

## II. CONDUCT DYNAMIC DISCOVERY AND CASE INVESTIGATION

### F. Streamline Informal Discovery By Accessing Public Sources of Information

When evaluating and investigating a claim, you can secure a substantial amount of needed information through the internet.

**Police Reports:** Prince William County provides internet access to police reports.

<https://www.pwcgov.org/apps/crashrptb/login.aspx>

**Guilty Pleas:** All General District Courts allow access by computer to the status of traffic court charges. To determine if your defendant pleaded guilty, look him up.

<http://www.courts.state.va.us/courts/gd.html>

**Map of Accident Scene:** Google Earth <http://earth.google.com/> allows one to examine and print a satellite photograph of the intersection or roadway where the collision occurred.

**People Finder:** There are many free services on the internet which allow you to find and confirm the address of a defendant.

<http://www.whitepages.com/> If you have a telephone number you can use the reverse look-up to find the matching address

[http://www.whitepages.com/reverse\\_phone](http://www.whitepages.com/reverse_phone)

**Registered Agents:** Use the State Corporation Commission's web site to look up current registered agents.

[http://s0302.vita.virginia.gov/servlet/resqportal/resqportal?&rs\\_custom\\_dir=scccisp1](http://s0302.vita.virginia.gov/servlet/resqportal/resqportal?&rs_custom_dir=scccisp1)

**Real Estate:** You can look up real estate records to verify home ownership

and assessed values.

<http://icare.fairfaxcounty.gov/Main/Home.aspx>

**ERISA:** Free Erisa allows the practitioner to determine if a particular health insurer is entitled to any reimbursement from the injury settlement. <http://www.freeerisa.com/>

**Doctors:** Virginia keeps an on-line data base of all practicing medical professionals, which enables you to look them up and assess their credentials and whether there are any reported malpractice payouts <http://www.dhp.virginia.gov/>

**Motor Vehicles:** If you know the make and model of the vehicle operated by the defendant, you can google that vehicle and secure a photographic replica which can be useful when comparing the sizes of the vehicles. You can also access the National Highway Traffic Safety Administration (NHTSA) website [www.nhtsa.gov](http://www.nhtsa.gov) for recalls and potential defects. The web can also provide you technical details (weight, safety features, engine and braking performance, etc.) of any model of motor vehicle.

**Court Forms:** Most of the forms you need for everyday practice can now be found online. For example, the following website has many of the forms you need.

<http://www.courts.state.va.us/forms/home.html>

## **G. Frequently Encountered Problems With Preservation of Evidence**

Plaintiff's counsel must understand the importance of preserving evidence after an injury involving a motor vehicle or other machinery.

First, consider taking photographs of the damaged vehicle, if the damage is obvious, even if the injuries are not life threatening. If you wait too long, the vehicle may be disposed of as salvage or repaired. In either case, you will not be able to show the insurer or court photographs which can enhance your client's bodily injury claim. However, even if you learn your client's vehicle has been sold for "salvage", you may be able to call the salvage yard, locate the vehicle through the "lot number" and send an appraiser to take photographs.

**Practice Pointer:** Never accept your client's representation that the other party's insurer took photographs to dissuade you from taking your own. In the author's experience you have no better than a 50-50 chance of securing valuable photographs from the defendant's insurer.

If you represent a victim of a tractor trailer collision, you need to secure the truck driver's manifests to determine if he was working more hours than permitted. If the accident involves fatal or life altering injury, you should consider hiring an expert to download data from the truck's "black box". The black box is an electronic data recorder, or event data recorder (EDR). Such devices routinely record data such as speed and braking events. Many cars will also record data such as vehicle speed at the time of impact.

**Practice Pointer:** Crash data can be lost by simply turning the ignition after a crash. For serious collisions where liability could be an issue, consider hiring an expert to retrieve the data stored in the vehicle's EDR. Counsel should also consider filing suit immediately if cooperation

regarding preservation of evidence is not forthcoming.

Drivers of tractor trailers traveling interstate are required to maintain manifests recording hours driving, hours off duty but awake and hours sleeping. These manifests can be of great importance to counsel after a collision. Counsel must be aware that pursuant to 49 C.F.R. [§ 395.8](#), such manifests need be retained by the employer for only 6 months.

Wage loss claims can be simplified if the client keeps track of the time lost from work as it is lost. Many employers cannot reconstruct hours lost for medical appointments and will depend on your client for the raw data.

#### **H. The Importance of Proper Evaluation of Property Damage**

Many insurers are basing their offers on the extent to which they can prove or disprove the existence of visible damage.

First, consider taking photographs of the damaged vehicle, if the damage is obvious, even if the injuries are not life threatening. Similarly, do not take photographs and, consider advising your client to forgo an appraisal by the defendant's insurer, if the damage is not significant and does not affect the operation of the vehicle.

Other important areas of investigation include an examination of the headlight filaments which can determine if the lights were on at the time of the collision, an examination of the tires to look for tread and markings to match what is found at the scene, and use color film when taking photographs of the vehicles to determine if paint transfers can help your case. Brakes can be examined to determine braking distances, worn drums or pads, or other defects. As set forth above, data from EDR's can be downloaded to determine speed, braking events,

and other important data.

You may also want to hire an appraiser or other automotive expert to look for damage which is not obvious to the layman. For example, the frame can be measured to determine if it has been bent. Shock absorbers behind the bumper cover can be examined for force and impact. The gaps between the doors and body of the car can be measured and if “pinched” can reflect frame damage.

Counsel must be aware that cases involving severe injury or death where liability is contested, a thorough evaluation, appraisal and inspection of the vehicles involved must be accomplished. This will likely mean purchasing and preserving the wrecked vehicles, or if counsel does not have access to the defendant’s vehicle, writing a letter to the defendant requesting the vehicle be preserved for examination by the experts.

#### **I. Discovery of Expert Opinions - What You Can Get and What You Must Give**

The discovery of expert opinions is controlled by Supreme Court Rule 4:1(b)(4)(A) which allows interrogatories identifying the opponent’s experts and requiring the opponent to divulge:

- (1) the subject matter about which the expert is to testify;
- (2) the substance of the facts and opinions to which the expert is expected to testify, and
- (3) a summary of the grounds for each opinion.

Subject to paying a reasonable fee, counsel may depose his opponent’s testifying expert . However, a party may not discover the opinions of a retained expert who is not expected to testify absent *exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions*

*on the same subject by other means.* 4:1(b)(4)(B).

Parties may also seek **Lombard** information from the opposing expert. Named after *Lombard v Rohrbaugh*, 262 Va. 484, 551 S.E.2nd 349 (2001), the information sought includes income earned from the insurance carrier retaining the expert. The theory is that significant earnings will show bias. In *Lombard*, the amount earned by Dr. Ammerman was over \$100,000.00 per year in 1998 and 1999, which the Court ruled constituted a substantial connection between the doctor and Allstate.

#### **J. Rule 4:10 Examinations of the Plaintiff - Can You Help Your Client?**

This rule allow the defendant, with leave of court, to require the plaintiff to attend

an examination with a health care provider selected by the defendant. Generally, the defendant will request such an examination if the plaintiff is claiming permanent or ongoing injury. The Rule is set forth below.

*Rule 4:10. Physical and Mental Examination of Persons.*

*(a) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending, upon motion of an adverse party, may order the party to submit to a physical or mental examination by one or more health care providers, as defined in [§ 8.01-581.1](#), employed by the moving party or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties, shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and shall fix the time for filing the report and furnishing the copies.*

*(b) Out-of-State Examiners. -- Examiners named in such an order shall be licensed to practice in, and shall be residents of or have an office in, this Commonwealth. However, notwithstanding the reference to licensure by this Commonwealth in the definition of health care providers in [§ 8.01-581.1](#), the court may, in the exercise of its sound discretion and upon determining that the ends of justice will be served,*

*order an examination by one who is not licensed to practice in, is not a resident of, and does not have an office in, this Commonwealth but who is duly licensed in his or her jurisdiction.*

*(c) Report of Examiner.*

*(1) A written report of the examination shall be made by the examiner to the court and filed with the clerk thereof before the trial and a copy furnished to each party. The report shall be detailed, setting out the findings of the examiner, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition.*

*(2) The written report of the examination so filed with the clerk may be read into evidence if offered by the party who submitted to the examination. A party examined who takes the deposition of any examiner who shall have conducted an examination ordered pursuant to this Rule, waives any privilege that might have been asserted in that action or in any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.*

*3) This subdivision applies to examination made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of a health care examiner or the taking of a deposition of such examiner in accordance with the provisions of any other Rule.*

This Rule has been the subject of much litigation.

1. What constitutes “good cause” to seek the examination;
2. Can the Defendant tell the jury the examination is “independent”;
3. What constitutes a “mental examination”;
4. Can the defendant force the plaintiff to be examined by a vocation rehabilitation expert;’
5. What controls can plaintiff’s counsel insert into the order allowing the examination.

There is much plaintiff’s counsel can attempt to protect the client. First, you must always prepare the plaintiff for the examination. The plaintiff should be advised to be polite, but not overly friendly. The plaintiff should be familiar with his medical history and be able to explain where he has pain and how it affects his

daily activities. The plaintiff should understand the examination is for the defendant, the doctor is not neutral, and the examination is not for treatment. A doctor-patient relationship is never formed as a result of a Rule 4:10 examination.

Never sign an order which labels the examination as “independent” because it is a defense examination. Do not agree to multiple examinations, and be wary of some of the “usual suspects” who will always find that treatment beyond 6-10 weeks is excessive for a strain, sprain or other “soft tissue” injury. Do not agree to the examination if your client is not claiming a permanent injury. It is doubtful the defendant can show “good cause” under these circumstances.

**Practice Pointer:** If the claims adjuster asks for a medical examination before suit is filed, agree only on the condition that there will be no further requests. Most judges will enforce such an agreement.

If the ability of your client to find and keep employment is in issue, do not agree to have your client examined by a vocational rehabilitation counselor. Some vocational rehabilitation counselors are not licensed professional counselors, and therefore are excluded under [8.01-581.1](#). Even where the vocational counselor is a licensed professional counselor, argue the purpose of the examination is to focus on employment issues, not mental health counseling.

Brain injury cases present unique problems. The court will allow a brain injured victim to be examined by defense experts, including neuropsychologists. Such examinations typically involve hours of testing, some on a computer screen, some multiple choice and some in interview format. Consider inserting in the order language allowing the entire session be recorded by video, or at least that a witness be allowed to observe such sessions. Bias of the defense examiner can be



very difficult to establish if the jury has to decide only between the “brain injured” plaintiff or the defense neuropsychologist.

As sample order is attached as **Exhibit C**.

Finally, be wary of any report which concludes your client is not truthful or is exaggerating. File a motion in limine to prevent the expert or defense lawyer from commenting on such opinions, as they invade the province of the jury, and may also be outside the expertise of the physician. . Batzel v. Gault, et al., At Law 195596, Motions Hearing, pp. 31-32 (J. Roush, Fairfax County Circuit Court, April 12, 2002) (attached as Exhibit 4); House v. House, 102 Va. 235 (1904); Va. Code [§ 8.01-401.3\(B\)](#). Expert testimony is proper only when the subject matter of the inquiry is of such character that only persons of skill or experience in that area are capable of forming a correct judgment. Bradley v. Poole, 187 Va. 432 (1948); Neblett v. Hunter, 207 Va. 335 (1966)

EXHIBIT C

VIRGINIA :

IN THE CIRCUIT COURT OF THE COUNTY OF FAIRFAX:

Plaintiff, :

:

v. : LAW NO.

Defendants. :

**ORDER ON MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF**

Defendant's Motion of Physical Examination of Plaintiff is GRANTED as follows:

- 1) **Time:**
- 2) **Place:**
- 3) **Manner of the examination:**(i) The physical examination shall consist of visual assessment by the examiner, manual palpation or measurement, if desired by the examiner, and directed questioning by the examiner about the results of in-session physical tests. (ii) There shall not be any invasive testing, films, nerve conduction studies or other intrusive or painful requirements or stimuli.
- 4) **Conditions to the examination:** (i) Counsel for the Defendant are responsible for all Plaintiff's transportation costs [if the examination is not conducted in the city where Plaintiff is currently residing/ within \_\_ miles of Pl's residence], which costs shall be paid in advance if requested by Plaintiff. (ii) Counsel for Defendant is responsible for providing the examiner with any medical history, medical records, or radiographic studies requested by the examiner.

Plaintiff shall have no responsibility to furnish any such materials. Plaintiff need not complete any questionnaire or history forms upon arrival at the examiner's office. (iii) The examiner is not permitted to conduct interview of Plaintiff. Rule 4:10 is not a substitute for a deposition. The oral exchange shall be limited to affirmative or negative responses to elicited testing questions. (iv) Plaintiff is permitted to have a court reporter and/or videographer present during any interchange between Plaintiff and the examiner in connection with the examination. (v) Plaintiff's counsel or his designee is allowed to be present to object to any attempted oral exchange initiated by the examiner that exceed the scope of this Order. (vi) This examination is by agreement. Plaintiff is voluntarily appearing for the examination. Neither the examiner nor defense counsel will be permitted to state, suggest, argue or imply during the examination, in the report, or at trial that the examination was in any way limited by the Plaintiff's refusal to allow an examination.

1) **Scope of the examination:** The examination is limited to the plaintiff's physical condition as raised by the pleadings in this action and as authorized by this Order. The examiner shall be provided a copy of the Order at least 72 hours in advance of the examination, and must agree to abide by its terms.

1) **The person or persons by whom it is made:** (Name of examiner), a physician who has been selected by the defendant(s); and

2) **The time for filing the report and furnishing the copies:** A copy of Dr. [insert name of DME doc] report, his CV, all raw data generated by the examination, including any x-rays, and a copy of his charges will be furnished to counsel for plaintiff (i) five (5) days after the examination or (ii) the first date than any information about the examination is furnished to the defendants' counsel. The results of the examination and a copy of the Rule 4:10 report shall be

filed with the Clerk . "Raw data" shall include all clinical notes and other documents generated by the examination of plaintiff.

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ENTERED

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JUDGE

**WE ASK FOR THIS:**

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Counsel for Defendant

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Counsel for Plaintiff

EXHIBIT D  
EXHIBIT 4

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

DAW A. BATZEL

Plaintiff/Complainant

v.

Law/Chancery No. 195596

KENNETH GAULT, ET AL.

Defendant/Respondent

ORDER

This case came before the Court on the 12<sup>th</sup> day of April, 2002, for ARGUMENT ON PLAINTIFF'S MOTION TO EXCLUDE/ LIMIT TESTIMONY OF KREITZER & PECK

It is ORDERED as follows: MOTION IS GRANTED IN PART, DENIED IN PART. DEFENDANT'S EXPERTS KREITZER & PECK WILL NOT, IN DIRECT TESTIMONY, OPINE THAT THE PLAINTIFF IS LYING, FAKING, MALINGERING OR NOT CREDIBLE. ALL OTHER MATTERS ARE DEFERRED AND TO BE TAKEN UP AT TRIAL.

ENTERED- this 12 day of April, 2002.

James Murray Pouch  
Circuit Court Judge

[Signature]  
Counsel for Plaintiff/Complainant, subject to, noted or Roger J. Creger (all objections preserved)

[Signature]  
COUNSEL FOR DEFENDANT GAULT

[Signature]  
Counsel for Defendant/Respondent  
JOHN A. ROBERTS, JR.