As Judges See It: Top Mistakes Attorneys Make in Civil Litigation

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AS JUDGES SEE IT: TOP MISTAKES ATTORNEYS MAKE IN CIVIL LITIGATON.

I. What Attorneys MUST Know about the Local Court Procedure.

A. Before filing, verify the filing fees and number of copies needed. Basic, but important.

B. Working effectively and courteously with Court Staff is essential and often beneficial.

C. Where to Get Court and Case Information: Begin at http://www.courts.state.va.us/, which is the website of Virginia's judicial system. It contains online forms, case status information, contact information for each court, and more.

II. Summary Judgment Hearings- What Information the Judge Needs to Make a Ruling.

A. Rule 3:20. Summary Judgment, Rules of Supreme Court of Virginia.

1. Any party may make a motion for summary judgment at any time after the parties are at issue, except in an action for divorce or for annulment of marriage. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in that party's favor. Summary judgment, interlocutory in nature, may be entered as to the undisputed portion of a contested claim or on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment shall not be entered if any material fact is genuinely in dispute. No motion for summary judgment or to strike the evidence shall be sustained when

based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the action shall agree that such deposition may be so used, or unless the motion is brought in accordance with the provisions of subsection B of § 8.01-420.

B. Va. Code Ann. § 8.01-420.

1. (A) Except as provided in subsection B, no motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5, unless all parties to the suit or action shall agree that such deposition may be so used. Notwithstanding the foregoing, requests for admissions for which the responses are submitted in support of a motion for summary judgment may be based in whole or in part upon any discovery depositions under Rule 4:5 and may include admitted facts learned or referenced in such a deposition, provided that any such request for admission shall not reference the deposition or require the party to admit that the deponent gave specific testimony.

2. (B) Notwithstanding the provisions of subsection A, a motion for summary judgment seeking dismissal of any claim or demand for punitive damages may be sustained, as to the punitive damages claim or demand only, when based in whole or in part upon any discovery depositions under Rule 4:5. However, such a motion may not be based upon discovery depositions under Rule 4:5 with respect to any claim or demand for punitive damages based on the operation of a motor vehicle by a person while under the influence of alcohol, any narcotic drug, or any other self-administered intoxicant or drug.

C. Effect of July 1, 2013 Amendment on Rule 3:20 and § 8.01-420.

1. Prior to the Amendment, discovery depositions were essentially 'out of bounds' for motions for summary judgment.

2. After the Amendment, Virginia courts allow discovery depositions in motions for summary judgment so long as the deposition is not referenced. Virginia courts also allow discovery

depositions to be used in motions for summary judgment seeking dismissal of any claim or demand for punitive damages, so long as the claim or demand for punitive damages is not based on the operation of a motor vehicle by a person while under the influence of alcohol, any narcotic drug, or any other self-administered intoxicant or drug.

III. Keys to a Successful Pre-Trial Conference.

A. Preparation: Know your case and objectives.

1. Settlement Authority must be verified and the client must understand the risks of trial, and approve your negotiation strategy and goals.

2. Selection of the Mediator is one of the most, if not the most important factor for a successful meeting. Mediators with knowledge and experience for your type of case are the most likely to produce positive results.

a. Rule 1:19. Pretrial Conferences, Rules of Supreme Court of Virginia.

i. In addition to the pretrial scheduling conferences provided for by Rule 4:13, each trial court may, upon request of counsel of record, or in its own discretion, schedule a final pretrial conference within an appropriate time before the commencement of trial. At the final pretrial conference, the court and counsel of record may consider any of the following:

(a) settlement;

(b) a determination of the issues remaining for trial and whether any amendments to the pleadings are necessary;

(c) the possibility of obtaining stipulations of fact, including, but not limited to, the admissibility of documents;

(d) a limitation of the number of expert and/or

lay witnesses;

(e) any pending motions including motions *in limine*;

(f) issues relating to proposed jury instructions; and

(g) such other matters as may aid in the disposition of the action.

b. Rule 4:13. Pretrial Procedure; Formulating Issues, Rules of Supreme Court of Virginia.

i. The court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) A determination of the issues;

(2) A plan and schedule of discovery;

(3) Any limitations on the scope and methods of discovery;

(4) The necessity or desirability of amendments to the pleadings;

(5) The possibility of obtaining admissions of fact and admissions regarding documents and information obtained through electronic discovery;

(6) The limitation of the number of expert witnesses;

(7) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(8) issues relating to the preservation of potentially discoverable information, including electronically stored information and information that may be located in sources that

are believed not reasonably accessible because of undue burden or cost;

(9) provisions for disclosure or discovery of electronically stored information;

(10) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;

(11) any provisions that will aid in the use of electronically stored or digitally stored documents in the trial of the action; and

(12) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

B. Preparation of the Confidential Pre-Trial Settlement Memorandum.

1. Pre-Trial Settlement Statements should succinctly summarize your case and explain why your position should prevail.

2. Demands and Offers should be fully disclosed and explained. If the parties are far apart, then it will be helpful for the mediator to know why.

3. Narrowing Down the Issues- The Global Parameters of Negotiation: determine what the other side wants. That will change the focus of the discussion by showing that you are attempting to address those concerns.

4. "Settlement Value" is probably a misnomer. That is not a constant, and will be different for each jury or judge that hears the case. What matters is the number that will resolve the dispute. Remember that you and your opponent are unlikely to agree upon disputed issues, but often can agree upon a number.

5. Develop a strategy and goal prior to the conference, and try to follow it.

6. Negotiations should begin as early as possible, but it is never too late to start. The more information that is provided to the opposing party, the more likely the parties will be able to reach a resolution. Candor and credibility are usually reciprocated.

C. The Pre-Trial Process.

1. Introductions are and important opportunity to break the ice. Discussions about unrelated topics prior to mediation are utilized by some mediators as a technique to reduce the intensity of the horse trading that will follow.

2. The attorney needs to be an advocate, as well as a "healer of wounds."

3. The Mediator or Judge needs to be the umpire, as well as a sage who commands the respect of both sides.

4. The interests of lien holders and third parties must not be overlooked. Medicare liens must be addressed in every personal injury case. If you do not have the required expertise, then retain a consultant for assistance.

D. Settlement most often results when each side acknowledges the possibility that it may lose. That will require some degree of objectivity. If one party has become indoctrinated by its own propaganda, then the Mediator or Judge can help.

IV. Case Scheduling and Keeping the Court Apprised of Case Updates.

A. Scheduling Appearances: Rule 1:20 of the Supreme Court of Virginia provides that each circuit court determines the procedures (i.e., telephone call,

electronic communication, in person, etc.) it will allow for scheduling civil cases for trial.

B. When there are scheduling delays beyond your control, then be patient and make the best of the situation. Do not lose site of your case evaluation and goals.

C. If you find yourself running late for a hearing or motion, then first notify the court, and then opposing counsel. Honesty will be the best policy, even when it is painful. To avoid this type of situation, then try to follow the principle that being on time requires that you appear early.

D. Deadlines are becoming more prevalent, and less forgiving. Maintain a double diary system. If you are the plaintiff, remember your non-suit "parachute" (Va. Code 8.01-380).

E. When the case is dismissed or settled, then all counsel must either be provided notice of the motion, or must endorse the order. Rule 1:13.

V. Issues that Should be Resolved without the Judges' Involvement.

A. Scheduling of Depositions and Motions.

B. Any special deadlines requirements for the Pre-Trial Order.

C. Avoid and minimize discovery disputes. They are seldom result determinative. Remember the requirements of Rule 4:15(b)(All motions require certification that the movant either has in good faith conferred, or attempted to confer with other affected parties in an effort to resolved the dispute without court action).

VI. Motion Hearings.

A. Being prepared by knowing your issues, and cases, is the best method of avoiding the appearance of being unprepared or disorganized.

B. Try to avoid reading your brief. Highlight your important arguments, while conforming to your time estimate. The format should not materially differ from a presentation to the Virginia Supreme Court.

C. Cite your controlling authority, but do not hide from adverse authority. You will need credibility to prevail. By explaining why a potentially adverse case is distinguishable, or why it should not be followed, you will have much more

credibility, but more importantly, and increased likelihood of persuading the court that your position is correct.

VII. Your Briefs: What Judges Don't Want to See and How to Get to the Point Quickly.

A. Avoid personal attacks and inflammatory language. In most cases, this approach is not persuasive and is counter-productive.

B. Consider using an introductory summary of argument section informing the court, in one paragraph if possible, why your position should prevail. Bold type subheadings can make your arguments clearer, and add variety to your text to make it more readable.

C. If you would not buy your argument, then ask yourself "why am I trying to sell it."

VIII. Legal Ethics.

A. The Meaning of "Justice" and the Role of the Judges and Attorneys in Upholding It.

1. "A lawyer is a representative of clients or a neutral third party, an officer of the legal system and a public citizen having special responsibility for the quality of justice." Preamble: A Lawyer's Responsibilities, Virginia State Bar Rules of Professional Conduct (2013).

2. "The traditions of professionalism at the bar embody a level of fairness, candor, and courtesy higher than the minimum requirements of the Code of Professional Responsibility." Gunter v. Virginia State Bar, 238 Va. 617, 621, 385 S.E.2d 597, 600 (1989).

B. Candor Towards Tribunal.

1. Rule 3.3 of the Virginia State Bar Rules of Professional Conduct

a. A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act

by the client, subject to Rule 1.6;

(3) fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

b. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

c. In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

d. A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

2. Attorney-Client Privilege v. Candor Toward Tribunal.

a. In Legal Ethics Opinion No. 1777, the Virginia State Bar's Standing Committee on Legal Ethics opined that the attorney's duty of confidentiality prevailed over his duty of candor to the court when he learned about a mistake committed by a former client which the client did not want to disclose.

C. The Duty of Exercising Reasonable Diligence in the Courtroom Setting.

1. Rule 1.3 of the Virginia State Bar Rules of Professional Conduct

a. A lawyer shall act with reasonable diligence and promptness in representing a client. NOTE: "Zealous representation" is no longer mandated.

b. A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

c. A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.

2. Comment [1], Rule 1.13 of the Virginia State Bar Rules of Professional Conduct.

a. A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.

D. Consider the Following: Which do you consider more important, winning or your reputation? The case will pass and probably be soon forgotten, but you and your adversary may have many more cases against each other in the future.

E. Judges and lawyers can work together to improve the Civil Justice System by recognizing and fulfilling their respective roles.

IX. Unacceptable Litigation Tactics.

A. Lack of Cooperation with Opposing Counsel

B. Excessive Motions and/or failing to comply with Rule 4:15(b).

C. Intentional Delays in Presenting Issues to Court

D. When you are the victim of improper tactics, determining the appropriate recourse will be difficult. Being professional and focusing upon your case is most often a wise course. If the conduct is particularly egregious or offensive,

then consider (1) requesting judicial relief though a written motion, with supporting authority; or (2) if the conduct occurs during a jury trial, then move for a mistrial. If you do not, then the objection will be waived.

X. How Judges Decide When and How to Use Sanctions.

A. Va. Code 8.01-271.1 was applied in *Benitez v. Ford Motor Co.*, 237 Va. 242,252, 639 S.E. 2d 203,207 (2007), where the Court held that: "A pleading that puts the opposing party to the burden of preparing to meet claims and defenses the pleader knows to have no basis in fact is oppressive. It constitutes an abuse of the pleading process and results in the wrong that Code 8.01-271.1 was enacted to prevent."

B. Another relevant case is *Brown v. Black*, 260 Va. 305, 534 S.E. 2d 727 (2000), where the Court held that it was error to dismiss the plaintiff's case for failure to respond to discovery where no sanctions had first been entered pursuant to Rule 4:12.

XI. Witness and Evidence Management.

A. Failure to timely disclose the identity of a lay witness, or the complete testimony of an expert witness, can result in exclusion of that testimony. In *Crane v. Jones*, 274 Va. 581, 650 S.E. 2d 851 (2007) the Court held that the trial court did not abuse its discretion in excluding the testimony of a defense medical expert whose opinions concerning the amount of asbestos found in the air, and its causal relationship to the plaintiff's mesothelioma had not been sufficiently disclosed during discovery. However, in *Condo Services v. First Owner's Association*, 281 Va. 561, 709 S.E.2d 163 (2011), the Court held that the trial court did not abuse its discretion in allowing expert testimony of an accounting expert, even though the precise amounts claimed for tax penalties and interest had not been disclosed during discovery. When preparing expert witness designations, it is best to err on the side of over disclosure.

B. The Virginia Rules of Evidence.

1. Rule 2:102 provides that the Rules of Evidence were adopted "to implement established principles, under the common law and not change any established case law rendered prior to the adoption of the Rules."

2. Rule 2:103 continues the prior practice concerning contemporaneous objection to evidence and rulings; and continues the requirement that excluded evidence must be proffered for the record for the error to be preserved.

3. Rule 2:601 General Rule of Competency, Rules of Supreme Court of Virginia.

   a. *Generally.* Every person is competent to be a witness except as otherwise provided in other evidentiary principles, Rules of Court, Virginia States, or common law.

   b. *Rulings.* A court may declare a person incompetent to testify if the court finds that the person does not have sufficient physical or mental capacity to testify truthfully, accurately, or understandably.

4. Rule 2:402 Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible, Rules of Supreme Court of Virginia.

   a. *General Principle.* All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of Virginia, statute, Rules of the Supreme Court of Virginia, or other evidentiary principles. Evidence that is not relevant is not admissible.

   b. *Results of Polygraph Examinations.* The results of polygraph examinations are not admissible.

C. Witness Preparation and Cross Examination.

1. The Classic Dilemma – Advocacy v. Coaching.

   a. As attorneys we have an ethical duty to exercise "reasonable diligence" on behalf of our clients, and we try to present facts

in their most favorable context. Note: We are no longer required to be "zealous" advocates. Factual presentation is not factual invention; but how essential facts are elicited can have important consequences.

i. First Scenario – The Blank Slate: You ask the client to tell you what happened, without offering the client any explanation or preparatory comments about the controlling legal standard. You may not like what you hear.

ii. Second Scenario – Outlining the Relevant Legal Standards Before Asking Questions: This discussion should be instructional and informative, and the witness should be reminded of the importance of full and truthful disclosure.

iii. What are the Relevant Ethical Considerations? When does Advocacy become Coaching?

a) The Apathetic or Poor-Recollection Witness – (e.g. "I do not recall any foreign substance on the floor, that incident occurred six months ago.") What inducements are proper, and how much inducement is enough?

b) The Adverse-Fact Witness or Client – (e.g. "I walked by the spill before the plaintiff fell") If you try to hide the ball, what tactics are permissible? You can ask questions but not suggest testimony (e.g. "Was it your intention to get a mop to clean it up?"). It is improper to suggest any inducement or false testimony.

c) The Zealous-Advocate Witness. This type of witness is rare but sometimes encountered. This type of witness is extremely dangerous

because they know it all and can provide you with a false sense of comfort. Your knowledge of the case will be important in informing these individuals of facts that they think they know when, in fact, they do not (e.g., knowledge of an accident or product that is flatly contradicted by documents or reports.)

iv. Remind the Witness about Questions that "Open the Door." If the other side wants your witness to provide an opinion, then your witness needs to be prepared, and uninhibited.

D. Evidence Spoliation and Privilege Disputes

1. Evidence Spoliation.

a. "Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably forseeable litigation. [citations excluded] To make a finding of spoliation, the court must be satisfied that the party alleged to have spoliated evidence had a 'duty to preserve' relevant evidence, which the party then 'breach[ed]... through the destruction or alteration of the evidence.'" E.I. du Pont de Nemours and Co. v. Kolon Industries, Inc., 803 F.Supp.2d 469, 496 (E.D. Va. 2011).

b. "[S]poliation is not a substantive claim or defense but a "rule of evidence," and thus is "administered at the discretion of the trial court."" Hodge v. Wal-Mart Stores, Inc., 360 F.3d 446, 450 (4th Cir. 2004).

2. Provisions of the Virginia Rules of Evidence governing privileged communications:

i. Rule 2:501 Privileged Communications.

ii. Rule 2:503 Attorney-Client Privilege.

iii. Rule 2:503 Clergy and Communicant Privileges.

iv. Rule 2:504 Spousal Testimony and Marital Communications Privileges.

v. Rule 2:505 Healing Arts Practitioner and Patient Privilege.

vi. Rule 2:506 Mental Health Professional and Client Privilege.

vii. Rule 2:507 Privileged Communications Involving Interpreters.

E. Depositions of adverse party can be read as substantive evidence under holding in *Horne v. Milgrim*, 226 Va. 133, 306 S.E. 2d 893 (1983) and Rule 4:7(a)(3).

F. Motions *in Limine*. Under Rule 3 of the Rules of the Supreme Court of Virginia, "Absent leave of court, any motion in limine which requires argument exceeding five minutes shall be duly noticed and heard before the day of trial."

XII. Bench v. Jury Trial: Case Presentation Tips.

A. For bench trials, prepare findings of fact and conclusions of law. Even if they are not required by the court, they will benefit your preparation and presentation.

B. For jury trials, develop a theme, and tell a story. Try to develop a compelling theme that can be expressed in one or two sentences.

C. Common Mistakes During Closing Argument:

a. Calling on Jurors to invoke the "Golden Rule."

i. "Put yourself in plaintiff's position. . . ."

a) *Velocity Express, supra*; *Seymour v. Richardson*, 194 Va. 709, 715, 75 S.E.2d 77, 81 (1953); *State Farm Mut. Auto. Ins. Co. v. Futrell*, 209 Va. 266, 272-73, 163 S.E.2d 181, 186 (1968).

ii. Guidelines for Closing Arguments.

a) The attorney may not suggest a verdict or a "per diem" formula . *See Reid v. Baumgarder,*

217 Va. 769, 232 S.E.2d 778, (1977) ($1000 for each of his remaining years); *Certified T.V. Applicance Co. v. Harrington*, 201 Va. 109, 109 S.E.2d 126 (1959) (amount of verdict is within the jury's discretion and it is improper for formula to be suggested)

b) *Wakole v. Barber*, 283 Va. 488, 722 S.E.2d 238 (2012) Requesting a specific amount for each element of damage is allowed so long as the total amount sought did not exceed the plaintiff's ad damnum, and the amount was not based on a per diem or other fixed basis.

iii. The Arguing Attorney's Personal Opinion or personal knowledge is improper. *See Artis v. Commonwealth*, 213 Va. 220, 191 S.E.2d 190 (1972) (I've never seen a more convincing case).

iv. Counsel is permitted by statute to inform jury of the amount sued for in opening statement or closing argument, or both; and the plaintiff can request an amount less than stated in the *ad damnum*. Va. Code 8.01-379.1.

v. It is improper to Inflame with Prejudice or use "Golden Rule Arguments.

a) Cannot "appeal to the economic fears and passions of a jury." *Velocity Express, supra; Seymour v. Richardson, 194 Va. 709, 75 S.E. 2d 77 (1953); Southern Ry. Co. v. Simmons*, 105 Va. 651, 55 S.E.2d 459 (1906).

b) *See Virginia Electric & Power Co. v. Jayne*, 151 Va. 694, 144 S.E. 638 (1928) (how long will

defendant company shed tears after the trial is over?).

c) Arguments or evidence that deliberately injects collateral or prejudicial facts are improper. In *Lowe* v. *Cunningham*, 268 Va.268, 601 S.E. 2d 628 (2004), the Court held that it was reversible error for the trial court to allow cross-examination of the plaintiff concerning his failure to pay child support.

vi. Injection of Insurance may be proper to show bias.

a) *Hope Windows, Inc. v. Snyder*, 208 Va. 489, 158 S.E.2d 722 (1968) (holding that question about employment by and insurance company during voir dire constituted deliberate reference to insurance that required a mistrial).

b) *But compare, Lombard v. Rohrbaugh*, 262 Va. 484, 551 S.E.2d 349 (2001) where the plaintiff was allowed to show that an expert witness has received substantial amounts from the defendant's insurer because such evidence was relevant on the issue of bias; and *Sullivan v. Rixey*, 241 Va. 512, 403 S.E. 2d 346 (1991), where Court allowed cross-examination of insurance adjuster to show employment by an insurance company as evidence of bias.

c) It is error for an uninsured motorists insurer to advise the jury of insurance coverage in a personal injury action. *Allstate Ins. Co. v. Wade*, 265 Va. 383, 579 S.E. 2d180 (2003) (case involved punitive damage claim); *Travelers Ins. Co. v. Lobello*, 212 Va. 534, 186 S.E. 2d 80 (1972).

vii. Reference to Excluded Evidence may be grounds for reversible error, if there is a contemporaneous objection. Rule of Evidence 2.103.

viii. Injection of New Evidence.

a) Do not allow evidence or argument to be injected into the case which was not introduced into evidence. *See Aylor v. Glover*, 47 Va. Cir. 472 (Cir. Ct. of Fauquier, 1998) (plaintiff alleged defense counsel improperly interjected into closing reference of plaintiff's purported history of alcoholism which had no relevance to the issues to be tried). Failure to assert timely objection is likely to constitute a waiver. Rule of Evidence 2.103.

D. If you must use a deposition, then present it through video, and be conscious of attention spans. Avoid reading depositions of key witnesses in your case in chief, except for limited excerpts from depositions of opposing parties, pursuant to Rule 4:7(a)(3). The portions introduced should contain admissions of important and material facts.

E. Exhibits that Work help the jury understand your evidence and theory of the case.

F. Technology in the Courtroom: The Judges' Stories of the Good, the Bad, and the Awkward.

1. It is the responsibility of the lawyer, not the court, to test all technology (CD's, videos, PowerPoint's, etc.) before trial. No technology is better than bad technology that displays only the ineptness of its presenter.

2. Not all courtrooms are wired for new technologies. Visit the courthouse before trial and, if possible, the courtroom you will be in, and determine what is available and what you should bring.

3. Always have a back-up plan (e.g., a poster board exhibit).

XIII. Judges' View of Jury Selection and Communications.

A. Striking for Cause.

1. Va. Code Ann. § 8.01-358. Voir dire examination of persons called as jurors

   a. The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

   b. A juror, knowing anything relative to a fact in issue, shall disclose the same in open court.

2. In Mayfield v. Com., 59 Va. App. 839, 848, 722 S.E.2d 689, 694 (2012), the Court of Appeals of Virginia held that the trial court had not abused its discretion when the trial court refused to strike a juror for cause where the juror was related to two of the Commonwealth's witnesses but indicated that she has no bias in favor of these witnesses and she could be fair to Mayfield and the Commonwealth.

3. In David v. Com., 26 Va. App. 77, 81, 493 S.E.2d 379, 381 (1997), the Court of Appeals of Virginia held that the trial court had abused its discretion when the trial court refused to strike a juror for cause when the juror, based on her past experience as a crime victim, stated that she had a bias in favor of the prosecution.

B. Jury instructions need not be based upon the Model Instructions. Va. Code 8.01-379.2.

C. The instructions are very important. Consider enlarging several for closing argument that can be held next to you, and shown to the jury during closing argument.

D. Failure to preserve an objection to a jury instruction can have serious consequences. *In Spitzli v. Minson*, 231 Va. 12, 341 S.E. 2d 170 (1986), the Court held that the failure to object to a jury instruction constituted a waiver of the motion to strike that had been made at the close of the plaintiff's case, and again after all evidence had been presented. This result appears to have been legislatively changed by the enactment of Va. Code 8.01-384, but until there is a case directly on point, one can never be certain.

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