Supreme Court Initiatives Led Year of Successful 'Firsts'

by Phillip V. Anderson, 2005–2006 VSB President

The beginning of a new year is time for all of us to reflect on the successes and disappointments of the past and to focus on our hopes for the future. So it is with the Virginia State Bar. The year 2005 brought many successful firsts. The bar along with the Supreme Court of Virginia offered the first Indigent Defense Training Initiative, an advanced skills training program for court-appointed counsel and public defenders, in two locations in the state at no charge to attendees. The daylong program showcased leading criminal defense experts and received overwhelmingly positive reviews from those in attendance.

The first Solo and Small-Firm Practitioner Forum was offered twice in 2005, to provide resources and opportunities for lawyers to learn more about claims avoidance and to interface with Supreme Court justices and bar officials on various ideas in a town hall meeting format.

There were disappointments, as well. We who hoped for increased funding for court-appointed counsel and public defenders representing Virginia's indigent population in criminal cases were greatly disappointed when increases failed to find their way into the Governor's proposed budget. Barring intervention by the General Assembly, Virginia will continue to maintain its last-place position among the fifty states in terms of the funding provided for defense of Virginia's poor.

It also brought news that for me was very disappointing. In the late days of December, Barbara Ann Williams called to tell me that after eight years as Virginia State Bar counsel she had accepted an opportunity to return to private practice. It truly was an opportunity too good to pass up. Although excited for Barbara, I was disappointed because she has been a great friend and ally to me and all who have worked with her.

She offered great leadership to the bar. She handled complicated and demanding cases as lead counsel, and she managed and restructured the system to improve efficiency in complaint processing. She developed a highly motivated professional staff.

Despite an 18 percent growth in the bar's membership and 60 percent increase in bar complaints during her tenure, Barbara lessened the time it took to process and resolve disciplinary complaints. The backlog in old cases was reduced to an all-time low. Supervising a staff of forty, including assistant bar counsel, investigators, ethics counsel, intake counsel and staff, Barbara led by example. She worked diligently and conscientiously to improve the system and set the very highest standard for herself and her department. An impassioned believer in our self-regulatory system, Barbara will be missed by her colleagues and by the hundreds of volunteers who looked to her for leadership. I will miss her wise counsel and insight. We wish her the very best.

We look forward to 2006 with promise. The disciplinary system is now in the very capable hands of Deputy Bar Counsel Harry M. Hirsch. Harry has been with the bar for twenty two years and has worked closely with Barbara over the years in developing many of the structural changes to improve the efficiency of our disciplinary system. He will manage the disciplinary department while VSB President-elect Karen A. Gould leads a bar counsel search committee.

We are unveiling an unprecedented service—a Web-based legal research service available to Virginia lawyers as a membership benefit, with no additional fee. (See story on page 6.) The project was first discussed in 2004, during David P. Bobzien's year as president.

So we look forward to 2006 with optimism, as we continue to serve Virginia's lawyers and the public by regulating and elevating our profession. ⚖

Fastcase Offered Free to VSB as Member Benefit

The Virginia State Bar will begin offering online legal research software as a free benefit to all members of the VSB on March 1. The VSB has contracted with Fastcase to provide the member benefit for three years, to include national coverage, unlimited usage, unlimited customer service, and unlimited free printing—at no additional cost to bar members, as a part of their existing membership dues.

The benefit is national in scope. It includes cases from the U.S. Supreme Court from 1 U.S. 1 to present, the U.S. Courts of Appeal from 1 F.2d 1 to present, federal district courts from 1915 to present, federal bankruptcy courts from 1 B.R. 1 to present and courts from all fifty states back to at least 1950.

In addition, the Fastcase service adds cases, statutes, regulations, constitutions, and court rules from all states and from federal sources. Where the official versions of these materials are already available for free on the Web, Fastcase brings them together for easy access on the same site.

The service benefit is Web-based, so members will have no discs to buy or software to download. It is accessible anywhere lawyers have Internet access, twenty-four hours a day, seven days a week—at the office, at home, or on the road. The service is updated daily, and includes both official citations and citations to commercial reporters, both at the header of the case and within the case for "star pagination."

"Lawyers have been looking foward to this online research service, and we are pleased to be able to provide it as a new benefit for members of the Virginia State Bar," said VSB President-elect Karen A. Gould, who served on the committee that solicited bids for the contract.

"The service will give all Virginia attorneys access to case law and many other resources they need to effectively represent their clients. The service is paid for out of their annual bar dues, with no additional fees.

"Ultimately, the people who will benefit are the public who turn to Virginia lawyers for help."

Sample document obtained through Fastcase.

Fastcase at-a-glance

Sign up—Go to the Virginia State Bar Home Page at **www.vsb.org** and click on the Fastcase logo.

Tutorial—Fastcase provides a five-minute online overview of how the research tool works. See **https://www.fastcase.com** and click on "online demo."

FAQs—For questions about searches see **https://fastcase.com/Corporate/Questions.aspx**.

Customer Service & Tech Support—Phone 1-866-773-2782 (1-866-77-FASTCASE) 8 A.M.–8 P.M. (M-F) or e-mail **support@fastcase.com**.

Local Roots

Fastcase was founded in Alexandria in 1999. One of its cofounders, Ed Walters, has been a member of the VSB since 1996. "Since we started six years ago, Fastcase has grown into one of the largest case law databases in the world, but it's so gratifying to offer it to our home jurisdiction in Virginia, and at no cost to users," Walters said.

Members of the VSB were some of Fastcase's earliest subscribers, and the company has exhibited at the bar's Annual Meeting in Virginia Beach, and at Continuing Legal Education seminars across the state.

The company was started when Walters was in practice in the Washington, D.C., office of Covington & Burling. "One of our larger clients needed legal research for a project, but asked us not to charge them for the expensive services our firm used," Walters said. "When we couldn't find an affordable alternative, another lawyer at the firm and I decided to leave and build one ourselves." A few months after that project, Walters (who is the company's chief executive officer) and Philip Rosenthal (the company's president) started Fastcase, which now has more than 155,000 subscribers worldwide.

"Fastcase levels the playing field between small firms and large firms, providing everyone the kind of access to the law that only the largest firms have enjoyed," Rosenthal said. "Now all lawyers, from the biggest firms to the most remote solo practitioner, will have the entire national law library right on their desktops."

"We have launched similar benefits in Florida, Louisiana, Iowa, and Massachusetts," Walters said. "In those states, Fastcase has improved the quality of the practice of law by giving lawyers access to more of the law, providing smarter search tools, and allowing lawyers to do more research for pro bono and nonbillable work."

The Fastcase service is constantly expanding, and it plans to include a larger offering of Virginia materials as part of the service, as well as other materials to expand its libraries.

Using the Fastcase Benefit

To use Fastcase, members will go to the VSB Web site (www.vsb.org) and click the Fastcase logo. They will be prompted to

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Searches begin with this screen.

Searches can be narrowed by jurisdiction.

I would like to call your attention to an error in the December 2005 edition of *Virginia Lawyer*. An article relating to the Old Dominion Bar Association's Scholarship Dinner erroneously states that Oliver W. Hill and Samuel W. Tucker were principal attorneys for the *Brown v. Board of Education* cases. Mr. Tucker was not involved in the *Brown* case. Mr. Hill and the late Spottswood W. Robinson III tried the Virginia case that became a part of the Brown cases (*Davis v. School Board of Prince Edward County*). Mr. Tucker was the principal attorney in *Green v. County School Board of New Kent County*, which was decided in 1968. The New Kent case was important because the Court held that the burden was on school boards to establish a desegregation plan that worked, and that school boards were required to desegregate every school "root and branch."

—Clarence M. Dunnaville Jr.
Richmond

Send your letter to the editor* to:
coggin@vsb.org; fax: (804) 775-0582; or mail to:
Virginia State Bar,
Virginia Lawyer Magazine
707 E. Main Street, Suite 1500, Richmond, VA 23219-2800

*Letters published in *Virginia Lawyer* may be edited for length and clarity and are subject to guidelines available at **www.vsb.org/publications/valawyer/letters.html**.

Correction

An article in the December 2005 edition of *Virginia Lawyer* on pro bono award recipients from Harrisonburg incorrectly stated the affilitation of Dana J. Cornett. She is president of Blue Ridge Legal Services. *Virginia Lawyer* regrets the error.

Correction

In the January 2006 issue of *Virginia Lawyer Register*, the word "broad" found in paragraph b of the Proposed Amendment to Rule 5.6, which ran on page 50, was not struck. It appears correctly on the Web version at **http://www.vsb.org/publications/valawyer/jan06/PropRuleCh.pdf**.

Reforming the Involuntary Commitment Process: A Multidisciplinary Effort

by Dawn Chase

The needs of people with mental illnesses touch the legal profession as heavily as they do the rest of society.

Lawyers serve as special justices to preside over involuntary commitment hearings. Lawyers represent respondents in those hearings. They serve as guardians *ad litem*. They defend mentally ill people charged with crimes. They counsel people with chronic mental illnesses and their families on an array of issues, including interventions and estate planning.

On December 9, 2005, lawyers who serve in those roles throughout the state met in Richmond with mental health professionals, law enforcement officers, hospital administrators and advocates for "Reforming the Involuntary Commitment Process: A Multidisciplinary Effort," a conference sponsored by the Supreme Court of Virginia and Virginia State Bar.

The conference was organized by a committee appointed in November 2004 by Chief Justice Leroy R. Hassell Sr. to study Virginia's civil commitment process and suggest improvements.

Hassell told 250 attendees at the Holiday Inn-Koger Center that the Supreme Court is "committed to an outstanding judicial process that is fair and impartial and that respects the rights of people who are subject to Virginia's involuntary civil commitment process."

Before the conference, one thousand surveys werre sent to Virginians involved in the commitment process. Many lawyers' answers focused on due process: "The limited time made available to interview detainees and the wholesale admissibility of hearsay by special justices." "Inadequate advance notice of the hearing to the respondent." "No prosecutors." "The appeals process is a mess." "[Need for] uniform protocol throughout the state." "Instead of formalizing the process, . . . more of a collaborative effort should be used. Due process doesn't help out a catatonic, delusional or psychotic patient."

Participating in the Supreme Court of Virginia's conference on reforming the commitment process were (l–r) Chief Justice Leroy R. Hassell Sr., Dr. Paul S. Appelbaum, Professor Richard J. Bonnie, attorney and former special justice Judith L. Rosenblatt and Gregory E. Lucyk, chief staff attorney to the Supreme Court.

Survey respondents also complained about mechanics: "Rotten pay for court-appointed attorneys." "I stopped doing this because of hassle getting paid, undesirable location and amount of time it took from my regular practice." "You can end up miles from your locale, making visitation very difficult." "Difficult clients."

At the conference, lawyers' perspectives were added to the other professionals'. Sheriffs talked about difficulty providing transportation and appropriate restraints. They complained about having to house and protect mentally ill people in jails when psychiatric hospital beds are not available. Mental health practitioners questioned the training in psychiatric problems provided to special justices and magistrates. They cited inadequate funding of community services boards that help people maintain therapies and medicines so they can avoid crises. Advocates expressed concern for respondents who suffer from other impairments, such as vision or hearing loss. They observed that many medications, while essential to control psychiatric symptoms, sometimes cause serious physical problems, and each patient must balance all considerations as he or she tries to cope with mental illness.

Richard J. Bonnie—a law professor and director of the University of Virginia Institute of Law, Psychiatry and Public Policy—gave his perspective as a veteran of mental health reform efforts in Virginia. "Here we are with many of the same complaints concerning lack of due process, lack of clarity, lack of uniformity in the interpretation of the Code, leading to a great deal of variation across the state and sometimes even within the same jurisdiction.

"And some problems, particularly on the services side, have gotten worse: A shortage of beds for evaluation and detention pending hearings, and occasionally for commitments themselves . . . .

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"The involuntary commitment process in Virginia does need to be reformed," Bonnie said. He summed up the needs: "More beds, higher fees and fewer handcuffs."

"From the perspective of civil commitment reform, specifically, I would sketch a three-part vision: One, close the services gaps, especially for people in crisis. Two, facilitate voluntary engagement to the maximum possible extent. Three, when coercion is necessary—as of course it will be in some cases—do it with a genuine commitment to due process."

Bonnie cautioned that the subjects of mental health commitment hearings are very rarely so disordered that they cannot participate meaningfully.

"Some will say that the trappings of due process in the context are a charade," he said. "That may be true of some patients, but it is not true of most. And patients will know, almost however disordered they are, whether they have been treated with dignity and respect and whether the judge and lawyers paid any attention to them, or even made eye contact with them."

A MacArthur Research Network study about ten years ago of acute psychiatric admissions in the United States found "one of the strongest predictors of whether patients perceived that they had been coerced was whether they felt that they had been treated fairly, and that the psychiatrist and judges had cared about hearing their side of the story," Bonnie said.

Raymond R. Ratke—chief deputy commissioner of the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services—emphasized that the commitment process can itself inflict trauma that respondents must recover from. "It's stigmatizing. You become the illness," he said.

More than 50 percent of people with serious mental illness "have experienced abuse or other trauma in their lives. The process that we have . . . of people going into the hospital may, in fact, be retraumatizing and be something that people need to get over."

Several speakers said that the bar for involuntary commitments—danger to self or others or inability to care for one's self because of mental illness—should be lowered. Some endorsed alternatives such as mental health courts—in which a judge oversees compliance with treatment regimes for mental illness—or a process for commitment to outpatient services.

Insurance companies and Medicaid also set too high a bar for coverage of crisis services, Ratke said. "You have to get really bad off to get services . . . . You have to get to a place where other alternatives don't necessarily exist."

Bonnie said, "By embracing dangerousness as the sole clinical indication for hospitalization, many managed care plans have been too restrictive, especially when their plans do not cover intensive crisis stabilization services."

Dr. Paul S. Appelbaum, the A.F. Zeleznik professor of psychiatry and director of the Law and Psychiatry Program at the University of Massachusetts Medical School, described the history of how Americans have treated the mentally ill.

Other states, like Virginia, have dealt with patient dumping—people released from mental hospitals were transported across a county or state line and told not to come back. And they have endured the effects of the deinstitutionalization movement of the 1960s, when state systems discharged disabled people from hospitals into communities without providing adequate outpatient services to help them.

Panels of judges, special justices, mental health professionals and law-enforcement officials discussed their perspectives of involuntary commitment and the variations from locality to locality.

In closing, Hassell said the multidisciplinary discussion will continue.

"Lawyers of this commonwealth would be very, very proud because [the conference] was funded by lawyers' dues," he said. The participants are on a mutual "journey to improve how we treat people" with mental illness.

The Supreme Court of Virginia will provide training to special justices, magistrates, judges and lawyers, he said. And "we will have conferences in the future . . . . It is very important that we hear all voices . . . as we seek to improve Virginia's mental health system." ⚖

Legal Fiction Contest Announced

SEAK Inc., a Massachusetts-based company that provides training and publications for professionals, is sponsoring its fifth annual National Legal Fiction Writing Competition for Lawyers. First prize is one thousand dollars and lunch on Cape Cod with lawyer authors Lisa Scottoline and Stephen Horn.

The contest is open to short stories or novels of 2,500 or fewer words in the legal fiction genre by U.S.-licensed attorneys. Entries (one per attorney) are due by June 30, 2006, and should be sent to SEAK Inc. Legal Fiction Competition, Attention: Steven Babitsky, President, Post Office Box 726, Falmouth, Massachusetts 02541.

For more information, contact Kevin J. Driscsoll at (508) 548-4542 or kevin.driscoll@verizon.net.

IN MEMORIAM

John Muse Bareford Sr.
Saluda
November 1919–March 2005

Jerry T. Batts Jr.
Sun City West, Arizona
March 1912–October 2003

Herbert Berl
Washington, D.C.
January 1913–December 2005

H. Brice Graves
Richmond
September 1912–October 2005

Chris E. Hagberg
Vienna
December 1949–October 2005

Jo Hambrick Kittner
Glen Allen
September 1959–August 2005

Henry I. Lipsky
Arlington
November 1921–May 2005

Peter Leo McCloud
Lexington
December 1950–July 2005

Harold C. Skeen
Richmond
February 1925–December 2004

John Thurston Wassom
Richmond
October 1916–January 2006

James Woolls
Alexandria
May 1933–September 2005

Colins Denny White
Richmond
March 1914–January 2005

Free and Low-Cost Pro Bono Training

Visit the Pro Bono page on the VSB Web site for free and low-cost pro bono trainings and volunteer opportunities: www.vsb.org/probono/.

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Designed to meet the needs of Virginia's elder citizens, the *Senior Citizens Handbook* contains information about:

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- Choosing a Care Facility
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- Age & Disability Discrimination
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To order copies contact Joy Harvey at **harvey@vsb.org** or (804) 775-0548.
Available online at www.vsb.org/publications.

Second Indigent Criminal Defense Seminar Scheduled; Free CLEs for Court-Appointed Lawyers

For a second year, the Supreme Court of Virginia and Virginia State Bar have assembled a prestigious and diverse panel of national experts to present "Indigent Criminal Defense: Advanced Skills for the Experienced Practitioner," a seminar for public defenders and court-appointed counsel in the commonwealth.

This year's program will take place April 7, 2006, live at the Richmond Convention Center, with a video conference at the Southwest Virginia Higher Education Center in Abingdon. Lawyers who take court-appointed criminal cases, either as private attorneys or public defenders, may attend without charge. The program will carry 7.5 hours of Continuing Legal Education credit.

Advance registration is required and space will be limited. For details, watch the VSB Web site at **www.vsb.org**.

The seminar grew out of Chief Justice Leroy R. Hassell Sr.'s desire to provide more resources to Virginia's court-appointed lawyers, who receive the lowest fees in the nation for their work.

Last year's seminar, led by Virginia Court of Appeals Judge Walter S. Felton Jr., drew 450 lawyers.

The 2006 program, headed by Richmond attorney Steven D. Benjamin, includes the following speakers:

- Jeffrey P. Robinson, Esquire, of Schroeter Goldmark & Bender in Seattle. He is a former public defender for Seattle and King County, Washington, and the U.S. District Court in the Western District of Washington. He will talk about the importance, impact and effective presentation of opening statements.
- Richard Ofshe, Ph.D., a professor emeritus of sociology at the University of California at Berkeley and a national expert on the subject of false confessions.
- Paul C. Nugent, Esquire, of Foreman DeGuerin Nugent in Houston, an experienced criminal defense lawyer. His topic is "Creative Solutions for Impossible Cases."
- Vanita Gupta, whose first case as a young attorney with the NAACP Legal Defense and Education Fund was a challenge to a bogus drug sting that targeted black residents of Tulia, Texas. She will be the luncheon speaker.
- William C. Thompson, Ph.D., a professor in the Department of Criminology, Law and Society at the University of California at Irvine. An expert in DNA testing, he helped discredit the work of the Virginia Division of Forensic Science in the case of Earl Washington Jr. He will talk about detecting laboratory error.
- Ruben C. Gur, Ph.D., a psychologist and director of the Brain Behavior Laboratory at the University of Pennsylvania Medical Center in Philadelphia. He is a national expert on schizophrenia and was part of the defense team for convicted Unabomber Theodore J. Kaczynski. His topic is judgment and impulse control in young adults.
- Barbara E. Bergman, Esquire, president of the National Association of Criminal Defense Lawyers and a professor of law at the University of New Mexico. A former public defender in Washington, D.C. and associate counsel to President Jimmy Carter, she served on the defense team for Terry Nichols in the Oklahoma City bombing case. She will give a U.S. Supreme Court update, including the latest developments in *Washington v. Crawford.*

Legal Services of Northern Virginia to Sponsor Two CLE Programs in Fairfax

Two continuing legal education programs will be sponsored this spring by Legal Services of Northern Virginia at Fairfax Judicial Center. The classes—free to lawyers who agree to volunteer for a limited number of legal aid cases—are:

- **Equitable Distribution of International Organization Retirement Benefits**—March 22. Taught by Linda J. Ravdin and Vicki Viramontes-LaFree.
- **Employee Retirement Income Security Act Qualified Domestic Relations Orders: The Law, Current Developments and Present Pitfalls**—April 25. Taught by Janine H. Bosley.

Both programs will be held in the judicial center's cafeteria from 4 to 6:30 P.M. For more information, e-mail Q. Russell Hatchl, pro bono coordinator for LSNV, at **rhatchl@lsnv.org**.

Zoning Finds Religion

by Samuel W. Meekins Jr.

In response to what Congress saw as local governments' hostility toward acts of religious exercise, the Religious Land Use and Institutionalized Persons Act (RLUIPA) became law in 2000. The statutory scheme can be found at 42 U.S.C. § 2000cc, *et seq.* Congress's prior attempt to insert itself into local zoning decisions that affect religious exercise was titled the Religious Freedom Restoration Act of 1993 (RFRA). That act was declared unconstitutional by the Supreme Court of the United States in *City of Boerne v. Flourez, Archbishop of San Antonio, et al.*, 521 U.S. 507 (1997). The decision was authored by Justice Anthony M. Kennedy as part of a six-justice majority. The Supreme Court felt the RFRA unlawfully extended existing free exercise jurisprudence. Does a similar fate await the RLUIPA?

Section (a) of the RLUIPA makes it illegal for any government to regulate land use in a way that imposes a substantial burden on the religious exercise of any person, assembly or institution unless the government can demonstrate that it has a compelling interest in imposing such a burden and that it is using the least restrictive means available to accomplish that compelling interest. The act defines religious exercise as any exercise of religion, including the use, building or conversion of real property for religious exercise. Substantial case law has already been developed in the federal circuits interpreting the RLUIPA as it applies to local government application of zoning laws —often conditional use permits—to prevent, among other things, the construction or rehabilitation of churches in municipal zones.

The federal nexus for the legislation is found in 2000cc(a)(2), titled "The Scope of Application." The statute sets forth three perceived grounds for federal intervention into a local venue's decisions: (A) The program that imposed the substantial burden receives federal financial assistance; (B) Imposition of the burden affects interstate commerce; and (C) The burden is imposed in a land use system under which the government makes individualized assessments of proposed uses for property. (C) would seem to apply in every instance in which a church is required to obtain a conditional use permit to operate within a specific zone of a city. Conditional use permit procedures usually provide for the governing body, based upon recommendations and public input, to individually assess whether a use permit should be granted. Under those circumstances, RLUIPA would be implicated and the question would then arise as to whether the denial of the use permit would impose a substantial burden on the applicant's religious exercise. If it does, the government would have to produce evidence of compelling interest and least restrictive means in order to avoid RLUIPA implications.

Equally interesting under the act is the interface with the free exercise clause of the First Amendment. Under traditional First Amendment jurisprudence, the substantial burden on the free exercise of religion is held to be imposed only when a person is required to forego a tenant of his or her religious belief. See: *Shubert v. Verner*, 374 U.S. 398 (1963). Under the RLUIPA, however, "religious exercise" includes any exercise of religion "whether or not compelled by or central to a system of religious belief" and specifically applies to the "use, building or conversion of real property for the purpose of religious exercise." 42 U.S.C. § 2000cc-5(7)(A) and (B). Hence, the RLUIPA provides that a person's religious exercise could be substantially burdened merely by the government's preventing the use of real property, even if no specific religious tenant of the person would be affected by the denial of that use.

The question will be answered by a Supreme Court that has been increasingly hostile to the expansion of federal power. When the Court's makeup is changed by two new justices who are favorites of the religious right (if Samuel A. Alito Jr. is confirmed), the landscape will be set. Can the new Court actually declare unconstitutional a law that makes it easier for churches to establish places of worship in locales that Congress has declared to be hostile to such religious practices? We will see. ⚖

Samuel W. Meekins Jr. is chair of the Virginia State Bar Litigation Section. He is a shareholder, former president and current vice president of Wolcott Rivers Gates, and practices in Hampton Roads. He has experience in federal and state court trials in cases involving white-collar criminal defense, business tort litigation, lender liability and construction and land use. He is president of the Virginia Beach Central Business District Association and a former chair of the Virginia Beach School Board.

Getting A Writ In Virginia's Appellate Courts

by L. Steven Emmert

This article was adapted from an Appellate Practice Symposium sponsored by the author in November 2005 in Virginia Beach.

So many petitioners; so few writs. That's the harsh reality of the writ system in Virginia's appellate courts. In most cases, the writ is the key to the appellate courthouse, as it is first necessary to persuade the court to take the case. Only then may the parties address the merits of the appeal. But the overwhelming majority of petitions for appeal are denied; an alarming number are dismissed for procedural defaults. For those more accustomed to addressing jurors than justices, the system can seem a labyrinth.

This article is intended to demystify the writ process, to give the trial practitioner insight into how petitions are handled in these courts; and to give attorneys a better idea of how to maximize their chances of getting—or resisting—a writ.

Mechanics of the writ process

With few exceptions,[1] appeals to the Supreme Court of Virginia require that the appellant get a writ.[2] In the Court of Appeals of Virginia, most types of appeals are of right, and do not require a writ. Workers' Compensation cases and domestic relations rulings, for example, may be appealed immediately, without the necessity of filing a petition. But criminal and traffic appeals, which make up the largest portion of the appeals court's caseload, require a writ.

Supreme Court — Appeals from Trial Courts

The writ process in the Supreme Court begins with a notice of appeal, which is filed with the clerk of the *trial court* (not the Supreme Court) within thirty days after the judgment is entered.[3] The notice is usually very short—often no more than two sentences. It identifies the judgment you're appealing, specifies which court you're appealing to, and states whether a transcript will be filed.

The next step is the filing of the petition for appeal, which must be filed in the Supreme Court Clerk's Office not more than three months (not ninety days) after entry of the judgment order that is being appealed. Keep in mind that an order is entered on the day the judge signs it,[4] without regard to whether it is entered *nunc pro tunc*. No judge may deny you the right to appeal by the expedient of entering an order *nunc pro tunc*.

You should consult the rules for petitions[5] each time you face an appeal. This article will not attempt a line-by-line explication, but provisions relating to assignments of error merit special emphasis. First, inclusion of assignments of error is essential in the petition; omitting them results in the immediate dismissal of the appeal without leave to amend.[6] For this reason, drafting assignments of error should be the first thing you do in writing your petition. Second, merely stating that the judgment you're appealing is "contrary to the law and the evidence" will also violate the rule and result in the dismissal of the appeal.[7] You must point to some particular error in the trial court that you are appealing. As a practical matter, it is always best to get the appellate court focused, at an early point in your brief, on the exact error you are raising.

After service of the petition, the appellee may, but is not required to, file a brief in opposition, in which it urges the court not to take the case.[8] This is where the appellee can assign cross-error, if he or she chooses.[9]

The appellant may then choose to file a reply brief, but this generally results in a waiver of the appellant's right to oral argument at the writ stage.[10] The Court will either read your reply, or listen to your oral argument, but not both. The only exception is where the appellee has assigned cross-error; in that event, the appellant may file a reply that addresses only the issues raised in the cross-error, and still preserves its right to oral argument.

Supreme Court — Appeal from the Court of Appeals

The rules for an appeal from the Virginia Court of Appeals to the Supreme Court are parallel to the rules for appeals from the trial court, with a few significant distinctions. First, the notice of appeal must be filed in the Court of Appeals (again, not in the Supreme Court) Clerk's Office, within thirty days after the ruling of the Court of Appeals becomes final.[11] The anomaly is that the petition for appeal must also be filed with the Supreme Court Clerk's Office within thirty days,[12] not the three months provided in appeals from trial courts. As a practical matter, this means that the notice of appeal and the petition are often filed on the same day, albeit in different clerk's offices.

Second, in assigning error in your petition for appeal, you must assert that the Court of Appeals erred, not merely that the trial court erred. If you only assign error to the trial court's ruling, the Supreme Court will be powerless to reverse the Court of Appeals ruling.[13]

Third, there are a number of issues over which the Court of Appeals has jurisdiction, and in which that court's rulings are considered to be final and unappealable.[14] To appeal one of those matters to the Supreme Court, you must state in your petition why the case presents "a substantial constitutional question as a determinative issue or . . . matters of significant precedential value." But be warned: The cases in which this exception is actually applied are very rare.

Finally, as noted below, the Court of Appeals does not require assignments of error. But when you appeal up from the Court of Appeals to the Supreme Court, you must draft assignments to insert into your petition. Those provisions of Rule 5:17(c) are not waived merely because a different appellate court applies a different rule.

Court of Appeals

The process in the Court of Appeals is parallel to that in the Supreme Court, but there are important differences. First, a copy of the notice of appeal must be filed in the Court of Appeals clerk's office.[15] (In the Supreme Court, a copy of the notice is mailed to each counsel of record, but not to the Supreme Court.) Second, the time for filing the petition is calculated differently; it's within three months in the Supreme Court, but in the Court of Appeals, it's not more than forty days after the record is filed in that clerk's office.[16] As this date will vary, the clerk will notify counsel of record of the date on which the record is filed, so counsel can calculate when the petition is due.

The Court of Appeals also requires that the petition specify where in the record the appellant preserved his or her objection to the ruling that is being appealed. In the future, the Supreme Court may adopt this requirement as well, but for now the preservation requirement only applies to petitions filed in the Court of Appeals.

Preparation for Oral Argument — Supreme Court

After the briefs are in, each appeal is assigned to an attorney in the office of the Chief Staff Attorney. That attorney will review the record and the briefs and prepare a report summarizing the case, the record, and the arguments. The report also generally recommends whether the writ should be granted.

In case you skimmed over that last paragraph, go back and read it again. Most attorneys have no idea that their briefs are, in essence, prescreened. This process means that the first person who will read your petition (or brief in opposition) is not a justice and not a law clerk, but a staff attorney who deals with hundreds of such petitions each year. The Court does not always follow the attorney's recommendations, but the "conformance" rate is very high. Any fear that may accompany this information is unfounded; the justices do not decide the case merely on the basis of the summaries. You should assume that the Court has read your brief, and your adversary's, in preparation for oral argument on the petition.

In cases in which no oral argument is demanded, the staff attorney's summary is provided to a panel of the court for action in conference.

Oral Argument

Assuming oral argument is requested in the petition, both courts assure counsel of the right to argue. The procedures, however, are different.

In the Supreme Court, counsel for the appellant will receive a notice of the scheduling of oral argument approximately one month before the writ panel meets. The petition is then considered by a panel of three current or senior justices, any one of whom may grant the writ.[17] The goal of oral argument is thus not to persuade a majority of the panel that your position is right. Your goal is to persuade *one* justice that the case deserves attention. If you do that, you'll get your writ.

In the Court of Appeals, the briefs are first presented to a single judge of the court, who may, if she feels it is appropriate, grant the writ immediately without any oral argument.[18] If that happens, the parties proceed directly to the merits stage. If not, the court will issue a *per curiam* order denying the petition, and explaining the reasons why. The appellant may then demand consideration by a three-judge

panel by filing a demand that generally must include a short statement of the reasons why the appellant believes the *per curiam* order is incorrect. As with the Supreme Court, a single judge of the panel can grant the writ.[19]

Decision And Rehearing

The courts generally decide which petitions to grant the same day they are argued. News of these decisions may take some time to reach the practitioner, though, due to the volume of cases and the need for the clerks to prepare an order in each case. Counsel may expect to receive a decision on the writ a few days to a few weeks after oral argument.

In both courts, petitions for rehearing must be filed electronically, by attaching a PDF file to an e-mail addressed to the clerk.[20] You'll receive an almost instantaneous receipt by return e-mail. Paper filing is restricted to unrepresented inmates and others who can obtain leave of court.[21]

Statistics

Each appellate court releases caseload statistics annually. Those figures provide insight into an appellant's chances of getting a writ, and how a case may play out once a writ has been granted.

The first thing one must do in evaluating the statistics is to segregate criminal and civil appeals. Both courts deal with a large volume of criminal appeals, and the overwhelming majority of those petitions are denied. In the Court of Appeals, the percentage of writs granted[22] has been steadily declining for at least fifteen years. In 1990, 22.4 percent of such petitions were granted. By 2004,[23] that figure was down to 9.4 percent. On average, then, a criminal appellant has about one chance in eleven of getting a writ from the Court of Appeals.

The figure for criminal appeals in the Supreme Court is even smaller—only 2.5 percent of criminal petitions were granted in 2004. This reflects the reality that most criminal appeals[24] have been filtered through the Court of Appeals. The Supreme Court grants only about two or three criminal writs per month.

The outlook is significantly brighter for civil appellants; they received writs nearly 20 percent of the time.[25] And even this figure is affected by procedural dismissals. When one factors out those cases (in which, for example, a notice of appeal was filed late, or a petition was filed without assignments of error), appellants' success rate jumps to nearly 25 percent. This provides an answer to the most frequent question posed by losing civil litigants: "What are our chances on appeal?" The answer is roughly one in four chances of getting a writ, if the attorney does his job right.

Once a civil writ is granted, the appellant is generally in the driver's seat. The Supreme Court reverses (in whole or in part) in about 65 percent of cases where a writ is granted. This number, more than any other, illustrates the importance of the writ in the appellate process.

Improving Your Chances of Getting (or Resisting) a Writ

The first and most important thing you can do to improve your chances of getting a justice's attention at the writ stage is to *preserve your objections in the trial court.* A detailed discussion of preservation of error is beyond the scope of this essay, but Rules 5:25 and 5A:18 routinely massacre more appeals each year than all other procedural land mines put together. As noted above, in the Court of Appeals, counsel must specify where in the record the objection was preserved.[26]

Appellees should be sensitive to this issue as well. If you believe that the appellant has not adequately preserved error in the trial court, you should not sit idly and expect the court to notice the default; bring the defect to the attention of the court in a prominent place in your brief in opposition. It is even worth taking this position in close cases, where the objection was not stated with clarity in the trial court.[27]

The next most important aspect of appellate success is *case and issue selection.* Not every losing case justifies an appeal, and one sure way to increase your odds of getting writs is to screen cases carefully for appellate merit. The lawyer also should restrict the number of appellate issues presented in any given petition. Appellate jurists, who are the "consumers" of lawyers' briefs, uniformly state that they prefer focused briefs that address comparatively few issues forcefully but concisely.

The appellate lawyer is likely to encounter cases in which a disgruntled litigant wants to appeal a long-shot case, or to throw in as many appellate issues as possible, theoretically in order to improve his chances of getting a writ on at least one issue. The lawyer faces several competing interests here—following the client's directives versus maximizing the chances of success; zealously advocating a client's position versus filing an appeal the lawyer believes has no likely merit; appealing every possible issue so as to prevent a claim that the lawyer has abandoned a potentially winning argument; and sacrificing the lawyer's personal credibility with the court in the interest of advancing a client's desire to press on.

In such situations, the lawyer is advised to consider the following factors:

- No civil client has the right to compel you to note an appeal that you believe has no appellate merit.[28]

- While omitting weaker, fallback position arguments may expose the lawyer to criticism in hindsight, you are more likely to get your writ if you appeal the fewest issues possible. In these cases, the lawyer should review with the client the reasons why only some possible issues will make the final cut in the petition.

- Your credibility *does* matter; in fact, personal credibility is probably the most powerful tool an appellate lawyer can bring into the courtroom. If you routinely file hopeless appeals, you will get

at least an informal reputation with the court for doing so, which will diminish your effectiveness in otherwise meritorious cases.

- That being said, a desire to take only obviously winning cases may dissuade the lawyer from taking important cases that require cutting-edge legal positions. Where important societal interests are at stake, the lawyer should consider taking even a case she regards as a potential loser, on the chance of fashioning important case law that can last for generations.[29]

In brief writing, for both appellants and appellees, remember that shorter is almost always better. A ten-page petition is more likely to be read carefully than one that comes in at the thirty-five-page maximum. In this context, editing becomes the most important part of brief writing. An appellate lawyer should revise the draft of a petition ten or more times, if that makes the brief concise and forceful. The most important arguments should be placed in the beginning of the petition, not buried near the end.

While the rules state what must be included in a petition, they do not prohibit other matters. Two important features that are not required but are strongly recommended are a preliminary statement and a statement of the standard of review. In a *preliminary statement*, the lawyer summarizes in a few short sentences what the appeal is about and why it is important. Remember that you are competing with hundreds of other petitions for the interest of the staff attorney and the judge or justice. A nutshell summary, at the very beginning of the brief, can help you to get that attention. The *standard of review* is cited near the beginning of virtually every appellate opinion. If the court thinks it's that important, you should, too. A superior brief will include a short section at the beginning of the argument section that sets forth the lawyer's contention as to what the applicable standard of appellate review is, with citations to support it. Far more cases than generally recognized are won or lost on this factor, which most trial lawyers view as an unimportant bother.

The rules do not require that briefs at the writ stage be bound; they may merely be stapled in the upper left corner. But binding produces a professional look that can enhance the credibility of the litigant and the attorney. It cannot hurt to make your presentation look more formal.

Certiorari Versus Error Correction

Some appellate courts—notably the Supreme Court of the United States—are considered courts of certiorari. Those courts only accept for review those cases that present issues of sufficient importance that they merit a precious space on the court's argument docket. The other kind of appellate court is one of error correction. These courts will accept any case, no matter how insignificant the implications of the decision under review, as long as they perceive that error has occurred.[30]

Both Virginia appellate courts act as courts of error correction. You do not need to show that your case presents an important issue with implications for society at large, or a legal issue of first impression in the commonwealth. You merely need to persuade one judge or justice that the court below was likely wrong on one significant aspect of your case.[31]

Conclusion

If you have ever argued a petition to a writ panel, you will no doubt have listened to a number of very persuasive arguments by appellants' lawyers. Many present compelling justifications for granting writs, and you may come away from your court date thinking that several of the cases will ultimately be reversed.

The truth is far harsher. In a typical day, the average Supreme Court writ panel hears twenty to twenty-five petitions; six hundred to eight hundred get argued per year. The odds are that of the twenty or so petitions your panel hears, probably only one to three will result in writs.[32] Keep in mind that of all those persuasive presentations you hear, precious few will bear fruit.

In order to succeed at the petition stage in Virginia's appellate courts, a petitioner must start with a sound record; master the appellate rules; file a concise, persuasive petition; argue succinctly and forcefully at oral argument; and, even then, occasionally get lucky. The presentation that stands out from the great mass of petitioners has the greatest chance of blooming into a writ. ⚖

Endnotes:

1 The exceptions are death penalty appeals, State Corporation Commission appeals, attorney disciplinary appeals, and original jurisdiction cases, such as petitions for writs of mandamus filed originally in the Supreme Court.

2 In the parlance of the Rules of Court and the appellate statutes, this is referred to as being awarded an appeal. In this article, the informal term "getting a writ" will be used for simplicity.

3 Rule 5:9.

4 Rule 5:1(b)(13).

5 Rule 5:17.

6 Rule 5:17(c).

7 *Id*.

8 Rule 5:18.

9 Note that the appellee can assign cross-error even if he does not file a notice of appeal. As long as one party brings the case to the appellate court, the court is free to adjudicate the claims of both sides.

10 Rule 5:19.

11 Rule 5:14.

12 Rule 5:17(a)(2).

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13 It is acceptable, if it will make you feel better, to allege, "The Court of Appeals and the trial court erred in ruling that Smith's testimony was admissible."

14 *Code of Virginia* (1950) § 17.1-410. Examples include traffic cases where no incarceration is imposed, and spousal support rulings.

15 Rule 5A:6(a).

16 Rule 5A:12(a).

17 In a few instances, you may have a panel of four justices. You should regard this as good news, keeping in mind that you only have to persuade one to grant the writ.

18 *Code* (1950) § 17.1-407(C).

19 *Code* (1950) § 17.1-407(D).

20 Rules 5:39A and 5A:33A.

21 The courts initiated this requirement as a pilot program in 2005 and have been so pleased with the results that the program has been extended indefinitely. This is probably a harbinger of a more general e-filing requirement.

22 All of which are necessarily criminal or traffic convictions.

23 2004 is the last year for which statistics were available as of the date of preparation of this article.

24 Excluding the death penalty cases, where Supreme Court review is automatic and no writ is necessary.

25 115 writs granted out of 597 acted upon in 2004.

26 In either court, it is strongly advisable that counsel preparing for oral argument make a note of where such objection was made, so she can respond quickly to the court's question if one arises.

27 Appellate jurists vary in how strictly they require an appellant to note the specific grounds of an objection; some require that the exact argument be made in the trial court, while others are satisfied if you're reasonably in the ballpark. You won't know who is on the panel when you file your brief in opposition, so you may as well raise the issue.

28 Criminal clients have the power to decide whether to appeal, and the lawyer must carry out the client's wishes. But even in this context, the lawyer retains control of which issues and arguments to advance on appeal.

29 *See, e.g.*, A. Dershowitz, *Letters to a Young Lawyer* (Basic Books 2001), ch. 26.

30 Because of this, the Supreme Court of the United States no doubt turns down many cases in which the justices believe the ruling is wrong, but perceive that the case just isn't important enough.

31 This is not to say that the attorney should ignore important or first-impression issues. It is always advisable to mention to the court where you perceive that an important issue arises in your case. That makes it more likely that the court will grant the writ. But keep in mind that this offers an additional "hook" for your case, and is not necessary if you can convince the court that error has occurred.

32 The odds are comparable in the Court of Appeals.

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In Search of Whales, Not Minnows:

Casting the Noncompete Net After *Omniplex*

by Gregory J. Haley[1] and Scott C. Ford

No area of business disputes has generated more litigation, judicial attention and stress to participants than the enforceability of covenants not to compete in employment agreements. In *Omniplex World Services Corp. v. US Investigations Services*, 270 Va. 246, 618 S.E.2d 340 (2005), a sharply divided Supreme Court of Virginia held a narrowly drafted noncompetition provision with a duration of less than a year to be overbroad and unenforceable based on the restriction's hypothetical application to a person delivering materials to a government agency.

Recent History

In *Omniplex,* the Court restated the well-established standard applied in reviewing a covenant not to compete:

> A noncompetition agreement between an employer and an employee will be enforced if the contract is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy. Because such restrictive covenants are disfavored restraints on trade, the employer bears the burden of proof and any ambiguities in the contract will be construed in favor of the employee. Each non-competition agreement must be evaluated on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved. Whether the covenant not to compete is enforceable is a question of law which we review *de novo.* (citations omitted).

270 Va. at 249, 618 S.E.2d at 342.

The disputes from which these standards arise have bedeviled the Supreme Court and other courts for decades. The Court's decisions have swung between reluctant enforcement of restrictive covenants according to their plain meaning, on one hand, to outright judicial hostility to enforcement efforts on the other.

In 1989 and 1990, the Court decided three cases enforcing restrictive covenants in varying circumstances. *See Blue Ridge Anesthesia and Critical Care Inc. v. Gidick*, 239 Va. 369, 389 S.E.2d 467 (1990) (holding a three-year noncompetition agreement enforceable against a salesman and two servicemen formerly employed by a medical equipment vendor); *Therapy Services Inc. v. Crystal City Nursing Center Inc.*, 239 Va. 385, 389 S.E.2d 710 (1990) (holding a provision in a contract between a rehabilitation services company and a nursing center that restricted the ability of the nursing center to hire employees of the rehabilitation services provider for six months after termination of the contract protected a legitimate interest of the rehabilitation services company and was not against public policy); *Paramount Termite Control Co. v. Rector*, 238 Va. 171, 380 S.E.2d 922 (1989) (holding a two-year

noncompetition provision and nonsolicitation of customer provision was valid and enforceable against five employees who began working for a competing pest control business based on the limited geographical scope of the restriction). Cumulatively, these decisions resulted in a higher level of certainty and predictability in suits brought to enforce noncompetition agreements.

This judicial receptivity to the enforcement of covenants not to compete continued through 1998. *See New River Meda Group Inc. v. Knighton,* 245 Va. 367, 429 S.E.2d 25 (1993) (holding that a twelve-month noncompetition agreement entered into after the termination of employment with a payment was enforceable against a radio station disc jockey and operations manager who accepted employment with a directly competing radio station within the sixty-mile radius specified in the agreement); *Rash v. Hilb, Rogal & Hamilton Co.*, 251 Va. 281, 467 S.E.2d 791 (1996) (affirming a judgment in a case involving a breach of a covenant not to compete in the insurance benefits business when the employee indirectly engaged in a business owned by his wife that competed with his former employer and took customers from the former employer); *Advanced Marine Enterprises Inc. v. PRC Inc.*, 256 Va. 106, 501 S.E.2d 148 (1998) (affirming a judgment based on a violation of a noncompetition provision where employees implemented a secret plan involving the mass resignation of an entire department's employees and the transfer of the department's business to the new employer). *But see Clinch Valley Physicians v. Garcia*, 243 Va. 286, 414 S.E.2d 599 (1992) (holding a noncompetition provision in an employment contract inapplicable by its terms when the contract was not "renewed"; plain meaning rule applied; strict construction to favor the employee adopted).

The Dawning of the New Millennium

After the decision in *Advanced Marine Engineering*, the Supreme Court's receptivity to enforce covenants not to compete turned frosty. In four decisions between 2001 and 2004, the Court held noncompetition provisions unenforceable. *See Simmons v. Miller*, 261 Va. 561, 544 S.E.2d 666 (2001) (holding that a noncompetition clause was unenforceable because the three year duration, the expansive scope of the restricted activities, and the lack of a geographic limitation made the restriction greater than necessary to protect the employer's interests and unduly oppressive to the employee); *Motion Control Systems Inc. v. East*, 262 Va. 33, 546 S.E.2d 424 (2001) (affirming the trial court's holding that a covenant not to compete was unenforceable because it imposed restraints that exceeded those necessary to protect the employer's legitimate business interests in a case involving an integral member of the employer's management team when the restricted activities could include enterprises unrelated to the employer's business of the specialized manufacture of brushless motors); *Modern Environments Inc. v. Stinnett*, 263 Va. 491, 561 S.E.2d 694 (2002) (affirming the circuit court's holding that a covenant not to compete was unenforceable when the covenant prohibited a former furniture sales person from employment in any capacity with a competitor); *Parr v. Alderwoods Group Inc.*, 268 Va. 461, 604 S.E.2d 432 (2004) (holding that a buyer's breach of payment obligations under an asset purchase agreement involving a funeral home business relieved the seller from any obligation under restrictive covenants in a management agreement and a lease agreement when the various agreements were part of an integrated transaction).

The Court's opinions in these cases implemented four analytical points. First, the examination of a covenant not to compete presents a question of law that will be reviewed *de novo*. *Motion Control*, 262 Va. at 37, 546 S.E.2d at 426. Second, the Court will determine the validity of a covenant not to compete by applying the legal principles specifically applicable to such covenants and not the standard principles of contract construction. *Motion Control, Id.* at 37, 546 S.E.2d at 425.

Third, the Court will not limit its review to considering whether the restrictive covenants are facially reasonable. Rather, the Court will examine the nature of the employer's interests, the nature of the employee's former and subsequent employment, whether the employee's actions actually violated the terms of the noncompetition agreement, and the nature of the restrictions in light of all of the circumstances of the case. *See Modern Environments*, 263 Va. at 494-495, 561 S.E.2d at 696.

Finally, a restrictive covenant cannot simply prohibit employment in any capacity with a competitor. Rather, the scope of the restrictive activity must be shown to serve a legitimate business interest of the employer. *Modern Environments*, 263 Va. at 495-496, 561 S.E.2d at 696. A covenant not to compete will be overly broad if it restricts activities that could include enterprises unrelated to the employer's business. *See Motion Control*, 262 Va. at 38, 546 S.E.2d at 426 (holding the covenant unenforceable because it prohibited employment in any business that sold motors, regardless of whether the motors were the specialized types of brushless motors sold by the employer).

The Rise of "Omniplexity"

In *Omniplex*, a divided Court held that a noncompetition provision was overly broad and unenforceable. Justice Elizabeth B. Lacy wrote for the four-justice majority and Justice G. Steven Agee wrote a vigorous dissent joined by two justices. The Court refused a postdecision petition for rehearing.

In *Omniplex*, the employer (Omniplex World Services) hired Kathleen Schaffer in August 2003 to work in a support role at an overt location of a sensitive government agency customer. Ms. Schaffer was a relatively low-level administrative employee with modest pay whose duties included monitoring alarms. Ms. Schaffer also had a coveted security clearance she had obtained while working for another company. In October 2003 Ms. Schaffer

accepted a job with a new employer (The Smith Company), also a staffing company, at a different location with different job duties. Ms. Schaffer had applied for employment with The Smith Company before going to work with Omniplex.

The Omniplex covenant not to compete covered only the one-year period after her employment began. If her employment was terminated, the restriction was in effect only for the remainder of that year. The employee agreed not to accept employment, become employed by, or perform any services for any other employer in a position supporting Omniplex's government customer if the employment required that the employee possess the same level of security clearance the employee relied on during employment with Omniplex. Omniplex paid Ms. Schaffer a two thousand-dollar signing bonus as part of the one-year agreement. The noncompetition provision, therefore, was for the short duration of less than one year, restricted employment activities with respect to a single government agency customer, and was triggered only if the same level of security clearance was required for the new employment. On the other hand, the noncompetition provision did not include a geographic limitation, nor did it require that the employee be engaged in activities in direct competition with Omniplex.

The majority reasoned that covenants not to compete prevented employees from engaging in activities that actually or potentially competed with the employee's former employer and, thus, covenants not to compete had been upheld only when employees were prohibited from competing directly with the former employer or through employment with a direct competitor. 270 Va. at 249, 618 S.E.2d at 342.

In a striking analysis, the Court concluded that the covenant was overly broad because it prohibited an employee from working with any business that provided support (of any kind) to Omniplex's government customer and was not limited to security staffing businesses that competed with Omniplex. *Id.* at 250, 618 S.E.2d at 342. The majority articulated a hypothetical example where the provision prohibited an employee from working as a delivery person for a vendor that delivered materials to the government customer even if the vendor was not a staffing service that competed with Omniplex. *Id.* at 250, 618 S.E.2d at 341-343. In this analysis, the majority did not examine the interrelated factors or the surrounding circumstances. Rather, the Court concluded that the noncompetition provision was overly broad based on a hypothetical situation in which it was theoretically possible that the restriction could apply to a fact situation that did not involve direct competition with Omniplex.

Omniplex sought to protect its workforce from "poaching" by other security staffing companies that needed employees who already had government security clearances. The Court's holding suggests an emerging requirement that a restrictive covenant may not be enforceable if it is directed at protecting a business interest other than restricting direct competition.

The dissenting justices, relying on the Court's decisions in *Modern Environments* and *Simmons*, emphasized the necessity of a fact-specific analysis. The dissent analyzed the Omniplex noncompetition provision and the related facts and concluded that the majority failed to give due weight to the narrow aspects of the restriction. 270 Va. at 255, 618 S.E.2d at 346.

The dissent also concluded that Omniplex had a legitimate business interest in protecting its workforce from "poaching" by competitors. *Id.* at 257, 618 S.E.2d at 347. Finally, the dissent dismissed the significance of the hypothetical delivery person posited by the majority as being an "unlikely" scenario and, in any event, such an effect would not render the restriction overly broad under the specific facts presented. *Id.* at 246, 618 S.E.2d at 346.

Primacy of the Intangibles

Some nuances in the recent decisions suggest possible trends in the Court's thinking and how the case law may develop in the future. The Court's approach will continue to be affected by intangible factors including "victim/villain" elements. For example, in *Omniplex*, Ms. Schaffer was a relatively low-level employee, her security clearance predated her employment with Omniplex, she applied for her job with The Smith Company before beginning work at Omniplex, and her new job involved different duties at a different location. Ms. Schaffer was not much of a villain. In addition, Omniplex's interest as an employer involved preventing the poaching of its staff, rather than directly protecting the customer relationship. Omniplex, therefore, was not much of a victim.

Although the employee in *Motion Control* was a senior manager, the new employer (Litton) was not directly competing with Motion Control in the manufacture of custom ordered brushless motors. The opinion notes the employer's concern that Litton could become a competitor in its main product line, but only in the future. Also, there was nothing in the record suggesting that the departing manager took any records or intended to disclose any trade secrets to his new employer. On these facts, the employer did not seem to be unduly victimized.

In *Omniplex, Motion Control* and *Modern Environments*, there was no suggestion of employees "sneaking around" such as secret meetings, purloined records, or concerted action by groups of employees, all as existed in *Advance Marine Engineering*. A key variable seems to be the existence (or absence) of facts establishing the departing employee "sneaking around."

Tips

With the rise of "Omniplexity," it is important that attorneys not have tunnel vision. The analysis must take into account the language of the agreement, the business of the employer and the specific conduct of both the employer and the employee. *Omniplex* highlights important considerations when litigating, drafting and counseling clients with noncompetition agreements.

Tips for the Litigator

The first step to enforce the noncompetition agreement generally will be a cease-and-desist letter to both the departing employee and new employer. If the letter does not resolve the dispute, you will then need to determine whether to file in state or federal court. The relief sought will generally be a request for temporary or preliminary injunction. An employer should promptly initiate this action, since failure to do so will run counter to any claim of irreparable injury.

The availability of injunctive relief in federal court typically is controlled by the court's diversity jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiffs, therefore, may have no choice but to pursue their claims in state court in the absence of diversity. Where a choice does exist, some of the factors influencing whether to file in state or federal court will include the speed in which a decision is required and the anticipated reaction by the court to noncompetition agreements.

Next, you will need to draft your complaint, preliminary injunction motion and supporting materials. The lawyer must consider other potential causes of action often available, including tortious interference with contract and/or business expectancy; misappropriation of trade secrets; statutory and/or common law conspiracy; conversion; and breach of fiduciary duty. A significant benefit to the statutory claims for misappropriation of trade secrets and statutory conspiracy is the availability of attorney's fees. Punitive or treble damages may also be available for these claims.

The lawyer must consider whether to include other defendants, such as the new employer, in addition to the departing employee. If the client's goal is recovery of money damages, it may be wise to bring in the new employer. However, if the client's goal is simply enforcement of the noncompetition agreement, bringing in a "deep pocket" that may vigorously defend the action may be counterproductive.

These cases are often won or lost at the preliminary injunction stage. The lawyer's time and energy, therefore, must be focused on the preliminary injunction issues from the first moment. In seeking enforcement, the employer must be able to articulate how the restriction directly protects its customer relationships or other competitive interests. The employer must go beyond "we used the form prepared by our lawyer."

If you represent the employer, investigate whether the employee took villainous actions that will negate any judicial sympathy. Few employees entering a new job can resist the temptation to improve their prospects by taking customer lists and company documents or otherwise exposing themselves to legal retribution.

If you represent the departing employee, collect facts to break open the weak spots in the covenant. The areas of investigation include:

- Does the covenant prohibit the employee from working for companies that are not direct competitors?
- Does the covenant prohibit the employee from working for a competitor "in any capacity"?
- What is the purported competitive interest protected by the restriction?
- Is the geographical restriction broader than the employer's actual customer base?
- What is the logic underlying the geographic and time restrictions in the covenant?
- Does the employer use a "one size fits all" form for employees at all levels?
- Does the employee require that all employees sign employment agreements?
- Has the employer consistently enforced noncompetition agreements signed by departed employees?

Litigation results in a winner and a loser only after each side has spent considerable money and time. Lawyers should consider a settlement that may permit the employee to compete in the market with restrictions that are narrower than those contained in the employment agreement. The parties in these disputes are often emotional and committed to their positions and initiating meaningful settlement discussions can be difficult.

Tips for the Drafter

Unlike most contracts, where the court will simply enforce the plain language of a lawful contract between competent parties, a court will not automatically enforce a covenant not to compete. For example, is the employee a high-level executive with access to substantial confidential information who has left to work with the largest competitor performing the same job? Or is the employee (like Kathleen Schaffer in *Omniplex*) a low-level worker with little access to confidential information who has gone to work with a competitor in an entirely different job?

Drafters must be aware that one size definitely does not fit all. Using a boilerplate noncompetition provision for all clients is never a good practice. A strategy to maximize the chances of enforceability is to catch the whales and forget the minnows. This may involve a new way of looking at the drafting of these agreements.

Drafting a noncompetition provision that has a reasonable chance of enforcement is a maddening task. The client, of course, sees the task as simple scrivening. The lawyer must sit down with the client to learn the business and competition.

Once that is done, the drafter should put together an agreement that ensures a legitimate interest of the employer is protected and that is reasonable from the standpoint of the employee.

The courts primarily examine the following factors when evaluating the enforceability of a restraint:

- **Time Restriction**. Virginia courts have permitted time restrictions up to three years; however, up to two years is more likely to withstand scrutiny.[2]

- **Geographic Restriction**. Geographic restrictions should not reach any further than the market area that the employer actually competes in.[3] There must be some logical nexus between the location of the employer's business activity and the restricted geographic area. To maximize chances of enforceability, it is a good practice to only include geographic restrictions that cover the area that the employee actually works in.[4] Language used to define the geographic scope should be clear and unambiguous.

- **Activities Restricted**. Drafters should be certain that the activities restricted are limited to the actual work performed by the employee with only the employer's actual direct competitors.[5] Many covenants not to compete contain language barring former employees from working for "competitors" in any capacity whatsoever, including, for example, as a janitor. These are not likely to be enforceable. The defense asserted in opposition to such a broad restriction is referred to as the "janitor defense."[6] The employer's direct competitors should be identified by name, if practical, and only include the actual major competitors of the employer. Language that the restrictive covenant does not bar the employee from work in some other role which does not compete with the business of the employer is also advisable.[7]

The cases reflect a sort of sliding scale as to time, geography and activities restricted. For example, a court is more likely to enforce a longer period of noncompetition where the geographic scope and restricted activities are tightly drawn.

A well-drawn employment agreement should also include the following terms, preferably in separately numbered paragraphs:

- **Non-solicitation of customers**. These should be limited to prohibiting solicitation of the employer's actual customers (preferably identified by name) for a discrete period and a limited geographic region.

- **Confidentiality**. Requires return and prohibits disclosure of employer's confidential information upon termination. Confidential information should include all records of the employer, including those maintained on noncompany computers used by the employee or personally created by the employee.

- **Choice of law and forum selection**. Requires any dispute over the employment agreement to be heard in the court where the employer is located and provides a choice of law. Virginia courts recognize the enforceability of forum selection clauses unless they are "unfair or unreasonable or are affected by fraud or unequal bargaining power."[8] An employer can gain a significant advantage in presenting its case in a local court.

- **Severability**. States that if any separate provision of the agreement is declared unenforceable, the remaining terms of the agreement will be enforced. Virginia courts will not blue-pencil noncompetition or nonsolicitation provisions to make them enforceable, but courts may sever invalid provisions from an agreement and enforce the balance.[9]

- **Attorney's fees and costs**. Provides for attorney's fees and costs should the employer be required to seek enforcement of the contractual provisions. If possible, the employee should bargain to delete the provision or change it to a prevailing party provision.

- **Mutual agreement**. States that the terms have been mutually agreed upon by the parties and should not be construed in favor of any one party.

- **Injunctive relief**. Expressly authorizes the enforcement of the agreement by temporary, preliminary and permanent injunction. This provision should state that the parties recognize a breach of the agreement will irreparably injure the employer's business interests.

- **Integration**. Excludes claims of prior oral statements.

- **Entirety provision**. States that the agreement constitutes the entire agreement of the parties.

- **No avoidance for first breach by employer**. Provides that the terms of the employment agreement will be enforced against the employee even if the employer breaches first.[10]

- **Right to disclose terms of employment agreement to third parties**. This may prove helpful in avoiding any counterclaim by the departing employee.

- **Nonsolicitation of employees**. Prohibits solicitation of the employer's employees.

Tips for Advising the Client

Attorneys providing counsel should be careful not to have tunnel vision by merely reviewing the language of the agreement. Instead, any inquiry as to enforceability must include an examination of the circumstances of the particular employer and employee with a clear understanding that courts disfavor these covenants. *Omniplex* and other recent decisions of the Supreme Court illustrate this disfavored status.

A tendency by employers to cast the noncompetition net too broadly should be avoided. Employers must be advised to focus on catching whales and forget the minnows. Concentrate on preparing agreements for high-level employees whose access to confidential information and customer relationships will harm the organization should they leave to work for the competition. Noncompetition provisions

should be narrowly tailored and customized to reflect the nature of the particular employer-employee relationship.

Employees should be advised that their conduct might determine whether the agreement they have signed will be enforced. If the employee presents an agreement that appears unenforceable on its face, it may be a good strategy to seek a declaratory judgment that the agreement is unenforceable before the employee starts competing.

Also, employees should be counseled to carefully consider whether to sign a noncompetition provision in the first place. Many employees mistakenly believe such agreements are per se unenforceable in Virginia and sign them thinking they will never be enforced. It may be proper advice to suggest that employees simply refuse to sign such agreements, negotiate narrower terms, and/or require greater consideration when signing them.

Conclusion

Time will tell whether the majority's decision in *Omniplex* will harden into doctrine or turn out to be the high-water mark of a tide of judicial hostility to enforcement of postemployment restrictions. The Court's decision in *Omniplex* may represent a movement in the law to further limit the circumstances in which a court will enforce a covenant not to compete. ⚖

Endnotes:

1 The authors thank W. David Paxton and others for their help and ideas.

2 *Blue Ridge Anethesia & Critical Care* (holding that three-year prohibition on employment with competitive firms was reasonable where the geographic scope included only the territories serviced by former salesmen and only those activities were prohibited that would compete with the plaintiff's business); *Paramount Termite Control* (holding that a two-year time restriction and a geographic limitation based upon the counties "in which the Employee was assigned" was reasonable"); *Roanoke Engineering Sales Co. v. Rosenbaum*, 223 Va. 548, 290 S.E.2d 882 (1982) (finding a period of three years and a geographic limit defined by the "territory covered by Roanoke [Engineering Sales Company] to be reasonable); *Fish v. Collins*, 9 Va. Cir. 64 (Frederick Cty. Cir. Ct. 1987 (permitting five-year restriction where geographic and restricted activity were narrow). *But see Simmons v. Miller*, 261 Va. 561, 544 S.E.2d 666 (2001) (declining to enforce three-year restriction where the activities restricted were deemed to be broader than the plaintiff's business activity and the geographic scope was not limited).

3 *See Advanced Marine Enterprises* (upholding a noncompetition and nonsolicitation restriction on marine engineers within fifty miles of any of the employer's three hundred offices located worldwide where the time period was limited to eight months and the activities were narrowly defined); *New River Media Group* (upholding twelve-month restriction on radio disc jockey from engaging in competing business within sixty air miles of former employer's radio station where the radius of the station's signal strength was sixty air miles); *Blue Ridge Anesthesia* (upholding three-year restriction of performing same or similar services within any of the territories serviced by agent of employer providing, however, that employee able to work in medical industry in same role which would not compete with business of employer). *But see, John J. Wilson Associates, Inc. v. Smith*, 2000 WL 1915928 (Va. Cir. Ct. Oct. 20, 2000) (noncompetition agreement that prohibited employee from working in a similar business anywhere Gress & Associates within Virginia was held geographically overbroad).

4 *Alston Studios Inc. v. Lloyd V. Gress & Associates*, 492 F.2d 279 (4th Cir. 1974) (held covenant not to compete was overbroad both as to geography and the activities of future employment in that it encompassed activities in which defendant was not engaged); *Pais v. Automation Products Inc.*, 36 Va. Cir. 230 (Newport News Cir. Ct. 1995) (geographic restriction held too broad and unenforceable that prohibited competition within 125 miles of any office of the employer or workplace of an employee of employer).

5 Compare *Motion Control* (covenant not to compete restricting employment with motor manufacturers that did not manufacture motors similar to employer overbroad because covenant did not protect against competition), and *Richardson v. Paxton Co.*, 203 Va. 790, 795, 127 S.E.2d 113, 117 (1962) (covenant not to compete restricted from employee, who sold specific supplies and services, from working for any employer involved with any kind of supplies, equipment, or services in the same industry overbroad because covenant encompassed business for which employer did not compete), with *Blue Ridge Anesthesia* (noncompetition agreement reasonable because restriction protected against direct competition by prohibiting former employees from employment with another company in a position selling similar medical equipment to that sold by former employee), and *Roanoke Engineering Sales Co. v. Rosenbaum*, 223 Va. 548, 553, 290 S.E.2d 882, 885 (1982) (noncompetition covenant reasonable because employment restriction limited to activities similar to business conducted by former employee).

6 In *Modern Environments* the Court addressed head-in the so-called "janitor defense" finding a provision that prohibited employment in any capacity with a competitor as overbroad and unenforceable.

7 *See Blue Ridge*, supra, 389 S.E.2d at 469.

8 *Paul Business Systems Inc. v. Canon U.S.A. Inc.*, 240 Va. 337, 397 S.E.2d 804 (1990).

9 *Roto-Die Inc. v. Lesser,* 899 F. Supp. 1515, 1518 (W.D. Va. 1995) (severing overbroad portions of employment agreement and enforcing those not overbroad, but refusing to "blue-pencil agreement"). *But see, No. Va. Psychiatric Group, P.C. v. Halpern,* 19 Va. Cir. 279 (1990) (declining to sever or blue-pencil offending terms and sustaining defendant's motion to dismiss).

10 *Wiess v. EVMS Academic Physicians and Surgeons Health Services Foundation*, Chancery No. CH05-1362, Circuit Court of the City of Norfolk (August 30, 2005) (holding that parties to an employment contract may agree that a covenant not to compete will be enforceable even if the employer breaches other provisions of the contract).

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Announcing a New Virginia "Civil" Union: The Marriage of Chancery and Law

by Simon H. Scott III and W. Everett Lupton

A marriage may be made in heaven, but it has to be lived out on earth. —Anonymous.

Hopefully the above quotation will not be an epithet for Virginia's January 1, 2006, "marriage" of chancery and law. Theoretically, the marriage is a step forward and should simplify Virginia civil procedure. In practice, however, as in some marriages, there may be many headaches and arguments before everyone adjusts to the new system. Just remember: this marriage was carefully arranged by our General Assembly and blessed by our Judicial Council.[1]

First, a bit of history: The concept of "law" as opposed to "equity" is in many ways an accident. "Law courts" or "courts of law" enforced the king's laws in medieval times in England. Around the turn of the thirteenth and fourteenth centuries, under pressure from a nobility no longer distracted by the Crusades, courts of law restricted the types of claims they would hear and tightened the procedure that governed the hearing of those claims. Because the range of legal claims at that time was quite narrow, legal procedures were excruciating in their technicality. Jurors were regularly offered bribes. Many meritorious plaintiffs were denied relief.[2]

Another avenue to remedies could be accessed through filing a petition with the king by throwing oneself upon the mercy or conscience of the monarch. As time passed, the responsibility for resolving such petitions passed to the chancellor, a member of the King's Council. The chancellor was usually a clergyman and the king's confessor, and as such he was the keeper of the king's conscience. The Chancery began to resemble a judicial body and became known as the "Court of Chancery." The High Court of Chancery developed from the lord chancellor's jurisdiction. Unlike the common law courts, which were based on written precedent, the lord chancellor had jurisdiction to determine cases on behalf of the king according to equity or fairness rather than according to the letter of the law. The Office of the Lord Chancellor was responsible for issuing all writs. Through the centuries, Chancery developed its own set of rules while at the same time holding onto many of its distinctions.[3]

In modern practice, law and equity offer different remedies: the most common remedy a court of law can award is money damages. Equity, however, enters injunctions or decrees directing someone either to act or to forbear from acting. Often this form of relief is more valuable to a litigant.

Another of equity's distinctions is the unavailability of a jury. Equitable remedies can only be dispensed by a judge, as it is a matter of law and not subject to the intervention of the jury as trier of fact. The distinction between "legal" and "equitable" relief is an important aspect of common law systems, including the American legal system. The right of jury trial in civil cases is guaranteed by the Seventh Amendment of the United States Constitution, but only in cases that traditionally would have been handled by the law courts at common law. The question

of whether a case should be determined by a jury depends largely on the type of relief the plaintiff requests. If a plaintiff requests damages in the form of money or certain other forms of relief, such as the return of a specific item of property, the remedy is considered legal, and the Constitution guarantees a right to a trial by jury. On the other hand, if the plaintiff requests an injunction, declaratory judgment, specific performance, modification of contract or other nonmonetary relief, the claim would usually be one in equity.

Equity courts largely disappeared in the northeastern United States by the late 1700s. They remained for some time in mid-Atlantic and southern states. Federal courts retained the law/equity separation until the promulgation of the Federal Rules of Civil Procedure in 1938.[4] Prior to January 1, 2006, Virginia was one of few states maintaining separate divisions for legal and equitable matters in a single court. Chancery courts traditionally handled wills and probate, adoptions, guardianships, marriage and divorce, and corporate law.

In arranging the marriage of law and chancery, Virginia's General Assembly has made many small changes to the *Code of Virginia* in advance of the upcoming 2007 recodification.[5] The following is an example:

> Previous § 51.5-46. Remedies.
> A. Any circuit court having chancery jurisdiction and venue pursuant to Title 8.01, on the petition of any person with a disability, shall have the right to enjoin the abridgement of rights set forth in this chapter and to order such affirmative equitable relief as is appropriate and to award compensatory damages and to award to a prevailing party reasonable attorneys' fees, except that a defendant shall not be entitled to an award of attorneys' fees unless the court finds that the claim was frivolous, unreasonable or groundless, or brought in bad faith. Compensatory damages shall not include damages for pain and suffering. Punitive or exemplary damages shall not be awarded.

> New § 51.5-46. (Effective January 1, 2006) Remedies.
> A. Any circuit court having jurisdiction and venue pursuant to Title 8.01, on the petition of any person with a disability, shall have the right to enjoin the abridgement of rights set forth in this chapter and to order such affirmative equitable relief as is appropriate and to award compensatory damages and to award to a prevailing party reasonable attorneys' fees, except that a defendant shall not be entitled to an award of attorneys' fees unless the court finds that the claim was frivolous, unreasonable or groundless, or brought in bad faith. Compensatory damages shall not include damages for pain and suffering. Punitive or exemplary damages shall not be awarded.

Most allusions to the word "chancery" are being deleted from the *Code*. Some vestiges are being retained for lack of an alternative. For example, references to commissioners in chancery (for those jurisdictions that still use them) are being retained pursuant to Code § 8.01-609.1.

The General Assembly enacted a single form of pleading for law and chancery cases by modifying multiple *Code* sections. All legal and equitable pleadings filed in a circuit court after January 1, 2006, are named "civil." The *Code* changes have created a single form of pleading for civil actions. A single action will be able to incorporate both law and equitable issues, with the judge and jury deciding their respective matters. Multiple suits, transfers from law to equity and vice versa, or stays of one court's action to pursue the other exclusively are no longer necessary. Although pleadings are now uniform between law and equity, it is important to remember that legal and equitable claims will remain distinct and the substantive law unchanged by the marriage.

The Supreme Court of Virginia has followed the General Assembly's lead and modified the Virginia Rules of Court. The Court has repealed the entirety of both Rules 2 and 3, reserving Rule 2 for future use and enacting a "new" Rule 3. According to the "new" Rule 3:1, "[t]here shall be one form of civil case, known as a civil action. These Rules apply to all civil actions, in the circuit courts, whether the claims involved arise under legal or equitable causes of action, unless otherwise provided by law." Although the rules look similar, many of the terms for pleadings have changed. For example, "new" Rule 3:2. *Commencement of Civil Actions* states, "[a] civil action shall be commenced by filing a complaint in the clerk's office." Notice the nomenclature previously seen only in federal procedure; the quaint Virginia terms "bill of complaint" and "motion for judgment" appear now to be relics of our procedural past. Respondents to previous bills of complaint and defendants named in the obsolete motions for judgment are now defendants filing an answer.[6] Under the "old" Rules 2 and 3, respondents in chancery (or defendants at law) were required to file responsive pleadings within twenty-one days of service of the subpoena in chancery (notice of motion for judgment and motion for judgment). Under the "new" Rule 3, defendants still must file responsive pleadings within twenty-one days of service of the summons and complaint.[7] Subpoenas in chancery are another relic of the past. Process in all civil cases will be by a "summons" not a "subpoena in chancery" or "notice of motion for judgment."[8]

For many common law pleadings, however, the more things change, the more they stay the same. The entrenched demurrer as well as motions to dismiss, pleas in bar, motions for a bill of particulars, bills of particulars, and motions craving oyer all survive the marriage.[9] As previously mentioned, the time limits for filing responsive pleadings remain the same. Although the rules regarding counterclaims, cross-claims, replies as to new matters, commissioners of chancery, and the joinder of additional parties have been renumbered, each remains substantively the same as each "old" rule with only minor changes.[10] The third-party practice rule now explicitly allows a third-party defendant to assert both counterclaims against any plaintiff and cross-claims against any other third-party defendant.[11] According to "new" Rule

3:15, any interpleader proceeding brought pursuant to statute is governed by all of the provisions of Rule 3.[12] "New" Rule 3:16—General Provisions as to Pleadings is devoid of language allowing a party to file a motion for a bill of particulars amplify particular allegations of negligence or contributory negligence.[13]

"New" Rule 3:19 (Default) has several changes. Absent is any provision that a party in default waives objections to the admissibility of evidence. Notable additions: Rule 3:19(b) and Rule 3:19(d) are default defendant "escape hatches." Subsection (b) explicitly enshrines what has been a common practice of allowing a party in default to file a late responsive pleading with leave of court and good cause shown.[14] Subsection (d) explicitly permits the court within twenty-one days of entry of the order to relieve a party of the default judgment provided the satisfaction of certain predicate conditions.[15]

Two "new" rules attempt to answer one of the major marriage concerns, "to jury or not to jury?" Although "new" Rules 3:21 (Jury Trial of Right) and 3:22 (Trial by Jury or the Court) set forth jury demand procedure, the constitutional and statutory rights to trial by jury and the established practice of a judge deciding equitable claims remain unchanged.[16] A party may demand trial by jury on any issue "triable of right by a jury" in the complaint or in writing, filed with the court, and served on all parties after the date of filing and no longer than ten days after service of the last pleading directed to the issue."[17] A party can demand a jury trial on all of the issues or specify certain issues only for a jury trial. For these qualified jury demands, any other party can demand a jury trial on any or all of the remaining issues within ten days of filing the initial demand.[18] Rule 3:22(c) deals with the right to a statutorily authorized advisory jury on certain equitable issues and a statutorily authorized binding jury on certain equitable claims by a defendant.[19] Rule 3:22(d) allows the court with the consent of all parties to order an advisory or binding jury on any claim or issue.[20]

Rules 3:21 and 3:22 pertaining to jury practice bring up another valid point—the potential need for local rules to be supplemented and/or amended to be congruent with the "new" Rule 3. Although the statewide rules have changed, individual circuit courts will need to modify their local rules. A particular example that a coauthor of this article has experienced is one party demanding a trial by jury three days before scheduled trial date. Should the court grant the demand? If so, what conditions or consequences should be ordered? Another obvious need: each circuit must determine if pleadings will be rejected for "style" errors or to what extent and how long that circuit will accept errantly titled motions for judgment. When deciding this issue, circuit courts might bear in mind the maxim of the General Assembly in enacting the changes: to simplify matters for pro se litigants and attorneys who may occasionally revert to old habit of usage.[21]

Circuit court clerks have been preparing for the marriage for several months. Many decisions about operations have been made; others still need to be determined. Many of the clerks' offices will change their staffing, the physical appearances of their offices and their Web sites. Clerks have attended regional conferences to ease the transition. As deputy clerks receive and read attorney's filings, a concise, specific cover letter will be even more critical in determining how the clerk processes the filing. According to Bevill M. Dean, clerk of the Richmond Circuit Court, one of the most troublesome aspects may be fee assessments for new filings under the combined "civil" system.[22] Some circuits have already decided to allow mistitled pleadings for a yet-undetermined time.[23] Hopefully, circuit courts will not uniformly reject pleadings filed after January 1, 2006, with the headings "Motion for Judgment" or "Bill of Complaint." Effective January 1, 2006, all civil actions, both law and equitable, will be assigned a case number beginning with a "CL-" prefix. There will no longer be files assigned a case number beginning with "CH-". Reinstatements of equitable cases filed prior to January 1, 2006, will be assigned a new "CL-" number and cross-referenced with the old "CH-" number.

It seems reasonable to the authors to conclude that the creation of a civil division within the courts of general jurisdiction was meant to bring Virginia into line with the federal courts and the vast majority of the states. A single set of rules will no doubt simplify things for practitioners and pro se litigants. In short, the marriage is a good thing, and it should last. ⚖

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sign in using a password, which the VSB provides to each member. The service supports terms and connectors (or Boolean) searching, natural language searching, and searching by citation. Searches use terms and connectors familiar to users of most commercial legal research systems, so no new training should be required to use Fastcase. In addition, there is a five-minute tutorial available on the site, which is an introduction to Fastcase and a good brush-up course on legal research.

Some of the standout features of Fastcase are its "best-case-first" ranking of search results, which works like Web search engines such Google, Yahoo! or MSN Search, with the most relevant results at the top of the list. In addition, users can decide for themselves which cases are most relevant, sorting by date, how often the case has been cited in other cases, its relevance score, or even alphabetical order. Fastcase displays information about the cases in a results list, including the citation and either the most relevant paragraph or the first paragraph of the case. "These features help people find the needle in the haystack by sorting the haystack to put needles first," Walters said.

Fastcase also offers dual-column printing of cases, in Word, PDF or WordPerfect-compatible Rich Text Format. The service also offers phone support and a real-time chat support service. "People really like the chat support," said Rosenthal. "It offers fast, authoritative answers to questions, right where people need the help."

Search results can be sorted by relevance, date and other criteria.

The Fastcase service has been very popular in the states where it has been offered. Florida Bar President Alan B. Bookman said that the service provides his bar's members with "immediate access to free legal research, the cornerstone of a lawyer's ability to provide competent, quality legal advice." Michael W. McKay, a past president of the Louisiana State Bar Association, called it "our most important member benefit ever."

Louisiana lawyers had more reason than ever this year to like the service. After Hurricanes Katrina and Rita, many lawyers in the state had to evacuate their homes and offices. Although many are only now returning, one thing they did not have to leave was their law libraries, since all members of the state bar had online access through Fastcase, which set up a special link when the state bar site was offline.

"There are so many benefits to having an online research service," Walters said. "It's a great complement for lawyers who already have a legal research system, and a terrific alternative for those who have been waiting for the right service at the right price." ⚖

VIRGINIA LEGAL AID AWARD

Presented by the VSB Access to Legal Services Committee, the recipient of this award is an outstanding legal aid attorney. The nominee must be a member of the VSB and an employee of a legal aid society that is licensed by the VSB to operate in the commonwealth of Virginia. The deadline for the receipt of nominations is Monday, April 10, 2006. See **www.vsb.org/awards.html**.

Clients' Protection Fund Board Petitions Paid

On December 2, 2005, the Clients' Protection Fund Board approved payments to seven clients. The matters involved six attorneys.

Attorney/Location	Amount Paid	Type of Case
O. Stuart Chalifoux, Richmond	$5,500.00	Unearned retainer/Divorce
O. Stuart Chalifoux, Richmond	$2,500.00	Unearned retainer/Child support/Custody
Robert D. Eisen, Norfolk	$10,000.00	Unearned retainer/Criminal representation
Arthur C. Ermlich, Sr., Deceased	$783.50	Embezzlement/Personal injury settlement
Margaret E. Hyland, Fredericksburg	$1,000.00	Unearned retainer/Divorce
Steven Y. Lee, Fairfax	$4,421.14	Unearned retainer/Immigration matter
Patrick Roger Owen, Arlington	$4,125.00	Unearned retainer/Immigration matter
Total	**$28,329.64**	

Midyear Legal Seminar

Ritz-Carlton Penha Longa Resort • Portugal
November 8–15, 2006

The 33rd Annual Midyear Legal Seminar of the Virginia State Bar will be held at the **Ritz-Carlton Penha Longa Hotel and Golf Resort**.

Located 30 minutes from Lisbon in the picturesque Estoril coastal region near Sintra, Portugal, the resort is situated on a splendid 500-acre estate renowned for its rare blend of historic treasures and modern amenities. Blending beautifully with their natural surroundings are two exquisite golf courses designed by Robert Trent Jones, Jr. The resort also offers six tennis courts and a beautiful spa facility. To learn more about this wonderful property, visit the Web site at **www.penhalonga.com**.

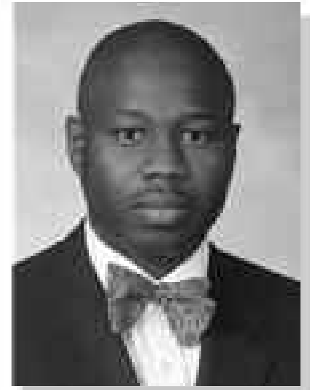
The seminar will be planned to include nine hours of CLE credit and optional tours to the historical attractions in Lisbon and the surrounding area.

Please note that there will be **no** general mailing to the entire membership for this seminar. All registrations will be via the VSB Web site, and a special mailing to past participants and other interested members. If you have not attended this seminar in the last five years and would like to receive the printed brochure, please send your contact information to the VSB Bar Services Department at **barservices@vsb.org**.

Air and land services will be handled by Tour Plan International of Richmond, Virginia. As in past years, Stephany Pishko will be our designated travel representative. For further information regarding this seminar package, please contact Stephany at (804) 359-3217 (ext. 318); email: **stephanytrvl@msn.com**.

Look for registration information at www.vsb.org

How Dignified Defiance Can Change A Nation: A Tribute to Rosa Parks, An American Icon



Each person must live their life as a model for others.

—Rosa Parks

Jimmy F. Robinson Jr., 2005–2006 Young Lawyers Conference President

In my mission to strengthen our community and better our profession, I often find inspiration in the history books. Join me in revisiting a story that taught a nation that human dignity is a right, regardless of one's station in life; and that right must be acknowledged and respected.

The death of Rosa Parks at age 92 reminded me that dignified defiance has the power to change laws, lives and nations. Fifty years ago, this American icon referred to by many as the "Mother of the American Civil Rights Movement," led the challenge to the South's Jim Crow laws and Montgomery Alabama's segregated bus seating policy. Mrs. Parks began a movement that would bring international attention to the unjust practices of the segregated South. By refusing to relinquish her seat to a white passenger, this ordinary citizen, armed with human dignity and moral fortitude, changed the destiny of millions. I include myself in that number. All across this country, civic and community centers, schools and even highways are named in her honor.

On Thursday, December 1, 1955, Mrs. Parks, a forty-two-year-old seamstress for the Fair Department Store boarded the Cleveland Avenue bus in Montgomery. For African-Americans, who made up two-thirds of the bus riders, riding the bus in 1955 segregated Montgomery was no easy task. They had to step onto the bus, pay the driver, exit the bus and walk to the back door to reboard. If they were fortunate, they would find an empty seat in the "colored section" and would complete their ride. However, pursuant to Alabama law, when asked, African-Americans were required to give up their seats to white patrons, and had to move to the back of the bus. They were not allowed to sit across the aisle from whites.

On that famous Thursday, Mrs. Parks took her seat in the "colored section." As the bus made its stops, it became crowded. Mrs. Parks was ordered to give up her seat to a white passenger. She refused. Some historians have written that her feet ached and she was tired. Others have written that her act was planned by the NAACP. However, by her own testimony, Mrs. Parks stated that she was "no more tired than usual" and that she did not plan her arrest. "I did not get on the bus to get arrested. I got on the bus to go home."

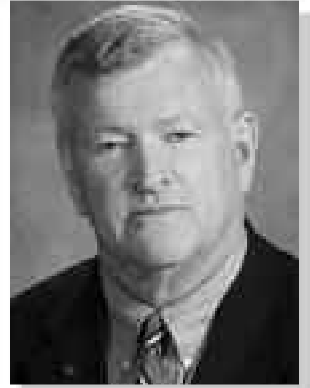
Mrs. Parks stated that she was tired of segregation, Jim Crow laws and the racist treatment she and other African-Americans received every day of their lives. In her book, *Quiet Strength*, Mrs. Parks wrote, "Our mistreatment was just not right, and I was tired of it. I kept thinking about my mother and my grandparents, and how strong they were. I knew there was a possibility of being mistreated, but an opportunity was being given to me to do what I had asked of others."

Clifford Durr, a white attorney whose wife had hired Mrs. Parks as a seamstress, posted bail for her release after her arrest. The NAACP had searched long and hard for an ideal plaintiff for a case to challenge the constitutionality of Montgomery's segregation laws and expose the injustice of segregated public transportation. That evening, they lobbied Mrs. Parks, and she agreed to be the face for the NAACP's case.

The rest of the story is American history: her trial, a 381-day Montgomery bus boycott, the establishment of the Montgomery Improvement Association with the Reverend Martin Luther King Jr. as its president, and the Supreme Court's ruling in November 1956, finding that segregation on public transportation was unconstitutional.

Today we can all learn from the example of Rosa Parks. She was tired of being humiliated; tired of having to adapt to unjust rules codified into unjust laws. By sitting, Rosa Parks stood up for African-Americans and challenged all laws that treated them as less than human beings. In her simple act of dignified defiance, Rosa Parks taught us: Each of us has the power within us to change our communities, our families, and maybe even our nation through simple acts of dignified defiance. Do your part in 2006 to pass on this legacy. ⚖

Annual Meeting Program Will Focus On Nursing Homes/Assisted Living Facilities



William T. Wilson, 2005–2006 Senior Lawyers Conference Chair

At the December meeting of the Senior Lawyers Conference (SLC) Board of Governors, we were privileged to hear from Senator Emmett W. Hanger Jr. of Augusta County, who chairs the Senate Committee on Rehabilitation and Social Services. His committee oversees legislation that affects nursing homes and assisted living facilities. I reported in the October 2005 *Virginia Lawyer* that I was trying to contact the chairs of key committees in the House of Delegates and the Senate to ask about some of the problems that face nursing homes and assisted living facilities, in an effort to see how the SLC could help. Senator Hanger was kind enough to spend almost two hours explaining to the board of governors the legislature's concerns about these facilities and what the SLC could do. As we get older, all of us face the possibility of living in one of these institutions, and we certainly want the care provided to us, our friends and our families to be of high quality.

Not long ago, the *Washington Post* ran a series of articles that included horror stories arising from the operation of some assisted living facilities. The same sort of thing happens in nursing homes. Too frequently, these institutions are understaffed, at times with people who are under qualified, leading to patient neglect and abuse.

I was recently involved in a case in which an elderly woman, while in a nursing home recovering from surgery for a broken hip, was allowed to fall, breaking her other hip. The nursing home neglected to call the family's doctor. The staff put the patient back to bed, and she spent the night in agony. Because she had Alzheimer's disease, she was unable to describe her discomfort. The next morning, the staff dressed her while she cried out in pain and then took her to the local hospital for a postsurgical examination. When she repeatedly cried out, the orthopedic surgeon suspected something was wrong and ordered x-rays. It was then that the second broken hip was discovered. A lawsuit was filed and a large verdict was returned against the nursing home. When collection efforts began, we discovered that the nursing home not only was mortgaged to the hilt, but it also was one of a network of nursing homes which was insured by one liability insurance policy with total coverage for all homes and all claims in the amount of three hundred thousand dollars. We also discovered that the premium for the policy was $375,000. It was, of course, a ridiculous situation, but it made me even more concerned than ever about how some nursing homes and assisted living facilities are structured and operated. This particular nursing home was owned by a married couple, but it was a part of a corporate network of facilities located in several states. We suspected a scheme to thinly capitalize the corporate network to the prejudice of creditors, and we filed a suit to "pierce the corporate veil." I tell you all of this because, more and more, nursing homes and assisted living facilities are owned by out-of-state individuals and companies, and Virginia's regulatory oversight is inadequate regarding corporate structures and liability insurance.

The General Assembly has been active in recent years in efforts to improve the quality of nursing homes and assisted living facilities, but there is much to be done. Assisted living facilities are looking more like nursing homes every day. When some of our mental hospitals were downsized years ago, many people who should have been put in nursing homes or other medical settings ended up in assisted living facilities. There has been much controversy about that trend, and the General Assembly needs to do more to regulate in that area.

The SLC is still wrestling with the question of what we can do to help the General Assembly improve these institutions. One thing we have planned is a program at the Annual Meeting of the Virginia State Bar in Virginia Beach in June 2006 entitled "So You Are Going to a Nursing Home/Assisted Living Facility." It is my hope that we can bring together a panel that will paint a broad picture of what is going on at nursing homes and assisted living facilities and that will suggest possible improvements in those institutions. I hope that many of you will attend.

I would now like to talk a little bit about hospital-acquired staph infections, another subject I addressed in my October 2005 column. To quote a *Legis Brief* (October, 2005, Vol. 13, No. 42) of the National Conference of State Legislatures:

> Hospital acquired infections, also known as healthcare-associated infections, are garnering greater attention as the debate over health safety grows. Legislation forcing hospitals to detail the number of patients infected while under their care may provide patients and insurers with information they can use in their role as consumers. It may also give hospitals an incentive to adopt better infection control practices. The Centers for Disease Control and Prevention reports that roughly two million patients contract an infection while in a hospital each year in America. These infections result in 90,000 deaths and an estimated total cost of $4.5 billion.

That article states that hospitals have never thoroughly tracked infection rates. There is, however, a voluntary survey of hospitals which has been conducted by the U.S. Centers for Disease Control and Prevention since 1970. Approximately three hundred hospitals throughout the United States participate in that survey. The survey deals only with large hospitals, however, and the procedures which are reported are limited. The responses of individual hospitals are never made public. In my judgment, the time to shine the light of day on the hospital-acquired infection situation is at hand. I am happy to report to you that through the efforts of, among others, Delegate Harry R. "Bob" Purkey of Virginia Beach, legislation was passed in the 2005 General Assembly that requires Virginia hospitals, beginning July 1, 2008, to report hospital-acquired infections. I do not know why the start-up date is so far off when so many deaths and injuries occur because of this problem. Although I realize that there are technical issues involved and that reporting infection rates can have a negative impact on some hospitals, the overall good of the public should be the dominating factor, and now is the time to gather this information. Hospitals and doctors are concerned about this problem, but historically they have tried to deal with it internally without involving the General Assembly or the public.

During a program on healthcare and senior citizen-related issues at the VSB Annual Meeting last June, I asked for a showing of hands from those who either had personally contracted a hospital infection or had family members or close friends who had. Almost everyone in the room raised a hand. Several years ago, a member of my immediate family almost died from a hospital-acquired staph infection. What should have been a relatively straightforward lung operation with a short convalescence turned into months of agony and rehabilitation. This experience brought the problem to my attention. In that case, the hospital wrote off well over $150,000 in medical costs.

For those of you who really want an eye-opener, I refer you to "Infection Epidemic Carves Deadly Path," a series in the *Chicago Tribune* in July 2002, as well as the aforementioned *Legis Brief* article.

I have been in touch with Delegate Purkey about this subject, and he has promised to make his staff and his resources available to the SLC. The SLC has not taken on this issue as a part of its 2005–2006 program, but the board of governors is receiving information from me on the subject so that it will be better informed.

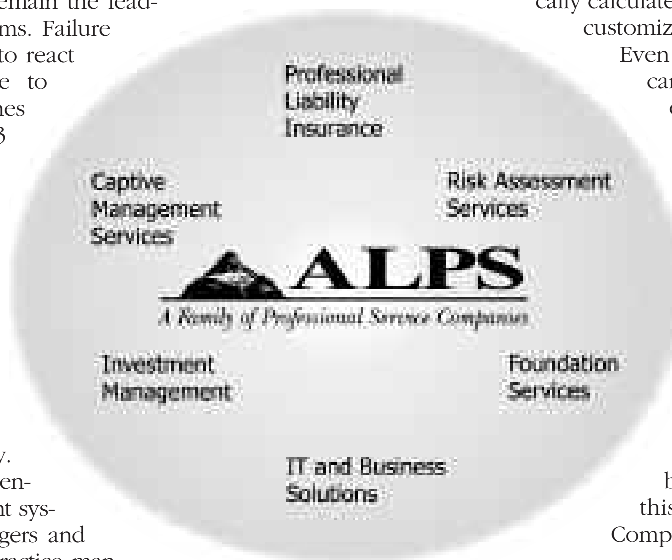
If you have questions or comments regarding nursing homes, assisted living facilities or hospital-acquired staph infections, please send them to Patricia Sliger, SLC Liaison, at Virginia State Bar, 707 East Main Street, Suite 1500, Richmond 23219-2800; fax (804) 775-0501; or **sliger@vsb.org**. ⚖

Minimizing Risk While Maximizing Performance*

by Mark Bassingthwaighte, mbass@alpsnet.com

Insurance is all about risk. Law firms and lawyers need professional liability insurance to help protect them against the risk of frivolous malpractice accusations and to see that clients are protected in the event that a malpractice error ever does occur. For those providing the insurance, it all comes down to managing risk. Insurance companies strive to manage the risks that they take on, in part by working to help insureds minimize the risks that they represent.

Today, the greatest risk to law firms, and, by extension, their insurance companies, are malpractice claims that arise due to a calendaring error. The American Bar Association has found in its latest malpractice survey (ABA Profile of Legal Malpractice Claims, 2000–2003) that calendaring and deadline-related errors remain the leading cause of malpractice claims. Failure to calendar properly, failure to react to the calendar and failure to know and ascertain deadlines account for a combined 16.63 percent of all malpractice claims at a national level.



Many of the largest law firms are getting the message. Those firms, which enjoy the advantages of numerous support staff and extensive technology budgets, are taking steps to address the problem and reduce their potential liability. Big firms can better afford calendaring and matter management systems. They have office managers and administrators who oversee practice management and ensure that certain methods are standardized throughout the entire firm. But, it's a different situation for mid-sized and small firms. These firms tend to drag their feet when dealing with malpractice prevention through investment in systems and processes.

For insurance companies, reluctance on the part of any law firm, regardless of size, to implement standardized practices and firm-wide computerized calendaring systems is highly worrisome. For this reason, insurance companies encourage firms to take a proactive approach to the problem, and one of the most effective ways to do so is through the adoption of a systematic firm-wide calendaring system. Insurance companies view the issue as so significant that many offer premium credit exclusively to law firms with automated calendaring technology.

Since every law firm is different, there is no one-size-fits-all solution. However, there are a few characteristics that any good state-of-the-art calendaring system will have in place.

It Should Be Rules-Based

Staying on top of the rules of various courts is a challenge for firms of every size. Even major multinational firms have found themselves on the wrong end of a lawsuit due to a missed deadline.

Changing court calendars, differing rules in different jurisdictions and local holidays make checking and rechecking deadlines a tiresome and often nervewracking process for law firms. But a calendaring system that incorporates a rules-based program helps to take away that anxiety and uncertainty. With these rules-based systems, court holidays and internal firm deadlines, for example, are automatically calculated and set with the ability to add customized predetermined reminders. Even better, calendaring practices can now be standardized throughout a firm or practice group.

Many sophisticated calendaring technology programs, such as CompuLaw Vision software (**www.compulaw.com**), update court rules automatically and regularly. Since dates and deadlines are constantly changing and must be monitored throughout the course of any matter, getting those regular updates should also be efficient and affordable and this is where a product like CompuLaw shows its value.

A good system should also include a standardized method for file review, which is a major shortcoming of so many law firms. With multiple cases that can take years to resolve, it can be too easy for attorneys to forget to review every file and, unfortunately, sometimes a seemingly small matter gets overlooked and a serious loss follows. With regular prompting from the system, via a customized file review reminder, lawyers are able to stay abreast of every open matter.

It Should Be Useful at an Administrative Level

Convincing even two technologically savvy attorneys in one law firm to switch to the same calendaring system can be a challenge. Old habits die hard sometimes. Therefore, when searching for a new system, it must be one that everyone at the firm, including support staff, buys into. Take the time to understand the product, determine how it will fit into the practice and train your users.

continued on next page

* Previously published in FindLaw's Modern Practice, http://practice.findlaw.com

The system should include an audit trail to determine who has made what changes when. The system should also be viewable in different formats. The ability to view an individual calendar as well as a firm-wide or practice group-wide master calendar meets different needs. Attorneys and support staff must also be able to upload it to different formats, including desktop calendars and personal digital assistants.

It Must Contain Redundancies

If your law office burned to the ground overnight, would every attorney at the firm have a calendar in the morning? This is a favorite question of risk managers, who love redundancies. In fact for—litigation firms particularly—risk managers and insurance companies are looking for a minimum of three independent redundant calendaring systems within a firm. At the end of the day, if one calendar is wrong, the hope is one of the others is correct and the calendar error will never result in a viable claim.

Of course, don't overlook off-site storage of the backup of all computer files—not just calendars—as another redundancy. As recent events have unfortunately proven, man-made and natural disasters can have far-reaching and devastating consequences.

Hopefully, these few thoughts adequately demonstrate the concerns that insurance companies have regarding the risks associated with critical deadlines as well as provide insight into how you can reduce your exposure to these kinds of risks. Failing a client by missing critical deadlines can be both personally and professionally devastating. But, by being proactive in implementing systems and procedures that seek to guarantee that deadlines are being met, lawyers can focus on doing what they do best—practicing law and serving clients well.

ALPS is the endorsed legal malpractice insurance carrier of the Virginia State Bar.