2017 Convention
Champions for Justice

15. Virginia Law of Sanctions

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VIRGINIA LAW OF SANCTIONS UPDATE

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"An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice." In Re: McConnell, 370 U.S. 230, 236 (1962).

This quote from the United States Supreme Court published more than 50 years ago was part of a ruling in a dispute between a lawyer and a judge. Reversing a summary contempt order against a lawyer who upset a trial judge in the process of "presenting his client's case strenuously and persistently," the court held that such conduct "cannot amount to a contempt of court as long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duties." Id.

Although there are clearly differences between contempt of court rulings and the imposition of sanctions, the analysis applied in both instances highlights a tension that has always existed in our profession. Specifically, litigation involves conflict resolution, and that necessarily means that there are almost always differences of opinion regarding the facts and the law. Whether those differences are brought forward in good faith or in a manner that is frivolous, abusive or otherwise improper is also sometimes a matter of opinion and can be extremely difficult to determine.

From the beginning of 2016 through the past month of 2017, we have seen courts at every level issue rulings involving Virginia's sanction statute, Code §8.01-271.1, as well as related Rules of the Supreme Court of Virginia, primarily 4:1(g) and 4:12.

In addition to reading the summary of recent cases ruling on sanctions, I hope you will take a moment to read the attached President's Message I wrote for the Virginia State Bar

Virginia Lawyer in 2014 entitled "Exhibiting Professionalism Goes Beyond Ethical Requirements." It is always unfortunate to find oneself involved in either the pursuit of sanctions or defending against a sanctions motion, and as we consider the current state of the law, it is my hope that our profession will improve to the point where sanctions motions and rulings become less common.

A. Supreme Court of Virginia

1. **Ragland v. Soggin, 291 Va. 282 (April 14, 2016)**: Although a trial court's imposition of sanctions is reviewed under the deferential "abuse of discretion" standard, the Supreme Court reversed sanctions against two attorneys in the amount of $200 each for submission an erroneous jury instruction. The trial court found that the mistake was inadvertent, and the Supreme Court found that nothing in Code §8.01-271.1 gives a trial judge authority to impose monetary sanctions for an inadvertent mistake. A trial court's power to impose a monetary sanction is limited to the authority provided to the trial judge by a statute or rule.

2. **Env't Specialist, Inc. v. Wells Fargo Bank Northwest, N.A., 291 Va. 111 (February 12, 2016)**: The Supreme Court reversed the trial court award of $1,200 in sanctions against plaintiff's counsel. In this matter, plaintiff's counsel declined to voluntarily extend the time in which the defendant could file an answer to a lawsuit. A trial judge does not have authority to impose sanctions on an attorney for failing to agree to an extension of a deadline. In this matter, plaintiff's counsel fulfilled his obligation to pursue his client's best interests and did not engage in unprofessional behavior.

B. Court of Appeals of Virginia

1. **Kahn v. McNicholas, 67 Va. App. 215 (January 31, 2017)**: In a domestic relations case, the Court of Appeals determined that a trial court did not abuse its discretion in declining to impose sanctions under circumstances where a party and her lawyer used

an arguably incorrect label to describe the nature of support payments that the opposing party owed. To the extent that the payments were labeled incorrectly in the pursuit of a show cause order, the mistake was "inadvertent" and the former husband "was not prejudiced by the mistake."

2. **Wagner v. Wagner, 2016 Va. App. LEXIS 257 (October 4, 2016)**: In a domestic relations case, the Court of Appeals analyzed Code §8.01-271.1, Rule 4:1(g) and Rule 4:12(d). The Court of Appeals determined that the circuit court did not abuse its discretion in awarding the husband "only $2,000" when the husband requested more due to various and repeated misconduct by the wife. Further, although the husband was unsuccessful in the appeal, the wife's request for costs and attorney's fees incurred on appeal was denied because the husband's appeal addressed "appropriate and substantial issues" and was "not frivolous."

3. **McGeorge v. McGeorge, 2016 Va. App. LEXIS 242 (September 13, 2016)**: In this domestic relations case, the Court of Appeals was presented with, *inter alia*, two assignments of error regarding sanctions issued against the father's counsel. The wording of each assignment objected to the sanctions award against the attorney himself for submitting post-trial motions that the trial court determined to be "not well grounded in fact and not warranted by existing law or good faith argument for the extension, modification or reversal of existing law" and "otherwise improper repetitions of matters previously raised by [father's] counsel." In this instance, an appellate mistake doomed the appeal. Specifically, although the notice of appeal named both the father and his attorney as appellants, the opening brief was not filed on behalf of the lawyer but only on behalf of the father, and listed the father as the sole appellant. The Court of Appeals determined that this mistake was "fatal" to its review of the assignments of error directed to the issue of sanctions against legal counsel. Therefore, it dismissed that portion of the appeal. [NOTE: Compare this with the apparent appellate procedure followed in Env't Specialist, Inc. v. Wells Fargo Bank Northwest, N.A., 291 Va. 111 (February 12, 2016) in which counsel was not a named appellant.]

4. **Stephens v. Chrismon, 2016 Va. App. LEXIS 165 (May 17, 2016)**: In a per curiam opinion, the Court of Appeals found that the trial court did not err in dismissing the matter under Rule 4:12(d)(2)(C). This Rule specifically "allows a trial court to dismiss a proceeding if a party fails to obey an order to provide discovery."

Circuit Court Cases

1. **Byington v. Sentara Life Care Corp., 2016 Va. Cir. LEXIS 198 (City of Norfolk, December 30, 2016)**: Whenever a trial judge describes the "procedural background" with a sentence that describes a "long and tortured procedural path", that's a good indication that the judge is frustrated and that sanctions may be issued. In this matter that originated as a medical malpractice action and involved efforts to appoint a guardian for an allegedly incapacitated plaintiff and then involved numerous procedural battles, the Honorable David W. Lannetti determined that the defendants "incurred costs and fees totaling at least $6,000 associated with responding to plaintiff's counsel's improper actions." Accordingly, the court granted the defendants' "motion for costs" in the amount of $6,000 to be paid by plaintiff's counsel.

2. **Prezio Health, Inc. v. Kirmes, 2016 Va. Cir. LEXIS 201 (City of Chesapeake, December 28, 2016)**: In an employment dispute involving an alleged breach of a non-competition agreement, a plea in bar filed on behalf of the defendant and various related procedural issues, the Honorable Marjorie A. Taylor Arrington sustained the plea in bar to one count of the complaint and then addressed a request by the defendant that sanctions be awarded against his former employer (rather than counsel). The defendant argued that the former employer adopted a position without a good faith basis. Although the trial judge was "unable to identify any fact or existing law" to support the former employer's position, the trial judge also stated an inability to "determine the extent to which [the former employer] knew or should have known that its position was unwarranted, or to which [the former employer] had an

improper motive." Accordingly, the request for fees and costs was denied "without prejudice to [the former employee] to raise the issue upon proof of a violation of Code §8.01-271.1."

3. **Black v. Rhodes, 2016 Va. Cir. LEXIS 140 (Roanoke County, September 29, 2016)**: In a discovery dispute arising from employment litigation, the Honorable David B. Carson determined that defense counsel's direction to his client not to answer certain deposition questions was improper. Instead, an immediate effort to contact the court should have been initiated. However, rather than ruling on a motion for sanctions, the court set the matter for an additional hearing. While this opinion does not state the result, it provides useful guidance for dealing with deposition objections relating to privilege, relevance and other areas of dispute.

4. **Reading & Language Learning Ctr. v. Sturgill, 2016 Va. Cir. LEXIS 125 (Fairfax County, April 4, 2016)**: In this employment dispute involving a non-compete and allegations of tortious interference with contractual relationships, the defense filed a plea in bar and demurrer, and discovery disputes followed. Although the Honorable John M. Tran determined that the plaintiff's "discovery motions were not substantially justified" and although he was troubled by other comments made on behalf of the plaintiff, the court concluded that under the totality of the circumstances, an award of fees would be "unjust". The analysis was conducted pursuant to Rule 4:12(a)(4). Ultimately, the trial court sustained the defendant's plea in bar and demurrer and denied the plaintiff's discovery motions.

5. **RECP IV WG Land Investors, LLC v. Capital One Bank (USA), N.A., 2016 Va. Cir. LEXIS 122 (Fairfax County, July 27, 2016)**: In a lengthy opinion analyzing a prevailing party's request for attorneys' fees pursuant to contract, the Honorable John M. Tran briefly discussed the application of Rule 4:12 to discovery disputes and requests for attorneys' fees. Judge Tran held that although Rule 4:12 "mandates the imposition of fees to the prevailing party in a discovery dispute, that mandate may be excused if the losing party's actions were substantially justified or the imposition of

fees would be unjust." Because the court was aware of a contractual prevailing party provision providing for an award of attorney's fees at the end of the litigation, Judge Tran "deemed that the imposition of fees after each hearing on a discovery issue would have been ineffective and potentially unjust, thereby by reserving the imposition of fees until the conclusion of the case. As [the defendant] is the prevailing party, there is no longer a need to parse out the fees and costs that would otherwise have been imposed under Rule 4:12."

6. **Doe v. Va. Wesleyan Coll., 2016 Va. Cir. LEXIS 80 (City of Norfolk, May 13, 2016)**: This dispute arose from an alleged rape and sexual assault at Virginia Wesleyan College. The Honorable David W. Lannetti determined "by clear and convincing evidence, that [plaintiff] was untruthful" in discovery responses and deposition testimony, "thereby committing a fraud on the Court." Accordingly, Judge Lannetti determined that sanctions "unquestionably are warranted." In considering that sanctions would be appropriate, Judge Lannetti noted that the defense sought dismissal of the plaintiff's case with prejudice. However, Judge Lannetti determined that dismissal of the case or striking the plaintiff's claim for damages would be "too harsh a remedy in light of the circumstances." Instead, Judge Lannetti determined that the jury would be "entitled to be informed about [plaintiff's] false claim and concomitant lack of veracity", and that if plaintiff prevailed at trial, "five percent of any judgment awarded to [plaintiff must be] paid to [defendant] to both compensate [defendant] and sanction [plaintiff] for her dishonesty."

7. **Friedman v. Five Guys Enters., LLC, 91 Va. Cir. 457 (Fairfax County, January 8, 2016)**: The Honorable John M. Tran awarded $3,500 in attorney's fees and costs pursuant to Rule 4:1(c), 4:1(g) and 4:12(a)(4). Judge Tran determined that an award of fees was appropriate against the plaintiff's counsel under circumstances where plaintiff's counsel waited until a mere week and a half before the discovery cut-off to notice a corporate designee deposition with 29 deposition topics identified. The opinion outlines in detail conduct that Judge Tran found to be unreasonable. He

summarized his grounds for his ruling as follows: "The ever-evolving discovery rules invest the courts with the authority and responsibility to manage the cases that come before it rather than relinquishing control to the pursuit of discovery brinkmanship. Serving notice of an all-inclusive corporate designee deposition at the end of discovery compels this Court to respond under the facts of this case."

Attachment (President's Message)

President's Message

by Kevin E. Martingayle

Exhibiting Professionalism Goes Beyond Ethical Requirements

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

—"Virginia Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities."

YEARS AGO, I served two terms on the Virginia State Bar Second District Disciplinary Committee. This is the local disciplinary committee that decides whether ethical complaints against attorneys should proceed, and if so, in what manner and at what level. After that, I served two terms on the VSB Standing Committee on Legal Ethics, which includes among its duties the responsibility for proposing changes to the Virginia Rules of Professional Conduct and issuing legal ethics opinions. In both roles, I frequently had to remind myself and others that the VSB does not control matters of style nor mandate good taste. Engaging in such exercises would be virtually impossible.

So, is the enforcement of minimum standards of conduct the sole focus of our self-regulation efforts at the VSB? Is compliance with baseline requirements all that is expected of us? Of course not.

When I attended a recent VSB Professionalism Course for new VSB admittees, I was reminded that there is more to "professionalism" than mere adherence to the ethical standards set forth in the Rules of Professional Conduct. Complying with ethical standards is required, while acting with professionalism is not. Nevertheless, we should strive to exhibit the highest level of professional conduct whenever, however, and wherever we can. And contrary to popular belief in some quarters, there are good business reasons for doing so.

One thing that any new lawyer needs to understand—and that we all need to remember—is that reputation matters. Many of the best and most engaging attorneys I know are supremely skilled at being vigorous advocates while always maintaining a reputation for courtesy, decency, and civility. This is true with litigators, appellate attorneys, transactional lawyers, and so on. These are the lawyers to whom the lion's share of important, interesting, and complex case and client referrals are made. These attorneys know that in addition to being the right thing to do, exhibiting professionalism is the smart thing to do. Their reputations bring home the best opportunities.

Many times over the years I have received calls from potential clients claiming to want a "pit bull" or "bulldog" to handle their issues and fight opponents. But in our profession, we are not here to act as attack dogs or guard dogs, or animals of any kind. What clients really need are problem solvers. And the most skilled and successful problem solvers know how to get to solutions with the least amount of conflict, expense, and aggravation necessary.

There is an old saying that when the only tool you have is a hammer, everything looks like a nail. We have all dealt from time to time with attorneys who are unyielding, unreasonable, unpleasant, and consistently uncompromising. They are also usually unsuccessful at finding efficient solutions, especially when compared with their more mentally flexible, better-mannered peers.

None of this is meant to say that one should never stand firm and refuse to give in to unreasonable demands. Those situations arise, and when they do, we have to act accordingly. Some amount of conflict is to be expected. But a willingness and ability to collaborate, compromise, and advocate with professionalism should be the rule, not the exception.

Although enforcement of the mandatory ethical requirements is a core function of the VSB, we strive for better than minimum standards. The VSB Professionalism Course for new bar admittees has emerged as one effective way to teach our newest members to aim higher and expect better. It is also critical that those of us with more experience never lose sight of the goal of demonstrating the utmost professionalism in everything we do. We set the example daily.

As stated by the Virginia Supreme Court in *National Airlines v. Shea*, 223 Va. 578 (1982), "Higher standards should prevail in the practice of law." *Id.* at 583. These words remain as true today as they were more than three decades ago. It's not up to our Supreme Court or VSB discipline case prosecutors to establish those "higher standards." That job is ours.