



Section IV

Foundations and the Current Law of Sanctions in Virginia

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FOUNDATIONS AND THE CURRENT LAW OF SANCTIONS IN VIRGINIA

GUIDELINES FOR PRACTICE IN LIGHT OF RECENT DECISIONS ON SANCTIONS AND CONTEMPT

By R. Lee Livingston and L. Steven Emmert

The recent burst in appellate rulings on sanctions, and in the related area of contempt citations, has sparked renewed interest in this long-dormant field. After decades of relative calm, the Supreme Court and Court of Appeals of Virginia have handed down several important rulings that will have a noticeable effect on the way Virginia attorneys practice their craft.

The courts have long been reluctant to punish lawyers for advocacy that borders on overzealousness. This may be due in part to the fact that judges still regard themselves as being a part of a profession with a healthy respect for advocacy, and a great many judges exercise restraint because they recall well what it's like to be an attorney, doing his best to represent a client. Another reason may be the courts' recognition that an attorney has "a duty to use legal procedure for the fullest benefit of the client's cause" (RPC 3.1, note 1). In this context, the courts may have subconsciously adopted a standard borrowed from qualified immunity law, reasoning that attorneys should not be sanctioned "for bad guesses in gray areas; they are liable for transgressing bright lines." (The quote is from the qualified immunity case of *McVey v. Stacy*, 157 F.3d 271, 277 (4th Cir. 1998).)

Nevertheless, the transgressing of one of those bright lines is, as a result of this new string of cases, more likely now to result in the imposition of sanctions or a finding of contempt against an attorney. And the consequences of violating the sanctions statutes and rules can be enormous, as illustrated by the recent cases of *Northern Virginia Real Estate Inc. v. Martins*, 283 Va. _____, _____ S.E.2d _____ (2012) (\$272,000 sanction for vexatious litigation) and *Landrum v. Chippenham and Johnston-Willis Hospitals, Inc.*, 282 Va. 346, 717 S.E.2d 134 (2011) (exclusion of experts in medical-malpractice case for failure to obey discovery order). If nothing else, these cases have brought the issue of sanctions to the attention of bench and bar alike, raising the specter of an increase in ancillary sanctions litigation.

Origins of the Court's Power

Trial courts—at least, courts of record—have long held the power to discipline attorneys practicing before them. In the early 19th Century, the Supreme Court turned to English law to support the proposition that trial courts have the power to punish officers of the court for misbehavior. In *Ex parte Fisher*, 6 Leigh (33 Va.) 619, 624 (1835), the court noted that this power was held “independently of any statutory restriction,” implicitly based on the separation of powers doctrine. Thus, while the legislature could provide for statewide disbarment proceedings, it could not curtail a trial judge’s right to control conduct in his own courtroom.

On a few occasions thereafter, the Supreme Court considered discipline imposed upon attorneys, and always reaffirmed the trial court’s power, and its inherent nature. See, e.g., *Legal Club of Lynchburg v. Light*, 137 Va. 249, 250-51, 119 S.E. 55, 55 (1923) and *Norfolk and Portsmouth Bar Ass’n v. Drewry*, 161 Va. 833, 836, 172 S.E.2d 282, 283 (1934). From the captions of these cases, the reader will note that they were brought in the names of local bar associations, who long controlled admission to the bar.

In 1938 came the integration of the state bar, and with it statewide licensure and statewide disbarment procedures. That did not, as we will see, deprive the courts of the inherent power to impose discipline.

Rule 11 and Code §8.01-271.1

When the Federal Rules of Civil Procedure were promulgated in the 1930’s, they included the familiar language of Rule 11, requiring that pleadings be signed and authorizing sanctions for pleadings signed in bad faith, without an adequate legal or factual basis, or for an improper purpose. Many states adopted the federal rules wholesale in subsequent years; Virginia did not (although it did adopt those relating to discovery, as the foundation for the current Part Four). Rule 11’s provisions thus did not make their way into Virginia state court practice.

In 1987, the General Assembly enacted Code §8.01-271.1, which codified Rule 11’s requirements. In essence, where the Supreme Court declined to import Rule 11, the legislature went ahead and did it.

Congress revised Rule 11 in 1993. The most important change was the creation of a “safe harbor,” giving an attorney 21 days within which to act to withdraw a potentially sanctionable pleading. The addition of this provision was

not without controversy; Justice Scalia filed a dissent to the promulgation of the new requirement, on these grounds:

In my view, those who file frivolous suits and pleadings should have no “safe harbor.” The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule, parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty.

146 F.R.D. 410, 508 (1993).

Justice Scalia’s view may not have prevailed in Washington, but it did in Richmond. Perhaps because of these objections, the Virginia statute has never been amended to include a safe harbor. As a result, a violation of §8.01-271.1 is complete as soon as the offending pleading is filed, and there is no opportunity to withdraw it. In addition, once the trial court finds that a pleading violates the statute, sanctions are mandatory:

If a pleading, motion, or other paper is signed or made in violation of this rule, the court, upon motion or upon its own initiative, *shall impose* upon the person who signed the paper or made the motion, a represented party, or both, an appropriate sanction . . .

Code §8.01-271.1 (emphasis supplied). This language indicates that the court’s only discretion lies in determining what kind of sanction is “appropriate.”

Who May be Sanctioned

The sanction statute empowers the courts to sanction any person who violates its requirements. In 2011, the Supreme Court clarified that only litigants and their counsel of record may be sanctioned; the statute does not apply to non-parties. *Johnson v. Woodard*, 281 Va. 403, 707 S.E.2d 325 (2011). The appellants in *Johnson* were 40 citizens of Gloucester County who circulated and filed petitions seeking removal of four indicted members of the county board of supervisors; the trial court sanctioned them, feeling that the petitions were not well-grounded in fact.

While this appeal presented obvious Petition Clause issues, the Supreme Court ruled that since the party plaintiff in a removal proceeding was the Commonwealth, the citizens could not be sanctioned as a matter of state law. The court accordingly did not reach the First Amendment issue. The opinion may leave room for inclusion of other persons or entities who are not technically parties, such as *amici curiae* and unsuccessful intervenors.

The Current State of Sanctions and Contempt

Recent appellate decisions have clarified certain aspects of trial courts' powers to impose sanctions or other discipline, and have given guidance on what sort of conduct may be addressed in such proceedings. For example:

A. The generations-old practice of pleading a laundry list of affirmative defenses, so as to avoid a waiver, is no longer permissible; this is the direct lesson of *Ford Motor Company v. Benitez*, 273 Va. 242, 639 S.E.2d 203 (2007).

B. Sharp criticism of the court, or vile language about it, will definitely engender unwanted attention. Recent examples include *Taboada v. Daly Seven*, 272 Va. 313, 626 S.E.2d 889 (2006) (numerous imprecations against the Supreme Court included in petition for rehearing); *In re Moseley*, 273 Va. 688, 643 S.E.2d 190 (2007) (complaint about "an absurd decision by a wacko judge, whom I believe was bribed"); *Williams & Connolly v. PETA*, 273 Va. 498, 643 S.E.2d 136 (2007) (accusation of unethical conduct by judge); *Scialdone v. Commonwealth*, 52 Va.App. 165, 660 S.E.2d 317 (2008) (tendering into evidence a document with the words "West is a Nazi" to a judge not coincidentally named West). In many of these cases, the sanction is based upon the premise that the pleading is filed for an improper purpose, as in *Taboada*; but it may also be based on a want of factual support, as in *Williams & Connolly*.

C. Trial courts retain the inherent power to suspend or revoke the privilege of an attorney to practice in a particular court. *In re Moseley*, 273 Va. 688, 643 S.E.2d 190 (2007). Note that the geographic limitation of such an action corresponds to that court's bailiwick; statewide suspension or revocation can only be achieved through state bar disciplinary proceedings under Code §54.1-3934 et seq. This prohibition even applies to the Supreme Court. When that court sanctioned an attorney by suspending his privilege to practice for one year (*Taboada*), the ban only applied to his appearance in the Supreme Court; he was still free to appear in every other court in the Commonwealth.

D. When relying upon its inherent power (as opposed to the sanction statute), trial courts may not award attorney's fees to the "offended" party. *Nusbaum v. Berlin*, 273 Va. 385, 641 S.E.2d 494 (2007). The only grounds upon which a court can assess attorney's fees against a sanctioned lawyer (or his client) are those specifically provided in the sanctions statute or in the Rules of Court (e.g., Rule 4:12).

E. Direct or Indirect Contempt

1. The court can punish lawyers summarily for contempt that occurs in the court's presence and perception ("direct contempt"). *Scialdone v. Commonwealth*, above. In such circumstances, there is no need for a trial, since the court has witnessed the event. In summary contempt proceedings, normal due process protections don't apply. *Id.* But courts are constrained in most summary contempt findings to assess no more than a \$250.00 fine and ten days in jail (the latter of which would presumably be reserved for egregious, repetitive violations). Code §18.2-457.

2. If the trial court did not witness all of the events, so that testimony is necessary to resolve the matter, then summary contempt proceedings are not available, and the lawyer must be afforded due process of law. This kind of contempt is known as indirect, *Scialdone v. Commonwealth*, above, and usually involves the issuance of a rule to show cause. The contempt in *Nusbaum v. Berlin* (a short scuffle between opposing counsel) technically occurred in the judge's presence, but the judge didn't see it, so a separate hearing was conducted.

F. A trial court may not sanction an attorney who lawfully files a bankruptcy petition for the defendant on the eve of a jury trial. *McNally v. Rey*, 275 Va. 475, 659 S.E.2d 279 (2008). The filing of bankruptcy petitions is protected by federal law, and courts may not chill that right by striking at the lawyers who file them. The trial court had sanctioned the lawyer for filing the required witness and exhibit list while allegedly having no real intention to try the case (because of the planned bankruptcy).

G. Can exclusion of evidence be a sanction? Absolutely; the Supreme Court approved such a sanction in *Landrum v. Chippenham and Johnston-Willis Hospitals, Inc.*, 282 Va. 346, 717 S.E.2d 134 (2011). The trial court excluded an expert witness as a sanction for a party's failure to abide by an order that addressed earlier discovery failings.

Landrum is the analytical successor to *John Crane, Inc. v. Jones*, 274 Va. 581, 650 S.E.2d 851 (2007), in which the Supreme Court affirmed a trial court's decision to exclude the testimony of two experts who had not been properly disclosed pursuant to a pretrial scheduling order. *John Crane* was not technically a sanctions case—there was no motion for sanctions under the statute and no invocation of the court's inherent power to impose discipline—but the effect of the ruling certainly felt like a sanction, from the defendant's viewpoint. These rulings signal the Supreme Court's view that the obligations in scheduling orders can and should be enforced.

H. In an unpublished order, the Supreme Court reversed a sanction award where the trial court's order imposed sanctions on a lawyer, but did not address the standards expressed in the statute. *Ferris v. Kiritsis*, Record No. 091245 (May 14, 2010). This decision hints that if a judge decides to sanction someone, the reasons must be set out somewhere in the record, viewed in the context of the statute.

Pleading and Practice Considerations

Some of these cases have perfectly obvious lessons, such as the advisability of restraint, respect, and tact when addressing the court, either orally or in writing. Lawyers who use intemperate language in criticizing either a court or its rulings can expect to be sanctioned or cited for contempt.

In the wake of *Benitez*, all pleadings must have a good faith factual and legal basis. It's no longer accepted practice to plead the kitchen sink, and then see what supporting facts you can dig up in discovery. The court has reaffirmed the strong presumption in favor of liberal amendment of pleadings (Rule 1:8), and has pointed to that rule as the proper approach for claims or defenses that are discovered during the course of the legal proceedings. In this light, the *Benitez* doctrine is really harder on plaintiffs than on defendants; there is no limitations period for asserting an affirmative defense, but the statute of limitations may well bar an amended pleading to add a new defendant whose liability is first revealed during discovery.

The Supreme Court stated explicitly in *Benitez* that the due diligence expected of an attorney will likely vary with the circumstances. For example, a client who retains counsel two days before the statute of limitations will expire has thereby sharply limited her lawyer's ability to conduct a thorough pre-filing investigation. The same thing can happen on the defense side, as a defendant might delay two weeks in forwarding suit papers to his insurance company,

thereby putting his attorney at a disadvantage in framing responsive pleadings. The language of *Benitez* indicates the court's view that trial courts should be more understanding of attorneys who are placed in this position. (Indeed, one of the key underpinnings of the *Benitez* holding is that the case had previously gone through discovery only to be nonsuited, so the defense attorney knew that there would be no basis for some of his defenses when he signed the offending pleading.)

Where an attorney believes that her adversary has filed a sanctionable pleading, she can file a motion for sanctions right away if she chooses. That being said, by far the better course is a simple one: Pick up the phone. No matter how contentious the litigation has become, it is always better to try to resolve the matter amicably than it is to head straight to court. Indeed, Rule 4:15(b) requires that you certify in each motion that you have made "a reasonable effort to confer . . . to resolve the subject of the motion," so under the rules, firing off a motion immediately is improper.

In this context, it's important to remember that motions for sanctions may themselves subject the movant to sanctions. See the notes of the advisory committee on the 1993 amendments to Rule 11. For example, if the court perceives that the sanctions motion was filed for an improper purpose, such as to harass or intimidate the opposition, then sanctions could end up flowing in the other direction. Those "reverse sanctions" may be all the more likely if the movant has made no effort at conciliation, as Rule 4:15(b) requires.

A De Facto Safe Harbor?

Despite the mandatory-sanctions language in the statute, we perceive that many trial judges may employ, as a matter of equity, a modified safe harbor rule for dealing with relatively minor violations of the statute. The factors that will likely influence a court's decision to impose or forgo sanctions probably include:

- Whether there was at least an arguable basis for the pleading;
- Whether the pleader readily offered to amend the pleading;
- Whether the movant attempted in good faith to confer, or merely went through the motions of doing so;
- Whether the movant was prejudiced;

- Whether the respondent has a history of filing sanctionable pleadings; and
- Whether the movant has a history of filing frequent sanctions motions.

Of course, even where the court finds that sanctions must be imposed, it retains the freedom to tailor an appropriate sanction, which could be as minor as a “don’t do it again” admonition.

A Change in Law or a Change in Practice?

Careful observers will have noted that the recent line of sanctions cases has not really effected a change in the law. There was no pre-*Benítez* caselaw that held that it was permissible to “reserve” unsubstantiated defenses, and certainly no decision before *Taboada* had held that it was acceptable to berate a court in response to an unfavorable ruling. This, then, is not a sea change in Virginia jurisprudence in the mold of *Fancher v. Fagella*, 274 Va. 549, 650 S.E.2d 519 (2007), which explicitly overturned well-established precedent in view of societal changes over the past sixty years.

Without question, however, these cases have dramatically altered the way attorneys practice in Virginia courts. The change in pleading as a result of *Benítez* is very real, and easily recognizable. Strict compliance with scheduling order requirements is now far more urgent in the wake of *John Crane*. And trial judges now see that the Supreme Court will support them in the imposition of sanctions where lawyers cross the line.

One of the recent cases illustrates this last point. In *Williams & Connolly v. PETA*, the sanctioned attorneys used clearly intemperate language in filing a recusal motion, accusing the trial judge of misfeasance, prejudice, and unethical conduct. The Supreme Court first affirmed the trial court’s findings that the motions lacked an adequate factual basis and sufficient legal support. Since the three statutory requirements for certification (factual foundation; legal basis; and not filed for an improper purpose) are independent and in the conjunctive, 274 Va. at 510, those two findings were fully sufficient to support affirmance.

But the Supreme Court did not stop there. It went on to consider, and affirm, the trial court’s finding that the pleadings were filed for an improper purpose. By taking this approach—by making a ruling that it technically didn’t have to make in order to decide the case—the Supreme Court sent the bench and bar alike a message, that the court will stand behind trial judges who face abusive language or other improper conduct. *Williams & Connolly* was the first case in a

great many years in which the Supreme Court affirmed a statutory sanction imposed by a trial court (*Taboada* was decided eight months earlier, but that sanction was imposed by the Supreme Court itself). In conjunction with the contempt finding in *Nusbaum* and the inherent-power sanction in *Moseley*, any lingering doubt as to the Supreme Court's support for its trial court brethren has vanished.

Yet Another Level – Bar Complaints

In *Weatherbee v. Virginia State Bar*, 279 Va. 303, 689 S.E.2d 753 (2010), the Supreme Court affirmed a three-judge panel's imposition of a public reprimand without terms where a lawyer sued the wrong defendant without conducting a proper investigation to determine the proper identity. The court based its finding upon this requirement in RPC 3.1: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous"

The sanction imposed here is among the lighter tools in the State Bar's toolbox, but the principle should alarm sensible attorneys, especially given the tendency, described above, for some lawyers to be trigger-happy in these matters. As noted early in this essay, a sanction can be very modest, even fleeting; but a bar record is forever. Lawyers should be very reluctant to resort to this option, especially where alternatives exist that will not damage a career.

Conclusion

While sanctions are here to stay, it is not inevitable that these cases will result in an explosion of sanctions litigation. Attorneys who lose their heads and file utterly frivolous or spiteful documents will justifiably face these repercussions. But a greater awareness of the likely consequences of such behavior may well give many attorneys pause – just enough pause to correct a violation before it occurs.

We are responsible as members of the Bar to employ sanctions motions with due restraint. Sanctions litigation is by definition ancillary to the real dispute, and diverts legal and judicial resources that can and should be channeled toward the merits of the underlying litigation, not to a dispute that is purely between the attorneys.