PROCEDURAL ISSUES IN CIVIL LITIGATION IN THE RICHMOND DIVISION OF THE ROCKET DOCKET

Hon. Robert E. Payne
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for the Eastern District of Virginia, Richmond Division

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I. PLEADINGS AND PROCESS

A. Service of Process

1. **Deadline**: Service of process must occur within 120 days from filing of complaint, unless extended by the court for good cause shown. Fed. R. Civ. P. 4(m). Failure to comply with this deadline results in the dismissal of the action without prejudice.

B. Subject Matter Jurisdiction

1. **Burden of Proof**: A motion to dismiss for lack of subject matter jurisdiction is assessed under Fed. R. Civ. P. 12(b)(1). It is the burden of the party bringing a case to prove the existence of subject matter jurisdiction. *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

2. **Constitutional Standing**: In assessing a motion to dismiss for lack of constitutional standing under Rule 12(b)(1), "the court may consider evidence outside the pleadings without converting the motion to one for summary judgment." *WiAV Solutions LLC v. Motorola, Inc.*, 679 F. Supp. 2d 639, 645 (E.D. Va. 2009) (citing *Velasco v. Gov''t of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004)).

3. **Preemption**: The Supreme Court has consistently held that "questions of express or implied preemption" begin with "the assumption that the historic police powers of the States [are] not superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Altria Grp., Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (neither the text of the Federal Cigarette Labeling and Advertising Act, nor the previous decisions of the FTC regarding statements of tar and nicotine content preempt defendant's duty not to deceive under the Maine Unfair Trade Practices Act.). Thus, there is a strong presumption against federal preemption in cases involving state police powers. *Id.*

C. Venue

1. **Waiver**: "Because venue is for the convenience of litigants, it is a personal privilege of defendants and can be waived by the parties." *Am. Int'l Specialty Lines Ins. Co. v. A.T. Massey Coal Co.*, 628 F. Supp. 2d 674, 684 (E.D. Va. 2009) (citation omitted). "In this respect, venue is similar to personal jurisdiction, which can also be waived, but it is unlike subject matter jurisdiction, which cannot be waived by the parties." *Id.* However, "if the statutory rules on venue are not followed, and an objection is

made on the ground of improper venue, the action cannot be heard in that district, even though the court may have jurisdiction over the subject matter and the defendants." *Id.*

2. **Transfer/Dismissal for Improper Venue**: When venue is improper and objected to, a complaint can be dismissed for improper venue, or the matter can be transferred to a location where venue is appropriate. Fed. R. Civ. P. 12(b)(3). The transfer of a case can be accomplished *sua sponte* or by motion. *Jensen v. Klayman*, 115 Fed. Appx. 634, 635-36 (4th Cir. 2004). However, the transfer of a case to cure improper venue should only occur when such a transfer would be "[f]or the convenience of parties and witnesses" and would also be "in the interest of justice." 28 U.S.C. § 1404(a).

3. **Intra-District Venue**: The same principles which apply to venue generally also to intra-district venue within the three divisions of the Eastern District of Virginia.

   a. E.D. Va. Local Rule 3(c) provides: "Civil actions for which venue is proper in this district shall be brought in the proper division, as well. The venue rules stated in 28 U.S.C. § 1391 *et seq.* also shall apply to determine the proper division in which an action shall be filed. For the purpose of determining the proper division in which to lay venue, the venue rules stated in 28 U.S.C. § 1391 *et seq.* shall be construed as if the terms 'judicial district' and 'district' were replaced with the term 'division.'" *Id.*; *see also Mullins v. Equifax Info. Servs., LLC*, No. 3:05CV888, 2006 U.S. Dist. LEXIS 24650 (E.D. Va. Apr. 28, 2006) (the court denied the motions to transfer the lawsuit from the Richmond Division to the Alexandria Division because the defendants did not meet their burden of demonstrating that the convenience of the parties and witnesses and the interests of justice weighed strongly in favor of transfer).

4. **Standard for Transfer of Venue**: When a party files a motion to transfer venue from one location where venue is proper to another proper venue, the moving party bears the burden of demonstrating that a transfer of venue is warranted under § 1404(a). *The Original Creatine Patent Co., Ltd. v. Met-Rx USA, Inc.*, 387 F.Supp.2d 564, 566 (E.D. Va. 2005). Because of the judicial preference for honoring the plaintiff's location of filing, the moving party must show that the balance of convenience among the parties and witnesses "is beyond dead center, and strongly favors the transfer sought." *Medicenters of Am., Inc. v. T & V*

Realty & Equip. Corp., 371 F.Supp. 1180, 1184 (E.D. Va. 1974) (granting transfer from Richmond Division to Norfolk Division).

a. Thus, it is the burden of the party seeking the transfer to proffer, "by affidavit or otherwise, sufficient details" to enable the court to find that the transfer of venue is appropriate. *Mullins*, 2006 U.S. Dist. LEXIS 24650, at *23

D. **Removal**

1. **Forum-State Defendant**: Defendants in state civil actions may remove the case to federal court if the court has original jurisdiction, whether through federal question or diversity jurisdiction. 28 U.S.C. § 1441(a). However, in lawsuits where the only arguable basis for federal jurisdiction would be diversity of citizenship under 28 U.S.C. § 1332, § 1441(b) prohibits a segue into the federal court unless none of the named defendants is a citizen of the state in which the federal forum is located. *Coury v. Prot*, 85 F.3d 244, 252 (5th Cir. 1996) ("[A] defendant may not remove a state action to federal court if a defendant is a citizen of the state in which the action is filed.").

2. **Amount in Controversy Determination**: Under 28 U.S.C. § 1332, a party may remove a matter to federal court where there is complete diversity of citizenship and where the amount in controversy exceeds $75,000, exclusive of interest and costs. The black letter rule "has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed in 'good faith.'" *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 353 (1961). Thus, the plaintiff's allegations regarding the amount in controversy will suffice unless it appears to a "legal certainty" that the plaintiff in good faith cannot claim the jurisdictional amount. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-89 (1938).

a. When monetary damages are not claimed, "[t]he test for determining the amount in controversy in a diversity proceeding is the pecuniary result to either party which [a] judgment would produce." *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002). Under this "value" test, the jurisdictional amount in controversy requirement is met if either the "direct pecuniary value" of the right the plaintiff seeks to enforce, *Work v. U.S. Trade, Inc.*, 747 F. Supp. 1184, 1186 n.2 (E.D. Va. 1990) (addressing a declaratory judgment action), or the cost to the defendant of complying

with any prospective equitable relief exceeds $75,000. *See Griffin v. Red Run Lodge, Inc.*, 610 F.2d 1198, 1204 (4th Cir. 1979) (considering the cost to the defendant of complying with an order for specific performance in determining that the requisite amount in controversy was satisfied).

3. **Consent of All Defendants Required**: Removal requires the consent of all of the defendants. *See*, *e.g.*, *Wis. Dep't of Corr. V. Schacht*, 524 U.S. 381, 393 (1998). However, three exceptions to the requirement that all defendants join in or consent to a petition for removal have been recognized: (1) when the non-joining defendant has not been properly served at the time the removal petition is filed; (2) when the non-joining defendant is merely a nominal or fraudulently joined party; and (3) when the removed claim is separate and independent from other aspects of the lawsuit filed in state court. *Cooke-Bates v. Bayer Corp.*, No. 3:10CV261, 2010 U.S. Dist. LEXIS 77633, at *5-6 (E.D. Va. Aug. 2, 2010) (citing *Creekmore v. Food Lion, Inc.*, 797 F. Supp. 505, 508 (E.D. Va. 1992)).

4. **Nominal Parties**: In the Court's inquiry into diversity jurisdiction, "nominal" parties that have been joined to the action should be disregarded, and only the "real parties to the controversy" are to be considered in assessing whether complete diversity of citizenship is present. *See*, *e.g.*, *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460-61 (1980).

   a. The Fourth Circuit has not provided an exact standard against which courts can determine what constitutes a "nominal party" for removal purposes. *See*, *e.g.*, *Creed v. Virginia*, 596 F. Supp. 2d 930, 933-34 (E.D. Va. 2009). However, in assessing whether a party is merely a nominal party, courts within this Circuit have considered whether there is any "legal possibility for predicting" that the party could be found liable, *id.* (citing *Allen v. Monsanto Co.*, 396 F.Supp.2d 728, 733 (S.D.W.Va. 2005)), and they have also asked "whether a court would be able to enter a final judgment favoring the plaintiff in the absence of the purportedly nominal defendant without materially affecting the relief due to the plaintiff." *Creed,* 596 F.Supp.2d at 935; *accord Blue Mako, Inc. v. Minidis*, 472 F. Supp. 2d 690, 696 (M.D.N.C. 2007).

5. **Fraudulent Joinder**: For related but nonetheless independent reasons, the citizenship of parties that are "fraudulently joined" is also ignored when assessing whether complete diversity is

present. *See Boss v. Nissan N. Am., Inc.*, 228 F. App'x 331, 334-35 (4th Cir. 2007); *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999).

a. The term "fraudulent joinder" is, in numerous ways, a misnomer, as it does not require fraud. *Mayes*, 198 F.3d at 461 n.8. It is more accurately characterized as "a term of art [which] does not reflect on the integrity of plaintiff or counsel, but is merely the rubric applied when a court finds either that no cause of action is stated against [a] nondiverse defendant, or in fact no cause of action exists." *AIDS Counseling & Testing Ctrs. v. Group W Television, Inc.*, 903 F.2d 1000, 1003 (4th Cir. 1990).

b. To establish that a nondiverse defendant has been fraudulently joined, the removing party must establish either: (1) that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or (2) that there has been outright fraud in the plaintiff's pleading of jurisdictional facts. *Baltimore County v. Cigna Healthcare*, 238 F. App'x 914, 920 (4th Cir. 2007) (citing *Mayes*, 198 F.3d at 464); see also *McGeorge Camping Ctr., Inc. v. Affinity Grp., Inc.*, Civil Action No. 3:08cv38, 2008 U.S. Dist. LEXIS 18611 (E.D. Va. March 11, 2008) (finding no fraudulent joinder).

6. ***Sua Sponte***: Although courts can remand a case *sua sponte* for a lack of subject matter jurisdiction, courts may not remand *sua sponte* for prodecural defects in removal. *Ellenburg v. Spartan Motors Chassis*, 519 F.3d 192 (4th Cir. 2008) (on review of a *sua sponte* remand by the district court to the state court for defendant's failure to make a factual showing of the amount in controversy in its Notice of Removal, the Fourth Circuit found that the district court exceeded its statutory authority to remand case where it remanded a case *sua sponte* based on a procedural defect without a motion from a party).

7. **Added Counter-Defendants Cannot Remove**: The Fourth Circuit has held that "the phrase 'the defendant or the defendants,' as used in § 1441(a), be interpreted narrowly, to refer to defendants in the traditional sense of parties against whom the [original] plaintiff asserts claims." *Palisades Collections LLC v. Shorts*, 552 F.3d 327, 333 (4th Cir. 2008). This principle is not altered by the Class Action Fairness Act. *Id.*

8. **Last-Served Defendant Rule**: In *Barbour v. Int'l Union*, 594 F.3d 315 (4th Cir. 2010), for the first time, the Fourth Circuit

explicitly adopted the "last-served defendant rule," and joined the Sixth, Eighth and Eleventh Circuits in holding that in cases involving multiple defendants, each defendant, once served with formal process, has 30 days to file a notice of removal pursuant to 28 U.S.C. § 1446(b) in which earlier-served defendants may join regardless of whether they have previously filed a notice of removal.

9. **Class Actions**: Pursuant to 28 U.S.C. § 1332(d)(2)(A), as amended by the Class Action Fairness Act, 28 U.S.C. § 1453, and §§ 1711-171, a putative class action in which at least one member of the putative class is a citizen of a state different from that of at least one of the defendants and the amount that the plaintiff's allegations place in controversy exceeds $5,000,000, exclusive of interest and costs, may be removed to federal court.

E. Complaints

1. **Rule 8(a) Pleading Standards**: "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see* Fed. R. Civ. P. 8(a)(2) (pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief"). A claim is "factually plausible" when the claimant pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*; *accord Feeley v. Total Realty Mgmt.*, 660 F. Supp. 2d 700, 707 (E.D. Va. 2009).

   a. However, "the requirement that the Court take the facts in the light most favorable to the plaintiffs on a motion to dismiss does not obligate the Court to accept the legal conclusions drawn from the facts." *Id.* (citing *E. Shore Mkts. Inc. v. J.D. Assoc. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000)).

   b. Question: How do courts reconcile the form complaints appended to the Federal Rules of Civil Procedure with *Twombly* and *Iqbal*? *See*, *e.g.*, *Automated Transactions, LLC v. First Niagara Fin. Grp., Inc.*, No. 10-cv-00407(A)(M) at 9-10 (W.D.N.Y. Aug. 31, 2010) (ruling that the standard governing a patent infringement complaint is Appendix Form 18 and Rule 84 and not *Twombly* and *Iqbal*).

2. **Rule 9(b) Pleading Standards**: While Rule 8(a) requires that every complaint include "a short and plain statement of the claim" showing that the pleader is "plausibly" entitled to relief, *see Iqbal*, 129 S. Ct. at 1949, Rule 9(b) expressly requires any such party to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). This requires that a complaint, "at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *United States ex rel. Owens v. First Kuwaiti Gen. Trading & Contr. Co.*, No. 09-1899, 2010 U.S. App. LEXIS 14610, at *16 (4th Cir. July 16, 2010).

F. Affirmative Defenses

1. **Waiver**: "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: accord and satisfaction; arbitration and award; assumption of risk; contributory negligence; discharge in bankruptcy; duress; estoppel; failure of consideration; fraud; illegality; injury by fellow servant; laches; license; payment; release; res judicata; statute of frauds; statute of limitations; and waiver." Fed. R. Civ. P. 8(c).

   a. "It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case." *Carr v. Hazelwood*, No. 7:07cv00001, 2008 U.S. Dist. LEXIS 81753 , at *8 (W.D. Va. Oct. 8, 2008) (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1278 (3d ed. 2004)); *see also Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 612 (4th Cir. 1999).

2. **Pleading Standard**: Some district courts have extended the *Twombly-Iqbal* pleading standard to the pleading of affirmative defenses. *Francisco v. Verizon South Inc.*, No. 3:09cv737, 2010 U.S. Dist. LEXIS 77083, at *16-17 (E.D. Va. July 29, 2010). At least two decisions within the Fourth Circuit have also taken this position. *See id.*; *see also Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 U.S. Dist. LEXIS 63265 (W.D. Va. June 24, 2010). This issue, however, remains largely unsettled within the Eastern District of Virginia.

G. Amendments to Pleadings

1. **Timing of Amendment**: Under Fed. R. Civ. P. 15, "a party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a). The 2009 amendments to Rule 15 thus allow a plaintiff to amend the complaint "as a matter of course" (*i.e.*, without leave of court) within 21 days after service of the pleading. As a result of this amendment, the filing of an answer no longer closes the pleadings absent court order; the plaintiff now has twenty-one days to amend as a "matter of right." *See*, *e.g.*, *Jeter v. Alliance One Receivables Mgmt.*, Case No. 10-2024-JWL, 2010 U.S. Dist. LEXIS 50178, at *13 (D. Kan. May 20, 2010).

2. **Counterclaims Governed by Rule 15**: Furthermore, prior to December 2009, Rule 13(f) provided that a pleader could obtain leave of the court to amend the pleadings and assert a counterclaim that was omitted "through oversight, inadvertence, or excusable neglect or if justice so requires." 6 Wright & Miller, *Federal Practice & Procedure*, § 1430, at 252 (2010). The 2009 amendments to the Federal Rules of Civil Procedure, which eliminated Rule 13(f), however, clarify that the decision whether to allow an amendment to add an omitted counterclaim is governed exclusively by Rule 15.

3. **Standard for Amendment**: Rule 15 declares that leave to amend should be "freely" given "when justice so requires." Fed. R. Civ. P. 15(a)(2). The Supreme Court has instructed courts to "heed" this mandate, holding that amendments should be freely allowed in the absence of considerations such as undue delay, bad faith, repeated failure to cure deficiencies, undue prejudice to the opposing party, or futility of the amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980) (stating that in exercising its discretion, the court should focus on prejudice, futility, and bad faith as the only legitimate concerns in denying leave to amend, as only these concerns truly relate to the protection of the judicial system or other litigants). Additionally, "[t]he argument for allowing amendment is especially compelling when . . . the omitted counterclaim is compulsory." *Atl. Bulk Carrier, Corp. v. Milan Express Co.*, No. 3:10cv103, 2010 U.S. Dist. LEXIS 74995, at *10 (E.D. Va. July 23, 2010).

a. Notwithstanding the general liberality of amendment, however, when the time for amendment of pleadings set forth in the court's "scheduling order" has passed, the "good cause" standard of Rule 16(b) applies, and not the more lenient standard of Rule 15(a). *Nourison Rug Corp. v. Parvizian*, No. 07-1973, 2008 U.S. App. LEXIS 17820, at *9 (4th Cir. July 28, 2008).

H. Injunctions

1. **Preliminary Injunction Standard**: In *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374-76 (2008), the Supreme Court articulated the standard for obtaining a preliminary injunction. Because of its differences with the *Winter* test, however, in *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342 (4th Cir. 2009), the Fourth Circuit held that the traditional *Blackwelder* balance-of-hardship test could no longer be applied in granting or denying preliminary injunctions in the Fourth Circuit. *Id.* at 344.

   a. Thus, it is now established that the party seeking the preliminary injunction must make a "clear" showing: "(1) that he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) an injunction is in the public interest." *Id.*

   b. *Real Truth* stands for the proposition that a party must clearly satisfy all four criteria before obtaining preliminary relief, and *Real Truth* rejects the "flexible interplay" among the standards permitted under *Blackwelder*, which held that the "two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; *and plaintiff need not show a likelihood of success*." *Id.* (emphasis in original).

   c. On April 26, 2010, however, *Real Truth* was remanded by the Supreme Court of the United States to the Fourth Circuit "for further consideration in light *of Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 175 L.Ed. 2d 753 (2010) and the Solicitor General's suggestion of mootness." The matter remains pending.

II. DISCOVERY

A. Discovery Rules in the Eastern District of Virginia

1. **Objections**: A party has 15 days to serve objections to discovery requests, including privilege logs, *see* E.D. Va. Local Rule 26(C), and 30 days to serve responses to discovery requests. *Id.*

   a. Objections must be made with requisite specificity to allow the Court to assess the validity of the objection. Boilerplate and/or general objections will not suffice. *ACMA USA Inc. v. Surefil LLC*, No. 3:08cv071, 2008 U.S. Dist. LEXIS 51636 (E.D. Va. July 7, 2008) (defendant's general objections to plaintiff's discovery requests set forth in six paragraphs at the beginning of the document and "incorporating these objections into the responses below" violate Rules 36 and 37 of the Federal Rules of Civil Procedure, which require that objections be stated specifically); s*ee also Barb v. Brown's Buick, Inc.*, No. 1:09cv785, 2010 U.S. Dist. LEXIS 8655, at *2-3 (E.D. Va. Feb. 2, 2010) ("Defendant's 'General Objections' and 'General Statements' contained in its Amended Objections do not relate to any particular discovery request and, in fact, are nothing more than boilerplate, designed to obfuscate. It is impossible to tell which, if any, of these General Objections or General Statements would actually be relied upon with respect to any particular Interrogatory. They are not specific nor appropriate and are, therefore, stricken.").

   b. Rule 33(b)(4) requires that the grounds for any objection to an interrogatory must be "stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure." Fed. R. Civ. P. 33(b)(4).

   c. Similarly, an objection to part of a request for production of documents must be specifically stated, and the producing party must permit inspection of the non-objectionable part. Fed. R. Civ. P. 34(b)(2)(C).

   d. The grounds for objecting to a request for admission "must be stated," but a party taking issue with the objection may move to determine the sufficiency of an answer or objection, and "[u]nless the court finds an objection justified, it must order that an answer be served." Fed. R. Civ. P. 36(a)(5)-(6); *accord Cappetta v. GC Servs. Ltd.*

P'ship, No. 3:08CV288, 2008 U.S. Dist. LEXIS 103902, at *5-6 (E.D. Va. Dec. 24, 2008).

2. **Local Rule 37(E) Certification**: "Counsel shall confer to decrease, in every way possible the filing of unnecessary discovery motions. No motion concerning discovery matters may be filed until counsel shall have conferred in person or by telephone to explore with opposing counsel the possibility of resolving the discovery matters 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 at issue." E.D. Va. Local Rule 37(E).

   a. "After a discovery request is objected to, or not complied with, within time, and if not otherwise resolved, it is the responsibility of the party initiating discovery to place the matter before the Court by a proper motion pursuant to Fed. R. Civ. P. 37, to compel an answer, production, designation, or inspection." E.D. Va. Local Rule 37(A).

   b. Should any party or attorney fail to comply with any of the provisions of this Local Rule 37 or otherwise fail or refuse to meet and confer in good faith in an effort to narrow the areas of disagreement concerning discovery, sanctions provided by Fed. R. Civ. P. 37 may be imposed." E.D. Va. Local Rule 37(H).

   c. Certain judges also have particular procedural requirements relating to discovery disputes contained in their scheduling orders.

   d. Question: To what extent does Local Rule 37(E) apply formally or informally to non-discovery motions (*e.g.*, motions for contempt or sanctions, motions for leave to amend)?

3. **Privilege Logs/Privilege**: "For many years, courts have required that parties claiming privileges demonstrate entitlement thereto in a list or log that describes the ground of the putative protection with a degree of specificity that allows the opposing party to assess the assertion of the privilege against the applicable tests and to challenge any claim thought to be wanting." *Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 272 (E.D. Va. 2004) ("Any privilege log must be particularly specific, fulsome, and fleshed out."). "The descriptions in the log must satisfy the claiming party's burden," and if they do not, privilege will be

deemed waived and the documents ordered disclosed to opposing counsel. *Id.*

a. Importantly, "[o]nce a party voluntarily discloses otherwise privileged documents to a third party, the disclosing party waives any privilege respecting the documents that were voluntarily disclosed." *Id.* at 275; *see also Sheet Metal Workers Int'l Ass'n. v. Sweeney*, 29 F.3d 120, 125 (4th Cir. 1994); *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982).

b. "It is clear, however, that a 'judicially compelled' disclosure is not a voluntary one." *Rambus, Inc.*, 220 F.R.D. at 275 (citing *Chubb Integrated Sys. Ltd. v. Nat'l Bank of Washington*, 103 F.R.D. 52, 63 n.2 (D.D.C. 1984)). Hence, when a party has disclosed information "only after a judge ordered it to do so," it does "not waive any privilege" with respect to those documents in any subsequent proceeding. *Rambus, Inc.*, 220 F.R.D. at 275.

4. **Work-Product Protection**: Fed. R. Civ. P. 26(b)(3)(A) outlines the basic precepts of the work-product privilege. The rule provides in pertinent part: "Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3)(A). This rule codifies the holding in *Hickman v. Taylor*, 329 U.S. 495 (1947), which established the principle that materials prepared in the "anticipation of litigation" are protected from discovery. *Id.* at 507.

a. There are two types of work-product: one that is completely immune from discovery and one that is qualifiedly immune. *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992). In order to determine whether or not a document is protected by work-product privilege, one must look at "whether the documents or tangible things were prepared in anticipation of litigation or for trial and then for materials other than legal opinion or theory…whether the requesting party has demonstrated a substantial need." *Id.* at 984.

b. The party claiming the privilege has the burden to prove its existence and application. *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332, 355 (4th Cir. 1992). A party claiming "substantial need" for access to non-opinion

work-product has the burden to demonstrate substantial need. Fed. R. Civ. P.26(b)(3)(A)(ii).

c. It is settled in the Fourth Circuit that a document must have been prepared "because of" the potential for litigation in order to be protected by the work-product doctrine. *Id.* Materials that are prepared in the "ordinary course of business" or for other non-litigation purposes are not considered to have been prepared in the anticipation of litigation, even if litigation is anticipated. *Id.* Finally, if a document is prepared in anticipation of litigation but does not contain mental impressions that document may be discoverable upon a demonstration of substantial need and an inability to obtain the information in the document without undue burden. *Id.*; *accord Sanford v. Virginia*, No. 3:08cv835, 2009 U.S. Dist. LEXIS 66484, at *8-9 (E.D. Va. July 31, 2009).

5. **Filing Documents Under Seal**: Under E.D. Va. Local Rule 5, no documents may be filed under seal without an order entered by the Court. "The Court will prospectively enter a protective order allowing for the filing of documents under seal if the motion for a protective order is accompanied by a non-confidential memorandum stating: (1) what would be filed under seal, (2) why sealing is necessary and why another procedure will not suffice, (3) governing caselaw, and (4) the period of time the party seeks to keep the matter under seal. The only exception is for documents that must be filed under seal pursuant to a governing statute, rule or order. Additionally, trial exhibits (including documents previously filed under seal) and trial transcripts will not be filed under seal except upon a showing of necessity." *Id.*

a. Because placing documents under seal requires a court order, this process cannot simply be accomplished through the consent of the parties. *Id.* Rather, the standard under Local Rule 5 must be satisfied.

b. A motion to have an entire case kept under seal shall be subject to the same requirements specified above. *Id.*

6. **Extensions of Time**: "Depending upon the facts of the particular case, the Court in its discretion may, upon appropriate written motion by a party, allow an extension of time in excess of the time provided by the Federal Rules of Civil Procedure, these Local Rules, or previous Court order, within which to respond to or complete discovery or to reply to discovery motions." E.D. Va. Local Rule 37(F).

a. "Any agreement between counsel relating to any extension of time is of no force or effect; only the Court, after appropriate motion directed thereto, may grant leave for any extension of time." *Id.* It is advisable to seek a motion for extension of time before the deadline has passed.

b. Unless otherwise specifically provided, such extension will be upon the specific condition that, regardless of what may be divulged by such discovery, it will not in any manner alter the schedule of dates and procedure previously adopted by the Court in the particular case." *Id.*

7. **Deposition Summaries**: "Whenever depositions are expected to be presented in evidence, counsel shall, before the final pretrial conference or if same are not then available before the day of trial, review such depositions and (1) extract therefrom a short statement of the qualifications of any expert witness to read to the jury, (2) eliminate unnecessary and/or irrelevant matters, and (3) eliminate all objections and statements of counsel to avoid reading same to a jury. In the event counsel are unable to agree on what shall be eliminated, they shall submit to the Court for a ruling thereon before the date of trial. Failure to do so will constitute a waiver of objections." E.D. Va. Local Rule 30(F).

a. "In all nonjury cases, counsel shall attach to any deposition a summary of the examination of the testimony of each witness, thereby pointing out the salient points to be noted by the Court." E.D. Va. Local Rule 30(G).

B. Discovery Generally

1. **Impeachment**: Discoverable information need not be admissible and may be sought for impeachment purposes. *Capital One Bank (USA) N.A. v. Hess Kennedy Chartered, LLC*, Civil Action No. 3:08cv147, 2008 U.S. Dist. LEXIS 76385 (E.D. Va. Sept. 30, 2008) (holding that plaintiff was entitled to tax documents, correspondence, advertisements, and certain documents related to any regulatory action against defendants including bar actions).

2. **Deposing an Organization**: "A party may name as the deponent an entity, and must describe with reasonable particularity the matters for examination. The named entity must then designate one or more officers, directors, managing agents, or other persons who consent to testify on its behalf. The persons designated must testify about information known or reasonably available to the organization." Fed. R. Civ. P. 30(b)(6).

a. "Ordinarily, managing agent status is determined as of the time of the deposition, not as of the time when the activities disputed in the litigation occurred. Thus, the general rule is that former employees cannot be managing agents of a corporation. However, like most rules, this one has exceptions. When a managing agent is fired to avoid disclosure in pending or potential litigation, or when the managing agent has been or might be reappointed to another position in the corporation, managing agent status that exists at the time of the events at issue does not magically disappear with the person's termination or reassignment." *E.I. DuPont de Nemours & Co. v. Kolon Indus.*, No. 3:09cv58, 2010 U.S. Dist. LEXIS 51373, at *11-12 (E.D. Va. May 25, 2010).

b. In *Spicer v. Universal Forest Prods.*, No. 7:07cv462, 2008 U.S. Dist. LEXIS 77232 (W.D. Va. Oct 1, 2008), the court held that a corporation must make a good faith effort to designate people with knowledge of the matters sought by the opposing party, and to adequately prepare its representatives so that they may give complete, knowledgeable, and non-evasive answers in deposition. *Id.* at *10. A corporation that fails to comply with this obligation is subject to sanctions. *Id.* at *23. In *Spicer*, the court struck defenses relating to topics on which defendant failed to provide a knowledgeable witness and ordered the defendant to pay attorney's fees and costs related to the inadequate 30(b)(6) deposition. *Id.*

3. **Time Limit**: Under Rule 30(d)(2), all depositions have a durational limit of one seven-hour day, unless otherwise ordered by the court or stipulated by the parties. *See* Fed. R. Civ. P. 30(d)(2).

4. **Location of Depositions**: There is an initial presumption that a defendant should be deposed in the district of his residence or principal place of business. *Turner v. Prudential Ins. Co. of Am.*, 119 F.R.D. 381, 383 (M.D.N.C. 1988). Also, a deposition of a corporation through its agents or officers normally should be taken in the district of the corporation's principal place of business. *Id.* at 383.

a. A number of factors, however, may overcome the presumption and persuade a court to permit the deposition of a corporate agent or officer to be taken elsewhere. *Id.* "These factors include location of counsel for the parties in the forum district, the number of corporate representatives

a party is seeking to depose, the likelihood of significant discovery disputes arising which would necessitate resolution by the forum court; whether the persons sought to be deposed often engage in travel for business purposes; and the equities with regard to the nature of the claim and the parties' relationship." *Id.*; *accord Kolon Indus.*, 2010 U.S. Dist. LEXIS 51373, at *11-12.

b. The filing of a permissive counterclaim is also a factor that a court may consider in deviating from the foregoing presumptive deposition locations (*e.g.*, requiring the deposition to occur in the forum district). *Rapoca Energy Co., L.P. v. AMCI Exp. Corp.*, 199 F.R.D. 191, 193 (W.D. Va. 2001); *see also Armsey v. Medshares Mgmt. Servs., Inc.*, 184 F.R.D. 569, 572 (W.D. Va. 1998) ("By choosing to file the counterclaim in this district, I find that Medshares consciously chose to avail itself of the services of this court, much in the same way as a plaintiff would. Furthermore, based on the tone of this litigation to date, I regret that I must anticipate the likelihood of additional discovery disputes arising which would necessitate resolution by the forum court. Therefore, I hold that Medshares corporate officers should be made available for depositions in this district.").

c. Additionally, under the Federal Rules of Civil Procedure, there is a distinction between agents or officers of a corporate party, who may be compelled to attend a deposition based on notice only, and employees who are not officers, directors or managing agents of the corporate party and who must be served with a subpoena under the applicable federal rules governing subpoena power to compel their testimony. *Armsey*, 184 F.R.D. at 571.

5. **Spoliation**: As one court in the Eastern District of Virginia has remarked, "[i]t is difficult to imagine conduct that is more worthy of being considered litigation misconduct or more worthy of sanction than spoliation of evidence in anticipation of litigation because that conduct frustrates, sometimes completely, the search for truth." *Samsung Elecs. Co. v. Rambus Inc.*, 439 F. Supp. 2d 524, 535 (E.D. Va. 2006) (emphasis added).

a. Sanctions for spoliation can run the gamut from an adverse inference to dismissal, depending on the intent of the party destroying the evidence and the resulting prejudice to the moving party. *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 285 (E.D. Va. 2001) (noting that spoliation may occur

even in the absence of a court order requiring production of particular documents, and further noting that in addressing spoliation, courts have "considerable discretion, including ordering dismissal, granting summary judgment, or permitting an adverse inference to be drawn against the party as a means of leveling the playing field").

b. In *Rambus, Inc. v. Infineon Tech.*, 222 F.R.D., 280 (E.D. Va. 2004), the court held that Rambus intentionally destroyed documents. The court also required Rambus to produce documents withheld as privileged because they addressed Rambus's document destruction policy. The decision was vacated on appeal because of agreement between the parties.

6. **E-Discovery**: All relevant information which is available on electronic storage media is discoverable, whether readily readable ("active") or "deleted" but recoverable. *See*, *e.g.*, *Liggett v. Rumsfeld*, No. 04-1363, 2005 U.S. Dist. LEXIS 34162 (E.D. Va. Aug. 29, 2005) (discussing the discovery of material stored on the defendant's hard drive); *Trigon Ins. Co. v. United States*, 234 F. Supp. 2d 592 (E.D. Va. 2002) (permitting the discovery of "computer generated communications").

a. In *Qualcomm Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 911 (S.D. Cal. Jan. 7, 2008), Qualcomm sued Broadcom for patent infringement. Broadcom pleaded an affirmative defense that the patents were not enforceable because Qualcomm participated in "Joint Video Team" ("JVT") in 2002 and 2003. Broadcom sought discovery on Qualcom's participation in the JVT. At trial, testimony revealed that Qulacomm failed to produce tens of thousands of emails and other electronic documents relating to its participation in the JVT. The magistrate judge ordered Qualcomm to pay Broadcom $8.5 million for its "monumental and intentional discovery violation," representing all of Broadcom's attorneys' fees and costs incurred in the litigation. *Id.* at *43.

b. In *In re Fannie Mae Secs. Litig.*, 552 F.3d 814, 819 (D.C. Cir. 2009), the appeal concerned a dispute over subpoenas issued by three former senior Fannie Mae executives. *Id.* On appeal, the Office of Federal Housing Enterprise Oversight ("OFHEO") argued that the stipulated order limited the executives to specifying appropriate electronic search terms and did not unambiguously compel it to process inappropriate terms. *Id.* In the alternative, it

argued that it substantially complied with the stipulated order, rendering a finding of contempt inappropriate, and that in any event the district court abused its discretion by compelling compliance with the subpoenas in the first place. *Id.* The court held that the stipulated order obligated the OFHEO to process the search terms the executives specified and to meet the corresponding deadlines, and it violated the order by failing to produce privilege logs on time. *Id.* The court was unwilling to entertain an argument that the pecuniary burden on a non-party was too high to be reasonable once the nonparty had entertained a stipulated discovery order. *Id.* Moreover, the stipulated order was not ambiguous. *Id.* The OFHEO's alleged substantial good faith compliance was insufficient to avoid contempt. *Id.*

C. **Expert Disclosures**

1. **Substance**: Under Fed. R. Civ. P. 26, a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Rules 702, 703, or 705. Unless otherwise stipulated or ordered by the court, this expert disclosure must be accompanied by a written report — prepared and signed by the witness — if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. *Id.* The report must contain:

   a. a complete statement of all opinions the witness will express and the basis and reasons for them;

   b. the data or other information considered by the witness in forming them;

   c. any exhibits that will be used to summarize or support them;

   d. the witness's qualifications, including a list of all publications authored in the previous 10 years;

   e. a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

   f. a statement of the compensation to be paid for the study and testimony in the case.

2. **Timing of Expert Disclosures**: A party must make such disclosures at the times and in the sequence that the court orders in its scheduling order. *Id.* Otherwise the timing requirements of the Federal Rules of Civil Procedure apply.

3. **Proposed Amendments to Rule 26**: Furthermore, certain significant amendments to the text of Fed. R. Civ. P. 26 are presently scheduled to take effect on December 1, 2010 (a copy of the proposed amendments are attached in Appendix 1).

   a. If enacted, revised Rule 26 will extend work-product protection to draft reports by testifying expert witnesses and communications between an expert and retained counsel except for communications that: (1) "compensation for the expert's study or testimony;" (2) "facts or data provided by the lawyer that the expert considered in forming opinions;" and (3) "[a]ssumptions provided to the expert by the lawyer that the expert relied upon in forming an opinion."

   b. In another change, the proposed rule also would require, for expert witnesses who do not provide a written report under Rule 26(a)(2)(B), a summary disclosure of the facts and opinions about which they are expected to testify. This change would apply to witnesses who are not specially retained or employed to provide expert testimony, including party employees who do not regularly give expert testimony.

   c. Despite the language of the existing rule, some courts have required such witnesses to provide a Rule 26(a)(2)(B) report. The addition of this summary disclosure requirement and of express reference to the fact that such witnesses are not required to provide a written report should make it less likely that courts will continue to require such reports.

   d. If the proposed amendments do go into effect on December 1, 2010, as expected, they would apply to any new action commenced after that date. They also would govern in actions that are already pending in federal court when the new rule takes effect, unless the Supreme Court specifies otherwise, or unless the court in which the action is pending decides that enforcement of the new rule would not be feasible, or would result in injustice.

III. MOTIONS PRACTICE

A. Motions Generally

1. **Timing**: "All motions, unless otherwise directed by the Court and except as noted [] in subsection 7(F)(2), shall be accompanied by a written brief setting forth a concise statement of the facts and supporting reasons, along with a citation of the authorities upon which the movant relies. Unless otherwise directed by the Court, the opposing party shall file a responsive brief and such supporting documents as are appropriate, within eleven (11) days after service and the moving party may file a rebuttal brief within three (3) days after the service of the opposing party's reply brief. No further briefs or written communications may be filed without first obtaining leave of Court." E.D. Va. Local Rule 7(F)(1). Three days are added onto these deadlines for response if the pleading was served electronically. Fed. R. Civ. P. 6(d).

   a. "Briefs need not accompany motions for: (a) a more definite statement; (b) an extension of time to respond to pleadings, unless the time has already expired; and (c) a default judgment." E.D. Va. Local Rule 7(F)(2).

   b. "Any requests for an extension of time relating to motions must be in writing and, in general, will be looked upon with disfavor." E.D. Va. Local Rule 7(I).

   c. It is the practice of the courts in the Eastern District of Virginia that all agreed orders for an extension of time must contain original signatures.

2. **Format**: "All briefs, including footnotes, shall be written in 12 point Roman style or 10 pitch Courier style with one inch margins. Except for good cause shown in advance of filing, opening and responsive briefs, exclusive of affidavits and supporting documentation, shall not exceed thirty (30) 8-1/2 inch x 11 inch pages double-spaced and rebuttal briefs shall not exceed twenty (20) such pages." E.D. Va. Local Rule 7(F)(3).

3. ***Roseboro* Notice**: "It shall be the obligation of counsel for any party who files any dispositive or partially dispositive motion addressed to a party who is appearing in the action without counsel to attach to or include at the foot of the motion a warning consistent with the requirements of *Roseboro v. Garriso*n, 528 F.2d 309 (4th Cir. 1975)." E.D. Va. Local Rule 7(K).

B. **Pretrial Scheduling Orders**

1. **Supplant Federal Rules When Conflict**: Numerous judges in the Eastern District of Virginia use pretrial scheduling orders with varying provisions. "The parties and their counsel are bound by the dates specified in any such orders and no extensions or continuances thereof shall be granted in the absence of a showing of good cause." E.D. Va. Local Rule 16(B).

    a. The forms of scheduling orders for Judges Payne, Spencer, Williams and Hudson are attached. (Appendix 2).

C. **Personal Identifiers**

1. Personal identifiers must be redacted in accordance with Fed. R. Civ. P. 5.2, which provides: "Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only: (1) the last four digits of the social-security number and taxpayer-identification number; (2) the year of the individual's birth; (3) the minor's initials; and (4) the last four digits of the financial-account number." *Id.*

2. "The responsibility for redacting personal identifiers rests solely with counsel and the parties. The Clerk will not review each pleading for compliance with this Local Rule. Counsel and the parties are cautioned that failure to redact these personal identifiers may subject them to sanctions." E.D. Va. Local Rule 7(C).

    a. Prior to filing on the electronic case filing system, parties must also certify that they have complied with the requirements for redacting personal identifiers, as stated in the federal rules. This requirement applies to both pleadings and any exhibits filed with such pleadings.

D. **Summary Judgment**

1. **Briefing Requirements**: The Eastern District of Virginia requires that each brief in support of a motion for summary judgment include a specifically captioned section listing all of the material facts as to which the moving party contends there is no genuine issue and citing the parts of the record relied on to support the listed facts. E.D. Va. Local Rule 56(B).

a. Likewise, a brief in opposition must include a specifically captioned section listing all material facts as to which it is contended that their exists a genuine issue and citing the parts of the record relied on to support the facts alleged to be in dispute. *Id.*

b. "In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its listing of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." E.D. Va. Local Rule 56(B).

c. Per standard practice, all affidavits referenced in summary judgment memoranda must contain an original signature.

2. **One Motion Permitted**: "Unless permitted by leave of Court, a party shall not file separate motions for summary judgment addressing separate grounds for summary judgment." E.D. Va. Local Rule 56(C).

3. **Timing**: "[N] motion for summary judgment shall be considered unless it is filed and set for hearing or submitted on briefs within a reasonable time before the date of trial, thus permitting a reasonable time for the Court to hear arguments and consider the merits after completion of the briefing schedule specified in Local Civil Rule 7(F)(1)." E.D. Va. Local Rule 56(A).

4. **Proposed Amendments to Rule 56**: As with Rule 26, there have been a number of proposed amendments to Rule 56 that will take effect on December 1, 2010, unless Congress acts to provide otherwise (a copy of the proposed amendments are attached in Appendix 1).

a. The proposed amendments include: (1) requiring that a party asserting a fact that cannot be genuinely disputed provide a pinpoint citation to the record supporting that assertion; (2) recognizing that a party may submit an unsworn written declaration, certificate, verification, or statement under penalty of perjury in accordance with 28 U.S.C. § 1746 as a substitute for an affidavit to support or oppose a summary-judgment motion; (3) setting forth the court's options when an assertion of fact has not been properly supported by the party or responded to by the other party, including giving an opportunity to properly support or address the fact, treating the fact as undisputed for purposes of the motion, and granting summary judgment if supported by the motion and supporting

materials; (4) setting a time limit, subject to variation by local rule or by court order in a particular case, for the filing of a summary-judgment motion; and (5) explicitly recognizing that partial summary judgment may be entered. The changes are intended to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts.

b. Amended Rule 56(a) also returns to the use of the word "shall" in describing when summary judgment is to be entered ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."). In 2007, the restyling project of the Rules had replaced the former "shall" with "should." *See* Fed. R. Civ. P. 56(c)(2). Returning to the word "shall," which was the basis for years of case law interpretation before the 2007 restyling, will allow that case law to continue to develop. The standard for granting summary judgment, however, remains unchanged. Fed. R. Civ. P. 56, Advisory Committee Note of 2010.

E. **Class Actions**

1. **Virginia Law**: Virginia law does not provide a mechanism for class certification. Nevertheless, in *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), the assignee contended that a class of insureds could satisfy the prerequisites for a class action under Fed. R. Civ. P. 23, and that Rule 23 overrode the prohibition of class actions to recover penalties under New York state law in the federal action based on diversity of citizenship. The insurer argued that state law precluded the class action from being pursued, regardless of whether the putative class might otherwise be certifiable under Rule 23. The Supreme Court held that a class action was available in the federal diversity action to recover the statutory interest from the insured. *Id.* at 1448. Rule 23 explicitly provided a categorical rule that a class action could be maintained if the action satisfied the criteria of Rule 23. Thus, the Court held that a state law limiting the availability of the class action based on the relief sought did not apply under federal diversity jurisdiction. *Id.*

a. The implications of *Shady Grove* have yet to be addressed meaningfully by the Fourth Circuit, the Eastern District of Virginia or the Western District of Virginia.

F. **Rule 11 Sanctions**

1. **Pre-filing Requirements**: The "safe harbor" provisions of Rule 11 require the party seeking sanctions to serve the Rule 11 motion on the opposing party at least twenty-one days before filing the motion with the district court. Sanctions may be sought only if the challenged pleading is not withdrawn or corrected within twenty-one days after service of the motion. Fed. R. Civ. P. 11(c)(2).

2. **No Continuing Obligation**: The Fourth Circuit expressly has found that Rule 11 does not impose on a litigant a continuing obligation to re-evaluate the merits of the claim. *Brubaker*, 943 F.2d at 1381-82. The court reasoned that "Rule 11, by its own terms, can never be the basis for sanctions for failure to file certain papers," and that requiring a continuing obligation to reevaluate the merits of the case would be tantamount to sanctioning a failure to file. *Id.* at 1381 (citing *Simpson v. Welch*, 900 F.2d 33 (4th Cir. 1990)).

3. **No Sanctions After Dismissal**: Prior to the 1993 amendment to Rule 11, courts held that a voluntary dismissal of a claim did not strip a court of its power to impose Rule 11 sanctions. *See Bakker v. Grutman*, 942 F.2d 236, 241 (4th Cir. 1991) (citing *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2455 (1990)). However, following the addition of the "safe harbor" provisions in 1993, the Fourth Circuit found that the "safe harbor" "preclude[s] the serving and filing of any Rule 11 motion after conclusion of the case." *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 152 (4th Cir. 2002); *see also Brickwood Contrs., Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 389 (4th Cir. 2004) (en banc) (citing *Hunter* for the proposition that "[b]ecause [Rule 11] requires that the party submitting the challenged pleading be given an opportunity to withdraw the pleading, sanctions cannot be sough after summary judgment has been granted"); *accord Cincinnati Ins. Co. v. Dynamic Dev. Group, LLC*, 336 F. Supp. 2d 552, 569 (M.D.N.C. 2004).

G. **Attorney's Fees**

1. **American Rule**: A court's "basic point of reference when considering the award of attorney's fees is the bedrock principle known as the 'American Rule': Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt v. Reliance Std. Life Ins. Co.*, 130 S. Ct. 2149, 2156-57 (2010).

2. **Sanctions**: However, courts may impose an award of attorney's fees as a form of sanctions. For instance, Rule 37 provides, in pertinent part: "If the motion [to compel] is granted or if the disclosure or requested discovery is provided after the motion was filed, the court *shall*, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees . . . ." Fed. R. Civ. P. 37(a)(4)(A) (emphasis added); *see also* Fed. R. Civ. P. 56(g) ("If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result."); 28 U.S.C. § 1927 ("Any attorney or other person admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").

H. Stipulations of Dismissal

1. **Timing Requirements**: A "plaintiff may dismiss an action without a court order: (1) by filing a notice of dismissal before the opposing party serves an answer or a motion for summary judgment; (2) or by filing a stipulation of dismissal signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A)). After the filing of an answer or motion for summary judgment, however, if the defendant does not consent to dismissal, the plaintiff must seek leave of court to obtain dismissal. Fed. R. Civ. P. 41(a)(2).

I. Hearings

1. "The moving party shall be responsible to set the motion for hearing or to arrange with opposing counsel for submission of the motion without oral argument. Unless otherwise ordered, a motion shall be deemed withdrawn if the movant does not set it for hearing (or arrange to submit it without a hearing) within thirty (30) days after the date on which the motion is filed. The non-moving party also may arrange for a hearing." E.D. Va. Local Rule 7(E).

2. "Before endeavoring to secure an appointment for a hearing on any motion, it shall be incumbent upon the counsel desiring such hearing to meet and confer in person or by telephone with his or her opposing counsel in a good-faith effort to narrow the area of disagreement." *Id.*