



Successful Strategies for Asserting and Defending Against Virginia Consumer Protection Act Claims

Melissa R. Levin

I. INTRODUCTION

A consumer who believes he or she has been the victim of a fraudulent business practice has a powerful weapon in addition to a common law fraud action: an action for a violation of the Virginia Consumer Protection Act (“VCPA” or “the Act”).¹ The VCPA seeks to promote “fair and ethical standards of dealings between suppliers and the consuming public.”² The Virginia General Assembly enacted the VCPA to protect consumers against and deter fraudulent business practices by suppliers of goods and services.³ VCPA claims can result in substantial damages awards to successful plaintiffs, including awards of treble damages and/or attorney’s fees.⁴ Attorneys representing clients who believe they have been treated unfairly by a merchant or service provider should determine whether the Act applies to the parties and transaction at issue and assert VCPA claims in appropriate situations.

Attorneys defending clients against VCPA claims can apply proven strategies to prevail on such claims or to minimize any damages awards. Such strategies include demurrers, summary judgment motions, settlement or cure offers, and introduction of favorable evidence

regarding the nature of the client’s business practices and the nature of the alleged VCPA violation.

All attorneys should be familiar with the provisions of the Act and advise their clients regarding compliance with it to avoid any future VCPA actions.

II. THE ACT MUST APPLY TO THE PARTIES AND TRANSACTION AT ISSUE

The VCPA applies only to certain consumers, suppliers and goods and services. Thus, in analyzing a VCPA claim, counsel first must determine whether the VCPA applies to the parties and transaction at issue.

A. The VCPA regulates consumer transactions between individual consumers and suppliers of goods and services.

The VCPA regulates “consumer transactions,” which

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Letter From The Chair

Samuel W. Meekins, Jr.

As President of the Board of Governors of the Litigation Section of the Virginia State Bar, I presided over the first meeting of the year on September 23, 2005 in Richmond, Virginia. We discussed our projects for the coming year. We expect a lot from our Board Members and they have always come through with flying colors. Our goal is and has been to provide to you, as Members of the Litigation Section, valuable assistance in making each of you a better attorney. I will delineate below the efforts we are making this year. If you have suggestions as to how we can better serve you, please contact me by e-mail at meekins@wolriv.com or write to me at Wolcott Rivers Gates, One Columbus Center, Suite 1100, Virginia Beach, VA 23462-6765. I encourage your input and involvement. As you will note below, a primary focus is on creating written comments and notes regarding issues arising in the litigation arena. Production and publication of these articles and notes are not limited to Board Members. If you have a topic that you believe would be of interest to the Litigation Section generally, please submit it to me. I will see that it is passed along to our publication staff and given every consideration for publication in our newsletter. You will not only be helping us do our job, but you will be helping Members of the Litigation Section do theirs. Of course, a little notoriety for publishing a good article does not hurt either.

NEWSLETTER

The Section strives to publish a newsletter four times a year. Last year we ran into some difficulties with service providers and did not achieve our goal. We are working hard to do so this year. As you know, each newsletter contains at least four articles on topics of interest to litigators across Virginia. Board Members are responsible for producing these articles.

That does not mean they have to write them and that is why we look to you for your valuable input. If we achieve our goal of publishing four newsletters this year that will mean we will have produced at least sixteen articles.

THE VIRGINIA LAWYER

Occasionally, the Litigation Section is given an opportunity to be the featured section in *The Virginia Lawyer*. This year we will be the featured section in the February issue. Once again, this means that the Section will be providing articles applicable to litigation that may be of interest to the Virginia State Bar Membership generally. More writing assignments, but also more information available to you through publication to help you do your job.

MID-YEAR SEMINAR

The Litigation Section was selected to be one of the presenters at the midyear seminar to be held this year in Barcelona, Spain. The Section is responsible for producing a Continuing Legal Education program of three hours duration that fits the needs of the litigation bar. Presenters this year will be Bob Scully and The Honorable William Ledbetter. We are also working on a presentation for next year's midyear meeting.

DEPOSITION SEMINAR

To assist younger lawyers in getting their feet wet in the deposition arena, the Young Lawyers Subcommittee of the Litigation Section, chaired by Sandra Chinn-Gilstrap, will be putting on a seminar in the Danville area. The purpose of the seminar is to have experienced litigators and judges advise, teach and assist younger practitioners in the art of deposition taking.

Samuel W. Meekins, Jr. is Chairman of the Virginia State Bar Litigation Section. He is a partner in the Virginia Beach Firm, Wolcott Rivers Gates.

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Establishing the Standard of Care in a Medical Malpractice Case - Use the Defendant?

Matthew W. Lee

Can a medical malpractice plaintiff establish the standard of care through the testimony of the defendant-physician? The Virginia Supreme Court has not expressly ruled on the issue. However, in *Smith v. Irving*, 268 Va. 496, 604 S.E.2d 62 (2004), it did recently conclude that a trial court did not abuse its discretion in refusing to permit a medical malpractice plaintiff to cross-examine a defendant-physician regarding the standard of care. In reaching that conclusion, the Supreme Court cited to the well accepted rule that the scope of a cross-examination is limited to the issues elicited on direct and because the defendant-physician in the *Irving* had not opened the door on direct, the plaintiff-patient was barred from doing so on cross. While the *Irving* decision does not establish new law in Virginia, it does raise several unanswered questions under Virginia procedural and evidentiary precedent.

II. MEDICAL MALPRACTICE IN VIRGINIA

While a medical malpractice claim owes its existence to the physician-patient relationship, e.g., a contract, the claim is traditionally pled *ex delicto* in the form of negligence. In that regard, the elements of the claim are familiar and are no different from the elements and burden of proof for any other negligence claim: duty, breach, causation and damage - with duty expressed as the standard of care. *Blondel v. Hays*, 241 Va. 467, 403 S.E.2d 340 (1991).

The standard of care for a physician is set forth, generally, in Virginia Code section 8.01-581.20. The statute dispenses with the locality standard in favor of a statewide standard of care. The statewide standard is not dependent upon the intentions of the physician but rather objectively measures whether the defendant-physician's actions were consistent with those of a reasonably prudent physician in the Commonwealth faced

with like or similar circumstances.

Of course expert medical testimony is usually required to establish the standard of care and a defendant's departure from, or adherence to, that standard. See *Raines v. Lutz*, 231 Va 110, 113, 341 S.E.2d 194, 196 (1986); *Dickerson v. Febti*, 253 Va. 324, 484 S.E.2d 880 (1997); *Perdieu v. Blackstone Family Practice Center, Inc.*, 264 Va. 408, 420, 568 S.E.2d 703, 710 (2002). The purpose of the expert requirement is to assist a jury regarding subjects beyond the ken of average layperson.

The requirement of expert testimony to establish the standard of care is obviated where the subject matter is within the common knowledge of the average juror. *Beverly Enterprises - Virginia, Inc. v. Nichols*, 247 Va. 264, 267, 441 S.E.2d 1, 3 (1994). The classic example of this exception in medical malpractice claims is the foreign object inadvertently left in the patient's body following surgery. The application of the "common knowledge" exception is not limited to medical malpractice claims and is equally applicable to other professional claims, e.g., legal malpractice for failure to file a lawsuit within the applicable statute of limitation. See *Gregory v. Hawkins*, 251 Va. 471, 468 S.E.2d 891 (1996).

III. SMITH V. IRVING

Dr. Declan Irving is a general surgeon specializing in gastric bypass procedures. One of Dr. Irving's patients was Michael R. Smith. In January of 1999, Dr. Irving evaluated Mr. Smith's obese condition and recommended a treatment plan that included gastric bypass surgery. Dr. Irving performed the surgery in February of 1999. A chief concern following such a procedure is a leak or leaks in the GI system. A week after the surgery, Mr. Smith's stomach perforated in the area where Dr. Irving had "closed [it] off" and the contents of Smith's stomach emptied into his abdomen. Mr. Smith developed peritonitis and emergency surgery was performed to repair the rupture. Mr. Smith survived the surgery but unfortunately later died due to complications incident to peritonitis.

During the discovery process, both parties identified at least two standard of care expert medical witnesses respectively. However, neither party identified Dr. Irving as a standard of care expert. On direct examination at trial, Dr. Irving testified in some detail regarding the general procedures involved in gastric bypass surgery and his specific techniques and experience in performing the procedure. On cross-examination, plaintiff's counsel attempted to expound upon that testimony and the following exchange took place:

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are defined as: (1) the advertisement, sale, lease, license or offering for sale, lease, or license, of goods or services to be used primarily for personal, family or household use; (2) transactions involving the advertisement, offer, or sale to an individual of a "business opportunity" (sale of products, supplies, or services to an individual for the operation of a business out of the home); (3) transactions involving the advertisement, offer, or sale of employment services; and (4) layaway agreements.⁵ Consequently, the Act's definition of "consumer transaction" limits the protection of the Act to *individual* consumers.⁶ Although the VCPA defines "person" as "any natural person, corporation, trust, partnership, association and any other legal entity,"⁷ a corporation rarely would qualify for protection under the VCPA, because a business would not use goods and services for personal, family, or household purposes, or otherwise be involved in the other three types of transactions listed in Section 59.1-198.⁸

The VCPA defines "goods" as "all real, personal, or mixed property, tangible or intangible."⁹ In 2001, the Virginia General Assembly amended the definition of intangible property to include computer information.¹⁰ Along with other modifications, the 2001 amendments state that the leasing and licensing of computer information, programs, databases, and other computer related transactions are within the scope of the VCPA.¹¹

Under the VCPA, a "supplier" is a "seller, lessor, or licensor who advertises, solicits, or engages in consumer transactions, or a manufacturer, distributor, or licensor who advertises and sells, leases, or licenses goods and services to be resold, leased, or sublicensed by others in consumer transactions."¹² The Act does not apply to individuals who do not make a business out of supplying goods and services in consumer transactions.¹³ Furthermore, publishers, radio and television stations, advertising agencies (or any entities that transmit or process advertising) also are exempt from liability if they lack knowledge of the false nature of the advertising.¹⁴

Accordingly, before filing a VCPA action, plaintiff's counsel should make sure that the Act applies to their client and the goods and services at issue. Defense counsel should demur to or move for summary judgment on any VCPA claim brought by or against a person or entity who does not meet the criteria of the Act

or involving a transaction that falls outside the definition of "consumer transaction" set forth in the Act.

B. Privity between the parties may or may not be required.

The VCPA only covers transactions between suppliers and *consumers* and not transactions between merchants, such as wholesaler-retailer transactions. Virginia circuit courts, however, are divided regarding the application of the Act to a wholesaler who misrepresents the condition of a product to a retailer, but who then sells the product to a consumer.¹⁵ In *Kieft v. Becker*,¹⁶ a homeowner hired a contractor, Becker Interiors, Inc., to perform a home improvement project. The contractor did not have the necessary permits to perform the project, so another contractor, A & L Construction, agreed to place its name on the building permit application.¹⁷ Upon the unsatisfactory completion of the project, the homeowner brought an action against both contractors alleging, *inter alia*, violation of the VCPA.¹⁸ A & L demurred, arguing that plaintiff could not rely on the VCPA because it did not have a direct relationship with plaintiff.¹⁹ The court held that although the "definitional section of the act appears to be describing transactions that occur between a consumer and a supplier of services . . . [, this] section is overwhelmed by the very expansive definition of 'prohibited practices.'"²⁰ The court concluded that "[t]o limit the scope of this language by applying the concept of privity given the expansive listing of fraudulent practices would seem to be inappropriate" and overruled the demurrer.²¹

On the other hand, in *Jazayerli v. Renaissance Housing Corp.*, the Fairfax County Circuit Court reached the opposite result.²² In *Jazayerli*, the plaintiffs allegedly suffered damages from the use of an Exterior Insulating & Finishing System ("EIFS") on their house and brought suit against the builder and its representatives claiming, *inter alia*, violation of the VCPA.²³ Although plaintiffs did not purchase their house from or have any interaction with defendants, they argued that their reliance upon representations made by defendants to the original purchaser was sufficient to establish a violation under the VCPA.²⁴ The court disagreed, however, and determined that privity was required.²⁵ In ruling on defendants' demurrer, the court stated that the VCPA presupposes "a transaction

or at least some direct interaction between the Plaintiffs and the Defendants.”²⁶ The court noted that “[p]laintiffs admit that they had no direct interaction with Defendants but rather relied on the representations made to them by the original purchaser concerning the EIFS.”²⁷ The court concluded that although a claim under the VCPA was “facially colorable as to the original purchasers because of their direct relationship with the developer,” its viability was lost “as to strangers to the initial transaction when the allegedly misrepresented good is sold.”²⁸

Until this issue is resolved by the Virginia Supreme Court, counsel can advocate for an expansive or limited application of the Act against suppliers who do not have direct contact with the ultimate, injured consumer. Defendants may be able to prevail on VCPA claims by establishing lack of privity between the parties to the suit.

III. THE VCPA PROHIBITS

UNFAIR BUSINESS PRACTICES

Counsel examining a VCPA claim next should determine whether the VCPA applies to the business practice at issue. The VCPA is broad in scope and prohibits numerous unfair business practices, including but not limited to: misrepresenting goods or services, advertising used goods without clearly indicating that they are used, advertising goods or services with an intent not to sell them as advertised, making false or misleading statements of fact regarding the reasons for or amounts of price reductions, misrepresenting that repairs have been made, failing to disclose all conditions, charges or fees, and using any other deception, fraud or misrepresentation in connection with a consumer transaction.²⁹ Further, any violation of numerous other Virginia consumer protection laws, such as the Virginia Home Solicitation Sales Act, constitutes a violation of the VCPA.³⁰

A. Misrepresentations and misleading advertisements are VCPA violations, but expressions of opinions are not.

Although the VCPA lists forty-one prohibited business practices, most of them involve some type of misrepresentation or false advertising. Any misrepresentation of the origin, contents, quality, or benefits of products or services in a consumer transaction constitutes a violation of the VCPA.³¹ In order to recover under the Act, a plaintiff need only show by a preponderance of the evidence that a representation by a business practice or supplier had a “tendency to mislead and deceive.”³² To constitute a VCPA violation, however, the misrepresentation, “must be of an existing fact, not a mere expression of opinion.”³³ Thus, a supplier who merely voices an opinion about a good or service is not liable under the Act.³⁴

In *Nigh v. Koons Buick Pontiac GMC, Inc.*,³⁵ for example, a consumer asked a car salesman if a truck had ever been “wrecked or been in any accidents.”³⁶ The salesman replied, “It doesn’t look like it’s been in any accidents to me.”³⁷ The United States

District Court for the Eastern District of Virginia found that the car salesman’s statement was “an opinion, not a fact”³⁸ and therefore did not constitute a misrepresentation under the Act. Further, the court held that the uncertainty of the salesman’s statement should have put the consumer on notice that further inquiry was necessary.³⁹

Misleading advertising also constitutes a violation of the Act.⁴⁰ This includes advertising intended to lure consumers to the store with promises of certain products at certain prices in an attempt to sell them more expensive or less attractive products.⁴¹ This technique is often referred to as the “bait and switch.”⁴² Accordingly, to comply with the Act, advertisements must clearly state that there are limited supplies at the advertised price, or the supplier may face liability.⁴³

Plaintiff’s counsel should take advantage of the broad scope of the Act and the long list of prohibited practices. Defense counsel, on the other hand, should argue that their clients’ representations were clear, accurate and not misleading. Defense counsel also should

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consider filing a demurrer or motion for summary judgment if the alleged misrepresentations were merely expressions of opinions. All attorneys advising business clients should explore their clients' business practices, determine which, if any, are VCPA violations and counsel their clients to stop utilizing any sales or marketing tactics that could result in liability under the Act.

B. Unintentional misrepresentations can be VCPA violations.

The VCPA provides for restitution and awards of attorney's fees and court costs even for *unintentional* violations committed by suppliers.⁴⁴ The VCPA, however, "exculpates a supplier if a misrepresentation was made despite the seller's best efforts to prevent such an occurrence."⁴⁵ If a supplier has no control over the practice, or the practice is the result of a bona fide error, then the supplier is not liable under the Act.

Plaintiff's counsel should be mindful of this limitation on liability under the Act. Defense counsel successfully can defend a client against a VCPA claim if the defendant lacked control over the allegedly fraudulent or deceptive act or practice, or the fraudulent or deceptive act was the result of a bona fide error. Defense counsel should explore their client's business practices and procedures and use evidence of any favorable procedures to defeat a VCPA claim based on an unintentional violation.

IV. THE VCPA DOES NOT APPLY TO OTHERWISE REGULATED TRANSACTIONS

In analyzing and defending VCPA claims, counsel should be cognizant of a critical exception to application of the Act.

Section 59.1-199(A) of the VCPA provides that the Act does not apply to "any aspect of a consumer transaction which aspect is authorized under laws or regulations of this Commonwealth or the United States, or

the formal advisory opinions of any regulatory body or official of this Commonwealth or the United States."⁴⁶ For example, any transaction subject to the Landlord and Tenant Act falls outside the scope of the VCPA, unless the landlord's actions amount to a misrepresentation or fraud.⁴⁷ In addition, the Act does not apply to any aspect of a consumer transaction governed by the Federal Consumer Credit Protection Act.⁴⁸ Entities already regulated by other federal or Virginia acts, such as banks and insurance companies, likewise are exempt from application of the Act.⁴⁹

Applying § 59.1-199(A), a Virginia court has held that the VCPA does not apply to a claim for medical malpractice for an unlawful abortion because "various statutes and regulations in Virginia . . . refer to and govern abortions as well as health care."⁵⁰ Similarly, another Virginia court has held that a plaintiff cannot state a claim for a VCPA violation where property damage resulted from an interstate carrier's transportation of the property because the Carmack Amendment to the Interstate Commerce Act governs such acts.⁵¹ Furthermore, courts have applied § 59.1-199(A) to claims relating to the sale of a

condominium because such sales are governed by the Virginia Condominium Act.⁵² Claims for violations of the VCPA relating to an automobile inspection are also barred because auto inspections are governed by state law.⁵⁴

Given the pervasive scope of federal and state regulation of the manufacture, prescription, and sale of prescription and other medications,⁵⁴ transactions involving such products also fit within the exclusions set forth in section 59.1-199(A) of the VCPA. One court applied a similar New York consumer protection statutory provision in a case involving an over-the-counter drug (OTC) regulated by the FDA.⁵⁵ The New York court analyzed similar exemptions in a number of state consumer protection statutes, including Virginia's, and found that "the rationale underlying the exemptive provisions of all of these statutes is the need for uniformity in the regulation of advertising and labeling and a deference to the expertise of the responsible regulatory

Plaintiff's counsel should take advantage of the broad scope of the Act and the long list of prohibited practices. Defense counsel, on the other hand, should argue that their clients' representations were clear, accurate and not misleading.

agency.”⁵⁶ Despite finding that “the FDA was too deliberate” in requiring a label warning, the court was unwilling “to doubt [the FDA’s] competence or . . . commitment to police OTC drug labeling and to mandate whatever additional changes need to be made . . . and even less reason for this court to vouchsafe that expert regulatory function to a lay jury” and granted defendant’s motion to dismiss based on the statutory exemption.⁵⁷

Thus, counsel should determine whether Virginia Code Section 59.1-199(A) precludes application of the Act to the transaction at issue. If so, defense counsel should file a demurrer or move for summary judgment on the VCPA claim, arguing the defendant is statutorily exempt from liability under the Act.

V. THE VCPA SPECIFIES THE DAMAGES THAT CAN BE AWARDED FOR VCPA VIOLATIONS

Once counsel has determined that the VCPA applies to the parties and transaction at issue, he or she should determine what damages, if any, may be awarded for a proven VCPA violation.

A. Recovery under the Act is limited to actual damages.

The VCPA allows recovery for “actual damages” resulting from a “loss.”⁵⁸ As illustrated below, in applying this language, some courts have held that the Act only allows for recovery of out-of-pocket losses and therefore does not extend to damages for personal injury and emotional distress. For example, in *Deane v. Novacare Orthotics & Prosthetics East, Inc.*⁵⁹ the plaintiff, a quadruple amputee, claimed mental anguish, embarrassment, and inconvenience resulting from a delay in delivery of a prosthetic device. The court stated that “a fair reading of the Consumer Protection Act indicates that the ‘actual damages’ allowed by it are limited by those pecuniary, out of pocket losses that plaintiff has sustained.”⁶⁰ The court concluded that such “‘personal injury’ damages . . . can be, and should be, recovered in a products liability case.”⁶¹ In *Devonshire v. EurAuPair International, Inc.*,⁶² the court considered the question of whether the plaintiffs were “precluded from recovering damages under the [Act]” as a remedy

for personal injury. The court agreed with the defendant’s assertion that “a clear reading” of § 59.1-204 “reveals that in enacting this statute, the General Assembly intended to permit recovery for pecuniary losses only, not damages for bodily injuries” and held that the plaintiffs were not entitled to recover damages pursuant to the Act.⁶³

Another circuit court, however, reached a different result in a case where plaintiffs filed a claim under the Act for personal injuries sustained when a car purchased from the defendants caught fire.⁶⁴ The defendants argued that the plaintiffs failed to state a claim under the VCPA because it “does not create a personal action for personal injury.”⁶⁵ The court observed that “nowhere in the Act is ‘loss’ limited to property interests” and overruled the defendants’ demurrer.⁶⁶

Based on the above circuit court decisions, plaintiff’s counsel asserting a VCPA claim should argue that the issue is not clear under Virginia law and that their client’s VCPA action for personal injury damage is permissible. Defense counsel should argue that the Act does not permit recovery for personal injuries and file a demurrer or motion for summary judgment on such damages claims. Defense counsel should argue that “actual damages” means only out of pocket losses or costs, such as the cost of the good or service at issue, and not personal injury type damages. Courts may dismiss damages claims for personal injuries or emotional distress and limit plaintiff’s claims to actual damages.⁶⁷

B. Willful violations may warrant treble damages.

For willful VCPA violations, the trier of fact may award “an amount not exceeding three times the actual damages sustained, or \$1,000, whichever is greater.”⁶⁸ The VCPA does not, however, mandate a tripling of the damages award upon a finding of willfulness. In *Holmes v. LG Marion Corporation*,⁶⁹ plaintiff purchased a 1989 Isuzu automobile for \$5,695 from the defendant car dealer.⁷⁰ During a test drive, plaintiff complained of a “whining noise” coming from the vehicle.⁷¹ Defendant explained that the noise was the sound of the “turbo-charged engine.”⁷² Based upon these oral representations, plaintiff purchased the car.⁷³ After the plaintiff had driven the vehicle for over 6,000 miles, the

Fanning the Winds of Change: Court Approval of Confidential Settlements and the Virginia Mediation Statute

Brian J. Schneider

Parties in cases that require court approval of settlements often find that the holding of the Virginia Supreme Court in *Shenadoah Publishing House, Inc. v. Fanning*, 235 Va. 253, 368 S.E.2d 253 (1988), poses a significant challenge to any effort to keep a settlement confidential. *Fanning* concluded that judicial records -- including settlement details -- should be open to the public absent some "compelling" circumstance.

What many parties fail to realize is that by mediating their disputes, they can take advantage of the Virginia Mediation Statute and argue in favor of confidentiality under an exception to disclosure carved out by the General Assembly. Although not yet addressed by the Virginia Supreme Court, the current attitude of the Court in favor of Alternative Dispute Resolution ("ADR"), the Virginia trend towards encouraging ADR, and the willingness of lower courts to recognize the mediation exception, all provide litigants with one more reason to consider mediation as an option to litigation.

A. The *Fanning* Decision

In *Fanning*, the plaintiff filed suit for the wrongful death of her husband resulting from the defendant's medical malpractice. The case was ultimately settled. Because it was a wrongful death case, however, the settlement had to be approved by the circuit court under

Virginia Code section 8.01-55. On joint motion of the parties, the details of the settlement were sealed by the trial court.

Various media entities subsequently sought access to the terms of the sealed settlement. On appeal to the Virginia Supreme Court, the media entities relied on Code section 17.1-208 (at that time section 17-43) which provides in part: "Except as otherwise provided by law, the records and papers of every circuit court shall be open to inspection by any person."

As the Supreme Court recognized, "*subject to statutory exceptions*, a rebuttable presumption of public access applies in civil proceedings."¹ To overcome this presumption, the party seeking to keep a settlement confidential "bears the burden of establishing an interest so compelling that it cannot be protected reasonably by some measure other than a protective order."²

B. The Virginia Mediation Statute

Fanning was handed down on April 22, 1988. Just over two months later, the Virginia mediation statute was enacted, Code section 8.01-581.22. It provides in pertinent part:

All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, *unless the parties otherwise agree in writing*.

Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except ... as provided by law or rule.

Thus, section 8.01-581.22 mandates that where the parties to a mediation have reduced to writing their agreement to keep confidential the mediated settlement, the agreement must be honored, except as otherwise provided by law. Alternatively, section 17.1-208 calls for open access to circuit court records, subject to exceptions recognized by the *Fanning* Court. The issue then

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becomes how to interpret these statutes together, a question not yet addressed by the courts in Virginia.³

C. Construing the Statutes Together

It is important to put into context the scenario in which any need to reconcile the two statutes would arise: Parties in a case involving the claims of those who cannot speak for themselves successfully mediate those claims and reach a settlement. At least one of the parties (often the defendant) wishes to keep the outcome confidential and makes it a condition of settlement. Plaintiff agrees, the condition is incorporated into a written settlement agreement at the conclusion of the mediation, and the case is resolved. However, pursuant to Virginia statute, those claims must still be submitted to the court for approval.⁴

At first blush, *Fanning* would appear to provide that under section 17.1-243, the settlement cannot be kept confidential. However, *Fanning* did not present a situation where the parties had reached a settlement through means of mediation. Furthermore, *Fanning* was handed down prior to the adoption of the confidentiality provisions of section 8.01-581.22. Indeed, *Fanning* itself recognized that its presumption of openness was subject to "statutory exceptions."⁵ Thus, upon closer examination, it becomes clear that *Fanning* does not apply at all.

Instead, the real question is the interplay between sections 17.1-243 and 581.22. It is a well-established rule of statutory construction in Virginia that, where possible, two statutes on a related topic must be construed in such a way as to give effect to both.⁶ Here, one statute (section 17.1-208) calls for public access to papers filed in a judicial proceeding, while the other (section 8.01-581.22) calls for the details of confidential mediated settlements to remain confidential in any judicial proceeding. Thus, on their face, the two statutes cannot be reconciled.

In light of this conflict, there are at least two rules of statutory construction that dictate in favor of confidentiality. The first is that where one statute speaks to a subject in a general manner and another deals with a part of the same subject in a more specific way, if they cannot be reconciled, the latter prevails.⁷ Here, section 17.1-208 deals with open records generally, whereas section 8.01-581.22 carves out an exception for mediated confidential settlements that require court approval. The second rule of statutory construction in favor of confidentiality is

that a later act which is inconsistent with an earlier act, so that the two cannot be reconciled, prevails over the earlier act.⁷ Section 17.1-243 (and its predecessors) dates back to the Code of 1919. Section 8.01-581.22 took effect on July 1, 1988, two months after *Fanning* was decided.

Both of these rules of construction grow out of the axiom that when the legislature comes to pass a new law, "it is presumed to act with full knowledge of the law as it stands bearing upon the subject with which it proposes to deal."⁹ With regard to sections 17.1-243 and 8.01-581.22, the General Assembly was aware of existing disclosure requirements under section 17.1-243 and *Fanning*, and carved out the exception to disclosure contained in section 8.01-581.22.

Although Virginia does not publish or maintain any legislative history, a compelling argument can be made that -- as a matter of policy -- this and other changes to the Virginia Code were made to promote the use of ADR by the parties. The enactment of section 8.01-581.22 came on the heels of sweeping efforts towards ADR in Virginia to relieve the burden of growing dockets across the Commonwealth.¹⁰ In the two years prior to section 8.01-581.22's enactment, Virginia saw the creation of a Joint Committee on ADR established by the Virginia State Bar, the establishment of Dispute Resolution Centers in Charlottesville and Richmond, the introduction of ADR to Virginia's CLE courses, and the appointment of a 34 member committee by then Chief Justice Harry Carrico to study ways to improve Virginia's judicial system. The committee encouraged the development of alternative dispute resolution processes in the court system and in the community.¹¹

Against the backdrop of this trend in favor of ADR, it is reasonable to conclude that the legislature saw fit to encourage ADR's use through legislation such as section 8.01-581.22.¹² Thus, litigants in a dispute that may already be a good candidate for mediation should also weigh the importance of confidentiality as another factor in determining whether ADR is the right course of action. ☒



1. 235 Va. at 258, 368 S.E.2d at 256 (emphasis added).
2. *Id.* at 258-59, 368 S.E.2d at 256.
3. The only substantive application of §8.01-581.22 is found in *Anderson v. Anderson*, 29 Va. App. 673, 514 S.E.2d 369 (1999), where the court of appeals held that a psychologist was acting as a counselor rather than a mediator in a divorce case, and thus his testimony was improperly excluded.
4. Two of the most common examples are a wrongful death case under Va. Code

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Q: If [patients] have a suspicion of a leak they should not be given anything by mouth?

A: Probably not, no, depending on the situation.

Q: And you were trained at that?

A: Correct. There are many other parts of the intestine that can leak besides this and it depends on the situation. There's no hard and fast rule about it.

Q: Well, the standard of care requires that a patient with a leak should not have fluids by mouth, correct?¹

At which point, defense counsel objected that Dr. Irving had "not been designated as an expert witness on what the standard of care is." The Circuit Court sustained the objection and stated that the plaintiff could not "ask the doctor to be an expert witness against himself."

The jury later returned a defense verdict and judgment was entered in Dr. Irving's favor. On appeal, the decedent's representative argued that the Circuit Court had abused its discretion by not the plaintiff to elicit standard of care testimony from Dr. Irving on cross-examination. Through a unanimous decision authored by Justice Keenan, the Supreme Court affirmed the trial court's decision. In reaching its conclusion, the Supreme Court applied the "American Rule" which confines cross-examination to the scope of its corresponding direct examination and concluded that Dr. Irving had not "opened the door" by testifying as to standard of care issues.

The Supreme Court's decision in *Smith* does not set forth new precedent. Indeed, the Court only ruled upon that which was needed and the decision is narrow in its scope. However, the decision raises several additional questions which, as of yet, remain unanswered by the Court. The chief among which is whether a medical malpractice plaintiff can ever, over a defendant's objection, establish the standard of care through the defendant's own testimony?

III. USING THE DEFENDANT-PHYSICIAN AS AN EXPERT WITNESS

There appear to be no procedural or evidentiary precedents in the Commonwealth prohibiting a medical malpractice plaintiff from using a defendant-physician's own testimony to establish the standard of care. Indeed, under the holding of *Irving*, if a physician testifies on direct examination regarding the applicable standard of care, then theoretically the door is open for a plaintiff to explore that area on cross-examination. However, that still does not answer the question of whether a plaintiff can plan, in advance, to elicit standard of care opinions from a defendant-physician as part of the plaintiff's case in chief.

It is safe to assume that, if faced with similar standard of care questions, many a defense attorney would react in the same manner as defense counsel and the trial court did in *Irving* - namely to argue that it is improper to require a professional defendant to testify against

himself.² Yet, there is very little, if any, authority supporting such a prohibition. *cf.* Va. Code § 8.01-223.1 (a party's invocation of a constitutionally protected right cannot be held against him in a civil proceeding).

Of course there is no constitutionally protected right to refuse to render an expert opinion adverse to one's own property interests. Neither is this writer aware of any evidentiary precedent prohibiting such testimony. In fact, it is well settled in Virginia that one civil party may compel another party to testify at trial and the examining party, on direct, may use the rules applicable to cross-examination of witnesses. Va. Code § 8.01-401(a). Further, not only is it appropriate to compel a party to testify at trial, if the testifying party still refuses to answer a question, the trial court is empowered to punish the refusing party through contempt and/or the striking of that party's claim or defense. *Id.*; see also Rule 4:12 (Circuit Courts empowered to strike claims and defenses as discovery sanction). So why is it that lawyers and courts insist that a professional defendant cannot be forced to render an opinion adverse to his own property interests?

Perhaps the objection stems from procedural precedent. However, no express provision of the Supreme Court Rules permits a professional defendant to refuse to testify simply because it is opinion testimony. In fact, the controlling authorities suggest otherwise. Virginia has enacted the dis-

Can a medical malpractice plaintiff establish the standard of care through the testimony of the defendant-physician? The Virginia Supreme Court has not expressly ruled on the issue.

covery provisions of the pre-1993 version of Federal Rules of Civil Procedure. W. Hamilton Bryson, *Handbook on Virginia Civil Procedure*, p. 327 (3rd ed. 1997); see also *Smith v. National Railroad Passenger Corp.*, 22 Va. Cir. 348 (City of Richmond 1991). The wholesale adoption of the pre-1993 federal discovery rules was to "enable Virginia lawyers and circuit court judges to use federal precedents to guide Virginia practice in the field of discovery." *Id.* In that context, neither Section Four of the Rules of the Virginia Supreme Court nor the pre-1993 discovery provisions of the Federal Rules of Civil Procedure allow a defendant to refuse to render an expert opinion on the standard of care or render an adverse expert opinion.

Like Virginia, the District of Columbia has also adopted the discovery provisions of the pre-1993 Federal Rules of Civil Procedure and that jurisdiction's highest court, the District of Columbia Court of Appeals,³ has had occasion to pass on this very issue. See *Abbey v. Jackson*, 483 A.2d 330 (D.C. 1984). In *Abbey*, the plaintiff was pregnant and sought an abortion from the defendant-physician. The procedure resulted in complications to the plaintiff and she sued the defendant-physician under a theory of lack of informed consent. At trial, the plaintiff attempted to use the testimony of the defendant-physician to establish the standard of care. The trial court, however, sustained the defendant-physician's objection and entered judgment in favor of the defendant.

Reversing the trial court, the District of Columbia Court of Appeals cited to that jurisdiction's adverse witness statute and Superior Court Rule 26(b)(4) - counterpart to Virginia Rule 4:1 - and concluded that, under appropriate circumstances, a plaintiff could establish the standard of care through the testimony of the defendant-physician. *Id.*, at 334-335. Specifically, the D.C. Court of Appeals concluded that under the adverse witness statute, a professional defendant could not refuse to render opinion testimony merely because it was detrimental to his defense or because the opinion was the product of his professional training and experience. *Id.*

In light of the District of Columbia Court of Appeals' decision in *Abbey*, perhaps it can be argued that the Virginia Supreme Court would have taken a less jaundiced view of Smith's attempted use of Dr. Irving, if Smith had simply designated Dr. Irving as an expert in the pretrial discovery process. *Irving, supra*, 268 at 498-499, 604 S.E.2d at 63-64 ("Dr. Irving was not designated as an expert witness by either party ..."). Yet, the D.C. Court of Appeals concluded, in *Abbey*, that a plaintiff does not need to identify a defendant-physician as a standard of care expert in the pretrial discovery process. The D.C. Court of Appeals reasoned that under Superior Court Rule 26 and its pre-1993

Federal counterpart, a treating physician did not "acquire ... or develop ... [his opinion] in anticipation of litigation or for trial."⁴ *Abbey, supra*, at 334-335; citing Fed.R.Civ.P. Advisory Committee note (1970) and C. Wright & A. Miller *Federal Practice & Procedure* § 2033 (1970). Thus according to the D.C. Court of Appeals, a patient does not have to identify her treating physicians as experts.

This writer believes that the foregoing conclusion is misplaced because the D.C. Court of Appeals' and Messrs. Wright and Miller's reliance upon the treating physician exception to the expert designation requirement is not a perfect fit in medical malpractice settings. Specifically, the policy under-girding the treating physician exception is that the physician is a fact based witness in that he developed his knowledge and opinions while treating his patient. In contrast, however, it is unlikely that a treating physician consciously forms an opinion as to the appropriate standard of care (legal floor) when rendering treatment to a patient.

The Virginia Supreme Court's recent decision in *Pettus v. Gottfried*, 269 Va. 69, 606 S.E.2d 819 (2005), lends guidance in this area. In *Pettus*, the Virginia Supreme Court ruled that, under Va. Code section 8.01-399, a treating physician does not need to state the medical conclusions he or she reached in treating the patient to a "reasonable degree of medical probability." However, the Supreme Court went onto to hold that any opinions formed outside of the medical record and/or the actual treatment of the patient would, potentially, be subject to the statute's requirements.

Based upon the foregoing, if a medical malpractice plaintiff in Virginia intends to use the testimony of the defendant to establish some or all of the standard of care issues in a malpractice lawsuit, she would do well to designate the defendant, early and often, as an expert as to dispel a subsequent contention of surprise or prejudice by the defendant; particularly if such an opinion is not contained in physician's medical records for the plaintiff-patient. Moreover, a plaintiff proceeding with such a strategy should ensure in the pretrial discovery process that the defendant will, at trial, render the opinion sought and do so to a "reasonable degree of medical probability."

In the end, using the defendant as a standard of care expert is probably not an appropriate tactic in complex medical malpractice lawsuits where standard of care issues are closely intertwined with causation and damage issues. However, using the defendant's own testimony may well be appropriate where the standard of care is not necessarily disputed or contested, *informed consent* lawsuits. In those types of cases, the focus is less upon what needed to be said but rather whether the information was actually provided to the patient. As a practical matter, however, a

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strategy of solely relying upon a defendant-physician to establish the standard of care is fraught with peril - particularly as the Supreme Court has yet to weigh in on this issue and plaintiffs' counsel should be wary of ever relying solely upon the defendant to establish any prima facie element of a malpractice claim. ☒

Editor's Note: The 2005 General Assembly enacted Code section 8.01-20.1. The new statute provides, in part, that service of a motion for judgment by a medical malpractice plaintiff against a defendant "shall be deemed a certification that the plaintiff has obtained from an expert witness . . . a written opinion signed by the expert witness that, based upon a reasonable understanding of the facts, the defendant for whom service of process has been requested deviated from the applicable standard of care and the deviation was a proximate cause of the injuries claimed. This certification is not necessary if the plaintiff, in good faith, alleges a medical malpractice action that asserts a theory of liability where expert testimony is unnecessary because the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience." Please refer to the Code for the entire text of the statute, which also addresses the circumstances in which the defendant may discover information from the certifying expert and the consequences for a plaintiff who fails to obtain the necessary certification prior to having a defendant served with process.



1. It is unlikely that the issue of standard of care in the *Irving* case centered upon whether the decedent Smith was given fluids by mouth or whether he was N.P.O. (nothing by mouth). Rather, it appears that in the heat of the moment, plaintiff's counsel inadvertently used the magic words "standard of care" in phrasing the question.
2. An attorney should be wary of ever instructing her client not to answer a deposition question save for reasons enumerated in the Rules of the Supreme Court or, if applicable, in the Local Rules/Guidelines of the forum Court.
3. On July 1, 1971, the District of Columbia Court of Appeals displaced the United States Court of Appeals for the District of Columbia Circuit, as the highest "state court" in the District of Columbia and its decisions after that date are controlling precedent in that jurisdiction's state courts. *M.A.P. v. Ryan*, 285 A2d 310 (D.C. 1971).
4. In Virginia, the disclosure of plaintiff's experts is generally required 90 days before trial but only if requested in an interrogatory. See *Uniform Scheduling Order*; Rule 4:1(b)(3)(A)(i). Rule 4:1(b) further allows a party to discover an adversary's expert's opinions through deposition testimony - until recently a method not previously allowed absent leave of Court.



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

ANNUAL MEETING

Of course, the Virginia State Bar holds its Annual Meeting every year in June with this year's meeting scheduled to be held in Virginia Beach, VA. As part of every Annual Meeting, the Litigation Section presents a Continuing Legal Education program on a topic of interest to the litigation bar. In the past few years, the Litigation Section has combined with the Bench and Bar Conference and last year with the Bankruptcy Section to present this program. Also, last year the Litigation Section sponsored the key note seminar for the entire Annual Meeting. We hope to do so again this year. The topics have not yet been selected but we have a December deadline for doing so. Lee Livingston is leading the charge on the Annual Meeting Continuing Legal Education program.

THE LAW AND SOCIETY CONTEST

Since I have been a member of the Board, we have annually participated in The Law and Society Essay Contest. This is a program made available to high school students across Virginia wherein they may earn scholarships in amounts of up to \$500.00 based upon their written submissions on a topic of general legal interest. The Litigation Section supports this program financially and through grading of the students' submissions. The obvious focus of this program is to keep the concept of government involvement and debate over current topics of significance alive. My experience has been that high school seniors through their government classes have benefitted greatly from this writing exercise. I encourage you to speak to your local schools about participation in this program as participation is free and the students get a valuable opportunity to test their legal and analytical acumen.

APPELLATE SUBCOMMITTEE

For those of you who do not know, the Litigation Section several years ago published an "Appellate Handbook." This book was useful for those who found themselves in the position of appeals without having a lot of experience. Unfortunately, the handbook has gotten slightly out of date. The Appellate Subcommittee, chaired by Steve Emmert, has taken on the task of updating the Appellate Handbook for publication this year. In addition, Mr. Emmert is leading the charge to organize a panel of appellate lawyers to write occasional *amicus curiae* briefs in cases pending before the Supreme Court which involve *pro se* litigants. This is a program strongly encouraged by Chief Justice Hassell. Also, the Appellate Subcommittee is contemplating as many as four statewide symposia on appellate topics. The purpose, of course, will be to help you as litigators in those instances where you find yourself in an appellate forum.

WEBSITE

As of last year, the Litigation Section has opened a website which can be accessed through www.usb.org/sections. This year we are endeavoring to make the website more user friendly and to provide additional links to services helpful to you in your business. Also available on the website, in a searchable format by topic, are previously published Litigation Section newsletters. We will continue to update these newsletters as they are published so that articles previously published can be accessed without the necessity of you holding and storing each of the newsletters in your offices. I hope you will use this website and let us know how we can make the website better for you.

OTHER TOPICS

Finally, as a part of the general business of the Board, we are from time to time asked to comment on various topics of interest to the litigation commu-

nity. Because we do not have a readily available mechanism for gauging Litigation Section Members' interests on topics one way or another, the Board has been reticent to take firm positions for the Litigation Section in most instances. A review of the minutes of the last few years' meetings indicates the kind of matters that have been coming before the Board and that will affect you in your litigation environment. Over the past few years we have seen such topics as:

- Multi-Discipline Practice Issues;
- ABA Civil Practice Standards;
- Pro Se Litigate Planning Committee Reports on the "unbundling" of legal services;
- Proposed Legislation on Process Servers;
- Proposed Federal Rule Changes;
- Proposed Changes in the Use of Commissioners-in-Chancery; and,
- The Merger of Law and Equity.

Many of these issues have come to fruition in one form or another either as rule changes or legislative enactments. Of course, the most recent issue that has the potential to dramatically affect your practice is the merger of law and equity which will become effective January 1, 2006. For a copy of the proposed rules and legislative amendments that bring about that merger, I encourage you to visit the Virginia Supreme Court website.

Whether the Members of the Board are successful or not may depend upon perspective. Nonetheless, we are endeavoring to make your job easier. I hope you will not hesitate to provide me, or other Board Members, with input as to how we are doing and how we can do a better job for you.

ADDITIONAL NOTE FROM THE CHAIR

I talked with Tina Sinnen, Virginia Beach Circuit Court Clerk, about the law and equity merger commencing on January 1, 2006. There are issues yet to be ironed out including the proper charges for the fil-

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View From the Bench

The Honorable William H. Ledbetter, Jr.

Trial on the merits should be the main event... rather than a “tryout on the road.” *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

Civil litigation is compromised of four stages: pleadings, discovery, trial, and post-trial including appeal. Each of these components has its own *raison d'être* and its own evolutionary history. But the heart of the process is and always has been the point at which the dispute is adjudicated in a formal, neutral setting — i.e., the trial.

Litigators should keep this in mind. It is easy to stray, to lose focus, and to give too much emphasis to the other stages of the litigation process.

Two distractions bear comment.

DISCOVERY

Discovery is a particularly alluring diversion. In modern practice, it can take on a life of its own.

As long as pleadings were lengthy and detailed expositions of each party's position in the case, there was little need for formal discovery. Everything one needed to know about the claim or defense could be gleaned from the pleadings, set forth there with tedious specificity. With the reforms of the 19th and 20th centuries, however, pleadings were converted into little more than succinct assertions and general denials. This development gave rise to discovery - the new set of mechanisms by which a litigant could learn the specifics of the other party's position in the dispute.

So, by modernizing pleadings, the reformers who sought to eliminate excessive controversy from pleadings merely transferred those issues, i.e. — notifica-

tion-and-clarification issues — and the contentiousness surrounding them, from the pleading stage to a later stage — discovery. See e.g., Bryson, *Virginia Civil Procedure* (3rd Ed.) p. 199.

In fact, the reformers not only postponed the contentiousness, they exacerbated it. With notification-and-clarification issues delayed until just before trial, anxiety levels are elevated, increasing the risk of friction.

No one would suggest that discovery should be avoided, or that it is unimportant. Every litigant should know what the other is claiming. Further, the materiality — and, thus, admissibility — of evidence proffered at trial is defined by reference to the issues genuinely in dispute, which in turn is determined in modern practice from discovery as much as from the pleadings.

Nevertheless, trial lawyers should engage in discovery with a sane mission and purpose. Trial is just around the corner. At the stage of the process when discovery is usually carried out, the lawyer must be more concerned with preparing his or her own case for trial than plumbing for minutiae in the adversary's case.

At bottom, discovery should be used carefully and purposefully, in the manner for which it is intended, so that counsel can stay focused on the trial, the “main event”.

PRESERVING THE RECORD

Another distraction is undue attention to “preserving the record” for appeal.

Clearly, litigators must be attuned to the need for well-crafted objections in appropriate circumstances at trial. Appeal “specialists” and appellate court judges and justices routinely emphasize the importance of this aspect of trial practice at CLE seminars and workshops. On the other hand, an obsession with “preserving the record” can divert one's attention from the trial itself — at considerable cost.

It is elementary, learned in Trial Practice 101, that objections are irritants. When objections are frequent, accompanied by lengthy commentary, the irri-

The Honorable William H. Ledbetter is a retired judge of the 15th Judicial Circuit. He is a member of The McCammon Group and serves on the Board of Governors of the VSB Litigation Section.

tation increases. Jurors shift in their chairs, glance at one another, and look pleadingly at the trial judge as if to implore, “spare us this”.

In *Riner v. Commonwealth*, 286 Va. 296 (2004), the Supreme court held that the defendant have waived his objection to hearsay testimony because the hearsay actually was double hearsay and counsel had failed to call the judge’s attention to the fact that he had ruled on just one of the two levels of hearsay.

In the recent issue of this publication, Monica Taylor Monday of Roanoke aptly expressed concern about the implications of *Riner*. See *Litigation News* Vol. XII No. 1 (winter 2005) p.1. In the article, she pointed out the pitfalls of failing to make an articulate contemporaneous objection, and/or failing to ensure that the trial judge has addressed all grounds of the objection or at least has been alerted that he or she has not ruled on them all.

Whether *Riner* ratchets up the requirements of the so-called contemporaneous objection rule in Virginia, which is already strictly applied notwithstanding Virginia Code Sec. 8.01-384(A), or is merely an iteration of earlier holdings such as *Reid v. Baumgardner*, 217 Va. 769 (1977) and *Rose v. Jaques*, 268 Va. 137 (2004), is open to debate. Only time will tell. Meanwhile, litigators must stay focused: the trial is the critical stage of the process; adducing persuasive proof and presenting compelling arguments to the finder(s) of fact is the heart of the process.

There is another reason why many lawyers gravitate to other stages of litigation rather than focus on the trial itself. Our common law tradition of trial puts heavy stress on “orality”.

...[T]he spoken word is the heart of the common law trial-- testimony fresh from the mouths of living, breathing witnesses, who stand or sit in plain view in the courtroom, examined and cross-examined by lawyers. The system is so familiar --- so ingrained --- that we take it for granted. Americans find it astonishing that there are other ways of running trials --- that there are systems which, basi-

cally, judges proceed by shuffling paper and documents. Friedman, *American Law* at 68 (1984).

Thus, lawyers who are more comfortable with the written word will be tempted to allow the other stages of litigation, all paper-driven, to trump trial preparation and presentation. Lawyers who are more inclined to oratory, those with a commanding presence, those with a little thespianism in their blood, and those who are propelled by the urge to be eloquent on their feet rather than with their pens, will more naturally stay focused on the trial as the “main event.”

Good lawyers can and do attend to all phases of the litigation process by assigning to each stage its proper due. But the best lawyers never lose sight of the primary objective: obtaining a favorable decision on the merits at trial. ☒

Successful Strategies *cont'd from page 7*

car broke down.⁷⁴

After a bench trial, the court concluded that defendant had willfully violated the VCPA, awarding plaintiff actual damages of \$1,500 and attorney's fees of \$4,000.⁷⁵ The trial court, however, did not award treble damages.⁷⁶ The Supreme Court of Virginia refused to overrule the trial court's decision, stating that "[t]he General Assembly . . . did not mandate the imposition of such penalty [trebling of the damages], but left that decision to the trier of fact."⁷⁷ The court agreed with the trial court that the plaintiff's delay in complaining about the problem "had an adverse effect on determining the actual damages" plaintiff incurred.⁷⁸

Although plaintiffs may pursue awards of treble damages, the Act leaves application of the treble damages provision to the trier of fact's discretion.⁷⁹ Thus, defendants may not be liable for treble damages even if they committed a willful violation of the Act. As in *Holmes*, courts can consider mitigating factors in determining damages awards in VCPA cases.⁸⁰ Defense counsel should attempt to minimize any damages award by introducing evidence of plaintiff's actions that make the damages calculation difficult and/or evidence that places some of the fault for the violation on plaintiff.

C. The VCPA permits recovery of reasonable attorney's fees.

A plaintiff who prevails on a VCPA claim also may recover reasonable attorney's fees and court costs, even in cases involving unintentional violations.⁸¹ In 2005, the General Assembly amended the VCPA to allow the court to decide whether the plaintiff will be awarded attorneys' fees and court costs in cases where the parties

decide to settle their dispute.⁸² In cases that go to trial, however, the Supreme Court of Virginia has held that "the fact finder must determine 'from the evidence the amount of the reasonable fees under the facts and circumstances of each particular case.'"⁸³ Any award of attorney's fees, therefore, must be reasonable. The

Virginia Supreme Court has held:

In determining whether a party has established a *prima facie* case of reasonableness, a fact finder may consider, *inter alia*, the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.⁸⁴

Furthermore, an appellate court will set aside the trier of fact's award of attorney's fees only upon a finding of an abuse of discretion.⁸⁵ A plaintiff may present expert testimony on the reasonableness of the fees; however, the trier of fact is not bound by that

testimony.⁸⁶ In *Holmes v. LG Marion Corp.*,⁸⁷ for example, plaintiff claimed that the trial court erred in limiting his attorney fees to \$4,000.⁸⁸ At trial, plaintiff offered records of his attorney's fees and an affidavit of an expert witness as to the reasonableness of the fees.⁸⁹ Defendant objected to the fee request, claiming that several items were "excessive, redundant or otherwise unnecessary."⁹⁰ Specifically, defendant alleged that time spent trying to disqualify defense counsel and on unsuccessful non-VCPA claims should not be included in the award.⁹¹ The court concluded that there was no abuse of discretion in the trial court's consideration of these factors and allowed the \$4,000

The Virginia Supreme Court has held:

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award to stand.⁹²

Plaintiff's counsel should request attorney's fees when asserting VCPA claims and be comforted by the fact that appellate courts will set aside an award of attorney's fees only for an abuse of discretion. Defense counsel, however, should argue that the VCPA limits attorney's fee awards to only those incurred in connection with the VCPA claims and move to exclude any evidence of legal fees unrelated to the VCPA violation. Also, defense counsel should attempt to minimize any attorney's fee award by arguing, if appropriate, that the fees are unreasonable given the facts and circumstances of the case.⁹³

VI. STATUTE OF LIMITATIONS FOR VCPA CLAIMS.

Under the VCPA, a plaintiff must file an action within two years after the right to bring suit accrues.⁹⁴ Section 59.1-204.1 states, "Any individual action pursuant to § 59.1-204 for which the right to bring such action first accrues on or after July 1, 1995, shall be commenced within two years after such accrual. The cause of action shall accrue as provided in § 8.01-230."⁹⁵

In *Neal v. Haley Imports, Inc.*,⁹⁶ the court found that a cause of action under the VCPA accrues from the time the violation is "discovered or should have been discovered through the exercise of due diligence."⁹⁷ However, in *Herman v. McCarthy Enter., Inc.*, the court found that the discovery rule did not apply because VCPA claims are "statutorily created."⁹⁸ Instead, § 59.1-204.1 "clearly provides that a VCPA cause of action accrues when the injury is sustained and not when the resulting damage is discovered."⁹⁹ The *Herman* court said that "[i]f the legislature had intended for a discovery rule to apply in cases of actual fraud, then it would have inserted such a provision in the VCPA," and so found that the cause of action accrued when the wrongful act occurred, regardless of when it was discovered.¹⁰⁰

Plaintiff's counsel facing dismissal of a VCPA claim on the ground that it is time-barred should argue that the decision in *Herman* is correct not only because it is in keeping with the terms of the Act itself but also because it is consistent with § 8.01-230, which governs accrual of rights of action.¹⁰¹ Defense counsel should

assert that plaintiff's VCPA claim is time barred when the facts do so suggest. Defense counsel should argue that a cause of action asserted under the VCPA accrues when the injury is sustained. This argument is consistent with the Virginia rule regarding claims of injury to person or property.¹⁰² Defense counsel also should argue that the statutory exception for fraud claims, which provides that such a claim "accrues when the fraud is or should have been discovered in the exercise of due diligence rather than when it is discovered,"¹⁰³ should not apply to VCPA claims. Because the circuit courts' holdings regarding accrual of VCPA causes of action are inconsistent, defense counsel also should attempt to prove that plaintiff knew or should have known of the violation outside the two-year statute of limitations.

VII. ADDITIONAL STRATEGIES FOR PLAINTIFF'S COUNSEL ASSERTING VCPA CLAIMS.

In drafting a Motion for Judgment or Complaint including a VCPA claim or when opposing a demurrer to a VCPA claim, plaintiff's counsel should be mindful that "claims of fraud and misrepresentation are distinct" from VCPA claims.¹⁰⁴ Misrepresentation in violation of the VCPA, therefore, "need not be pled with the same kind of particularity as common law fraud claims."¹⁰⁵ Without the heightened pleadings requirements of a fraud claim, plaintiff's counsel should argue vigorously against any demurrer for failure to allege sufficient facts to support a VCPA claim.

VIII. ADDITIONAL STRATEGIES FOR DEFENSE COUNSEL DEFENDING AGAINST VCPA CLAIMS.

Although a VCPA claim threatens potentially large damages, some additional strategies have proven successful in eliminating these actions or minimizing damages awards.

A. Settlement Offer.

If the defendant appears to be liable, defense counsel should consider offering to reimburse the plaintiff

Successful Strategies *cont'd from page 17*

for his or her pecuniary, out-of-pocket losses, such as reimbursement for the cost of the goods or services at issue, if the plaintiff will agree to dismiss the VCPA claim. In *Alston v. Crown Auto, Inc.*,¹⁰⁶ a customer was charged an excessive late fee by a used car dealership from which she had purchased a vehicle. The customer sued the dealership alleging, *inter alia*, violation of the VCPA.¹⁰⁷ The dealership reimbursed the plaintiff for the excess late fees, plus interest.¹⁰⁸ The dealership then argued that the plaintiff suffered no out-of-pocket loss because of the reimbursement.¹⁰⁹ The court agreed with the defendant and found that plaintiff failed to present any evidence that she suffered a loss because of a violation of the VCPA and granted defendant's summary judgment motion.¹¹⁰

Even if defense counsel cannot resolve plaintiff's non-VCPA claims at the outset of the litigation, resolving the VCPA claim early would eliminate the risk of an attorney's fee award against the defendant. Once the VCPA claim is dismissed, plaintiff would not be entitled to attorney's fees for the remaining, non-VCPA claims.

B. Cure Offer.

A cure offer is a written offer made by a supplier and delivered to "a person claiming to have suffered a loss as a result of a consumer transaction...reasonably calculated to remedy" that loss.¹¹¹ In 2004, the General Assembly amended the VCPA to allow a supplier to introduce a cure offer into evidence in a proceeding for damages if the offer was delivered "prior to the filing of the supplier's initial responsive pleading."¹¹² If the damages awarded in the proceeding do not exceed the value of the cure offer, the supplier will not be liable for the person's "attorney's fees and court costs incurred following delivery of the cure offer."¹¹³ The cure offer must include an additional amount of at least "10 percent of the value of the cure offer or \$500, whichever is greater, as compensation for inconvenience, any attorney's or other fees, expenses, or other costs" incurred in the loss.¹¹⁵

Defense counsel should consider making such an offer at an appropriate time. If plaintiff does not accept it, and defendant obtains a better result at trial, plaintiff

will not be able to recover for attorney's fees and court costs incurred after the offer is made.

VI. Conclusion.

The VCPA is an effective tool for plaintiffs against merchants or service providers who engage in fraudulent or deceptive business practices. Successful claims for VCPA violations can result in awards of treble damages and attorney's fees.

Defense attorneys can utilize the strategies discussed in this article to obtain dismissals of VCPA claims against their clients or to reduce any damages awards against their clients. ☐



1. Va. Code Ann. §§ 59.1-196-59.1-207 (Michie 2004). In addition to allowing civil suits by consumers, the VCPA empowers the Commonwealth to enforce the Act through court action. *Id.* at § 59.1-203. The court may award the following damages for a violation of the Act in a civil enforcement action: 1) injunction; 2) civil penalties for willful violations; 3) costs; and 4) restitution for individuals, which may include recovery for injured individuals who are unnamed in the suit. *Id.* at §§ 59.1-203, 59.1-205-59.1-206. Civil penalties may reach \$2,500 per violation and \$5,000 for a violation of an injunctive order. *Id.* at § 59.1-206.
2. *Id.* at § 59.1-197.
3. *See id.* at §§ 59.1-197, 59.1-200.
4. *Id.* at § 59.1-204.
5. *Id.* at § 59.1-198.
6. *Id.* at §§ 59.1-197-59.1-198.
7. *Id.* at 59.1-198.
8. *See Winchester Homes, Inc. v. Hoover Universal, Inc.*, 27 Va. Cir. 62, 63 (Fairfax Co. 1992) (holding that the sale of roofing materials to a building contractor did not amount to a consumer transaction under the VCPA because the contractor did not purchase the materials for primarily personal, family, or household use); *Eubank v. Ford Motor Credit Co.*, 54 Va. Cir. 170, 171-72 (Amherst Co. 2000) (holding that the VCPA did not apply to the sale of an automobile between merchants because the sale did not qualify as a "consumer transaction").
9. Va. Code Ann. § 59.1-198 (Michie 2004).
10. 2001 Va. Acts 741.
11. *See id.*
12. Va. Code Ann. § 59.1-198 (Michie 2004).
13. *See Sullivan v. Reliable Realty*, 16 Va. Cir. 118, 126 (Clarke Co. 1989) (holding that the VCPA applies only to commercial entities that advertise, solicit, or engage in consumer transactions as business).
14. *Id.*
15. *Compare*, *Kieft v. Becker*, 58 Va. Cir. 171, 176 (Fairfax Co. 2002) (privy not required), and *Merriman v. Auto Excellence, Inc.*, 55 Va. Cir. 330, 331 (City of Richmond 2001) (privy not required), and *Harris v. Universal Ford, Inc.*, 2001 U.S. Dist. LEXIS 8913 (E.D. Va. 2001) (privy not required), with *Jazayerli v. Renaissance Hous. Corp.*, 55 Va. Cir. 49 (Fairfax Co. 2001) (privy required).
16. *Kieft*, 58 Va. Cir. at 172.
17. *Id.*
18. *Id.* at 175.
19. *Id.*
20. *Id.* at 176.
21. *Id.*
22. 55 Va. Cir. 49.
23. *Id.*
24. *Id.* at 50.
25. *Id.*
26. *Id.*

27. *Id.*
28. *Id.*
29. Va. Code Ann. § 59.1-200 (listing 41 prohibited practices).
30. *Id.*
31. *Id.*
32. *Commonwealth v. Smokey Mountain Secrets, Inc.*, 41 Va. Cir. 564, 569 (City of Richmond 1997).
33. *Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 2d 535, 554 (E.D. Va. 2001), *aff'd*, 319 F.3d 119 (4th Cir. 2003), *rev'd*, 125 S. Ct. 460 (2004) (reversed on Truth in Lending Act issues); *see also Mortarino v. Consultant Eng'g Serv., Inc.*, 251 Va. 289, 293, 467 S.E.2d 778, 781 (1996); *Saxby v. Southern Land Co.*, 109 Va. 196, 198, 63 S.E. 423, 424 (1909).
34. *See Nigh*, 143 F. Supp. 2d at 554; *see also Lambert v. Downtown Garage, Inc.*, 262 Va. 707, 711, 553 S.E.2d 714, 716 (2001); *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 110-11, 540 S.E.2d 134, 142 (2001).
35. 143 F. Supp. 2d at 535.
36. *Id.* at 554.
37. *Id.*
38. *Id.*
39. *Id.*
40. Va. Code Ann. § 59.1-200 (Michie 2004).
41. *Id.*
42. Black's Law Dictionary 58 (2d Pocket ed. 2001).
43. *See* Va. Code Ann. § 59.1-200 (Michie 2004).
44. Va. Code Ann. § 59.1-207 (Michie 2004).
45. *Gill v. Rollins Protective Servs. Co.*, 836 F.2d 194, 197 (4th Cir. 1987).
46. Va. Code Ann. § 59.1-199(A) (Michie 2004).
47. *Id.*
48. *Id.*
49. *Id.*
50. *Ott v. Baker*, 53 Va. Cir. 113, 114-15 (Norfolk 2000).
51. *Harlow v. Bekins A-1 Movers, Inc.*, 59 Va. Cir. 198, 202 (Fairfax Co. 2002).
52. *See Al-Roubathy v. Council of Co-Owners*, 60 Va. Cir. 194, 196 (Fairfax Co. 2002) (public sale of a condominium for failure to pay assessments); *Board of Directors v. Crossland Savings FSB*, 15 Va. Cir. 239, 241 (Alexandria 1989).
53. *Darden v. Vinton Car Connection, Inc.*, 41 Va. Cir. 465 (Roanoke 1997).
54. *See* Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.*, and Virginia Drug Control Act, Va. Code Ann. §§ 54.1-3400, *et seq.*
55. *See American Home Prods. Corp. v. Johnson & Johnson*, 672 F. Supp. 135, 144 (S.D.N.Y. 1987) (noting that § 59.1-199(A) was similar to the exemption at issue).
56. *Id.*
57. *Id.* at 146.
58. Va. Code Ann. § 59.1-204 (Michie 2004) (a person who suffers "loss" as a result of a VCPA violation may initiate an action to recover "actual damages").
59. 50 Va. Cir. 418 (Rockingham Co. 1999).
60. *Id.* at 419-20.
61. *Id.* at 420.
62. 40 Va. Cir. 149 (Fairfax Co. 1996).
63. *Id.* at 151.
64. *Lambert v. Downtown Garage, Inc.*, 47 Va. Cir. 88, 89 (Spotsylvania Co. 1998), *aff'd*, 262 Va. 707, 553 S.E.2d 714 (2001). In its *Lambert* opinion, the Supreme Court of Virginia found that the plaintiffs had failed to make a *prima facie* case for a violation of the VCPA and therefore did not reach the issue of whether personal injury damages could be recovered pursuant to the Act. *See Lambert*, 262 Va. at 714, 553 S.E.2d at 718.
65. *Id.*
66. *Id.*
67. *See id.*
68. Va. Code Ann. § 59.1-204 (Michie 2004).
69. 258 Va. 473, 521 S.E.2d 528 (1999).
70. *Id.* at 476, 521 S.E.2d at 531.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 477, 521 S.E.2d at 531.
75. *Id.* at 477, 521 S.E.2d at 531-32.
76. *Id.* at 478, 521 S.E.2d at 532.
77. *Id.*
78. *Id.*
79. Va. Code Ann. § 59.1-204(A) (Michie 2004).
80. *See, e.g., Holmes v. LG Marion Corp.*, 258 Va. 473, 478, 521 S.E.2d 528, 532 (1999).
81. Va. Code Ann. § 59.1-204(B) (Michie 2004)
82. Va. Code Ann. § 59.1-204(D) (2005)
83. *Holmes v. LG Marion Corp.*, 258 Va. 473, 479, 521 S.E.2d 528, 533 (1999) (quoting *Tazeuwell Oil Co. v. United Virginia Bank*, 243 Va. 94, 111, 413 S.E.2d 611, 621 (1992)).
84. *Chawla v. Burgerbusters, Inc.*, 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998).
85. *Holmes*, 258 Va. at 479, 521 S.E.2d at 533.
86. *Id.* at 480, 521 S.E.2d at 533 (citing *Beale v. King*, 204 Va. 443, 446, 132 S.E.2d 476, 478 (1963)).
87. 258 Va. 473, 521 S.E.2d 528 (1999).
88. *Id.* at 479, 521 S.E.2d at 532.
89. *Id.* at 480, 521 S.E.2d at 533.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Chawla*, 255 Va. 94, 111, 413 S.E.2d 611, 621 (1992).
94. Va. Code Ann. § 59.1-204.1 (Michie 2004).
95. *Id.*
96. 55 Va. Cir. 152 (Chesterfield Co. 2001).
97. *Id.* at 153.
98. 61 Va. Cir. 697, 699 (Loudoun Co. 2002).
99. *Id.*
100. *Id.*
101. Va. Code Ann. § 8.01-230 (Michie 2004) ("[T]he right of action shall be deemed to accrue and the prescribed limitation period shall begin to run from the date the injury is sustained...except...where otherwise provided under § 8.01-233, subsection C of § 8.01-249, 8.01-250 or other statute.").
102. *See Al-Abood v. Elshamari*, 217 F.3d 225, 233 (4th Cir. 2000) (citing Va. Code Ann. § 8.01-230).
103. *Id.*
104. *Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 2d 535, 554, 2001 U.S. Dist. LEXIS 5374 (E.D. Va. 2001), *aff'd*, 319 F.3d 119 (4th Cir. 2003), *rev'd*, 125 S. Ct. 460 (2004) (reversed on other grounds).
105. *Id.*
106. 224 F.3d 332 (4th Cir. 2000).
107. *Id.* at 336.
108. *Id.*
109. *Id.*
110. *Id.*
111. 2004 Va. ALS 41.
112. *Id.*
113. *Id.*
114. *Id.*



Letter from the Chair *cont'd from page 13*

ing of the Complaint. Apparently, when the General Assembly enacted the legislation for the merger, there was no change to the fee structure for filing cases in the Circuit Courts. Consequently, the Clerks are still legally bound to collect the fees based upon the existing structure which means they vary based upon whether the matter is on the law versus the equity side of the court and the amount of damages claimed, among other things. The Clerks are under audit pressure from the state to be sure they properly collect and account for the filing fees. To deal with this issue, since the clerks will not be able to review each suit and characterize it for filing fee purposes, a "cover sheet" is or has been developed that puts the burden on the filing party to characterize the case so the proper fee can be collected. Hence, counsel will still have to be aware of the filing fee system and the differences between law and equity actions even though the Complaint was supposed to eliminate that distinction. There will be a meeting in Virginia Beach on October 27, 2005 between the Clerks and Supreme Court personnel. This is one of the issues to be addressed at that meeting. Ms. Sinnen was sure that other operational issues will be addressed as well. We will attempt to keep you updated. Don't throw away those filing fee schedules yet. ☒

Fanning the Winds of Change

cont'd from page 9

tion 8.01-50, or a settlement of any claim involving a minor or other incapacitated person under section 8.01-424.

5. 235 Va. at 258, 368 S.E.2d at 256.
6. *Moore v. Downham*, 166 Va. 77, 81-82, 184 S.E. 199, 200-01 (1936).
7. *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 294, 396 S.E.2d 672, 674 (1990).
8. *Mandell v. Haddon*, 202 Va. 979, 986, 121 S.E.2d 516, 522 (1961).
9. *Powers v. School Bd. of Dickenson County*, 148 Va. 661, 669, 139 S.E. 262, 264 (1927) (quoting *School Bd. of Stonewall Dist. No. 1 v. Patterson*, 111 Va. 482, 69 S.E. 337 (1910)).
10. As recently recognized by the Honorable Leroy R. Hassell, Chief Justice of the Virginia Supreme Court, "ADR plays an enormously important role in the judicial system by relieving caseload pressures that otherwise would interfere with the efficient and expeditious functioning of the courts." *Founder of ADR in Virginia Awards Presented at VSB Program*, VIRGINIA ADR (Fall 2004).
11. Lawrence H. Hoover, *Virginia ADR Has A Rich History (Part I)*, VIRGINIA ADR, (Spring 2003), available at <www.mccammongroup.com/articles>, last visited on June 2, 2005.
12. The author has successfully argued for the sealing of mediated settlements in two circuits under section 8.01-581.22.



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