

## Nurse Cannot Testify On Consent, Judge Says

By JOHN D. TUERCK

A Virginia Beach defense attorney has successfully argued that a sexual assault nurse examiner's testimony concerning the consent of an alleged rape victim was scientifically unreliable and thus inadmissible.

In *Velazquez v. Commonwealth* (VLW 001-7-157), the Court of Appeals of Virginia had ruled that a nurse had sufficient expertise to testify that a 15-year-old victim's injuries were "inconsistent" with consensual intercourse.

However, the court left open the issue of whether the science underlying the nurse examiner's testimony is sufficiently reliable to prove an absence of consent, the "ultimate fact" in the case.

Representing a defendant charged with rape and abduction, Virginia Beach attorney **Greg D. McCormack** sought to use this latter point.

The case is *Commonwealth v. Williams*. There is no written opinion.

McCormack said he filed a motion in limine to bar a nurse expert from testifying that his client caused

the alleged victim's injuries.

He asserted that medical experts are divided on whether evidence of injury can show an absence of a consent on the part of a sexual assault victim. That division, he said, raises questions about the scientific reliability of using such evidence in sexual assault cases.

At the hearing on his motion, McCormack said, "[The nurse's testimony] would be extremely confusing and misleading to the jury because then the jury layperson is going to be called upon to try to interpret the meaning, if any, of the injuries when the only issue is whether or not there was penetration, and we'll stipulate to that fact."

Assistant Commonwealth's Attorney Karen D. Brown argued that the nurse's testimony about the alleged victim's injuries would help the state prove the element of force, threat or intimidation.

"It would be just like an assault-and-battery case when someone walks in with a black eye, and then they say, 'Well, you can't



**GREG D. MCCORMACK**  
Testimony was barred

testify how you got that injury," said Brown. "That's absurd."

When Circuit Judge S. Bernard Goodwyn granted McCormack's motion, the commonwealth nolle prossed the charge before indicating that there would be no re-indictment.

"I was very surprised by the ruling I got in this case," said McCormack. "I pretty much believed the judge would rule that the nature of the injuries was relevant."

The issue is likely to reappear in cases where a defendant concedes penetration but insists that there was consent, McCormack added.