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J. Westwood Smithers III

## Proving Bias of Defense Medical Experts: Overcoming a Defense Motion to Quash a “Lombard” Subpoena

By J. Westwood Smithers, III

Personal injury cases, particularly ones with complicated medical issues or where the stakes are very high, often become a battle of the experts. Even if a defendant admits liability, the defendant usually challenges the nature, seriousness, and permanence of the plaintiff’s injuries, as well as the amount of compensation that would fully and fairly compensate the plaintiff for the injury. Accordingly, the defendant often retains a medical expert to contest the plaintiff’s claimed damages. In most cases, these defense experts will conclude that most of the plaintiff’s injuries were not caused by the defendant’s wrongdoing or that the plaintiff’s injuries were not as serious, painful, long-lasting or in need of care as the plaintiff claims.

Since the testimony of the defense medical experts almost always differs widely from the testimony of the plaintiff’s treating doctors and medical experts, the jury’s evaluation of the credibility of each of these witnesses will be extremely important. The jurors will be instructed that they

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are to assess “the credibility of the witnesses” and in so doing may consider, among other things, the witness’s “interest in the outcome of the case” and “their bias.” *Va. Model Jury Instrs.—Civil Instr. No. 2.020* (2026). The jurors will also be instructed that they “are entitled to use . . . common sense in judging any testimony.” *Id.* The jurors could even decide that the considerations of “interest” and “bias” mean that they should “discard all or part of the testimony of” the expert witness. *Id.*<sup>1</sup>

Nearly four decades ago the Supreme Court of Virginia made clear that a litigant has the right to present evidence which jurors could reasonably conclude shows interest or bias. In *Henning v. Thomas*, 235 Va. 181, 366 S.E.2d 109 (1988), a medical negligence case, defendants’ counsel sought to cross-examine plaintiff’s expert witness concerning how he became involved in the case. On appeal, the defendants claimed that the trial court erred in prohibiting them from revealing to the jury that plaintiff’s expert witness was employed by a nationwide company engaged in the business of providing testimony in medical negligence cases. Agreeing with defendants, the Supreme Court of Virginia reversed, noting that:

*The bias of a witness, like prejudice and relationship, is not a collateral matter. The bias of a witness is always a relevant subject of inquiry when confined to ascertaining previous relationship, feeling and conduct of the witness. . . . On cross-examination great latitude is allowed and . . . the general rule is that anything tending to show the bias on the part of a witness may be drawn out. . . .*

The defendant doctors were entitled to attempt to persuade the jury that [plaintiff’s witness] was a “doctor for hire” . . . . Once the jury was made aware of this information it was for the jury to decide what weight, if any, to give to [the witness’] testimony. This was a classic case of an effort to establish bias, prejudice, or relationship.

*Id.* at 188–89, 366 S.E.2d at 113 (internal citations omitted) (emphasis by the Court in *Henning*).

Although the *Henning* case involved a challenge to the interest and bias of a plaintiff’s expert, the holding obviously is equally applicable to such challenges with respect to defense experts. In order to get this type of evidence in front of a jury, plaintiff’s counsel must get to work long before trial. As soon as the defense experts are identified, plaintiff’s counsel should check with other plaintiff’s lawyers and organizations to obtain financial information and prior deposition testimony of the defense experts.

These sources of information may show that the defense’s expert almost never serves as a plaintiff’s expert but has served as a defense witness in dozens of cases. These sources may show that the defense expert has regularly been hired by that specific defense lawyer and his law firm or that the expert receives large sums of money from defense firms in general and companies insuring defendants. Through such digging, a plaintiff’s lawyer might even discover that the defense expert makes a significant percentage of their overall income testifying in these cases for the defense versus actually practicing medicine or engaging in their field of expertise. Obviously, a jury

<sup>1</sup> Counsel should use care in deciding how to handle evidence and arguments relating to bias and interest at trial. An attack on an expert’s credibility based on financial information and work history which arguably show bias and interest will not necessarily have the effect of diminishing the expert’s credibility; it may have the opposite effect. Jurors might conclude, for example, that a defense expert who regularly testifies and receives more than \$100,000 each year for serving as an expert in personal injury cases must be very knowledgeable and highly qualified (and they may attach little significance to the fact that the money always comes from defense interests). Additionally, before making bias issues a central theme at trial, counsel should consider the extent to which her own experts are vulnerable to challenge on the basis of interest or bias.

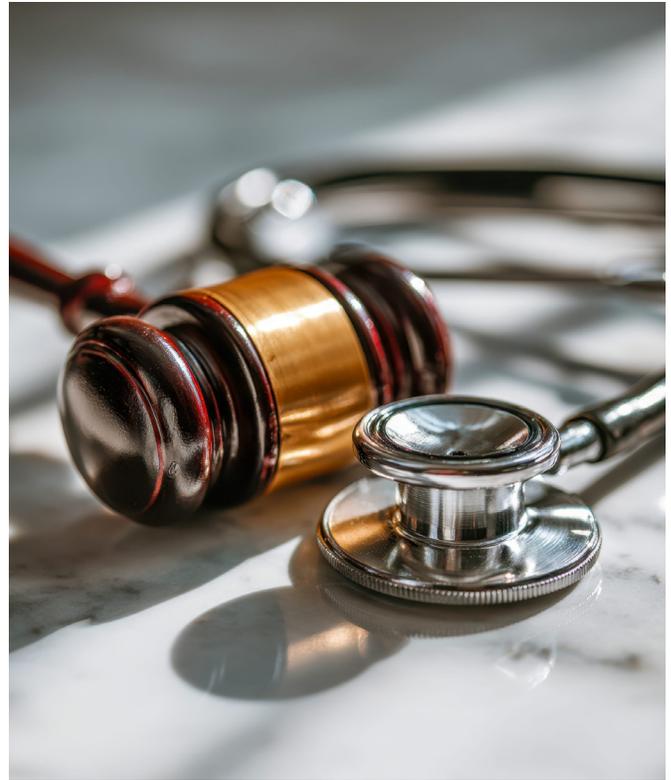
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using its common sense could decide that such a defense expert has a strong interest in maintaining this income stream and is thus biased in favor of defense interests.

Plaintiff's counsel should also consider issuing a subpoena duces tecum to some or all of the defense experts seeking documents containing financial information and other information relevant to interest and bias. These subpoenas have been referred to as "*Lombard* subpoenas"<sup>2</sup> ever since the opinion of the Supreme Court of Virginia in *Lombard v. Rohrbaugh*, 262 Va. 484, 551 S.E.2d 349 (2001), underscored the vital importance of the right to present evidence of bias and interest at trial. [Prior to issuing *Lombard* subpoenas to the opposing party's experts, however, counsel should consider whether doing so might lead to unintended negative consequences.<sup>3</sup>]

In *Lombard*, the Supreme Court held the circuit court properly allowed a plaintiff to cross-examine the defendant's expert witness to show that the witness had received over \$100,000 per year in payments from the defendant's insurance company for the years 1998 and 1999. 262 Va. at 495, 551 S.E.2d at 355. The Supreme Court held that the information regarding the retained medical expert's previous work with the insurance carrier was relevant and was so important that it had to be allowed into evidence despite the obvious potential for prejudice that could result from injecting information regarding liability insurance. 262 Va. at 494-97, 551 S.E.2d 349, 354-56.



The Court's *Lombard* opinion sparked an increased use of subpoenas to obtain information relevant to bias and interest of experts. The importance of the right of a party (whether the plaintiff or the defendant) to challenge an opposing expert on the basis of interest and bias has been powerfully reaffirmed by numerous subsequent decisions of Virginia appellate courts. See *Sawyer v. Comerci*, 264 Va. 68, 563 S.E.2d 748 (2002); *Graves v. Shoemaker*, 299 Va. 357, 851 S.E.2d 65 (2020); *Reston Anesthesia Assocs., P.C. v. Bandy*, 86 Va. App. 54, 68, 920 S.E.2d 559, 565 (2025).

<sup>2</sup> A so-called *Lombard* subpoena frequently will also include requests for documents relating to matters other than the interest or bias of the expert. For example, a *Lombard* subpoena may request a list or copy of publications authored by the expert, a copy of all materials which the expert reviewed in forming her opinions, or other kinds of documents. Those types of requests are also addressed later in this article.

<sup>3</sup> For example, plaintiff's counsel should think about whether issuing *Lombard* subpoenas to the defense experts will prompt the defense to issue *Lombard* subpoenas to the plaintiff's experts. Some experts are so opposed to responding to *Lombard* subpoenas that they may withdraw from the case (or be stricken by the court) instead of providing a response to the subpoena. And *Lombard* subpoenas also tend to invoke discovery disputes, as discussed later in this article.

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If counsel intends to issue *Lombard* subpoenas, they should issue them immediately after the defense experts are designated and anticipate push back from the defense. The need for prompt action arises from the fact that defense lawyers often file a motion to quash *Lombard* subpoenas. As a result, plaintiff's counsel will need time to resolve the issue by agreement with defense counsel or obtain a hearing with and order from the court. A court hearing, if necessary, will need to be held quickly enough to allow time for the expert to respond to the subpoena prior to the close of discovery.

Defense motions to quash *Lombard* subpoenas frequently assert that a subpoena to an expert should not be enforced until approval of the court is first obtained. These motions contend that Rule 4:1(b)(4) of the *Rules of Supreme Court of Virginia* provides that discovery from experts is limited to the standard expert interrogatory and a deposition of the expert. This contention is contrary to the plain language of the Rule.

The explicit language of Rule 4:1(b)(4) establishes that the limiting provisions of Rule 4:1(b)(4) apply **only** to “facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this Rule and acquired or developed in anticipation of litigation or for trial.” Va. Sup. Ct. R. 4:1(b)(4) (emphasis added). Thus, it is clear that the provisions of Rule 4:1(b)(4) limiting expert discovery **do not apply** to and do not limit discovery of documents and information which were not acquired or developed in anticipation of litigation or for trial.

The fundamental defect in the defense motions to quash is that all or nearly all of the documents which are sought by the *Lombard* subpoenas are **not** documents which concern “facts known and opinions held by experts” which have been “acquired or developed in anticipation of litigation or for trial.” For example, documents listing cases in which the expert has previously testified, documents listing or constituting the expert's previous publications, and the depositions from an expert's previous injury

cases are **not** “facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this Rule and acquired or developed in anticipation of litigation or for trial[.]” Va. Sup. Ct. R. 4:1(b)(4).

And in that event, the only limitation on a subpoena duces tecum would be the general limitation on all discovery: “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” Va. Sup. Ct. R. 4:1(b)(1) (emphasis added).

Any assertion that issuing a *Lombard* subpoena to a defense expert requires prior court approval is not only contrary to the language of Rule 4:1(b)(4) and the broad discovery provisions of Rule 4:1(b)(1), it is also contrary to the fact that the *Rules of Supreme Court of Virginia* expressly authorize the issuance of subpoenas to both parties and non-parties. See Va. Sup. Ct. R. 4:9 & 4:9A, respectively. The Rules expressly authorize an attorney to issue a subpoena duces tecum without first seeking leave of court or a court order. See Va. Sup. Ct. R. 4:9(b)(i) (“The request may, without leave of court, be served . . . after commencement of the action[.]”); Va. Sup. Ct. R. 4:9A(a)(2) (“In a pending civil proceeding, a subpoena duces tecum may be issued by an attorney-at-law as an officer of the court[.]”).

A *Lombard* subpoena will often also seek a copy of all documents relating to the referral of the plaintiff's claim and her records to the expert for his review and the fees for that review. Although these documents do relate to the expert's work on the case at hand, these documents are expressly permitted. See Va. Sup. Ct. R. 4:1(b)(4)(A)(v) (“Discovery of facts known and opinions held by experts, . . . acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:” “Communications between a party's attorney and any expert witness expected to testify at trial are not discoverable

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except to the extent that such communications relate to compensation for the expert's work on the case or identify facts or assumptions that the expert considered or relied upon in forming the opinions to be expressed.") (emphasis added).

Counsel should help courts understand that defense motions to quash a *Lombard* subpoena which are based upon the limiting language of Rule 4:1(b)(4) actually have no basis in the language of the Rule unless the subpoena seeks documents regarding facts known and opinions held by experts . . . and acquired or developed in anticipation of litigation or for trial." Va. Sup. Ct. R. 4:1(b)(4) (emphasis added). When a defense motion to quash improperly attempts to rely upon the language of Rule 4:1(b)(4) to block discovery which plainly is not barred by but instead is allowed by that Rule and the other *Rules of Supreme Court of Virginia*, the defense is attempting to improperly delay and increase the costs of the litigation and an award of sanctions should be considered by the courts.

Courts are, of course, reluctant to impose sanctions for violation of this statute. But a motion which improperly attempts to block discovery which is plainly not barred by and is instead allowed by the express language of the *Rules of Supreme Court of Virginia* is a motion which is not "warranted

by existing law or a good faith argument for the extension, modification, or reversal of existing law;" such a motion instead is a motion which has been interposed for an improper purpose, "such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Va. Code § 8.01-271.1(B).

The trial courts also need to understand that these motions to quash *Lombard* subpoenas seek to delay and interfere with the plaintiff's well-established and vitally-important right to challenge the interest and bias of defense experts. Trial courts should not allow that right to be rendered meaningless by means of motions to quash which have no basis. Trial courts should be reminded that an erroneous denial of pretrial discovery of relevant information may require reversal of the outcome of a subsequent trial or judgment. *See Lyle, Siegel, Croshaw & Beale, P.C. v. Tidewater Capital Corp.*, 249 Va. 426, 439, 457 S.E.2d 28, 36 (1995) (granting new trial of legal malpractice action on grounds that included trial court's refusal to require discovery of relevant documents); *O'Brian v. Langley Sch.*, 256 Va. 547, 552, 507 S.E.2d 363, 366 (1998) (summary judgment reversed because the trial court's erroneous denial of a pretrial motion to compel discovery "substantially affected the [movant's] ability and right to litigate" the issues in the case).



Steven G. Friedman

# Tort Claims Against Virginia Local Governments

By Steven G. Friedman

Bringing suit against the government implicates rules and procedures not applicable to the usual private-party tort case. The following is part one of a three-part series summarizing the process and procedure for bringing a negligence claim against local, state, and federal governmental entities.

The following article addresses the process and procedure for filing a tort claim against a Virginia local government, meaning a county, city, or town. Future articles will address claims against the state and federal government.

As detailed below, there are two things to note when preparing to sue a Virginia local government: (1) a pre-suit written notice requirement and (2) the specified person(s) upon whom to effect service of process. Please note that the question of whether a particular governmental entity is immune or otherwise not liable is beyond the scope of this writing.

## Pre-Suit Notice

Before filing a tort claim against a Virginia locality, the claimant must file “a written statement of the nature of the claim . . . within six months after such cause of action accrued.” Va. Code § 15.2-209(A) (emphasis added). “However, if the claimant was under a disability at the time the cause of action accrued, the tolling provisions of § 8.01-229 shall apply.” *Id.*

The written notice must be delivered to either the local government’s “attorney or with the chief executive or mayor” of the locality. Va. Code § 15.2-209(B) (emphasis added). “The notice may be

delivered by hand, by any form of United States mail service (including regular, certified, registered or overnight mail), or by commercial delivery service.” Va. Code § 15.2-209(C).

Significantly, the notice is only deemed filed upon receipt, not mailing. *See id.* Moreover, the claimant bears the burden of proving “notice in conformity with this section” Va. Code § 15.2-209(D). Luckily, however, “[a] signed United States mail return receipt indicating the date of delivery, or any other form of signed and dated acknowledgment of delivery, given by authorized personnel in the office of the official with whom the statement is filed, shall be prima facie evidence of filing of the notice under this section.” *Id.* So whichever means are used to effect delivery, it is important to obtain a signed and dated receipt.

There is no generic form or specified format for the written notice itself, which can simply be a letter from the claimant or their counsel. The only guidance for the substance of the letter is that it state “the nature of the claim,” including “the time and place at which the injury is alleged to have occurred.” Va. Code § 15.2-209(A).



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Significantly, when communicating that information, the claimant must provide sufficient detail so that a reasonable person could identify the location of the incident. Compare *Halberstam v. Commonwealth*, 251 Va. 248, 467 S.E.2d 783 (1996) (dismissed a claim for an injury that occurred in a GMU parking lot because the notice did not specify in which parking lot the injury occurred) with *Bates v. Commonwealth*, 267 Va. 387, 593 S.E.2d 250 (2004) (where there was only one university medical center in the city where the alleged events took place and the plaintiff's notice of claim identified that place and also stated that decedent was admitted to that hospital and was injured by the alleged negligence of the employees of that hospital, the combination of these assertions reasonably identified the place of injury; plaintiff was not required to identify the floor or room within the hospital at which the alleged injury as that degree of specificity was unnecessary to satisfy the statute).<sup>1</sup>

“The provisions of this section are mandatory and shall be strictly construed.” Va. Code § 15.2-209(G). *But see id.* (“This section is procedural and compliance with its provisions is not jurisdictional.”). However, the failure to provide a written notice of claim shall not bar a claim, “provided that the attorney, chief executive, or mayor of such locality, or any insurer or entity providing coverage or indemnification of the claim, had actual knowledge of the claim, which includes the nature of the claim and the time and place at which the injury is alleged to have occurred, within six months after such cause of action accrued.” Va. Code § 15.2-209(A) (emphasis added). The actual-knowledge exception is broader than the general written-notice requirement in that the former but not that latter includes “any insurer or entity providing coverage or indemnification.” In other words, if the locality's insurer has “actual knowledge” of the claim, no formal written notice is required.

Although there are presentment and appeal procedures for counties, see Va. Code § 15.2-1243

et seq., they do not apply to tort claims. See *Seabolt v. County of Albemarle*, 283 Va. 717, 721, 724 S.E.2d 715, 718 (2012).

## Service of Process

As there is no other statute specifying a statute of limitations for suit against a local government, the traditional time limitations apply, i.e., two years for negligence causing personal injury. See Va. Code § 8.01-243(A). To effect service of process against a local government, there are different people to be served depending on who exactly is named as the defendant.

If suing “a city or a town,” then you must serve the “city or town attorney,” if there is one; otherwise serve the “mayor, manager or trustee of [the] town or city.” Va. Code § 8.01-300(1). If suing “a county,” then you must serve the “county attorney,” if there is one; otherwise serve the “attorney for the Commonwealth” for that county. Va. Code § 8.01-300(2).

If suing “any political subdivision, or any other public governmental entity created by the laws of the Commonwealth and subject to suit as an entity separate from the Commonwealth,” then you must serve “the director, commissioner, chief administrative officer, attorney, or any member of the governing body of such entity.” Va. Code § 8.01-300(3) (emphasis added). If suing “a supervisor, county officer, employee, or agent of the county board, arising out of official actions of such supervisor, officer, employee, or agent,” then you must serve that person and the county attorney, if there is one; otherwise “the clerk of the county board.” Va. Code § 8.01-300(4).

“Service under this section may be made by leaving a copy with the person in charge of the office of any officer designated [herein].” Va. Code § 8.01-300.

<sup>1</sup> Although these two cases are against the Commonwealth rather than a local government, the pertinent statute for the state likewise requires “a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred.” Va. Code § 8.01-195.6(A).

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