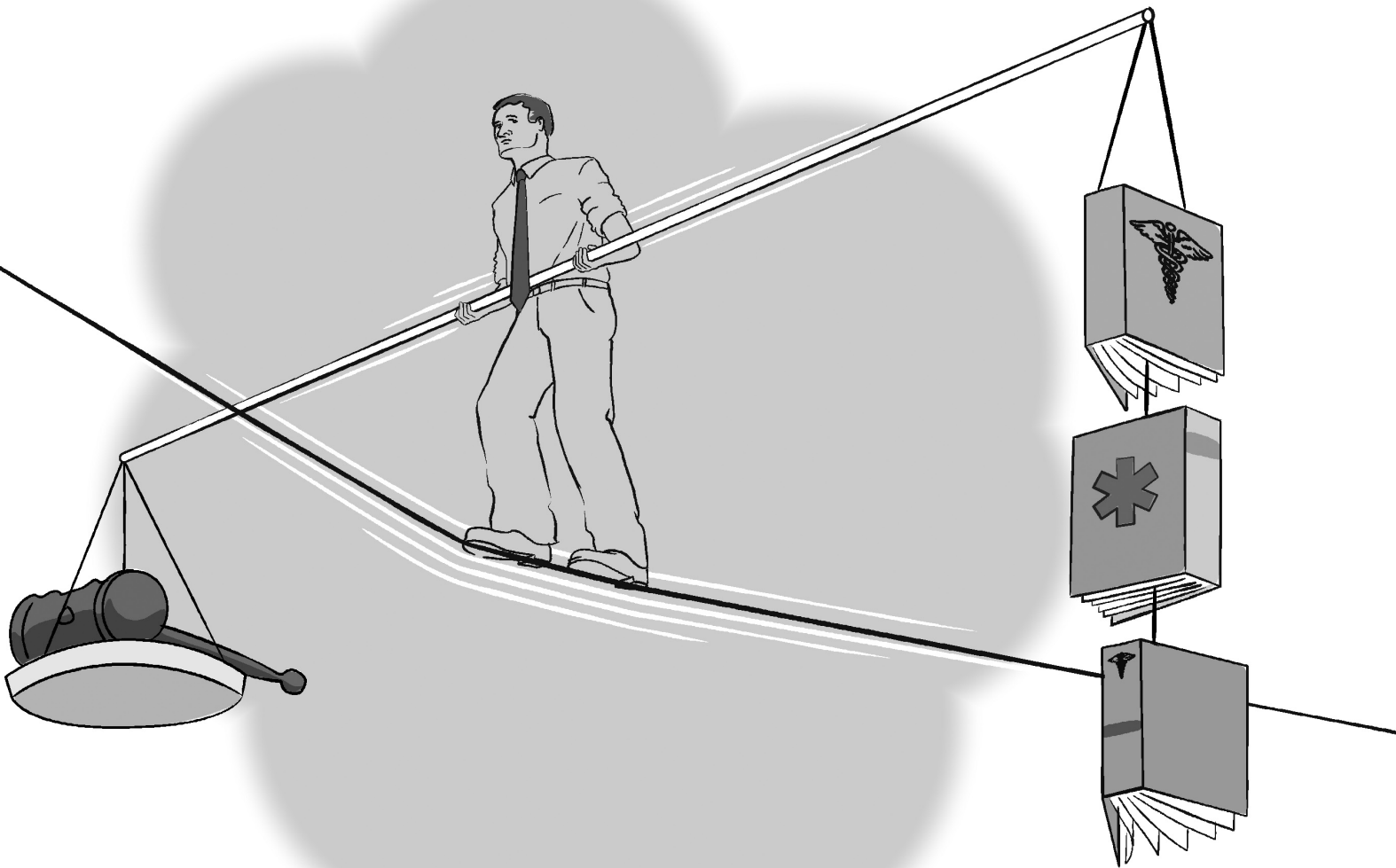

Definitive Answers

The defense is arguing that medical literature must be designated with experts and I thought it was 30 days before trial?

The Use of Medical Literature in Trial

by Stephanie E. Grana

Virginia Code Ann. §8.01-401.1, paragraph 3, controls the admissibility of medical literature or learned treatises in civil cases. Va. Code Ann. §8.01-401.1 was enacted by the General Assembly in 1982. It was essentially modeled after Federal Rules of Evidence 703 and 705 and did not contain a paragraph addressing the use of learned treatises. In 1994, the General Assembly substantially amended Va. Code Ann. §8.01-401.1 to include the following in a new third paragraph:

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay. If admitted, the statements may be read into evidence but may not be received as exhibits. If the statements are to be introduced through an expert witness upon direct examination, copies of the statements shall be provided to opposing parties thirty days prior to trial unless otherwise ordered by the court.

Paragraph 3 was modeled after Federal Rule of Evidence 803(18). However, the federal counterpart does not contain the last sentence in Va. Code Ann. §8.01-401.1 which requires that statements to be used by an expert witness on direct examination be provided to the opposing party 30 days before trial.

The 1994 amendment made a “substantive change” in the statute.¹ By amendment, and as interpreted by the Virginia Supreme Court in *Weinberg v. Given*, the statute permits the hearsay content of publications established to be **reliable authority** to be read into the record as substantive evidence “**in certain limited instances**” and “provided no other evidentiary rule prohibits such admission.”² Prior to the amendment, such publications were inadmissible as hearsay. It goes without saying that the admission of hearsay statements without the safeguard of cross-examination is fraught with overwhelming unfairness.³ Now such statements from a medical text or treatise are received into evidence not merely for purposes of impeachment, but as substantive evidence. In order to lay a proper foundation for the introduction of a medical treatise or article as permitted by the amended statute, the expert must testify that the publication itself is a **reliable authority** and not simply that the author of the publication is an authority.⁴ Cross-examination of an expert with an article he or she does not recognize as authoritative is typically reversible error, unless the opposing party’s expert establishes the article as a reliable authority on direct examination.⁵ In *Commonwealth v. Asphalt Roads & Materials, Inc.*, No. 1665-97-1

(Ct. of Appeals, March 3, 1998), the Court of Appeals held that it was inadmissible hearsay to admit the “rental rate blue book for construction equipment” where no expert witness tendered an opinion based on a specific reference to that book and, instead, the book itself was tendered as authoritative evidence of its contents.

Va. Code Ann. §8.01-401.1, as amended, specifically provides that: “[i]f the statements are to be introduced through an expert witness upon **direct examination**, copies of the statements **shall** be provided to opposing parties **thirty days prior to trial** unless otherwise ordered by the court.”⁶ The 30-day rule contained in Va. Code Ann. §8.01-401.1 requires a party to identify not just the publications he or she will introduce as evidence through his or her expert witness but the **specific statements contained in the publications**.⁷ Thus, in *May v. Caruso*, 264 Va. 358, 568 S.E.2d 690 (2002), the Virginia Supreme Court affirmed the trial court’s refusal to admit as evidence articles and treatises provided by the plaintiff thirty days before trial because the plaintiff had not identified the specific statements within the publications on which his expert would rely. Although the plaintiff had “technically complied” with the requirements of Va. Code Ann. §8.01-401.1 because the statements were contained within the articles and treatises identified before trial, that “mere technical compliance” with the section’s requirements does not mandate admission of the statements into evidence by the trial court. The statute expressly refers to **statements contained in the published literature** rather than the content of that literature in its entirety.⁸ Moreover, the statute expressly provides that such statements, if admitted, may be read into evidence but may **not** be received as exhibits.

The General Assembly’s use of this conditional language clearly indicates its intent that the decision whether to admit statements contained in published literature is committed to the “sound discretion” of the trial court. Such discretion is particularly appropriate in light of the purpose of limiting the hearsay exception to ensure notice to the opposing party and thereby safeguard the opposing party’s right to meaningful cross-examination of the expert witness.⁹ In *McMunn v. Tatum*, the Virginia Supreme Court held that the trial judge did not abuse his discretion in refusing to admit the articles and treatises into evidence as [n]o litigant in our judicial system is required to contend with the opinions of absent “experts” whose qualifications have not been established to the satisfaction of the court, whose demeanor cannot be observed by the trier of fact, and whose pronouncements are immune from cross-examination.¹⁰

In *Budd v. Punyanitya*, 273 Va. 583, 643 S.E.2d 180 (2007), a medical malpractice case, Plaintiff’s counsel designated articles and treatises on which his expert would rely at trial but failed to identify

specific statements contained in those publications or to provide copies of the publications. On direct examination of Plaintiff's expert at trial, Plaintiff's counsel attempted to have his expert testify that the publications he had designated, but failed to provide, were reliable authorities such that Plaintiff's counsel could introduce them as substantive evidence on cross-examination of the physician's experts. The trial court refused to allow Plaintiff's counsel to establish the articles as reliable authorities because Plaintiff had not identified the statements contained in the publications 30 days before trial. On appeal, Plaintiff argued that Va. Code Ann. §8.01-401.1 only requires a party to provide copies of statements contained in treatises when the expert was going to use them on direct examination and *not* when the only purpose was to identify the treatises as reliable authority so that they could be used on cross-examination.

The Virginia Supreme Court disagreed. It held that the issue was one of statutory interpretation and, as such, the Court would review the issue *de novo*.¹¹ The Court noted that prior to the 1994 amendment to Va. Code Ann. §8.01-401.1 the common law in Virginia was that a party, without violating the hearsay rule, could cross-examine an opposing party's expert witness through the use of statements in authoritative literature. Nothing in the language of Va. Code Ann. §8.01-401.1 remotely suggests that the legislature intended to change this rule, and the common law remains effective law. So long as the statements from authoritative literature are used "solely for the purpose of testing an expert's knowledge, reading, and accuracy in a field of expertise, and are not read directly or indirectly to the jury as substantive evidence regarding the contents of the literature or the opinions of its author, neither the hearsay rule nor the exception thereto found in Code §8.01-401.1 is implicated."¹² Because the Plaintiff in *Budd* was not simply planning to use the statements to cross-examine the physician's experts **but also to introduce those statements as substantive evidence**, the Virginia Supreme Court held that Va. Code Ann. §8.01-401.1 required that those statements be provided to opposing counsel 30 days before trial. "The crux of the issue presented in this case is then whether the language of the statute contemplates, as *Budd* maintains, a distinction between merely 'laying a foundation' to establish published literature as reliable authority for the subsequent introduction of that literature as substantive evidence and the introduction of published literature in evidence during the direct examination of the proponent's expert witness. The language of the statute makes no such distinction. The fact that statements from the literature established as reliable authority upon the direct testimony of the proponent's expert witness will not be read into the record, if at all, until a subsequent cross-examination of an opposing expert witness

does not alter the conclusion that in the context of the language of Code §8.01-401.1, the statements upon which the proponent intends to rely have been 'introduced through an expert witness upon direct examination.'"¹³

To hold otherwise, "a party could successfully circumvent the statute's thirty day notice requirement, and the hearsay rule, by having its expert essentially vouch for the reliability and authority of any number of publications which his opponent has never seen and has not had a fair opportunity to have his own expert review and prepare a response. Such a result would not provide the limited and balanced exception to the hearsay rule which the legislature clearly intended. To bifurcate the meaning of the statute's language so as to permit a party's expert witness to merely establish a publication as a reliable authority on direct examination without 'introducing' it is inconsistent with the purpose of the statute and, indeed, with traditional notions of fair play in the adversarial process."¹⁴ In the end, the Virginia Supreme Court held that "[w]hen a party intends to introduce into evidence statements from published literature during the cross-examination of an opposing expert, but wishes to avoid the possibility that the opposing expert will not acknowledge that literature as a reliable authority on a particular matter at issue by having the party's own expert establish the literature as a reliable authority on direct examination, **the party must provide opposing counsel with copies of the statements in the literature thirty days before trial** pursuant to Code §8.01-401.1."¹⁵

In enacting the 1994 amendment to Va. Code Ann. §8.01-401.1, the General Assembly was clearly aware of the dangers and overwhelming unfairness of the admission of hearsay expert opinion without the "testing safeguard" of cross-examination and sought to avoid such by inserting two prerequisites to the admission of hearsay expert opinions as substantive evidence on direct examination: (1) the testifying witness must have "relied upon" the statements contained in the published treatises and (2) that the statements must be established as "a reliable authority" by testimony or by stipulation.¹⁶ As noted above in construing paragraph 3 of Va. Code Ann. §8.01-401.1, the Supreme Court has opined: "we must give effect to the legislature's intention as expressed by the language used in the statute unless a literal interpretation of the language would result in a manifest absurdity."¹⁷

The disclosure requirements of Virginia Rule 4:1(b)(4)(A)(i) require the following:

A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to

which the expert is expected to testify and a summary of the grounds for each opinion.¹⁸

In *John Crane, Inc. v. Jones*, 274 Va. 581, 650 S.E.2d 851 (2007), the Supreme Court considered Rule 4:1(b)(4)(A)(i) and held that the trial court did not err in excluding expert testimony that failed to comply with the Rule by not disclosing the “substance” of an expert’s opinions in the expert witness disclosure or in the expert’s report.¹⁹ The Court explained that in ruling upon the admissibility of an expert’s testimony, “an opponent’s ability to depose an expert or familiarity with such expert through prior litigation does not relieve a party from complying with the disclosure requirements of Rule 4:1(b)(4)(A)(i).”²⁰ Designations pursuant to Va. Code Ann. §8.01-401.1 and/or the use of medical literature at trial were not at issue in the *Crane* decision.

If one’s expert has relied upon expert literature in the formation of his or her opinions in a case, it may be argued that the failure to disclose such literature in a party’s expert designation equates with a failure to include a “summary of the grounds” for each such expert’s opinion. If your expert designation does not include a simultaneous medical literature designation that you or your experts plan to rely on for trial testimony, there is a potential argument that you have not satisfied the requirements of the Rule and *Crane* because you have failed to provide a full and complete disclosure of your expert’s opinions. Following this logic, there is an argument post-*Crane* that the better or safer practice is to designate medical literature with your expert designation or, at the least, make a reference to such literature, especially since such statements, if admitted, may be read into evidence. It is also important to further note that the *Crane* ruling, including its’ reference to Rule 4:1(b)(4)(A)(i), may not need to be read so strictly and “must also be read in conjunction with the pre-trial scheduling order.”²¹ As Judge Fisher pointed out in the *Richards v. Butterfield and Cardiovascular Ctr. of Hampton Roads*, Newport News Circuit Court decision in 2009, there is no “bright line rule.”²² The pre-trial order provides that the adequacy of a party’s disclosure of expert opinions or lack thereof, rests within the discretion of the trial court and is reviewable only as an abuse of discretion.²³

In *Bostic v. About Women OB/GYN, P.C.*, in 2008, the Supreme Court opined that the statutory standard of Va. Code Ann. §8.01-401.1 was not met by an expert’s testimony that he relied upon the literature only to use “to talk to this jury” and the witness must testify that he or she relied upon the article in forming his or her opinion, which is consistent with the views expressed by the absent author.²⁴ “Any enlargement of the statutory limitations leads to the evils mentioned in *McMunn* and *Weinberg*, which the General Assembly clearly

sought to avoid.”²⁵ Viewed by that standard, the Supreme Court held that the circuit court erred in admitting the opinions contained in published medical literature without a sufficient foundation as required by Va. Code Ann. §8.01-401.1. The judgment appealed from was reversed and the case was remanded for a new trial.²⁶

“Statutes in derogation of common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms.”²⁷ As expressed by the Virginia Supreme Court in its opinions in *May v. Caruso* and *Budd v. Punyanitya*, *supra*, the Court is committed to the proposition that the 1994 Amendment to Va. Code Ann. §8.01-401.1 “means what it says, and says what it means – without room for interpretation.”²⁸ In *Durand v. Richards*, on July 29, 2009, Judge Weckstein of the Roanoke City Circuit Court set aside a defense verdict in a medical malpractice case after concluding that the court erred in allowing the Defendants to introduce through their own expert witness on direct examination statements that the Defendants had not provided to Plaintiff’s counsel 30 days before trial because the statements were contained in the articles that Plaintiff’s counsel had timely designated and utilized through their own expert on direct examination.²⁹ Approximately 30 days before trial, Plaintiff’s counsel duly designated specific statements from 15 medical and surgical publications for possible use during the direct examination of Plaintiff’s expert witness. Defendants’ medical literature designation pertained only to subject matter that previously had been non-suited. Plaintiff’s counsel later provided Defense counsel with five specific statements to be read into evidence from the 15 articles from which statements had been previously designated. During Defendants’ case and over specific objection by Plaintiff’s counsel, Defendants introduced through expert witnesses on direct examination, additional statements contained in articles that Plaintiff’s counsel had designated. Contrary to Va. Code Ann. §8.01-401.1, Defendants’ counsel had not designated any of these articles, nor any of the statements contained within these articles, and had not notified Plaintiff’s counsel of their intended use of such articles and/or statements. Over Plaintiff’s objections during direct and cross-examination of the Defendants’ experts, the use of the literature was allowed to stand at trial.

Pointing to the un-ambiguous language of Va. Code Ann. §8.01-401.1, the court later opined that a party intending to have its own witness establish on direct examination that published literature is a “reliable authority” must provide opposing counsel with copies of such statements in their literature designation 30 days prior to trial. As noted above, the court granted Plaintiff’s Motion to set aside the jury verdict and ordered a new trial on liability and damages. “The decision to allow the defendants to introduce through their own expert witness on direct examina-

tion statements that defendants had not timely provided to the opposing party because these statements were contained in articles plaintiff had produced also is at odds with the Supreme Court's teachings in *John Crane, Inc. v. Jones, supra.*^{30 31} Finally, to admit such statements as substantive evidence was not deemed to be harmless error, as alleged by the Defendants. As of the date of this article, no Order has been entered on this ruling.³²

In conclusion, the current state of the law concerning the use of medical literature in trial requires the designation of such literature 30 days before trial, the identification of specific statements to opposing counsel as opposed to complete articles, the recognition of such statements as "reliable authority" by the party's own expert and that he/she relied upon such statements, and the reading of such statements to the jury as substantive evidence, but not as exhibits. The pending question remains – should medical literature be required to be designated at the same time as the designation of experts by the Plaintiff and the Defendant on his or her respective designation dates, typically 90 and 60 days out from trial, respectively? Let's consider the options:

A strict constructionist interpretation of Va. Code Ann. §8.01-401.1 would strongly suggest that so long as copies of the statements to be read into evidence through an expert witness (for either party) on direct examination are provided to opposing counsel 30 days before trial, all is satisfactory. This statute clearly does not require a simultaneous expert and literature designations. Requiring such a simultaneous disclosure would rewrite the 30-day language of Va. Code Ann. §8.01-401.1 and the Supreme Court would not enforce such a revision, absent legislative action. One cautionary note to readers in this regard – make sure your expert is prepared to name literature or learned treatises or recognize that he or she is planning to assist you with such a designation at the time he or she is deposed by the opposing party. If your expert testifies on the record that nothing is reliable authority and/or that no literature was relied upon in forming his or her opinions, you may be precluded from using any literature at trial, even if timely and properly designated.

The other argument that may be gaining momentum among trial attorneys and strength from those who interpret the *Crane* decision strictly is that once experts are named, depositions are then scheduled and taken to learn the specific opinions of such expert and if an expert for either party is to rely upon medical literature, the opposing party should have the opportunity to learn of such articles and treatises at the time the expert is designated. Why not have the opportunity to explore the expert's reliance upon such articles and learned treatises at a deposition, prior to the jury trial? Of course, the positive and practical result of a simultaneous expert and literature designation is the chance to

fully explore any articles or learned treatises at the time of the designated expert's deposition and to truly inquire in a discovery setting as to whether or not the expert has "relied upon" the statements in forming his or her opinions and whether the expert opines that such statements are, in fact, a "reliable authority." The negative and opposing thought is that it is an unfair burden upon the plaintiff as the plaintiff's expert designation is due first and the defendant may obtain an unfair advantage in terms of their literature designation. In addition, some may argue that 90 days prior to trial (or more if the pre-trial order has been modified) is too long a time frame for pre-trial literature designation.

No answers here – just questions to be debated and potential issues for trial lawyers, trial courts, and ultimately, the Supreme Court of Virginia.

Endnotes

1. See *Weinberg v. Given*, 252 Va. 221, 476 S.E.2d 502 (1996) (distinguished in *May v. Caruso*, 264 Va. 358, 568 S.E.2d 690 (2002)).
2. *Id.* at 226, 476 S.E.2d at 504 (emphasis added); *Bostic ex rel. Brock v. About Women OB/GYN, P.C.*, 275 Va. 567, 575, 659 S.E.2d 290, 294 (2008).
3. See *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908 (1989). In *McMunn*, the Supreme Court ruled that "Code § 8.01-401.1 does not authorize the admission in evidence, upon the direct examination of an expert witness, of hearsay matters of opinion upon which the expert relied in reaching his own opinion." 237 Va. at 566, 379 S.E.2d at 912.
4. *Griffett v. Ryan*, 247 Va. 465, 443 S.E.2d 149 (1994).
5. *Id.*
6. See Virginia Code Ann. §8.01-401.1 (emphasis added).
7. *Id.* (emphasis added).
8. *Id.* (emphasis added).
9. See *McMunn, supra*; see also *Weinberg, supra*, at 503.
10. See *McMunn, supra*, at 912.
11. *Budd v. Punyanitya*, 273 Va. 583, 591, 643 S.E.2d 180, 184 (2007) (quoting *Crawford v. Haddock*, 270 Va. 524, 528, 621 S.E.2d 127, 129 (2005); *Ainslie v. Inman*, 265 Va. 347, 352, 577 S.E.2d 246, 248 (2003)).
12. See *Budd*, 273 Va. at 594, 643 S.E.2d at 186.
13. *Id.*
14. *Id.*
15. *Id.* at 186-187; see also Virginia Code Ann. §8.01-401.1 (emphasis added).
16. *Bostic, supra*, at 294.
17. *Id.* at 576, 659 S.E. 2d at 294 (quoting *Budd v. Punyanitya, supra*) (citing *Boynton v. Kilgore*, 271 Va. 220, 227, 623 S.E.2d 922, 925-26 (2006); *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003); and *Woods v. Mendez*, 265 Va. 68, 74-75, 574 S.E.2d 263, 266 (2003)).
18. See Rules of the Supreme Court of Virginia, Rule 4:1(b)(4)(A)(i).

19. *John Crane, Inc. v. Jones*, 274 Va. 581, 593, 650 S.E.2d 851, 857 (2007).
20. *Id.*
21. *See Richards v. Butterfield and Cardiovascular Ctr. of Hampton Roads* (Fisher, J.) No. CL 05-39491, July 23, 2009; Newport News Cir. Ct.; Amberley Hammer and O.L. Gilbert for plaintiff; Carolyn Oast for defendant. 8 pp.
22. *Id.*
23. *See Griffett, supra.*
24. *See Bostic, supra*, at 295.
25. *Id.*
26. *Id.* at 295-96.
27. *Id.*; (citing *Isbell v. Commonwealth*, 273 Va. 605, 613, 644 S.E.2d 72, 75 (2007); *see also Fruiterman v. Waziri*, 259 Va. 540, 544, 525 S.E.2d 552, 554 (2000) and *Schwartz v. Brownlee*, 253 Va. 159, 166, 482 S.E.2d 827, 831 (1997)).
28. *See Durand v. Richards* (Weckstein, J.) No. CL 06-1680, July 29, 2009; Roanoke City Cir. Ct.; Robert W. Mann for plaintiff; Powell W. Leitch III for defendant. VLW 009-8-158, 4pp.
29. *Id.*
30. *See Virginia Lawyers Weekly*, "Medical Malpractice - Expert Witness - Literature Designations," by Deborah Elkins, published August 10, 2009.
31. *See Crane v. Jones*, 274 Va. at 590, 650 S.E.2d at 855. In *Crane*, the Supreme Court opined the following: "[G]enerally, we review a trial court's decision to admit or exclude evidence using an abuse of discretion standard and, on appeal, will not disturb a trial court's decision to admit evidence absent a finding of abuse of that discretion. "While a trial court has no discretion to admit clearly inadmissible evidence, a great deal must necessarily be left to the discretion of the [trial court], in determining whether evidence is relevant to the issue or not."
32. Plaintiff's Memorandum in Support of a New Trial in *Durand v. Richards* also raised a second issue which was not addressed in Judge Weckstein's written opinion. Interestingly, the second issue involved a defense expert witness who acknowledged, on cross-examination that the article from which he had quoted was not authoritative.



Stephanie E. Grana is a partner with Cantor Stoneburner Ford Grana & Buckner in Richmond. She has more than 15 years of experience handling plaintiff's medical malpractice and personal injury cases. She is a leader in numerous professional organizations and is currently Treasurer of Virginia Trial Lawyers Association. Ms. Grana was selected as one of Virginia Lawyers Weekly's Influential Women of Virginia of 2010 and as a Top 25 Women Virginia Super Lawyers. She is a magna cum laude graduate of the University of Richmond and a cum laude graduate of the University of Richmond School of Law. She is also the proud mom of three children.