V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

CHERI SMITH,	)	
Plaintiff	)	
	)	
v.	)	**Chancery No. 53360**
	)	
WESLEY C. SMITH,	)	
Defendant	)	

#43 - MOTION FOR SANCTIONS FOR OBSTRUCTION OF DISCOVERY BY MR. FAHY

A pdf copy of this motion is available at: http://www.liamsdad.org/court_case/

COMES NOW the Defendant, Wesley C. Smith, and states that the GAL Ronald Fahy motion to quash of May 17, 2005, is not well grounded in fact, is not warranted by existing law, and respectfully demands that the court deny his motion to quash and impose sanctions pursuant to Virginia Code § 8.01-271. In support of his MOTION the Defendant states as follows:

1. The motion filed by Ronald Fahy is in violation of Code **§ 8.01-271.1** as it relies on a legal position that is not well grounded in fact, is not warranted by existing law, and Mr. Fahy would have been aware of that had he made any reasonable inquiry. He either made no inquiry about his position or **knowingly submitted to the court a motion that he knew was in violation of law and rule**.

2. Mr. Fahy cites "unreasonable and burdensome" for documents previously provided to the Defendant. **Obviously the Defendant does not intend, or desire, for him to provide additional copies**, a fact he could have determined with "reasonable inquiry" or if he had attempt to resolve the issue with the Defendant. He made no attempt to resolve any issues with the Defendant in spite of the rule requiring him to do so.

3. In his motion, Mr. Fahy claims:

> "The documents in my possession relevant to this case consist of (a) Court pleadings and Orders, (b) documents obtained from Wesley Smith, approximately 21 inches thick, (c) notes prepared by me for use by me as GAL in this case, and (d) the attached letter."

Given items (a) and (b) are already in the possession of the Defendant those were obviously not intended to be provided in response. Item (d) was provided, leaving item (c) notes and all the other documents he

doesn't consider relevant. However **his motion is so vague and ambiguous that it isn't clear which of the 11 specific requests he feels isn't relevant,** although it would be interesting to find which items he has been billing for collecting that he does not feel is relevant to that which his is billing for.

4. Mr. Fahy cites attorney/client privilege, work product, and not relevant as excuses for not providing the notes. He claims all three excuses apply at the same time to the documents in question. He seems to feel his refusal to comply will be tolerated by the court in spite of the **complete nonsensical nature of his objections**. It is impossible for a document to be covered by attorney/client or work product and at the same time not be relevant to the case. It also appears unlikely that any document is both attorney/client and work product at the same time. Mr. Fahy is either ignorant of the meaning of attorney/client or work product or **intentionally attempting to mislead** the court and/or Defendant.

5. Mr. Fahy's use of attorney/client privilege for any document in this case is completely inappropriate. First of all **Mr. Fahy does not have a client**, or at least to be more specific, our son, Liam Smith is not his client. Even if that was overlooked Mr. Fahy admitted he couldn't understand our son when he talks, and attorney/client only covers communication for a client seeking legal advice. It is unbelievable that our son is seeking legal advice from Mr. Fahy. If Mr. Fahy feels the court is his client, he still can't have documents covered by attorney/client as the court is prohibited from any ex parte communications and is required by § 20-124.2:1 to prepare a record of the interview and make it part of the court record. His use of attorney/client is clearly intentionally misleading and wrong.

6. Mr. Fahy argues that **all requested** documents "(i) constitute attorney work product, (ii) are protected by attorney-client privilege, (iii) are not relevant to the subject matter of this case, and/or (iv) the request for which is unreasonable, burdensome, overbroad and ambiguous". Instead it is his excuse that is overly broad and ambiguous. Mr. Fahy has not claimed to have a degree or license as a mental health professional so its hard to imagine his training in the area to be so voluminous as to be burdensome, the more likely correct response is that he has little or no training and just doesn't want to admit to it. His argument is also specious as it relates to the rest of the requests… requesting evidence he has in his possession but hasn't provided the Defendant hopefully is far from broad and burdensome.

7. Mr. Fahy should be aware that billing records are accepted as discoverable, especially when he is asking the Defendant to pay the bills. As to educational materials and training, they are clearly relevant as Mr. Fahy has presented his own views on the topics and presented no expert opinion or other evidence to support his views, he has in effect been representing himself to the court as someone knowledgeable as to mental health issues and the best interests of children. As such the Defendant has a right to question his credentials. The requests for his prior case reports are clearly relevant to show his bias and lack of proper performance of his duty. The reports would have been submitted to the court and thus can't possibly be covered by attorney/client or work product.

8. As traditionally articulated, the attorney-client privilege only covers communications from the client to the lawyer, and not vice versa. The general principle is that the attorney-client privilege only protects communications relating to the request for or rendering of legal advice. The attorney-client privilege does not protect communications with, in the presence of, or later shared with, a lawyer's agent whose role is not to assist the lawyer in providing legal advice to the client.

> Unless they are necessary for the transmission of the information between the client and lawyer, the presence of clients' agents during an otherwise privileged communication means that **the communication will not be privileged** ab initio. Examples include: friends (United States v. Evans, 113 F.3d 1457 (7th Cir. 1997)); family members (D.A.S. v. People, 863 P.2d 291 (Colo. 1993)); independent contractor or consultant on mental health issues (Crowley v. L.L. Bean, Inc., No. 00- 183-P-C, 2001 U.S. Dist. LEXIS 3726, at *3 (D. Me. Feb. 1, 2001)); third- party doctor participating in a telephone call between a lawyer and a client (Cooney v. Booth, 198 F.R.D. 62 (E.D. Pa. 2000));
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> … **privilege never exists if there is no expectation of confidentiality**, while a later sharing of protected information waives the privilege. Federal Election Comm'n v. Christian Coalition, 178 F.R.D. 61, 71-72 (E.D. Va.)

9. Mr. Fahy has not presented a log detailing which documents he considers privileged. The Virginia Rules explicitly require a privilege log. Va. S. Ct. Rule 4:1(b)(6).

> See Board of Dirs. of the Port Royal Condo. Unit Owners' Ass'n v. Crossland Savings F.S.B., 19 Va. Cir. 8, 9 (Alexandria 1989) (withholding a ruling on defendant's privilege assertions until the defendant filed a "Vaughan" index).
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> **Clients asserting the privilege may not assert it in a blanket fashion,** but rather must meet the burden of proof for each particular document or bit of information. Long v. Anderson Univ., 204 F.R.D. 129, 134 (S.D. Ind. 2001); Yurick v. Liberty Mut. Ins. Co., 201 F.R.D. 465, 472 (D. Ariz. 2001).

10. Additionally, as Cheri Smith, Loretta Vardy, and Igor Bakhir are not his employees or consultants, its impossible to apply "work product" or attorney/client for them. Arguing contrary is against the rules and law and should be punished. The work product doctrine usually does not cover facts obtained by a lawyer from third parties. McCoo v. Denny's Inc., 192 F.R.D. 675, 695 (D. Kan. 2000).

11. Mr. Fahy cites the vague "attorney work product" and/or "attorney-client privilege" phrase to exclude education/training materials. Clearly neither work product nor attorney/client applies to training materials. Mr. Fahy is obviously attempting to use the exclusion rules for an improper purpose.

> To deserve work product protection, a document must not only have been created at a time when the preparer anticipated litigation, **the document must have been prepared because of the litigation** (In re Grand Jury Proceedings, No. M-11-189, 2001 U.S. Dist. LEXIS 15646, at *49 (S.D.N.Y. Oct. 3, 2001);

12. "… to the extent that the materials sought relate to the preparation of expert testimony for trial **they should be produced**." Wilson v. Rogers, 53 Va. Cir. 280, 282 (Portsmouth 2000)

13. Under Code § 8.01-271.1 every motion signed or made orally by an attorney constitutes a representation that "to the best of his knowledge, information, and belief, formed after reasonable inquiry," the argument or legal position is "well grounded in fact," and is well grounded in current law or is made in good faith application of law that should be extended, modified, or reversed. If this statute is violated, then **the trial court shall impose** upon the attorney and/or the represented party "an appropriate sanction." (VINSON v VINSON 2003) Note the word **shall** in the law - **the discretion of the judge is to determine what sanction to impose not if a sanction should be imposed**.

> "…we use an objective standard of reasonableness in determining whether a litigant and his attorney, after reasonable inquiry, could have formed a reasonable belief that the pleading was well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and not interposed for an improper purpose. Flippo v. CSC Assocs. III, L.L.C., 262 Va. 48, 65-66, 547 S.E.2d 216, 227 (2001)." (VINSON v VINSON Virginia Appeals 2003)

> "Courts often impose sanctions when a litigant . . . has acted in bad faith." Gentry v. Toyota Motor Corp., 252 Va. 30, 34, 471 S.E.2d 485, 488 (1996). Sanctions are also "used to protect courts against those who would abuse the judicial process." Oxenham v. Johnson, 241 Va. 281, 286, 402 S.E.2d 1, 3 (1991). "The purpose of such . . . sanction[s] is to punish the offending party and deter others from acting similarly." Gentry, 252 Va. at 34, 471 S.E.2d at 488.

> The statute says only that such expenses can be included in the sanction, suggesting other amounts can be included also. Any other reading of the statute would make the term "including" meaningless. See Rasmussen v. Commonwealth, 31 Va. App. 233, 238, 522 S.E.2d 401, 403

(1999)

Additionally, the two main purposes of sanctions awards under the statute are punishment and deterrence. Cardinal Holding Co. v. Deal, 258 Va. 623, 632-33, 522 S.E.2d 614, 620 (1999). Allowing only reimbursement of costs associated with a motion made under Code § 8.01-271.1 would not always satisfy these purposes. Therefore, sanctions can exceed the amount necessary to reimburse the costs of litigating an action under Code § 8.01-271.1, as long as the sanctions imposed are reasonable. See id.

14. For such other and further reasons as may be advanced in open Court.

WHEREFORE as it has been shown no reasonable person would believe Ronald Fahy, a licensed Virginia Bar Association member, to be so completely ignorant of the law, rules, and rulings that govern attorney/client and work product but would instead conclude he intentionally submitted to the court a motion that he knew was in violation of law and rule, the Court has an **obligation** to sanction him for his conduct. The Defendant hereby moves the Court to issue sanctions to both punish him and to deter others from following his example and requests the following:

1. Order Mr. Fahy to comply with the subpoena.

2. Remove Ronald Fahy as Guardian Ad Litem.

3. Order Mr. Fahy to pay the Defendant for the time spent due to his misconduct, since the Defendants current wage would be neither a sanction or deterrent, the rate of a typical attorney ($175-$200/hour) is appropriate.

4. Recommend discipline by the Virginia Bar Association, or other suitable sanction.

5. Order such further relief as the nature of the case or the goals of equity require.

Respectfully Submitted,
Wesley C. Smith

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no phone

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing motion was served to Loretta Vardy and Ronald Fahy (GAL) via e-mail and/or fax and/or website, this 13th day of February 2006.

_____
Wesley C. Smith