Gateway to Discovery

Virginia Rule 4:1 only seems impenetrable.

by E. Stanley Murphy
discovery plays a critical role in issue formulation and truth seeking for even the simplest lawsuit. As trial lawyers though, we have an ambivalent relationship with the discovery process. It can be the most frustrating essential job we perform.

We love access to evidence that will support our case but hate dealing with the Sisyphean problem of prying meaningful discovery answers from our opponents. We expect our adversaries to disclose their case but are naturally resistant to disclosing weaknesses in our own. We happily propound our own questions but groan about requests that often seem too burdensome when directed to our clients. And the problem explodes in cases involving institutional defendants, many of whom have turned discovery obstruction into a business objective.

Judges have a much simpler view of the problem. They hate discovery disputes and lose patience with us when we cannot resolve issues that, on paper at least, appear simple.

No small part of the problem in Virginia is the structure and inelegance of Rule 4:1, which describes essential discovery rights and responsibilities. After more than four decades of amendments and writing by committee, the rule begs for simplification, with its 2,725 words crammed into 36 inconsistently numbered paragraphs.

Although basic discovery principles are clear from the rule, the mechanisms for asserting and evaluating privilege, and for judicial interest balancing, are scattered throughout Rule 4:1, sometimes in haphazard fashion. With so much raw material, it is no wonder that discovery abusers always seem to find something to argue about.

This article will examine the guiding principles of discovery in Virginia courts, provide a plain English summary of the rule’s most important features, and suggest a practical approach to discovery that employs these principles.

How we got here

Let’s begin with a look back. Eighty years ago issues in a lawsuit were developed and not infrequently decided through some form of common law pleading. The form of action was critical and specific factual averments met with specific types of written pleas (dilatory, peremptory or to the merits). Next came the plaintiff’s written replication followed by the defendant’s written rejoinder.¹

At each step a court had the power to determine the legal sufficiency of each side’s allegations and could end the litigation based upon the ping pong exchange of legal papers. Once a plaintiff made it through this procedural cattle guard, little discovery was available. Interrogatories were unknown until the early 1930’s and depositions, if available at all through a bill of discovery, were generally limited to examination of the parties. Even then, some states limited the scope of depositions to affirmative defenses. This practice led to one of the earliest forms of discovery abuse, raising sham defenses solely for the purpose of obtaining an opponent’s deposition.²

In 1938, recognizing the inadequacies of traditional pleading methods, and concerned that the outcome of trials often depended on the financial resources of the parties rather than the merits of the case, the U.S. Supreme Court promulgated the Federal Rules of Civil Procedure.³

The new federal rules were revolutionary. They eliminated the last vestiges of common law pleading and substituted the complimentary procedures of notice pleading and expanded discovery. These twin reforms constitute what the Supreme Court has called “one of the most significant innovations” of modern procedural practice.⁴ Nine years after adoption of the rules, Justice Murphy explained their impact:

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving, issue- formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial.⁵

He stressed that discovery is an integral part of the modern shift to notice pleading:

The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.⁶

Virginia was reluctant to adopt the federal discovery rules in their entirety but for many years the General Assembly enacted discovery statutes based upon them.⁷ The federal influence is clear from early reported cases, notably General Accident Fire & Life v. Cohen,⁸ a 1962 decision that may be the earliest instance of the Virginia Supreme Court favorably citing federal decisional law to interpret similar Virginia discovery law.
In 1966, the Virginia Supreme Court adopted the first version of state discovery rules. These provisions continued to co-exist with a patchwork of discovery statutes until 1977 when the Court and the General Assembly adopted a comprehensive set of discovery rules that we now recognize as Part Four of the Rules of the Supreme Court. Although amended continuously since their adoption, the essential structure of the rules has remained unchanged for 36 years. Unchanged too is the continuing influence of federal law when Virginia courts are required to apply or construe our own discovery rules.

Because most discovery rulings are discretionary and few involve more than harmless error, there is little discovery precedent from the Virginia Supreme Court. Reported Virginia circuit court opinions can be helpful but are best applied to specific discovery topics. Widely reported, and easily accessible through 80 years of treatise commentary, federal discovery opinions are the most reliable source of legal authority for most questions involving the scope of discovery and privileges.

Half a century after embracing federal discovery concepts, it seems beyond question that Virginia courts remain committed to the principle of liberal discovery to formulate issues, to eliminate trial by ambush, and to encourage settlement. As the U.S. Supreme Court noted on the twentieth anniversary of the federal rules:

Modern instruments of discovery serve a useful purpose. . . They, together with pretrial procedures, make a trial less a game of blindman’s buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable. Only strong public policies weigh against disclosure.

This short review of the origins of discovery is important for more than passing historical interest. If we understand the origin of modern discovery practices and the critical role they play in a notice pleading system, we are better able to choose the right discovery method, to write better discovery questions, and to understand our own responsibility to provide discovery responses. Most importantly, a firm grasp of the role that federal courts played in developing the twin towers of notice pleading and liberal discovery methods leads us to rich sources of federal decisional law that are useful in obtaining meaningful discovery responses from our opponents.

The Rule 4:1 Jungle

Twelve rules contained in Part Four describe methods of Virginia discovery:

- Depositions by oral examination or written questions;
- Written interrogatories;
- Production of documents, electronically stored information, or things;
- Entry, inspection and testing of land or other property;
- Physical and mental examinations; and
- Requests for admission.

All of these devices are regulated and to some extent limited by Rule 4:1 which defines basic discovery obligations and privileges. With all respect to the rule’s drafters and revisers however, the rule is a mess.

Based on Federal Rule 26, this gateway discovery provision has been amended more than a dozen times since it was originally adopted. For the most part, discovery rights have been expanded but the drafters have also attempted to provide mechanisms for asserting privilege, for managing electronic discovery, and for litigating motions to compel. Other revisions have imposed requirements of good faith pleading, and have revised requirements for supplementation of discovery responses. In places, these amendments seem to repeat discovery principles that already have been clearly stated in the rule. Even the inconsistent numbering of the rule is confusing.

When we consider that Federal Rule 26 itself had been written by committee over a 40-year period by the time Virginia adopted it as the basis for Rule 4:1, it is no surprise that the text has become ponderous.

None of which is to suggest that its provisions are hard to understand. Discovery rights, responsibilities and privileges clearly emerge from a disciplined approach to Rule 4:1’s 2,725 words and the six pages they consume in the current rule volume.

It helps then to summarize the most important discovery principles with a few declarative sentences. Without oversimplifying Rule 4:1, its important principles can be easily stated.

Subdivision (b) (1) describes the core discovery right:

**DISCOVERY IN LESS THAN 120 WORDS**

- Relevant non-privileged information is presumptively discoverable.
- Judges may limit the scope of discovery but only for good cause.
- The party seeking to limit discovery carries a heavy burden.
- Statutory and common law privileges are inviolate. Privileges created by Rule 4:1 are not.
- Opinion evidence may or may not be discoverable.

Opinions by a party not created in anticipation of litigation are usually discoverable.

Opinions of experts expected to testify must be disclosed without charge to opposing parties. Additional discovery is subject to limitations and will cost.

Opinions of consulting experts almost always are protected. Obtaining extraordinary discovery of them will cost. A lot.

Opinions of counsel and other forms of work product are never discoverable.
Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

But the rule also contains an important balancing provision:

Subject to the provisions of Rule 4:8 (g), the frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice to counsel of record or pursuant to a motion under subdivision (c).

This language yields the three principal areas of discovery disputes and essential procedural tests for resolving them.

**Why we argue (usually needlessly)**

Most discovery disputes revolve around three questions:

- What is relevant?
- What is privileged?
- What interest balancing is appropriate in light of the practical needs of the case?

The first two questions typically have easy answers.

Relevance is broadly defined under the Rule 4:1 and by decisional law. A discovery request need only relate to “the subject matter of the litigation.” Plentiful federal authority recognizes that relevance is tested by the breadth of the claims asserted and that discovery should be permitted unless it is clear that the material requested can have “no possible bearing” on the subject matter of the case.

This idea is supported by the rule’s stipulation that information need not be admissible at trial provided that it “appears reasonably calculated to lead to the discovery of admissible evidence.” These two ideas are complimentary and that it is a mistake to base relevancy objections strictly on the question of how a discovery request can lead to admissible evidence. The second clause should never be used to overwrite the first.

Most questions of privilege are also conceptually easy, even though work product objections and questions of whether material was “prepared in anticipation of litigation” usually are decided on a case by case basis.

It is easiest to divide privilege questions into two categories. If the privilege asserted is based upon a statutory or common law right, then it is inviolate in discovery. Rule 4:1 however creates two qualified privileges which may be invaded under certain circumstances. If a discovery request involves materials “prepared in anticipation of litigation” or “trial preparation materials” then the court must determine whether the requesting party meets a two part test, showing both a “substantial need” for the materials as well as the inability “without undue hardship to obtain the substantial equivalent by other means.”

When these tests are met, then the court may order discovery while protecting “against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.” Application of this portion of the rule is more frequent than might be assumed.

To begin with, Rule 4:1 itself provides that parties and non-parties each have a right to their own statements, and it also requires routine disclosure of opinions from experts expected to testify at trial. In cases where a party has had exclusive access to evanescent proof, courts freely required disclosure of information that simply cannot be duplicated. For example, Virginia circuit courts frequently require production of accident and investigation reports even though a claim might be foreseeable. This approach follows the comparable view of federal courts.

Two features of these rule based privileges also deserve special comment. First, the protection of materials “prepared in anticipation of litigation” only applies to documents and tangible things. A litigant must always disclose facts relevant to the case even those facts may be derived from privileged documents, even facts contained in attorneys files. Aggressive discovery objections frequently do not recognize this distinction.
Second, protections for materials prepared for litigation and trial apply to persons other than attorneys. Express language of the rule protects material prepared “by or for [a] party or by or for that . . . party’s representative (including his attorney, consultant, surety, indemnitor, insurer, or agent).”42

**Burdens and boilerplate**

Before we consider the nettlesome question of interest balancing, it is important to understand the procedural setting of motions to limit discovery.

When a litigant requests non-privileged information relevant to the subject matter of the lawsuit, the burden shifts to the responding party to show that the request is improper. Because the scope of discovery is broad, the burden of evading discovery is heavy. As one federal court described the principle:

Rule 26(c) provides in pertinent part: “Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, opprobrium, or undue burden or expense.”

All motions under these subparagraphs of the rule must be supported by ‘good cause’ and a strong showing is required before a party will be denied entirely the right to take a deposition. Under the liberal discovery principles of the Federal Rules defendants were required to carry a heavy burden of showing why discovery was denied.

In order to meet this burden, a party resisting discovery must make a “strong showing” of good cause,43 supported by specific facts and persuasive legal arguments.44

Broadly worded boilerplate objections and self-serving discovery limitations are improper and often draw the ire of judges as demonstrated by the following excerpt from *Atheridge v. Aetna*, a frequently cited federal discovery case:45

Aetna includes the standard boilerplate “general objections” section in its responses to plaintiffs’ requests for production which includes blanket objections as to relevance, burdensomeness and attorney-client privilege and work product privilege. Such general objections do not comply with Fed. R. Civ. P. 34(b) and courts disfavor them.

* * *

The defendant does not object with specificity to the request itself, or to its scope, on relevance grounds. Rather, it merely repeats the discovery standard contained in *Fed. R. Civ. P. 26(b)(1)*, then states that it will determine what documents are relevant and produce those documents only. This type of answer hides the ball. It leaves the plaintiff wondering what documents are being produced and what documents are being withheld. Furthermore, it permits the defendant to be the sole arbiter of that decision. Such an objection is really no objection at all as it does not address why potentially responsive documents are being withheld. The defendant, having no incentive to err on the side of disclosure, has arrogated to itself the authority to decide the question of relevance which is unquestionably the decision of the judge.46

The procedural burden for obtaining discovery is slightly different in cases involving a privilege arising under the discovery rules.

Once a party has demonstrated that the requested information qualifies as trial preparation or material prepared in anticipation of litigation, the burden of showing substantial need and undue hardship returns to the party seeking discovery.47 Most frequently, substantial need can be shown by demonstrating that the evidence has disappeared or cannot be duplicated.48 Undue hardship frequently involves expense or effort beyond the resources of the requesting party,49 but some courts treat practical impossibility of obtaining comparable evidence as a form of hardship.50

**Interest balancing**

With these procedural burdens in mind, we are prepared to consider the circumstances under which a court will constrain the scope of otherwise relevant discovery. Ordinarily the circumstances should be rare.

Subsection (b) (1) authorizes the court to limit discovery under four circumstances, most of which involve the proportionality and reasonableness of the request. Discovery can be limited after a showing that the discovery:

- Is “unreasonably cumulative.”
- Can be obtained from a more convenient, less burdensome or less expensive source.
- Is “unreasonably burdensome”; or
- That the party has had ample opportunity to obtain the information.51

In general, courts resolve questions under this section of the rule by weighing the cost and burden of responding to a particular request against the importance and relevance of the evidence it is likely to produce.52 It bears repeating, however, that conclusory claims that discovery is “unduly burdensome” are insufficient. The party resisting discovery must always show how and why a request is unreasonable:

Defendant merely states, in conclusory fashion, that the requests are unduly bur-
Opinion discovery

Finally, we consider the discovery of opinion evidence. Again, the topic is easily bookended. Because discovery of relevant information is permissible if reasonably calculated to lead to admissible evidence, relevant opinions from a party litigant typically are discoverable. A possible exception exists for so-called “self-critical analysis” materials but the privilege is controversial and has never been recognized by the Virginia Supreme Court. Federal courts also have been reluctant to recognize “self-criticism” as a new privilege and the better reasoned cases limit discovery of self-critical opinion only to instances in which a party is required by law to analyze its own behavior, for example, hospital peer review proceedings and federally mandated equal opportunity audits.

At the other end of the spectrum is the absolute prohibition against discovery of attorney client communications and work product. A complete treatment of that subject is well beyond the scope of this article but attorney client privilege is deeply embedded in Virginia law and is specifically protected under Rule 4:1(b)(3).

In between these two extremes are questions relating to discovery of expert witnesses. Rule 4:1(b)(3) not only permits but requires disclosure of opinions by experts expected to testify at trial if this information is requested. The litany of required information is familiar to all but the most unseasoned trial lawyers, and failing to disclose trial opinions virtually mandates their exclusion at trial. Parties may depose opposing trial experts at their own expense but discovery through other means is within the discretion of the court.

Discovery of experts who are not expected to testify at trial is severely limited. It may be ordered only after a showing of “exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.”

Even if a party is able to satisfy this austere test, the resulting discovery will cost the opposing party not only the cost of the expert’s time in responding to discovery but also a portion of the expense required to develop the opinions in the first place. The burden of obtaining discovery of consulting experts is extraordinarily high and generally only can be met if it is impossible to duplicate the opinion due to a lack of access to source materials, or in cases where there are no other available witnesses in the same expertise.

Five keys to a happy discovery life

Except for the problem of dealing with recalcitrant litigants, most discovery disputes can be avoided with good sense and attention to the discovery principles discussed in this article. Even if your opponent is a discovery abuser, a few practical suggestions can streamline your discovery and improve the results of your discovery motions.

**Think before you ask.** Before sending the first interrogatory, write a discovery plan that outlines what you need to know and the best ways to discover those facts. Remember the twin purposes of discovery and concentrate on issue formulation, definition of your opponent’s claims, and discovery of facts that either buttress or damage your case.

Learn the basis of the other side’s claims and use discovery tools to limit the issues that need to be litigated. Resist the impulse to propound discovery requests under the guise of thoroughness that are out of proportion to the importance of issues in controversy.

Carefully evaluate which discovery methods are best suited to your discovery goals. Use requests for admission to narrow issues and to establish uncontested facts and documents. Use interrogatories to identify the basis for claims or defenses, to identify witnesses, and to commit your opponent to the claims he or she can litigate. Using an interrogatory to identify documents within your opponent’s control seems pointless. Instead, use a 4:9 request to obtain the document. That interrogatory you just saved can be used to inquire about documents that no longer exist or that may be in the possession of someone other than your opponent.

Remember that answers to your interrogatories will be written by a lawyer and frequently will be self-limited in some fashion. Under those circumstances, it will be hard to ask meaningful follow up questions. Use interrogatories to identify the people you will need to depose in order to get productive follow up answers. Limit the number and length of examinations only to what the case will justify. Don’t forget the power of party depositions either of an individual litigant or through the subject matter deposition of a corporation.

Use discovery forms as checklists, not as a substitute for thoughtfully analyzing what you really need to know. Once you develop a reliable set of forms, reread them regularly and evaluate the quality of the information they produce as well as any difficulty you have encountered enforcing them.

**Use discovery sparingly.** It’s never a good idea to do something just because you can. Remember that every discovery question you ask will telegraph your own concerns or objectives. Don’t reveal more than is necessary. Also bear in mind the work that you may be creating for yourself by requesting...
oceans of information that you do not really need. A carefully targeted discovery plan is always better than a scattershot approach. Massive discovery requests are difficult to enforce and may well fuel your opponent’s motion to limit discovery under Rule 4:1(b) (1) (i), (ii), (iii).

**Never send discovery that you are not prepared to compel.** Your discovery questions can be brilliant, narrowly tailored to the issues, and carefully considered as part of an overall plan. Unless you are prepared to enforce your discovery request though, you might as well save the effort of serving it. In today’s discovery climate, particularly against many corporations, you should expect to receive aggressive boilerplate objections. Don’t help your adversary by writing irrelevant, overly broad, and difficult to understand questions.

As you are writing the discovery request or asking a deposition question, imagine the objection you are likely to draw and visualize yourself arguing the motion to compel. Ask yourself what you can do to tighten up the question or to reduce its scope so that an overworked circuit judge will find it easy to compel an answer.

**Answer discovery the way you would expect your opponent to answer your questions.** Providing your opponent with meaningful discovery responses has practical consequences far beyond the philosophical implications. Among other things, there is a severe risk of losing evidence important to your claim if you withhold the information from discovery. You might ultimately prevail on a claim that your adversary’s question is objectionable or that it is not written clearly enough to require a particular disclosure. It is hard to predict the outcome of those battles however, and you risk both evidence exclusion and trial delay. A far wiser course is to err on the side of disclosing more than a question strictly requires, particularly if it pertains to an issue on which you bear the burden of proof.

Written discovery questions frequently are overbroad, difficult to interpret, or ask for both privileged and non-privileged information. Resist the impulse to file a blanket objection. Disclose discoverable information that is within the contemplation of the question. Object where you must. Describe what you believe is fair inquiry and what is out of bounds. Delineate the boundaries you have placed on your response, but give discoverable information.

Providing the discovery response you expect to receive is also tactically a good idea. If you are dealing with a difficult adversary or an institutional discovery abuser, you can be certain of two things: You will be filing a motion to compel and your opponent will usually retaliate with a cross motion to compel answers from your client. Don’t give them ammunition. Write the discovery response that demonstrates by comparison what they have refused to provide you. If your own requests are reasonable and your opponent has nothing to hurl your way, you will litigate fewer discovery motions and win more of the motions that you file.

**Be firm, but don’t overflow burden the court.** This is the hardest part of living a virtuous discovery life. It is a lot of work to prepare a motion to compel, to negotiate it, and to argue it. The reality of modern dockets is that judges frequently have trouble finding time to devote to extensive discovery motions and that you are likely to wait a while even to get on the docket. Discovery abusers understand these realities and use them to delay your case. If you have been selective with your discovery requests and thoughtful in the way you have written them, you should have a manageable motion to compel. If your motion includes more than you would want to decide as a judge, trim it down or split it into two motions.

When you present your arguments, make the most of your time. Present thoughtful arguments and demonstrate not only that you have exhausted efforts to negotiate a resolution before filing he motion, but also that your original request was relevant, proportional and unobjectionable. Deal with blanket objections at one time. Group similar issues unless the court requires you to proceed one question at a time. There are usually patterns to discovery evasion.

Support your motion with a brief that outlines the basis for, and the importance of receiving meaningful discovery answers. The authority cited in this article is a good starting point but develop your own standard cure letter and core legal argument for your supporting memorandum. If the issue involves more than broad based discovery objections (yes, you will get those), look for fact specific federal and Virginia circuit court cases that will give your judge a starting point for deciding your motion.

If you find yourself dealing with a Rambo-like opponent who simply refuses to answer, demonstrate in your arguments how much time and effort that party has invested in evading discovery rather than providing meaningful answers. Do it gently though. The court generally doesn’t need much help in spotting discovery abusers.

Consider alternative methods of resolving discovery obstruction that is overwhelming in scope. Rule 4:1 is broad enough and flexible enough to support a request for appointment of a special master whose expense may be charged to the non-prevailing party.

Mark Twain once remarked that “Work is a necessary evil to be avoided.” He was probably talking about discovery. A firm understanding of Rule 4:1 and the importance of the discovery process make the work much easier and improve your chances of avoiding quagmires.

Be reasonable. Be smart. Read the rules.
Endnotes

3. Id. See, generally, Historical Notes, Orders and Advisory Committee Notes, FED. R. CIV. P. 1, et seq. Congress gave the Court power to adopt uniform federal rules in 1934, eliminating the so-called “conformity principle” that required federal courts to use the procedure of the state in which each district court sat. Federal rule making is carried out through the Judicial Conference of the United States which the Congress established in 1922 as the first effort to modernize federal courts. See, 28 U.S.C. §331.
5. Id.
6. Id.
9. See, Sinclair & Middleditch, supra, §12.1; also, Rules of the Supreme Court of Virginia, Historical Notes preceding Rule 1:1; *Rakes*, 210 Va. 542, 545; 172 S.E.2d 751, 754, n.4.
10. Id.
16. Early versions of the rules excluded divorce and annulment proceedings, *habeas corpus, coram nobis* and condemnation proceedings from discovery. Today, at least limited discovery is available in all those cases. See, Rule 4:1(b) (5).
17. Rule 4:1(b) (6).
18. Rule 4:1(b) (7).
19. Rule 4:1(b) (8).
20. Rule 4:1(b) (8) (g).
21. Rule 4:1(b) (8) (e).
22. For example, the stipulation in Rule 4:1 (b) (5)(1)(a) that discovery in domestic relations, *habeas* and eminent domain cases is restricted to “issues that are relevant to the proceeding and which are not privileged.” The limitation seems redundant in light of earlier portions of the rule allowing discovery of “any matter, not privileged, which is relevant to the subject matter involved in the pending action.”
24. Id.
28. *Miller v. Doctor’s Gen. Hosp.*, 76 F.R.D. 136, 138-139 (W.D. Okla. 1977) (“relevancy is broadly construed at the discovery stage of litigation and a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action.”); *Gagne v. Reddy*, 104 F.R.D. 454, 456 (D. Mass. 1984) (“discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action”).
33. See, *Sinclair & Middleditch*, supra, §12.3 for a list of Virginia privileges.
34. Va. Rule 4:1 (b) (3).
35. Id.
36. Id.
37. Id.

40. See, In Re Cendant Corp. Securities Litigation, 343 F.3d 658, 662 (3rd Cir. 2009); In Re Echo Star Litigation, 448 F.3d 1294, 1301 (Fed. Cir. 2006).


42. Va. Rule 4:1 (b) (3).


50. In re Int’l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1240 (5th Cir. 1982) [inability of witness to recall earlier statements].

51. Va. Rule 4:1 (b) (1) (i), (ii), (iii).


57. “A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion” Va. Rule 4:1(b) (4) (i).


59. Va. Rule 4:1(b) (4) (A) (ii), (iii).

60. Colloquially known as “consulting experts.”

61. Va. Rule 4:1 (b) (4) (B)

62. Va. Rule 4:11 (b) (4) (C). Only “manifest injustice” will prevent expense sharing. The language of the rule is otherwise mandatory.


64. R.C. Olmstead, Inc. v. CU Interface, LLC, 657 F. Supp. 2d 899, 904 (N.D. Ohio 2009), aff’d in part on other grounds, 606 F.3d 262 (6th Cir. 2010).