V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

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

#29 - DEFENDANTS MOTION FOR SANCTIONS AGAINST PLAINTIFF

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 Complainant's Attorney Loretta Vardy motion of May 27, 2005, contains false statements, is not well grounded in fact, is not warranted by existing law, and respectfully demands that the court impose sanctions pursuant to Virginia Code § 8.01-271. In support of his MOTION the Defendant states as follows:

1. The motion filed by Loretta Vardy, **one month after the subpoena was filed**, is in violation of Code **§ 8.01-271.1** as it both contains false statements as well as relies on a legal position that is not well grounded in fact, is not warranted by existing law, and Ms. Vardy would have been aware of that had she made any reasonable inquiry. She either made no inquiry about her position or **knowingly submitted to the court a motion that she knew was in violation of law and rule**.

2. It should be noted that the only reason the subpoena was sent in the first place was due to the **failure of Ms. Vardy and her client to comply with the Defendants previous discovery requests**, and their continued refusal to comply even 10 months after a motion to compel and ruling to provide some of the documents. Ms. Vardy neither provided any documents in response to the subpoena, nor did she make any attempt to resolve the issue with the Defendant. Such things as documents already provided were obviously not intended to be requested again. Ms Vardy could and is actually required by rule to attempt to resolve the issue before involving the court.

3. Ms. Vardy claims there was not proper **service** of the Subpoena Duces Tecum. The Defendant

asked the clerk to have the sheriff serve the subpoena and additionally mailed a copy to her. The very fact she cites the specific requests shows that she received it, thus per § 8.01-288 "process which has reached the person… shall be sufficient…" Thus her argument is in violation of § 8.01-271 and warrants sanctions.

4. Ms. Vardy cites attorney/client privilege yet **the Defendant specifically excluded items covered by attorney/client privilege**, thus her position is specious.

5. Ms. Vardy cites "duplicative, overly broad and burdensome" for documents previously provided to the Defendant. **Obviously the Defendant does not intend, or desire, for her to provide additional copies**, a fact she could have determined with "reasonable inquiry" or if she had attempt to resolve the issue with the Defendant.

6. Ms. Vardy argues that **all requests** are "overly broad and burdensome". Instead it is her excuse that is overly broad. No reasonable person would conclude that records of bills she is asking the Defendant to pay is "overly broad and burdensome" and in fact any reasonable person would assume that if the court rules in her favor she will herself produce the bills for payment without finding it "overly broad and burdensome". Similarly as Ms. Vardy has not claimed to have a degree or license as a mental health professional so its hard to imagine her training in the area to be so voluminous as to be burdensome, the more likely correct response is that she has little or no training and just doesn't want to admit to it. Her argument is also specious as it relates to the rest of the requests… requesting evidence she has but hasn't provided the Defendant hopefully is far from broad and burdensome, if it is then her removal from the case is necessary.

7. Ms Vardy also claims that "intended to harass Complainant's counsel. Ms Vardy can't possibly know the intent of the Defendant. Ms. Vardy has refused to provide the Defendant with any record of the amount of money she is asking the court to order him to pay her, its unreasonable to consider asking for documents to determine how much money she is asking for. She has knowingly made a false statement in violation of RULE 3.3.

8. Ms. Vardy claims items 5,6,7,8, are beyond the proper scope of discovery. She should be aware that billing records are accepted as discoverable, especially when she is asking the Defendant to pay the bills. Her argument is specious and should be sanctioned for making it. As to educational materials and training, they are clearly relevant as Ms. Vardy has repeatedly presented her own views on the topics and presented no expert opinion or other evidence to support her views, she has in effect been representing herself 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 her credentials.

9. Ms. Vardy has also attempted to use **attorney/client** privilege to cover documents that she is (or should) be aware are not covered by attorney-client privilege. She uses it in reference to billing and retainer agreements. Even an untrained pro-se litigant such as myself is aware that with "reasonable inquiry" its obvious the courts have consistently ruled that retainer agreements and billing records are discoverable especially when she has put the information at issue by requesting the other to pay attorney fees.

> The **privilege usually does not protect information about a lawyer's fee arrangement with a client or the amount of fees paid**. Patel v. Allison, 54 Va. Cir. 155, 158 (Virginia Beach 2000) ("It is generally held that the attorney-client privilege generally does not protect disclosure of information about, inter alia, attorney billing records, attorney fees, and fee arrangements."); In re Grand Jury Proceedings, 33 F.3d 342, 354 (4th Cir. 1994) ("The attorney-client privilege normally does not extend to the payment of attorney's fees and expenses."); NLRB v. Harvey, 349 F.2d 900, 904-905 (4th Cir. 1965);

10. Ms. Vardy used the attorney/client excuse in a vague manner to cover communications with persons other than her client thus intentionally being deceptive. Specifically **attorney/client does not cover communications between Ms. Vardy and people the Plaintiff is committing adultery with**.

> 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)); outside company accountant attending a board of directors meeting (Ampa Ltd. v. Kentfield Capital LLC, No. 00 Civ. 0508 (NRB)(AJP), 2000 U.S. Dist. LEXIS 11638, at *1 (S.D.N.Y. Aug. 16, 2000)); 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));

11. 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.

> … **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.)

> **The privilege does not apply: just because a client communicated with the lawyer** (Maine v. United States Dep't of the Interior, 124 F.Supp. 2d 728 (D. Me. 2001); Alexander v. FBI, 186 F.R.D. 21, 45-46 (D.D.C. 1998)); just because a document is in a lawyer's file (National Union Fire Ins. Co. v. Valdez, 863 S.W.2d 458, 460 (Tex. 1993)); just because the client or lawyer send each other transmittal letters (United States Fidelity & Guar. Co. v. Braspetro Oil Servs. Co., Nos. 97 Civ. 6124 (JGK) (THK) & 98 Civ. 3099 (JGK) (THK), 2000 U.S. Dist. LEXIS 7939, at *51 (S.D.N.Y. June 7, 2000)); just because a client sends a non-privileged document to a lawyer (Smithkline Beecham Corp. v. Pentech Pharms., Inc., No. 00 C 2855, 2001 U.S. Dist. LEXIS 18281, at *4 (N.D. Ill. Nov. 5, 2001);

12. Also attorney/client does not cover all communications between attorney and client and specifically excludes **communication about future crimes** such as plans to violate court orders. Since the Plaintiff has informed him that **Ms. Vardy has advised her to violate portions of court orders**, such communication is not covered by attorney/client privilege. Again if I can do "reasonable inquiry" and learn that fact so could Ms Vardy even if she didn't learn it in law school, although she likely knew and was **counting on the court to help in her deception** instead of imposing sanctions as required by law.

13. Also the claim that her attorney told her to do so is a **waiver of attorney/client**. A waiver would also occur if privileged information were later shared with third parties. Such as information shared with Mr. Fahy or others.

> 'The client's offer of his own or the attorney's testimony as to a part of any communication to the attorney is a waiver as to the whole of that communication, on the analogy of the principle of completeness.'"

14. Attorney/Client does not cover communications when other parties are a part of the communication, so communications with a third party, such as when my wife sends e-mail to both Ms.

Vardy and myself are not covered. The **privilege generally does not protect facts relating to the circumstances of the communication, such as date, place, duration of the communication**. Cardtoons, L.C. v. Major League Baseball Ass'n, 199 F.R.D. 677 (N.D. Okla. 2001).

15. Attorney/Client privilege can, and should, be **overturned for misconduct** and in cases like this where the Plaintiff has intentionally refused to comply with discovery after over 1.5 YEARS and for claiming the wrong protection when withholding a document. See Cleveland Hair Clinic, Inc. v. Puig, 968 F. Supp. 1227, 1241 (N.D. Ill. 1996); Horizon of Hope Ministry v. Clark County, Ohio, 115 F.R.D. 1, 5-6 (S.D. Ohio 1986); Patel v. Allison, 54 Va. Cir. 155 (Virginia Beach 2000)

16. Ms. Vardy has not presented a log detailing which documents she 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).

17. Ms. Vardy's excuse of "work product" is about the only claim she made that has any merit as it is a legal reason and the pro-se Defendant didn't specifically exclude documents covered by it when excluding "attorney/client" documents. However her excuse is too broad. She cites "work product" and "attorney/client" in a general group with items, 1,2,3,5,6. Attorney-client privilege and work product doctrine are fundamentally different concepts. Caremark, Inc. v. Affiliated Computer Servs., Inc., 195 F.R.D. 610, 613 (N.D. Ill. 2000). Its impossible to tell from her motion which items she believes are "work product" and which are "attorney/client".

> **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).

18. Additionally, as "Liam Smith, Wesley Smith, or Igor Bakhir" are not her 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).

19. Ms. Vardy cites the vague "attorney work products and/or protected by the attorney/client privilege" phrase to exclude education/training materials. Clearly neither work product nor attorney/client applies to training materials. Ms. Vardy 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);

20. "… 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)

21. 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.

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

WHEREFORE as it has been shown no reasonable person would believe Loretta Vardy, a licensed Virginia Bar Association member, to be so ignorant of the law, rules, and rulings that govern attorney/client and work product but instead believe she intentionally misused them, the court has an obligation but to sanction her for her conduct. The Defendant hereby moves to issue sanctions to both punish her and to deter others of following her example and requests any or all of the following:

1. Fines paid to the Defendant for the time spent due to her misconduct, since the Defendants current wage would be neither a sanction or deterrent, the rate of a typical attorney ($175-$200/hour) is appropriate.

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

3. Prohibit the Plaintiff from filing any more motions until she has complied with discovery and this subpoena.

4. Prohibit the Plaintiff from presenting any evidence in hearings on Defendants motion until she has complied with discovery and this subpoena.

5. Dismiss the Plaintiffs case.

6. Change Pendente Lite custody to the Defendant.

Respectfully Submitted,
Wesley C. Smith - Defendant

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Wesley C. Smith
5347 Landrum Rd APT 1, Dublin, VA 24084-5603, no phone
Defendant

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 first-class mail, this 18th day of August 2005.

_____
Wesley C. Smith