# LIMITATIONS ON DISCOVERY IN EMINENT DOMAIN PROCEEDINGS: APPLICATION OF RULE 4:1(b)(5)

by Christi A. Cassel*

How often have you heard that irrelevance is not a valid objection to any information sought in discovery under the theory that the information "appears reasonably calculated to lead to the discovery of admissible evidence"? Lawyers make this erroneous argument regularly, and, unfortunately, at times, successfully. *See, e.g., Feiner v. Mazur*, 1989 WL 646381 2 (Va. Cir. Ct. 1989) ("If not relevant, matter may be discovered if the 'information appears reasonably calculated to lead to the discovery of admissible evidence.'"). This Article will argue that the plain meaning of the Rules of the Supreme Court of Virginia that govern discovery procedure make such an argument insupportable, particularly in eminent domain proceedings.

Discovery procedure is governed by Part Four of the Rules of the Supreme Court of Virginia. *See* Va. Sup. Ct. R. 4:0-4:15 (2008). Rule 4:1(b)(1) governs the general scope of discovery. It states:

> In General. Parties may obtain discovery regarding any matter, not privileged, which is *relevant to the subject matter* involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Va. Sup. Ct. R. 4:1(b)(1) (2008) (emphasis added).

Notably, when Part Four of the Rules was originally drafted, it did not apply to eminent domain proceedings. Va. Sup. Ct. R. 4:0 (1967) ("The Rules in this Part Four . . . *shall not apply* in any proceeding . . . for the exercise of the right of eminent domain . . . .") (emphasis added). Pre-trial discovery in eminent domain proceedings did not exist until the Supreme Court entered an order amending Part Four of the Rules in 1977 to expressly apply to domestic relations, eminent domain, habeus corpus, and coram nobis[1] proceedings. *See* 218 Va. 397, 416 (1977); W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE § 9.03 (4th ed. 2005). To limit the scope of discovery in these types of proceedings, the Court also amended Part Four to include Rule 4:1(b)(5):

> In any proceeding (1) for separate maintenance, divorce, or annulment of marriage, (2) *for the exercise of the right of eminent domain*, or (3) for a writ of habeus corpus or in the nature of coram nobis; (a) the scope of discovery shall extend *only* to matters which are *relevant to the issues* in the proceeding and which are not privileged . . . ."

Va. Sup. Ct. R. 4:1(b)(5) (2008) (emphasis added).

This rule applies to the delineated proceedings in which additional protections against overbroad discovery are required to further public policy interests. In domestic relations cases, the Rule protects the inherent privacy interests of the parties. In habeus corpus and coram nobis actions, the Rule protects the government from excessive and unnecessary use of resources. *See Yeatts v. Murray*, 249 Va. 285, 289 (1995) (noting that, because of the state's interests, "simplifying procedures" may be used to ease the

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* Christi A. Cassel is a 2008 graduate of William & Mary School of Law and an associate at Waldo & Lyle, P.C. Her practice area is limited to representing property owners in eminent domain proceedings and defending private property rights.

[1] Coram nobis, in this context, refers to proceedings involving prisoners. KENT SINCLAIR & LEIGH B. MIDDLEDITCH, VIRGINIA CIVIL PROCEDURE § 12.2, n.4 (4th ed. 2003).

sovereign's burdens). And, in eminent domain proceedings, the Rule protects a property owner's constitutional safeguards against abuses of the exercise of the power of eminent domain. *See* KENT SINCLAIR & LEIGH B. MIDDLEDITCH, VIRGINIA CIVIL PROCEDURE §12.2 (4th ed. 2003).[2]

Statutory rules of construction and interpretation aid in understanding the affects of this limiting rule on the general discovery rule that applies to all other civil actions. Courts have used statutory construction rules to interpret the Rules of the Supreme Court of Virginia. The Court of Appeals held that "familiar rules of statutory construction are instructive and provide guidance in the interpretation of court-adopted rules." *Hanson v. Commonwealth*, 509 S.E.2d 543, 546 (Va. Ct. App. 1999) (interpreting a discovery rule in a criminal case). In *Kessler v. Smith*, the Court substituted "rule" for "statute," applying a statutory rule of interpretation to a Rule of the Supreme Court. 521 S.E.2d 774, 776 (1994) ("'Where the language of a [rule] is clear and unambiguous, we are bound by the plain statement of legislative intent.'") (citing *Commonwealth v. Meadows*, 440 S.E.2d 154, 155 (1994)) (substitution in the original). Statutory construction rules provide an accepted framework for analyzing the Rules.

The starting point in analyzing any rule or statute relating to eminent domain proceedings must be the rule of strict construction in such proceedings. The Court has often reiterated that, because the jurisdiction of courts is wholly statutory in eminent domain proceedings, "statutes must be strictly construed and followed." *Schmidt v. City of Richmond*, 206 Va. 211, 217 (1965). In *Hoffman Family v. City of Alexandria*, the Court described this rule of statutory interpretation in detail, stating:

> The statutes confirming[3] the power of eminent domain must be strictly construed, and a locality must comply fully with the statutory requirements when attempting to exercise its right. We consider the language of each statute to determine the General Assembly's intent from the plain and natural meaning of the words used. When the language of a statute is unambiguous, courts are bound by the plain meaning of that language.

272 Va. 274, 283-84 (2006) (citations omitted).

Because Rule 4:1(b)(5) relates directly and specifically to eminent domain proceedings, Courts should strictly construe this Rule. The Rule states that the scope of discovery in proceedings for the exercise of the right of eminent domain shall extend "*only* to matters which are *relevant* to the *issues*." Va. Sup. Ct. R. 4:1(b)(5) (emphasis added). An "issue," as defined in *Black's Law Dictionary*, is "a point in dispute between two or more parties." BLACK'S LAW DICTIONARY 849 (8th ed. 2004). Strictly construed, thus, Rule 4:1(b)(5) limits the scope of discovery in eminent domain proceedings *only* to information that has some probative value to the points then in dispute between the parties to the eminent domain proceeding.

As previously mentioned, however, attorneys often misconstrue the applicability of the general rule, Rule 4:1(b)(1), as it relates to the specific, limiting rule, Rule 4:1(b)(5). The Virginia Supreme Court has clarified how specific statutes or rules should be read in light of general statutes or rules. In *Frederick County School Board v. Hannah*, the Supreme Court of Virginia resolved a conflict among three distinct Code sections regarding insurance requirements for school-board owned vehicles. The Court described the controlling rule of statutory interpretation: "When one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails." *Frederick Cty. Sch. Bd. v. Hannah*, 267 Va. 231, 236 (2004).

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[2] Such abuses include the costs and burdens of exploring unnecessary matters. *See id.* Such additional, unnecessary costs amount to additional takings by the government.

[3] Eminent domain is an involuntary taking where the owner is protected not only by statute but also by the Constitutions of the United States and of Virginia. *See* U.S. CONST., amend V; VA. CONST., art. I, § 11.

Ultimately, the Court determined that, in order to "harmonize [the Code sections] so as to give full force and effect to both," the *specific* Code section would prevail:

> The School Board's proposed reading ignores the General Assembly's expressed intent to regulate the insurance requirements for motor vehicles used to transport students by a *specific* statutory framework as opposed to the *general* requirements of the Pool for all other permitted political subdivisions. *The more specific statutory provisions must prevail.* The General Assembly has specifically required school boards to meet different requirements regarding motor vehicle insurance than other political subdivisions.

*Id.* at 237 (emphasis added).

There are two noteworthy differences between the general rule governing nearly all civil actions and the specific rule governing the scope of discovery in eminent domain proceedings. First, the general rule allows the discovery of any matter relevant to the *subject matter*. Va. Sup. Ct. R. 4:1(b)(1). In contrast, the specific rule allows the discovery of any matter relevant to the *issues*. Va. Sup. Ct. R. 4:1(b)(5). "Subject matter" is a far broader category, covering any information related to "the matter of concern over which something is created." BLACK'S LAW DICTIONARY 1465 (8th Ed. 2004) (defining "subject"). "Issue," on the other hand, relates only to those particular questions the parties have raised by the pleadings. *See id.* at 849. The difference between "subject matter" and "issue" thus hinges on materiality; only *material* information may be discovered under Rule 4:1(b)(5). *See* MARK A. DOMBROFF, TRIAL OBJECTIONS § 421 ("[Information] is immaterial if it does not relate to the issues of the case."). In order to harmonize these two rules in eminent domain proceedings, the more specific provision must prevail. Therefore, information sought in discovery must be material to the questions raised by the pleadings to be admissible under Rule 4:1(b)(5).

The second point of conflict results from the language in Rule 4:1(b)(1) which provides that "[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Lawyers attempt to use this language to suggest that *irrelevant* information may be discovered so long as it appears that it will lead to the discovery of admissible evidence. Bearing in mind the language of the specific rule, this argument is without merit. The word "only" in Rule 4:1(b)(5) acts as a constraint; it strictly confines the scope of discovery in eminent domain proceedings to information *relevant* to the issues. This cannot be harmonized with a lawyer's attempt to discover inadmissible, *irrelevant* evidence under the theory that it will lead to the discovery of admissible evidence. The specific rule must prevail, allowing discovery *only* as to matters relevant to the issues.[4]

Despite lawyers' attempts to discover irrelevant information using a misapplication of Rule 4:1(b)(1) in eminent domain proceedings, rules of statutory construction lead to the clear conclusion that such information is outside the scope of permissible discovery. A property owner in an eminent domain proceeding is before the court in an involuntary proceeding, where the owner's rights are protected by the United States Constitution and the Virginia Constitution. Courts, therefore, must strictly construe statutes and rules applicable to such proceedings. The specific limiting rule of 4:1(b)(5) prevails over the general rule of 4:1(b)(1), allowing the discovery *only* of material matters relevant to the questions raised in the pleadings.

[4] For example, information sought about valuation on a date other than the date of take would be irrelevant and undiscoverable, and information sought about use would be irrelevant and undiscoverable unless the use was market use.