WHAT DID THE PLAINTIFF KNOW AND WHEN DID HE KNOW IT? THE AVAILABILITY OF POST-TRIAL DISCOVERY TO PURSUE SANCTIONS UNDER VA. CODE ANN. 8.01-271.1

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I. Introduction

Virginia law provides for monetary and nonmonetary sanctions against litigants and their counsel for signing a pleading that is not well grounded in fact and law or is otherwise brought for an improper purpose.[1] The statute is silent, however, as to what sort of factual investigation is appropriate to determine what the signer knew at the time the pleading was signed. Although sanctions hearings are often evidentiary in nature, there are no clear directives as to what discovery is appropriate in support of investigating a motion for sanctions. Only one court of record in the Commonwealth has addressed this question. More than two decades ago, in *Fairfax County Dept. of Family Services v. Neidig*,[2] the court adopted an especially high standard for a sanctions movant to justify the need for discovery.[3] The court accepted the guidance of the Advisory Committee of the Federal Rules requiring litigants to demonstrate "extraordinary circumstances" to warrant post-trial discovery for a sanctions inquiry.[4]

As discussed in this article, the exceptional circumstances test adopted in *Neidig* is consistent with the general purpose of the statutory sanctions and appropriately acts as a functional bar to discovery in post-trial sanctions proceedings. Although not yet adopted by the Supreme Court of Virginia, sanctions jurisprudence strongly suggests that the Court would adopt the "extraordinary circumstances" test if presented with this issue. Considering the application of extraordinary circumstances tests in other contexts, the full adoption of this test in Virginia would all but prohibit post-trial discovery to pursue sanctions motions. Accordingly, to determine what the plaintiff knew and when he knew it, defendants should

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[1] Va. Code Ann. § 8.01-271.1(B).

[2] 43 Va. Cir. 46 (Cir. Ct. 1997).

[3] *See generally* 1997 WL 33575579 (Fairfax Cir. Ct. 1997).

[4] *Id.* at *3.

aggressively use the tools of pre-trial discovery to investigate whether a pleading or motion is well grounded in fact and brought for a proper purpose.

II. Pursuing Sanctions under Va. Code Ann. 8.01-271.1(B)

To successfully pursue sanctions under section 8.01-271.1(B), a movant must demonstrate that the opposing party or counsel signed a pleading, motion, or other paper that was submitted to the court, and either failed to reasonably investigate the factual and legal basis of the document, or otherwise drafted the document for an improper purpose. Specifically, the statute states:

> The signature of an attorney or party constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The statute largely tracks the language of Rule 11 of the Federal Rules of Civil Procedure, which also prohibits pleadings brought for an improper purpose or otherwise unwarranted by existing law or evidentiary bases.[5] However, unlike Rule 11, section 8.01-271.1(B) does not require a safe harbor period and does not provide instruction as to the type of sanctions.[6] Furthermore, Virginia's statute is mandatory, whereas Rule 11 is permissive.[7] So, if a Virginia court makes a finding that a party violated section 8.01-271.1(B), the court *must* impose sanctions.[8] However, Virginia courts generally disfavor sanctions where there is any basis for debate on the legitimacy of legal or factual issues.[9]

Per the instruction of the statute, sanctions inquiries focus on two questions of fact: (1) did the party/attorney conduct a reasonable inquiry before signing and filing a pleading, motion, or other paper; and (2) did the party/attorney interpose

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[5] Fed. R. Civ. P. 11(b).

[6] *Compare* Fed. R. Civ. P. 11(b) *and* Va. Code Ann. 8.01-721.1(B).

[7] *Id.*

[8] *See* Williams & Connolly, L.L.P v. People for the Ethical Treatment of Animals, Inc., 273 Va. 498, 510, 643 S.E.2d 136, 141 (2007).

[9] Oxenham v. Johnson, 241 Va. 281, 286, 402 S.E.2d 1, 3 (1991) (ruling that "the threat of a sanction should not be used to stifle counsel in advancing novel legal theories or asserting a client's rights in a doubtful case."); *see also* Shebelskie v. Brown, 287 Va. 18, 27, 752 S.E.2d 877, 882 (2014); Gilmore v. Finn, 259 Va. 448, 466, 527 S.E.2d 426, 435 (2000); Ward v. NationsBank of Va., N.A., 256 Va. 427, 442, 507 S.E.2d 616, 624 (1998) (sanctions are inappropriate where the case presents a legitimate debate."); Bandas v. Bandas, 16 Va. App. 427, 438, 430 S.E.2d 706, 712 (1993) (remanding a sanctions award to the trial court for further consideration where case presented a legal issue is one "of first impression" and presented a "facially reasonable argument."); County of Prince William v. Rau, 239 Va. 616, 620, 391 S.E.2d 290, 292 (1990) (ruling that any doubts are resolved in favor of the party against whom sanctions are sought, and "eschew[ing] the wisdom of hindsight" (internal citations omitted)).

the document for an improper purpose? Courts apply an objective reasonableness standard in assessing these inquiries.[10]

A. REASONABLE INQUIRY

In evaluating whether a party violated the reasonable inquiry prong of section 8.01-271.1(B), courts ask whether the party's prefiling investigation was objectively reasonable.[11] "Whether an appropriate amount of pre-filing investigation was done is a fact-bound inquiry that requires judicial discretion and inevitably is a judgment call."[12] Courts may consider a number of factors in concluding whether an inquiry was reasonable, including the amount of time the lawyer has to investigate a claim or defense before filing.[13] In conducting a reasonable inquiry, lawyers are permitted to rely on the investigations of others, and specifically may rely on reasonable information furnished by the client.[14] Interpretations of F.R.C.P. 11 are helpful in identifying other considerations as to what constitutes a "reasonable inquiry."[15] The duty to conduct a reasonable inquiry is ongoing; that is, it "arises each time a lawyer files a 'pleading, motion, or other paper' or makes 'an oral motion.'"[16] That does not mean, however, that a lawyer has a duty to retract, correct, or amend and pleadings later discovered to have been based on incorrect facts or conclusions of law. The Supreme Court has ruled explicitly that "Code § 8.01-271.1 imposes no continuing duty upon a lawyer to 'update his pleadings in light of any new findings[.]"[17]

In evaluating whether an investigation was reasonable, federal courts look to the time available for the investigation, the "extent to which the attorney had to rely on his or her client for the factual foundation," whether the case was passed from another attorney, the factual complexity, and whether discovery would have been beneficial to the development of the underlying facts.[18] While the definition of *reasonable inquiry* is nebulous, the Supreme Court has unequivocally ruled that section 8.01-271.1 forbids counsel from filing a pleading or motion known to be "unfounded in fact."[19]

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[10] *Rau*, 239 Va. at 620, 391 S.E.2d at 291 (1990) (citing Tullidge v. Board of Supervisors, 239 Va. 611, 613, 391 S.E.2d 288, 289 (1990)).

[11] Ford Motor Co. v. Benitez, 273 Va. 242, 253, 639 S.E.2d 203, 208 (2007).

[12] Parsch v. Massey, 2009 WL 7416040, at *11 (Charlottesville Cir. Ct. 2009) (citing *Benitez*, 273 Va. at 250, 639 S.E.2d at 206 (2007); Mars Steel Corp. v. Continental Bank, 880 F.2d 928, 933 (7th Cir.1989)).

[13] *Benitez*, 273 Va. at 253, 639 S.E.2d at 208 (2007).

[14] *Parsch*, 2009 WL 7416040, at *11 (citing Frantz's Auto. Servs., Inc. v. Crabtree, 21 Va. Cir. 443, 445 (Fairfax 1990); In re Kunstler, 914 F.2d 505, 514 (4th Cir.1990) (internal citations omitted)).

[15] *See Crabtree*, 21 Va. Cir. 443 (1990).

[16] Oxenham v. Johnson, 241 Va. 281, 288, 402 S.E.2d 1, 4 (1991).

[17] *Id.* at 287 (citing Pantry Queen Foods v. Lifschultz Fast Freight, 809 F.2d 451, 454 (7th Cir.1987) (construing FED. R. CIV. P. 11).

[18] *Id.* (citing Beverly Gravel, Inc. v. DiDomenico, 908 F.2d 223, 225 (7th Cir.1990)).

[19] *Benitez*, 273 Va. at 253, 639 S.E.2d at 208 (2007).

B. IMPROPER PURPOSE

The sanctions statute provides greater textual guidance as to what constitutes an "improper purpose" than it provides for a "reasonable inquiry," specifically enumerating harassment, delay, and increased cost of litigation as improper purposes.[20] However, the use of the phrase *such as* makes clear that these three examples are not the exclusive universe of improper purposes.[21] Indeed, the Supreme Court has upheld trial courts imposing sanctions for other forms of improper purposes. Such examples include "contemptuous language and distorted representations," abusing the legal process to undermine "public confidence and respect for the rule of law," derision of the court, intimidation, revenge, or a desire to harm the opposing party.[22] In identifying other explicit improper purposes, courts seek to bar conduct that is at odds with the goal of the sanctions statute, which "is to hold attorneys, who are officers of the court, responsible for specified failures involving the integrity of the documents that they have signed."[23] Likewise, the Supreme Court of Virginia has explicitly expressed public policy considerations in favor of expanded categories of improper purpose, including reducing the volume of unnecessary litigation, protecting litigants from mental anguish, and protecting the courts from litigants abusing the judicial process.[24]

Courts may find that a pleading was interposed for an improper purpose from the mere nature of the writing, without the need for additional evidence. The court can make that determination from the language of pleadings (such as the use of derisive language), the volume of the pleadings and claims, or the reiteration of previously dismissed claims.[25] Testimony regarding the actual mental state of the nonmovant, including the stated or subjective reason for interposing the pleadings, can therefore be irrelevant to the decision to impose sanctions. In that sense, the factual investigation into the purpose of the pleading can be less intensive than conducting a reasonable inquiry.

III. *Neidig* and the Extraordinary Circumstances Test

The Supreme Court of Virginia has never addressed whether litigants are entitled to post-trial discovery to pursue a sanctions motion. However, sanctions jurisprudence in the Commonwealth generally indicates that the Court would most likely look with great disfavor on allowing special discovery for a litigant to pursue a sanctions motion should the issue reach the Justices. The Court has expressed explicit concern about expanding the scope of sanctions litigation,

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[20] Va. Code Ann. § 8.01-271.1(B).

[21] *See id.*

[22] Kambis v. Considine, 290 Va. 460, 468, 778 S.E.2d 117, 121 (2015); Williams & Connolly, L.L.P., 273 Va. 498, 519–20, 643 S.E.2d 136, 146–47 (2007).

[23] *Williams & Connolly*, 273 Va. at 510, 643 S.E.2d at 141 (2007).

[24] *Kambis*, 290 Va. at 467–68, 778 S.E.2d 117, 121 (2015) (citing Oxenham v. Johnson, 241 Va. 281, 286, 402 S.E.2d 1, 3 (1991)).

[25] *See Kambis*, 290 Va. at 469, 778 S.E.2d at 122; *Williams & Connolly*, 273 Va. at 519–520, 643 S.E.2d at 146–147 (2007).

generally, stating that "courts should take care that the litigation of a sanction issue does not itself defeat one purpose of § 8.01-271.1, that of reducing the volume of unnecessary litigation."[26] If and when the Supreme Court does address this issue, it would most likely adopt the "extraordinary circumstances" test adopted by the Fairfax Circuit Court, which is consistent with federal courts' interpretations of Rule 11, and other states' interpretations of their respective sanctions provisions.[27]

The extraordinary circumstances test sets a high threshold. Indeed, no Virginia, federal, or out-of-state court has employed this test and approved a litigant's motion to conduct post-trial discovery to pursue a sanctions motion.

A. THE *NEIDIG* CASE

There is only one reported opinion in Virginia that addresses the issue of post-trial discovery for the purposes of seeking sanctions, *Fairfax County Dept. of Family Services v. Neidig*.[28] In that case, the movant engaged in no pre-trial discovery.[29] After trial, and after the court ruled in his favor, Neidig learned of medical examinations that had occurred approximately eight months before trial.[30] At that time, Neidig filed a Motion for Sanctions against the Fairfax County Department of Family Services, noticed the depositions of two witnesses involved in the medical examinations, and filed a subpoena duces tecum to a medical provider.[31] The County filed a motion for protective order to prevent Neidig from pursuing this post-trial discovery.[32]

After a hearing, the court granted the County's motion and issued a protective order, prohibiting Neidig from taking depositions and issuing subpoenas to investigate facts in support of his motion for sanctions.[33] The court noted that the "issue of propriety of initiating discovery in support of a Motion for Sanctions under Va. Code § 8.01-271.1 is apparently an issue of first impression in the Commonwealth."[34] The court identified the small number of Supreme Court cases discussing the issue of sanctions, which uniformly "evidence[d] a reluctance to interpret the statute broadly."[35] Relying on interpretations of Rule 11 and the expressed public policy against a broad sanctions statute, the court in *Neidig*

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[26] *Oxenham*, 241 Va. at 286, 402 S.E.2d at 3 (1991).

[27] *See generally* Fairfax County Dept. of Family Servs. v. Neidig, 1997 WL 33575579 (Fairfax Cir. Ct. 1997).

[28] *Id.*

[29] *Id.* at *1.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *See generally Neidig,* 1997 WL 33575579 (Fairfax Cir. Ct. 1997).

[34] *Id.* at *2.

[35] *Id.* at *2–3 (internal citations omitted).

adopted the extraordinary circumstances test[36] discussed in *Indianapolis Colts v. Mayor and City Council*.[37]

In applying that test, the court in *Neidig* found no extraordinary circumstances to justify post-trial discovery for Neidig to investigate his section 8.01-271.1 motion.[38] In ruling, the court noted that the judge assigned to the sanctions hearing would be in possession of the information needed to evaluate the movant's claim for sanctions, including witness testimony, affidavits, and medical records.[39] The court explained that it did not wish to "take the first step down a very slippery slope toward acceptance of exhaustive sanctions litigation" which "could subsume the intended" purpose of section 8.01-271.1, which is to reduce unnecessary litigation.[40]

The ruling in *Neidig* is consistent with a general disfavor toward extensive sanctions litigation in the Commonwealth.[41] Although the attitude of the bar and judiciary with respect to sanctions has shifted over the intervening years in favor of a robust exercise of section 8.01-271.1, the caveat against protracted sanctions proceedings espoused in *Oxenham* remains good law.[42] No Virginia court has addressed the propriety of post-trial sanctions discovery in a recorded opinion since *Neidig*.

B. INTERPRETATIONS OF RULE 11

In *Neidig,* the court noted that section 8.01-271.1 "is modeled after Rule 11 of the Federal Rules of Civil Procedure, [so] authority interpreting the Federal Rules is instructive."[43] Indeed, federal authorities have issued far more guidance about when post-trial discovery is appropriate. Rule 11 itself contains no explicit instruction as to whether discovery is permitted for the purpose of pursuing a sanctions motion.[44] However, the Advisory Committee notes accompanying the 1983 revision of Rule 11 encouraged federal courts to adopt the extraordinary circumstances test to limit the scope and cost of "satellite litigation over the imposition of sanctions."[45] The Advisory Committee suggested that courts "limit the scope of sanctions proceedings to the record" and urged that "discovery should be conducted only by leave of the court, and then only in extraordinary circumstances."[46]

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[36] *Id.* at *2.

[37] 775 F.2d 177 (7th Cir. 1985).

[38] *Neidig*, 1997 WL 33575579, at *3.

[39] *Id.* at *4.

[40] *Id.* at *4 (citing Oxenham v. Johnson, 241 Va. 281, 286, 402 S.E.2d 1, 3 (1991)).

[41] *See Oxenham*, 241 Va. at 286, 402 S.E.2d at 3 (1991).

[42] Ford Motor Co. v. Benitez, 273 Va. 242, 251, 639 S.E.2d 203, 207 (2007) (distinguishing *Oxenham* to find that defense counsel did not conduct a reasonable inquiry before signing the grounds of defense.).

[43] *Neidig*, 1997 WL 33575579k, at *2 (citing *Oxenham*, 241 Va. at 286–88).

[44] Fed. R. Civ. P. 11.

[45] Fed. R. Civ. P. 11, Advisory Committee Notes – 1983 Amendment.

[46] *Id.*

As in Virginia, the United States Supreme Court has not weighed in on the topic of post-trial sanctions discovery. However, federal courts across the circuits are consistent in their hostility toward post-trial sanctions discovery. No federal court has permitted a litigant to pursue discovery to prosecute a sanctions motion after trial. The justification for this hostility is largely in line with the public policy considerations the Supreme Court of Virginia has observed in sanctions proceedings, as well as the federal Advisory Committee's instruction.

In fact, when moved to allow discovery in post-trial sanctions proceedings, federal courts have uniformly denied the expansion of satellite sanctions litigation.[47] Indeed, the courts have largely adopted the extraordinary circumstances test recommended by the Advisory Committee. In *Indianapolis Colts*—the case *Neidig* discussed in detail—the appeals court ruled that the district court had all the tools necessary to determine whether sanctions were appropriate without the need for discovery.[48] The Seventh Circuit cited the district court's time spent overseeing the case and trial, understanding of the relevant facts, experience with litigation and the Federal Rules, and familiarity with the standards of the district court bar in finding no extraordinary circumstances present.[49] The court in *Indianapolis Colts* noted the balance of considerations at play under Rule 11 motions: "the costs of satellite litigation over sanctions [should not] outweigh the benefits indended from Rule 11."[50]

In *Klayman*, the United States District Court in Washington D.C. took the procedural limitations on sanctions proceedings a step further in ruling against the preclusive effects of sanctions rulings.[51] There, the court found that "[i]t would be unfair to preclude an issue based on the resolution of a motion for sanctions

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[47] *See* Amwest Mortg. Corp. v. Grady, 925 F.2d 1162, 1165 (9th Cir. 1991) (holding that "the scope of a Rule 11 hearing is much narrower than a full civil proceeding … ."); Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987) (adopting the Advisory Committee Note and explaining that courts must strike a balance between due process and unnecessary waste of judicial resources.); McLaughlin v. Bradlee, 803 F.2d 1197, 1205 (D.C. Cir. 1986) (holding that discovery was unnecessary because "[t]he trial court, as a primary participant in the proceedings, had already observed those elements of the litigation most relevant to the criteria for imposing sanctions."); Indianapolis Colts v. Mayor and City Council of Baltimore, 775 F.2d 177, 183 (7th Cir. 1985) (denying defendant's request for discovery in order to "end this vexatious litigation rather than encourage parties to pursue secondary and patently frivolous litigation over attorneys' fees"); Burbidge Mitchell & Gross v. Peters, 622 F. App'x 749, 758 (10th Cir. 2015) (adopting the advice of the Advisory Committee); Klayman v. Barmak, 602 F. Supp. 2d 110, 117 (D.D.C. 2009) (holding that "[a] motion for sanctions does not provide parties an opportunity to litigate fully—conduct discovery, present and cross-examine witnesses … ."); McIntyre's Mini Computer Sales Grp., Inc. v. Creative Synergy Corp., 644 F. Supp. 589, 592 (E.D. Mich. 1986); Alvarez v. Johns Hopkins Univ., 2019 WL 4038562, at *9 (D. Md. Aug. 27, 2019) (movant did not demonstrate "extraordinary circumstances" to justify satellite discovery to support a motion for sanctions); Backpage.com, LLC v. Schmitt, 2019 WL 2285909, at *14 (E.D. Mo. May 29, 2019); Stelor Prods., LLC v. Silvers, 2006 WL 8435226, at *2 (S.D. Fla. Jan. 23, 2006) (declining to permit discovery in a Rule 11 proceeding because credibility issues can be resolved at an evidentiary hearing.); Sosland Pub. Co. v. Mulholland, 1988 WL 87335, at *1 (S.D.N.Y. Aug. 17, 1988).

[48] *Indianapolis Colts*, 775 F.2d 177, 183 (7th Cir. 1985).

[49] *Id.*

[50] *Id.* (citing Fed. R. Civ. P. 11, Advisory Committee Notes).

[51] *Klayman,* 602 F. Supp. 2d 110, 117–18 (D.D.C. 2009).

because sanctions hearings are procedurally dissimilar to trials."[52] Among the procedural dissimilarities noted in *Klayman* include a sanction litigant's inability to conduct discovery, and even to call and cross-examine witness.[53] The Ninth Circuit reached a similar conclusion in *Amwest Mortgage*, where it emphasized that a party cannot obtain collateral estoppel from a sanctions ruling because sanctions proceedings do not afford a party a "'full and fair opportunity' to litigate th[e] issue in the earlier case."[54] These cases indicate a general attitude in the federal courts against treating sanctions hearings as anything less than a subordinate dispute within the existing litigation.

Federal jurisprudence on discovery in Rule 11 proceedings is extensive and uniform: courts across the nation have adopted the federal Advisory Committee's disfavor toward satellite discovery for post-trial sanctions motions and employ the extraordinary circumstances standard as a prohibitive bar to expanded proceedings.

C. OTHER STATES' SANCTIONS STATUTES PROVISIONS

Similarly, state courts interpreting Rule 11 and statutes based on Rule 11—like Virginia Code section 8.01-271.1—consistently deny requests to conduct discovery in sanctions proceedings.[55] For example, in *Holloway v. Holloway Sportswear, Inc.*, the Ohio Court of Appeals reversed a lower court's decision to allow post-trial discovery for a sanctions proceeding, finding that the court abused its discretion in "expand[ing] the sanctions proceeding into full-blown litigation contrary to the intent of Civ.R.11."[56] The court in *Holloway* relied heavily on federal court interpretations of F.R.C.P. 11 in interpreting the Ohio sanctions rule.[57] The court found that sanctions hearings are "much narrower in scope than civil proceedings" and litigants must demonstrate extraordinary circumstances to justify post-trial discovery.[58]

The Washington Court of Appeals also adopted federal interpretations of F.R.C.P. 11 in finding that discovery to pursue a sanctions motion "should be

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[52] *Id.* at 117 (citing Faigin v. Kelly, 184 F.3d 67, 78–79 (1st Cir.1999); Amwest Mortgage Corp. v. Grady, 925 F.2d 1162, 1164–65 (9th Cir.1991)).

[53] *Id.* (citing *Amwest Mortgage*, 925 F.2d at 1164–1165).

[54] *Amwest Mortgage*, 925 F.2d at 1164–65 (citing Allen v. McCurry, 449 U.S. 90, 95, 101 (1980)).

[55] *See* Agency of Nat. Res. v. Lyndonville Sav. Bank & Tr. Co., 811 A.2d 1232, 1237 (Vt. 2002) (applying Rule 11 precepts to uphold an environmental court's decision to refuse additional discovery in enforcement action similar to sanctions proceeding.); Holloway v. Holloway Sportswear, Inc., 971 N.E.2d 1001, 1006 (Ohio Ct. App. 2012) (holding that the trial court abused its discretion in permitting discovery in a sanctions proceeding); Watson v. Maier, 827 P.2d 311, 317 (Wash. App. 1992); Marconi v. Savage, 2016 WL 530049 (Ohio Ct. App. Jan. 28, 2016) ("To allow collateral proceedings on sanctions and fees to expand into a full blown prelitigation of the underlying issues is not in accord with the purpose of the rule and statute.").

[56] *Holloway*, 971 N.E.2d at 1005–07.

[57] *See generally id.* The Ohio sanctions rule, Civ. R. 11, largely mirrors Virginia's statute, although it is narrower in scope; the Ohio rule prohibits only the signing of pleadings where there is no "good ground to support it" or where it is "interposed for delay." OHIO CIV. R. 11; *compare* VA. CODE. ANN. § 8.01-271.1(B).

[58] *Id.* at 1006.

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[58] *Id.* at 1006.

allowed only in extraordinary circumstances."[59] That court adopted the Federal Advisory Committee's guidance and determined that the relevant factors to consider in assessing extraordinary circumstances include "(1) the circumstances in general; (2) the type and severity of the sanction under consideration; (3) the judge's knowledge of the facts and whether there is need for further inquiry."[60] Although providing a clearer definition of *extraordinary circumstances* than most other courts, the test espoused in this Washington appellate case still leaves a broad degree of discretion for the trial court to evaluate "the circumstances in general."[61]

IV. What Constitutes Extraordinary Circumstances?

No court has held definitively what constitutes extraordinary circumstances for post-trial sanctions discovery because no court has ever found that extraordinary circumstances existed for such an issue. The uniformly negative posture toward post-trial discovery sanctions suggests that extraordinary circumstances may be all but a uniform bar to such discovery. This is relatively consistent with interpretations of extraordinary circumstances in other areas of the law. Indeed, instruction from the application of the extraordinary circumstances tests in other matters suggests that this high standard may never afford grounds for post-trial discovery for purposes of pursuing a sanctions motion.

A. Other Extraordinary Circumstances Tests

The United States Supreme Court instructs federal courts to apply an extraordinary circumstances test in determining whether to equitably toll a claim.[62] Although the Court has not explained its definition of *extraordinary* in this context, it has been explicit that a litigant may not establish extraordinary circumstances where the issues necessitating equitable tolling were within its own control.[63] Put another way, the extraordinary circumstances must be related to some external obstacle that caused the litigant to seek equitable relief.[64]

Likewise, courts have employed extraordinary or exceptional circumstances tests where parties seek to compel the depositions of high-ranking government officials concerning their reasons for undertaking official government action.[65]

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[59] *Watson*, 827 P.2d at 317 (citing Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir.1987); 2A Moore's Federal Practice 11.01[4] at 11–26, 27 (2d ed. 1987)).

[60] *Watson*, 827 P.2d at 317.

[61] *See id.*

[62] *See generally* Menominee Indian Tribe of Wis. v. United States, 577 U.S. 250 (2016).

[63] *Id.* at 256–57.

[64] *Id.*

[65] United States v. Morgan, 313 U.S. 409, 422 (1941); *see* Bogan v. City of Boston, 489 F.3d 417, 423 (1st Cir.2007); In re United States (Holder), 197 F.3d 310, 313–14 (8th Cir.1999); In re FDIC, 58 F.3d 1055, 1060 (5th Cir.1995); In re United States (Kessler), 985 F.2d 510, 512 (11th Cir. 1993); Franklin Sav. Ass'n v. Ryan, 922 F.2d 209, 211 (4th Cir.1991); Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir.1985); Kyle Eng'g Co. v. Kleppe, 600 F.2d 226, 231–32 (9th Cir.1979); Warren Bank v. Camp, 396 F.2d 52, 56–57 (6th Cir.1968).

In clarifying the proof required under that test, the Second Circuit held that extraordinary circumstances require a demonstration that the official from whom the deposition is sought "has unique, first-hand knowledge related to the litigated claims or that the necessary information cannot be obtained through other, less burdensome means."[66] Similarly, the Tenth Circuit requires the party seeking the deposition to demonstrate that "(1) the official has first-hand knowledge related to the claim being litigated; (2) the testimony will likely lead to the discovery of admissible evidence[;] (3) the deposition is essential to the party's case[;] and (4) the information cannot be obtained from an alternative source or via less burdensome means."[67] In adopting that doctrine, the Tenth Circuit clarified that requiring essentiality means that the information sought must be not only relevant, but necessary.[68] This application of the extraordinary circumstances test to high-ranking government official depositions is a helpful map as to how extraordinary circumstances inquiries may proceed in post-trial sanctions discovery matters.

B. EXTRAORDINARY CIRCUMSTANCES FOR POST-TRIAL SANCTIONS DISCOVERY

As the Washington Court of Appeals addressed in *Watson*, a court determining whether extraordinary circumstances exist may consider the type and severity of the sanction and the judge's involvement in the case to date.[69] But even the test adopted in that case leaves courts with broad discretion in evaluating the "circumstances in general" when determining whether to permit post-trial discovery.[70] Other applications of the extraordinary circumstances tests are instructive in determining what information is relevant to elucidate whether the "circumstances in general" are extraordinary in nature.

As noted above, proving extraordinary circumstances in other contexts entails an exceptionally heavy burden for the movant. The factors central to extraordinary circumstances tests are even less forgiving when applied to post-trial sanctions discovery. For one, sanctions litigants would need to demonstrate that an external force prevented them from receiving that information before trial during the ordinary discovery phase. Before trial, sanctions movants have the opportunity to issue written discovery, notice depositions, and conduct third-party discovery into the conduct and claims of the opposing party. There are few circumstances in which a movant can demonstrate that failure to obtain the needed information was outside their control, such as where an opposing party withheld information or lied. Otherwise, a party's failure to seek or obtain that information is squarely the party's own fault.

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[66] Lederman v. New York City Dep't of Parks & Recreation, 731 F.3d 199, 203 (2d Cir. 2013) (citing Bogan v. City of Boston, 489 F.3d 417, 423 (1st Cir.2007); In re United States (Holder), 197 F.3d at 316 (8th Cir.1999)).

[67] In re Off. of the Utah Att'y Gen., 56 F.4th 1254, 1264 (10th Cir. 2022).

[68] *Id.*

[69] Watson v. Maier, 827 P.2d 311, 317 (Wash. App. 1992).

[70] *See id.*

Furthermore, a party seeking discovery must show that the information is essential to the sanctions claim and that the information cannot be obtained via an alternative source or less burdensome means. Given that courts are often able to rule on the sanctions motions without the need for evidence outside the case record, there are likely few instances in which a party can meet this burden. Even in the case where a court is unable to rule on the sanctions motion based upon the pleadings and case record as it existed at the conclusion of trial, the sanctions movant would need to show that there is not a less burdensome means of obtaining this information. Sanctions motions may, within the court's discretion, proceed as evidentiary hearings, so a litigant would need to demonstrate that he cannot obtain the information in testimony at that hearing.[71]

Given the high bar of the extraordinary circumstances test along with the espoused public policy disfavoring prolonged sanctions litigation, it is unlikely that a Virginia court applying this test would ever allow a movant to proceed with post-trial discovery to investigate facts related to a discovery motion.

C. WITHOUT DISCOVERY, HOW DOES A SANCTIONS MOVANT LEARN WHAT THE OTHER PARTY KNEW, AND WHEN IT WAS KNOWN?

To date, no party in any court across the nation—state or federal—has successfully established extraordinary circumstances to justify the right to conduct post-trial discovery to pursue a sanctions motion. Determining whether a pleading was brought for an improper purpose is a slightly less fact-intensive inquiry since courts can rely on inferences from the pleadings and other conduct to evaluate the motivation behind the pleading. But determining whether a party conducted a reasonable investigation before signing a pleading, motion, or other writing is a more difficult inquiry to resolve without some factual inquiry. This begs the question: how is a sanctions movant to determine what the opposing counsel knew when they filed the writing about which sanctions are sought?

The answer is simple: the ordinary tools of pre-trial discovery. Where a party anticipates that a suit may have been brought for an improper purpose or may otherwise be based upon poor factual or legal conclusions, that party should avail themselves of discovery to investigate a potential sanctions motion. A trial court may appropriately "consider any relevant and admissible evidence tending to show the attorney's state of knowledge at the time" the pleading in question was signed.[72] Accordingly, building a factual record as to the reasonable inquiry and motivation is essential to a successful sanctions motion.[73] A party can appropriately ask about the basis of factual assertions in the complaint in written discovery. Likewise, a party can interrogate motivations underlying the lawsuit in deposition. This becomes somewhat more complicated as the lawsuit progresses

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[71] Fed. R. Civ. P. 11, Advisory Committee Notes – 1983 Amendment.

[72] Ford Motor Co. v. Benitez, 273 Va. 242, 251, 639 S.E.2d 203, 207 (2007).

[73] In *Benitez*, the trial court considered information from the previously nonsuited action in determining that the lawyer failed to conduct a reasonable inquiry. *Id.*

and the available discovery wanes, particularly if a party seeks sanctions based on a late-stage motion. But, at that point, the prospective sanctions movant ought to have constructed a sufficient record to challenge the factual basis or motivation of a given motion.

In short, if a lawyer has reason to believe that a pleading or motion may be based upon dubious facts or law, the best practice is to aggressively investigate the basis of that writing as thoroughly as possible in the ordinary course of discovery. Often, the purpose of a pleading or motion can be clear on the face of the writing itself, particularly where the improper purpose is delay or derision. But, if a lawyer believes that a pleading or motion is brought for the purpose of harassing or intimidating the client, he should investigate that motivation in discovery, as well. Courts are loathe to turn sanctions motions into full, satellite litigation; pre-trial discovery is almost certainly the only time a party has the opportunity to substantively investigate whether a pleading or motion violated Virginia Code section 8.01-271.1.

V. Conclusion

Pursuing a sanctions motion is an uphill battle, wherein a movant must overcome the general disfavor toward protracted satellite litigation and demonstrate that the opponent was objectively unreasonable in filing an improper or unfounded pleading or motion. Proving extraordinary circumstances to justify post-trial discovery to investigate the basis of a sanctions motion is an even more arduous task. As courts around the nation have held, post-trial discovery for a sanctions motion is appropriate only under extraordinary circumstances. In context of other applications of extraordinary circumstances tests, there is almost no conceivable circumstance in which a sanctions movant can demonstrate cognizable extraordinary circumstances. Should Virginia courts address the propriety of post-trial sanctions discovery, they will most likely fall in line with federal courts and the holding in *Neidig* and adopt the strict extraordinary circumstances test. As best practice, prospective sanctions movants should anticipate having to answer the question of "what the opposing party knew and when they knew it," and seek that information through the ordinary tools of pre-trial discovery.