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The Work Product Privilege — Don't Waive It; Don't Lose It

by Philip G. Gardner

The Work Product Doctrine protects from disclosure certain information created or produced in anticipation of litigation. *Restatement (Third) of Law Governing Lawyers*, Section 136. The qualified privilege created by the Work Product Doctrine is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure and Rule 4:1(b)(3) of the Rules of Court of the Supreme Court of Virginia. Generally, the doctrine protects from disclosure materials prepared in anticipation of litigation or for trial either by a party or by a party's representative. The federal and state codifications of the doctrine have left for the courts a determination of what constitutes "in anticipation of litigation," and the rules are silent altogether on the critical issue of waiver of the privilege. This article will deal with the issue of waiver and related issues. The question of what documents meet the definition of prepared "in anticipation of litigation" and thus qualify for the privilege has been the subject of extensive litigation. There are numerous Virginia Circuit Court decisions exploring this issue, and they can be found in Thomas Spahn's excellent, "must have/must read" book, *Virginia's Attorney Client Privilege and Work Product Doctrine* (4th edition, Virginia CLE Publications, 1999).

The issue of waiver by inadvertent disclosure presents a difficult legal and ethical question. Communication by fax and e-mail has significantly increased the risk and incidence of negligent or inadvertent disclosure of materials intended to be

protected by the Work Product Doctrine. As readers of *Virginia Lawyers Weekly* know, a lawyer's duty as the recipient of inadvertently disclosed work product is a subject of hot debate. Such issues were squarely presented to the Circuit Court for the City of Martinsville in *Davidson v. Byrd*, CL00-42, Opinion dated November 13, 2000, Geronimo at 21st Va. Cir. CL00-42.

The *Davidson* case was simple enough. The plaintiff's vehicle was rear-ended by a vehicle whose driver apparently fell asleep. Even though the crash was severe, the plaintiff did not think he was injured. He quickly attended to the injured defen-

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Letter from the Chair

Looking Back, with Thanks

As my tenure as Chair ends, I would be remiss if I did not thank those who helped the Board make contributions to the trial bar this year. Sam Meekins has taken meticulous care of our budget and finances. We achieved a surplus again this year, which we will return to the Virginia State Bar. No doubt we are one of the few government entities that return a portion of our budget.

Paul Black performed a commendable job working with the Bench/Bar Committee in preparing our annual CLE offering at the convention, which should have broad appeal. The topic is, "Winning the Battle of Experts without Losing the 'Civil' in 'Civil' Discovery." I am leaving this post in good hands, with Paul assuming the chairmanship for the coming year.

Kevin Mottley successfully reinvigorated the Young Trial Lawyers Section by putting on an excellent CLE deposition workshop that was not only informative, but innovative in its pedagogy. Kevin is moving on to edit *Litigation News*, no small task. Lee Livingston concluded seven years of outstanding service

as editor for *Litigation News* by keeping our publication on track for another year. He will be missed, and I thank him for a job well done.

The judges who serve our Board deserve special recognition. Judge Lydia Taylor offers valuable insights and demonstrates a willingness to serve at every opportunity, and Judge William Ledbetter, in his first year on the Board, has been a positive contributor whose service is of great value to our work. These judges who serve in courts with heavy dockets are demonstrating exemplary selflessness in working with us.

Patricia Sliger, our staff liaison, facilitates all of our logistics with a learned hand. Her long-standing service to the Board is exceeded only by her availability and courteous service.

Finally, I am in debt to the immediate past chair, Frank Friedman, who set a high bar for this position and graciously assisted in Board affairs even after his obligations to do so expired.

We had an opportunity to contribute to important issues facing trial lawyers, and in every instance, members of your Board took that opportunity seriously and devoted appropriate time and energy to accomplish the task at hand. For example, when asked to comment on the merger of law and equity in Virginia, Board members took a keen interest in researching both points of view and several discussions focused on our desire to adequately represent the views of members of the Litigation Section, rather than our individual points of view.

Thank you for the opportunity to serve.

Thomas E. Albro
Chair, Litigation Section

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“I Want It, And I Want It Now!” — Obtaining A Temporary Injunction In Covenant Not To Compete Cases

by Francis H. Casola & Ellen S. Moore

Introduction

When a client calls to tell you a former employee is violating her covenant not to compete and is stealing customers, one of the first things that comes to mind is injunctive relief. What are the issues; what law applies; what court should I be in; how should I plead the claim; what obstacles do I face, and how do I prove my client is entitled to the relief requested? Usually there is not a lot of time to consider these issues in light of the relief requested. This article discusses these and other issues under federal and Virginia state procedures for obtaining injunctive relief in the context of covenant not to compete litigation, where injunctive relief often plays a vital role.

Threshold Considerations

One of the first considerations is whether to be in federal or state court. Temporary injunctive relief is available in federal court under Rule 65 of the Federal Rules of Civil Procedure (“FRCP”). Virginia’s Code provides for injunctive relief as well under Sections 8.01–620 *et seq.*

Federal or State Court?

The availability of injunctive relief in federal court typically is controlled by the court’s diversity jurisdiction under 28 U.S.C. § 1332,¹ as these cases rarely involve federal questions. Plaintiffs, as such, may have no choice but to resort to state court in the absence of diversity. Where a choice does exist,

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however, factors influencing one’s decision to apply for relief in federal versus state court include the availability of judges to hear the motion on an expedited basis, the need for *ex parte* relief, the court’s experience with commercial and employment matters, and the general hostility of the court to noncompete covenants. These concerns are in addition to the usual procedural and evidential concerns relating to such a decision. In each of these areas, recourse to federal courts, when available, may provide the employer with an advantage.

Authority for Federal Injunctive Relief — FRCP 65

Overview Of Federal Rules

Authority for federal injunctive relief comes from FRCP Rule 65. Under Rule 65, a party may obtain a temporary restraining order (“TRO”) with or without notice to the opposing party or that party’s attorney (see below for a discussion of the availability of a TRO without notice). The TRO may last for as long as 10 days, but may be extended “for good cause shown” for another 10 days or by the consent of the opposing party.² If the TRO is awarded without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time. The applicant must file a bond in an amount to be determined by the court to be sufficient to cover the “costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”³

A preliminary injunction, in contrast, may not be obtained without notice to the adverse party.⁴ The court may consolidate the hearing on a preliminary injunction motion with the trial of the action on the merits, even if the hearing already has commenced.⁵ In any event, “any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on trial and need not be repeated upon the trial.”⁶ This does not, however, affect any rights the parties may have to trial by jury.⁷

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If the trial on the merits has not been consolidated with the hearing on the preliminary injunction motion, as discussed above, a full evidentiary trial on the merits is held to determine the availability of a permanent injunction. Even where the preliminary injunction has been denied, the employer may offer additional evidence at trial and thereby attempt to persuade the court to come to a different conclusion.⁸

Availability of Ex Parte Relief in Federal Courts

As mentioned above, under Rule 65, a party may obtain a TRO without notice to the opposing party or that party's attorney. This is true, however, *only* if:

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.⁹

If the TRO is awarded without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time.

Authority for State Temporary Injunctive Relief — Va. Code §§ 8.01-620, et seq.

Overview of Virginia State Law

Under Virginia state law, a party may obtain injunctive relief under Virginia Code §§ 8.01-620, *et seq.* The Code explicitly confers jurisdiction on every circuit court to award injunctive relief.¹⁰ The injunction may be obtained with or without notice to the opposing party, depending on the court's

determination of the propriety of giving such notice.¹¹ The applicant must file a bond with the court for the injunction to take effect.¹² The court must state in the injunction order the time during which the injunction will be effective.¹³ The court, of course, may extend that time frame or grant a further injunction, but only "after reasonable notice to the adverse party, or to his attorney of record of the time and place of moving for the same."¹⁴ The court also may dissolve the injunction, again after reasonable notice to the opposing party or his attorney.¹⁵

As in the federal courts, a permanent injunction may be awarded after a full trial upon the merits. Sometimes referred to as "perpetual" injunctions, these injunctions may remain in force indefinitely.¹⁶

Availability of Ex Parte Relief in State Courts

Given Virginia courts' ready willingness to invalidate covenants that they view as overbroad, the choice of a state's law that permits blue penciling or other reformation of the covenant should the court find it overbroad could be the difference between victory and defeat.

As noted above, an applicant may obtain a temporary injunction with or without notice to the opposing party, in the court's discretion.¹⁷ In these writers' experience, however, state courts are more reluctant than their federal counterparts to award injunctive relief in the absence of notice. "The cases are rare indeed which justify the awarding of a preliminary injunction without notice to those affected thereby."¹⁸ As the *Cohen* court noted, applications made

without notice are to be scrutinized with greater care, "so as to avoid abuse of the power."¹⁹ Except in those few cases of the utmost urgency, good practice dictates that notice be provided.

Other Threshold Issues

The contract itself containing the covenant not to compete may contain clauses affecting where and whether injunctive relief may be obtained, and

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An Analysis of the Impact of the Dead Man's Statute in Medical Malpractice Cases

by *Walter H. Peake, III & Katherine Cabell Londos*

A continuing issue confronting both plaintiff and defense attorneys in medical malpractice cases is the impact and application of Virginia's "Dead Man's Statute."¹ In particular, to the defense attorney in medical malpractice cases, the Dead Man's Statute frequently presents a significant obstacle to the introduction of important defense evidence. The purpose of this article is to analyze the Dead Man's Statute, the applicable law and, in particular, the two Virginia Supreme Court cases that have analyzed the application of the statute in a medical malpractice setting.² The statute and the case law are best discussed through the application of the law to actual factual scenarios that occur in practice.

The operative language of the Dead Man's Statute in a practice setting is as follows:

In an action by or against a person who, from any cause, is incapable of testifying...no judgment or decree shall be rendered in favor of an adverse or interested party founded on his uncorroborated testimony.³

This language often comes into play in a wrongful death medical malpractice action because the patient, as a result of the alleged negligence of the defendant physician or health care provider, is deceased and thus incapable of testifying. Thus, the practical operation of the statute is that the physician or health care provider cannot offer "his uncorroborated testimony" where that uncorroborated testimony would result in a judg-

ment in favor of the defendant physician or health care provider.

Of course, a discussion or analysis of the Dead Man's Statute must be considered within the context of its purpose. That purpose is to prevent a party — for our purposes, a physician/health care provider — from having the benefit of his or her own testimony when due to the death of the patient, the personal representative of the adverse party has been deprived of the testimony of the decedent [the patient of the defendant physician/health care provider].⁴ The statute substitutes a requirement that testimony be corroborated in place of the harsher common law rule which disqualified the surviving witness for interest.⁵

The statute itself does not define the term "uncorroborated testimony." The analysis of what is or is not uncorroborated testimony has been left to case law. The Court has repeatedly explained that "[t]o be deemed sufficient under § 8.01-397, the corroboration must at least tend, in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings and testified to by the surviving witness which allegation or issue, if unsupported, would be fatal to the case."⁶ Another significant point is that the statute specifically references "uncorroborated testimony," as opposed to the more comprehensive term "uncorroborated evidence."

The statute also does not define or address how a party may establish corroboration. The Court has repeatedly held that no hard and fast rule determines whether the requirement of corroboration has been met.⁷ Instead, each case must be decided upon its own facts and circumstances.⁸ The corroborating evidence need not be provided by witnesses, but may be furnished by surrounding circumstances adequately established.⁹

The sufficiency of the corroboration offered is usually a question for the jury. The trial court must consider the sufficiency of the corroboration in light of all the trial testimony or evidence on the point in issue in order to determine whether there is "more than a scintilla of corroborative evidence upon which the jury may determine sufficiency."

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