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Discovering FOIA

by Patricia Collins McCullagh

Scenario/Introduction.

Your client, an architecture firm, contracted with a Virginia local government to design several new buildings. After working on the project for several months, the local government terminated the contract, apparently because your client's competitor told the locality verbally and in writing that your client's architects were not properly licensed by the Commonwealth of Virginia—all untrue statements.

Your client files suit against its competitor for defamation and tortious interference. You serve discovery requests seeking all correspondence between the competitor and the locality during the relevant time frame. The competitor refuses to produce these documents, so you file a motion to compel. Depositions and the discovery cut-off date are fast approaching, but the Court is so busy that the earliest hearing date is almost two months out. Moreover, even if you win the motion to compel—which you expect you will—you suspect there will be some "foot dragging" in getting the relevant documents. And once you get the documents, you cannot guarantee there will be enough time to review them, take appropriate depositions, etc. You are certain the Court will not continue the trial. What else can you do to get your hands on those critical documents without nonsuiting the case? Can you issue a Freedom of Information Act request and get the documents directly from the locality, you ask? Yes! Is this going to be the answer to all your litigation concerns? Maybe so, maybe not. But it is at least worth considering.

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What is "FOIA" and Can it be Used as a "Discovery Tool?"

Virginia's Freedom of Information Act ("Virginia FOIA") applies to all "public bodies," including any legislative body, agency, or political subdivision of the Commonwealth.[1] Its stated purpose is to provide "the people of the Commonwealth ready access to records in the custody of public officials and free entry to meetings of public bodies wherein the business of the people is being conducted."[2] The Federal FOIA applies to all federal agencies, and requires that each agency make available for public inspection and copying the records and information prepared by that agency.[3] Certain documents and certain types of meetings are exempt from this "open meeting/open document" requirement under both acts.[4]

Both FOIAs authorize access to documentation and information, but are not discovery tools *per se*. Both Virginia and Federal law view their respective FOIAs as "stand alone" statutes, affording the public the right to review and monitor government activities. These acts were not established to supplement discovery proce-

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Letter From The Chair • Practicing Law with a Song

by Jennifer Lee Parrish

From the moment I began practicing law, I knew I had chosen the career path that was exactly right for me. A job filled with variety and challenge, and yet order, organization and logic. Although I may not spend every day at work singing a song of joy from the rooftop, I have yet to even imagine an alternative profession which could possibly hold so much excitement. If there is anything almost as good as working as a lawyer, it is hanging out with other lawyers. Lawyers are the most interesting, stimulating and fun people with which to converse, even in subject areas completely unrelated to law. Not only is it fun socializing with other lawyers, but it is fun having cases with and even against other lawyers.

Surely there are lawyers in practice today who do not share such a positive view of the legal profession, or who do not share it all the time, particularly in light of the inordinate demands and constant stressors that surround us, and often overwhelm us. It is during those times that things can be made better due to the relationships we have with other lawyers—whether they be our partners, associates, friends in the community or even opposing counsel. While no one should remain long in a job in which he or she is unhappy, surely it is impossible to be happy all the time with one's profession.

During my first couple years of practice, I recall noting that one of the lawyers in my firm never attended the local bar meetings and did not participate in any of the voluntary bar associations. When I posed the question about why he did not wish to attend a local bar social event, he said, "Who wants to hang out with a bunch of lawyers?" I responded, "Are you kidding? What could possibly be more fun than that?"

As a prime example, let me tell you about our current Virginia State Bar Litigation Section Board. We are a diverse group of lawyers from all over the state, from all ages, and from all different backgrounds. The one thing we have in common is that we are all litigators—either current litigators or former litigators who now judge current litigators. We have a Senior Justice of the Virginia Supreme Court, a Federal Court Judge and a State Court Judge. We have members who drive all the way from Pulaski, Danville, Roanoke, Staunton, Virginia Beach, Falls Church, Leesburg and Norfolk just to attend meetings of our section Board in Richmond. Whether we are working on public service projects, planning articles for our Litigation Section Newsletter, planning topics for CLE courses or trying to solve current problems that come before our Board for comment or resolution, our meetings are filled with a camaraderie that has its foundation in working in the law, with the law, and for the law.

In the fall of 2007, John Monahan, Ph.D., a professor at the University of Virginia School of Law, and Jeffrey Swanson, Ph.D., a professor at Duke University School of Medicine, conducted a survey that measured both the job satisfaction and life satisfaction of the class of 1990 from the University of Virginia School of Law. As a 1990 graduate from UVA law school, I took part in the study, but even I was surprised when I learned of the results. Professors Monahan and Swanson enti-

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tled their study as follows: "Lawyers at Mid-Career: A 20-Year Longitudinal Study of Job and Life Satisfaction." The response rate was 72.2% of the 360 living graduates of the class, a rate high enough to alleviate concerns about sample bias. The study showed that 81.2% of all respondents were either "extremely" or "moderately" satisfied with their decisions to become lawyers. Interestingly, there was no significant gender gap in satisfaction with the decision to become a lawyer—80.4% of the men and 82.5% of the women. The study also showed that among this class of lawyers, 85.5% were satisfied with their lives overall.

In thinking about all the lawyers with whom I work, have cases with, and have cases against, it often seems easy to tell which lawyers have the song in their hearts. Those lawyers who are happy with their career choices and their lives in general are the ones who make our profession a great one. They are the ones who work to improve the reputation of our profession to the public, and they are the ones who donate countless hours of their time and energy (like those on the Litigation Section Board) to make the practice of law a rewarding and satisfying career for others.

Even when the hours grow long and the decisions become harder and more elusive, most of us probably still know that no other career could make our lives complete. As we continue to serve our clients, each other, and the public, and as we each play our own roles in the shaping of our laws and legal system, may we do so with a song in our hearts.

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dures. But neither the state nor the federal FOIA prevents a citizen from obtaining access to certain documents based on his or her motive or merely because the documents may be used in litigation.[5] Although the acts were not designed as discovery tools, they nevertheless can be used as such.

Thus, the only factors that should be considered when determining whether documents requested pursuant to FOIA should be produced are (1) whether the requester is a citizen of Virginia (for purposes of Virginia FOIA), (2) whether the documents are the type of records covered by the FOIAs, (3) whether any exceptions apply to preclude the disclosure of certain documents, and (4) whether the requester will pay the cost of production.[6] If you can satisfy the prerequisites, it may be worthwhile to consider using FOIA to supplement other discovery tools.

The benefits and drawbacks to issuing a FOIA request.

Even if you meet the requirements of the applicable FOIA, you still should analyze whether obtaining documents pursuant to FOIA is helpful, whether it meets your identified goals, and whether the applicable rules of civil procedure are better tools. The following is a summary of the issues you should keep in mind when considering a FOIA request.

A. What time frames are you facing?

One of the most significant benefits that Virginia's FOIA provides is the short time frame in which such documents must be produced or made available by the public body. A Virginia public body must initially respond to a FOIA request within 5 business days. Before the close of that 5 day time frame, the public body must respond that either (a) the requested documents will be provided; (b) the requested documents will be entirely withheld because they are exempt under Va. Code §§ 2.2-3705; 1-3706 and identify the nature of the specific exemption; (c) that the documents will be provided in part and withheld in part; or (d) that an additional 7 business days is necessary to provide one of the responses listed above. Thus, the total time for a public body to respond is about 16-18 calendar days, depending on which day of the week the FOIA is served, and excluding holidays. Accordingly, in many (but not all) cases, the public body may produce documents in a shorter time frame than a party or third party would need to respond to discovery requests or a subpoena. Although a Virginia FOIA request can result in a response time that is longer than the time third parties are required to respond to subpoenas duces tecum, a public body has much less leeway in delaying its response to a properly issued FOIA request than a third party would in responding to a subpoena. For example, it is common for a third party to fail to respond, to refuse to respond, or to object to discovery for a myriad reasons, forcing the issuing party to file a motion to compel, obtain a court date, prepare arguments, and attend hearings—all of which require additional time and money to obtain the requested documents. By contrast, most public bodies take their FOIA responsibilities seriously and do not want to risk failing to timely respond to FOIA requests due to the potential consequences if they do so. These consequences can include penalties as well as the payment of attorneys' fees to the petitioner for having to bring an action to obtain the requested documents. Accordingly, you are more likely to get the documents you need from a public body through a FOIA request.

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The time frame in which you may expect to receive documents pursuant to a Federal FOIA, though, may not be as expeditious. Upon receipt of a FOIA request,

a federal agency generally has 20 business days to respond, equating to approximately 28-30 calendar days.[7] This may be too long of a time frame—especially if you are trying a case in the United States District Court for the Eastern District of Virginia. Moreover, if the agency then responds that the sought-after documents are exempt under a particular provision, you can appeal that decision to the agency head, or designee. (Whether such an appeal *must* be filed before filing an action to force production is debatable and will depend on your specific situation.) The agency head then has 20 more business days to consider the appeal. Thus, your Federal FOIAs need to be issued early on in your case to be of more benefit.

B. What documents can the public body/agency withhold?

Unlike in the discovery process, a local government cannot object to producing documents on the theory that such documents are not relevant, would not lead to the discovery of admissible evidence, or other similar grounds under the applicable rules of civil procedure. Va. Code §§ 2.2-3705.1 to -3705.8 enumerate the specific exemptions up on which a public body may rely in withholding documents. Further, although some of the listed exemptions are more general—e.g., those that allow the withholding of documents involving "consultation with legal counsel" or the "disciplining or resignation of . . . public officers, appointees or employees of any public body"—many of the exemptions are very narrowly tailored, and often refer only to specific documents produced in the normal course of business by a specific public body. Therefore, many of the exemptions are not applicable to a wide variety of litigated matters. Moreover, the statute is interpreted strictly, so a withheld document must fit squarely into the exemption in order to be properly exempted. Thus, a public body has little discretion to determine whether a document is exempt or not. Accordingly, if a public body possesses a document requested by a citizen, and it is not specifically excluded by statute from production, the public body must produce or provide access to the document. Such a requirement eliminates the legal wrangling that often occurs when parties differ over what documents are relevant to a case, what documents are "confidential," and which objections are legitimate.

C. Involvement of opposing parties/counsel?

FOIA requests also differ from subpoenas in that there is no requirement to copy opposing counsel or the opposing party on the transmittal of such request. Further, even if copied on such a transmittal, opposing counsel has no right to file a motion to quash or similar objections to such a request to block the FOIA response. Although arguably opposing counsel could communicate with the respective public body or agency to identify what he or she believed to be specific exemptions that would prevent the production of the requested documents, the "objections" could not be predicated on an argument that the documents sought were irrelevant or would not lead to the discovery of admissible evidence in the case. Moreover, these communications would themselves be subject to FOIA, giving you access to them.

Nevertheless, upon receiving documents pursuant to FOIA, you should assess whether it is necessary to turn over to the other side some—or all—of the documents obtained from the public body or agency. Thus, you should review the discovery requests, scheduling orders, and any other obligations you may have under the respective rules of civil procedure.

D. Has the discovery deadline passed?

If the documents you need are public records in control of a public body or agency, FOIA can also be a wonderful safety net if you are pushing up on—or have passed—the discovery deadline in your case. Because FOIA is not "discovery," a rule or order cutting off discovery would not apply to a FOIA request. Thus, if discovery deadlines have passed, it may be possible to obtain documents from another source using FOIA. But be wary. Even though a FOIA request itself is not subject to discovery cut offs, you still need to comply with scheduling and other orders requiring disclosure of exhibits and witnesses, and/or may need to take depositions within the existing discovery deadline to authenticate or otherwise lay proper foundation to introduce documents

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received pursuant to FOIA into evidence at trial.

E. What is the cost to obtain documents pursuant to FOIA as compared to through document requests or subpoenas?

The cost to obtain documents pursuant to FOIA sometimes can be less expensive than obtaining such documents through regular discovery methods. For example, when issuing requests for production of documents or subpoenas, additional time and money are often spent negotiating with opposing or third party counsel as to what will and what will not be produced, what will be the terms of any confidentiality agreement, etc. Also you may need to file a motion to compel, prepare a brief, and attend a hearing on a motion to obtain such documents.

The cost to obtain documents pursuant to FOIA sometimes can be less expensive than obtaining such documents through regular discovery methods.

Although obtaining documents pursuant to a FOIA is not free, a well-drafted FOIA request can cut down on costs. Virginia Code § 2.2-3704(E) allows a "public body [to] make reasonable charges for its actual cost incurred in accessing, duplicating, supplying or searching for the requested records." This includes the cost of employee time necessary to retrieve the documents requested.[8] Federal FOIA has similar—although not identical—provisions.[9]

There are a couple of things you can do, though, to reduce these costs. First, you can draft a very narrow FOIA request—provided you know the specific documents you want to obtain. This will reduce the time necessary for the public body's staff to access and retrieve the documents you seek. Second, if you do need to issue a broad request (e.g., because you are uncertain about the nature and extent of documents the public body possesses) you can request that the documents be made available to review, and that copies of such documents be made later. (And, if you want to even reduce attorney time in reviewing these documents, the client may be able to review in your stead.)[10] This option will reduce your actual copying costs, as well as the charges associated with the public body's time spent in copying all the potentially responsive documents. The important part of the process, though, is to evaluate what documents you need and the costs associated with obtaining them. Then you can carefully draft the FOIA request to meet your and your client's needs in a cost-efficient manner.

F. What happens if properly requested documents are not produced?

In addition to FOIA costs associated with obtaining documents, if a public body or agency does not respond and/or refuses to produce documents believed to be subject to the FOIAs, you may have to resort to legal action to compel production of such documents. The remedy for such cases in Virginia is to file a petition for mandamus or injunction against the public body.[11] For a federal FOIA, the filing of a complaint is the appropriate mechanism.[12] The Virginia petition can be filed in either the general district court or the circuit court of the jurisdiction where the "aggrieved party" lives, in the City of Richmond or where the public body is located.[13] Although having to file a writ of mandamus is "an extraordinary remedial process,"[14] and can increase the time and cost associated with obtaining documents pursuant to FOIA, such a petition must generally be heard by the court within seven days of its filing. Further, any failure by a public body to follow the specific procedures outlined by FOIA is presumed to be a violation of the act. Accordingly, the public body, not you, bears the burden of proving that it has properly withheld a document pursuant to a specific authorized exemption. If successful, an aggrieved party can also obtain its costs and fees (including attorneys fees) associated with filing the mandamus or petition, so public bodies generally try to comply with FOIA requirements.[15] However, in analyzing the "worst case" cost associated with obtaining documents through FOIA or discovery, you must balance the costs and hurdles associated with a motion to compel as compared to bringing a mandamus or separate action.

G. What type of relationship do you need to maintain with the public body or agency?

You will also want to consider the time, cost, and effort that filing a FOIA request may have on the public body or agency, which may already be short on resources and/or have other very critical matters to attend to. That public body or agency may also be a client who you do not want to drag into the middle of litigation. Is there a way to easily obtain such documents through another source? Is a motion to compel likely to succeed? How fast can you obtain a motion to compel? All of these questions must be analyzed.

If you do need to file a FOIA, make sure to be courteous to those assisting you with your request. Try to be precise about the nature of the documents you are seeking. Make prompt payment for the costs associated with retrieving and preparing the documents. And if, upon review of the documents, you determine that a public employee may be a necessary witness, consider contacting the entity's counsel to discuss the matter with him or her first. In short, think about the relationship with the public body or agency and its representatives—how they will play as a witness at trial, the inconveniences presented and other similar matters—the same as you would with any other third party or potential witness you must work with.

If you do need to file a FOIA, make sure to be courteous to those assisting you with your request. Try to be precise about the nature of the documents you are seeking. Make prompt payment for the costs associated with retrieving and preparing the documents. And if, upon review of the documents, you determine that a public official may be a necessary witness, consider contacting the entity's counsel to discuss the matter with him or her first.

Conclusion

So, should you go ahead and issue that FOIA request to the locality who has terminated your client's contract, as discussed above? Only you and your client can answer that question, but make sure to read the applicable FOIA statute, the rules of civil procedure and orders controlling your case, and consider all of the other issues discussed above.

1 See Va. Code § 2.2-3701.

2 Id.

3 See 5 U.S.C. § 552.

4 See Va. Code §§ 2.2-3705.1-3705.8. See also 5.U.S.C. § 552.

5 See Deering Milliken, Inc. v. NLRB, 548 F.2d 1131 (4th Cir. 1977) (Under federal FOIA [the requester's] right to obtain information is neither enhanced nor diminished because of its needs as a litigant. Its access to agency documents must be determined by the public's right to obtain them.") See also Associated Tax Service, Inc. v. Fitzpatrick, 236 Va. 181, 187-88, 372 S.E.2d 625 (1988) ("the motivation behind a [Virginia FOIA] request is irrelevant to a citizen's entitlement to requested information.")

6 See Associated Tax Service, 236 Va. at 187, 372 S.E.2d at 626.

7 See 5 U.S.C. § 552.

8 See Virginia FOI Advisory Council Opinion AO-05-02, May 24, 2002.

9 5 U.S.C. § 552.

10 FOIA grants the requester of the documents the authority to determine whether he or she wants the requested documents copied, or just available for inspection. See Va. Code § 2.2-3704; see also Virginia FOI Advisory Council Opinion AO 04-04, March 19, 2004 ("the choice lies with the requester, and not the public body, to decide whether or not to obtain copies of the requested records.")

11 See Va. Code § 2.2-3713.

12 5 U.S.C. § 552.

13 See Va. Code § 2.2-3713.

14 See Richmond-Greyhound Lines v. Davis, 200 Va. 147, 104 S.E.2d 813 (1958).

15 See Va. Code §§ 2.2-3713(D).

Hiss v. Friedberg: An Exception to the American Rule Barring an Award of Attorneys' Fees

*by David N. Anthony**
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INTRODUCTION

"Can I recover my attorneys' fees?" Who of us has not been asked that by a client considering the pros and cons in initiating litigation over a business deal gone badly or a broken contract? And, as has been drilled in our heads, we recite the "American rule"[1] that each party bears its own attorneys' fees unless a statute or contract provides otherwise. Virginia jurisprudence, however, recognizes one narrow exception to the "American rule" where certain, well-defined circumstances may provide an additional vehicle for the recovery of fees even in the absence of an applicable contract or statute.

HISS v. FRIEDBERG

In what is commonly referred to as the "*Hiss* exception," the Supreme Court of Virginia, nearly 50 years ago, in the case of *Hiss v. Friedberg*, held that reasonable attorneys' fees are recoverable even if the contract contains no attorneys' fees provision when one party's breach of contract forces a non-breaching party to litigate with a third party.[2]

Hiss involved a real estate deal in which the purchasers of land in Fairfax County hired two attorneys, Hiss and Rutledge, to handle the transaction. The sellers assured the purchasers that the property was free of any encumbrances. Another individual, however, claimed an unrecorded leasehold interest in the property.[3] To protect the purchasers, the parties entered into an escrow agreement with Hiss and Rutledge by which the attorneys agreed to hold the purchase money in escrow until a title company issued a policy insuring title "free and clear of any liens and encumbrances whatsoever."[4]

Hiss and Rutledge applied for the insurance policy, but they represented that no other parties had rights to possess the property aside from the seller. The individual claiming a leasehold interest had informed Hiss and Rutledge of his intention to retain possession of the property. Despite receiving this information, Hiss and Rutledge paid the purchase money to the seller. When the title insurance was issued, the policy contained an exclusion of claims by parties in actual possession of the property, other than the insured. Upon discovery of the lease and the terms of the title insurance policy, the purchasers sued the sellers. The parties reached a settlement agreement, which preserved the purchasers' right to sue Hiss and Rutledge. The purchasers then successfully sued Hiss and Rutledge for breach of the escrow agreement.[5]

As part of the judgment against Hiss and Rutledge, the trial court awarded the purchasers their attorneys' fees incurred in litigating against the sellers. The Supreme Court of Virginia affirmed this decision, holding that "where a breach of contract has forced the plaintiff to maintain or defend a suit with a third person, he may recover the counsel fees incurred by him in the former suit provided they are reasonable in amount and reasonably incurred."[6] The Court stated that the purchasers could recover their attorneys' fees because the purchasers' "employment of [trial] counsel . . . was a direct and necessary consequence of the breach of the contract of [Hiss and Rutledge] . . . ."[7] Importantly, the exception does not deal with the cost of litigation with the defendant itself.[8] The rationale underlying the exception is that losses suffered by a plaintiff because of a defendant's breach of contract may include the expenses of litigation with the third party, and these expenses are properly recoverable from the defendant.

INTERPRETATION AND APPLICATION OF THE HISS EXCEPTION

Since *Hiss* was decided, most cases have found the exception not applicable and declined to award attorneys' fees despite creative arguments by counsel.[9] Attorneys should consider the specific facts of the case within the context of the almost sixty decisions over nearly fifty years interpreting *Hiss* before asserting or defending a claim for attorneys' fees outside of the American Rule. For example, the Supreme Court of Virginia repeatedly has stressed that any award of attorneys' fees under the exception is inappropriate unless the damages were the "direct and necessary consequence" of the alleged breach of contract.[10] Thus, where a defendant was said to have violated an agency agreement, the Court held that, in order to recover attorneys' fees, a plaintiff had to have maintained or defended a suit with a third party because of the breach of the agency agreement.[11] Other instances where the *Hiss* exception did not apply include when the contract at issue provides for attorneys' fees,[12] where the plaintiff is partly responsible for the breach,[13] where no breach of contract exists,[14] or—obviously—where the plaintiff did not have to litigate against a third party.[15] So when *is* the exception available? Actually not very often.[16]

In *Owen v. Shelton*, the Supreme Court of Virginia affirmed the award of fees under the *Hiss* exception where sellers of real property instructed their broker not to close on the sale of property unless the buyers paid interest for failing to close by the original date.[17] The broker accepted the buyers' check for interest, along with a letter preserving the buyers' right to contest the interest payment. The buyers filed suit against the sellers, and the sellers obtained a judgment against the broker for the attorneys' fees incurred by the sellers in the litigation with the buyers.[18]

The Court also affirmed the award of attorneys' fees incurred by a buyer who purchased all of the stock of a corporation pursuant to an agreement under which the seller assumed responsibility for all of the undisclosed liabilities of the corporation. After the sale, the IRS asserted a deficiency claim against the corporation and the seller refused to negotiate with the IRS. The seller was ordered to pay the buyer the fees incurred by the buyer in his dispute with the IRS, but not the fees incurred in litigation between the buyer and the seller.[19]

In other cases, courts have applied *Hiss* to award fees incurred during litigation with third parties, but not in prior litigation between the same parties.[20] *Hiss* also has been cited for the proposition that an indemnitee may recover its attorneys' fees to defend a third party claim, but not to establish the right of indemnity.[21] The Fairfax County Circuit Court even extended the *Hiss* exception to apply to situations in which a party's torts have caused the plaintiff to maintain a suit against a third party.[22]

CONCLUSION

The bottom line is that a court typically will not award attorneys' fees absent an applicable contractual provision or statute. Courts have cautioned against an expansive interpretation of the *Hiss* exception in order to avoid "the first step toward obliterating the general rule."[23] In those few narrow cases that fall under the *Hiss* exception, the breaching party may be liable for more than compensatory damages, and a recovery of attorneys' fees may be a significant pro or con for your client. Given this potentially significant impact and ready opportunity for misapplication, attorneys should analyze with caution the possible application of the *Hiss* exception at the start of every case.

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1 *See, e.g., Justus v. Kellogg Brown & Root Servs.,* 373 F. Supp. 2d 608, 613 (W.D. Va. 2005); *Gilmore v. Basic Indus., Inc.*, 233 Va. 485, 490, 357 S.E.2d 514, 517 (1987); *see generally* Charles E. Friend with Kent Sinclair, Friend's Virginia Pleading & Practice § 23.03[7]b], at

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23-21(2d ed. 2006) (observing that "[a]ttorneys' fees are not normally awarded as an element of the plaintiff's compensatory damages").

2 201 Va. 572, 112 S.E.2d 871 (1960).

3 *Id.* at 574, 112 S.E.2d at 873-74.

4 *Id.* at 574-575, 112 S.E.2d at 874.

5 *Id.* at 575, 112 S.E.2d at 874.

6 *Id.* at 577, 112 S.E.2d at 876.

7 *Id.* at 579, 112 S.E.2d at 876.

8 *Id.* at 577-78, 112 S.E.2d at 876.

9 *See, e.g., Ranger Constr. Co. v. Prince William Co. School Bd.*, 605 F.2d 1298, 1301-05 (4th Cir. 1979) (finding the *Hiss* exception inapplicable to fees to establish liability under a contract and performance bond); *Fisher v. Va. Elec. & Power Co.*, 258 F. Supp. 2d 445, 454 (E.D. Va. 2003) (holding that attorneys' fees under *Hiss* were not appropriate for breach of warranty and covenant claim); *Cox v. Geary*, 271 Va. 141, 151, 624 S.E.2d 16, 22 (2006) (denying attorneys' fees under *Hiss* because the fees were recoverable and compensable through legislative act); *State Farm Fire & Cas. Co. v. Scott*, 236 Va. 116, 123-24, 372 S.E.2d 383, 386-87 (1988) (concluding that obligations arose from contract and hence *Hiss* was not applicable); *Young v. M-C Co.,* 37 Va. Cir. 204, 209-10 (Shenandoah County 1995) (citing *Hiss* without discussion and denying plaintiff's demand for attorneys' fees); *Dulles Corner Prop. II v. Smith*, 27 Va. Cir. 425, 427 (Fairfax County 1992) (rejecting fee award under *Hiss* when pleadings did not make sufficient allegations that the attorneys' fees were incurred in litigation with third party due to defendant's breach of duty); *see also Imaging Sci. Techs. v. Scully*, Case Nos. 98-96 and 98-89, 1999 Va. Cir. LEXIS 748, at *2 (City of Charlottesville 1999) (refusing to expand *Hiss* exception to include any breach of duty by a party).

10 *Fidelity Nat'l Title Ins. Co. v. Southern Heritage Title Ins. Agency, Inc.*, 257 Va. 246, 254, 512 S.E.2d 553, 558 (1999); *Long v. Abbruzzetti,* 254 Va. 122, 128, 487 S.E.2d 217, 220 (1997); *see also Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 631 (4th Cir. 1999) and *McCloskey & Co. v. Wright*, 363 F. Supp. 223, 230 (E.D. Va. 1973); *see also* John L. Costello, Virginia Remedies § 19.01[1], at 19-7 (3d ed. 2005) (emphasizing that the application of the *Hiss* exception turns on "determinations of causality and directness of the relationship") (citations omitted).

11 *Fidelity Nat'l Title Ins. Co.*, 257 Va. at 254, 512 S.E.2d at 558.

12 *Chesapeake & Potomac Tel. Co. v. Sisson & Ryan, Inc.*, 234 Va. 492, 502, 362 S.E.2d 723, 729 (1987).

13 *Transdulles Ctr., Inc. v. USX Corp.*, 976 F.2d 219, 228-28 (4th Cir. 1992).

14 *Johnston v. Johnson*, No. 92-1623, 1993 U.S. App. LEXIS 98, at *6 (4th Cir. Jan. 5, 1993).

15 *Sanner v. Poli (In re Poli)*, 298 B.R. 557, 564 (Bankr. E.D. Va. 2003), *Smith v. Fleming*, 55 Va. Cir. 315, 316 (City of Charlottesville 2001); *Virginia Builder's Supply v. Degaetani & Sons Drywall, Inc.*, 50 Va. Cir. 284, 286-87 (City of Richmond 1999); *Herat v. Keats*, 25 Va. Cir. 306, 307 (Fairfax County 1991); *R. L. Moore Inc. v. Shawn,* 23 Va. Cir. 117, 118 (Fairfax County 1991); *Riegel v. Knudsen,* 3 Va. Cir. 124, 125 (Arlington County 1983).

16 Virginia Circuit Courts have cited *Hiss* to deny a defendant's demurrer to plaintiff's request for attorneys' fees. *See Fidelity Nat'l Title Ins. Co. v. Southern Heritage Title Ins. Agency*, 42 Va. Cir. 408, 410 (City of Va. Beach 1997), *rev'd on other grounds*, 257 Va. 246 (1999); *Jurdi v. Bellamy*, Law No. 226503, 2005 Va. Cir. LEXIS 57, at *3 (Fairfax County 2005); *First Am. Title Ins. Co. v. Moran*, Law No. 105380, 1992 Va. Cir. LEXIS 593, at **3-4 (Fairfax County 1992). *Hiss* also has been relied on to award attorneys' fees to a creditor who filed a nondischargeability action in bankruptcy court in *Elrod v. Bowden (In re Bowden)*, 326 B.R. 62, 94 (Bankr. E.D. Va. 2005). *Hiss* was cited without further discussion in holding that a plaintiff's claim was within the *Hiss* exception in *RML Corp. v. Lincoln Window Prods.*, 67 Va. Cir. 545, 567 (City of Norfolk 2004), and was cited in passing for the general proposition that attorneys' fees may be awarded when a defendant's breach of contract forced the plaintiff to maintain a suit with a third party in *Patel v. Anand, L.L.C.*, 264 Va. 81, 87, 564 S.E.2d 140, 144 (2002), *Prospect Dev. Co. v. Bershader*, 258 Va. 75, 92, 515 S.E.2d 291, 301 (1999) and *Rappold v. Indiana Lumbermens Mut. Ins. Co.*, 246 Va. 10, 13, 431 S.E.2d 302, 304 (1993).

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22 *Green v. Zimpel*, 23 Va. Cir. 524, 529 (Fairfax County 1989); *but see R.L. Moore, Inc.* 23 Va. Cir. at 121 (refusing to apply *Hiss* exception when claim sounded in tort, and when plaintiff failed to allege that defendant's actions caused plaintiff to litigate with a third party).

23 *R.L. Moore, Inc.*, 23 Va. Cir. at 121.

View from the Bench

by Elizabeth B. Lacy

The author of the View from the Bench often uses this opportunity to provide observations or suggestions to litigators that will improve the trial process or the litigators' skill. At times the column may be used by its author to highlight particular practices by litigators that the author finds either outstanding or annoying. In any event, the column is intended to present the members of the Litigation section with a judge's perspective on litigation or litigators. I would like to use the column to talk about a litigator rather than the litigation practice—and, more specifically one particular litigator, one who is no longer with us—Robert E. Shepherd, Jr.

In this Commonwealth and indeed throughout legal circles in this country, the name Bob Shepherd is synonymous with issues involving the rights and legal treatment of children. Bob's contributions on informing and molding public policy for juveniles and juvenile justice are legendary. Bob was tireless in his efforts to secure legislation on the legal rights of juveniles, child abuse and special education. His contributions to legislative initiatives in Virginia include his role as co-chair of the committee that produced the suggested revision of the Juvenile Code in 1975-77 and his work with the Virginia Bar Association in creating standards for guardian ad litems in Virginia Courts, to name only a few.

Bob Shepherd's sphere of influence extended beyond the Old Dominion. He was a nationally recognized expert in his field, serving as an expert witness in the courtroom as well as in congressional hearing rooms. He chaired the American Bar Association's Juvenile Justice Committee. Not surprisingly, Bob was also widely recognized for his work. Among his accolades were the Virginia State Bar Family Law Section Lifetime Achievement Award, the Criminal Law Section's Harry L. Carrico Professionalism Award, and the American Bar Association's prestigious Livingston Hall Award in Juvenile Justice, which he received for his "positive and significant contributions to juvenile justice and the children it serves."

In addition to thinking of Bob Shepherd as an advocate for juvenile justice, most lawyers in this state think of Bob Shepherd as a professor and teacher of law. Bob had served on the faculty of the University of Richmond Law School from 1978 to 2001, and when he died in December 2008, he held the position of Professor Emeritus. Most likely any graduate of that law school since 1978 was taught, mentored or befriended in one way or another by Professor Shepherd.

Mentally pigeonholing Bob Shepherd as a law professor or as a nationally recognized expert on issues of juvenile justice and children's law, however, leaves out a significant part of Bob's 40-year legal career. For a quarter of his professional life—for 10 years before he entered academia—Bob Shepherd was a *litigator*, serving in the Army JAG Corps, in private practice, and in the Virginia Attorney General's office. It was in the crucible of litigation that his interest in juvenile law was nurtured and grew. Bob represented juveniles in criminal matters before such representation was recognized as constitutionally required in the landmark case of In re Gault, 387 U.S. 1 (1967), and, while in the Attorney General's office, he was the first assistant attorney general assigned solely to youth services. It was in the actual practice of law that Bob Shepherd's life-long journey of working to improve the juvenile justice system and other issues concerning children and family law began.

With all due respect to non-litigators, it is in litigation, in the courtroom, that the deficiencies of the legal system, the needs of the litigants, and the obstacles presented by the process become glaringly evident. Those who litigate are often in the best posi-

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Justice Lacy is a Senior Justice of the Supreme Court of Virginia.

The Impact of Inadvertent Disclosure Under Fed. R. Evid. 502

by Sharon Goodwyn

It is among a lawyer's worst nightmares. Tens of thousands of documents (including of course electronically stored information) have been produced after months of litigation. Now you lie awake at night wondering whether—despite multiple level of review prior to production—a privileged document managed to slip through. Prior to September 19, 2008, there was the added concern that, depending on the jurisdiction in which your case was pending, the inadvertent disclosure would be construed as a waiver of the attorney-client privilege. But the enactment of Federal Rule of Evidence 502 on that date now provides some comfort that inadvertent production of privileged material will not automatically waive the privilege.

Fed. R. Evid. 502 states, in relevant part:

> **(b) Inadvertent disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
>
> (1) the disclosure is inadvertent;
>
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
>
> (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B).

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Courts addressing the issue of inadvertent disclosure post-Fed. R. Civ. P. 502 have shown that the rule does not amount to a free pass. In assessing whether inadvertent disclosure waives the privilege, Courts have focused on whether the holder of the privilege (1) took "reasonable steps to prevent disclosure;" and (2) "promptly took reasonable steps to rectify the error."

The Oregon District Court considered the impact of Fed. R. Evid. 502 in the context of request for attorneys' fees in Relion, Inc. v. Hydra Fuel Cell Corp., 2008 U.S. Dist. LEXIS 98400 (D. Or. December 4, 2008). Defendant American Security Resources Corporation's (ASRC) fee request included two e-mails produced by Relion. Relion alleged that the inadvertently produced e-mails were privileged and moved the Court to compel ASRC to return the e-mails and all copies thereof to Relion pursuant to the parties' protective order. Id. at *4. The Court explained that in accordance with Rule 502(b), it "will find the privilege preserved if the privilege holder has made efforts 'reasonably designed' to protect and preserve the privilege; conversely, the court deems the privilege waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter." Id. at *5-6.

In October 2007, Relion's counsel, Wells St. John, assembled documents that occupied more than 40 feet of shelf space for production to defendant Hydra. Before the documents were made available to Hydra's counsel, attorneys and staff from Wells St. John reviewed the documents and removed attorney-client and work-product materials. Id. at *7. During her review of the documents at Wells St. John's office, Hydra's counsel came across a file less than three inches thick marked "re-exam." She immediately alerted a Wells St. John paralegal and expressed concern that the re-exam file may have been inadvertently produced. She also asked Wells St. John to remove the file from the conference room. Id. Hydra's counsel had the documents selected from its review copied off-site and gave Relion's counsel a copy of the documents. Id. Hydra's counsel also provided Relion's counsel, at its own expense, with electronic, text searchable copies of the documents. Id.

On February 18, 2008, four months after the documents were produced, and in response to a February 15 letter about the two e-mails from Hydra's counsel, Relion's counsel asserted for the first time that the e-mails were privileged and had been inadvertently produced. Relion's counsel claimed that he did not realize that the e-mails had been produced until he received the letter from Hyrda's counsel and that a subsequent review of his file revealed that the e-mails had been "misfiled" such that they were not removed from the documents made available to Hydra. Id. at *8.

In assessing whether inadvertent disclosure waives the privilege, Courts have focused on whether the holder of the privilege (1) took "reasonable steps to prevent disclosure;" and (2) "promptly took reasonable steps to rectify the error."

The Court concluded that Relion had not met its burden of disproving waiver because it did not "pursue all reasonable means of preserving the confidentiality of documents produced to Hydra." Id. at *9. Specifically, there was no deception on the part of Hydra's counsel. Moreover, Wells St. John had a chance to review the documents before they were produced and could have reviewed the hard copies or electronic text searchable copies of documents selected by Hydra. Id. The Court's analysis suggests that after the oversight involving the "re-exam" file, it would have been prudent for Relion's counsel to review the documents that Hydra selected for copying to ensure that they did not contain any privileged material.

By contrast, the Plaintiffs' inadvertent production of over 800 privileged electronic documents in Rhoads Industries, Inc. v. Building Materials Corp. of America, 2008 U.S. Dist. LEXIS 93333 (E.D. Pa. November 14, 2008) did not waive the privilege. Before it produced electronically stored information, Rhoads hired a consultant who used a sophisticated computer program to perform electronic searches designed to screen for privileged material. The consultant ran and re-ran searches using terms identified by Rhoads's counsel and Rhoads's counsel manually reviewed e-mails from select e-mail boxes, removed privileged e-mails from that group, and listed the e-mails on a privilege log. Id. at *15-19. Rhoads produced hard drives containing 78,000 documents on May 13, 2008. On June 5, counsel for Defendant GAF informed Rhoads's counsel that a number of documents produced appeared to be privileged. Rhoads's counsel responded immediately and asserted the privilege. But due to the deposition schedule over the following weeks and the need to respond to defendant R.W. Cooper's motion to dismiss, Rhoads's counsel was not able to follow-up and manually review the 78,000 e-mails produced for privileged documents for two weeks. The manual review revealed that 812 of the 78,000 e-mails produced were, in fact, privileged. On June 30, Rhoads's counsel gave GAF's counsel a privilege log listing 812 privileged documents. Thereafter, Defendants R.W. Cooper and GAF filed a motion claiming that Rhoads had waived the privilege. Id. at *19-20.

Evaluating whether waiver was warranted under Rule 502, the Court analyzed (1) the reasonableness of Rhoads's precautions to prevent disclosure; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) the promptness and nature of measures taken to rectify the disclosure; and (5) "whether the overriding interests of justice would or would not be served by relieving the party of its errors." Id. at *23-29. While the Court found that the first four factors weighed in favor of waiver, the fifth favor weighed overwhelmingly against waiver.

With regard to the reasonableness of steps taken to prevent disclosure, the Court noted that Rhoads purchased sophisticated software in order to meet its discovery obligations, its consultant performed trial searches to evaluate the software before it was purchased, and Rhoads's attorneys spent significant time conducting a privilege review prior to production. But the Court found that those precautions were tempered by the facts that (1) Rhoads should have used additional search terms to identify potentially privileged documents, (2) an attorney without prior privilege-review experience

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conducted the review with little oversight, (3) the keyword searches used to weed out potentially privileged e-mails were limited to the e-mail address lines and did not include the body of e-mails; and (5) Rhoads failed to develop searches that would weed out all potentially privileged documents and the search terms it used did not identify all of the e-mails that should have been flagged using those limited terms. Id. at *22-25.

Concerning the number of disclosures, the Court opined that while the privileged e-mails that were produced constituted only 2% of the 78,000 e-mail files produced, in absolute numbers over 800 documents was still a lot of documents. Id. at *25-26. There was no evidence as to the extent of disclosure so the Court did not evaluate this factor. Id. at *26.

As to the fourth factor—the promptness and effectiveness of measures taken to rectify the disclosure—the Court noted that Rhoads immediately responded to GAF's e-mail and stated that the disclosure was inadvertent. Further, although the attorney primarily responsible for the privilege review was helping to prepare for nine depositions taken over twelve days following GAF's e-mail and Rhoads had to respond to Defendant R.W. Cooper's Motion to Dismiss, Rhoads produced a privilege log for the inadvertently disclosed documents three weeks after they were produced. Id. at *26-27. Rhoads also asked to have the documents sequestered pursuant to FRCP 26(b)(5)(B) and offered to produce a hard drive without the privileged documents in September. Id. But the Court also noted that, notwithstanding Rhoads's actions, Rhoads initiated the lawsuit and had ample time to review and segregate privileged documents before production began. Moreover, the time constraints that existed after Rhoads received GAF's e-mail were attributable in large measure to the fact that Rhoads had not previously devoted sufficient resources to the privileged-communication issue. And not only did Rhoads not catch its own mistake; it took over three weeks to produce a privilege log after it learned of the disclosure. Finally, Rhoads did not offer the cleansed hard drive until two months after it learned of the inadvertent disclosure, and Rhoads waited four months to offer suggestions to rectify the inadvertent production. Id. at *27-28.

On the last factor—i.e., whether the interests of justice would be served by allowing Rhoads to avoid waiver—the Court noted (1) Rhoads's general compliance with Rule 502, (2) that Rhoads should have conducted a more rigorous privilege review and that (3) allowing Rhoads to preserve the privilege may not deter Rhoads from engaging in similar conduct in the future. But it also observed that loss of the privilege would be highly prejudicial to Rhoads and that Defendants had not demonstrated that they would suffer substantial unfairness as a result of their inability to review the privileged documents. Id. at 28-29.

Summarizing its findings, the Court found that:

> Although Rhoads took steps to prevent disclosure and to rectify the error, its efforts were, to some extent, not reasonable. As to the five-factor balancing test, reviewed in the context of the evidence summarized above, I find that the first four factors favor Defendants. The most significant factor . . . is that Rhoads failed to prepare for the segregation and review of privileged documents sufficiently far in advance of the inevitable production of such a large volume of documents.

Id. at *32. Notwithstanding its holding concerning the first four factors, the Court found that "the fifth factor, the interest of justice, strongly favors Rhoads." While waiver could lead to "serious prejudice" for Rhoads, Defendants would not be prejudiced if they were denied the documents because "they have no right or expectation to any of Rhoads's privileged communications." Id. at *33. The potential for serious prejudice to Rhoads coupled with the Defendants' failure to carry their burden, as the moving party, to prove waiver led the Court to hold that the privilege was not waived with respect to the 800 plus documents that were inadvertently produced.

The Court in Reckley v. Springfield, 2008 U.S. Dist. LEXIS 103663 (S.D. Ohio December 12, 2008), conducted a relatively cursory analysis of the Rule 502 factors. The defendant in Reckley inadvertently produced five admittedly privileged e-mails. The Court noted that the disclosure "took place in a context particularly intended to be addressed by [Rule 502]" and concluded that the Rule 502 factors were satisfied because some of the e-mails were endorsed "ATTORNEY-CLIENT PRIVILEGED" and Defendants' counsel took prompt action to claim the privilege and retrieve them. Id. at *6-7.

While it is impossible to predict how courts will interpret Fed. R. Evid. 502, these cases suggest that the factors in Rule 502 will be evaluated on a case-by-case basis. They also show that Rule 502 does not excuse counsel from taking appropriate precautions to prevent and limit inadvertent disclosure of privileged material.

View from the Bench

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tion not only to identify these imperfections, but also to devise or prescribe alternative strategies and programs that can enhance rather than hinder access to a more efficient, effective, and fair legal playing field. But the task of addressing areas within the system that should be improved is not an easy undertaking. It is time-consuming. It does not necessarily result in making new friends or attracting new clients. Indeed, changing the status quo can require "stepping on toes" and otherwise alienating some aspects of the profession or public. But if litigators are not involved in correcting the imperfections and obstacles presented by the legal process, who will be? Who will assure that any suggested change will really work in the real world of litigation or will not be rife with unintended consequences?

When Bob Shepherd moved from the courtroom to the classroom, his scholarly and research work, including interdisciplinary activities, provided an expanded horizon as he sought solutions to issues of juvenile law. But I believe that his early experience as a litigator provided the first and continuing backdrop for the solutions he suggested for the many aspects of juvenile justice he championed. The contributions Bob Shepherd gave to the cause of juvenile rights are a good example of the type of contributions a litigator can make to the improvement of the legal system we hold so dear. He will be missed by all, but his legacy of identifying the cracks in the legal system and working to fill those cracks remains as an inspiration and challenge to all lawyers—especially litigators.

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