Conference must be held, the first source to consult is the Order Setting Pretrial Conference. Some Eastern District judges provide a specific deadline by which the parties must conduct the conference, *e.g.* within 10 days of entry of the Order Setting Pretrial Conference; no later than 10 days before the Rule 16(b) Pretrial Conference.³ However, if the Order is silent on the issue, Rule 26(f) provides that it must be held no later than 21 days before the Rule 16(b) Pretrial Conference — a date readily ascertainable because the Order Setting Pretrial Conference must, of course, specify when the attorneys are to appear in court.

With respect to the content of the Rule 26(f) Conference, one must again consult the Order Setting Pretrial Conference. Some judges require that the parties discuss additional topics, such as whether the parties will consent to a trial by magistrate judge. At a minimum, Rule 26(f) requires that the parties discuss: (1) the nature and basis of their claims and defenses; (2) the possibility for a prompt settlement or resolution; (3) the initial disclosures required by Rule 26(a)(1); and (4) a proposed discovery plan.

The first two topics can be addressed in a matter of minutes through an informal and generalized discussion about the parties' understanding of the lawsuit and the possibility for settlement. The remaining two topics require a more in-depth discussion, however, because its results will be memorialized in a "discovery plan" to be reported to the court.

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