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## ii. Civil & Criminal Procedure

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but allow the city an opportunity to prepare and present a plan that will remedy the vote dilution characteristic of the at-large electoral system. Further, the Fourth Circuit stated that, if the city fails to comply, the district court should prepare a single district plan for use in future city council elections.

#### CIVIL & CRIMINAL PROCEDURE

In *Kolibash v. Committee on Legal Ethics of West Virginia Bar*, 872 F.2d 571 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit considered whether a federal officer may remove a state bar disciplinary proceeding to a federal district court pursuant to the federal officer removal statute, 28 U.S.C. section 1442 (1982). The West Virginia State Bar Committee on Legal Ethics accused United States Attorney William Kolibash of negligent supervision of a subordinate and failure to disclose salient information in a court investigation of charges of conflict of interest against that subordinate. Kolibash petitioned under the federal officer removal statute to remove the state bar disciplinary proceeding to the United States District Court for the Southern District of West Virginia. The federal district court refused to order removal of the case and remanded the proceedings to the West Virginia State Bar Committee on Legal Ethics. Kolibash appealed to the Fourth Circuit, seeking reversal of the remand order or, in the alternative, a writ of mandamus compelling the district court to retain jurisdiction.

In considering Kolibash's appeal, the Fourth Circuit first determined that it could review the remand order. The Fourth Circuit noted that under the federal officer removal statute a remand order is reviewable unless removal was without jurisdiction and improvident. The court then stated that the district court's decision to remand was a discretionary decision not based on lack of jurisdiction and, therefore, reviewable on appeal. The Fourth Circuit further held that removal was provident because Congress designed the federal officer removal statute to protect federal officers from state harassment in the performance of the officer's federal duties and that the removal statute guaranteed federal officers a federal forum. As a result, because the district court had jurisdiction to decide the removal request and because removal in this case would be provident, the Fourth Circuit determined that it properly could review the district court's remand order.

After the Fourth Circuit found that it could review the district court's order to remand the case, the Fourth Circuit examined Kolibash's pleadings to determine if the federal officer removal statute should apply to the case. The Fourth Circuit found Kolibash's pleadings substantially similar to a claim of immunity, and thus the pleadings were sufficient to invoke the federal officer removal statute. The Fourth Circuit, relying on Supreme Court precedent, found that although the federal officer removal statute generally requires a specific averment of a federal defense, the court properly could liberally construe the pleadings in this case. The court stated that general pleading will suffice to invoke the federal officer removal statute if

that general pleading contains a statement alleging that the officer was acting in the capacity of a federal officer. The court declined to decide whether or not immunity attached in this case, stating that a colorable immunity claim is enough to remove the proceedings to federal district court and that the district court is the proper trier to resolve the immunity claim under federal standards.

After finding Kolibash's pleadings sufficient to state a federal defense, the Fourth Circuit scrutinized the language of the federal officer removal statute to determine if the West Virginia State Bar disciplinary proceeding met the statutory requirements of the federal officer removal statute. Relying on precedent of the Fourth, Eighth, and Ninth Circuits, the court stated that courts should construe broadly the right of removal under the federal officer removal statute. The Fourth Circuit, therefore, rejected the State Bar's contention that a bar disciplinary proceeding is not a "civil action or criminal prosecution commenced in a State court" as the removal statute requires. The Fourth Circuit held that if a state investigatory proceeding is adjudicatory in nature and a federal officer is subject to process in that state proceeding, then the statutory requirements of the federal officer removal statute are met.

In reaching its decision that Kolibash's case should be removed to federal district court, the Fourth Circuit weighed the state interest in regulating the legal profession against the federal interest in protecting officials in performing their federal duties. The court found the balance in favor of the federal interest. The Fourth Circuit expressed concern over the potential for state interference with, and harassment of, federal officials carrying out their duties. The Fourth Circuit viewed the removal statute as a check on the potential threat of state interference with federal officials.

Finally, the Fourth Circuit held that, to avoid any local prejudices, courts should apply federal rules of procedure under the federal officer removal statute. The Fourth Circuit then held that the Southern District of West Virginia was the appropriate forum in which to resolve the merits of the case because the State Bar proceedings were commenced in the Southern District of West Virginia and Kolibash filed a petition for removal in the United States District Court for the Southern District of West Virginia. Consequently, the Fourth Circuit reversed the district court's decision and remanded the case to the federal district court.

In *Shoup v. Bell & Howell Co.*, 872 F.2d 1178 (4th Cir. 1989), the Fourth Circuit considered whether a dismissal by one federal court on statute of limitations grounds bars later litigation of the identical claim between the identical parties in a second federal court. On July 19, 1984, Shoup was injured while operating a machine Bell & Howell had manufactured. On July 14, 1986, Shoup filed an action against Bell & Howell in the Pennsylvania Court of Common Pleas alleging injury due to the defective design and manufacture of the machine. Because of untimely service on Bell & Howell, Shoup had to reinstate her claims in January 1987. At that time Bell & Howell received service and removed the case to the United

States District Court for the Eastern District of Pennsylvania on diversity grounds. Bell & Howell then moved for summary judgment, asserting that the applicable statute of limitations barred Shoup's claims. Because Bell & Howell did not receive service until after the statute of limitations had run, the Pennsylvania district court granted the motion. Shoup did not appeal.

On July 14, 1987, Shoup filed a suit against Bell & Howell in a Maryland federal court and a Maryland state court. Upon consolidation of the claims in federal court on the basis of diversity of citizenship, Bell & Howell argued that the prior dismissal of Shoup's action required the federal court in Maryland to dismiss the action on res judicata grounds. The district court denied Bell & Howell's motion for summary judgment, and Bell & Howell appealed.

The Fourth Circuit noted that a three-pronged test governs claims of res judicata. First, the parties must be the same or in privity with the original parties. Second, the claims in the subsequent litigation must be substantially the same as those in the prior litigation. Third, the earlier litigation must have resulted in a final judgment on the merits. The *Shoup* court stated that the third requirement was the sole issue in the case.

The Fourth Circuit initially disagreed with the district court's choice of law. Unlike the district court's reliance on Maryland law, the Fourth Circuit asserted that federal law determines the preclusive effect of a prior judgment of a federal court. The *Shoup* court thus disregarded the lower court's reliance on Maryland law and focused on FEDERAL RULE OF CIVIL PROCEDURE 41(b), which provides in part that:

Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits.

The Fourth Circuit determined that the dismissal in the Pennsylvania federal court was not one for lack of jurisdiction, for improper venue, or for failure to join a party under FEDERAL RULE OF CIVIL PROCEDURE 19. The *Shoup* court, therefore, concluded that the earlier dismissal operated as an adjudication upon the merits.

The Fourth Circuit asserted that res judicata clearly applied in *Shoup*. The prior Pennsylvania action involved the same claim and the same parties as the subsequent suit. The *Shoup* court determined that requiring Bell & Howell to litigate an identical action in Maryland would undercut the effect of the Pennsylvania judgment, deplete limited judicial resources, and either lead to an inconsistent judgment or require a party to prevail twice. Despite the apparent harshness of res judicata, the Fourth Circuit maintained that res judicata promotes economy in the use of judicial resources and of finality in litigation.

Judge Murnaghan, in his dissenting opinion in *Shoup*, contended that the Fourth Circuit's reading of rule 41(b) was too narrow. Judge Murnaghan relied on *Costello v. United States*, 365 U.S. 263 (1961), in arguing that

the *Shoup* court should have read “jurisdiction” in rule 41(b) more expansively. Judge Murnaghan asserted that the United States Supreme Court in *Costello* indicated that the lack of jurisdiction exception in rule 41(b) included dismissals that are the result of a plaintiff’s failure to comply with a precondition to the court’s determining the merits of the plaintiff’s claim. Judge Murnaghan believed that *Shoup* was a case in which the plaintiff failed to comply with a precondition to the hearing of the plaintiff’s claim. The majority in *Shoup* distinguished *Costello* on the basis that the plaintiff in *Shoup* did not fail to comply with any precondition to the hearing of the plaintiff’s claim.

In *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988), the Fourth Circuit considered the discovery requests of the defendant, William Pollard, from Martin Marietta Corporation. A grand jury indicted William Pollard on one count of conspiring to defraud the United States Department of Defense (DOD) and two counts of mail fraud. The DOD accused Pollard, a former employee of Martin Marietta Corporation, of falsely inflating Martin Marietta’s travel budget and thereby defrauding the DOD, which reimbursed Martin Marietta for travel expenses. After making various disclosures to the prosecution, Martin Marietta was able to avoid indictment and settle its controversy with the DOD. The government’s case against Pollard, however, continued.

Pollard, under FEDERAL RULE OF CRIMINAL PROCEDURE 17(c), requested six categories of documents from Martin Marietta. Martin Marietta refused to reveal documents from three of the six categories. The contested documents included: (1) workpapers, supporting documents, and internal audit reports; (2) witness statements about Martin Marietta’s dealings with travel vouchers; (3) and all correspondence and notes of unwritten communications between Martin Marietta and the DOD regarding their settlement agreement.

The United States District Court for the District of Maryland ordered Martin Marietta to produce the contested documents at an *in camera* hearing. At this hearing Martin Marietta admitted that it previously had revealed portions of the requested documents to the DOD. The district court then ordered Martin Marietta to disclose all the relevant documents that Pollard had requested. Martin Marietta refused and appealed the disclosure order.

On appeal the Fourth Circuit initially noted that rule 17(c) guarantees an accused the sixth amendment right to have compulsory process to secure evidence on the accused’s behalf. To determine whether Pollard deserved access to Martin Marietta’s documents under rule 17(c), the district court had employed the standards of relevancy, admissibility, and specificity that the Supreme Court outlined in *United States v. Nixon*, 418 U.S. 683, 700 (1974). The district court found that Pollard established these three elements and, therefore, should have access to the documents. Martin Marietta argued to the Fourth Circuit that the district court misapplied the three *Nixon* requirements.

The Fourth Circuit noted that Martin Marietta carried a heavy burden on appeal because, without a finding of abuse of discretion, an appellate

court would hesitate to overrule a lower court's decision that an applicant for a subpoena duces tecum had complied with rule 17(c). The Fourth Circuit then applied the three-step *Nixon* test. First, the court concurred with the district court's standard of review for the admissibility criterion. The court concluded that Pollard had made a good faith effort to obtain the requested documents and, consequently, satisfied the admissibility requirement. Second, the Fourth Circuit held that the district court applied the correct standard for specificity and properly found that Pollard had sufficiently described the documents. Finally, the Fourth Circuit found that Pollard established relevancy, the third *Nixon* requirement, even though the district court failed to make any detailed findings regarding relevancy. The Fourth Circuit, therefore, disposed of Martin Marietta's claim that the district court abused its discretion by misapplying the *Nixon* requirements.

Martin Marietta next argued that either its attorney-client privilege or its work-product privilege, or both, should protect the documents from disclosure. Pollard countered that Martin Marietta's earlier disclosure of the documents to the DOD impliedly waived Martin Marietta's attorney-client and work-product privileges as to all the materials with the same subject matter as the previously released documents. Martin Marietta responded that its prior actions created only a limited implied waiver which would permit Pollard to discover only those documents that Martin Marietta earlier had disclosed to the DOD.

The Fourth Circuit first analyzed Martin Marietta's claim of limited implied waiver of its attorney-client privilege. The court found that precedent in the Fourth Circuit follows the view that, if a client talks to the client's attorney with the understanding that the attorney will disclose the information to others outside of the privileged relationship, the client waives the attorney-client privilege to that information and to the details underlying the information. After finding that Martin Marietta vitiated any confidentiality by disclosing documents to the DOD, the Fourth Circuit held that Martin Marietta could not claim a limited implied waiver of its attorney-client privilege over the documents. Thus, the court found that Martin Marietta had to disclose to Pollard all of the documents that Martin Marietta incorrectly claimed to be under an attorney-client privilege and that contained subject matter relating to the previously released documents.

The Fourth Circuit next reviewed Martin Marietta's claim of limited implied waiver of its work-product privilege. The court examined the United States Supreme Court's decision in *United States v. Nobles*, 422 U.S. 225, 238 (1975), which addressed the issue of implied waiver. In *Nobles* defense counsel sought to use the testimony of a private investigator to rebut the testimony of two prosecution witnesses. Defense counsel, however, did not want to release the private investigator's written report to the prosecution. The Supreme Court held that if the private investigator testified, defense counsel would have to disclose the investigator's written report to the prosecution. According to the Fourth Circuit in *Martin Marietta*, Martin Marietta wanted to disclose only the previously revealed documents, as defense counsel in *Nobles* tried to reveal only the investigator's testimony.