DISCOVERY (December 2, 2014)

This is a synthesis of discovery decisions which will govern the resolution of your discovery dispute, so read this memo carefully before appearing on a discovery motion. If you are advancing a proposition contrary to one expressed herein, you should have legal authority to support your argument.

1. Consultation among counsel. Counsel are encouraged to participate in pretrial discovery conferences to minimize the filing of unnecessary discovery motions. No discovery motion should be filed until counsel has discussed with opposing counsel the discovery in controversy. The Court will not consider any motion concerning discovery matters, unless the motion is accompanied by a statement of counsel that a good faith effort has been made between counsel to resolve the discovery matters in dispute.

All relationships are improved by courtesy. Former Virginia Code of Professional Responsibility, EC 7-35, provided that:

> A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client.

Courtesy is the foundation of all viable human relationships, and this rule still applies to the practice of law in Virginia.

2. Good Faith. Rule 4:1(g) provides that:

> The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is: (1) consistent with these Rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose ...; and (3) not unreasonably burdensome or expensive, given the needs of the case ....

Despite this admonition, objections have been made to discovery on the sole ground that the attorney did not understand the meaning of the following words: "similar accidents, examine, paid, warranty claim, notify, respond, and medical treatment." These are words of common parlance and were used in their ordinary context. In each instance the objection was contrary to the rules of discovery and was overruled. A retreat into rubrics in discovery is usually the last gasp of the desperate.

3. Permissible scope. Rule 4:1(b) provides that "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 the other party...." This is almost the same as Federal Rule of Procedure 26(b). Virginia has adopted the Federal Rules of Discovery "verbatim so far as consistent with Virginia practice ... to enable Virginia lawyers and circuit court judges to use federal precedents to guide Virginia practice in the field of discovery. W. H. Bryson, Handbook on Virginia Civil Procedure (2d ed. 1987), p. 319. See, e.g. Smith v. Nat'l. R. Passenger Corp., 22 Va. 348, 350 (Richmond 1991).

In personal injury cases, traumatic personal experiences which occurred more than a year before the accident or incident, except for past accidents and physical injuries, will not generally lead to admissible evidence, so questions about teenage abortions and suicide attempts, childhood physical or sexual abuse, and tempestuous past divorces are usually improper, and the party seeking to obtain such information must show good cause as to why such a line of inquiry may produce admissible evidence. Where a plaintiff is claiming damages for psychological treatment as a result of an accident making his or her past psychological condition an issue in a particular case, questions designed to elicit information about the plaintiff's past psychiatric and psychological treatment may be asked, such as when, where, and why for each such treatment, but personal questions like "how did that abortion or incident make you feel" are not proper. If such an inquiry is to lead to admissible evidence, it could only be through the vehicle of an independent psychological or psychiatric evaluation, so while the examining health care provider may ask such a question, a lawyer generally may not.

In a personal injury action, the plaintiff is usually required to respond to discovery about his prior medical history. As a general rule, all of the plaintiff's medical records and medical history with respect to that portion of the body which was allegedly injured are discoverable, so in a back case all records and history of the plaintiff's back from the time of birth to the present are discoverable. However, discovery inquiries about the plaintiff's general medical and psychological history and injuries to portions of the body, which are not alleged to have been injured, are generally limited to five years preceding the accident. However, even though they are discoverable, the Plaintiff only has to produce medical records which he actually has in his possession. See section 12 of this memo.

4. Interrogatories are limited to thirty including subparts. Rule 4:8(g). They should be concise not canned. Given the fact that number of issues which a Court is potentially required to consider in domestic cases (fault, equitable distribution (10), child support (18), custody (10), and spousal support (13)) exceeds thirty and the wide array of property issues, the interrogatory limit does not apply to subparts in domestic cases. An exception to this rule is usually granted in complex cases like professional negligence, products liability, and complex business litigation, where there is a multi-count complaint alleging conspiracy, tortious interference, breach of fiduciary duties, etc..

5. Limitations. Discovery limited in divorce suits to "matters which are relevant to the issues ...." Rule 4:1(b)(5).

6. Objections. Objections must be specific to allow opposing counsel to appropriately respond to cure the defect without the intervention of the court, and to permit the court to rule intelligently if so required. See generally Discovery: The Successful Advocate's Advantage Virginia CLE, pp. II-15-16 (1995). Objections to interrogatories must be specific and must be supported by a detailed explanation of why a particular interrogatory or class of interrogatories is objectionable. 23 Am. Jur. 2D Depositions and Discovery § 136. "Objections should be plain enough and specific enough so that the court can understand in what way the interrogatories are claimed to be objectionable. General objections such as the objection that the interrogatories will require the party to conduct research and compile data, or that they are unreasonably burdensome, oppressive, or vexatious, ..., or that they would cause annoyance, expense, and oppression to the objecting party without serving any purpose relevant to the action, or that they duplicate material already discovered, or that they are irrelevant and immaterial, or that they call for opinions and conclusions, are insufficient [where no specific factual statements supporting the objection accompany it]." 4A Moore's Federal Practice § 33.27 (2nd Ed.) The objection that an interrogatory is ambiguous is not available to one whose answer shows an understanding of its meaning, but a party may restrict or qualify its answer to ... ambiguous interrogatories. 23 Am. Jur. 2D Depositions and Discovery § 140.

Vague is an objection frequently encountered in discovery. Its etiology is unknown, but its synonym, ambiguous, is a term of legal art with a long genealogy in both the law of document construction and the law of evidence. A statement which may be understood in more than one way is ambiguous. In terms of the phraseology of a question or statement, ambiguity may arise from syntactical or semantical error. In document construction these errors would be called patent ambiguities, and in modern discovery practice, they are not common. Under the rules of court, the proper response to a truly ambiguous question is to describe the ambiguity, so your opponent can appropriately respond to your objection to cure the ambiguity, and the court can properly rule on your objection. If the question or statement is not patently ambiguous, but rather would produce a latent ambiguity when applied in the context of the case, such a question requires a qualified response, not an objection based on vagueness or ambiguity.

Supreme Court 4:11 governing responses to requests for admissions sets forth principles similar to those governing objections to interrogatories: "If objection [to a request for admissions] is made the reasons therefore shall be stated."

"Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time." Supreme Court Rule 4:7(d)(3)(A). The only objections that should be raised at a discovery deposition are those involving privilege against disclosure, some matter that may be remedied at the time, such as the form of the question (compound question, argumentative, asked and answered, or ambiguous, this latter objection is frequently improperly used, and it shall not be used as a foil to interrupt the flow of an examination or to alert the witness to a potential problem), or that the question is beyond the scope of discovery. All objections should concisely state the problem with the question so the defect may be readily cured and must not suggest answers or otherwise coach the deponent. For example, it is not proper for the attorney representing the deponent, to add the gloss, "If you know," to the interrogator's question. It is rarely proper to instruct a witness not to answer. See Rule 4:5(d). Save your argument for the court, do not spend deposition time sparring with opposing counsel.

A health care provider that has treated a plaintiff may not object, based on Virginia Code § 8.01-399, to a plaintiff's discovery request for information about the plaintiff's treatment that is contained in, or can be ascertained from, that treating health provider's records.[1] See, e.g., Archambault v. Roller, 254 Va. 210, 212-213 (1997).

7. Opinions and Conclusions of Law. An interrogatory or a question in a deposition or a request for admissions is not objectionable simply because the response involves an opinion or contention that relates to fact or the application of law to fact. See Rule 4:8(e). "The test of whether an interrogatory calling for matters of opinion, legal theories, or contentions is proper ... is whether or not the answer thereto would serve any substantial purpose, such as providing leads to evidence or clarifying issues in the case, avoiding wasteful preparation, eliminating unnecessary testimony, or generally expediting the fair disposition of the lawsuit and serving any other substantial purpose sanctioned by discovery." 23 Am. Jur. 2D Depositions and Discovery § 121. Frequently, such interrogatories are used as substitutes for a motion for a bill of particulars, or to learn whether the opposing party claims the negligence or breach of contract of any other person contributed to the plaintiff's injuries. Requests for admissions regarding the application of law to the relevant facts in the case are

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[1] Virginia Code 8.01-399 expressly provides, in pertinent part, that:

> A. ***Except at the request or with the consent of the patient***, or as provided in this section, no duly licensed practitioner of any branch of the healing arts shall be permitted to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.
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> B. ***If the physical or mental condition of the patient is at issue in a civil action, the diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court*** or through testimony at the trial of the action.
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> D. Neither a lawyer nor anyone acting on the lawyer's behalf shall obtain, in connection with pending or threatened litigation, information concerning a patient from a practitioner of any branch of the healing arts without the consent of the patient***, except through discovery pursuant to the Rules of Supreme Court as herein provided***.
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> F. ***Nothing herein shall prevent a duly licensed practitioner of the healing arts, or his agents, from disclosing any information that he may have acquired in attending, examining or treating a patient in a professional capacity where such disclosure is necessary in connection*** with the care of the patient, ***the protection or enforcement of a practitioner's legal rights including such rights with respect to medical malpractice actions***, or the operations of a health care facility or health maintenance organization or in order to comply with state or federal law.

also proper. 23 Am. Jur. 2D Depositions and Discovery § 181. The editors of 4A Moore's Federal Practice § 36.04[4] state:

> In 1970 both Rule 33 [interrogatories] and Rule 36 [requests for admissions] were amended to liberalize the practice with regard to discovery of opinions, conclusions, and contentions. In both cases it was made explicit in the rule that discovery could be had of opinions related to fact or to the application of law to fact. The change made it possible to discover the contentions of the parties.

8. Lack of knowledge. If a party does not have the knowledge or information necessary to answer the interrogatory, he should not ignore the inquiry in part or in whole, but should state such lack of knowledge as an answer under oath. The party should also set forth in detail the efforts made to obtain the requested information. 23 Am. Jur.2d Depositions and Discovery § 127.

9. Corporations. A corporate party cannot avoid answering interrogatories by an allegation of ignorance if the information can be obtained from its agents, from persons who acted in its behalf, or from sources under its control, which includes its attorneys. 23 Am. Jur.2d Depositions and Discovery §§ 127 and 130. Individuals designated by a corporation to testify pursuant to Rule 4:5(b)(6) on its behalf must "testify to matters known or reasonably available to the corporation." See American Safety Cas. Ins. v. C. G. Mitchell Constr., 268 Va. 340, 352 (2004).

10. Request for Production of Documents. Rule 4:9(b) provides that "The Request shall set forth the items to be inspected by individual item or category, and describe each item with reasonable particularity." See also 23 Am. Jr. 2D Depositions and Discovery § 164. In most cases the place of production is the producing attorney's office or the clerk's office. In cases involving extensive business records, items should be produced, inspected, and copied at the producing party's office or place of business during reasonable business hours. **It is the producing party's responsibility to identify, segregate, and produce the documents responsive to each category of requested documents**, so that the document production will be as efficient as practical. See Rule 4:9(b)(iii)(A). The needle in the haystack response of simply opening the corporate records room and saying "look at anything you want" is not a response complying with the Rule. The requesting party is permitted to make copies of any records produced pursuant to the request. In the absence of a written agreement between the parties to the contrary, the requesting party shall be permitted to take a copier to the place of production and copy the documents or to have a mobile copy service enter the premises of the producing party to make the copies. If in response to the request, the producing party makes copies and produces them and there is no written agreement in advance with respect to the copying costs, the producing party shall pay the costs of copying the documents produced for the requesting party.

Electronically produced documents shall be produced in a readable format. Supreme Court Rule 4:9(b)(iii)(B)(2). If there is a disagreement as to the readability of the file format, the documents shall be produced in PDF format.[2]

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[2] "[T]he presumption is that the producing party should bear the cost of responding to properly initiated disco]very requests." Thompson v. U.S. Dep't of HUD, 219 F.R.D. 93, 97 (D. Md. 2003); see also Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978) (the party responding to a discovery request ordinarily bears the expense associated with doing so). Also, "[a] party that seeks an order from the court that will allow it to lessen the burden of responding to allegedly burdensome electronic records discovery bears the burden of particularly demonstrating that burden and of providing suggested alternatives that reasonably accommodate the requesting party's legitimate discovery needs." Hopson v. Mayor & City Council of Baltimore, 232 F.R.D. 228, 245 (D. Md. 2005).

Adkins v. EQT Prod. Co., 2012 U.S. Dist. LEXIS 75133 (D. Va. 2012)

<u>In any case in which the responding party elects to copy and produce documents and more than 50 pages of documents are copied and produced</u>, all of the documents produced in discovery shall be Bates stamped, which means that each document page produced in discovery shall have a unique, identifying number stamped on it so that it can be readily identified both in discovery and at trial if the documents are introduced at trial. Where documents are copied and produced pursuant to a discovery request, they may be produced by responding as follows: "The documents requested in this Request for Production of Documents are attached as Document Request No. __, which contains Bates stamped documents _____ (set forth the Bates stamp page numbers).

<u>Subpoena Duces Tecum on Third Parties.</u> Rule 4:9A(c)(3) contemplates that the producing third party may be paid for the "reasonable costs of producing the documents … and tangible things so designated." The party seeking production of the documents should ascertain in advance what the costs of producing and copying the documents will be, and if there is a dispute over the reasonableness of those charges that issue should be presented to the Court prior to the production of the documents.

<u>Corporate Response to Subpoena Duces Tecum.</u> The subpoena is served on the corporation by serving an appropriate officer, and the corporation then designates someone in its hierarchy to respond, the so called "custodian of the records." Supreme Court Rule 4:9A expressly provides that:

> (b) Content of Subpoena Duces Tecum; Objections. --Subject to paragraph (d) of this Rule, a subpoena duces tecum shall command the person to whom it is directed, or ***someone acting on his behalf, to produce the documents, electronically stored information,*** or designated tangible things (including writings, drawings, graphs, charts, photographs, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form) designated and described in said request, and to permit the party filing such request, or someone acting in his behalf, to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 4:1(b) which are in the possession, custody or control of such person to whom the subpoena is directed, at a time and place and for the period specified in the subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.
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> Va. Sup. Ct. R. 4:9A (Emphasis added)

When a subpoena duces tecum is served on a corporate officer, the party served is the corporation, and the "person to whom it is directed" is the corporate officer, who was personally served with the subpoena, and that corporate officer has a duty to deliver the subpoena to the proper person in the corporate hierarchy to respond to the documents request, so to that extent the corporate duty to respond is like that of responding to a corporate deposition designation under Supreme Court Rule 4:5(b)(6), i.e, the corporation must designate a personal capable of appropriately responding to the document requests. Therefore, the "someone acting on his behalf [the officer served]" to respond to a document request on behalf of the corporation is whomever the corporation in the regular course of its business has designated as the person responsible to oversee the maintenance of their corporate records, which is the so called "custodian of the records" who may be the corporate secretary, or in more modern times, the head of the department of information technology for the corporation. The title of the person is not important, the function that they perform for the corporations with respect to its records is determinative of their responsibility. This person changes from time to time, but there is always someone in the corporate hierarchy who performs this function, so the respondent corporation is required to identify that person to respond to the subpoena for records.

11. <u>Option to produce business records.</u> "Where the answer to an interrogatory may be ... ascertained from the business records [of the respondent] ..., it is a sufficient answer to such interrogatory to

specify the records from which the answer may be derived .... *A specification shall be in sufficient detail to permit the interrogating party to locate and identify, as readily as can the party served, the records from which the answer may be ascertained."* Rule 4:8(f). This "provision cannot be used as a procedural device for avoiding this duty [to provide all of the information requested] by shifting to the interrogating party the obligation to find out whether information is ascertainable from the records which have been tendered." 23 Am. Jur. 2D Depositions and Discovery § 134. This means that given the information in the answer, that a reasonable person in possession of the documents can look at the answer find the documents specified and identify the information requested in five-ten minutes, if this is not the case, then the respondent must answer the interrogatories and provide the names and other information requested rather than relying solely on the entries in the medical or business record. "As a general rule, neither the incorporation by reference of allegations of pleadings, nor a reference to a deposition or other documents, constitutes a responsive answer to an interrogatory." 23 Am. Jur.2d Depositions and Discovery § 128. Therefore, a broad statement that the information sought is in documents which are available for inspection is not a sufficient answer. Rather, the answering party must precisely identify which documents will provide the information requested and give the interrogating party a reasonable opportunity to examine and copy the records. 23 Am. Jur.2d Depositions and Discovery § 134. In medical malpractice cases, the plaintiff usually has a copy of his medical record and then files interrogatories seeking the names of persons who provided him treatment, and the Defendants answer that this information is equally accessible in the medical record. However, the names of nurses and doctors in medical records are frequently confirmed by handwritten initials or by signatures, which are often cryptic and/or illegible.

Generally, in an answer to an interrogatory, when the respondent refers to a specific part of the record or to a specific document as his answer, the document must have been provided to or be in the possession of the interrogating party; otherwise, the court cannot reasonably rule on the objection. Whenever a reference to documents is part of a discovery response, and a motion to compel is to be heard, ***both parties must bring the relevant records in question to the hearing, with a copy for the court, so that the court can review the documents and determine where the merits lie***.

12. Possession, Custody, or Control. "[R]ecords in the possession of a physician or person acting at his request are not in the possession, custody, or control of the party who has been examined by the physician ...." 23 Am. Jur. 2d Depositions and Discovery § 249. Accord 4A Moore's Federal Practice (2nd Ed) §34.17. While the Court has the power to order that a party obtain and produce such records, that is not the general rule or practice.

13. Equally Accessible. Discovery need not be ordered if the discovering party already has the documents in question, or if the discovering party can obtain the documents in question as readily as can the adverse party. Accordingly, discovery need not be required of documents of public record which are equally accessible to all parties. See Rakes v. Fulcher, 210 Va. 542, 547, 172 S.E.2d 751 (1970) (where evidence equally available to both sides discovery should not be granted). This objection is frequently incorrectly asserted by corporate defendants and defendants in medical malpractice cases. See discussion under item 11 option to produce business records.

14. Entry and Inspection of Property. Rule 4:9(a) provides for the right to enter and inspect premises that are material to the issues. Generally, the parties have a right to be present during this entry and inspection. Very frequently photographs or videos are taken during this process. The time and manner of the inspection is usually set by agreement to reasonably accommodate the parties' schedules. Where business premises are entered, the entry and inspection may be done before or after regular business hours so that the party's business will be disrupted as little as practically possible. Premises are regularly inspected and photographed in domestic and premises liability cases. If either party reasonably believes that the inspection poses a risk of violence, that matter should be brought to the Court's attention for a protective order, and local law enforcement authorities consulted to assist in the orderly entry and inspection.

15. Generally, inquiries about similar accidents or occurrences within three years of the accident are discoverable in premises liability, product liability, and nursing home negligence cases because they may lead to evidence admissible at trial. 23 Am. Jur.2d Depositions and Discovery § 43.

16. Defendant's financial condition. When a party's financial condition is relevant to a claim , such as lost income or punitive damages, it is a proper subject of discovery inquiry. 23 Am. Jur.2d Depositions and Discovery § 38. Defendant's tax returns are frequently requested documents. When discoverable the most recent three years usually covers the potentially relevant time. In domestic cases, the parties' tax records are always discoverable. In business cases, the tax returns or some portion thereof, such as the manner in which a party treated an alleged business transaction, are frequently discoverable, but if only a portion of the return is relevant, edited copies may be provided, e.g., the schedule of business loss deductions. A protective can be entered to protect the parties' privacy.

17. Experts.

a. Defendants and transaction witnesses are not experts within the meaning of the rules governing discovery of expert opinions.

23 Am. Jur. 2D Depositions and Discovery § 73 (earlier edition) stated:

> The rules governing the disclosure of facts and opinions in the possession of an expert do not apply to discovery requests directed at information acquired or developed by a deponent as an actor in transactions which concern the lawsuit, and the mere designation of a party of a trial witness as an "expert" does not thereby transmute the experience of that expert witness acquired as an actor into experience that he acquired in anticipation of litigation or for trial. Similarly, parties to litigation are not experts under these rules, even though they may be experts in their profession.

See Rodregues v. Hrinda, 56 F.R.D. 11 (W.D. Pa.) (doctors in malpractice action). Williams v. T. Jefferson U., 54 F.R.D. 615 (1972). "[I]t appears that the defendant in a medical malpractice action will be required to answer questions put to him in the course of pretrial discovery relating to his expert opinions, so long as the questions seek an opinion based upon the facts of the case, and are not based upon an entirely hypothetical set of facts for which there is no proof...." Annotation, Scope of Defendant's Duty of Pretrial Discovery in Medical Malpractice Actions, 15 A.L.R. 3rd 1446 § 3 (1967); accord, Annotation, 88 A.L.R. 2nd, 1186, § 4.

A Defendant or witness, who because of his training could be considered an expert, such as a defendant physician in a medical malpractice case, may be questioned in discovery about his professional opinions as they apply to the care which he rendered to the plaintiff, or in the case of a construction professional, about his opinions as they apply to the plaintiff's construction project. So long as the examiner does not use the phrase "standard of care" and the question expressly or implicitly makes it clear that the witness is being asked about his or her personal opinion on the circumstances surrounding the transaction in question, the question is proper. To remove any doubt the examiner should preface his or her examination of the witness by stating that "Any question which I may ask you about your personal professional opinions and practice apply specifically to your examination and treatment of the plaintiff and her condition when you saw her. None of my questions are intended to ask for your opinion about the 'standard of care' in general."

The Defendant's contact with the Plaintiff's treating physicians is limited by statute to "discovery pursuant to the Rules of Court." Virginia Code § 8.01-399.B. A letter which a physician writes to a plaintiff's attorney about the plaintiff's medical condition which is at issue in the case is discoverable, and it is not protected work product, because a treating physician is not a party's agent or representative. While treating physicians may be the source of expert testimony at trial about the plaintiff's medical condition and are therefore subject to the discovery rules governing the disclosure of their opinions, Rule 4:1(b)(4), they are not

"Trial Preparation Experts" in the pure sense, since they have not been retained by the parties solely for the purpose of performing a retrospective analysis of the facts to render an expert opinion at trial, and their files are subject to discovery by both parties. Since the Rules of Court require the defendant to give the plaintiff a copy of the medical report prepared by the defendant's expert who examines the plaintiff pursuant to Rule 4:10(c), by like logic, the defense should be entitled to see any report about the plaintiff which the treating physician prepares for the plaintiff's attorney.

b. Experts to be called at Trial. A party through interrogatories may require any other party to identify each person whom the other party expects to call as an expert 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 give a summary of the grounds for each opinion. Rule 4:1(b)(4)(a)(i). Supreme Court Rule 4:1(b)(4)(a)(2) provides that "upon motion, the Court may order further discovery by other means...," such as by depositions. It is a long standing practice for parties to agree to depose each other's experts. Upon a showing of good cause a subpoena duces tecum may issue against the opposing party's expert. See e.g., Sanford Constr. Co. v. Kaiser Aluminum & Chemical Sales, Inc., 45 F.R.D. 465, (E.D. Kentucky 1968) (Reports of plaintiff's expert, pipe material, and photographs taken by plaintiff ordered produced). However, this is a fairly extraordinary procedure, and it is preferable to proceed by interrogatory to obtain the information. When ordered the party seeking discovery must "pay the other party a fair portion of the fees and expenses reasonably incurred by the latter (responding) party in obtaining facts and opinions from the expert." Rule 4:1(b)(4)(c). Rule 4:10(c) provides that a copy of the written report of an IME must be provided to the other party.

Many cases turn on the experts' opinions. The answers to interrogatories about experts should be detailed, so that the opposing side knows what your expert will be testifying about from reading your answer. Your answer must include the subject matter, the substance of the facts and opinions to which the expert will testify, and a summary of the grounds of each opinion. If these required elements are not in your answer, then your answer is insufficient. John Crane, Inc. v Jones, 274 Va. 581, 591-93 (2007); see generally Handling Products Liability Cases in Virginia, Virginia CLE (1994), p. III-2. Parties very frequently fail to adequately state the "substance of the facts," the "opinions," and "a summary of the grounds of each opinion." While there is no talismanic form for an answer, in a typical personal injury action, the following would be an adequate answer with respect to an orthopedic surgeon who had treated the plaintiff (IF IN DOUBT, ERR ON THE SIDE OF INCLUSION):

Name and Address:

Substance of the Facts: Attached are the treatment records of Dr. X., who is a board certified orthopedic physician licensed to practice in Virginia, who treated the Plaintiff, and who will testify about his examinations and his treatment as shown on these records.

Summary and Grounds of Opinions: Based on his examination, consultations, and treatment of the Plaintiff, Dr. X will testify that:

1. In the accident of October 1, 2011, the Plaintiff sustained a comminuted fracture of his left tibia.

2. As a result of his injury, the plaintiff had to be off from work from October 1, 2011 - December 31, 2011.

3. The fracture resulted in a shortening by 5 mm of the Plaintiff's left leg, as a result of which he has suffered a 5% loss of use of the lower left leg. His physical restrictions caused by his injury are that he is restricted to walking not more than five miles a day, and has problems walking on uneven surfaces.

4. The Plaintiff was charged $900.00 by Dr. X for his treatment as shown on the attached bills, which are reasonable in amount and were necessarily incurred as a result of the injury sustained in the October 1, 2011 accident. (If Dr. X will testify as to the need for future treatment and its cost, set it out in particular.)

A court may grant summary judgment on relevant claims because a party fails to identify expert witnesses as required by the pretrial order. Woodbury v. Courtney, 239 Va. 651, 654, 391 S.E.2d 293 (1990) (failure to identify expert witness five months prior to trial in medical malpractice case). Alternatively, the court may refuse to allow the witness to testify. See, e.g., Ashmont v. Welton, 20 Va. Cir. 181 (1990).

c. Experts consulted but not to be called at trial. In the course of educating themselves about the technical aspects of their case, attorneys frequently consult on both a formal basis and a casual basis with experts, e. g., they may informally discuss a medical issue with a physician friend. The rules do not contemplate that these experts who are consulted, but are not to be called at trial must be disclosed absent "a showing of exceptional circumstances under which it is impractical for the party seeking discovery to obtain facts or opinions on the same subject by other means." Supreme Court Rule 4:1(b)(4)(B). Since a special exception is recognized under the rules for such non-trial experts, they need not be disclosed when an interrogatory is filed asking for the names of persons who have knowledge about the facts of the case.

18. Party Statements. A party may obtain a statement previously made by that party even if made in anticipation of litigation. Rule 4:1(b)(3).

19. Work Product and Anticipation of Litigation. As a general rule neither the work product privilege nor the attorney client privilege prevents the disclosure of facts or the identity of witnesses which the attorney has learned about during his investigation of the case. Attorneys are not permitted to use the work product doctrine as a curtain behind which they can hide factual data which should in all fairness be available to both parties. Thus, provable facts underlying the parties' contentions are not work product. See 23 Am. Jur. 2d Depositions and Discovery §§ 45-47. Trial preparation materials are discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Rule 4:1(b)(3). The work product privilege is a limited privilege provided to the party and to the attorney, who represents a party, and it is limited to "documents and tangible things ... prepared in anticipation of litigation." See generally Duplain Corp. v. Moulinage et Retorderie de Chavanez, 509 F.2d 730, 747-736 (4th Cir. 1974). It is both different from and narrower in scope than the attorney-client privilege.

A document "will be considered to have been prepared in anticipation of litigation only when 'the probability of litigating the claim is substantial and imminent' or where 'litigation was fairly foreseeable at the time the memorandum was prepared." Darnell v. McMurray, 141 F.R.D. 433, 435 (W.D. Va. 1992). Generally, where the memorandum was prepared after the cause of action accrued, was not prepared in the regular course of business or pursuant to regular habit of the author, and was prepared after the party had made the conscious decision to prepare a claim or to defend against a probable claim and in furtherance of that decision, then the document will be deemed to be prepared in anticipation of litigation and will be protected from discovery. The period of time between the cause of action and the writing of the memo and consulting with counsel are all factors to consider in determining whether the document was prepared in anticipation of litigation. Accordingly, a diary or journal began before the event in question is discoverable, because the entries cannot have been made in anticipation of litigation. See generally 23 Am. Jur. 2D Depositions and Discovery § 47. However, a journal or diary kept at the express instructions of a party's counsel after an event has occurred and the attorney consulted about the litigation is work prepared in anticipation of litigation. See 23 Am. Jur. 2D supra § 46.

To obtain written witness statements procured by a party's attorney or agent in anticipation of litigation,

"the movant must show good cause." Rakes v. Fulcher, 210 Va. 542, 545-546, 172 S.E.2d 755 (1970) (Defendant's attorney took witness statements after notice of the action). The Virginia position is the minority rule. See 23 Am. Jur. 2D Depositions and Discovery § 45; and Dobbs v. Lamonts Apparel, Inc., 155 F.R.D. 650 (Alaska 1994). This is why it was necessary to promulgate Rule 4:1(b)(3) making a party's statements discoverable. While the witness statements themselves may not be discoverable, "the information [about the facts] gleaned ... [by a party's counsel] ... through his interviews with the witnesses ..." is discoverable. Hickman v. Taylor, 329 U.S. 495, 508-509, 91 L.Ed. 451, 461 (1947). Accordingly, a party may discover the identity of witnesses and a summary of the facts about which they have knowledge, even though that information is contained in a statement which itself is not discoverable under the present Virginia Rule.

Since Rakes v. Fulcher, supra is the minority rule, statements of persons other than parties taken by a party's insurance company after an accident are statements given to a party's agent in anticipation of litigation and are not discoverable. However, employee statements, accident reports, and other materials prepared in the ordinary course of business, other than by an insurance company, for nonlitigation purposes are not immunized under the work product rule or documents prepared for litigation and are discoverable. 23 Am. Jur.2d Depositions and Discovery § 47. "It is clear that the statements taken ... [the defendant's employees] ... were taken in the ordinary course of business of the defendant..." and are therefore discoverable. Whitehead v. Harris-Teeter, Inc., 28 Va. Cir. 367, 368 (Amherst 1992); cf. Dolan v. CSX Transp., Inc., 31 Va. Cir. 465 (Richmond 1993) (Reports about crossing accidents protected by 23 U.S.C. § 409); contra Smith v. Nat'l. Passenger Corp., 22 Va. Cir. 348 (1991) (Reports of accident investigation protected in FELA action). Reports prepared in the regular course of business by defendant's employees who are experts, but not within the control group of the corporation are discoverable. Virginia Elec. & Power Co. v. Sun Shipbuilding & D. D. Co., 68 F.R.D. 397 (E.D.Va. 1975).

Although pictures, surveillance films, and other tangible evidence relevant to the case may be procured in anticipation of litigation, they are usually discoverable because of their unique, objective character.

Letters from Counsel to their Expert. There is no appellate decision in Virginia on whether counsel's communications with an expert retained to testify at trial is protected work product, and the courts which have considered this question have reached varying results. See Intermedics, Inc. v. Bentrix, Inc., 139 F.R.D. 384 (N.D. Cal. 1991) (communications written and oral from counsel to an expert retained to testify at trial are discoverable); Abujaber v. Kawar, 17 Va. Cir. 398 (Loudoun County 1989) (production of certain documents between counsel and his expert real estate appraiser were denied; and Rail Intermodal Specialists v. General Elec., 154 F.R.D. 218 (N.D. Iowa 1994) (discovery of counsel's letters to experts were barred by the work product doctrine) There is a sea of authority on this question from which one may pluck a fish to suit one's taste. See Annotation, Protection from Discovery of Attorney's Opinion Work Product under Rule 26(b)(3), Federal Rules of Civil Procedure, 84 A.L.R. Fed. 779 § 14 (1987) and Annotation, Developments, since Hickman v. Taylor, of Attorney's "Work Product" Doctrine, 35 A.L.R. 3d, 412 (1971).

This court finds most palatable the analysis of the United States Court of Appeals for the Third Circuit in Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3rd Cir. 1984), in which that court ruled that the federal rules permitting discovery of opinions of expert witnesses and the facts upon which those opinions were based did not limit the rule restricting disclosure of attorney work product containing mental impressions and legal theories, where memorandum, containing the protected work product, were shown to the expert witness who was scheduled to testify. The Third Circuit reasoned as follows:

> [W]here the same document contains both facts and legal theories of the attorney, the adversary party is entitled to discovery of the facts. It would represent a retreat from the philosophy underlying the Federal Rules of Civil Procedure if a party could shield facts from disclosure by the expedient of combining them or interlacing them with core work product. Where such combinations exist, it will be necessary to redact the document so that full disclosure is made of facts presented to the expert and considered in formulating his or her

> opinion, while protection is accorded the legal theories and the attorney-expert dialectic. The advisory Committee Notes also recognize this need. They state, "In enforcing [the Rule 26(b)(3) protection of lawyers' mental impressions and legal theories], the courts will sometimes find it necessary to order disclosure of a document but with portions deleted." Id. at 595.

Virginia Code § 8.01-401.1 expressly provides that an expert testifying at trial may "be required to disclose the underlying facts or data on cross-examination" upon which his opinion is premised. Therefore, to the extent that any communication from counsel to its expert contains a statement of facts, then that material is discoverable, because the expert may be cross-examined on that subject at trial. See Discovery - The Successful Advocate's Advantage p. IV-32 (Va. Law Fd. CLE 1995). If the letter from defense counsel to its expert contains any statement of facts, then the letter must be edited and provided to counsel, with any portions of the letter that contain "mental impressions, conclusions, opinions, or legal theories" of the attorney edited out. Accord Lamonds v. General Motors Corp, VLW 098-3-246, (W.D.Va., Judge Michael, 1998). If a controversy develops about whether the letter has been properly edited, counsel shall send a copy of the original letter under seal to the Court to be compared to the edited copy provided to the other party's counsel.

20. Attorney-Client Privilege. "Parties may obtain discovery regarding any matter, not privileged ...." Supreme Court Rule 4:(b)(1). "Communications between lawyer and client are privileged to the end that the client be free to make a full, complete and accurate disclosure of all facts, unencumbered by fear that such true disclosure will be used or divulged by his attorney, and without fear of disclosure by any legal process." Seventh Dist. Comm. v. Gunter, 212 Va. 278, 286-87, 183 S.E.2d 713 (1971). The communication must be actually confidential and must relate to the matter about which the attorney was consulted. See generally, C. Friend, The Law of Evidence in Virginia § 7-3 (4th Ed. 1993). Supreme Court Rule 4:1(6) expressly provides that:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Each claim of privilege is document specific, and a party cannot reasonably respond to the objection nor the court reasonably rule, unless the existence and general nature of the document is disclosed. Supreme Court Rule 4:1(b)(6); see e.g., Fed.R.Civ.P. 26(b)(5); Anderson v. Torrington Co., 120 F.R.D. 82 (N.D. Ind. 1987); and In re Bieter Co., 16 F.3d 929, 940 (8th Cir. 1994). For, example, the following documents are protected by the attorney-client privilege: Letter dated, January 15, 2011, from John Doe to Edward Esquire; File memo, dated January 21, 2011, of conference between John Doe and Edward Esquire; etc.

Whether a communication is privileged is for the trial court to decide, after being apprised through preliminary inquiry, of the characterizing circumstances. 81 Am. Jur. 2D Witnesses § 363. Since the privilege drives from the inception of the attorney client relationship, "[n]o privilege attaches to an instrument by reason of its passage from an attorney to his client, or vice versa, where the instrument existed prior to the formation of the relation of attorney and client, or although coming into existence subsequently, did so from independent causes. ... It has been observed that the administration of justice could easily be defeated if a party and his counsel could -- by transferring from the one to the other important papers required as evidence in a cause -- thereby prevent the court from compelling the production of important papers on a trial. ... Although the delivery of a document by a client to his attorney may constitute a privileged communication to the attorney, records, papers, and documents which are not privileged cannot be made so by the simple expedient of delivering them to counsel." 81 Am. Jur. 2D Witnesses § 407. "Where the client is an organization, the attorney-client privilege extends to those communications between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject of the

communication [or the subject of the litigation]." 81 Am. Jur. 2D Witnesses § 410. On February 28, 1998, the Virginia Bar Council formally adopted the "control group" test for ex parte contacts with corporate employees. See generally Disciplinary Rule 4.2. Generally persons in authority in the corporation and persons with a lawyer may not be spoken to, whereas, low level employees, whose testimony would not be considered an admission by the corporation and all former employees may be interviewed ex parte. Virginia Law Weekly, "Making Contact" (March 9, 1998).

21. Peer Review and Quality Care Assurance Records and Treatment Protocols. "The proceedings, minutes, records, and reports of any medical staff committee, utilization review committee, or other groups described in § 8.01-581.16 together with all communications, oral and written, originating in or provided to such committees are privileged communications ...." Virginia Code § 8.01-581.17. This privilege is entity specific, so when the privilege is asserted the specific committee(s) or entities whose records are claimed to be privileged must be specifically identified, because the first question is whether the documents or communications in question originate in or were provided to a group whose activities are protected by the statute. As is the case in all privilege assertions, the documents claimed to be privileged must be identified, and in this case the group from which the documents derive must be specifically described. For example: Minutes of the medical staff executive, which is a committee created by Article IX, § 1 of the Medical Center Bylaws to review quality care issues and concerns, dated April 2, 2004.

There are differing opinions among the circuit courts as to what documents are protected by § 8.01-581.17. This court has taken an intermediate position and has held that "incident reports" and quality assurance review proceedings incident to a specific potential act of medical malpractice are protected from disclosure by the statute where made incident to an inquiry by an entity described in § 8.01-581.16. See Mangano v. Kavanaugh, 30 Va. Cir. 66 (Loudoun 1993). Such proceedings and investigations are internal, retrospective examinations undertaken to prevent a reoccurrence of a similar incident and to ensure future quality care. Such proceedings are not undertaken in the "ordinary course of business"; they are undertaken to "evaluate ... the adequacy or quality of professional services ...." If an incident report is not protected by the statutory privilege, it may still be a protected from disclosure if generated in anticipation of litigation, which requires an inquiry into the specific circumstances in which the document was generated. The documents generated by quality assurance committees, peer review committees, and entities which generally "review, evaluate, or make recommendations" about the matters categorically listed in § 8.01-581.16 (i)-(vi) are specifically given privileged status.

On the other hand, policy manuals or treatment protocols, which are generally distributed to employees and health care providers within an institution and which are intended to govern prospective conduct, are documents produced in the "ordinary course of business" and are not promulgated to "review evaluate or make recommendations" on the specific items listed in (i)-(vi); consequently, they are generally discoverable, even though their contents may not be admissible. See Johnson v. Roanoke Memorial Hospital, 9 Va. Cir. 196, 205-206 (Roanoke 1987).

22. Duty to Supplement. Rule 4:1(e) provides:

> (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness, at trial, the subject matter on which he is expected to testify, and the substance of his testimony.
>
> (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing

concealment.

Seasonally generally means within at least twenty-one days.

23. Requests for Admissions. The purpose of requests for admissions is not to discover facts but rather to establish some of the material facts in a case without the necessity of formal proof at trial. Accordingly, they are regularly used to establish the authenticity of documents and background facts such as the contents of medical records, the substance of which is not in dispute. They are an excellent vehicle for limiting both the length and the issues of a trial

"A party may serve upon any other party a written request for admission ... of the truth of any matter within the scope of Rule 4:1(b) (parties may obtain discovery about any matter not privileged) set forth in the requests that relate to statements or opinions of fact or the application of law to fact." Supreme Court Rule 4:11. This language is lifted verbatim from Federal Rule of Civil Procedure 36, so the cases and discussions under the federal rule are instructive, since there are few Virginia cases on the point. The rule "eliminates the requirement that the matters be 'of fact.' This change [1970] resolves the conflicts in the court decisions as to whether a request to admit matters of 'opinion' and 'matters involving 'mixed law and fact' is proper under the rule.'" Advisory Committee Note of 1970 to Amended Rule 36, 4A Moore's Federal Practice § 36.01[5]. See generally 4A Moore's Federal Practice § 36.04[4] and Annot., Permissible Scope, Respecting Nature of Inquiry, of Demand for Admissions under Modern State Civil Rules of Procedure, 42 A.L.R.4th 489 (1985). A party may serve a request for admissions even though he has the burden of proving the matters asserted. 23 Am. Jur. 2D Depositions and Discovery § 184. "[W]hen a party is served with requests for admission regarding matters he considers 'in dispute,' the proper response is nonetheless an answer not an objection. The purpose of such a request is to determine whether the answering party is prepared to admit the matter or considers it a genuine issue for trial." 4A Moore's Federal Practice § 36.04[8]. "Under Rule 4:11(a) a party upon whom requests for admission are served has a 'good faith' duty to 'specify so much of [a request] as is true and qualify or deny the remainder.'" Erie Ins. Exchange v. Jones, 236 Va. 10, 14, 372 S.E.2d 126 (1988) (Defendant contested that the accident caused the injury). Requests for admissions as to issues such as the medical necessity of expenses and causation are permitted requests.

Rule 4:11(a) specifies in detail how a denial is made or a response qualified:

> The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made a reasonable inquiry and that the information known or readily available by him is insufficient to enable him to admit or deny.

See generally 23 Am. Jur. 2D Depositions and Discovery §§ 185-192.

"If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 4:11, and if the party requesting the admission thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees." Supreme Court Rule 4:12(c).

24. Deposition Procedure. If there is a dispute about the sequence of depositions, for example, which party will be deposed first, the defendant will first take the Plaintiff's deposition, and then the Plaintiff will take the Defendant's deposition. See 23 Am. Jur. 2D Depositions and Discovery § 8. If there is a dispute about the length of a deposition, the deposition will begin at 9:00 a.m. and conclude at 5:00 p.m., with an hour break

for lunch and recesses at mid-morning and midafternoon like in a trial. No deposition may last more than one day without leave of court (A day is 9 - 5 as set forth above). If a deposition starts after 10:00 a.m., and there is a dispute about when it will end, the deposition will conclude at 6:00 p.m.

Corporate Designations. When a deposition notice is served on a corporation, association, partnership, or government agency, to designate persons to testify "as to matters known or reasonably available to the organization," pursuant to Rule 4:5(b)(6). See American Safety Cas. Ins. v. C. G. Mitchell Constr., 268 Va. 340, 352 (2004). "If the persons designated by the corporation do not possess personal knowledge of the matters set forth in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation." U. S. v. Taylor, 155 F.R.D. 356, 361 (M.D.N.C. 1996). Producing a witness ignorant of the specific matters designated is tantamount to producing no witness, and can lead to sanctions. See Resolution Trust Corp. v. Southern Union Co., 985 F.2d 196 (5th. Cir. 1993). If no one in the organization has knowledge about the subject matters specified in the notice, say so in a written response to the notice. E.g., No one in the corporation has any knowledge about the conversation concerning the price of the grain auger, because John Smith, who was then vice-president of sales, left the corporation on July 1, 2007, and no one else has any knowledge of conversations between our company and your purchasing agent, and we cannot produce Mr. Smith. The last address that we have for Mr. Smith is ___.

Conduct. All counsel and the parties should conduct themselves with the same courtesy and respect for the rules that are required in the courtroom during a trial. If you have a problem with behavior, consider bringing both the transcript and a copy of the tape of the relevant portions of the deposition to court when you argue your motion. After a deposition has commenced, "conferences between the witness and [his] lawyer are prohibited both during the deposition and during recesses" except where the purpose of the conference is to decide whether to assert a privilege, in which case the conferring attorney shall state on the record the purpose of the conference, and the decision reached with respect to the assertion of the privilege. Hall v. Clifton Precision, 150 F.R.D. 525, 529 (E.D. Penn. 1993) (This is an excellent discussion of deposition practices, and a copy may be obtained from the Court). Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner.

Place. The locality where depositions are to be taken is governed by Supreme Court Rule 4:5(a1). The actual place in a locality at which the deposition is taken is usually selected and arranged by the person taking the depositions. However, as a matter of professional courtesy and longstanding local custom, the depositions of physicians who have been designated as expert witnesses are taken at the physician's place of business. Absent an agreement to the contrary, a plaintiff, who is not a resident of the jurisdiction in which he has filed a suit, must come to the jurisdiction in which he has filed the suit for his deposition, that is he must come to Winchester or to Front Royal.

Costs. Supreme Court Rule 4:1(b)(C) provides that: "Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent and his expenses incurred in responding to discovery ...." This means that the party seeking discovery pays the expert's reasonable costs incident to the expert's preparing for and attending the deposition. Where the reasonableness of the fee is an issue, such as how much to pay the witness per hour, that matter should be resolved in advance of the deposition pursuant to the rule, because generally after the deposition is taken the amount owed to the expert will be determined as a matter of contract law among the parties.

Objections. "Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time." Supreme Court Rule 4:7(d)(3)(A). The only objections that should be raised at a discovery deposition are those involving privilege against disclosure, some matter that may be remedied at the time, such as the form of the question (compound question, argumentative, asked and answered, or ambiguous, this latter objection is frequently

improperly used, and it cannot be used as a foil to interrupt the flow of an examination or to alert the witness to a potential problem), or that the question is beyond the scope of discovery. All objections should concisely state the problem with the question so the defect may be readily cured and must not suggest answers or otherwise coach the deponent. When depositions are introduced at trial the admissibility of the testimony is governed by the rules of evidence, so if the expert did not state his opinions to a reasonable degree of scientific probability at his deposition, if that objection is made at trial, the expert's opinion will be excluded. Impression and speculation testimony is permitted in discovery, but it is not admissible at trial, because it has no probative value and is not relevant. State Farm Mut. Ins. Co. v. Kendrick, 254 Va. 206, 208 (1997). The only reason to direct a witness not to answer is to preserve privileged information. See Rule 4:5(c).

De bene esse depositions are creatures of consent or court order, and they are taken because a witness, which is usually an expert witness, cannot attend the trial. There is no statute or Rule of Court specifically authorizing a de bene esse deposition. Since all depositions are governed by the Rules of Court, any deposition of a witness taken outside the Commonwealth may potentially be used at trial pursuant to Rule 4:7(a)(4); therefore, it is potentially a de bene esse deposition as that term has evolved.

25. Insurance agreements are clearly discoverable. Rule 4:1(b).

26. Effect of invocation of Fifth Amendment Privilege in Response to Discovery. There is no blanket Fifth Amendment right to refuse to answer questions in civil proceedings, so the privilege must be "must be specifically claimed on a particular question and the matter submitted to the court for its determination of the validity of the claim. North American Mortg. Investors v. Pomponio, 219 Va. 914, 918-920 (1979). Therefore, when the privilege is asserted in a deposition the pertinent questions should be asked of the witness, who may asset the Fifth Amendment to each pertinent question; then a transcript can be prepared so that the court can consider each question to determine whether the privilege against self-incrimination applies.

The first question to decide is whether the previous transaction is one that may potentially give rise to both criminal prosecutions and civil remedies. If it is determined that the previous transaction is one in which criminal charges could potentially arise, the second question to decide is whether the danger of prosecution is reasonable or so remote as to be speculative.

> To satisfy the Hoffman test and sustain the privilege, it is necessary: ". . . (1) That the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime . . . and (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case. It is in this latter connection, the credibility of the suggested connecting chain, that the reputation and known history of the witness may be significant. "United States v. Coffey, 198 F.2d 438, 440 (3d Cir. 1952).
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> Pomponia, supra at 919..

If the Hoffman test is met, then the privilege should be sustained unless the statute of limitations has run on the potential criminal activity, in which case there is no reasonable fear of prosecution; therefore, the Fifth Amendment Privilege against self-incrimination may not be asserted. Burbach v. Hystad, 68 Va. Cir. 181, 183 (2005); and U. S. v. Aelitis, 855 F. Supp. 1114, 1119 (C.D. Cal. 1994) (5th Amendment Privilege did not attach to tax years on which the statute of limitations had run). The party asserting that the statute of limitations has run has the burden of proof on that issue.

Virginia Code § 8.01-223.1 provides that: "In any civil action the exercise by a party of any constitutional protection shall not be used against him." This statute has superseded the "sword and shield" doctrine, so invocation of the Fifth Amendment has no adverse effect on the invoker's affirmative claims. Travis v. Finley, 36 Va. App. 189, 548 S.E.2d 906 (2001). See generally Barnes and Powers, Comments on

the Fifth Amendment and its Use in Family Law Cases, Virginia Lawyer (Feb. 2002).

27. Independent Medical Examination. The costs of an independent physical or mental examination of a party pursuant Rule 4:10 is paid by the party requesting the examination. This includes the reasonable cost of transportation, which if by private vehicle is reimbursed at the rate of .56 per mile and meals (breakfast and lunch a maximum of $12.00 per meal per person and dinner a maximum of $20.00 per person Department of Social Services' Records may be disclosed.

28. Identification of Scientific Authorities. When a party is required to identify written authorities upon which an expert is relying either pursuant to a discovery request or pursuant to Virginia Code § 8.01-401.1, each statement relied upon or to be read to the jury shall be specifically identified by providing the complete name of the article, the complete name and date of the publication in which the article or statement appears, and the pages on which the statement appears. Where the statement is to be read to the jury, a copy of each complete page containing the statements with the statements to be read indicated by underlining will be provided. If requested by the opposing party, a complete copy of the article or chapter in which the statement appears shall also be provided.

29. Department of Social Services' Records may be disclosed.

Civil Cases. In child custody cases, the parties and their children may have been the subject of an investigation or recipient of services of the Department of Social Services, so the Department may have material information in its files about the parties and their children. While these records are kept confidential from public scrutiny, the parties may obtain copies of records that pertain to them. Virginia Code § 63.2-104 provides for the general confidentiality of the Department's records, but the cloak of confidentially does not apply to persons "having a legitimate interest" in seeing the records. Virginia Code § 63.2-105.A expressly provides in pertinent part:

> The ***local department may disclose the contents of records*** and information learned during the course of a child-protective services investigation or during the provision of child-protective services ***to a family***, ***without a court order and without the consent of the family, to a person having a legitimate*** **interest** ***when in the judgment of the local department such disclosure is in the best interest of the child who is the subject of the records.*** Persons having a legitimate interest in child-protective services records of local departments include, but are not limited to, (i) ***any person who is responsible*** for investigating a report of known or suspected abuse or neglect or ***for providing services to a child or family that is the subject of a report ….***

This statute expressly authorizes the Department to release otherwise personally sensitive material "to a family" and "to a person with a legitimate interest" and implicitly recognizes that a court can order the disclosure of the records. The Guardian ad litem for the child is clearly a "person in interest," so the records may be disclosed to the parties or to their attorneys in a custody case; frequently, this disclosure is by subpoena duces tecum, and the Court can limit the scope of the records produced, such as excluding information about the identity of persons who filed a complaint of suspected child abuse. See Virginia Code § 63.2-104.1.

Criminal Cases. In criminal cases, exculpatory material in the form of witness statements in the possession of the Department of Social Services is within the purview of the Constitutional Due Process rights of the Defendant as set forth in Brady v. Maryland, 373 U.S. 83 (1963), and may be obtained by the criminal defendant pursuant to a subpoena duces tecum. See also Commonwealth v. Williams, 84 Va. Cir. 325, 328 (Fairfax 2012) (The Court holds that DFS, as a state agency, is an extension of the Commonwealth and subject to disclosure of properly requested Brady evidence. See, e.g., Everett v. Commonwealth, 2004 Va. App. LEXIS 558 (Va. Ct. App. Nov. 16, 2004).