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Our Mission
The Virginia Bar Association is the independent voice of the Virginia Lawyer, advancing the highest ideals of the profession through advocacy and volunteer service.
Our New Strategic Plan at Work: The VBA Weighs in on Judicial Vacancies

BY STEPHEN D. BUSCH

In this, my last President’s Page I want to share with you information about our newly adopted Strategic Plan and how this plan already is working to shape our future activities. Among other initiatives, the plan contemplates that the Association will be the, “independent voice of the Virginia lawyer.” When the 2011 session of the General Assembly of Virginia convenes in January this voice will be speaking on an issue of vital importance to all Virginians—access to justice in our courtrooms. We expect to forcefully weigh in on the difficulties presented by the present and future judicial vacancies. Before addressing the judicial vacancy issue, I will provide an overview of our strategic planning process and key elements of the plan.

Strategic Planning Process

Last January at our annual meeting in Williamsburg I announced plans for a strategic planning process that President John Epps had asked me to lead beginning in early winter of 2009. John’s request had its roots in discussions beginning in 2008 within the Association’s leadership. Concerns had been expressed about whether economic conditions would affect membership of voluntary service organizations of all types. We also considered the effectiveness of traditional law firm recruitment of members and demographic changes in the bar.

These discussions led the Board of Governors in April 2008 to authorize the retention of a consultant to conduct what became the most comprehensive survey of our membership to date. The Board rightly concluded that before considering potentially significant changes in our organization, we should find out what our members like or dislike about the activities and services the Association offers and which are thought to be of greater or lesser value. The Association retained Ms. Elizabeth Derrico, Associate Director of the American Bar Association Division for Bar Services, to serve as its consultant.

The leadership’s discussions about the Association’s future preceded the events triggered by the “Great Recession” and served to position the Association well to initiate the 2010 strategic planning process. Importantly, for the Association, the process was not begun because the organization is presently weak or at risk. To the contrary, despite two of the worst years in our country’s economic history, the Association remains strong. Positive factors include a strong financial reserve, no debt, a loyal and steady membership base, strong meeting attendance, active sections and divisions, including our award-winning Young Lawyers’ Division, and a successful legislative program.

With Ms. Derrico’s able assistance a survey was conducted of the Association’s current membership in February 2009 and of former members in March 2009. The results of the surveys were very informative. Many of the results served to shape the goals and objectives of our new strategic plan.

A Steering Committee was formed that was comprised of the current Executive Committee and a recent past president:

Stephen D. Busch, Chair
John D. Epps
Hugh M. Fain, III
G. Michael Pace, Jr.
Lucia Anna Trigiani
Henry I. Willett, III

A broader Planning Committee was appointed that was comprised of other VBA leaders:

Rudene Mercer Bascomb
Dean Davison M. Douglas
Hon. Robert Hurt
B. Webb King
Daniel E. Ortiz
Anita O. Poston
Robert D. Seabolt
David G. Shuford
Elizabeth Derrico, ABA consultant

―1868, British Prime Minister William Gladstone

“In God we trust

Justice delayed is justice denied”
Other constituents of this planning process included VBA members; VBA Board of Governors; other VBA leaders from our sections, divisions, committees and past presidents; law firm managing partners; and other bar-related organizations, including leadership of the Virginia State Bar and the Virginia Law Foundation.

The next step in the process was the creation of a structure to analyze certain subject areas identified by the survey and Board of Governors’ discussions as meriting study. Six task forces were formed to evaluate the following topics: (1) purpose, function, role and mission of the VBA; (2) young lawyers; (3) member services, benefits and programming; (4) membership, communications and marketing; (5) governance structure; and, (6) legislative initiatives.

The Board of Governors held a facilitated meeting with our consultant on April 16 - 17, 2010. This included identification of the Association’s core values. The Board also discussed the existing mission of the Association and whether that mission remains vibrant and relevant and reflects our purpose for being. Significant time was expended in considering our vision for the future. More pragmatically, the Board evaluated what is needed in order to be successful in the future, including resource development and allocation.

During the summer and early fall work continued on the new plan. Our core values, vision and mission were committed to paper, and then specific goals and objectives were established.

Summary of Strategic Plan

With this background, I want to share with you the essence of the Strategic Plan adopted by the Board of Governors at our October board meeting. Core values were identified that reflect the essence of the Association. These values relate to the vision. The mission in turn supports the vision and is the foundation for certain goals. Next, specific objectives are derived from the broad goals that have been identified. In turn, action plans specifying tactics support each objective. This is the process that was used to develop our new plan.

The plan covers the period 2011 - 2013 and is entitled Objectives, Resources and Structure to Succeed in the 21st Century.

Core Values

Many hours of discussion over several years have taken place to capture the essence of the Association—the Association’s core values. They necessarily are reflected in everything that we seek to accomplish through the plan. They are:

- Professionalism
- Service to others
- Integrity
- Independence
- Collegiality and civility
- Duty
- Generosity
- Excellence

Vision

The halls of the Capitol in Richmond are filled each session of the General Assembly with citizens, special interest groups and their representatives. The Association desires to be recognized as the preeminent advocate seeking the improvement of law and the administration of justice in the Commonwealth. When this vision is achieved, the Association will be viewed as the leading force for improvement of our laws and system of justice on a non-partisan basis without seeking to protect or to advance special interests. In addition, the Association will be the organization of choice to enrich the professional experience of Virginia lawyers. These thoughts are embodied in our new vision:

**Vision Statement**

The Virginia Bar Association strives to be the preeminent advocate in Virginia for the improvement of law and the administration of justice and the organization of choice for enrichment of the professional experience of Virginia lawyers.

Mission

The mission statement we have developed captures what we seek to achieve as an organization. Everything that the Association does necessarily must be consistent with the mission. Quite simply it is our purpose for being.

**Mission Statement**

The Virginia Bar Association is the independent voice of the Virginia lawyer, advancing the highest ideals of the profession through advocacy and volunteer service.

Complete independence is the hallmark of the Association. As an organization the Association is not beholden to any individual or other organization. It is this freedom that has allowed the Association to accomplish so much. When the Association seeks a patron to sponsor a bill for the legislature, our reputation for independence and an organizational desire to improve the law on a non-partisan basis enhances the prospects for enactment.

In using the words "the highest ideals of the profession" the plan reflects an intention to set the standard for the entire bar. Recent examples are the development of the Principles of Professionalism for Virginia Lawyers adopted by all statewide bar organizations and endorsed by the Supreme Court of Virginia, organizing and hosting the Pro Bono Summit at the request of the Chief Justice held at the Supreme Court last April, and the continuing growth of the Rule of Law Project with the support of the Virginia Law Foundation.

Similarly, legions of VBA members of all ages volunteer to help others, and in doing so their actions speak for themselves. The desire to help others is the underpinning for nearly all of the Association’s activities. This is demonstrated through a multitude of activities, whether this involves participating in a legislative initiative or volunteering to assist someone in need through pro bono service.

Goals

The strategic planning process identified four specific goals to support the Association’s mission:

- **Advocacy and Legislative Reform.** The Virginia Bar Association will be the preeminent leader in the Commonwealth of Virginia for law reform and preservation of access to justice.
- **Membership.** The value of VBA membership will be enhanced by fostering a community of lawyers and providing unique opportunities for leadership, professional development, collegiality and personal satisfaction.
- **Communication.** The VBA story will be told internally and externally.
- **Organizational sustainability.** The VBA will manage its business affairs in a manner that will allow it to achieve its vision and to fulfill its mission.

Continued on page 8
The "Ins and Outs of Good Legal Writing: Part One

BY DAVID H. SPRATT

Every year right around the holidays, national and local newspapers publish an "in and out" list that tells their bread-breath readers what exciting trends will be popular and what old trends have become passé and decrepit. This year, in a sporadic series of columns, your resident columnist will offer a few legal writing "ins," banishing some outdated writing techniques and extolling the benefits of clearer, more effective writing.

In: Appropriately Using Passive Voice

Out: Avoiding Passive Voice at All Costs

The difference between active and passive voice is a mystery to many people (if, at this very moment, a dim, yet not fully decipherable, bell is ringing in the back of your mind, you are probably one of those people). Do only attorneys who practice sports or energy law use active voice? Is passive voice the voice we use at the end of a long day at the office, tired and unable to muster much enthusiasm?

Despite their somewhat misleading names, active voice and passive voice really have nothing to do with "voice" and everything to do with sentence structure. In the active voice, the subject of the sentence does the acting; in the passive voice, the subject of the sentence is acted upon. In most sentences, the subject performs the action denoted by the verb; most sentences are written in the active voice:

Professor Spratt [subject] is writing [verb] this column [object].

Active voice has nothing to do with tense; if the subject of the sentence is performing some action, has performed some action, or will perform some action (or in any way "acts upon" the verb), then the sentence is written in active voice:

Professor Spratt will write this column.
Professor Spratt wrote this column.

Passive voice, on the other hand, emphasizes the object of the action, making it look like the subject has been acted upon or is the recipient of a particular action. Although not a definitive rule, the presence of an auxiliary verb (like "was," "is being," "will be," or another variant of the verb "to be") followed by another verb and then the word "by" is a clue that you have written a sentence in passive voice:

This column is being written by Professor Spratt.
This column will be written by Professor Spratt.

No one disputes that using the active voice is always shorter and clearer (and quite often more interesting). What is disputed by some writers and scholars is when, if ever, the passive voice is appropriate (and perhaps more effective) in at least three situations:

1) Passive voice is appropriate when the writer wants to downplay the subject's role in performing a certain action (or even leave out the subject altogether).

Several years ago, one of my former students was backing out of a Starbucks parking lot when her car "accidentally came into contact" with a nun. Fortunately, the nun was not hurt: Thank God! After the police arrived, my student had to complete an accident report. Wanting to downplay her role (and having apparently listened to me in class), she wrote:

The nun was hit.

You will hear politicians use this technique frequently. For example, Ronald Reagan, when referring to the Iran-Contra scandal in his 1987 State of the Union Address stated: "Mistakes were made," thereby attempting to minimize the role of his Administration.

As advocates, the passive voice allows us to briefly deflect attention from the sometimes less-than-stellar actions of our clients by focusing attention on the action, rather than the actor. This persuasive writing technique should not be overlooked and can be effectively used (but not overused) in fact statements in motion memoranda, appellate briefs, and other persuasive documents.

2) Passive voice is appropriate when the action is more important than the person who performs the action.

In my last column, I briefly mentioned my love of Virginia wine (starting to see a trend here, aren't we?). Not surprisingly, I belong to wine clubs at several Virginia wineries, and wine is shipped to me each quarter. Although the persons who ship the wine are always very friendly and perform a great service (at least to me), the identity of the person shipping the wine is unimportant:

The next wine club shipment will be made on September 18, 2008.

3) Sometimes the actor is unknown.

In such instances, depending on what sounds best in your particular document, it is equally appropriate to write:

The sign was vandalized [passive voice].
Someone vandalized the sign [active voice].

So, despite massive "writer's block," I finally finished this column. As a concluding example, let's wildly hypothesize that the column was less than perfect, not one you particularly enjoyed. If so, please choose one of the following examples. The first example will hopefully divert the reader's attention from the subject before she finishes reading the sentence, and the second example will leave out the subject entirely:

The column was written by Professor Spratt.
The column was written.

As always, I welcome and even encourage questions, comments, or suggestions (note the deliberate use of active voice here?). Happy New Year!

David H. Spratt is a professor at The American University, Washington College of Law, where he teaches Legal Rhetoric, Introduction to Advocacy, and Family Law Practice and Drafting. Professor Spratt practiced family law for 10 years and is a former chair of the VBA Domestic Relations Section.

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President's Page  
Continued from page 5

I will focus the balance of this report on judicial vacancies in the Commonwealth and what the VBA plans to do about this problem as contemplated by our first strategic goal, Advocacy and Legislative Reform.

Judicial Vacancies

Earlier this month Guy Tower, our Executive Director, and I sent a communication to our membership about the challenges presented by judicial vacancies. We reported that the Virginia General Assembly enacted a freeze in March of this year on filling vacancies in Circuit and District Court judgeships arising between February 15, 2010 and June 30, 2012. This was part of a cost-cutting plan to trim $4.2 billion in state spending in order to balance the biennial budget of $70 billion.

Specifically, 18 judgeships were left vacant, and possibly 32 more will become vacant by the end of fiscal 2012 due to mandatory and voluntary retirements. The Richmond Times Dispatch reported on June 2, 2010 that the vacancies will result in a projected savings of only $11.26 million in judges’ salaries and benefits through June 30, 2012. Information that I recently have obtained places the savings even lower at $10.5 million. As a result of the vacancies, some Courts and Districts already have seen the number of cases per judge rise sharply with more unfilled vacancies expected from mandatory retirements and other unforeseen reasons.

Unfilled vacancies in Circuit Court judgeships in the 5th, 9th, 15th, 27th and 30th Circuits and General District Court judgeships in the 2nd, 6th, 19th, 20th and 25th Districts have driven case-per-judge levels well above state averages. For example, a single vacancy in the 30th Circuit is projected by the end of 2010 to produce a case load of 3,523 cases per judge, which is an increase of 49.5% above the 2009 Circuit average, and almost twice the state average of 1,837 cases per judge. Similarly, a single General District court vacancy in the 20th District is projected to result in a 33.3% increase from the 2009 General District average to 39,708 cases per judge, which is 47% above the state average of 26,929 cases. An unfilled vacancy on the Juvenile & Domestic Relations District Court in the 11th District has left the one remaining J&D judge in the District with a projected caseload more than double the statewide average.

A June 5, 2010 article in the Richmond Times Dispatch reported that our judicial branch would provide $437,520 in funding beginning July 1, 2010 to pay replacement judges in 18 District and Circuit court systems affected by the hiring freeze. This amounts to about 182 days of funding per month to pay retired or substitute judges to temporarily fill the gap where the vacancies exist. However, recently available information indicates that a total of nearly $500,000 has been redirected from other judicial needs to pay the cost of providing judges on a temporary basis where the vacancies exist. This stop-gap measure proves the point that an unmet need for sitting judges currently exists.

The VBA and other statewide bar organizations are concerned that the unprecedented actions of the General Assembly present risks to the administration of justice and the rule of law in the Commonwealth. Other bar leaders including Irving Blank, President of the Virginia State Bar, Dennis Quinn, President of the Virginia Association of Defense Attorneys, and Jack Harris, Executive Director of the Virginia Trial Lawyers Association likewise have advised their members of the need for legislative action to address the problems created by these vacancies.

In order to help legislators to focus on the problems created by the vacancies, our President-Elect Pia Trigiani has agreed to serve as Chair of a newly formed "Special Committee to Evaluate Judicial Vacancies." This special committee is comprised of representatives of our substantive law sections and others with significant experience with our courts to help evaluate the problem and to craft a potential solution. Pia’s committee, Guy Tower and the Association's retained legislative representatives will take the steps necessary to communicate with the legislature about the impact the vacancies have had on the administration of justice.

We are all well aware that substantial budget cuts have been made in most if not every area of state government. Thus it is not known whether it is possible to persuade the General Assembly to appropriate sufficient funds to reverse completely the judicial budget reductions enacted earlier this year. However, we believe that minimally a limited restoration of judgeships targeted at the most significant problem areas might be adopted with strong support from the VBA and other bar groups.

The great British Prime Minister William Gladstone is credited with using the now well-worn phrase, "justice delayed is justice denied" as the climax of an important 1868 speech about the Irish question. Your VBA leadership believes that this is precisely what is happening in some courtrooms in the Commonwealth today. The two photographs accompanying this President's Page are intended to reflect what the end result could be in localities throughout the Commonwealth if the legislature does not take decisive action to correct the obvious imbalance in case loads in our courts.

Irving Blank, President of the Virginia State Bar, was quoted in Virginia Lawyers Weekly on June 18, 2010 as stating that the funding cut is "a direct affront to public protection; we're denying access to the courts." As the judiciary, the Hon. James F. D’Alton, Chief Judge of the 11th Circuit, was interviewed about the problems created by judicial vacancies. He indicated that the two remaining judges in the 11th Circuit will do their best, "but it’s not going to be perfect. And it’s going to frankly create some
delay, and I think the public is going to be the one least served by it.” Richmond Times Dispatch, May 2, 2010.

The Supreme Court’s statistical information demonstrates the overall scope of the problem, but Guy and I have invited our membership to share real world stories about how the freeze is being felt most acutely by you - the practicing lawyers of Virginia - and your clients in terms of delays in scheduling trials, having motions heard and the like. I again urge you to supply us with stories of justice delayed or endangered as a result of the judicial vacancies. This information will help our newly formed special committee to formulate a plan to convince legislators that at the least a targeted fix is necessary to address problems caused by the freeze on filling judicial vacancies. We already have heard from many of our members and I encourage you to provide information to us directly at lawyersforfillingjudgeships@vba.org.

Conclusion

The Association’s engagement in the debate about judicial vacancies will serve as a signature issue as we begin implementing our new strategic plan, especially in relation to our first goal - Advocacy and Legislative Reform. More broadly, your leadership is enthusiastic about all of the plan’s goals and objectives. As we move forward with the plan over the next three years, let us keep in mind the words of Oliver Wendell Holmes, “The great thing in this world is not so much where we stand, as in what direction we are moving.” We look forward to working with you as this plan is implemented and appreciate your anticipated support.

VBA’s First Veterans Day Initiative a Huge Success!

The first ever VBA Veterans Day Initiative proved to be a success with over $24,000 raised (as of December 19) for the William & Mary Legal Veterans Benefit Clinic.

Kicked-off by a breakfast ceremony at McGuireWoods, law firms across the state stepped up to the plate by holding fundraisers, jeans day, etc. to raise much-needed money for the cause.

Under the leadership of 2009 VBA president John Epps of Hunton & Williams, with assistance by former VBA president Jim Meath of Williams Mullen and VBA members Bob Barrett of Degremont Technologies, NA and Matt Kapinos of McGuire Woods, the month highlighted a year’s long project to raise money for the clinic and to create a list of lawyers willing to provide pro bono or reduced-fee legal services to servicemembers who have returned from overseas. To date more than 175 members of the Virginia legal community are participating.

“I am very proud of our community for coming together for such a worthy cause.” Notes VBA president Steve Busch, “We are encouraged by this year’s accomplishment and hope to have this program continue to grow for years to come.”

Congratulations Fall New Admittee iPod Shuffle Winners!

Marynelle Wilson
Katherine Slecker
Christina Hardwick
David Robinson
Eric Grodon

L to R: Bob Barrett, Hugh Fain, John Epps, Jim Meath, Steve Busch, Guy Tower, Matt Kapinos and Henry Willett at the Virginia Veterans Legal Services Month kick-off event.
### Our Winter Weekend Schedule

#### Thursday, January 20, 2011
- **9:00 AM - 1:00 PM** Virginia CLE Committee Meeting
- **10:00 AM - 4:30 PM** VBA Board of Governors Meeting and Luncheon (For 2010 Board members.)
- **1:00 PM - 5:00 PM** Virginia Law Foundation Committee and Board Meetings
- **2:00 PM - 6:00 PM** Registration and Information Desk Open (Courtesy of Kaufman & Canoles, PC)
- **5:00 PM - 6:00 PM** Friends of Bill W. (Open meeting.)
- **5:45 PM - 6:15 PM** Virginia Law Foundation New Fellows Orientation
- **6:30 PM - 7:30 PM** Welcome Reception (Courtesy of SunTrust Bank)
- **7:30 PM - 9:30 PM** Virginia Law Foundation Fellows Dinner and Induction Ceremony

#### Friday, January 21, 2011
- **8:00 AM - 6:00 PM** Registration and Information Desk Open (Courtesy of Kaufman & Canoles, PC)
- **8:15 AM - 9:15 AM** Continental Breakfast (Courtesy of Virginia Business Magazine)
- **8:15 AM - 9:15 AM** Exhibits
- **8:15 AM - 9:15 AM** Section/Committee Business Meetings
- **8:30 AM - 9:30 AM** Past Presidents Council Breakfast
- **9:30 AM - 12:30 PM** CLE Programs: Concurrent Sessions (See separate listing.)
- **10:00 AM - 11:30 AM** Spouse/Guest Program: A Culinary Demonstration and Tasting (Separate registration and fee required.)
- **10:00 AM - 12:00 N** YLD Law School Liaison Recruiting Roundtable
- **12:00 N - 4:30 PM** Virginia Association of Defense Attorneys Board Luncheon Meeting
- **12:30 PM - 2:00 PM** Legacy Series Luncheon Program “An American Turning Point: The Civil War in Virginia (It’s Not Your Grandfather’s Civil War).” A presentation by the Virginia Historical Society on behalf of the VBA Committee on Special Issues of National and State Importance. (Courtesy of Hunton & Williams LLP (Register separately—additional fee for lunch.))
- **12:30 PM - 1:30 PM** YLD Executive Committee/Council Luncheon and Passing of the Gavel
- **1:30 PM - 2:30 PM** Special CLE Presentation for Young Lawyers (1 Credit) “Tips From the Bench for Young Lawyers.” The Honorable Jane Marum Roush, Fairfax Circuit Court
- **3:30 PM - 4:45 PM** General Session (1.5 CLE Credits) “Keeping the Lights On in Virginia (and the Rest of the Country): What Will It Take?” A presentation by the Committee on Special Issues of National and State Importance featuring Thomas F. Farrell, II, Chairman and CEO of Dominion Resources, Inc.
- **5:00 PM - 6:00 PM** Friends of Bill W. (Open meeting.)
- **5:45 PM - 7:00 PM** VBA Portrait Gallery Complimentary photographs will be taken of VBA members and guests as they enter the reception. (Courtesy of Wells Fargo Private Bank Legal Specialty Group)
- **6:00 PM - 7:00 PM** Reception (black tie) (Courtesy of LexisNexis)
- **7:00 PM** Banquet and Dance (black tie) Banquet courtesy of The McCammon Group Visual Presentation Courtesy of McGuireWoods, LLP Decor Design Courtesy of MercerTrigiani After Dinner President’s Reception Courtesy of McGuireWoods, LLP and MercerTrigiani After-dinner Entertainment Live Music courtesy of Equity Concepts, L.L.C., and U.S. Bank Corporate Trust Services
- **10:30 PM - 12:30 AM** YLD “After-hours” Social Members of the YLD (Young Lawyers Division) and the OLD (“Old” Lawyers Division!) are invited to participate in after-hours cheer! (Courtesy of Christian & Barton, LLP)

#### Saturday, January 22, 2011
- **8:00 AM - 9:15 AM** Annual Breakfast and Business Meeting (Spouses and guests are welcome.) (Courtesy of Minnesota Lawyers Mutual Insurance Co.)
- **8:30 AM - 1:30 PM** Registration and Information Desk Open (Courtesy of Kaufman & Canoles, PC)
- **9:00 AM - 12:30 PM** Exhibits
- **9:30 AM - 11:00 AM** General Session “Whither the Billable Hour? How Lawyers Value and Charge for Their Services in the ‘New Normal’ Economy.” A presentation by the Law Practice Management Division.
- **11:00 AM - 12:30 PM** CLE Programs: Concurrent Sessions (See separate listing.)
- **11:00 AM - 12:30 PM** Managing Partners Roundtable “Raising New Firm Leaders.” A presentation by the Law Practice Management Division.
- **12:30 PM - 1:30 PM** Reception (Courtesy of Colonial Williamsburg)
- **1:00 PM - 2:30 PM** VBA Board of Governors Luncheon (For 2011 Board members and spouses/guests.)
- **2:30 PM - 4:00 PM** Orientation for New Members of the VBA Board of Governors
Educational Programming

Friday, January 21, 2011

9:30 AM - 11:00 AM  
Business Law Section  
(1.5 Credits)  
“Helping Your Small and Middle Market Business Clients Survive a Tough Economy.”

9:30 AM - 11:00 AM  
Domestic Relations Section  
(1.5 Credits)  
“Pseudo Science vs. Real Science in Custody and Divorce Cases.”

9:30 AM - 11:00 AM  
Environment, Natural Resources and Energy Law Section  
(1.5 Credits)  
“Protecting the Chesapeake Bay: A Challenge for Stakeholders.”

9:30 AM - 11:00 AM  
Health Law Section • Administrative Law Section  
(1.5 Credits)  
(See 11:00 A.M. schedule for Part 2.)

9:30 AM - 10:30 AM  
Transportation Law Section  
(1 Credit)  
“Kawasaki Kisen Kaisha v. Regal Beloit Corp.—the United States Supreme Court drops the other shoe to Norfolk Southern v. Kirby. Inland United States Cargo Liability for Shipper and Carrier in Connection with International Shipments.”

9:30 AM - 11:00 AM  
Wills, Trusts & Estates Section  
(1.5 Credits)  
“Estate Planning in Uncertain Times: Complexities of 2011 and Beyond.”

11:00 AM - 12:30 PM  
Administrative Law Section • Health Law Section  
(1.5 Credits)  
“Understanding the Patient Protection and Affordable Care Act (Part 2): Impact on Federal Health Care Reform on Commonwealth of Virginia Agencies and Programs.”  
(See 9:30 A.M. schedule for Part 1.)

11:00 AM - 12:30 PM  
Elder Law Section  
(1.5 Credits)  
“Properly Designing a Personal Injury Settlement for Clients with Special Needs.”

11:00 AM - 12:30 PM  
Intellectual Property and Information Technology Law Section  
(1.5 Credits/1.5 Ethics)  
“Avoiding Malpractice Risks and Ethics Complaints and Pitfalls in an IP Practice.”

11:00 AM - 12:30 PM  
Labor Relations and Employment Law Section  
(1.5 Credits)  
“35 Things Every Lawyer Should Know About Labor and Employment Law.”

11:00 AM - 12:30 PM  
Veterans Issues Task Force  
(1.5 Credits)  
“Representing Veterans: What Every Virginia Lawyer Needs to Know.”

11:00 AM - 12:30 PM  
Virginia Alternative Dispute Resolution Joint Committee • Civil Litigation Section • The Virginia Collaborative Professionals (VCP)  
(1.5 Credits)  
“Can We Have a Conversation? Improved Communication Skills in Negotiation and Litigation.”

12:30 PM - 2:00 PM  
Legacy Series Luncheon Program: Committee on Special Issues of National and State Importance  
(No Credit)  
“An American Turning Point: The Civil War in Virginia (It’s Not Your Grandfather’s Civil War).”  
A presentation by the Virginia Historical Society:  
(Spouses and guests are encouraged to attend. Register separately—additional fee for lunch.)

2:15 PM - 3:15 PM  
Retirement Journey Series  
(No Credit)  
“Where to Invest in 2011: What’s In Store for the U.S. Economy?”  
(Spouses and guests are encouraged to attend.)

3:30 PM - 4:45 PM  
General Session: Committee on Special Issues of National and State Importance  
(1.5 Credits)  
“Keeping the Lights On in Virginia (and the Rest of the Country): What Will It Take?”  
(Spouses and guests are encouraged to attend.)

Saturday, January 22, 2011

9:30 AM - 11:00 AM  
General Session: Law Practice Management Division  
(No Credit)  
“Whither the Billable Hour? How Lawyers Value and Charge for Their Services in the ‘New Normal’ Economy.”

11:00 AM - 12:30 PM  
Construction and Public Contracts Law Section  
(1.5 Credits)  
“Bankruptcy Issues in Construction Law.”

11:00 AM - 12:30 PM  
Health Law Section  
(1.5 Credits)  
“HIPAA/HITECH Business Associate Contracting is Expanding: What Virginia Hospitals, Physicians, Attorneys, and Consultants Must Know Now About Amending, Negotiating, and Drafting Business Associate Agreements.”

11:00 AM - 12:30 PM  
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New Rules of The Supreme Court of Virginia

(Part two of a two-part series)

BY L. STEVEN EMMERT

This is the second essay in a two-part series discussing the 2010 comprehensive revisions to the Rules of Court. The changes to the rules that apply in the Supreme Court of Virginia were discussed in the Fall 2010 issue.

Part 5A – The Court of Appeals of Virginia

Rule 5A:1—Most of the definitions in this introductory section remain unaffected by the overhaul of the appellate rules. The changes have eliminated obsolete references to “plaintiff in error” and similar terms that haven’t seen the light of day often since the days of Burks Pleading and Practice. New provisions are added requiring service of all documents filed in the appellate court; requiring notices of address changes; and describing the procedure for citing unpublished opinions. Unlike Rule 5:1, applicable in the Supreme Court, Rule 5A:1 still includes (probably by oversight) the distinction between the phrases “file with the clerk” and “file in the office of the clerk.” (The former requires service on all counsel; the latter does not.) In light of the new mandatory-service requirement in subsection (d), that distinction is no longer meaningful except in documents filed in other clerk’s offices (for example, the trial court).

Rule 5A:2—This rule gets three major additions. First, like its counterpart, the Supreme Court’s Rule 5:4, the rule now requires that anyone filing a motion must advise the opposing party in advance of the intended filing. If the other side has counsel, the statement must also indicate whether the motion will be opposed. This salutary addition comes from the Federal Rules of Appellate Procedure, and will streamline the process of presenting motions to the court. Second and third, the rule includes brand-new provisions for review of pre-trial and post-trial bail orders in criminal cases. These two new procedures give a criminal defendant a meaningful opportunity to secure review of what they perceive to be unfair bail determinations. Practitioners should keep in mind that such rulings will be reviewed using a lenient standard - abuse of discretion. Given the appellate court’s inability to gauge the in-person presentation of the evidence or to see the defendant in person, reversals under these provisions will likely be quite rare.

Rule 5A:3—There are a couple of significant changes here; the one that will have the greatest practical effect for most practitioners is the approval of express-mail filing. Previously, the only alternative to in-person filing was certificated mail, return receipt requested, on or before the due date. Now litigants may file by delivery to commercial carriers. (As before, hold onto the receipt if you’re filing on or near the last day.) There’s also a new provision detailing how and when to file a motion for extension of time. The new subsection concludes with a warning that merely filing the motion within the time permitted doesn’t toll the running of the deadline; that means that you must file the motion far enough in advance of the deadline that you can get a ruling before that date looms. As a practical matter, any such motion should be filed as soon as you recognize the need for it.

Rule 5A:4—Here is the first of several key differences between the rules applicable in the two appellate courts: The CAV does not employ the Supreme Court’s 14-point-type requirement. Pleadings and briefs in the Court of Appeals must be in at least 12-point type, as before. In a bow to progress, the cover now must contain not only the address and phone number of counsel, but also a Virginia Bar Number, a fax number, and an e-mail address. There’s also a new subsection requiring a certification of compliance with word-count limits.

Rule 5A:5—This rule, dealing with original-jurisdiction proceedings, gets only one change, and that will affect government law offices. Previously, the rule provided that no response was required when a pro se prisoner filed a petition. That exception is removed, signaling that the court expects at least some kind of response to all petitions.

Rule 5A:6—One significant difference in procedures in the two courts remains, and it’s a trap for the unwary if you don’t practice in the CAV often. When you appeal to the Supreme Court, you file your notice of appeal with the clerk of the trial court only. But in an appeal to the Court of Appeals, you are required to send an additional copy to the clerk of the CAV. There are minor changes in the information required in the certificate, and a new provision that no appeal will be dismissed merely because the appellant fails to identify or notify a guardian ad litem. In that event, the appellant can correct the notice by identifying and serving the GAL.

Rule 5A:8—In the past, the failure to file a transcript within 60 days after date of judgment was generally fatal; only if the appeal could be considered without a transcript could the appeal proceed. The deadline could be extended prospectively but never retroactively. Now, for the first time, the court has a curative provision to allow a late filing, as long as the motion is filed within 90 days after the judgment date. But practitioners beware: The extension is not automatic. You have to show “good cause to excuse the delay.” Just asking politely without having truly good cause will likely get you an equally polite refusal. You should also know that once the original deadline passes, the requirement for “good cause” effectively jumps to something like “extraordinary cause,” a far tougher standard. This distinction isn’t spelled out in the rules, but it’s the way the court applies the
rule. The best advice for practitioners is to order your transcripts early, and file a motion as soon as you perceive that you’ll need the extension. If you file the motion before the expiration of the original deadline, you have a good chance of getting it granted for some of the more common reasons (e.g., a crushing trial schedule; preexisting vacation plans). If you ask for relief after the deadline has passed, you’ll need a substantially more serious reason.

Rule 5A:10—The only significant change to this rule relates to clerks, not lawyers. The trial-court clerk is specifically directed not to transmit to Richmond certain listed contraband items, weapons, biological evidence, and bulky exhibits. The previous rule gave the local clerk the option of whether to package those materials with the record. The appellate court can still order the transmission of such evidence upon motion.

Rule 5A:11—The only noticeable change in this rule, dealing with Workers’ Compensation appeals, is to update the required information for counsel of record, as was done in Rule 5A:4.

Rule 5A:12—This very important rule sees several changes. First, one previous schism between the two appellate courts is closed, as the Court of Appeals now requires assignments of error instead of questions presented. In previous practice, many appellants were thwarted when they appealed from the CAV to the SCV by merely repackaging their CAV briefs, and neglecting to convert the questions presented to assignments of error. According to the Supreme Court’s inflexible Rule 5:17(c), such appeals were immediately dismissed. (Of course, with the good comes the bad: That inflexible rule now occupies a prominent place in the new Rule 5A:12, so clear assignments are essential in the Court of Appeals, too.) Just slapping something into the assignments section won’t help; the court may now dismiss an appeal if the assignments are insufficient. The rule also includes a word-count limit, which practitioners must use in lieu of the old page limits. The rule clarifies that the word-count limit doesn’t apply to your cover page, tables, and certificate. A new closing paragraph sets out in detail the procedures for filing an Anders brief, just as appears in the Supreme Court’s counterpart to this rule.

(Special note: Rule 5A:12 is also particularly noteworthy for what didn’t change. As before, the due date for a petition for appeal is 40 days after the clerk’s receipt of the record from the trial court. This continues the divide between the CAV and the SCV; in the latter court, the deadline is always three months from date of judgment, which is easy for appellant and appellee alike to calculate. In the Court of Appeals, there is no reliable way to calculate the due date for a petition for appeal merely by knowing when the judgment was entered; that due date is still measured from an entirely different event. Caveat appellant.)

Rule 5A:13—Briefs in opposition also get new word-count limits. The rule is amended to permit, rather than require, local prosecutors to file briefs in opposition. This reflects previous practice (if not the previous rule), where the local prosecutors often found themselves without sufficient time to respond to petitions and still perform their day jobs. If an appellee misses the filing deadline (or realizes before the deadline that she’ll need more time), a motion to extend can be filed no later than 10 days after that expiration.

Rule 5A:14—As with briefs in opposition, reply briefs get word-count limits and a 10-day grace period to seek additional time to file. They are still used in lieu of oral argument; the court will read your reply brief or listen to your writ argu-
VBA Fall Meetings and Events

In Photos
1) Members of the YLD Executive Council meet at the YLD Fall Meeting in Wintergreen.
2) Labor Relations & Employment Law Section conference attendees enjoy a reception.
3) Eddie Lee Isler and Harris D. Butler, III
4) Richmond Times Dispatch political columnist Jeff Shapiro discusses the November 2010 elections at the VBA Administrative Law Conference.
5) Moot Court judges and student participants pause for a photo.
6) Teresa Burke Wright, James B. Thorsen and Eddie Lee Isler.
7) Virginia Court of Appeals Chief Judge Walter Felton (R) stresses a point at the National Moot Court Competition.
8) YLD chair-elect Webb King and VBA membership coordinator Branden Patrick recruit new admittees at the First Day in Practice Seminar.
9) Hugh E. Aaron at the Sixth Annual Virginia Health Care Practitioners’ Roundtable.
11) Every new member of the VSB received a VBA application.
12) Yvonne S. Wellford, Teri Craig Miles, Andrew R. Fox and Ronald N. Regnery
13) Samuel T. Towell, Travis G. Hill and Dana A. Dew

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Ethical Obligations When Lawyers Commit Professional Errors During the Course of the Representation

BY DANNY M. HOWELL

Buried in a comment of the Restatement (Third) of the Law Governing Lawyers § 20 cmt. c. is the clear, but neglected, statement: “If the lawyer’s conduct of the matter gives the client a substantial malpractice claim against the lawyer, the lawyer must disclose that to the client.” While this unequivocal statement gives the impression that the principle is the subject of multiple reported decisions and academic commentary, in fact it is not.

B. Cooper, The Lawyer’s Duty to Inform his Client of his Own Malpractice, 61 Baylor L. Rev. 174, 176 (2009)

Attorneys who make professional errors of a sufficient magnitude to create potential malpractice liability routinely make things worse for themselves by failing to come to terms with the disclosure and conflict issues that such errors can trigger. Lawyers owe their clients a basic fiduciary duty to apprise them of facts material to their clients’ decisions—and when lawyers make mistakes serious enough to form the basis of a possible malpractice claim, that fiduciary duty requires that all facts material to the mistake be disclosed to the client as well. Such disclosure is also likely required by the Virginia Rules of Professional Conduct.

Moreover, when we become aware during the course of the representation of having made a professional blunder, we have more than a disclosure problem to contend with - we may have a conflict of interest with regard to any further representation, including any reparative efforts.

Determining what the Rules of Professional Conduct or our fiduciary obligations require or allow us to tell our clients is hard enough. Determining how to do it, and how to navigate our way through an often complex conflict of interest analysis, can be even more difficult.

I. The Duty to Tell the Client About the Mistake

The basic duty of disclosure is set forth in Virginia Legal Ethics Opinion 1817, which provides, in summary, that “[i]f a lawyer fails to act on a client’s case, the lawyer has a duty to promptly notify the client of this failure and of the possible claim the client may thus have against the lawyer, even if such advice is against the lawyer’s own interests.” Even if the lawyer concludes that he or she must withdraw because of the conflict of interest, the lawyer must, under Rule 1.16(d), take reasonable steps to protect the client’s interests. This would include informing the client of possible actions the client might take and any deadlines within which such actions must be taken.1

The duty to tell the client of a possible malpractice claim is rooted in Rule 1.4, which requires, in pertinent part, that “[a] lawyer shall keep the client reasonably informed about the status of the matter” and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

Whatever the precise scope of this rule, it surely can be read to require that a lawyer inform his client when the client may have a malpractice claim against him since this information is “necessary to permit the client to make informed decisions regarding the representation.” Among the most critical decisions that the client has to make “regarding the representation” in that situation are (1) whether the client has a viable malpractice claim arising out of the representation, and, if so, whether to pursue it now or later and (2) whether to continue the current representation. The client can’t make an informed decision regarding these issues without being informed about the potential claim. Indeed, in this situation, where the interests of the attorney and client may differ substantially, “a high degree of disclosure” is necessary. Certainly, the broad principles underlying Rule 1.4 support such a reading of the rule. The trickier question, addressed in Part III, is when exactly that duty arises, but certain attorney mistakes clearly trigger a duty to report under this rule.

B. Cooper, supra, 61 Baylor L. Rev. at 184.

Rule 1.4(b) essentially embodies
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the requirement imposed upon attorneys as fiduciaries to disclose all facts material to a client's decision about what to do regarding the fact that they may have a potential malpractice claim. This would typically include advising the client of any statutes of limitations that might apply to bringing such an action, or at least of the importance of obtaining independent legal advice as to that issue, and providing information regarding the attorney's malpractice carrier. See also Circle Chevrolet Co. v. Giordano, Halleran & Ciesla, 142 N.J. 280, 662 A.2d 509, 514 (1995), overruled on other grounds, Olds v. Donnelly, 150 N.J. 424, 696 A.2d 633 (1997) ('[t]hus, an attorney who realizes he or she has made a mistake must immediately notify the client of the mistake as well as the client's right to obtain new counsel and sue the attorney for negligence.

One thing that might not be immediately obvious with regard to client disclosure is that in speaking to the client about a potential malpractice claim, the attorney is now communicating with an represented party, bringing into play the panoply of requirements under Rule 4.3, which among other things will require that the attorney (a) make clear that as concerns any potential claim, the attorney's and the client's interests are adverse, and (b) avoid giving legal advice regarding any potential claim.

II. Conflicts of Interest in Continuing the Representation: Circumstances Requiring the Attorney to Withdraw

An attorney's negligence may result in the loss of a cause of action, as in the case of a missed statute of limitations. But many "midstream" errors may lead only to a partial dismissal, or simply make the client's case more difficult. Under Rule 1.7, withdrawal is required where there is a "significant risk" that representation of the client "will be materially limited" by "a personal interest of the lawyer" (see Rule 1.7(a)), unless the client consents to the continuing representation after consultation, and the lawyer "reasonably believes that the lawyer will be able to provide competent representation" to the client (see Rule 1.7(b)).

At first blush, it may seem that in most cases, a material breach of the standard of care would not create a significant risk that the representation would be materially limited, since the negligent attorney presumably has every incentive to prosecute or defend the action diligently, in order to eliminate any argument that the client was damaged. After all, one of the assumptions underlying the tolling doctrine of continuous representation is that "the attorney representing the client is in the best position to identify and correct his or her malpractice. Once the relationship ends, the ability to mitigate vanishes." Wiegman v. Caruso, 2008 N.Y. Misc. LEXIS 5495, *7 (N.Y. Sup. Ct. Sept. 10, 2008) (citations omitted), aff'd, 2009 N.Y. App. Div. LEXIS 6574 (Sept. 29, 2009).

But midstream negligence often causes irreparable damage to at least a part of the client's case or defense. Under these circumstances, winning the rest of the case won't necessarily negate any potential malpractice claim. Instead, the malpractice claim might be weakened or negated if the client lost the remainder of the case.

In Mastec North America, Inc. v. Consolidated Edison, Inc., 2008 N.Y. Slip. Op. 30565U, 2008 N.Y. Misc. LEXIS 8300 (N.Y. Sup. Ct. Feb. 1, 2008), the client threatened its attorneys with a malpractice suit following the loss of a mechanics' lien claim. When the firm moved to withdraw based on the resulting conflict, the client opposed the motion, stating that it was otherwise generally satisfied with the firm's work and that it wished to continue to be represented by the firm. The client argued that so long as the firm won the remaining causes of action, no conflict would develop. The Court gave that argument short shrift.

This contention is without merit. As the ethics opinions persuasively reason, in the case of a potential irretrievable malpractice claim "not only [is] there an inherent conflict between the interest of the client and the lawyer's own interest, but, from an objective perspective, one could not be confident that the quality of the lawyer's work would be unaffected if the representation continued." (State Bar Op 734.) Cozen also cogently points out that its continued representation of MasTec would place it in the anomalous position of having to demonstrate the merits of MasTec's claims, while at the same time anticipating a malpractice defense that would require it to establish that MasTec could not have prevailed on its claims. 2008 N.Y. Misc. LEXIS 8300 at **3-4.

Whether such a conflict may be waivable depends on the facts of the case. Yet from a practical standpoint, continuing the representation is likely to be so fraught with risk that seeking voluntary withdrawal will be advisable. In contrast to the Mastec case, where the firm decided to seek leave to withdraw, the case of Koen Book Distributors v. Powell, Trachman, Logan, Carle, Bowman & Lombardo, P.C., 212 F.R.D. 283 (E.D. Pa. 2002) illustrates some of the risks attendant to not doing so. In that case, as in Mastec, the clients told their law firm that they were considering a malpractice action against it but continued to retain the firm. While the representation continued, some attorneys in the firm consulted with another lawyer in the firm about the resulting ethical and legal issues. When the client eventually sued for malpractice, the firm claimed attorney-client privilege regarding that consultation. The court held that during the continuing representation, the firm was "in a conflict of interest relationship with its clients" and held the attorney-client privilege and work-product doctrine inapplicable. The court stated that even though the firm's client was independently represented during the course of the continued representation, that fact did not "remove the conflict so long as [the law firm] continued to represent the [clients]." "To avoid or minimize the predicament in which it found itself, the firm could have promptly sought to withdraw as counsel.

The court in Koen Book Distributors noted that "[a]lternatively, if [the firm] reasonably believed that representation of the clients would not be adversely affected by also representing itself, it could have promptly solicited the clients' consent to continue the representation 'after full disclosure and consultation.' See Rule 1.7(b). Neither course was pursued." 212 F.R.D. at 286.

As Koen Book Distributors suggests, "full disclosure" would require a discussion of how potential conflicts could play out as the case progressed forward. But there is a powerful psychological force at work once an attorney realizes a serious professional error has been committed. Even if it is not possible to deny that the error happened, there will often be a compelling

Continued on next page

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desire to deny that it made any difference. The bottom line is that the negligent attorney is unlikely to have the objectivity to advise the client about a number of potential courses of action, a concern reflected in a comment to the American Bar Association’s Model Rule 1.7 (but not found in the comments to Virginia’s version of the rule): “If the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.” This would hardly seem to be obviated simply by telling the client to seek independent legal advice, since any independent counsel would probably not be able to acquire (or acquire fast enough) sufficient information regarding the impact of the conflict on decisions to be made as the lawsuit progressed.

In fact, myriad future events occurring over the course of a lawsuit could be affected by the attorney’s conflict of interest, such as the following:

**Circumstances Requiring The Attorney To Admit To Negligence**

In federal court, motions for continued from previous page.

III. Errors That Could Become the Basis to a Possible Malpractice Claim

Attorney errors occur regularly in the course of litigation. Most would not be expected to supply the basis for a malpractice claim, since the errors usually can be remedied readily. What sort of errors are significant enough to prompt a reasonable attorney to disclose them to the client?

In general, a mistake that can lead to a malpractice claim is one that has the potential to cause harm to the client. See Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 629-30 (8th Cir. 2009) (“Negligent legal advice does not give rise to a claim for legal malpractice until the client suffers damages as a result. It follows that a lawyer’s duty to disclose his own errors must somehow be connected to a possibility that the client might be harmed by the error.”).

A mistake that can be easily and quickly fixed, and that does not carry the potential for causing damage, would typically not trigger disclosure obligations. In Commercial Underwriters Ins. Co. v. Hunt & Calderone, P.C., 261 Va. 38, 42, 540 S.E.2d 491, 493 (2001), accountants’ untimely filing of a tax credit application appeared (based on what was known at the time the error was discovered) to be a mistake that did not harm the client, “because the assurances by one of the tax credit program’s administrators . . . justified a conclusion that funds would be available [for the client] despite the untimely filing.” 261 Va. at 42, 540 S.E.2d at 494.

But the potential harm flowing from many mistakes can seldom be determined with anything close to certainty. A missed statute of limitations does not automatically mean that damages have been proximately caused by the attorney’s mistake—after all, perhaps the client’s lawsuit would not have been successful. But no one would seriously contest the notion that missing a statute of limitations creates the potential for a malpractice suit. Even mistakes that can be fixed may be significant enough to require disclosure, if the client is going to be charged for the work necessary to repair the damage caused by the attorney’s error, since the payment of such fees can become a basis for malpractice claim in and of itself.

Moreover, drawing from insurance coverage cases concerning an attorney’s obligation to disclose potential. If an error constitutes a breach of such importance as to require disclosure is unaffected by whether an appeal might ultimately change the result, or whether the client ever threatened a claim.

Failing to identify a mistake as significant enough to require disclosure and possible withdrawal can have serious consequences. Among other things, a future malpractice suit will undoubtedly include charges of breach of fiduciary duty and conflict of interest. Given the potential ethical breaches, the attorney also risks facing a bar complaint. Attorneys who fail to recognize a significant error will also likely fail to report it to the insurance carrier, potentially jeopardizing coverage for any lawsuit that is ultimately filed.

IV. Before Calling the Client, Call The Bar

While it is no excuse for inordinately delaying the disclosure to the client, an attorney can and probably should...
take advantage of resources available for guidance relative to the disclosures made necessary when an attorney recognizes that a mistake has the potential for leading to a claim for malpractice or breach of fiduciary duty. The Virginia State Bar’s hotline can be of great value not only with respect to determining what must be done in terms of disclosure, but also with regard to any future bar complaint, since the hotline keeps records (confidential, but releasable to the bar if the attorney so authorizes) of the call and the advice given. A lawyer’s malpractice carrier is often more than willing to provide counsel to advise an attorney regarding disclosure obligations and may even appoint counsel for the purpose of mitigating further loss to the client by undertaking corrective efforts. An attorney may wish to employ separate ethics counsel for advice on how to go forward.

V. What to Tell the Client

"Although it can be difficult to determine whether a lawyer must call a client’s attention to an error, it is relatively easy to describe what to say to the client when the lawyer has made the decision to disclose." Colorado Bar Association Ethics Opinion 113 (Nov. 19, 2005). Virginia Legal Ethics Opinion 1817 describes the type of information necessary to impart to the client once the attorney determines that disclosure of an error is required.

If a lawyer fails to act on a client’s case, the lawyer has a duty to promptly notify the client of this failure and of the possible claim the client may thus have against the lawyer, even if such advice is against the lawyer’s own interests. See Tallon v. Committee on Professional Standards, 447 N.Y.S.2d 50 (1982); In re Higginson, 664 N.E.2d 732 (Ind. 1996); Olds v. Donnelly, 150 N.J. 424, 443, 696 A.2d 633, 643 (1997). For example, a lawyer who fails to file suit within the statute of limitations period must so inform the client, pointing out the possibility of a malpractice suit and the resulting conflict of interest that may require the lawyer to withdraw. Rest. (2d) of Law Governing Lawyers §20, cmt. (c). Even if the lawyer concludes that he must withdraw because of the conflict of interest, the lawyer must, under Rule 1.16(d) take reasonable steps to protect the client’s interests. This would include informing the client of possible actions that client might take and any deadlines within which such actions must be taken.

Ethics Opinion 113 of the Colorado Bar Association lists additional disclosures that may well be necessary depending on the circumstances: "What must be disclosed are the facts that surround the error, and the lawyer should inform the client that it may be advisable to consult with an independent lawyer with respect to the potential impact of the error on the client’s rights or claims."

The Colorado opinion also addresses disclosures that need not, or cannot, be given: "The lawyer need not advise the client about whether a claim for malpractice exists, and indeed the lawyer’s conflicting interest in avoiding liability makes it improper for the lawyer to do so. The lawyer need not, and should not, make an admission of liability. Even if the lawyer genuinely believes that it is in the client’s best interests to continue the representation despite the error, the lawyer’s own interests prohibit him or her from advising the client on this issue."

Finally, as noted in the Colorado opinion, the attorney should consider insurance implications: "The lawyer should also consider the impact of disclosure of the error to the client on the lawyer’s malpractice insurance coverage. The lawyer should review and consider any applicable malpractice insurance contract provisions, including notice to the insurer of potential claims, disclosure on applications for insurance, and ‘cooperation clauses; in the lawyer’s policy.’"

NOTES

1) See also New Jersey Ethics Opinion 694 ("The Rules of Professional Conduct require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney’s own interest"); Wisconsin Ethics Opinion E-82-12 ("An attorney is obligated to inform his or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such omission"); and New York State Bar Association Opinion 734 (N.Y. St. Bar Assn. Comm. Prof. Eth.2000) (an attorney "has an obligation to report to the client that it has made a significant error or omission that may give rise to a possible malpractice claim. In such a situation, the [law firm] will be required to withdraw as counsel if its continued representation would be adversely affected by its interest in avoiding civil liability.").

2) Legal fees incurred as a proximate result of attorney negligence are recoverable damages in a legal malpractice action. Shipman v. Kruck, 267 Va. 495, 504, 593 S.E.2d 319, 323-24 (2004); Guthrie v. Flanagan, 2009 U.S. Dist. LEXIS 44087 * 16 (E.D.Va. May 20, 2009) ("[If the Guthries had been successful on appeal, they still could have recovered against Flanagan for legal malpractice, but their damages would have been limited to the attorney’s fees incurred in remedying his negligence.") (citation omitted), aff’d on other grounds, 358 Fed. Appx. 466 (4th Cir. Dec. 31, 2009).

3) See TIG Ins. Co. v. Robertson, Cecil, King & Pruitt, 116 Fed.Appx. 423, 425, 2004 WL 2603660, * 2 (4th Cir. Jan. 17, 2004) (The Partnership "argues that the response to the application question was not ‘untrue’ because at the time King signed the application no clients had notified him of their dissatisfaction. Client notification, however, is not required under the plain language of the policy which requests information on ‘any claims ... wrongful acts, errors, or omissions that could result in a professional liability claim’"); Sirignano v. Chicago Ins. Co., 192 F.Supp.2d 199, 205-06 (S.D.N.Y. 2002) ("... the fact that an insured lawyer continues to represent the client in a pending matter, and that the courts have not finally spoken on the case, does not eliminate his notice responsibility to his carrier. Indeed, even if the injured party tells the insured that no claim will be made, that does not excuse a notice delay.").

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On September 16, 2010, the Supreme Court of Virginia handed down its decision in Commonwealth of Virginia v. AMEC Civil, LLC. This decision marks the end of most claims brought by a road and bridge contractor against the Virginia Department of Transportation (“VDOT”) and sends several claims back to the trial court for further action. The case involved nearly every type of construction claim and defense that can arise. This article, written by trial counsel for VDOT, will review the case in some detail and explore the important rulings made by the Supreme Court and the Court of Appeals of Virginia.

AMEC Civil, LLC (“AMEC”) contracted with VDOT to construct a four-lane bypass of U.S. Route 58 around the town of Clarksville in Mecklenburg County. The project involved the construction of several miles of roadway and eleven bridges, four over water. The contract price was approximately $72.5 million. VDOT issued a notice to proceed on May 26, 2000 with a contract completion date of November 1, 2003. The project was substantially completed in June, 2005.

Nearly one year after completion, in May 2006, AMEC submitted an administrative claim to VDOT seeking nearly $25 million in additional compensation. AMEC alleged more than a dozen claim items including claims for delay, inefficiency, acceleration, differing site conditions, superior knowledge and defective specifications. AMEC priced its claims using several methodologies including modified total cost, Rental Rate Blue Book for owned equipment costs, loss of productivity rates and force account pricing.

Following VDOT’s denial of the claim, AMEC filed a breach of contract action in the Circuit Court of Mecklenburg County. After a 13-day trial, the circuit court, in a one-page letter, announced a general verdict in the full amount of AMEC’s claim, $21,181,941.00, excluding only pre-judgment interest.

**AMEC’s Claims**

The project’s primary feature was the construction of a nearly mile-long bridge across the John H. Kerr Reservoir. This bridge was constructed by installing drilled shafts into the lake bed to support concrete piers on which were placed steel girders for building the roadway. A drilled shaft is a reinforced concrete-filled steel shaft built by driving a large hollow steel cylinder (“casing”) vertically into the lake bed until it is seated in bedrock. Sediment and rock fragments inside the casing are then removed and a hole is drilled into the bedrock from inside the casing to a specified depth below the bottom of the casing. This is referred to as a “rock socket.” The rock socket is then cleaned, a rebar cage is installed into the casing and the rock socket and entire casing are filled with a special concrete (“drilled shaft concrete”).

AMEC was required to construct test shafts before building the bridge. On both test shafts, it had difficulty seating the casing and requested VDOT allow it to seat the casing deeper than planned. AMEC requested that VDOT compensate it for the increased depth. VDOT agreed and paid AMEC its requested unit price. AMEC began constructing drilled shafts in early 2001. Over two years later, AMEC first notified VDOT in writing of its intent to claim additional monies for this work. By then, AMEC had completed the majority of all drilled shafts. AMEC alleged differing site conditions in the bedrock and claimed approximately $6.0 million.

AMEC also had difficulty placing the drilled shaft concrete. AMEC told VDOT it was having difficulties with the thickness of the material causing great pressure within the pipes dispensing concrete under water. After a full year of problems, AMEC requested and VDOT agreed to modify the concrete specifications and AMEC’s difficulties resolved. While the project meeting minutes reflected discussions of the problem, AMEC never gave written notice to VDOT of intent to claim for this problem. In its claim, AMEC sought approximately $1.0 million alleging defective concrete specifications and that VDOT had “superior knowledge” of the defective specification from an earlier project and had withheld that knowledge from all bidders.

To construct the bridge across Kerr Reservoir, AMEC would construct a series of steel-reinforced concrete elements on top of the drilled shafts known as a foundation cap, water columns and a pier cap. AMEC contended it experienced losses in productivity and cost-overruns in constructing these items because of difficulties with drilled shafts and elevated lake water levels. AMEC never gave VDOT written notice of intent to claim for these items. Later, in its administrative claim, AMEC sought approximately $1.7 million for cost overruns in constructing caps and columns.

The contract specifically addressed the water level of Kerr Reservoir:

[D]ue to the method of operating the John H. Kerr Reservoir and other factors beyond the control of the Department, the power pool elevation in the reservoir routinely fluctuates by several feet…. It is the responsibility of the Contractor to avail himself of the historical records of the water levels maintained by the…Corps of Engineers…and determine the impacts possible fluctuations may have on planned construction methods and operation.

In 2003, the lake level rose to unusually high levels and remained high for several months, impacting AMEC’s critical path construction of the main bridge foundation work. VDOT issued two unilateral work orders extending the
contract completion date due to high water but not granting compensation, AMEC claimed the high water was a differing site condition and therefore compensable.

During construction, VDOT signed work orders to provide AMEC additional time or money for extra work. Four of these work orders were the subject of AMEC’s claim. In each case, VDOT and AMEC agreed to time and money, signed the work order, AMEC performed the work and VDOT extended the schedule. At no time did AMEC notify VDOT of an intent to claim additional compensation for the time extensions. Long after the work was completed, AMEC gave notice to VDOT of a claim for compensation of approximately $650,000.00. AMEC contended at trial that a VDOT representative told it to “hold” all such claims until the end of the Project.

AMEC also claimed at trial it began acceleration and incurred acceleration costs as of January 2002. In April 2004, AMEC first advised VDOT in writing of its intent to file a claim for acceleration damages of approximately $2.2 million.

Significant Circuit Court Rulings

Virginia Code § 33.1-386(A) allows a contractor to file and pursue a claim against VDOT provided “that written notice of the contractor’s intention to file such a claim shall be given to the Department at the time of the occurrence or beginning of the work upon which the claim and subsequent action is based.” VDOT contended at trial that AMEC failed to fulfill contractual and statutory conditions precedent. After completing discovery, VDOT moved for leave to file pleas in bar on various issues including lack of notice. VDOT proffered that AMEC never gave timely written notice for many of its claims. The circuit court denied VDOT leave to file its pleas. One month later, the court issued a lengthy letter opinion addressing the merits of VDOT’s pleas in bar, which the court previously held could not be filed. The court found “AMEC did not provide VDOT with written notice of its claims as required by Va. Code Ann. § 33.1-386”, but that VDOT had “actual notice” of the claims. VDOT asked the circuit court to reconsider its opinion. The court denied the motion.

Trial lasted 13 days with the presentation of 23 witnesses and several hundred exhibits. At the conclusion of AMEC’s case, VDOT moved to strike many of AMEC’s claims on a number of grounds, including lack of timely written notice. The trial court responded that the matter had been decided pretrial stating, “the motion on actual notice as a substitute for written notice has already been ruled on… I don’t need to hear another thing about it.”

Following closing arguments, the court took the matter under advisement. Three months later, the court issued its letter opinion rendering a “general verdict” for $21,181,941.00, every penny AMEC sought on every claim, denying only prejudgment interest. The trial court made no specific factual findings on any claim, other than to again comment on the issue of notice: “The evidence presented at trial proves the Commonwealth had actual notice of the plaintiff’s claims…” The court also found that VDOT had written notice of AMEC’s claims, referring generally to “memoranda addressing the issues” and “minutes” of meetings.

The Court of Appeals Decision

VDOT and AMEC filed cross appeals and the case proceeded to the Court of Appeals as required by statute. The Court of Appeals grouped the claims into four categories for analysis: (a) timely written notice of intent to claim pursuant to Code § 33.1-386(A); (b) VDOT contractual challenges to certain AMEC claims; (c) VDOT’s challenge to the damage award and (d) AMEC’s claim to prejudgment interest. On the issue of timely written notice, the Court of Appeals stated “we can only administer the law as it is written,” reminding that “courts must presume that a legislature says in a statute what it means and means in a statute what it says.” The Court of Appeals ruled that timely written notice of intent to claim is a condition precedent to AMEC’s right to bring suit against VDOT. The Court of Appeals reversed the trial court’s award for AMEC on its claims involving drilled shafts, defective concrete specifications, concrete formwork for piers, columns and caps, work orders, most acceleration damages and other claims relating to a pier foundation cap repair and delay into a winter period, stating “we hold the court erred as a matter of law in concluding AMEC gave timely written notice….” The Court of Appeals found no legal precedent for the conclusion that actual notice dispensed with the statutory mandate for timely written notice and found no support in the record for the trial court’s factual conclusion that AMEC had provided written notice to VDOT of these claims.

VDOT also challenged AMEC’s recovery of damages for elevated lake levels. The Court of Appeals analyzed the claim as either a Type I or Type II differing site condition. The court determined the elevated lake level was not a Type I condition because the lake levels did not differ from any condition represented or indicated in the contract. It was not a Type II condition, ruled the court, because such a condition must be, “unknown, unforeseeable and unusual.”

“At best, AMEC’s evidence proved only that for a period of time the lake water rose to an unusual level.” Under the contract, wrote the court, routine and

Continued on next page

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non-routine water level fluctuations presented "known" risks and therefore could not constitute a Type II condition.\(^4\)

VDOT also challenged the general verdict awarding nearly $4 million to AMEC for working through two extended winter periods. AMEC had claimed that every day of delay from the original contract completion date to substantial completion was compensable. Yet AMEC asserted that it was not seeking damages for the entirety of the second winter period because its acceleration efforts overcame delay caused by the second winter period. To the extent it overcame the delay through its own efforts, AMEC claimed it was not seeking compensation for the second winter period. AMEC claimed a contractual right to damages for working in the winter periods. The Court of Appeals found that the circuit court’s general verdict did not segregate either or both of the additional winter periods from the aggregate damage award and thus the court could not determine how much if any of the damage award the circuit court attributed to either or both winter periods. The Court of Appeals remanded this claim to the circuit court to review the record and make specific findings whether AMEC "demonstrated, through contemporaneous records if possible, the extent of the adverse weather and its impact on critical activities."\(^15\)

The Court of Appeals had the same problem when it analyzed AMEC’s claim for delay damages caused by the presence of boulders in the lake bed of one of the small bridges to be constructed. AMEC claimed a delay of 40 days. VDOT did not challenge compensability on appeal, but argued that the record only supported 8 days of delay due to boulders. VDOT asserted that the rest of the delay was part of AMEC’s drilled shaft claim which was barred for lack of notice. Given the “inseverable nature” of the circuit court’s general verdict, the Court of Appeals could not resolve the dispute. It remanded the claim to the circuit court with instructions to make specific factual findings based upon the evidentiary record.\(^16\)

On the issue of home office overhead, VDOT had filed a motion in limine and moved to strike AMEC’s evidence, both of which the circuit court denied without comment. The trial court awarded AMEC all claims for extended unabsorbed home office overhead in its general verdict. On appeal, VDOT contended AMEC had offered no proof that it could not reasonably recoup these costs from other revenue-producing work during any delay. The Court of Appeals agreed, noting that neither AMEC’s fact witnesses nor its expert addressed the point. "As a matter of law, the contractor cannot recover if it fails to show that it was reasonably unable to recoup the overhead costs."\(^17\)

The Court of Appeals also agreed with VDOT’s challenge to AMEC’s recovery of damages priced on a "force account" basis. VDOT had filed a motion in limine to challenge AMEC’s damages expert’s use of force account criteria to price labor, equipment and materials costs. The circuit court also denied that motion. VDOT renewed its objection at trial, contending AMEC must price its damages using “actual costs” as provided in the specifications. The court again rejected VDOT’s position and the general verdict awarded the damage figures advocated by AMEC’s expert. The Court of Appeals reversed. The court determined that force account provisions had no relevance, as AMEC’s claims were based on either the differing site conditions specification or Specification Section 105.16 which provides twice that, “[o]nly actual costs for materials, labor, and equipment will be considered.” Finding that “AMEC’s damage model was systemically flawed,” the Court of Appeals remanded the issue to the circuit court to determine whether the evidence affords a reasonable basis to determine actual costs.

VDOT also challenged AMEC’s use of the Rental Rate Blue Book (the "Blue Book") to calculate AMEC’s owned equipment costs, arguing that only AMEC’s "actual costs" of equipment could be used. AMEC’s expert testified that Blue Book was an industry-accepted resource for estimating owner-furnished equipment cost. The Court of Appeals rejected VDOT’s challenge, holding that the circuit court was not plainly wrong in accepting the Blue Book as a standard for estimating actual costs.\(^18\)

Finally, the Court of Appeals affirmed the circuit court’s lone decision in favor of VDOT—that VDOT was not liable for prejudgment interest in the absence of a statutory or contractual waiver of sovereign immunity from liability for such interest on contract claims.

The Supreme Court Decision

AMEC and VDOT both appealed to the Supreme Court, raising multiple assignments of error and cross-error. In a 44-page decision, the Supreme Court grouped the assignments to five primary issues: (1) whether AMEC gave timely notice; (2) whether high lake levels were a differing site condition; (3) whether AMEC established entitlement to home office overhead damages; (4) whether use of Blue Book was properly used to calculate actual equipment costs; and (5) whether AMEC is entitled to prejudgment interest.

(a) Notice of Claim

The Supreme Court affirmed the Court of Appeals’ holding that Va. Code § 33.1-386(A) is to be strictly construed. Written notice of the contractor’s intent to file a claim is mandatory and a condition precedent to filing suit against the Commonwealth. Actual notice cannot satisfy the statutory requirement. The court considered what writing can satisfy the requirement. Such notice must be a written document delivered to VDOT “clearly stating” the contractor’s intention to file a claim; minutes of meetings cannot satisfy the requirement even if they announce the contractor’s intent to file a claim. Code § 33.1-386(A) requires that written notice be given “at the time of the occurrence” of the claim or at the “beginning of the work upon which the claim...is based.”\(^19\) The determination of whether a written notice is timely and clearly shows an intention to file a claim requires an examination of the circumstances of each claim. The court
reviewed the record and determined that AMEC’s claims for drilled shaft expenses, drilled shaft concrete, formwork for concrete caps, piers and columns, Pier 17 foundation cap repair, and work orders were barred in their entirety for lack of timely written notice. This decision removed approximately $10 million from the circuit court’s general verdict. The court agreed with the Court of Appeals that AMEC’s notice of claim for acceleration was untimely for most of the acceleration claim, and that AMEC gave proper notice of its claim for damages resulting from working in a winter period. The court remanded these claims for the trial court to determine damages.20

(b) Elevated Lake Water Levels.

The court reversed the Court of Appeals’ decision that the sustained elevated water levels formed a Type II differing site condition entitling AMEC to additional compensation.21 The court began its analysis by noting that the existence of a Type II condition is a question of fact. “The unknown physical condition must be one that could not be reasonably anticipated by the contractor from his [or her] study of the contract documents, his [or her] inspection of the site, and his [or her] general experience[,] if any, as a contractor in the area.”22 The court noted that witnesses for both AMEC and VDOT testified that the sustained high water levels were of an “unusual duration,” presenting an “unusual circumstance.” Moreover, the condition was not one that could be reasonably anticipated by AMEC from its study of the contract, inspection of the site, or general experience as a contractor in the area.23

The court then addressed the proper method of calculating AMEC’s damages. AMEC had priced this claim using force account pricing. The court affirmed the Court of Appeals’ decision that force account pricing was not proper. Instead, AMEC’s claim for a price adjustment due to a differing site condition must be priced in accordance with the contract’s differing site conditions clause, Specification Section 104.03, which excludes anticipated profits. Thus, on remand, the trial court must calculate an appropriate adjustment to the contract, exclusive of profit, based on actual costs incurred by AMEC for delay to its work due to sustained elevated lake levels.24

(c) Home Office Overhead.

The Supreme Court agreed with VDOT and affirmed the Court of Appeals’ holding reversing the award to AMEC of home office overhead damages. The court ruled that entitlement to home office overhead is a question of fact and that AMEC did not meet its burden of proving that it could not reasonably recoup its home office overhead from other revenue-producing work. AMEC’s evidence consisted only of its expert’s rote application of the “Eichleay Formula”25 without any proof that AMEC could not otherwise recover home office overhead from other work.

Conclusion

In sum, the Supreme Court affirmed the Court of Appeals’ judgment on all but two issues: elevated lake levels as a differing site condition and lack of timely written notice of AMEC’s small claim for a plan error for pier 18. The court remanded the case in order for the circuit court to review the evidence already presented and calculate damages for AMEC on the following items:

• plan error for pier 18
• acceleration damages after April 2004
• delay damages resulting from high lake levels
• owned equipment costs based on Blue Book
• whether AMEC is entitled to damages for conditions during either or both winter periods
• whether AMEC is entitled to damages resulting from boulders
• damages for AMEC’s bond premium
• apply actual costs as a measure of damages for other claims surviving appeal

Few cases in Virginia’s jurisprudence have touched on as many construction law issues as Commonwealth v. AMEC Civil, LLC. The decisions from the Supreme Court and from the Court of Appeals provide needed guidance to practitioners in this area and will continue to do so for years to come.

NOTES

2) Richard T. McGrath, Senior Assistant Attorney General, argued VDOT’s appeals in the Court of Appeals of Virginia and the Supreme Court of Virginia.
3) Section 105.16 of the Project specifications required “a written statement describing the act of omission or commission by the Department or its agents that allegedly caused damage to the Contractor and the nature of the claimed damage shall be submitted to the Engineer at the time of the occurrence or beginning of the work upon which the claim and subsequent action are based...Submission of a notice of claim as such shall be mandatory. Failure to submit such notice shall be a conclusive waiver to such claim for damages by the Contractor. An oral notice or statement will not be sufficient nor will a notice or statement after the event.”
5) Id.
6) Commonwealth 1, 54 Va. App. at 251, 677 S.E.2d at 638.
7) See generally, Commonwealth 1.
8) Commonwealth 1, 54 Va. App. at 254, 677 S.E.2d at 640.
9) Commonwealth 1, 54 Va. App. at 262, 677 S.E.2d at 644.
10) Commonwealth 1, 54 Va. App. at 263, 677 S.E.2d at 644.
12) Commonwealth 1, 54 Va. App. at 266, 677 S.E.2d at 646.
13) Id.
14) Id.
15) Commonwealth 1, 54 Va. App. at 268-69, 677 S.E.2d at 647.
17) Commonwealth 1, 54 Va. App. at 274, 677 S.E.2d at 650.
18) Commonwealth 1, 54 Va. App. at 277, 677 S.E.2d at 651-52.
20) The court also found AMEC gave timely written notice of a claim in the amount of approximately $10,000.00 for a plan error, reversed the Court of Appeals on this issue and remanded for a calculation of damages consistent with its rulings on damages.
22) Commonwealth 2, 280 Va. at 418, 699 S.E.2d at 512.
25) Eichleay Corporation, ASBCA No. 5183,
filed at any stage of the appeal—petition, merits, or rehearing.

**Rule 5A:26**—There’s a new provision here, specifying that if the appellant fails to file a rules-compliant brief, the court “may dismiss the appeal.” Similarly, if the appellee doesn’t file a proper brief, any assignments of cross-error may be deemed waived. The rule continues the provision that if only one party has complied with the rules, the other party cannot deliver oral argument, “except for good cause shown.” This rule contains an anomaly in that if the appellee isn’t assigning cross-error, rules compliance is technically optional for that party. That’s because the rule says nothing about disregarding the arguments in (or even striking) a noncompliant brief of appellee; the court just disregards the assignments of cross-error. Appellees should take this anomaly with a large grain of salt; I suspect that the court may feel free to ignore a noncompliant brief in its entirety if the breach of rules is serious.

**Rule 5A:28**—The old rule governing oral argument provided that each side got up to 30 minutes to argue. The new rule is in line with the court’s long-standing practice to allow 30 minutes per case, divided equally between the parties. The court can allow a longer time in appropriate cases, but practitioners should expect that such leave will be very infrequently given. The new rule also specifies how an amicus curiae can share in the oral argument, and incorporates the Supreme Court’s non-waiver rule for briefed issues that are not addressed in oral argument.

**Rule 5A:30**—There’s only one significant change here. The old rule allowed a successful party 10 days to file a bill of costs, and gave the “loser” of the appeal 14 days within which to object. The new rule reverses those time limits; now the victors get 14 days to file the bill, and the vanquished have just 10 days to object.

**Rule 5A:33**—This rule collapses two first cousins, the former Rules 5A:33 and 5A:33A, into a single rule governing rehearings after decisions on the merits. Other than converting a page limit to a word-count limit, most of the changes amount to reorganizing the same provisions that were in place before.

**Rule 5A:34**—As with the previous rule, this new rule condenses the provisions of former Rules 5A:34 and 5A:34A into a single rule for those seeking en banc rehearings. Word-count limits are similarly inserted for the previous page limits.

**Rule 5A:35**—The changes here are subtle but important. For the first time, the rules provide that the Court of Appeals can grant en banc rehearing “in whole or in part,” and briefing is limited to those issues on which the court grants such rehearing. Another provision in the new rule states that the grant of en banc rehearing—even on a partial basis—acts to stay the mandate of the panel’s decision as to all issues. Thus, it’s possible to leave one or more issues in a sort of limbo, where those issues are not up for review, but they can’t be appealed onward to the Supreme Court for the time being.

**Rule 5A:36**—There’s a very minor change here. When the parties settle a case after the notice of appeal is filed, they must notify the Clerk in writing. The old rule only required such a notice where the settlement occurred after the record was received in Richmond. Those two events are often a month or more apart.

**Rule 5A:37**—The last rule in the CAV’s rulebook is brand-new. It provides for a settlement conference, something that doesn’t exist by rule in the Supreme Court. Those are now available in the CAV, with proceedings conducted by “a senior or retired appellate judge.” The court may order them upon informal motion (a letter to the Clerk will suffice) by a party or sua sponte. The usual rules that govern settlement conferences and mediations apply, including confidentiality of statements made in the course of the proceedings, and the rule gives the court the authority to issue orders to implement any agreement arising out of a conference. The court may consolidate related appeals for the purpose of a single conference, but it can’t order conferences in criminal cases, termination-of-parental-rights appeals, or any cases involving the court’s original jurisdiction. Finally, the ordering of a settlement conference does not automatically stay other deadlines in the appeal, but the settlement judge can order such a stay, presumably if he or she seems some meaningful chance of cooperation and eventual settlement.

I perceive some potential problems here. For example, if one party proposes a conference and the other objects, the objecting party must notify the court in writing of the objection. To this point, that parallels the provisions of Code §8.01-576.6, governing referrals to ADR-orientation sessions in the trial court. But the new appellate rule goes beyond the statute; it requires the objecting party to *explain the basis of his objection* in a letter that goes into the appellate court’s file. There is nothing in the rule that makes that letter confidential (unless the court goes ahead and orders a conference anyway), so members of the court can read it to learn whether one party or the other refuses out of pure stubbornness to talk. In my opinion, that’s a strong incentive to go along with the order, even if the party has no interest in negotiating in good faith once he gets to the conference.

Second, in the trial court, if either party objects, then there’s no settlement conference, recognizing the near-futility of compelling an unwilling party to participate. (I’m aware that federal courts occasionally order settlement conferences without regard to consent—see FRAP 33 for one illustration—but in my view, those are inherently limited by one party’s unwillingness.) Now in the CAV, the court may order a settlement conference over one party’s objection, and even over both parties’ objection in the event of a *sua sponte* order. It’s foreseeable that a few of these conferences will result in unexpected settlements, but I perceive that far more of them will only expend the litigants’ and the settlement judge’s time.

The author expresses his gratitude to Chief Judge Walter Felton of the Court of Appeals of Virginia, who reviewed a draft of this essay draft and made several helpful suggestions.

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BY HENRY I. WILLET, III, 2010 YLD Chair

As I enter the home stretch as Chair of the Young Lawyers Division, I want to take this opportunity to thank everyone who has supported the YLD over the past year. I particularly want to thank those lawyers throughout the Commonwealth who have worked tirelessly on behalf of the YLD and the various organizations and programs that it supports. The lawyers who volunteer on behalf of the YLD have many competitors for their time and talents, as they raise families and pursue professional advancement. Yet, as I am sure most would agree, it is the camaraderie and these volunteer activities that provide some of the most rewarding experiences for young lawyers. Additionally, I want to thank these lawyers’ families and firms, without whom the YLD simply would not be able to provide its services.

I also would like to take this opportunity to thank Steve Busch for his outstanding leadership over the past year as president of the VBA, which has recently culminated with the completion of a comprehensive strategic plan. Steve and countless others have put an extraordinary amount of effort into bringing this plan to fruition and it has set the VBA on course to continue its great work for years to come. Front and center in this strategic plan is the YLD. It never ceases to amaze me, with everything else that the VBA does, that the YLD and the services that it provides to the bar and to the community remain a top priority. Beyond Steve’s tremendous leadership, he, along with the other members of the VBA Executive Committee, Pia Trigiani, Hugh Fain and John Epps, and VBA executive director Guy Tower, have each served as wonderful mentors to me personally and professionally. They are all leaders in their firms/organizations and in the bar and truly exemplify what it means to be a citizen lawyer.

I also would like to thank the VBA Board of Governors and the VBA staff who, under the leadership of Guy and Brenda Dillard, continue to set the standard for how an organization, voluntary or otherwise, should be run. Guy, Brenda, Jeremy Dillon and all of the staff have been there at every turn to assist the YLD with any need so that it may serve the bar and the community. Without their unwavering support, the YLD’s meetings, programs and events would not be possible.

Regrettably, space limitations prevent me from personally acknowledging each and every member of the YLD who has gone above and beyond the call of duty this past year in their service to this organization and providing much needed legal and community services. However, I would be remiss if I did not mention some of the YLD’s highlights from the past year, which include yet another tremendously successful Legal Food Frenzy, Robert E. Shepherd, Jr., Juvenile Law and Education Conference, and Diversity Job Fair, along with ongoing projects such as the Pro-Bono Hotline, Model Judiciary and National Moot Court competitions. The YLD also received First Place recognition for its comprehensive application submitted to the American Bar Association’s Award of Achievement program. I especially want to thank Heather Hays Lockerman who took on the Herculean task of assembling the YLD’s submission for the Award of Achievement. I also would like to recognize Turner Broughton, Immediate Past-Chair of the YLD, for his work in shepherding the YLD through many of these recognized events and programs and in helping one of the YLD’s most successful programs, the Hispanic Chamber of Commerce, get off the ground. Without Turner’s leadership and hard work, along with the many others who staff the Hispanic Chamber of Commerce intake sessions on a monthly basis, many in the Hispanic community would not receive the legal services they desperately need but cannot afford.

Looking ahead, I am very excited for the coming year for the YLD and the VBA in general, as the VBA begins to implement its strategic plan. Under the leadership of Webb King (currently the YLD Chair Elect) and Dan Ortiz (Secretary/Treasurer), the YLD will continue to offer the wonderful programs and events for which it is known. Additionally, an outgrowth of the Chief Justice’s Pro Bono Summit held this past April, the VBA’s Ask-A-Lawyer program will provide the underserved public from Southwest Virginia with an opportunity to seek pro bono legal advice from lawyers across the Commonwealth, without getting a bill for the lawyers’ services. The YLD will hold quarterly “Ask-A-Lawyer” nights in areas around Virginia, including Richmond, Tidewater, Northern Virginia, and Southwest Virginia. The “Ask-A-Lawyer Nights” will allow lawyers to socialize together and network, while providing pro bono legal services to clients in need. The first “Ask-A-Lawyer Night” will be held in early 2011.

In closing I want to encourage as many young lawyers as possible to attend the Annual Meeting in Williamsburg, January 20 - 22, 2011. This year, for the first time, we will have a YLD track at this meeting, with programming and events tailored for young lawyers. Starting at 10:00 a.m. on January 20, the YLD will host the Law School Recruiting Round Table, followed by the Executive Committee/Council Meeting at 12:30 p.m., which is open to all members of the YLD. Next up at 1:30 p.m. is a special CLE program for young lawyers entitled “Tips From the Bench for Young Lawyers” featuring Judge Jane Roush of the Fairfax County Circuit Court. Followed by a young lawyers networking social, young lawyers are encouraged to attend the General Session “Keeping the Lights On in Virginia (and the Rest of the Country): What Will It Take?” This will be followed by the reception and banquet where we will have specially designated tables for young lawyers. The evening then concludes with the YLD “after-hours” social.

I hope to see all of you there.
Cheryl L. Black
Goodman, Allen & Filetti
Glen Allen
VBA Member Since: 2008
VBA Activities: LPMD Council Member, Intellectual Property and Information Technology Law Section Council Member

1. Why did you choose to get involved with the Intellectual Property and Information Technology Law Section Council? I see my participation in the Section Council as an opportunity to build relationships with IP practitioners and to serve as a resource for the Sections CLE programs.

2. What would be the title of your autobiography? Living Beyond the "What Ifs"

3. How has social networking impacted your legal career? Relationships are one of the keys to building and growing a law practice, and LinkedIn, the premier social media network for professionals, has made it convenient for me to maintain business relationships through career changes, job relocations, and the busyness of life. LinkedIn is an invaluable tool for reconnecting with classmates and colleagues, staying connected with new acquaintances, and being introduced to people.

4. If you had access to a time machine, where would you go? I am fascinated by the 1960's and early 1970's. It was a complex time in our country's history. The political climate, the Vietnam War and the civil rights movement exposed America's vulnerabilities and revolutionized American democracy. It was a defining era in our country. If I could access a time machine, I would program it to allow me to recapture the passion, pain, and power of the people of that time.

5. Do you have any secret talents? I have several secret talents, but the one that I've suppressed the most in my adulthood is acting. From second grade through high school, I performed in school plays. In college, I received national rankings for dramatic readings in Forensics competitions. I have not lost my passion or talent for acting (ask my kids). Appearing in a theatre production is one of my life-after-the-law aspirations.

6. What do you consider to be your greatest achievement? My family. I am grateful to God for my husband of 19 years and our three incredible sons.

Barry T. Meek
University of Virginia
Charlottesville
VBA Member Since: 1997
VBA Activities: Member of the Civil Litigation and Intellectual Property and Information Technology Law Sections

1. Who has had the greatest impact on your legal career? I've been fortunate to have great mentors. Justice Lawrence L. Koontz, Jr. and his wife, Eberle Smith, encouraged me to attend law school; Greg Robertson and later Mike Lockerby, taught me to litigate with passion, skill and purpose.

2. What is your biggest pet peeve and why? The misuse of email. Everyone who has an email account knows why . . .

3. What is the most rewarding aspect of working for a university? A college or university is a wonderful client. The faculty and administrators are engaging and sophisticated; the legal issues are diverse and challenging; and I believe in the mission of the institution. Working for a public institution of higher education also satisfies my interest in public service.

4. What is something most people would be surprised to learn about you? As counsel for the University of Virginia, most people assume that I'm an alumnus of the University. In fact, I took my undergraduate degree from Roanoke College and my law degree from the University of Richmond.

5. If you didn't pursue the legal profession, what would you be doing today? I still would be serving as a police officer for the Roanoke City Police Department and enjoying every minute of it. Cheers to the dedicated men and women at RCPD!

6. What has been your most memorable experience while attending one of the VBA Annual Meetings? Many of my memorable experiences likely should not be published . . . But the meetings always offer great opportunities to reconnect with friends and colleagues.
# Membership Application

**MISSION:** The Virginia Bar Association is a voluntary organization of Virginia lawyers committed to serving the public and the legal profession by promoting the highest standards of integrity, professionalism, and excellence in the legal profession; working to improve the law and the administration of justice; and advancing collegial relations among lawyers.

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## VBA MEMBERSHIP DUES

**New Admittees** — New admittees to the Virginia State Bar (Spring admittees are covered for balance of calendar year of admission; Fall admittees are covered for following calendar year). An application form must be returned to activate membership. 

**Regular and Young Lawyers Division Members** — 1-5 years in practice calculated from original license date. 

**Regular and Young Lawyers Division Members** — 6+ years in practice calculated from original license date. 

**Full-time Law School Faculty and Government/Public Service/Legal Aid Attorneys** 

**Fully Retired/Fully Disabled** 

**Judicial Members and Virginia Lawyer Legislators** 

**Law Students** — Currently enrolled in a fully accredited school of law. 

Membership dues may be deductible as an ordinary and necessary business expense but are not deductible as a charitable contribution. The Association estimates that 12% of your basic dues are used for lobbying expenses as defined by Section 13222 of the Revenue Reconciliation Act of 1993, and are therefore nondeductible as a business expense.

### A. TOTAL MEMBERSHIP DUES $

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### B. TOTAL SECTION DUES $

| 1888 Society (Platinum) $1000 and up | Leadership Patron (Gold) $500-$999 | Sustaining Patron (Silver) $250-$499 | Patron (Blue) $100-$249 |

### C. TOTAL PATRON CONTRIBUTION $

**TOTAL MEMBERSHIP/SECTION/FOUNDATION DUES AND CONTRIBUTIONS** (Sum of A, B and C) $ 

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- Computer Hacking
- Intellectual Property
- Money Laundering
- Cyber Crime


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