

Stuart Raphael

**MEMORANDUM**

TO: Boyd-Graves Conference  
FROM: Committee to Study Changes to Virginia Rule on Scope of Discovery  
DATE: July 1, 2008

**QUESTION PRESENTED**

Our committee studied whether Virginia Rule 4:1(b)(1) should be amended to track the amendment (effective 12/1/2000) to Rule 26(b)(1) of the Federal Rules of Civil Procedure. Eight members served on the committee: the Hon. Stanley P. Klein, Professor W. Hamilton Bryson, Leonard Brown, W. Coleman Allen, Jr., Susan Blackman, C. Kailani Memmer, Derrick L. Walker, and Stuart Raphael (Chairman).

Virginia Rule 4:1(b)(1) tracks the version of the federal rule prior to 2000. It allows discovery of matters unrelated to the claims and defenses asserted in the pleadings provided such discovery relates to the "subject matter involved in the pending action."<sup>1</sup> By contrast, Rule 26(b)(1), as amended, provides for discovery of information "relevant to the claim or defense of any party," but, "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."

<b>Comparison of Virginia and Federal Rules on Scope of Discovery</b>	
<p>Virginia Rule 4:1(b)(1):</p> <p>Parties may obtain discovery regarding any matter, not privileged, <b>which is relevant to the subject matter involved in the pending action</b>, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.</p>	<p>Fed. R. Civ. P. 26(b)(1) (2000 Amendment):</p> <p>Parties may obtain discovery regarding any matter, not privileged, <del>that which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party</del>, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. <u>For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.</u></p>

<sup>1</sup> See *Hall v. Hall*, 2005 Va. App. LEXIS 401, 2005 WL 2493382 (Oct. 11, 2005) ("The Supreme Court of Virginia has not yet followed the federal example by amending this discovery rule. Rule 4:1(b)(1) thus retains the broader scope of discovery present under the older, pre-2000 federal rule.")

## RECOMMENDATION

By a vote of 6-2, the Committee recommends that the Boyd-Graves Conference support amending Rule 4:1(b)(1) to incorporate the amendment to its federal counterpart. The revised rule would read as follows:

Rule 4:1(b)(1). Parties may obtain discovery regarding any matter, not privileged, that which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.

## DISCUSSION

According to the federal Advisory Committee, the amendment to federal Rule 26(b)(1) was “designed to involve the court more actively in regulating the breadth of sweeping or contentious discovery. The Committee has been informed repeatedly by lawyers that involvement of the court in managing discovery is an important method of controlling problems of inappropriately broad discovery.”<sup>2</sup>

To date, seven States have adopted a discovery rule that closely resembles the revised federal rule, except that in three of those States -- Arkansas, Mississippi, and Oregon -- the rule does not authorize broader subject matter discovery for good cause shown.<sup>3</sup>

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<sup>2</sup> Amendments to Federal Rules of Civil Procedure, 192 F.R.D. 340, 389 (2000).

<sup>3</sup> Ark. R. Civ. P. 26(b)(1) (“relevant to the issues in the pending actions, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party”); Colo. R. Civ. P. 26(b)(1) (“relevant to the claim or defense of any party . . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”); D.C. Sup. Ct. R. Civ. P. 26(b)(1) (“relevant to the claim or defense of any party . . . . For good cause, the Court may order discovery of any matter relevant to the subject matter involved in the action.”); Minn. R. Civ. P. 26.02(a) (“relevant to a claim or defense of any party . . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”); Miss. R. Civ. P. 26(b)(1) (“relevant to the issues raised by the claims or defenses of any party”); Or. R. Civ. P. 36(B)(1) (“relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party”); Wyo. R. Civ. P. 26(b)(1)(A) (“relevant to the claim or defense of the party seeking discovery or to the claim or defense of any party . . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”).

## Arguments for the Amendment

Commentators have identified three interrelated goals behind the 2000 amendment to federal Rule 26(b)(1): “first, to curb sweeping and contentious discovery in complex high stakes cases; second, to involve the court earlier and more often in discovery disputes; and finally, to encourage and confirm trial judges’ discretion to tailor discovery to the needs of the particular case.”<sup>4</sup>

In practice, the amendment would appear to shift the burden with respect to *which* party must justify discovery that goes beyond that which is relevant to the claims or defenses in the case. Under the current Virginia rule and the old federal rule, the party seeking discovery is entitled presumptively to broad discovery relating to the subject matter of the litigation, even if such discovery is not relevant to the particular claims or defenses raised in the pleadings. The burden is on the party opposing such discovery to persuade the court to disallow it under Rule 4:1(c) on the ground, for example, that it is unduly burdensome. Under the 2000 amendment, by contrast, a party is entitled to discovery related to the claims and defenses of any party, but if it seeks broader discovery relevant only to the “subject matter” of the litigation, and if the opposing party should object, then the burden is on the party seeking discovery to demonstrate “good cause.”

The amendment changes the calibration associated with determining the breadth of discovery that is proper in a given case, but it does not necessarily change the outcome of a particular discovery dispute. As explained by the Special Reporter to the federal Advisory Committee on Rules, “[i]n operation . . . these changes should not have a dramatic effect on the scope of discovery. [T]he vast majority of current discovery would not be affected at all by this change. Yet, as the Committee Note adds, the change ‘signals to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings.’”<sup>5</sup>

The six members of our Committee who favor the amendment viewed its primary benefit to be the reduction in the cost and burden associated with overbroad discovery, particularly in complex commercial cases. *Accord* Advisory Comm. Report, 192 F.R.D. at 389 (“The Committee has heard that in some instances, particularly cases involving large quantities of discovery, parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the ‘subject matter’ involved in the action.”). For instance, a defendant in a commercial contract or franchise dispute in which a single recent breach of contract is

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<sup>4</sup> Christopher C. Frost, *The Sound and the Fury or the Sound of Silence?: Evaluating the Pre-Amendment Predictions and Post-Amendment Effects of the Discovery Scope-Narrowing Language in the 2000 Amendments to Federal Rule Of Civil Procedure 26(b)(1)*, 37 Ga. L. Rev. 1039, 1080 (2003) (quotation and citation omitted).

<sup>5</sup> Richard L. Marcus, *The 2000 Amendments to the Discovery Rules*, 2001 Fed. Cts. L. Rev. 1, 5 (2001) (quoting 192 F.R.D. at 389).

alleged might seek discovery concerning plaintiff's performance during numerous preceding years, despite that such discovery has no relevance to any particular claim or defense. Such discovery would be permissible under the current rule because it relates to the subject matter of the litigation -- the parties' contract. Under the proposed amendment, unless the defendant could show good cause for the broader discovery request, it would not be allowed.

A secondary benefit of the amendment would be to eliminate an unnecessary inconsistency in discovery practice between the Virginia and federal rules. While consistency for its own sake is not necessarily a virtue, there is no clear benefit to maintaining the Virginia rule on scope of discovery, particularly when the Virginia rule is modeled on an old federal rule that has since been amended.

### **Arguments Against the Amendment and the Committee's Response**

Two committee members opposed the amendment. A copy of their separate view is appended to this report.

First, they contend that the current rule is adequate and that any party facing overbroad discovery can move for a protective order. A majority of the Committee members believe, however, that many litigants abuse the current rule by routinely seeking discovery well beyond the scope of the claims and defenses raised by the pleadings. In order to obtain relief from overbroad discovery, the party opposing it must demonstrate that such discovery subjects it to "annoyance, embarrassment, oppression, or undue burden or expense . . ." Rule 4:1(c). This relatively demanding standard tends to encourage parties pressing such overbroad discovery to take their chances on a motion for a protective order; as long as the discovery relates to the subject matter of the litigation, it will likely be permitted. Thus, the current rule tends to permit far flung discovery that is not relevant to the claims and defenses in the proceeding, increasing the costs of litigation and the burden it imposes on the parties.

A majority of the Committee believes that *relevance* should be the primary consideration when discovery is sought. If a party who seeks discovery cannot articulate why it is relevant to the claims and defenses in the case, then *that* party properly bears the burden of demonstrating good cause before such discovery is allowed. The rule change serves the salutary purpose of encouraging the parties to think about relevance in the first instance before pressing a discovery dispute relating to broad subject-matter discovery that does not relate to the claims and defenses in the litigation. Focusing on relevance achieves a better calibration between the discovery needs of a party and the burden imposed on the opponent. The rule change should encourage litigants to fashion their discovery requests according to the needs of the particular case, rather than to serve generic, off-the-shelf discovery packages.

Second, the two dissenting committee members expressed the concern that the amendment might tend to favor defendants over plaintiffs. Commentators who have analyzed the impact of the federal amendment, however, have concluded that the rule has

not been anti-plaintiff. One of the dissenters from the federal Advisory Committee reported in 2001 that, “so far plaintiffs have not been doing at all badly, both when they have sought discovery and when they have resisted it.”<sup>6</sup> A 2003 survey of reported cases similarly concluded: “[t]he concern that the new Rule allocates a burden to plaintiffs that serves as a significant barrier to the receipt of discovery finds little, if any, support in the cases.”<sup>7</sup> Although neither survey purported to apply rigorous statistical analysis, it is telling, nonetheless, that the authors -- one of whom voted against the rule change -- could not discern any anti-plaintiff consequence. One commentator explained that “[t]he minimal showings of relevance and admissibility hardly pose much of an obstacle for an inquiring party to overcome, even considering the recent amendment to Rule 26(b)(1).”<sup>8</sup>

Some opponents of the federal amendment also questioned whether it would be difficult to determine the dividing line between discovery relevant to the claims and defenses of the parties, for which discovery is presumptively allowed, and discovery relevant only to the subject matter of the litigation, for which the proponent would have to demonstrate good cause. The federal Advisory Committee responded that, while the dividing line between the two “cannot be defined with precision,” 192 F.R.D. at 389, the answer depends on the reason offered for the discovery and the claims and defenses to which it relates. Indeed, discovery relating to the claims or defenses could range well beyond the incident that gave rise to the lawsuit:

A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. For example, other incidents of the same type, or involving the same product, could be properly discoverable under the revised standard. Information about organizational arrangements or filing systems of a party could be discoverable if likely to yield or lead to the discovery of admissible information. Similarly, information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable. In each instance, the determination whether such information is discoverable because it is a relevant to the claims or defenses depends on the circumstances of the pending action.

*Id.*

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<sup>6</sup> Thomas D. Rowe, Jr., A Square Peg in a Round Hole? The 2000 Limitation on the Scope of Federal Civil Discovery, 69 Tenn. L. Rev. 13, 25 (2001).

<sup>7</sup> Frost, *supra* note 4, at 1063.

<sup>8</sup> *Id.* at 1067 (quoting *Anderson v. Hale*, No. 00C2021, 2001 WL 503045, at \*3 (N.D. Ill. May 10, 2001)).

## CONCLUSION

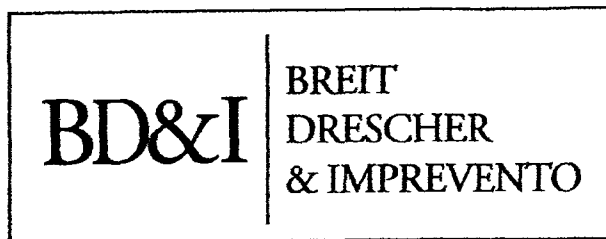
By a vote of 6-2, the Committee recommends that the Boyd-Graves Conference support the proposed amendment. The majority of our Committee do not view it as panacea to reign in all discovery abuses. But the amendment appears to give the parties and the trial court a tool that is at least marginally more effective than the current rule with respect to limiting the abusive use of broad-ranging discovery requests, the relevance of which a party is unable to articulate.



Stuart A. Raphael  
Chairman

Hon. Stanley P. Klein  
Prof. William Hamilton Bryson  
Leonard Brown  
Susan Blackman  
C. Kailani Memmer

Dissenting members (separate view attached):  
W. Coleman Allen, Jr.  
Derrick L. Walker



LAWYERS HELPING PEOPLE

June 23, 2008

**VIA FACSIMILE AND MAIL**

Stuart A. Raphael  
Hunton & Williams  
1751 Pinnacle Drive, Suite 1700  
McLean, Virginia 22102

**Re: Boyd-Graves Conference Committee to Study Changes to Virginia Rule  
on Scope of Discovery**

Dear Stuart:

As discussed during our committee's most recent meeting, Coleman Allen and I strongly oppose amending Virginia Rule 4:1(b)(1) to track the 2000 amendment to Fed. R. Civ. P. 26(b)(1) on several bases.

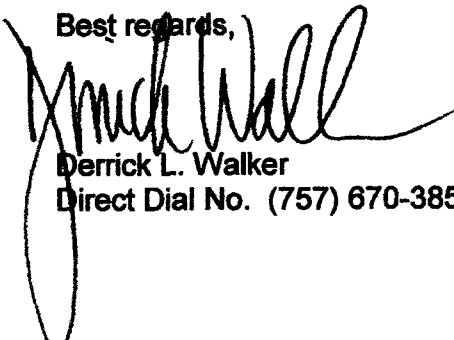
First, and perhaps most importantly, Rule 4:1(b)(1) is effective in its present form. Contrary to the prevailing view of our committee's majority, our due diligence indicates that overly broad, unduly burdensome, and otherwise contentious discovery is not a significant problem in need of a solution. In fact, most Virginia practitioners we encountered on this topic identified failures to produce discoverable material in a timely fashion, and the outright failure to produce as the most frequent and troubling bases for discovery disputes in Virginia practice. The number that viewed overly broad and contentious discovery as a significant issue was negligible. Nevertheless, regardless of the nature of the dispute, be it a failure to produce, or the propounding of overly broad and contentious discovery, those issues can be resolved adequately within the framework of the current rules by asserting an objection under Rule 4:1(g) and moving for relief in the form of a protective order under Rule 4:1(c), if necessary. As a result, we see no reason to overhaul Rule 4:1(b)(1).

The primary motivating factors behind the 2000 amendment to Fed. R. Civ. P. 26(b)(1) were: (1) a need to curb sweeping and contentious discovery in complex high stakes cases; (2) to involve the court earlier and more often in discovery disputes; and (3) to encourage and confirm trial judge's discretion to tailor discovery to the needs of a particular case. The proposed amendment is no better-suited to achieve these goals

than the current rule scheme. If relief from sweeping and contentious discovery in a complex high stakes case is appropriate, such relief can be sought and granted through the framework of the current discovery rules. If there is a desire to have the trial court take a more active role in the discovery process, then a motion can be pursued once reasonable attempts to confer prove futile. Whether to seek relief early and often is a tactical decision best left to counsel depending on the facts and circumstances of a particular case. Of course, the option remains available. If the goal is to provide discretion to the trial judge in tailoring discovery to fit the needs of a particular case, then one need look no further than Rule 4:1(b), which governs the scope of discovery and clearly grants the trial court the discretion to limit discovery where appropriate.

Many within the committee expressed a belief that the proposed rule change would decrease litigation costs by reducing the number of discovery disputes that will ultimately be brought to court. This is an oversimplification of what is likely to occur. In light of its wording, many practitioners will view the proposed rule as a substantial narrowing of the scope of permissible discovery in Virginia practice. The majority of our committee members certainly adopt this view. Others will view the amendment as strictly esoteric and will govern themselves accordingly. The practical effect will be an increase in discovery disputes; not a limitation of them. This will amplify the cost of litigation; not reduce it.

Finally, as you have noted throughout our discussions on this issue, we are concerned that the amendment which seeks to narrow the scope of discovery will tend to favor defendants over plaintiffs, particularly as plaintiffs have the burden of proof and in some instances must have the latitude afforded by expansive discovery in cases involving complex and novel theories of recovery.

Best regards,  
  
Derrick L. Walker  
Direct Dial No. (757) 670-3858

DLW/kep

cc: Hon. Stanley P. Kline  
Hamilton Bryson  
Leonard Brown  
W. Coleman Allen, Jr.  
Susan Blackman  
C. Kailani Memmer

Editor's Note: The Committee's recommendation to amend Rule 4:1(b)(1) to track