Defamation:
A Mini-Primer

by Conrad M. Shumadine

The tort of defamation allows recovery of damages resulting from false statements that tend to injure the reputation of a person or to render him odious, contemptible or ridiculous. Language is defamatory if it tends to injure the reputation of the party, to throw obloquy, or to reflect shame and disgrace upon him, or to hold him up as an object of scorn, ridicule, or contempt. Whether words are defamatory depends upon how they would be interpreted by a substantial and respectable minority of the population. One Virginia court has held that falsely accusing an individual of being gay is actionable per se in spite of an argument that this characterization should no longer be found to be defamatory.

At common law, there was a distinction between written defamation, referred to as libel, and oral defamation, referred to as slander. Defamatory speech that was classified as per se injurious and defamatory speech that was not per se injurious were treated differently. Generally, special damages akin to out-of-pocket losses were required to be alleged if the speech was not per se actionable.

Virginia merged actions for libel and slander. To distinguish words that are per se actionable from those that are not, Virginia utilized a modification of the four common law categories of slander per se. These four categories are: (1) words that impute to a person the commission of some criminal offense involving moral turpitude, for which the person, if the charge is true, may be indicted and punished; (2) words that impute to a person infection with a contagious disease; (3) words that impute to a person unfitness to perform the duties of an office of employment or profit or want of integrity in the discharge of such duties; and (4) words that prejudice a person in his or her profession or trade. If words are not actionable per se, then special damages must be pled and proved. At one time, it was felt that special damages were akin to pecuniary losses. However, the Supreme Court of Virginia has now ruled that, "special damages," which under the common law rule must be shown as a prerequisite to recovery where the defamatory words are not actionable per se, are not to be limited to pecuniary loss.

It is a question of law whether words are capable of defamatory meaning. The court also determines in a private figure defamation case whether the words uttered make substantial danger to reputation apparent.

To recover for a defamatory falsehood, an individual must establish that the falsehood was "of and concerning" him. A person may be identified both in the text and by extraneous circumstances. Defamatory statements about a large group of individuals are generally not actionable, whereas language directed toward a comparatively small or restricted group of individuals will allow any member to sue.

A defamatory charge need not be made in direct terms, but the meaning of the defamatory language cannot be extended beyond its ordinary and com-

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Letter from the Chair

I am honored to serve as Chair of the Litigation Section Board of Governors in 1999-2000, and I invite all Section members (and interested bystanders) to help us build on the many successes of past administrations. Last year, with Jeff Gray at the helm, we continued the fine traditions of our Section and also explored ways to counteract the downward spiral of our public image. Jeff’s commitment and service throughout his tenure on the Board of Governors has been outstanding, and we are all in his debt for the inspirational leadership he has provided.

As we look toward the new millenium, I would like to take stock of all that our Section has achieved, and also embark on a mission to reenergize ourselves. In recent years, our Section has annually sponsored at least one CLE presentation, published three newsletters, sponsored a high school essay competition and, through our appellate practice subcommittee, hosted several soirées with various appellate justices and judges. This year, we will be examining the value of these various endeavors to our members, with an eye toward expanding the more popular programs and considering whether to continue the lesser-appreciated ones.

Last year, lawyer advertising was in our Section’s spotlight. Unable to subdue all the spaceships, submarines, hammers and fighters, our Section supported the VSB’s positive ad campaign to educate the public about some of the good causes lawyers help their clients pursue (i.e. adoptions, fair employment practices, preventing child abuse, etc.).

This year, I hope to turn the focus of the Board of Governors inward. Our meetings will be on September 30, 1999, November 12, 1999, January 14, 2000, and March 24, 2000. I would be grateful for any suggestions you may have about services or programs you believe we should consider expanding or implementing. My own preference is to focus on what we can do to: (a) increase the level of respect litigators have for one another, and (b) ensure that our judicial system’s primary focus is on the search for truth and justice, rather than on docket control and quick, superficial answers to complex or tedious questions. In future columns I may attempt to address those issues. Of course, there will be the temptation to use this space to convince all Virginians that the collateral source rule should be abolished for evermore and that defendants, too, should have at least one voluntary nonsuit. However, in the hope of fostering a spirit of unity as we explore ways of returning dignity to the Bar and respect for one another, I promise to resist all such temptations.

Please let me or others on the Board of Governors hear from you about the direction in which you would like to see our Section head as we enter the 21st century.

Susan C. Armstrong, Chair
Board of Governors, Litigation Section
Civility: Perspectives from the Plaintiff and Defense Bar

by Edward H. Starr, Jr. & Robert T. Hall


I accepted the offer to write this article on how the plaintiff’s bar could make discovery and trial easier for both parties because of my observation of how times have changed in the practice of law. Years ago, when the bar was smaller, most trial lawyers knew and had frequent contact with each other. The result was that few of them engaged in sharp practices. They knew that, if they did so, their reputation would suffer and they would be ostracized.

The explosion in the number of trial lawyers in the bar over the last twenty years has created a sense of anonymity that lessens each lawyer’s concern about developing a bad reputation or suffering from ostracism. The by-product of this loss of a sense of community is that sharp and unpleasant practices occur with much greater frequency.

I offer the following suggestions to improve civility, honor and professionalism among trial lawyers. In making these suggestions, however, I do not intend to suggest that sharp practices are more likely to be perpetrated by plaintiff’s lawyers than by defense lawyers. Civility, like all human interaction, is a two-way street.

1. Do not plead causes of action for which you do not have support in fact or in law. If you plead such a cause of action in the belief that you later will develop facts to support such action, be willing to dismiss or nonsuit the cause of action promptly if the facts do not develop to support your theory. It is unfair to force defense counsel to go to the burden and expense of moving to dismiss a frivolous claim. When defense counsel are put to the expense of defeating frivolous claims, they then usually threaten sanctions, and the civility of the profession degrades another step.

2. If you have promised to dismiss or nonsuit certain parties or causes of action if certain conditions are met, make good on your promise.

Plaintiff Perspective — Robert T. Hall

I was reluctant to contribute to this article. Airing dirty laundry is bad form. Neither plaintiff’s lawyers nor defense lawyers are inherently bad, corrupt or unethical.

Most disagreements boil down to differences in style and personality. Over the last 33 years I have found that the bad actors are few and are rather equally divided between the plaintiffs’ and defendants’ bar.

I was given an advance copy of what my defense colleague had prepared, and found I could agree with most of the general principles espoused, reserving my few annotations to particular applications. The complaints he recited fell naturally into three categories: professionalism and common courtesy, concern for the workload of court and counsel, and abuses of fair play and good faith. The latter concern us all, not only because they may unfairly affect the outcome of our cases, but because they frequently form the basis for public condemnation of our profession.

Let me first address some of the issues his paper raises. For each deficiency by plaintiff’s counsel, I sensed there was a counterpoint on the defense side. Let me give you an example.

“Do not try to interview a witness who is represented by counsel without his counsel being present.” That statement is well-recognized and readily defensible. While ethically driven, it’s currently under attack by federal prosecutors who are trying to get exempted from this obligation on the premise that the rule gets in the way of efficient detection and prosecution of criminals, traitors and terrorists (as do many of our rules which protect individual rights).

The counterpoint to that sound general rule is this. The rule presumes that there is a real, not fictitious or imposed attorney-client relationship, i.e. that the witness is represented by an attorney who has as his or her goal the protection of the witness’ interests.

In litigation with employers, I have found that counsel to the company occasionally takes the position that, as to outsiders, he is counsel for all of the employees, whether they are in the control group or not, and even though the employees may be unaware...
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mon acceptance. In other words, innuendo can be
defamatory, but it cannot be used to enlarge or alter
the meaning of words. 12

A defamation plaintiff must prove falsity. At com-
mon law, truth was a defense, and the defendant
bore the burden of both pleading and proving
truth.13 Truth was not a defense to a charge of crimi-

nal libel.14 Under modern defamation law, falsity
must be established by the plaintiff.15 Truth is an
absolute defense. In determining whether defama­
tory statements are true, "It is not necessary to prove
the literal truth of the statements made. Slight inac­
curacies of expression are immaterial provided that
the defamatory charge is true in substance, and it is
sufficient to show that the imputation is substantially
true."16 The test is whether the "gist" or "sting" of
the actual words published is the same as the truth.17

There is a tension between the law of defamation
and the ability of a free people to receive information
from diverse and antagonistic sources. One court has
observed that "whatever is added to the field of libel
is taken from the field of free debate."18 Modern
defamation law is a balancing of these tensions. The
common law of defamation has been constitutional­
ized, and long established common law principles
have been jettisoned.

In the landmark case of New York Times Co. v.
Sullivan, 376 U.S. 254, 279-280 (1964), the U.S.
Supreme Court held that the First and Fourteenth
Amendments forbade

a public official from recovering damages for
a defamatory falsehood relating to his official
conduct unless he proves that the statement
was made with "actual malice" — that is,
with knowledge that it was false or with
reckless disregard of whether it was false or
not. (Emphasis added.)

In Curtis Publishing Co. v. Butts, the Court
extended the New York Times rule to comments on
matters of public interest concerning public figures.19

Applying the public official–public figure rule is
not without its difficulties. "The Court has not pro-
vided precise boundaries for the category of 'public
official'; it cannot be thought to include all public
employees, though."20 "The 'public official' designa-
tion applies at the very least to those among the hierar-
chy of government employees who have, or appear
to the public to have, substantial responsibility for or
control over the conduct of government affairs."21
Virginia applies a high threshold in determining
whether a public official has sufficient decision-mak­
ing authority to be classified as a public official for
libel purposes.

Determining who is a public figure is an even
more difficult task. One federal judge said defining a
public figure was "much like trying to nail a jellyfish
to the wall."22 There are different classes of public
figures. First, there is an all-purpose public figure. An
all-purpose public figure is "an individual [who]
achieve[s] such pervasive fame or notoriety that he
becomes a public figure for all purposes and in all
contexts."23 Celebrities, authors of popular fiction,
successful athletes, well-known actors and actresses
and similar individuals are all-purpose public figures.
In addition, a public figure may be a "vortex" public
figure.24 "Vortex" public figures have thrust them­
sehles "to the forefront of particular public controver-
sies."25 A public controversy is not merely something
that interests the public; it includes only matters that
are legitimately a subject of public discussion or
debate rather than issues of mere curiosity. A public
controversy is "a dispute that in fact has received pub-
lic attention because its ramifications will be felt by
persons who are not direct participants."26 It is pos­
sible for an individual to be an "involuntary public
figure."27 However, the court noted, "The instances of
true involuntary public figures must be exceedingly
rare."28 There is a real question whether an involun­
tary public figure is now possible in light of the
Court's even more strict emphasis on voluntariness. It
is clear that, "[T]hose charged with defamation can­
not, by their own conduct, create their own defense
by making the claimant a public figure."29

If an individual is either a public official or a pub­
lic figure, he may recover for a defamatory falsehood
only upon proof by clear and convincing evidence of
constitutional actual malice. Constitutional actual
malice is a term of art having nothing to do with
malice as ordinarily defined. One court noted:
In the context of a libel suit, "actual malice"
simply does not mean ill-will or spite. Rather,
"malice" must be taken to mean fraudulent,
knowing publication of a falsehood, or reck­
less disregard of falsity. And we also note that
reckless does not mean grossly negligent, its
common use, but rather intentional disre-
gard. When the Supreme Court uses a word,
it means what the Court wants it to mean.
"Actual malice" is now a term of art having
nothing to do with actual malice.30

Actual malice is a subjective test. It requires clear
and convincing truth that the person making the
statement "in fact entertained serious doubts as to
the truth of his publication.” A failure to investigate, without more, does not establish actual malice.32

The constitutionalization of the law of defamation was completed by the United States Supreme Court's decision in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Gertz established, as a matter of constitutional law, that (1) states may not impose liability for defamation without some showing of fault,34 (2) defamation plaintiffs who do not prove constitutional actual malice may recover only for actual injury,35 and (3) courts may not award presumed or punitive damages for defamation unless the plaintiff proves constitutional actual malice.36

In The Gazette, Inc. v. Harris, the Supreme Court of Virginia applied these principles. The court held that a private individual could recover damages for actual injury upon proof of negligence.37 This decision is in accord with the vast majority of decisions of the sister states. The court also held that any plaintiff, including a private plaintiff, could recover punitive damages only upon a showing by clear and convincing evidence of constitutional actual malice.38

Defamation deals with false statements of fact. “Pure expressions of opinion, not amounting to fighting words, cannot form the basis of an action for defamation.” The question of whether words express opinion or fact is a question of law to be decided by the court. It is not clear what statements constitute pure opinion, but the Virginia Supreme Court has held that words charging an architect lacked experience and charged excessive fees were protected.41

The United States Supreme Court limited significantly the opinion privilege.42 The Virginia Supreme Court has observed that speech that does not contain a provably false factual connotation or statements that cannot be interpreted as stating actual facts about a person cannot form the basis of a common law defamation action.43

In the context of a labor dispute, the words “cocksucker” and “motherfucker” were found insufficient to support liability because they could not be reasonably understood to convey a false representation of fact. In the same context, the reference to a plaintiff as a “scab” and a quotation from Jack London’s definition of a scab as a traitor to himself, to his god, to his country, his family, and his class were found to be nothing more than rhetorical hyperbole, “a lusty and imaginative expression of the contempt felt by union members toward those who refused to join.” Similarly, the use of the term “blackmail” in the context of a city council meeting has been held to be rhetorical hyperbole.

In cases involving constitutional actual malice, both the trial and appellate courts are required to make an independent, factual review of the record to determine whether the evidence is sufficient to support the determination of constitutional actual malice by clear and convincing evidence.47 The Supreme Court of Virginia has recognized the obligation of independent appellate review.48 In one case, it affirmed a finding of constitutional actual malice where a witness' credibility was apparently controlling, giving deference to “the determinations made on credibility of witnesses by the trier of fact [and to] the presumption of a correctness that attaches to factual findings.”

In cases not involving constitutional actual malice, the normal standard of appellate and trial court review applies. The judgment of a trial court will not be set aside unless it appears from the evidence that the judgment is plainly wrong or without evidence to support it, and the evidence is viewed in the light most favorable to the prevailing party.

The constitutional principles outlined above do not apply to speech “on matters of purely private concern.” In this situation, states are free to impose liability without fault and to award presumed or punitive damages without a showing of constitutional actual malice. The Supreme Court of Virginia has decided that in a suit brought by a private individual it would “not, as a matter of state law, apply to speech actionable per se, involving no matters of public concern, the Gertz rule inhibiting presumed compensatory damages,” but would continue to require “proof of New York Times malice for the recovery of punitive damages in all cases.” Unfortunately, neither the United States Supreme Court nor the Supreme Court of Virginia has provided guidance as to how to make the determination of what was and is a matter of legitimate public concern.

There are a number of privileges that are applied by Virginia courts protecting defamatory falsehood. Statements made in the course of judicial proceedings are absolutely privileged. The statements must be pertinent and relevant to the subject matter of the proceeding. Judicial proceedings are broadly defined and are “not restricted to trials of civil actions or indictments but...[include] every proceeding before a competent court or magistrate in the due
course of law or the administration of justice which is to result in any determination or action of such court or officer."56 There is an absolute privilege for a communication from an attorney preparatory to the institution of legal action.57 It would seem that administrative proceedings of state agencies exercising quasi-judicial functions may serve as the basis for a claim for absolute privilege.58 Legislative bodies probably have an absolute privilege.59

In addition to absolute privileges, there are a number of qualified privileges. To defeat a qualified privilege, the plaintiff must prove that the statements were made with common law malice or that the scope of the privilege was exceeded. This proof must be by clear and convincing evidence.60 There is a qualified privilege "where the author or publisher of the alleged slander acted in the bona fide discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interest" or in regard to "anything said or written by a master in giving the character of a servant who has been in his employment."61 In order for the privilege to attach, the party receiving it "must have a corresponding right or duty in the subject of the communication."62

In addition to the broad privilege, courts have held that a privilege attaches to a large number of specific items, as follows: (1) fair and accurate reports of public records,63 (2) fair comments,64 (3) comments by an employer to his employees and other interested persons concerning the reason for discharge of an employee,65 (4) testimony given at a police investigatory hearing,66 (5) statements made to the interested family members about other members of the family,67 (6) statements made by one in his own defense,68 (7) complaints about a policeman made to a chief of police,69 and (8) fair reports.70

In addition to a defamation action, Virginia recognizes a statutory tort for the publishing of "insulting words."71 Actions under this statute have been treated "precisely as an action for slander or libel for words actionable per se with one exception, namely, no publication is necessary."72 Recently the Supreme Court of Virginia has held that plaintiffs must prove that the words used were such as to provoke violence or a breach of the peace.73 One circuit court has ruled that for an action under the statute to be viable, the words must be said in the context where violence is likely.74

The constitutionalization of the law of defamation has resulted in many public official–public figure lawsuits being dismissed in situations where, under the common law, these actions would be viable. However, there is no evidence suggesting that in those cases presented to juries, the constitutionalization of libel law has made any difference. In fact, anecdotal evidence suggests that strong reliance on constitutional principles in a jury trial may result in a negative jury reaction. Juries are interested in fairness, proportionality, and responsibility, an argument that, even though the author was negligent, he should not be held liable because he did not deliberately lie is a difficult sell. Thus, although a lack of an investigation does not establish constitutional actual malice, careful investigation is always prudent.

Deadlines are important to journalists, but they are not important to juries. Excusing a failure to check on the basis of time constraints is dangerous. Looking at only one side of an argument is not actual malice, but it will be difficult to explain to a jury. In short, relying on the actual malice standard as a defense in any libel action is perilous.

The average person regards his reputation as important. He feels the reputations of others should be protected. Those whose business it is to report on public affairs have a responsibility to report wrongdoing. However, the average jury also feels they have a responsibility to be accurate. They must report fairly, accurately, and with balance.

1 Chaffin v. Lynch, 83 Va. 106, 1 S.E. 803 (1887).
3 Restatement (Second) of Torts § 559 (1977).
they are represented. He may have circulated a memo asking any employee who is approached as a witness to notify him promptly, then act as counsel when they are. He can use this imposed relationship as a tool to keep an employee witness in line.

No bona fide attorney-client relationship exists in this setting. The attorney has been chosen by the employer and imposed on the employee to protect the employer’s interests, not the employee’s. The employee is usually not in a position to protest, and where the employer’s conduct is arguably criminal, the employee’s greatest need is for his counsel to advise him of his rights and responsibilities, not to tell what his employer would like him to do.

Moreover, in my experience “counsel present” interviews rarely happen. Interviewing counsel rarely want the adverse party’s counsel to know their areas of interest and, even if such an interview was requested, plaintiff’s counsel is usually advised that the employee has elected not to grant the interview.

Other disagreements between us are just matters of perspective. For example, one of the defense complaints involves selection of a forum.

“Don’t,” my colleague suggests, “add an unnecessary party to a case solely to defeat diversity.” Assuming that “unnecessary parties” have the right to Section 8.01-271.1 sanctions, the spoken concern seemed less for the tribulations of the unnecessary party, and more a criticism that the plaintiff has deliberately prevented removal of the action to the federal court. Historically, the plaintiff picks the forum and the defendant, if he doesn’t like the forum, tries to have the forum changed. While the plaintiff, by creating diversity, may have been forum shopping, why isn’t the filing of a removal petition forum shopping?

It is no dark secret that defendants tend to prefer the summary judgment attitudes, rules and case law in the federal system to the greater restraint imposed on our circuit courts. Is it wrong for the plaintiff to seek a forum that seems better suited to the needs of his or her view of the case? Is it improper to want to avoid the rocket docket because the smaller plaintiff’s firm feels less well-equipped to devote the resources necessary to expedited prosecution of the claim? I think not. It is what we, in the vernacular, call trial tactics, and it hardly smacks of some violation of a moral creed.

There may be fundamental disagreements in any given case where the line should be drawn between zealous, but good, representation and conduct which crosses the line to the improper. While consideration of that issue is largely case-dependent, patterns do emerge. As we move into complaints dealing with discovery abuse and obstruction, we move closer to differences that are more than just style or personality.

The real question in dealing with instances of abuse and obstruction is this. Can each of us pursue ethically mandated zealous representation of our client’s interests in an environment of honesty and candor with each other, or must we resort to and accept sharp practices, dishonesty and false premises as the necessary ingredients of advocacy? Stated another way, is there a difference between being the prevailing party and the winning party? As a society, we place such a high premium on winning that sometimes how the game is played may seem of secondary importance.

Let me give a case example. A few years ago, a plaintiff litigating a medical claim had contracted HIV and, as his trial approached, he was dying from AIDS. The defense firm, sensing the case was more defensible with the plaintiff deceased, wanted a continuance, which was denied. In that firm was a member of the General Assembly, but he did none of the firm’s medical work. After the continuance was denied, he took over the case. Because he was a member of the General Assembly, he could and did get a continuance of the case as a matter of right. The plaintiff died before the new trial date was reached. Was this merely zealous representation, or did it cross the line?

One of the public’s most frequently-stated misapprehensions about the law is the degree to which form seems to dominate substance. The Fifth Amendment is seen as a law that allows guilty people to go free. In the example above, a procedural statute was invoked to deny a dying man his day in court. In each instance, form seemed to dominate substance, but the former involves a deeply imbedded constitutional right and the latter merely reflects what some might call zealous representation.

While not all disagreements between us have moral overtones, some behavior suggests that truth and justice are not our unified goals.

Discovery is a generally preferred to trial by ambush. It may equip us to prosecute, defend or settle our claim in ways we little understood at filing. The problems arise when the discovery becomes either excessive and/or abusive, or becomes non-discovery, when the party fails to produce or answer discoverable matters.
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10 Id., 229 Va. at 37, 335 S.E.2d at 738.
13 See generally Prosser & Keaton on Torts § 116 at 842 (5th ed. 1984); Hauser, LIBEL (1924).
17 Id. at 345.
19 Id. at 345.
22 Id. at 347.
23 Id. at 350.
25 Id.
26 Id. at 347.
27 Id. at 344.
28 Id. at 345.
29 Id. at 347.
30 Id. at 348.
31 Id. at 82.
32 Id.
33 Id. at 347.
34 Id. at 349.
35 Id. at 350.
36 Id. at 350.
37 Id. at 350.
38 Id. at 350.
39 Id. at 350.
40 Id. at 350.
41 Id.

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54 Penick v. Ratcliffe, 149 Va. 618, 140 S.E. 664 (1927); Williams Printing Co. v. Saunders, 113 Va. 156, 73 S.E. 472 (1912).
70 Chapin v. Knight-Ridder, Inc., 993 F.2d 1087 (4th Cir. 1993).
73 Id. at 345.
Take the differences between good faith claims of privilege or attorney work product as protections for otherwise discoverable documents, and the extensive practice of hiding important documents by claiming or creating such protection when no such protection would otherwise exist.

The tobacco companies sought to protect their scientific and health hazard documents from discovery by circulating them through general counsel’s office before internal distribution. A hospital with which I frequently litigate vigorously attempts to create claims of attorney-client privilege and attorney work product protection for otherwise discoverable documents. Adverse medical events are promptly reported to counsel (even, on occasion, before they are reported to medical staff) so that a counsel-ordered investigation, conducted by the risk manager, will generate only protected documents. These investigations are rarely instituted because there is a claim pending. They get initiated when the risk manager senses there is an adverse medical event that might result in a claim.

In some hospitals, the office of risk management is committed to determining why the patient was injured so that the harm might be prevented or minimized for subsequent patients. Others use the office of risk management as an extension of general counsel, and the prime function is no longer patient protection, but protection of the institution from legal liability. More on this subject in a moment.

Discovery abuse frequently occurs in cases that involve an imbalance of power and resources between the litigants.

In the scenario which follows, there is nothing improper, per se, about the case management. It reflects a rather standard battle between the larger, better-resourced defense firms on an hourly fee basis and the smaller plaintiff’s firm on a contingency fee basis. In what can only be described as discovery wars, the smaller firm is inundated with paper.

Paralegals churn out regular correspondence and discovery. Motions days have steady agendas. Tactical and procedural pleadings arrive weekly. Hearing dates are frequent and not necessarily cleared with counsel. After each hearing, defense counsel drafts an order that may only passingly reflects the court’s rulings and even includes relief denied. The entry of the order then becomes the subject of a separate hearing.

Extensive interrogatories arrive with the responsive pleadings. A few days before the answers are due, an inquiry comes in whether they will be answered on time. On the due date, the letter goes out reminding that the interrogatories are due that very day. A motion to compel follows shortly behind the reminders. Sanctions are regularly mentioned and frequently requested.

If five days’ notice of a motion or response is required by the rules, the fax machine starts to evict its product at 5 p.m. on Friday evening, or the courier arrives as the receptionist is locking the doors. One would think that notices were void unless they were given near the close of business on the day before a weekend or a holiday.

Depositions of a party may last a day or more, with little regard to the need of much of the information developed. Questions invading the party’s privacy are frequently posed on the grounds that the answers may lead to the discovery of admissible evidence. The real goal is to increase the party’s level of anxiety, their distrust of the system’s ability to protect them, and to soften them up to accept a lower settlement. Those defending the manufacturer of the Dalkon Shield made extensive inquiries into the sexual habits and mores of those in whom the shield had been implanted on the premise that some of the residual injuries claimed might have alternative explanations. One of the counsel involved in that defense acknowledged that a wished for by-product of that effort was to scare off a number of otherwise legitimate claimants who were unwilling to suffer such intrusions into their private life.

In these cases, multiple experts are identified on every conceivable area of expert testimony, and the quoted fees for their depositions, if paid, would support a sharp rise in the Dow Jones average. Counsel refuses to narrow the list of the named experts voluntarily, and insists on a motions hearing, arguing then that they need all of the witnesses on the list because, not knowing when the plaintiff will finish his case, they don’t know which of the witnesses named will in fact be then available. An offer to take a selected witness out of turn is refused because it would interfere with counsel’s trial strategy.

There are also non-discovery related contentious matters. Counsel may be rude, arrogant, dismissive, preachy, insistent, or abusive of adverse counsel’s staff. He will frequently leave promises unkept and representations unfulfilled, while complaining to the court of opposing counsel’s numerous cited failings. At some firms this attitude and approach are part of its culture.
promise promptly when such conditions are met. More generally, keep your promises.

3. Do not add inappropriate parties to a lawsuit in an effort to defeat federal diversity jurisdiction. The ploy will ultimately fail and the resulting ill will is likely to poison the rest of the case.

4. Be generous in granting extensions that do not prejudice your client. A generous act generates good will, which ultimately redounds to your benefit.

5. Do not try to interview a witness who is represented by counsel without his counsel being present. Do not try to mislead prospective witnesses as to who you are or whom you represent when you try to interview them. One example of the violation of these rules, which occurred some time ago, is illustrative. A lawyer, whose office happened to be in the old Seaboard Building, was handling a case against the railroad. The lawyer called a railroad witness to the accident and identified himself as the lawyer in the Seaboard Building in an effort to talk to the witness. The lawyer's statement was literally true but was intended to mislead the witness into thinking the caller worked for his employer. (By the way, the witness was not fooled). You might also wish to look at Armstrong v. Medshare Management Services, Inc. 1998 U.S. Dist. Lexis 21340 (W.D. Va. 1998) (Plaintiff's counsel prohibited from ex parte communications with former employees of the corporate defendant).

6. Do not remove harmful medical or employment records from documents you produce pursuant to a request for production of documents. Chances are your opposing counsel will independently subpoena the records and find the missing harmful material. No one will believe the missing records were inadvertently left out, and the only thing you will have accomplished is sullying your reputation.

7. Do not forget to copy opposing counsel with your requests for issuance of a subpoena duces tecum. See Rule 1:12.

8. Do not try to hide or bury supplemental discovery responses in the text of the original response, thereby making opposing counsel spend extra time and effort to find the new material. The supplemental material will be found, and all you will have accomplished is the motivation of your opponent to make your life miserable the next chance he or she gets.

9. Do not respond to an interrogatory requesting a description of damages claimed or injuries suffered by answering "see attached medical records of plaintiff." The response makes you look lazy and as though you do not have enough interest in your client's claim to take five minutes to list his or her injuries.

10. Do not withhold a document as being privileged without describing the document with sufficient particularity to allow a challenge to the claim.

11. Do not coach your client on how to answer questions. There is a standing joke in the defense bar about how all passenger plaintiffs of one prominent Richmond plaintiff's firm are always looking down at their laps at the time of accidents in which they are injured.

12. Do not fail to give notice to opposing counsel that you intend to videotape a deposition.

13. Do not make frivolous, inappropriate or speaking objections during a deposition. Here are some inappropriate comments made by an attorney in a recent deposition:

"No more questions about..."; Don't answer the next 15 questions; "[Don't answer the question] It's a waste of time"; "I'll tell you what, I'll let you go for another five minutes with this nonsense, and then I would expect you to move on"; and "I'm going to allow you three more questions, and then we'll stop talking about it..."

14. If you intend to solicit de bene esse deposition testimony from a physician who is being deposed by the defense in a discovery deposition, notify defense counsel...
Counsel may send self-serving letters to opposing counsel, accusing him of discovery misdeeds, so copies may be attached to discovery motions to reflect that defense counsel was making a good faith effort to resolve discovery disputes.

Whether it be counsel’s style or not, in such cases little if anything is ever accomplished by the agreement of counsel. The ear of the court is frequently and necessarily invoked. While there may be a failure of common courtesy and professionalism, more is involved. The case has stopped being about the facts and the law, but has become one of attrition. While hourly billing expectations may be a factor, one gets the sense that for the adverse party the case is not about the merits, but about the will to fight and the ability to bear the costs. Delay is considered an acceptable short and intermediate term ally.

After I was requested to contribute to this article, I solicited input from a number of my colleagues. Here are some of their collected comments and complaints:

In the medical malpractice setting my colleagues complain about:

1. The use of peer pressure and other forms of intimidation of their experts by communications to the experts partners, colleagues, administrators and others;

2. Withdrawal of Medical Malpractice Review Panel requests after the Panel has been appointed and pending for months;

3. Designation of multiple experts with identical language identifying their opinions;

4. Rarely, if ever, truly answering written discovery, generally objecting to clearly germane, material and relevant information. One attorney reported that defense counsel for a Fortune 400 closely-held corporation with over $1 billion annual sales, responded to a 50+ request for production in a products liability case with 27 pages of documents. Notably absent were any design drawings, specifications or prior complaints. It took two motions to compel, two motions for sanctions and a court-ordered deposition regarding document retention and location before the production became more expansive.

5. Resisting the setting of matters for trial for frivolous and fictitious reasons;

6. Making speaking objections throughout depositions with the clear intent to improperly assist the deponent;

7. Trashing de bene esse audio-visual depositions with scores of objections, making editing a nightmare;

8. Using correspondence from counsel as exhibits in motions to compel, etc.;

9. Never giving a straight admission with respect to Requests for Admission on things like the authenticity of medical records, bills, death certificates, certificates of qualification of personal representatives;

10. Personalizing and demonizing plaintiff’s counsel in oral argument in front of bench and jury;

11. Bending the rules prohibiting contact with treating health care providers by going through these individuals’ “attorneys” or colleagues;

12. Obstructing discovery as to experts’ prior engagements in the defense of claims (claiming no recollection of any specifics as to any prior testimony, or the dollars earned);

13. The apparent encouragement of or acquiescence in the alteration of medical records and/or the destruction of damaging portions of the record, i.e. chart and file jackets, x-rays, etc. This is a serious and disturbing complaint.

In a case recently concluded, a young patient committed suicide in the psychiatric unit of one of our major hospitals while he was under fifteen minute suicide checks. The record did not reflect that the checks had been performed. Inquiries made prior to the filing of suit produced an answer that the checks were recorded in the patient progress notes, yet the notes were silent on these checks.

Suit was filed, and interrogatories pounded about the checks. An answer under oath indicated that the checks were recorded in the nursing rounds form. It’s production was requested. A blank exemplar
ahead of time that you intend to elicit such testimony.

15. Do not instruct a client not to answer a question in a deposition unless the question asks for privileged information.

16. Be punctual for depositions. Showing up late suggests that you consider your time to be more valuable than that of your opposing counsel.

17. Use the red face test. Do not make an argument or adopt a position with opposing counsel that you would be embarrassed to make before a judge.

18. Afford your opposing counsel the same type of service of pleadings that you give to a court. In other words, if you hand-deliver a pleading to the court, you should hand deliver, e-mail or telecopy a copy of the pleading to opposing counsel, especially when a time deadline is significant. Do not use the U. S. Mail as a sandbag device. Note that Rule 1:7 now provides that an additional day is added to the response time when a paper is served by fax or commercial delivery service.

19. Do not have your medical illustrator draw an illustration with inappropriate features. For example, it is not appropriate for an illustration of a brain injury to coincidentally show the patient grimacing in pain.

20. Return phone calls promptly and, certainly, within the same day they are received. Do not hesitate to use phone mail — it is a great time saver.

21. Do not wait until the last minute to supplement discovery or to make new, previously undisclosed injury claims.

22. Do not wait until the last minute to disclose expert witnesses (or any witness for that matter) in an effort to gain an upper hand.

23. Be reasonable and generous with opposing counsel on discovery extensions or extensions of court practices and procedures. It is a rare lawyer who can meet every deadline and, therefore, you should think twice about forcing your opponent to do the same. If you live by the sword of strict adherence to deadlines, you may also fall on that sword.

24. Do not move to introduce photographs that you have never bothered to show to the other side. If you plan to use certain photographs at trial, do more than just put in your discovery response that photographs are available for review at your office. Instead, be courteous enough to send copies of the photographs to opposing counsel before trial begins.

25. Do not threaten sanctions or a Virginia State Bar complaint unless the conduct of which you complain is egregious. In other words, do not make the threat unless you intend to follow through on it. An idle threat scares no one and makes you look like a bully and a jerk.

26. Do not wait until the day of trial or just before a trial to nonsuit a case. When you decide to nonsuit a case or a party, let everyone know immediately.

27. Be prepared. It is exasperating and painful to watch opposing counsel fumble and bumble trying to do something that they should know how to do.

28. Do not make clearly inappropriate arguments or comments to the jury.

29. Do not ask a question for an inappropriate reason. In a recent trial against a driver and his employer, the plaintiff’s attorney asked in voir dire if anyone owned stock in the parent corporation of the driver’s employer. There was no need for the plaintiff’s lawyer to ask that particular question because the parent corporation’s name would never otherwise have been seen or mentioned in the case. The cynic in me wondered if the question was asked because the driver’s employer was an unknown corporation and the parent was a huge multi-national corporation that was receiving much negative press for distributing a tainted product.

30. Do not have one of your witnesses try to “slip in” a fact while testifying at trial when you know that you would be precluded from eliciting that fact from your witness on direct examination. In a recent case I tried involving a lady who claimed not to be able
to work again, one of the plaintiff's witnesses "volunteered" that the plaintiff's husband was disabled. The cynic in me wondered if the "volunteered" testimony was set up in the hopes that the jury would award the plaintiff enough to take care of all of the future financial needs of the family.

31. Do not try to secretly communicate with the jury with non-verbal cues such as winks, grimaces and rolled eyes.

If you get a reputation for not following these rules, you likely will reap what you sow. The result is that you will have to work twice as hard to get to your goal.

The more cases I try the more I become convinced that a client's success is in large part dependent on how the jury views the client's lawyer. Jurors like honest, open, helpful, direct, modest and forgiving lawyers.

If you display these traits in the course of your pretrial practice, you will be more likely to display them at trial and will be more successful in your practice. More importantly, you will gain the respect of your peers.

Civility—Plaintiff
cont'd from page 14

form was produced, but no filled in form reflecting the checks. The filled-in form was requested. The response: It had been destroyed because it was not part of the patient's chart.

Further discovery revealed that, before the family was notified of his suicide, the hospital risk manager had come to the floor, interviewed the duty nurses, recommended that some late entries be put on the patient chart, and gathered all relevant documents, presumably including the nursing rounds form since that was where the suicide checks were to be recorded.

Nurses on duty were deposed, and testified that notwithstanding the risk manager's answers to interrogatories, the nursing rounds form was not used to record suicide checks. Those, they said, were recorded in the patient progress notes. The nurse in charge of this patient that night then testified that she had in fact performed the checks, but had not recorded them because the unit was very busy that night.

Because of the inconsistencies in the sworn discovery responses, the court ordered the risk manager's file produced. In it was an interview with the nurse in charge, the one who had just testified at deposition that she performed, but did not record the suicide checks. She had told the risk manager that she didn't perform the checks in question because she didn't know the patient was on suicide checks. The only intervention between her interview by the risk manager and her deposition was intensive preparation for that deposition.

14. Filing affirmative defenses of contributory negligence, assumption of the risk, failure to mitigate, and a plea of the statute of limitations in every medical malpractice case. (I prosecuted a claim for a woman who entered the hospital unconscious and who was the victim of wrong-sided brain surgery while she was in a coma. The defense pled, inter alia, contributory negligence and assumption of risk).

15. Interrupting discovery depositions by coaching the witnesses, by grabbing them, using speaking objections to coach the witnesses, by giving them instructions during breaks, and trying to direct them to documents they have not seen or remembered to help them answer more favorably.

16. Identifying plaintiffs' treating witnesses as defense experts, citing fabricated opinions.

17. At trial, eliciting standard of care testimony from the defendant and his partners, who were never identified as expert witnesses, and who were or would have been directed to answer no standard of care testimony at their deposition.

18. Using improper and mistrial-warranted closing argument that "Dr. X has been taken away from all of his patients and forced to sit in the courtroom to defend himself and the plaintiff now wants to "nail him to the cross" when he is just as sorry as he could be about what happened to Mrs. Z, know-
Civility—Plaintiff

cont’d from page 13

...ing that Mrs. Z could not afford to retry the case if a mistrial were declared.

More issues of good faith were also raised in connection with products liability cases. I learned many lessons in semantics.

Discovery requests for discovery of prior claims for injuries sustained or claimed to have been sustained from the product in question received numerous artful, but non-productive responses.

For example, when asking for discovery of prior claims for injuries received when an object was thrown from a rotary lawn mower manufactured by the defendant, responses included: "We have no record or other information of anyone else injured from an object thrown from the mower in question." Since my client was the only purchaser of the "mower in question," it was not surprising to find that no one else had been injured by thrown objects "from the mower in question."

The inquiry was rephrased. I asked for discovery of such claims for this make and model. The response again suggested deception. I learned that there was only one of this make and model, the one belonging to my client. Why? Because each model had a discrete serial number and was considered one of a kind in that sense. When I asked for the prior claims experience for substantially similar makes and models, an objection was lodged that it called on the defendant to form an opinion what plaintiff meant by "substantially similar." The court intervened and ordered production. The resultant answer: "None."

Then I discovered a reported similar case in Westlaw, and returned to court. Defense counsel acknowledged awareness of the case, but the company denied it was substantially similar. When the smoke all cleared, the reported case involved the same size mower, using the same size engine, with the same blade speed in RPMs and housed in the same configuration housing, but in my instance the housing was black and the housing in the reported case was blue. Sanctions followed.

Issues of honesty and candor did not end there. Our expert contended that a device on a more expensive model was the very kind of safety device that should have been installed on our mower at a cost of $1.19, and would have prevented the injury. The defendant contended it was not a thrown object safety device, only a device to make the grass mowing more uniform and consistent by drawing the grass into the blade. However, the very expert selected to testify as a defense expert in our case had previously testified in another case for the defendant. In that case, a consumer who had purchased a mower with the device in place was injured after he removed the device because it was hanging the mower up on rocks. In that case the expert had testified that the consumer had caused the injuries to himself because he had removed a recognized safety device. We had a copy of his prior testimony. Defense counsel did not. End of story.

I suppose that in a way I have learned a new verity. Discovery and trial do involve a search for the truth, but in ways you and I never imagined when we entered law school. Doesn't fair play and good faith require greater homage to the truth and our professional responsibilities than some of the conduct described herein?

Can we even agree on these simple statements:

1. If I don’t ask for it, you don’t have to answer or produce it.

2. When I ask for it, you have an affirmative duty to answer or provide it unless you assert a good faith claim of privilege or work product protection.

3. When you claim either of these protections, you have to identify the testimony or document, but not its contents.

4. When the protection is challenged, you have the burden of demonstrating that the testimony or document is protected.

In the hierarchy of responses, the favored response is full and complete discovery. Equally favored are good faith claims of privilege or attorney work product protection. Next, descending down the favored line are limited responses occasioned by good faith mistakes in understanding what was requested or ambiguities in any request. Less favored are non-responses to discovery for which a motion to compel might reasonably lie. Disfavored and indefensible are false, misleading, dishonest, or deceptive answers, or answers purposefully left incomplete so as to mislead the adverse party into believing that he or she has received all that exists to which they were entitled.

Advocacy relies not only on zealous representation, but on good faith and the trustworthy behavior of the other side. In the present climate, is "In God We Trust" the best we can do under the circumstances?
The Jury Reform Task Force

by Ronald J. Bacigal

In the wake of the O. J. Simpson trial there were outcries for drastic change or even abolition of jury trials. The public and general media have moved on to more current news items, leaving serious consideration of jury reform to those who have more than a passing interest in the subject. Recent studies of the American jury system in other jurisdictions have challenged cherished views and raised important policy questions about the functioning of civil and criminal juries. In the past few years, Arizona has emerged as the leader in adopting (sometimes radical) innovations to the jury system; the District of Columbia completed its study of Juries for the Year 2000 and Beyond; the National Center for State Courts published Jury Trial Innovations; and, as part of its ongoing study of the American legal system, the American Bar Association continues to adopt new standards governing jury trials.

In January 1999 the Virginia Jury Reform Task Force was convened to review the most recent round of innovations proposed or adopted throughout the country. The charge to the Task Force is all encompassing, as the issues for consideration range from largely administrative matters [e.g. the role of the bailiff/jury coordinator in dealing with the jury] to broad policy issues [e.g. the elimination of peremptory challenges]. The options available to the Task Force range from “Virginia law ain’t broke, don’t fix it,” to recommending a drastic overhauling of some aspect of the jury system. The Task Force began meeting in January 1999 and plans to complete its study by Fall of this year, at which point the Task Force recommendations will be forwarded to the Judicial Council of Virginia. The Council will make the final decision as to how to proceed with the Task Force’s proposals.

The Task Force stresses that it wishes to serve as a forum in which to exchange and evaluate new techniques and procedures. Anyone wishing to comment or make suggestions to the Task Force during its initial study should contact either Robert N. Baldwin, Executive Secretary, Virginia Supreme Court, or Professor Ronald J. Bacigal, University of Richmond School of Law.

Listed below is a sampling of recommendations and commentaries tentatively adopted:

Recommendation

Individualized voir dire is recommended when counsel seek to ask questions that require the prospective juror to reveal: (1) particularly "private" matters, (2) opinions that might be highly unpopular or controversial, (3) bias, or (4) details of the juror’s exposure to prejudicial pretrial media reports, disclosure of which might contaminate other prospective jurors. Individualized voir dire should be limited to issues that cannot adequately be posed to a panel, and should not repeat the basic background information contained in the juror questionnaire.

Commentary

Current Virginia law recognizes the trial court’s discretion to permit examination of each venireman out of the presence of the others. See, Tuggle v. Commonwealth, 228 Va. 493 (1984). Although the trial judge may conduct individualized voir dire whenever he or she deems it appropriate, the four situations listed in the recommendation highlight situations where individualized voir dire is most needed. For example, particularly “private” matters might arise in cases where a juror is asked to disclose whether he or she has had association or involvement with some form of spousal abuse. Disclosure of unpopular or controversial opinions, whether or not warranting a challenge for cause, may embarrass the juror and diminish his or her standing in the eyes of the other jurors. Disclosing some form of bias also
might embarrass the juror and would have the additional disadvantage of exposing the other jurors to such bias. Lastly, in cases with extensive pretrial media coverage, disclosure might “taint” the entire panel with the substance of the media reports of the case. In all cases, individualized voir dire has the additional benefit of diminishing the tendency of jurors to conform their answers to those given by other jurors.

Recommendation
When any reasonable doubt exists as to whether the juror can be fair and impartial, the trial judge shall strike the juror for cause at the request of any party, or on the court’s own motion. The trial judge should pose questions only to clarify the juror’s responses; the court should not question the juror for the purpose of rehabilitation.

Commentary
In criminal cases, “any reasonable doubt regarding [a juror’s] impartiality must be resolved in favor of the accused.” Barker v. Commonwealth, 230 Va. 370, 374 (1985). Although the courts have not commented on the applicable standard in civil cases, the courts have stated that “it is not only important that justice should be impartially administered, but it should also flow through channels as free from suspicion as possible.” The appearance of justice is also an important consideration in civil cases, thus the recommendation applies the same standard to both criminal and civil cases.

The recommendation also addresses a recurring problem in Virginia — the tendency of some trial judges to engage in “overzealous” efforts to rehabilitate challenged jurors. As noted in McGill v. Commonwealth, 10 Va. App. 237 (1990), “a trial judge who actively engages in rehabilitating a prospective juror undermines confidence in the voir dire examination.... The trial judge should rule on the propriety of counsel’s questions and ask questions or instruct only where necessary to clarify and not for the purposes of rehabilitation.” Judicial efforts to rehabilitate challenged jurors can be seen as inconsistent with the “beyond a reasonable doubt standard.” In any case, a trial judge actively seeking to rehabilitate a prospective juror sacrifices the judge’s impartiality and may lead the judge to unconsciously become an advocate for the juror’s impartiality. The reliability of the voir dire procedure can be further compromised because a juror’s desire to “say the right thing” or to please the authoritative figure of the judge creates doubt about the candor of the juror’s responses.

Recommendation
The Court shall inform the jury that they may take notes during the trial. The Court should explain the guidelines for note-taking, including procedures for security of the notes, appropriate use of the notes, final disposition of the notes, and admonitions against giving special weight to the notes taken.
by Wyatte B. Durrette, Jr.

New publication a “must” for commercial litigators

Business and Commercial Litigation in Federal Courts
West Group
6 vols.
6,690 pgs. plus 2 diskettes of forms/jury charges
$480

If you can imagine a reference work that comprehensively and completely covers its subject, this is it. It is so good that you want to read it from the beginning of Volume 1 through Volume 5, and even at least peruse the massive index, case cites and other components of Volume 6. It covers most substantive areas of litigation and provides delicious insights into the common struggles one faces every day in commercial litigation. In short, this is a magnificent publication, and with its forms on WordPerfect 5.1 disks, it provides the commercial litigator with a federal court blueprint for successful practice.

For a succinct, yet accurate summary of this work, this reviewer cannot improve upon Editor Robert L. Haig’s introductory paragraph to his Forward:

Business and Commercial Litigation in Federal Courts is unique in four respects: its extraordinary author team; its focus on business and commercial litigation; its pervasive emphasis on the strategic issues and options that determine success or failure; and its inclusion of federal practice and procedure, substantive law, and litigation tactics and techniques, all in one package.

This publication combines the talents of 152 authors from some of America’s most prestigious firms, including among its architects practicing attorneys, judges and professors. In addition to the computer disks containing multiple forms, its “special finding tools” include full citations to the 25,000 cases cited throughout its pages, tables of sections, statutes, rules, forms and jury instructions. With this publication the practitioner has within easy reach the comprehensive reference work many of us have want-
Commentary
Virginia, like the vast majority of jurisdictions that have considered this issue, places the decision to permit jurors to take notes within the sound discretion of the trial court. The task force recommendation goes beyond existing law by recognizing that jurors are entitled to take notes, not merely permitted to do so when the court’s discretion is so inclined.

Recommendation
The Court shall establish procedures for handling juror notes during trial and deliberations. Upon conclusion of the trial, the jurors’ notes are to be destroyed by the court.

Commentary
Most jurisdictions mandate that juror notes are to be destroyed at the conclusion of trial. A majority of the task force considered, but rejected, a proposal to allow jurors to retain their notes when the trial is concluded because allowing jurors to retain their notes after the conclusion of trial would be an invitation to needless litigation. Although Virginia courts have guarded the secrecy of jury deliberations, verdicts may be impeached on grounds of outside influence upon the jury or juror misconduct in considering extraneous evidence not adduced at trial. In all cases where there is some basis to suspect jury misconduct, counsel will seek to discover the juror’s notes. Upon a plausible showing of juror misconduct, the trial court may have no option but to order those notes surrendered for inspection by counsel and the court. See, Commercial Union Ins. Co. v. Moorefield, 231 Va. 260 (1986).

The majority also was concerned that permitting jurors to retain their notes might have a chilling effect on the jury’s deliberations. Individual jurors might be reluctant to speak if they are aware that another juror is taking notes on their comments and might later disclose those notes. Although jurors may repeat from memory their perception of another juror’s comments, the written word is often accorded greater weight. Note-taking is permitted solely because it may aid the jury during the trial. Once the trial has concluded, retention of the notes serves no legitimate purpose.

Minority Recommendation
Upon conclusion of the trial, jurors are entitled to retain their notes.

Commentary
The minority concluded that court-ordered destruction of juror notes is paternalistic and demeaning to jurors. Jurors are trusted to make their own decisions to speak with the media or counsel after the trial is concluded, and they should be trusted to make the same type of responsible decision regarding retention and disclosure of their notes. The final decision to retain or destroy juror notes should remain with the individual juror.

Recommendation
Under the adversary system it is the province of the attorneys to develop the facts for the jury by asking questions of the witnesses. Accordingly, jurors should not be encouraged to suggest questions to be posed to witnesses. Notwithstanding the foregoing, if a juror believes that there is a question that should be posed to a particular witness or that should be considered by the attorneys or the court, it should be written and presented in a manner prescribed by the court. Following review with counsel, the court will present any appropriate questions to the witness or otherwise assure that a response is presented to the jury.
Recent Law Review Articles

by R. Lee Livingston

The following are recently published Law Review articles that may prove useful to you in your practice:

Contracts


Courts

Evidence

Insurance Law


Medical Jurisprudence


Practice and Procedure


Products Liability


Professional Ethics


...The opening sentences of a brief or of an oral argument should seize the judge's attention and state, as powerfully as possible, exactly why a motion should be granted or denied. The very first words from the lawyer's pen or mouth should be the hook on which the rest of the argument is hung.

More spice is then forthcoming. The chapters on trial tactics, issues and techniques are fascinating. The authors use actual cross-examinations to demonstrate certain methods. They contrast opening statements to teach how to gain maximum impact and avoid common pitfalls of mundaneness and boredom. They offer a mini-CLE on the "how-to" of trying a case. It is hard to imagine a better compilation of useful information in the space allotted to these subjects.

Volumes 4 and 5 cover substantive matters and causes of action in fields including antitrust, securities, contracts, insurance, banking, patents, labor law, products liability and more. The chapters on RICO and ERISA will be immensely helpful to any attorney seeking to analyze and possibly bring such an action. Innumerable forms are provided, on disk, for everything.

As indicated earlier, Volume 6 contains tables, forms and indexes to everything in the prior five volumes, including the full citations of the 25,000 cases cited and where to find them in the text. Like all else in this incomparable publication, the indexes are incredibly well done and useful. For anyone with significant business and commercial litigation in federal court (or for that matter, state court), this multi-volume virtually self-contained library will be among the most useful tools one can acquire. Now that I know it is available, I cannot imagine not having it and keeping it current. Not only will it serve essential research needs, but I also suggest to everyone that reading some of its multiple chapters just to learn their myriad insights and practical tips would be well worth the time. With this set in your library, you will not need to go elsewhere for virtually any aspect of practical, procedural or substantive elements of handling a business or commercial case in federal court. Whether you own it or not, you will need access to it, because you will find it cited, I predict, in legal memoranda in many of your future cases. If I am on the opposite side, you can count on it!

Law Review Articles

Remedies


Torts
Angela M. Easley, Note. Vendor Liability for the Sale of Alcohol to an Underage Person: The Untoward Consequences of... 21 CAMPBELL L. REV. 277-305 (1999).


Commentary

The task force believes that the recommendation is an appropriate compromise between two aspects of our judicial process:
(1) The American trial system is an adversarial system, not an inquisitorial system in which the jury might actively investigate and uncover relevant facts. Accordingly, the jury is to remain impartial and determine the case as presented by the advocates for each side. (2) The jury has the responsibility to accurately determine the true and relevant facts of the case. Accordingly, there are times when juror questions may help clarify or develop facts without invading the province of counsel in presenting the relevant facts. Permitting, but not encouraging, juror questioning of witnesses serves both aspects of the American trial system.

Minority Report

The minority agrees with the recommended procedures for handling juror questions, but the minority would recommend that the court shall inform jurors that they are entitled to submit written questions to be asked of witnesses by the trial judge. Juror questions aid the truth-finding function because such questions often alert the trial judge and the attorneys when the jurors have misunderstood an important point of the evidence or testimony. Counsel thus have the opportunity to correct any misunderstanding with additional testimony. In addition to aiding juror comprehension, permitting jurors to submit questions also has been found to help keep jurors alert and engaged during the trial proceedings. The minority's recommendation would require the trial judge to inform the jury that they may submit written questions, rather than place the burden on the jury to somehow discern that such a procedure is possible.

Recommendation

The Court shall instruct the jurors that they may discuss the evidence among themselves when all jurors are present in the jury room during breaks in the trial. Jurors shall be cautioned that they may not discuss the case with any non-juror until after the verdict, and that jurors should avoid forming opinions about the outcome of the case until they have heard all of the evidence.

Commentary

The traditional approach in Virginia has been for trial judges to instruct jurors “to refrain from discussing the case among themselves” prior to final deliberations. Boggs v. Commonwealth, 229 Va. 501, 514, 331 S.E.2d 407 (1985). The traditional admonition to refrain from discussing the evidence during trial runs contrary to human nature and is a source of frustration for jurors, especially in long or complicated trials. The Task Force recommendation would alter Virginia practice by permitting jurors to discuss the case, but only within the confines of the jury room when all jurors are present. The trial court’s instructions on when and where the jury may discuss the case allows the court to more effectively regulate juror discussions that may already be taking place.
# Virginia State Bar Litigation Section

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