Executive summary
This committee was formed to address the state of Virginia privilege law, which is inconsistent with that of all other jurisdictions in one key respect. Contrary to otherwise universal law about privileges, the wording of Virginia's privilege statutes does not make the communicant (for example, the patient, or the client) the holder of the privilege. Only in Virginia, the person to whom the communication is made (for example, the doctor, minister, or translator) is free to voluntarily disclose any of the presumably private matters stated by the communicant.

The committee unanimously believes that this arrangement is an erroneous statement of what the law should be, and what it is universally acknowledged to be. We urge the correction of the relevant Virginia statutes, set forth below, to ensure that confidential communications are, indeed, confidential.

Report
The attached appendix sets forth the text of Virginia's statutory privileges for confidential communications with doctors, religious ministers, and certain mental health professionals. All four statutes are curiously worded to limit only when those professionals may be required to disclose confidences entrusted to them by their patients and clients. As the courts have acknowledged, this unnatural and unfortunate language means that those statutes impose literally no limitations on when such professionals are permitted to make voluntary disclosures of privileged matters, so long as nobody requires them to do so. See Wright v. Kaye, 267 Va. 510, 526-27, 593 S.E.2d 307, 316 (2004) (because Virginia's medical privilege, Code § 8.01-399, only limits when a doctor may be "required" to disclose privileged information, it does not apply to a doctor who "agreed to testify voluntarily"); Seidman v. Fishburne-Hudgins Educational Foundation, Inc., 724 F.2d 413, 416 (4th Cir. 1984) (because Virginia's priest-penitent privilege, Code § 8.01-400, provides only that a priest may not be "required" to make disclosure of certain confidences, the law " plainly invests the
priest with the privilege" and is therefore "his alone to claim").

This result is virtually without parallel in the privilege statutes of other states, which almost invariably define when professionals are "permitted" to disclose confidential communications from their clients and patients, to make it clear that the client or patient is the holder of the privilege. See James Duane, Who Holds the Doctor-Patient Privilege in Virginia?: The Astounding Answer to an Unlikely Enigma, Litigation News, Vol. 12, page 1 (Fall 2004). Probably the most "distinctive attribute of a privilege is that it has a holder," and "only the holder has the ultimate authority to assert or waive the privilege," although others may also be authorized to assert it on his behalf. Christopher Mueller and Laird Kirkpatrick, Evidence 291 (3rd ed. 2003). Virtually every American privilege created for confidential communications between a layman and a professional (such as a physician, lawyer, therapist, or spiritual counselor) makes the layman the holder of the privilege. "With respect to professional services, the holder is usually the recipient of the professional services rather than the provider. It is ... the patient[,] not the psychotherapist, who decides whether the privilege will be waived or asserted." Id. That is no surprise, since any other rule would be impossible to reconcile with the purpose of the privilege. For centuries, courts have reasoned that privileges are justified either by the need to encourage people to speak with candor in certain important settings, or else by the intrinsic value of protecting the secrecy of certain extremely sensitive matters. Under either of those theories, the privilege naturally belongs only to the patient or the client. After all, he is the only one at the meeting who is supposed to be disclosing sensitive secrets about his medical or legal or spiritual problems (there is no good reason for them to be discussing the doctor's health), and he is the one who is paying for the meeting.

Any time a dispute arises between a patient and a doctor or therapist as to whether one of them should be allowed to testify to an otherwise privileged matter that once passed between them in private, that decision should always rest with the patient. That would be the result under the law of probably every other state, including all those that have adopted Uniform Rule of Evidence 503(b), which provides that the "patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications" made to his physician for the purpose of diagnosis or treatment. Even the leading reference works on Virginia evidence law categorically assert (although without any explanation or supporting authority) that the privilege created by § 8.01-399 "may be waived by the patient, and only by the patient." Charles E. Friend, The Law of Evidence in Virginia 260 (6th ed. 2003); accord Craig D. Johnston, Trial Handbook for Virginia Lawyers §18:14 (2006) ("The physician-patient privilege belongs to the patient, and only the patient may invoke or waive it."). As the Virginia Supreme Court correctly acknowledged in Wright v. Kaye, however, that is not the way this statute is actually written.

Under the literal reading of the doctor-patient privilege, as interpreted by the Supreme Court in Wright, a patient actually has no true privilege of any kind, and
no right to preclude his physician from voluntarily disclosing anything the doctor is willing to reveal in court. The only right this incongruous law reserves to a patient is the right to force his physician to testify to what the patient told him (assuming that prior statement is otherwise admissible under an exception to the hearsay rule), even if the physician would rather not do so. That is not what any objective observer would call a “privilege.” Moreover, the patient would have had that right even if this statute had never been enacted at all. It is extremely difficult to believe that the General Assembly could have truly intended to write a collection of privilege statutes with so many words and so little purpose.

Rarely does any statute pose such an unmistakable conflict between its plain language and the obvious intentions of its framers. Virginia’s General Assembly surely could not have intended to draft the doctor-patient privilege in a way that would only define when a doctor may be “required” to give involuntary testimony, and to place essentially no limits on the ability of the doctor to make voluntary disclosures. If that had been the intention of the legislature, there would have been no need for the “exceptions” set forth in § 8.01-399(F), which allow a doctor to make voluntary disclosures without the patient’s consent in several specified situations (for example, to protect the doctor from malpractice accusations), or for statutes such as Virginia Code § 54.1-2966.1, which provides that: “Any physician who reports to the Department of Motor Vehicles the existence, or probable existence, of a mental or physical disability or infirmity of any person licensed to operate a motor vehicle which the physician believes affects such person’s ability to operate a motor vehicle safely shall not be deemed to have violated the physician-patient privilege unless he has acted in bad faith or with malicious intent.” There would be no need for any of those statutory provisions if, as the Supreme Court declared in Wright v. Kaye, the privilege simply does not apply to doctors “who agree to testify voluntarily.”

The Committee therefore recommends that all four statutes be amended by replacing the word “required” with the word “permitted,” as reflected in the attached appendix, and by adding one clause at the beginning of two of those statutes to clarify that the privilege for spiritual counseling may be waived by the person who sought that counseling. This will bring those statutes in line with the law of every other state, the obvious purposes of those statutes, as well as the virtually certain intention of those who drafted these laws. Rarely can a collection of statutes be so greatly improved by the change of so few words.

Note: This report is substantially the same as a unanimous recommendation that was produced in 2005 by a committee made up of Beth Allen, Hon. Rosemarie Annunziata, Michael Blachman, Professor James J. Duane, Hon. William Ledbetter, Russ Palmore, Stephen Price, and Stuart Raphael. That report was approved without any stated objections by a nearly unanimous vote of the Boyd-Graves Conference.
§ 8.01-399. Communications between physicians and patients

A. Except at the request or with the consent of the patient, or as provided in this section, no duly licensed practitioner of any branch of the healing arts shall be required to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.

B. If the physical or mental condition of the patient is at issue in a civil action, the diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action. In addition, disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice. However, no order shall be entered compelling a party to sign a release for medical records from a health care provider unless the health care provider is not located in the Commonwealth or is a federal facility. If an order is issued pursuant to this section, it shall be restricted to the medical records that relate to the physical or mental conditions at issue in the case. No disclosure of diagnosis or treatment plan facts communicated to, or otherwise learned by, such practitioner shall occur if the court determines, upon the request of the patient, that such facts are not relevant to the subject matter involved in the pending action or do not appear to be reasonably calculated to lead to the discovery of admissible evidence. Only diagnosis offered to a reasonable degree of medical probability shall be admissible at trial.

C. This section shall not (i) be construed to repeal or otherwise affect the provisions of § 65.2-607 relating to privileged communications between physicians and surgeons and employees under the Workers' Compensation Act; (ii) apply to information communicated to any such practitioner in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug; or (iii) prohibit a duly licensed practitioner of the healing arts, or his agents, from disclosing information as required by state or federal law.
D. Neither a lawyer nor anyone acting on the lawyer's behalf shall obtain, in connection with pending or threatened litigation, information concerning a patient from a practitioner of any branch of the healing arts without the consent of the patient, except through discovery pursuant to the Rules of Supreme Court as herein provided. However, the prohibition of this subsection shall not apply to:

1. Communication between a lawyer retained to represent a practitioner of the healing arts, or that lawyer's agent, and that practitioner's employers, partners, agents, servants, employees, co-employees or others for whom, at law, the practitioner is or may be liable or who, at law, are or may be liable for the practitioner's acts or omissions;

2. Information about a patient provided to a lawyer or his agent by a practitioner of the healing arts employed by that lawyer to examine or evaluate the patient in accordance with Rule 4:10 of the Rules of Supreme Court; or

3. Contact between a lawyer or his agent and a nonphysician employee or agent of a practitioner of healing arts for any of the following purposes: (i) scheduling appearances, (ii) requesting a written recitation by the practitioner of handwritten records obtained by the lawyer or his agent from the practitioner, provided the request is made in writing and, if litigation is pending, a copy of the request and the practitioner's response is provided simultaneously to the patient or his attorney, (iii) obtaining information necessary to obtain service upon the practitioner in pending litigation, (iv) determining when records summoned will be provided by the practitioner or his agent, (v) determining what patient records the practitioner possesses in order to summons records in pending litigation, (vi) explaining any summons that the lawyer or his agent caused to be issued and served on the practitioner, (vii) verifying dates the practitioner treated the patient, provided that if litigation is pending the information obtained by the lawyer or his agent is promptly given, in writing, to the patient or his attorney, (viii) determining charges by the practitioner for appearance at a deposition or to testify before any tribunal or administrative body, or (ix) providing to or obtaining from the practitioner directions to a place to which he is or will be summoned to give testimony.

E. A clinical psychologist duly licensed under the provisions of Chapter 36 (§ 54.1-3600 et seq.) of Title 54.1 shall be considered a practitioner of a branch of the healing arts within the meaning of this section.

F. Nothing herein shall prevent a duly licensed practitioner of the healing arts, or his agents, from disclosing any information that he may have acquired in attending, examining or treating a patient in a professional capacity where such disclosure is necessary in connection with the care of the patient, the protection or enforcement of a practitioner's legal rights including such rights with respect
to medical malpractice actions, or the operations of a health care facility or health maintenance organization or in order to comply with state or federal law.

§ 8.01-400. Communications between ministers of religion and persons they counsel or advise

Except at the request or with the consent of the person who sought spiritual counsel or advice, no regular minister, priest, rabbi, or accredited practitioner over the age of eighteen years, of any religious organization or denomination usually referred to as a church, shall be required permitted to give testimony as a witness or to relinquish notes, records or any written documentation made by such person, or disclose the contents of any such notes, records or written documentation, in discovery proceedings in any civil action which would disclose any information communicated to him in a confidential manner, properly entrusted to him in his professional capacity and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

§ 8.01-400.1. Privileged communications by interpreters for the deaf

Whenever a deaf person communicates through an interpreter to any person under such circumstances that the communication would be privileged, and such person could not be compelled to testify as to the communications, this privilege shall also apply to the interpreter.

[Note from the committee - No amendment to this section is required, so long as the other statutes are corrected, since it reflects privileges protected in the other statutes.]

§ 8.01-400.2. Communications between certain mental health professionals and clients

Except at the request of or with the consent of the client, no licensed professional counselor, as defined in § 54.1-3500; licensed clinical social worker, as defined in § 54.1-3700; licensed psychologist, as defined in § 54.1-3600; or licensed marriage and family therapist, as defined in § 54.1-3500, shall be required permitted in giving testimony as a witness in any civil action to disclose any information communicated to him in a confidential manner, properly entrusted to him in his professional capacity and necessary to enable him to discharge his professional or occupational services according to the usual course of his practice or discipline, wherein such person so communicating such information about himself or another is seeking professional counseling or treatment and advice relative to and growing out of the information so imparted; provided, however,
that when the physical or mental condition of the client is at issue in such action, or when a court, in the exercise of sound discretion, deems such disclosure necessary to the proper administration of justice, no fact communicated to, or otherwise learned by, such practitioner in connection with such counseling, treatment or advice shall be privileged, and disclosure may be required. The privileges conferred by this section shall not extend to testimony in matters relating to child abuse and neglect nor serve to relieve any person from the reporting requirements set forth in § 63.2-1509.

Virginia Code
Title 19.2. Criminal Procedure
Chapter 16: Evidence and Witnesses
Article 1: In General

§ 19.2-271.3. Communications between ministers of religion and persons they counsel or advise

Except at the request or with the consent of the accused, no regular minister, priest, rabbi or accredited practitioner over the age of eighteen years, of any religious organization or denomination usually referred to as a church, shall be required permitted in giving testimony as a witness in any criminal action to disclose any information communicated to him by the accused in a confidential manner, properly entrusted to him in his professional capacity and necessary to enable him to discharge the functions of his office according to the usual course of his practice or discipline, where such person so communicating such information about himself or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

Editor's Note:

The Committee's recommendation that Virginia Code §§ 8.1-399, 8.01-400, 8.01-400.1, 8.01-400.2 and 19.2-271.3 be revised was approved by the Conference.
Who Holds the Physician-Patient Privilege in Virginia?: The Astounding Answer to an Unlikely Enigma

Professor James J. Duane

Every lawyer in Virginia knows at least a little bit about the statutory privilege entitled “Communications Between Physicians and Patients,” Code § 8.01-399. The statute is not a model of clarity or simplicity. It is over 900 words long, and probably no lawyer on earth is thoroughly conversant with its labyrinth of exceptions to exceptions. Just the same, if you are a trial lawyer in Virginia, you presumably imagine that you understand at least the most fundamental features of this law and its operation. Before you finish this essay, however, you will learn something quite unexpected about this statute that is sure to astound you.

The most fundamental issue involving the interpretation of § 8.01-399, like any other privilege, is the question of who controls the privilege. In the jargon of evidence law, we might ask: who is the holder of the privilege? Probably the most “distinctive attribute of a privilege is that it has a holder,” and “only the holder has the ultimate authority to assert or waive the privilege,” although others may also be authorized to assert it on his behalf. If the physician and the patient disagree over whether the patient’s secrets should be disclosed in court, whose preference will prevail?

Try your hand at the following simple multiple-choice question. Let us assume that a civil case involves a confidential communication by a patient to his physician that is clearly privileged under Virginia Code § 8.01-399 (that is, we assume the case does not fall within any of the exceptions in the statute). Under that statute, when may the physician testify at trial and disclose privileged medical information that he obtained in confidence from the patient?

A. Only if the patient consents; it is up to the patient, who is the holder of the privilege, no matter what the physician wants to do.
B. Only if the physician does so willingly; it is up to the physician, who is the holder of the privilege, no matter what the patient wants.
C. Only if both the patient and the physician consent to the disclosure, since the privilege is held jointly by both.
D. He may testify if either the patient or the physician consents to the disclosure; either one may unilaterally waive the privilege, even over the objection of the other, and neither one may assert the privilege if the other wishes to waive it.

Sounds simple, doesn’t it? At least, it should be ridiculously simple, since it involves the most basic aspect of the statute. Circle what you think is the correct answer before you read any further. As it turns out, the answer to this question is certain to amaze you. In fact, the more you know about evidence law, the less likely you are to get this question right!

In any state but Virginia, the answer would be too obvious to deserve even a one-paragraph explanation. Here in Virginia, as it turns out, the matter is much more complicated.

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Who Holds the Physician-Patient Privilege in Virginia? cont'd from page 1

The Most Sensible Reading of the Statute
To anyone who knows anything about evidence law, but not much about the Virginia statute, the "obvious" answer would be "A" — it all depends on what the patient wants, since he holds the privilege. That would be the correct answer under the law of probably every other state, including all those that have adopted Uniform Rule of Evidence 503(b), which provides that the "patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications" made to his physician for the purpose of diagnosis or treatment. Even the leading reference work on Virginia evidence law categorically asserted just last year (although without any explanation or supporting authority) that the privilege created by § 8.01-399 "may be waived by the patient, and only by the patient."3

If that were true, of course, it would be typical of virtually every American privilege. Whenever a privilege is created for confidential communications between a layman and a professional (such as a physician, lawyer, therapist, or rabbi), the laws of every state almost invariably make the layman the holder of the privilege.4 That is no surprise, since any other rule would be impossible to reconcile with the purpose of the privilege. For centuries, courts have reasoned that privileges are justified either by the need to encourage people to speak with candor in certain important settings, or else by the intrinsic value of protecting the secrecy of certain extremely sensitive matters. Under either of those theories, the privilege naturally belongs only to the patient or the client. After all, he is the only one at the meeting who is supposed to be disclosing sensitive secrets about his medical or legal or spiritual problems (at least there is no good reason for them to be talking about his doctor's medical problems) — not to mention that he is the one paying for the meeting. The "humanistic values of autonomy and privacy" amply justify the creation of a physician-patient privilege,5 which has been codified in 42 out of 50 states.6

Moreover, that is precisely how the Supreme Court of Virginia once interpreted this same law. Just seven years ago, in Fairfax Hospital v. Curtiss, the Supreme Court held that § 8.01-399 reflects a health care provider's "obligation to preserve the confidentiality of information about the patient," who often "must reveal the most intimate aspects of his or her life to the health care provider during the course of treatment."7 Admittedly, the court was resolving the scope of a physician's duty of confidentiality under state tort law, and not the reach of the privilege. Still, the Court held that this very statute, § 8.01-399, defines and limits when a physician is "permitted" to disclose a patient's medical records,8 and creates a legal duty to not release the patient's records without first obtaining "permission from either a court or the patient."9 That language plainly suggests that the privilege belongs to the patient — as it does in probably every other state — and may be waived only with her consent.

The Most Literal Reading of the Statute
Unfortunately, the matter is not nearly that simple, because there is a radical deviation between the purpose and the language of the statute. Contrary to what the court asserted in Fairfax Hospital v. Curtis, the literal language of Virginia Code § 8.01-399 does not limit or define the circumstances under which a physician is "permitted" to disclose privileged secrets while on the witness stand. On the contrary, the statute actually specifies when a physician may or may not "be required to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity."10 That language, taken literally and in isolation, imposes limits only on the physician's involuntary testimony, and sets no limits on when the physician can freely testify to things that he is willing to disclose. The statute requires the patient's consent only if the physician is to be required to disclose privileged information (presumably over the physician's futile "objection"); no such consent from the patient is explicitly required before the physician is permitted to make a voluntary disclosure.

Under a literal reading, therefore, the patient actually has no privilege of any kind, and no right to preclude the physician from voluntarily disclosing anything he wishes in court.11 That stingy reading of the statute is obviously consistent with a decision by the United States Court of Appeals for the Fourth Circuit, which relied on similar language in Virginia's priest-penitent privilege to conclude that only the clergyman holds that privilege and has standing to decide whether to disclose confidences related to him by a parishioner. The court concluded that because Virginia Code § 8.01-400 provides only that a priest may not be "required" to make disclosure of certain confidences, the law "plainly invests the priest with the privilege" and is therefore "his alone to claim."12

Moreover, well-settled principles of statutory construction furnish substantial precedent for that sort of narrow interpretation. The appellate courts of Virginia have repeatedly announced their preference for interpreting all privileges strictly and narrowly, and for enforcing all laws according to their plain language. When those two principles coincide — that is, when the literal reading of a privilege statute is also the reading that is more restrictive of the privilege — the Virginia courts never hesitate to summarily adopt that interpretation without any explanation or analysis.13 That approach is applied with special force in the context of § 8.01-399, since the common law recognized no physician-patient privilege at all, and the Virginia courts therefore do not recognize any such privilege beyond the protection created by the statute.14

The Problems with the Literal Reading of the Statute
But all this does not mean that the literal reading of Virginia's physician-patient privilege is the only proper interpretation, or even that it is the most natural. The Supreme Court of Virginia has said that a statute must be interpreted in accordance with its plain and unambiguous language "unless a literal interpretation would result in a manifest absurdity."15 There is ample room for a pow-
erful argument that the narrow and literal reading of § 8.01-399(A) would indeed render the law "a manifest absurdity." In every state other than Virginia, it is unheard of to place a so-called privilege outside the control of the very party whose confidential disclosures are supposedly protected by the privilege. Not one of the privileges set forth in the Uniform Rules of Evidence or the proposed Federal Rules of Evidence is written that way.

Moreover, it must be remembered that this lengthy statute begins with the statement that physicians may not be required to testify to privileged medical information "(except at the request or with the consent of the patient.)" These words, the very first words in the statute, make it plain that the statute never gives a physician any absolute privilege to refuse to testify (at least not without the concurrence of the patient), and clearly confirm that the General Assembly was interested in giving the patient some sort of important say in the matter. (No similar reference to the "consent" of the layman, by the way, is contained in § 8.01-400, which the Fourth Circuit interpreted as giving a privilege only to the priest and not to the penitent.) This suggests that perhaps the General Assembly really meant to define when a physician is permitted to disclose confidences without the consent of the patient — as privilege statutes almost invariably do — and that its unfortunate use of the word "required" in this context was an awkward oversight. Indeed, you need not take my word for it. That is precisely how the Supreme Court of Virginia read this same language in Fairfax Hospital v. Curtis, when it declared that this statute "permitted disclosure" by the physician only when the case fell within one of the exceptions set forth in the statute.17

Besides, a literal reading of the first line of this clumsily worded statute would flagrantly violate the settled principle of statutory construction that every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary.18 If the plain language of § 8.01-399(A) is taken out of context and examined in isolation, as I have said, it would seem to define only when a physician may be required to involuntarily disclose medical secrets over his objection, but would never give the patient any right to stop him from making a voluntary disclosure any time he pleases. But that reading would make superfluous most of subsection (F) of that same law, which spells out exceptions for several specific situations in which the physician is "permitted" to make a voluntary disclosure even without the patient's consent — for example, to protect himself from malpractice accusations.19 There would be no need for those exceptions if the statute had been intended to give a privilege only to the physician, and to give patients no rights to prevent a physician from making a voluntary disclosure of privileged communications.

The unfortunate truth is that Code § 8.01-399 was very clumsily drafted, and there is no interpretation of that law that does not conflict with at least one of the most well settled principles of statutory interpretation.

What Difference Does It Make?

Some may respond to this discussion of the privilege statute by pointing out that Virginia tort law already imposes a duty on physicians to refrain from at least certain kinds of extrajudicial disclosures of medical confidences without the consent of the patient, as the court held in Fairfax Hospital v. Curtis. And so, some may argue, there is no need for the statutory privilege to give the patient any rights at all, because the physician is already under a pre-existing duty to assert the privilege when he can. But the matter, unfortunately, is not nearly that simple.

First of all, the Fairfax Hospital case based its reading of state tort law largely on the assumption that § 8.01-399 imposes limits on when a physician is permitted to disclose privileged information, an assumption that would fall if the courts ever adopt a literal reading of the statute.20 Moreover, in Fairfax Hospital, the court specifically noted that the forbidden disclosure in that case was "extrajudicial," so it did not decide whether the duty of confidentiality applies to a physician who is invited to relate what he knows about relevant and unprivileged medical information during pretrial discovery proceedings or at trial.21 And it is unclear whether anything of the common law rule announced in Fairfax Hospital survived the subsequent enactment of Virginia's extremely detailed statutory provisions regulating the privacy of a patient's medical records, codified under the title of "Health Records Privacy."22 That elaborate legislative scheme regulates in minute detail all of the same privacy concerns identified by the court in Fairfax Hospital, but specifically provides that it imposes no limitations on "testimony in accordance with § 8.01-399,"23 so that Act gives a patient no greater rights than he enjoys under the privilege statute to stop his physician from revealing medical secrets through testimony in a judicial proceeding.

A physician is normally obligated to safeguard patient confidences and privacy only "within the constraints of the law," whatever that means. In the absence of a valid privilege, it is quite likely that physicians, just like lawyers, have no ethical duty to refrain from answering questions about even "confidential" (but unprivileged) matters that are relevant to a pending lawsuit.25 That is why, even when a witness has a professional ethical obliga-

The most fundamental issue involving the interpretation of § 8.01-399, like any other privilege, is the question of who controls the privilege.....

If the physician and the patient disagree over whether the patient's secrets should be disclosed in court, whose preference will prevail?
Who Holds the Physician-Patient Privilege in Virginia? cont’d from page 5

As we have seen, the proper interpretation of this important privilege requires the delicate balancing of the most fundamental principles of statutory interpretation, which point to two conflicting interpretations of the law and its reach. Tragically, however, the Supreme Court of Virginia has now resolved this critical issue in a passing comment so cursory as to be almost accidental, and with no indication that the court even realized the intricacy of the matter at all.

Just last year, in *Wright v. Kaye*, a case involving a most unusual set of facts, the Supreme Court had to decide whether § 8.01-399 could be used by a personal injury plaintiff to preclude a physician from testifying as a paid expert witness for the defense, even though he had never seen or treated her, merely because she had been treated by another physician who was employed in the same medical group. The court held that she could not, reasoning that the law is limited to physicians who have treated a patient or have acquired confidential information about her in that capacity, and there was no evidence that the expert witness had ever done either in that case.

That should have been the end of the matter. There was no need for the court to give any other reason for its holding, in keeping with the cardinal axiom that appellate courts should always refrain from attempting to decide a case on any broader grounds than necessary. (Indeed, it is surprising the Court even went that far, since her objection presumably could have been overruled simply on the grounds that she had waived any claim of privilege she might have had by electing to become the plaintiff in a personal injury action, although the court gave no indication that it considered that possibility.)

Unfortunately, however, the court did not stop there. Not nearly. As an alternative and independent basis for its holding — indeed, the first of the three reasons given by it — the Supreme Court also concluded that her privilege objection had to be overruled simply because:

First, Code § 8.01-399 states that no practitioner of the healing arts "shall be required" to offer testimony. Dr. Krebs agreed to testify voluntarily — his testimony was in no way "required."
ever use this statute to prevent his physician from giving voluntary testimony in any case. It is difficult to believe that the General Assembly could have intended to write a law with so many words and so little value.

Perhaps the most bizarre implication of the holding in *Wright v. Kaye* is that it means that this statute is not a true “privilege” at all. Every privilege from every other American jurisdiction always has at least one holder—a person who has the right to decide whether to assert the objection and thereby prevent others from disclosing the information in court. (A few privileges sometimes have more than one holder; for example, the privilege for confidential marital communications typically is held by both spouses, *either* of whom may assert the privilege with or without the concurrence of the other.)

Under the literal reading of § 8.01-399 adopted by the Supreme Court of Virginia in *Wright*, however, *neither* the physician nor the patient may be fairly described as the holder of this so-called privilege. The patient cannot refuse to answer questions about what he told his physician, and cannot prevent his physician from doing so voluntarily. The physician, likewise, can neither prevent the patient from disclosing those details, and cannot even refuse to do so himself if the patient consents to the disclosure. As construed in *Wright*, all this maladroit “privilege” statute supposedly does is give the physician the right to refuse to answer such questions if and only if *neither* the patient nor the physician consents to the question. *Neither* party is given an absolute unilateral right under this law to object to any question to *either* one of them about what passed between them in private. No legal “right” (or even a genuine right, for that matter) if it can only be exercised with the consent of someone else.

I am in no position to proclaim with confidence that the holding in *Wright* was wrong. It is faithful to the literal language of at least part of this terribly worded statute, on the one hand, and that is no small matter. On the other hand, it produces several results that are manifestly absurd, which is the one time that courts should refuse to interpret a law in accordance with its literal terms. All I that are manifestly absurd, which is the one time that courts should refuse to interpret a law in accordance with its literal terms. All I can say with confidence is that this issue is close enough, and important enough, that it never should have been resolved in a two-sentence “drive-by decision,” especially in a case that easily could have been decided on incomparably narrower grounds.

2. On May 12 and 14, two months after the Supreme Court of Virginia decided this question in *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004), I put this same multiple-choice question to hundreds of Virginia lawyers at a CLE evidence seminar sponsored by the Virginia CLE Foundation and conducted in Tysons Corner and Richmond. Fewer than 5% of the lawyers guessed the answer chosen by the Supreme Court— and many of them by that point in any talk had simply figured out that all of my questions, by design, involved the most surprising and unlikely aspects of Virginia evidence law, so that the “right” answer was usually the one that seemed to make the least sense.
4. Mueller & Kirkpatrick, supra note 1, at 291 (“With respect to professional services, the holder is usually the recipient of the professional services rather than the provider. It is . . . the patient[,] not the psychotherapist, who decides whether the privilege will be waived or asserted.”)
6. Id. at 490.
8. Id. at 443, 492 S.E.2d at 645. Indeed, in that case the court went so far as to hold that a hospital that had already received a notice of claim by a plaintiff intending to sue the hospital because of its alleged negligence in the delivery of her baby could not, without court permission or the consent of the patient, privately disclose her medical records to its attorney and to one of its nurses named as a codefendant. *Id.* It is surprisingly unclear how much of that narrow holding is still good law after *Archambault v. Rollle*, 254 Va. 210, 213, 491 S.E.2d 729, 731 (1997), which held that Code § 8.01-399(I) allowed a nonparty physician preparing for a deposition to disclose medical records to her lawyer for the protection of the unspecified “legal rights,” even though she was not even a potential party to the case and “could not have been drawn into the litigation because all applicable statutes of limitations had run.” Although Fairfax Hospital was decided first, it was based on events from an earlier point in time, before the enactment of § 8.01-399(P). Unfortunately, Fairfax Hospital never even cited, much less distinguished, its holding several weeks earlier in *Archambault*, leaving it for the bar to only guess how those holdings are to be reconciled in cases arising since the enactment of § 8.01-399(P).
9. Id. The court was interpreting the statute as it was worded before its 1993 amendment, but the earlier version contained the same language that now appears in Code § 8.01-399(A), the portion of the law that is critical to our inquiry here.
10. Code § 8.01-399(A) (emphasis added).
11. To be precise, under a strict literal reading, the only right this bizarre law reserves to a patient is the right to force his physician to testify to what the patient told him, even if the physician would rather not do so. That is not what any objective observer would call a “privilege.” Moreover, the patient would have that right even if this statute had never been enacted.
13. As I observed several years ago, “In the four most recent cases where a literal reading of a statute yielded a result that was more restrictive of the scope of some privilege, the Virginia appellate courts have summarily adopted that interpretation, often with little or no discussion of whether that conclusion was the most sensible one.” James J. Duane, The Bizarre Drafting Errors in the Virginia Statute on Privileged Marital Communications, 12 REGENT UNIV. L. REV. 91, 95 (1999-2000) (citing cases). For two subsequent cases in which the supreme court has done it again, see Wright v. Kaye, 267 Va. 510, 593 S.E.2d 307 (2004), and Burns v. Commonwealth, 261 Va. 307, 332-33, 541 S.E.2d 872, 889-90 (2001).
17. 254 Va. at 443, 492 S.E.2d at 645 (emphasis added). Admittedly, to say that no physician “shall be required to disclose information without a patient’s consent (as the statute reads) is not the same as saying that he is not permitted” to do so, as the court concluded in *Corbin*, but that is how the court read this very language. The court gave no indication of any awareness that it was actually departing from the plain language of the law, much less did it explain why it was doing so.
19. The statute affirmatively declares that it does not prevent a physician “from disclosing any information that he may have acquired in attending, examining or treating a patient in a professional capacity where such disclosure is necessary in connection with . . . the protection or enforcement of the practitioner’s legal rights including such rights with respect to medical malpractice actions, or the operations of a health care facility or health maintenance organization or in order to comply with state or federal law.” Code § 8.01-399(F). None of those exceptions would be necessary if the statute had been intended to give the privilege entirely to the physician and to place no limit on his ability to make voluntary disclosures when it suits him to do so. This list is not exhaustive, by the way, and includes other “legal rights” not listed there, including a physician’s right to the assistance of counsel in preparation for a deposition.

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...even when the physician is neither an actual nor a potential party to any malpractice suit. *Arcochek v. Roller,* 254 Va. 210, 213, 491 S.E.2d 729, 731 (1997).

20. Indeed, as we shall see, the state supreme court unwittingly overturned that very assumption in *Wright v. Kaye,* 267 Va. 510, 593 S.E.2d 307 (2004).


22. The "Health Records Privacy" Act, Code § 32.1-127.1:03(A), was enacted pursuant to the policies reflected in the federal Health Insurance Portability and Accountability Act ("HIPAA"), Public Law 104-191. The Virginia version of the act was enacted in 1997 and went into effect in 1998, after the decision in *Fairfax Hospital.*

23. Virginia's Health Records Privacy Act declares that "There is hereby recognized an individual's right of privacy in the content of his health records." Code § 32.1-127.1:03(A), but then adds in subsection (D)(3) that "health care entities may disclose health records ... in testimony in accordance with §§ 8.01-399 and 8.01-400.2."

24. AMERICAN MEDICAL ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS, Principle IV (2001)

25. See AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT 1.6(b).

26. MUELLER & KIRKPATRICK, supra note 1, at 291.


28. Id. at 526-27, 593 S.E.2d at 316.

29. See Code § 8.01-399(B).

30. Id.

31. Code § 8.01-400.2.

32. Professor Imwinkelried, who teaches at UC Davis Law School, is the author of the two volumes on Evidentiary Privileges in The New Wigmore (Aspen Publishing 2002). He gave me his written consent to quote him on this point.

33. This is actually the second time in the last several years that the state supreme court, in an almost casual adoption of a narrow and literal reading of a statutory privilege, gave no indication of any awareness that it was essentially overruling an earlier case in which it had adopted a broader reading of the statute that was inconsistent with its language but perfectly consistent with its obvious purpose. See James J. Duane, *The Virginia Supreme Court Takes a Big Bite Out of the Privilege for Marital Communications,* 29 THE VIRGINIA BAR ASSOCIATION NEWS JOURNAL 8 (March 2003).

34. Imagine rewriting the Fifth Amendment to provide "You have an absolute right to remain silent — unless your wife gives us her consent to make you talk."

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but not slaves. We serve our clients' desires without abandoning our own ethical norms. We engage our intellect, energy and rhetorical skill in the service of the ends they choose. Yet, in doing so, we remain constrained by the essential personal virtues of the just man: loyalty, courage, truthfulness, proportionality and piety.

Our trial work does not manifest our personal "will to power" in the world. Our efforts are of interest only to the parties involved. Few of us will ever handle a case, like *Brown v. The Board of Education,* which redesigns the very fabric of social justice. Yet, if we develop the proper balance in ourselves and seek true excellence in our courts, we can rightly claim to be the hand maidsen of Platonic justice. When we do it well, our work is neither slave labor nor the grint of a beast of burden. It is, instead, the essence of personal and civic virtue — the practice of Justice.

One Bad Actor Spoils the Case: Dismissal as a Sanction for Spoliation of Evidence

Mandi M. Smith
Randall T. Perdue

Both Virginia and federal law recognize the application of the affirmative defense of spoliation of evidence. "The textbook definition of 'spoliation' is 'the intentional destruction of evidence [...] . However, spoliation issues also arise when evidence is lost, altered or cannot be produced."1 "Spoliation encompasses [conduct that is either] ... intentional or negligent."2 A spoliation inference may be applied in an existing action if, at the time the evidence was lost or destroyed, 'a reasonable person in the [possessor's] position should have foreseen that the evidence was material to a potential civil action."3 This article will examine the divergent treatment by the Virginia state courts and the federal courts when presented with a claim of spoliation of evidence seeking the ultimate defensive sanction: dismissal of the civil action.

Dismissal of Claims for Spoliation of Evidence in Virginia Courts

The primary case on spoliation of evidence as an affirmative defense to claims in a pending civil action is *Gentry v. Toyota Motor Corp.* In *Gentry,* the driver of a motor vehicle was injured as a result of a single-vehicle accident following circumstances under which the engine of the motor vehicle began "racing" and the motor vehicle accelerated. The driver brought an action against the manufacturer and the sales dealer of the motor vehicle under a causal theory of "sudden acceleration." An expert retained by the driver examined the subject vehicle and concluded that a temperature control cable impinged on the accelerator pedal rod and caused the sudden acceleration. The expert then "without authorization or permission from anyone," used a hacksaw on the vehicle's instrument panel and removed the temperature control cable. The defendants in *Gentry* moved to dismiss for spoliation of evidence under a theory that removal of the temperature control cable deprived the defendants of their right to inspect the vehicle for any evidence of defect and that their ability to defend was severely prejudiced. After a hearing, the plaintiff moved for a stay of the spo-