A Non-Final Word on Finality

by Frank K. Friedman

Appellate courts discourage piecemeal litigation and generally frown upon hearing appeals from interlocutory or non-final orders. It is a time-worn rule of Virginia appellate procedure that a decree or order is "final" when it "terminates the suit or definitely determines the rights of the parties, and leaves nothing further to be done by the court," except acts which may be necessary to execute the decree. Unfortunately, like most time-honored rules, in many instances this principle has been far easier to recite than to apply in practice.

The question of when an order or decree is, or should be, deemed final is not one that launches ships or inspires poets, but finality does trigger certain meaningful events such as the time to execute on a judgment, or to obtain a supersedeas bond. Various important appellate deadlines are similarly triggered, most notably the time for filing a notice of appeal under Rules 5:9 and 5A:6 of the Rules of the Supreme Court of Virginia. If the date of the "final" order is misidentified, the appellant may file its notice of appeal too early or too late. In either event, in state court the appeal will be dismissed. Thus, determining when a judgment becomes final is no trivial matter.

A bevy of untoward and sleep-threatening scenarios routinely play out, leaving would-be appellants scrambling to decide when a notice of appeal is appropriately filed—and tempting wily appellees to file motions to dismiss dubiously preserved appeals. For example, what happens when the substance of the case is resolved, but fees and costs remain to be determined? When six defendants are dismissed from a suit, but one important defendant remains? When a non-suit is granted, but several of plaintiffs' claims previously have been dismissed?

In the past several years the Supreme Court of Virginia has shed light on answers to some of these questions. But there is still much justified confusion.

Basic Rules of Appealability

In Virginia state courts, for a judgment to be appealable, it must either be "final," constitute "an adjudication of the principles of a cause," or fit within the confines of a statute permitting an appeal from an otherwise non-final order. Statutes conferring appellate jurisdiction over non-final orders do exist and should always be considered. For example, with respect to appeals involving injunctive relief, Va. Code § 8.01-626

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Letter from the Chair

I must confess that the due date for this letter came upon me as quickly as the responsive brief to a summary judgment motion! My move through the offices of the Virginia State Bar Litigation Section began two years ago when it seemed that my responsibilities as chair would always be a part of my long-range planning. The time has arrived.

Let me introduce myself. I am a principal and currently the president of Clement & Wheatley, a professional corporation. Our firm has 13 attorneys and approximately 20 employees in our support group. We are located in Danville, and the firm's history traces its origins to 1936. I joined the firm in 1976 after graduating law school at University of Virginia State University. My exposure was diversified for about 8 years before I settled into an active civil litigation practice. While I have not kept a record, my "tried to conclusion" civil jury trial count would be around 100 and, like most litigators, I have prepared for hundreds more that settled before or during trial.

This background is being shared with the readers for one reason only. Many of the comments I will make in future "Letters from the Chair" will raise issues and present the perspective of a person with years of litigation experience in a mid-size firm serving a small city and its rural periphery. Hopefully, my perspectives as a litigator in such an environment will be familiar to many of our Section members who practice in "rural cities" and informative to members who practice in large metropolitan areas of the Commonwealth.

In future letters, I plan to discuss such topics as (1) the prevalence of strained relationships between attorneys and their clients—who is to blame and is the problem remedial?; (2) the need to recognize and address the inherent conflict between litigators attempting to develop a statewide or regional practice and resident litigators who feel threatened in the process; (3) whether litigators should be more concerned and involved with both law school education and the practical life experiences of law students, recognizing that future litigators must be well-rounded individuals with common sense and an ability to actually handle the cases as opposed to merely generating billables by responding to specific assignments; and (4) how can and should the organized Bar and its Litigation Section discourage tasteless advertising by plaintiffs' attorneys and solicitous marketing by statewide and regionally-minded defense attorneys. In offering my opinions, I will not attempt to express the position of this Board of Governors or the Section's membership on these issues. By expressing my personal opinion, however, I hope we will all move closer to identifying and addressing corporate concerns of litigators statewide.

In closing, I wish to express our appreciation to Susan Armstrong of Mays & Valentine, who has ably led our Section this past year; to Jeff Gray, Ron Ayers and Jay Gorry, whose terms on the Board have ended; and to Pat Sliger, our VSB Liaison, who has "herded cats" as well as anyone could. We welcome our new Board members, Vicki Devine and Samuel Meekins, Jr. These folks will join a group of hard-working members who will return for another tour of duty. Your Executive Committee consists of me as chair, Frank Friedman as vice-chair; Tom Albro as secretary; and Susan Armstrong as past chair. Our meeting dates have already been set, and included on our agenda is a retreat in October to discuss long-range plans for our Section. We look forward to another successful year in publishing our outstanding newsletter under the direction of Lee Livingston, its editor. Seminars and workshops will be sponsored by the Section at the mid-year meeting and at the Virginia Beach annual meeting in June 2001. We will conscientiously spend our Section dues on the above projects and others that will be identified as consistent with the best interests of our membership and the clients we serve.

Your input, involvement and support as members of this Section will be greatly appreciated.

Glenn W. Pulley, Chair
Board of Governors, Litigation Section

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Procedural and Evidentiary Considerations in Will Litigation

by Glenn W. Pulley

There are three procedural avenues in Virginia to establish, impeach or construe wills. The Bill to Impeach is probably most familiar, perhaps, because so many of the appellate decisions in this area arise in cases which have this procedural origin. The proceeding is purely statutory, and the applicable limitation period is one year from probate. Va. Code § 64.1-88, 89. While the suit is lodged on the equity side of the Court, this is an anomaly because the procedure follows common law principles, not equity. The only issue to be decided is whether a previously-probated will is indeed the entire last will of a competent testator who has complied with all necessary execution formalities while acting on his own free accord. No other relief should be requested, because it cannot be entertained. Issues of fact must be submitted to a jury unless all parties waive them. As discussed below, because these cases must name as parties all those who would take under the will or by intestacy, the prospects of all parties waiving a jury are slim. More often than not, parties brought into the case by service of process on interested parties, as discussed below, in which the jury is not automatic unless waived.

The second procedural route to contest, establish or construe a will is an Appeal of the Clerk's Order admitting the will to probate. This challenge is available under Va. Code § 64.1-78. Using this statute may be an advantage for those who wish to avoid a jury trial. The Appeal is docketed on the law side of the court, so the right to request a trial by jury is available. However, if the right to jury trial is not requested, it is waived and the matter may go forward to trial before the court. Such an Appeal also seems to occupy a preferred position on the docket.

Indeed, the parties can insist that the court set the Appeal for trial at the first docket call following the Appeal. Proceeding with the Appeal ex parte is possible but not advisable. Va. Code § 64.1-85 probably would be construed to allow for an ex parte Appeal of the Clerk's Order. The better practice is to assume that this ex parte procedure applies only to clerks' orders appointing a personal representative, which is at least, by perception, a decision that does not affect the property rights of interested persons. The limitation period for this procedural avenue is six months from the date of the objectionable clerk's order. The procedure to Appeal a Clerk's Order is somewhat antiquated and potentially risky for the practitioner. It starts with a petition requesting the clerk to enter yet another order which "authorizes" the Appeal. The clerk actually appears to have no discretion in the matter, yet the Appeal cannot go forward without this ministerial act. No bond is required for the Appeal. The matter is immediately placed on the Circuit Court docket and, because ex parte action is not advisable, the appellant must promptly arrange for service of process on interested parties, as discussed in more detail below.

The final procedural method for challenging, establishing or construing a will is really a hybrid, because the purpose of the proceeding is not to attack the will per se, but to raise questions about the will that could potentially result in rulings that invalidate all or portions of the will. This third option is a Suit for Aid and Guidance. It is probable that this proceeding cannot be maintained by just any interested party. Rather, this remedial approach is arguably reserved exclusively for the personal representative of the estate. The advantage of this method is threefold. First, for the litigant who wishes to avoid a jury trial, this cause of action will probably achieve the goal. The court can always refer out factual issues via an issue in chancery, but at least the litigant is comforted with the knowledge that the jury's influence will be advisory only and limited to answering specific questions rather than deciding for one party or another. Second, the Suit for Aid and Guidance places no burden of proof on the litigant, because he or she is not a proponent of the will but merely the source of a question or questions about the will and its proper interpretation. For strategic reasons this can lead an interested person to qualify as the personal representative, as soon permissible under the statutes, for the primary purpose of using this third procedural method of raising questions.

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about the validity of the will as a whole or portions thereof. The third reason for using this procedural route for will litigation is to enhance the prospects of gaining an equitable ruling from the court if a jury trial would involve “win big or lose big” consequences. The court, in a Suit for Aid and Guidance, clearly cannot serve as a mediator or arbitrator, but it is equally clear that the court may be better able than a jury to objectively interpret the will as a whole and testator’s intentions. In doing so, the distribution of the estate is more likely to be made in a manner perceived as fair to all concerned. Appeals are statistically less frequent when cases are decided by the court in the framework of lending aid and guidance to a personal representative rather than by a jury’s decision in a suit to impeach or establish a will or an appeal of a clerk’s admitting the will to probate.

Whether the litigant arrives in the Circuit Court via a Bill to Impeach, the Appeal of a Clerk’s Order or a Suit for Aid and Guidance, the first order of business will be to arrange for proper service of process and the appointment of a guardian ad litem to guarantee that the decree ultimately entered by the court will be enforced against and recognized by all interested persons and the public in general. Upon request, the clerk will make up a subpoena in chancery which can be served and a proof on which returns of service can be made. If possible, serve both residents and nonresidents in person. While personal service on the nonresidents outside the Commonwealth gives only in rem jurisdiction, that is sufficient in will litigation, because only the estate, the res, is being affected by the litigation. The better practice, however, is to serve nonresidents under the long arm statute if possible, to eliminate any argument that in personam jurisdiction is needed for certain rulings such as whether the case will be tried by a jury, discovery issues, motions to appoint curators or to award sanctions. Of course, since the persons on whom service must be perfected include all beneficiaries under purported wills of the decedent and all heirs at law, the typical will contest case will also include an Order of Publication to reel in those interested persons whose current names or addresses are not known for a certainty or whose identity is unknown.

Because one or more of those served with process in these cases will usually fail to respond to the suit, the appointment of a guardian ad litem is virtually mandated in order to insure finality in the decree. The order making that appointment should state that the attorney so appointed shall represent the interests of not only those persons referred to as “parties unknown,” but also any person who is under a legal disability including, without limitation, those who are minors, incompetent, imprisoned or in military service. Once appointed, the guardian ad litem must truly be treated as counsel of record who is noticed regarding all discovery and an endorser of all decrees. This last comment seems self-evident, but this author believes that omissions in this regard could be statistically proven.

A practice pointer which is often overlooked can be mentioned here. Once the moving litigant feels confident that all interested parties have been named and serviced, a motion is appropriate for entry of an interlocutory decree so holding. This can be accomplished in conjunction with a motion declaring that the suit is taken for confessed with respect to those who have been validly served but not answered. By taking the time to mark this milestone in the will contest litigation, the expense and embarrassment of a “redo” is avoided, and the universe of possible adversaries is narrowed.

Developing the evidence in will contest litigation can best be discussed by suffering through some of the author’s war stories. In Case I, the testator was an elderly lady who survived her husband and died without children or grandchildren. Her heirs were a brother, two incompetent sisters, and many nephews and nieces of siblings who predeceased her. An estate of about $450,000 attracted more attention that did the testator during her twilight years. Nevertheless, she had remained on the Christmas mailing list of many relatives, and the brother visited whenever he could arrange a trip from his home about 90 miles away. A local trust officer had been encouraging the testator to make a will, but it was his impression that she was in no hurry to do so and that she would not be devastated if her estate passed to her heirs by intestacy. For some five years before her death, the testator had received around-the-clock care from a sitter. The relatives, especially the brother, were not impressed with the care she gave and were suspicious of the sitter, who seemed overly protective of the testator, even to the point of making it difficult to arrange a visit. These concerns were brought to the boiling point when the sitter strolled into the clerk’s office with a will days after the funeral. Predictably, the will left the entire estate to the sitter and appointed her as executor without bond. A brother
and a sister refused to believe that the will was valid, and a Bill to Impeach was filed and served pursuant to Va. Code 64.1-88. The first evidentiary item on the agenda of the complainants’ attorney was, and always should be, to test the signature of the testator. A former FBI agent trained and qualified as a questioned document examiner was employed, but the signature was opined to be that of the testator and, though quite feeble, not suggestive of an incompetent person. Next, the medical records of the testator were obtained and were reviewed by a psychiatrist at a teaching hospital with special interest focused on a hospital stay within six months of the date the will was executed. This was another dry hole for the complainants, because the expert deemed problematic the use of dementia in the admission and discharge records without reference to the differential diagnosis tools of the DSM IV. Perhaps the last tool to develop evidence would prove to be the most successful. The will was not holographic, and the identity of the attorney who prepared it was known. Therefore, deposition of the sitter, the attesting witnesses and the attorney were set for the same day, with the sitter being deposed first. Gross inconsistencies in the testimony permeated the depositions, and the manner in which the will was prepared and executed became extremely questionable. The attorney recalled receiving the request for the will from the sitter and could not specifically recall speaking with the testator. The will was not signed in the attorney’s office but was picked up by the sitter and taken to the testator’s home. Two weeks passed before the will was signed, and the witnesses were the sitter’s daughter and one of her friends. A reasonable settlement concluded within a month of those depositions, the terms of which divided the estate in half between the sitter and heirs. The lesson learned from this case is that favorable expert testimony from a handwriting analyst or a medical doctor are important but not necessarily essential to a successful will contest. The circumstances under which the will was prepared and signed can raise serious questions about the validity of the will, especially when the testator is elderly and dependent on others.

Case II involved an Appeal of a Clerk’s Order under Va. Code 64.1-78. The case illustrates the diverse uses of experts, and their impact in cases where the credibility of witnesses is not quite so pivotal as in Case I. This involved an elderly testator who died in 1999, almost 20 years after signing a will typed at home by her husband on a circa 1968 Olivetti typewriter to “save the expense of hiring an attorney.” When her husband predeceased her in 1998, the testator’s will was found in the husband’s safety deposit box by a sister who served as attorney in fact for the testator. The will was taken to the sister’s home, kept in a safe and offered for probate. The problem with this will concerned the fact that when found in 1998, it resembled a checkerboard with black magic marker strokes carefully obliterating words here and paragraphs there. There was no way for a layman to see the typed words and no direct evidence as to the author of the cancellations. The sister qualified as administrator c.t.a. and proposed to distribute the 1.4 million-dollar estate to herself and her two sisters according to the provisions of the will that escaped the magic marker. This plan of action was interrupted by the clerk of court first and by a disappointed nephew second. Rather than either refusing to probate the will because of the cancellations or probating the will without comment on the cancellations, the clerk ordered that the will was probated in its unmarked form! This was problematical for the sister, because the cancelled words and phrases could not be read. The sister countered with an Appeal of the Clerk’s Order and a separate Suit for Aid and Guidance as a precautionary measure. The cases were consolidated for trial. Then the experts arrived. For the sister, the document examiner from Baltimore received the Court’s permission to test the will at his home laboratory. The tests successfully faded the magic marker and revealed the typed language that was cancelled. Knowing the stricken language made it possible to link the testator to the cancellations. It became fairly clear that the testator was updating her will by deleting words and paragraphs as she sold or gave away items of her property and as beneficiaries in the will either died, fell into disfavor, or received their inheritance by advancements. The expert hired by a nephew whose mother had been stricken from the will chose to attack on a different front. He was willing to concede that the first expert had properly exposed the cancelled language. However, he found through analysis that the will was actually a compilation of several different documents utilizing different types of paper, typewriters, ink and margins. This testimony raised, of course, the possibility that the testator had not only updated her will by cancellations but also by substitution of pages. The former method of updating a will is permissible by statute; the latter is not unless the testator republishes the will in the presence of attesting witnesses each time the page substitution occurs. At trial, however, the expert conceded that it was also possible that the
testator used several documents to make up her will and that she never substituted any pages thereafter. Without any evidence that the paper or the ink or the typewriter were not available to the testator at the time the will was executed, the expert could create no more than speculation on the page substitution theory, and the testimony was excluded after a proffer outside the jury’s hearing. This case highlights the critical role that an expert can play in will litigation, especially when the signatures or markings on the will are questionable.

Case III came before the court on a Petition for Aid and Guidance filed by the personal representatives of a testator whose three million dollar estate was to be distributed according to a holographic will riddled with language that was arguably precatory; and bequests that could be construed as either specific or demonstrative. Of course, any bequest that depended on language found to be precatory would fail, and several bequests, if found to be specific rather than demonstrative, could fail based on the doctrines of ademption by extinction, transformation or advancement. See Smith, George P., Jr., Harrison on Wills and Administration for Virginia and West Virginia, Third Edition (1990), Michie; Vol. 2, Sec. 416 et seq. A church responded aggressively to the Petition, contending that the bequests to the church were specific, but they did not adeem. Heirs who would take by partial intestacy argued in the alternative that the bequests were either specific bequests which had adeemed or they were demonstrative bequests which were limited to values that existed when the will was written 20 years ago. This case was settled through negotiations that focused almost exclusively on the legal issues rather than the evidence, which was generally not in dispute. Because the matter was before the court on a Petition for Aid and Guidance rather than the other two types of will litigation discussed in this article, the court assisted counsel and the parties during the negotiations by candidly disclosing the probable rulings that might be made on these legal issues.

This short article admittedly provides no more than a superficial exposure to the world of will contest litigation, but hopefully these observations on procedural and evidentiary issues peculiar to such litigation may reaffirm the knowledge and experiences of seasoned practitioners, while stimulating the interest of others.

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deals with expedited appeals of decisions to grant or refuse an injunction, while Va. Code § 8.01-670 provides a mechanism for appealing any interlocutory decree “granting, dissolving, or denying an injunction.” More specialized statutes confer appellate jurisdiction in matters ranging from arbitration disputes to claims involving “a mill, ferry, wharf, or landing,” and beyond. Such statutes involving “other appealable orders,” however, come into play relatively infrequently, and the focus of this article is upon the determination of whether an order is truly “final,” or not.

“Joint Interests” and “Collateral Matters”

The basic premise is simple enough: a judgment is not final for purposes of appeal if it is rendered with regard to some but not all of the parties involved in the case. Similarly straightforward is the general concept that all substantive issues before the Court must be resolved before the order is final for purposes of appeal. Thus, one would conclude that if twenty-seven of twenty-eight defendants were dismissed from a case, and only one defendant remained, the order still would not be final. But that is not necessarily true.

The Supreme Court of Virginia has noted exceptions to the general finality rule where a dismissed party shares no “joint interests” with other parties remaining in the case, and where an adjudication is “final in its nature as to a collateral matter, separate and distinct from the general subject of the litigation and affecting only particular parties to the controversy”—in such instances the order “may be appealed prior to the determination of the case against all defendants.”

An early case recognizing this exception was *Bowles v. Richmond*, in which the plaintiff sued the City of Richmond and a railroad for negligent failure to safeguard an approach to a bridge. The plaintiff’s case was dismissed on demurrer as to the City, while the action remained pending.
against the railroad. The demurrer was based on the ground that the plaintiff had not given written notice to the City Attorney, as required by the City Charter.\textsuperscript{10}

The Supreme Court ruled that the order granting the demurrer was final as to the City. The Supreme Court explained that the order in \textit{Bowles} was final because there was “no joint interest between the defendants in the matters decided by the circuit court [\textit{i.e.} whether plaintiff’s action was barred as against the City for failure to give proper notice], nor does it relate to the merits of the case[:] therefore the judgment is final as to the city.”\textsuperscript{11}

The same result was obtained in \textit{Hinchey v. Ogden}, in which a plaintiff motorist brought a negligence action against another driver and the Superintendent of an expressway for breach of his duty to provide traffic controls to prevent drivers from entering the wrong lane of travel. The trial court sustained a motion to dismiss as to the Superintendent on the basis of sovereign immunity. The Supreme Court granted the plaintiff an appeal from that order, holding that, under \textit{Bowles}, the judgment was appealable.\textsuperscript{12}

In \textit{Wells v. Whitaker}, applying the same concepts, an opposite result was reached in a case involving two defendants whom plaintiff claimed were joint venturers. The trial court dismissed claims as to one of the defendants but not the other. The Supreme Court rejected claims that the order was final as to the dismissed defendant; it reasoned that if the plaintiff later obtained a reversal and proved his “joint venturer” theory, the defendants would have identical—rather than several—interests. The Court offered a detailed discussion of when parties’ interests are “severable”:

\begin{quote}
[The] judgment is severable when the original determination of those issues by the trial court and reflected in the judgment of any determination which could be made as a result of an appeal cannot affect the determination of the remaining issues of the suit, nor can the determination of such remaining issues affect the issues between plaintiff and the dismissed defendants if such defendants are restored to the case by a reversal.\textsuperscript{13}
\end{quote}

This issue was at the heart of \textit{Leggett v. Caudill},\textsuperscript{14} the Supreme Court’s seminal recent case on finality. In \textit{Caudill} a former Springfield Church employee bought claims against Caudill, an ordained minister at the church, the Official Board and Congregation of the Springfield Church, and the Capital Area regional office of the Church. Essentially, Leggett brought claims against the minister for his alleged conduct, against the Regional Office for placing and leaving Caudill in the ministry, and against the Springfield Church for Leggett’s “constructive” discharge based upon Caudill’s actions. The Supreme Court summarized the Counts as follows:

In Count I of her motion for judgment, Leggett sought damages from Caudill and the Springfield Church, alleging that Caudill’s conduct caused her emotional distress, and that the Springfield Church knew, or should have known, that Caudill’s conduct was causing her to suffer emotional distress. In Count II, Leggett alleged that the Capital Area Church negligently failed to investigate Caudill’s fitness for the ministry prior to 1992 and negligently failed to respond to Leggett’s request for assistance. In Count III, she alleged that the Springfield Church wrongfully breached its written employment agreement with her by “constructively discharging” her.\textsuperscript{15}

The trial court sustained a demurrer to Count I against Caudill and the Springfield Church on October 7, 1992. Leggett filed a notice of appeal from this ruling on October 15. On November 25, 1992, an order was entered dismissing all the remaining claims. (Counts II and III.) No notice of appeal was filed from that order. When Leggett proceeded to file an appeal, the court determined that she had appealed only from an interlocutory order which had not adjudicated all the relevant issues, and had failed to appeal from the final order dismissing the whole case. Her appeal was dismissed.

While this result is not terribly surprising, it is notable that the October 7 order did dismiss all claims against Caudill. The Court found that since the Church defendants’ liability was deriva-
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tive of Caudill's, this case was more analogous to Wells v. Whitaker than to Bowles or Hinchey, and that the defendants' interests were therefore closely aligned and not severable. More recently, in Dalloul v. Agbey, another cruel appellate lesson was learned. Plaintiff raised seven counts versus a series of seven different defendants. The trial court dismissed counts III through VII, leaving only two defendants at risk from the remaining two counts. At this point the plaintiff non-suited as to all claims with the Circuit Court's blessing. The defendants appealed, contending a non-suit could not revive claims previously dismissed. Thus, the Court concluded the non-suit order actually constituted a final order as to the dismissed Counts III through VII. Since plaintiff had failed to appeal from the order, those claims were dead.

In making this ruling the Court dropped a very informative footnote which answered the question of whether a party whose appeal does fit the Bowles/Hinchey mold must appeal such a "final" order within thirty days or risk waiving the appeal. The Court stated:

We also note that an order which is final as to some, but not all, parties may in some circumstances be appealed before the case is concluded as to all defendants, under the "severable" interest rule set forth in Wells v. Whitaker, 207 Va. 616, 628-29, 151 S.E.2d 422, 432-33 (1966). See also Leggett v. Caudill, 247 Va. 130, 134, 439 S.E.2d 350, 352 (1994). In such instances, the order may be appealed either at the time of its entry or when the trial court enters a final order disposing of the remainder of the case. See Code § 8.01-670(A)(3); see e.g., Hinchey v. Ogden, 226 Va. 234, 236-37 and n.1, 307 S.E.2d 891, 892 and n.1 (1983). 17

Earlier this year, in Maximus, the Court cited this footnote and reiterated that "an order disposing of all claims against one defendant may be a final appealable order even if claims against other defendants remain." 18 A careful reader of case facts will notice several other instances of Virginia precedent where, without fanfare or detailed discussion, appeals proceeded although no judgment had been rendered as to certain counts or defendants. 19

Nothing Further to Do

In leaving behind the esoteric world of "severable interests," we should not give short shrift to analysis of when an order leaves "nothing further to do" by a Circuit Court, and is, therefore, final. This case law, too, is not without its surprises. When we speak of nothing left to do, we are not being literal. There are certain acts which a trial court must do after final judgment. 20 For the most part, however, the parties should know when an order disposes of the merits and fully adjudicates the case. Usually the order itself states that it is "final."

Certain unusual circumstances do give pause for reflection, however. For example, non-suit cases can be exasperating. Generally, denial of a non-suit order is not considered a final judgment for purposes of appeal. 21 When there exists a genuine dispute regarding the propriety of the granting of a non-suit, the order becomes appealable within the meaning of Va. Code § 8.01-670(A)(3). 22 And, of course, keep in mind that, as in Dalloul, a non-suit order can render rulings preceding the non-suit final and appealable.

Another somewhat troubling, but understandable, rule is that an order by a trial court awarding a new trial is not final and no appeal can be taken until the conclusion of the second trial. 23 However, an appeal is allowed where a plaintiff accepts a reduced verdict under protest, rather than suffer a retrial. 24 Similarly, as a general rule, decrees overruling motions as to joinder of parties, or substitution of parties are not final. 25 And the granting of a demurrer while granting the plaintiff leave to amend is not a final order. 26 Similarly, denial of a demurrer or motion to dismiss leaves more to be done by the court and is not final. 27

There will be times when one or both of the parties will want to appeal matters even though
not every last issue has been resolved by the Court. This may occur, for example, when the important issues of a case have been determined, but one nagging issue remains unresolved. Not addressing the nagging issues may render the existing rulings final. In other instances, the anxious party may attempt to appeal the existing rulings where the merits have been determined only. 29 In other words, when a final decision is reached on the merits (prior to resolution of attorney’s fees or costs issues), an appellant is required to file a notice of appeal from the merits ruling even before the collateral fee issues are concluded. 30

Virginia cases have not dealt with this point directly, although most Virginia attorneys’ fees appeals seem to have been heard together with merits issues. 31 This is logical since most attorneys would assume that there is much “left to be done” after a court rules on the merits and the prevailing party then undertakes a lengthy litigation over attorney’s fees. In other words, it might easily be presumed that an order disposing of the “merits” would be non-final, given that the trial court would still have a fee squabble on its plate. Moreover, if the initial order were really “final,” the trial court would only have twenty-one days to rule on the fees before losing jurisdiction—an impractical arrangement. On the other hand, when a very “close call” on the merits would lead to a seven month long litigation over attorney’s fees, the federal scheme of requiring an appeal of the “merits only” has some logic behind it. Why double the fees expended litigating over fees when the ultimate award is very much in doubt?

Under Virginia law this is something of an appellate trap waiting for a victim. The Supreme Court of Virginia has held that a trial court’s failure to award the costs of a suit does not render an order interlocutory if it is final in all other respects. 32 The United States Supreme Court has noted that attorney’s fees were regarded as an element of costs at common law. 33 Thus, an argument can be made that a final order technically occurs when the merits are resolved by order and fees remain to be decided (assuming that fees are not intricately bound up in the merits determination of the case). A failure to appeal from a final order, of course, is fatal.

Obviously, the safest rule for state court litigants concerned with this problem is to avoid a final order until fees and merits are both decided. Or for a court to suspend a “merits only” ruling under Rule 1:1 until all fee questions are resolved. If the parties seek to appeal from a merits only ruling before undertaking a lengthy fee dispute, there is some legal support for such a decision. In addition to federal precedent, remember the Bowles/Hinchey principle that if the decision is final except for collateral or severable issues, an appeal may proceed. However, the Supreme Court would need to make a useful exception to the rule to permit this in a “merits only” context, since a fee award is often tied to the merits and a reversal on the merits might cause a fee award to evaporate following the Wells v. Whitaker logic. 34 An argument might also be made that a “merits only” ruling fits the confines of the Va. Code § 8.01-670 category of cases “adjudicating the principles of the cause.”

In short, Virginia may ultimately determine that attorney’s fee disputes: (1) are expressly part of the merits (requiring an appeal from a single final order when there is “nothing further to be done”), (2) are “severable” from the merits (allowing a permissive appeal at the conclusion of the merits), or (3) follow the federal rule that one who lets a merits order sit several months until fee issues are resolved has waived an appeal of the merits. 35 This latter result would be a bitter one for some unsuspecting Virginia litigant. Until this issue is clearer, be aware of the potential problem.

Also remember that whenever a litigant seeks to convince a trial court to rehear or amend a final judgment order, caution should be exercised. Consider the following hypothetical:

A final judgment order is entered in Circuit Court on July 13, 1999. Lawyer X makes it clear he wants the trial judge to reconsider, but everyone is going on vacation over the next month. Lawyer X sets his motion for reconsideration to be heard on August 13, 1999, and shows up...
Finality
cont’d from page 9

with a lengthy brief. The other side shows up with a smile and informs Lawyer X that he has lost his case and waived his appeal. Is the opposition right?

The answer is yes. The trial court lost jurisdiction twenty-one days after entry of judgment under Rule 1:1. To make matters worse, the victim failed to note his appeal from the now-final judgment twenty-one days after entry of judgment under Rule 1:1. To make matters worse, the victim failed to note his appeal from the now-final judgment within the time period stated in its suspension order—the appellant will be out of luck.36

Raising Red Flags

In the world of appeals, waiver is an unpleasant reality. Waiver cases tend to fall into one of three categories: (1) failures to comport with necessary time requirements for the orderly adjudication of cases, (2) violation of rules that ensure that the trial court is given a fair opportunity to rule on issues actually presented and that opposing counsel is permitted to address matters without unfair surprise, and (3) “gotchas.” Unfortunately, finality gaffes usually fall into the “gotcha” category. It does not advance our system of jurisprudence in any way to watch a litigant who clearly intended to appeal a case stumble over a concealed deadline. A Virginia attorney must be vigilant in considering finality problems and thoughtful in addressing appealability tools at his or her disposal.37 Judges, too, should be cognizant of these potential snares and strive to further demarcate the playing field.

If this article accomplishes nothing else, it should heighten awareness that finality issues are fraught with danger. They should not be taken for granted.

2 Under Rules 5:5 and 1:1 the trial court can suspend its judgment beyond the twenty-one day period. If it fails to do so—or fails to rule within the time period stated in its suspension order—the appellant will be out of luck.36
6 See, e.g., Va. Code § 15.2-2656 (allowing appeal to Supreme Court from judgment concerning validity of school bonds); Va. Code § 19.2-318 (allowing appeal to the Court of Appeals from judgments of criminal or civil contempt); Va. Code § 19.2-398 (allowing the Commonwealth the right to appeal certain rulings in felony cases); Va. Code § 46.2-362 (allowing appeal to Court of Appeals from determination that an individual is an habitual drunk driver).
8 Wells v. Winstead, 207 Va. at 628, 151 S.E.2d at 432.
9 147 Va. 720, 129 S.E. 489 (1925), aff’d on reh’g, 147 Va. 729, 133 S.E. 593 (1926).
11 147 Va. at 725, 129 S.E. at 490. This explanation of Bowles is taken from the Supreme Court’s decision in Leggett v. Caudill, 247 Va. 130, 439 S.E.2d 350 (1994).
12 Hinsley v. City of Norfolk, 221 Va. 57, 266 S.E.2d 885 (1980).
13 207 Va. at 629, 151 S.E.2d at 432-33 (emphasis omitted) (citation omitted) (alteration in original).
14 247 Va. 130, 439 S.E.2d 350 (1994). Much of the above analysis is drawn directly from Caudill.
15 Caudill, 247 Va. at 132, 439 S.E.2d at 351.
19 Endorsing a Written Statement of Facts in Lieu of transcript pursuant to Rules 5:11(c) and 5A:8(c) is an obvious

Finality — cont’d on page 20
**Bowman Claims in the New Millennium: The Evolution of Wrongful Termination**

*by Michael C. McCann*

Although Virginia strongly adheres to the employment-at-will doctrine, it has adopted a narrow public policy exception to the general rule. Since the Supreme Court of Virginia first recognized wrongful termination claims based on violation of a public policy, employees and employers have struggled against one another to determine what public policies can form the basis of such a claim. The sources of public policy recognized by Virginia state courts have been in a continuous state of flux since the exception was first recognized. This article will explain the evolution of the public policy exception to the employment-at-will doctrine recognized in the Commonwealth. As you will see, the exception expands as the courts recognize new sources of public policy and retracts as the legislature attempts to keep the exception in check.

**Bowman and Its Progeny**

With its decision in *Bowman v. State Bank of Keysville*,1 the Supreme Court of Virginia held that employment-at-will is not an absolute truth in the Commonwealth. In its opinion, the Court found a public policy in Va. Code § 13.1-32 providing shareholders the right to one vote for each outstanding share of stock owned.2 The Court held that the Bank’s action of threatening employee shareholders with termination for not voting for a proposed merger violated this public policy. The Court stated that Virginia strongly adheres to the doctrine of employment-at-will; however, it provided for a “narrow” exception to employment-at-will based on the right the Code conferred on the shareholders. Thus was born the public policy exception to the employment-at-will doctrine. Following the decision in *Bowman*, a plaintiff could bring an action for wrongful termination in violation of public policy.3

In the cases following *Bowman*, employees and employers fought battles over the sources of public policy on which a plaintiff may base a common law claim for wrongful termination. A partial answer to this question came with the Supreme Court of Virginia’s 1994 decision in *Lockhart v. Commonwealth Education Systems Corp*.4 In *Lockhart*, the Court addressed whether two at-will employees could bring actions for wrongful termination against their respective former employers who terminated the employees based on race and sex. The Court found support for the employees’ claims in the Virginia Human Rights Act (“VHRA”),5 and the Commonwealth’s strong public policies against race and gender discrimination articulated therein. The VHRA did not serve as a source of public policy which could support a wrongful termination claim for long. Legislative action was not far behind the Court’s *Lockhart* decision.

In May of 1995, in response to *Lockhart*, the Virginia General Assembly amended the VHRA (“the 1995 amendments”). Among the legislative changes, was the addition of § 2.1-275(D), which essentially eliminated the public policies contained in the VHRA from consideration as the basis of a common-law wrongful termination claim. The legislature spoke clearly with the following statement: “Causes of action based upon the public policies reflected in this chapter shall be exclusively limited to those actions, procedures and remedies, if any, afforded by applicable federal or state civil rights statutes or local ordinances.”

The first test of this new statutory language in the Supreme Court of Virginia was in *Doss v. Jamco, Inc.*6 Doss filed an action claiming that Jamco had unlawfully terminated her due to her sex and pregnancy. She based her wrongful termination claim on the “statutorily expressed public policy of the Commonwealth of Virginia as embodied in the Virginia Human Rights Act.”7
The following are recently published Law Review articles that may prove useful to you in your practice:

**Evidence**


**Insurance Law**


**Medical Jurisprudence**


**Practice and Procedure**

Anstine, Amber M. *Comment. ERISA Qualified Subrogation Liens: Should They Be Reduced to Reflect a Pro Rata Share of Attorney Fees?* 104 DICK. L. REV. 359-377 (2000).


**Products Liability**


Procedure Quiz

So you think you know something about Virginia procedural law? Let's find out.

1. If your client is served personally with a federal court lawsuit, how many days do you have to answer?
   a. 21 days   b. 20 days   c. As many as you want

2. In state court, how many witnesses can you depose without leave of court?
   a. 10   b. 5   c. As many as you want

3. In federal court, how many witnesses can you depose without leave of court?
   a. 5   b. 10   c. As many as you want

4. What court publishes all of its opinions?
   a. Va. Court of Appeals   b. U.S. Supreme Court   c. Richmond Circuit Court

5. Can you file a Bill of Particulars in equity?
   a. Yes   b. No   c. Depends on the case

6. In state court, the limitation on the amount of punitive damages in a personal injury case is:
   a. 1 million   b. $350,000.00   c. $5672.84

7. If you fax a state lawsuit to a defendant, does the thirty day removal time start to run?
   a. Yes   b. No   c. Depends on the type of case

8. If a circuit court grants an injunction, can you ask a Virginia Supreme Court justice to immediately review the decision?
   a. No   b. Yes   c. Not if the Court is on vacation

9. In a federal criminal case, can you immediately appeal a finding that your client is incompetent?
   a. No   b. Yes   c. Yes, if you want to delay the trial

10. In a federal criminal case, can you immediately appeal a finding that your client is competent?
    a. Yes   b. No   c. Yes, if you want to delay the trial

Answers and explanations on page 21
Doss claimed that the statutory amendments to the VHRA following *Lockhart* only created a new statutory cause of action against employers of more than five but less than fifteen employees. She further argued that the 1995 amendments to the VHRA did not exhibit a clear intent to abrogate the common law as established in *Lockhart*, and therefore, *Lockhart* remained the controlling law. The Court disagreed, holding that the 1995 amendments to the VHRA did not exhibit a clear intent to abrogate the common law established in *Lockhart*, and therefore, *Lockhart* remained the controlling law. According to the Court, to hold otherwise would render the 1995 amendments meaningless. Accordingly, the Court held that Code § 2.1-725(D) prohibits common-law causes of action based on the public policies reflected in the VHRA.

The Bell Tolls for Bowman Claims

While **Bowman** claims were still valid following the Court’s decision in **Doss**, the removal of the public policies articulated in the VHRA as a basis for such a claim left plaintiffs searching for public policies to support their claims. Over the next two years, things did not improve for those plaintiffs asserting **Bowman** claims.

The next blow dealt to **Bowman** plaintiffs came in **Conner v. National Pest Control Association, Inc.** The question the Court addressed in **Conner** was “whether Code § 2.1-725 of the Virginia Human Rights Act...prohibits a common law cause of action for wrongful termination based on violation of public policies enunciated in both the VHRA and other provisions of state, federal, or local statutes or ordinances.” Conner alleged that her termination constituted gender discrimination in violation of the public policies established in the VHRA and other state and federal laws. National Pest Control Association (“NPCA”) filed a demurrer claiming that Conner had failed to state a cause of action because the 1995 amendments to the VHRA eliminated the common-law cause of action asserted. It argued that following **Doss**, the 1995 amendments restricted a plaintiff’s remedy for termination of employment based on the public policies in the VHRA to the appropriate statutory remedies. The Court agreed with NPCA and expanded its decision in **Doss** stating:

In this case, just as in **Doss**, subsection D’s exclusivity requirement would be circumvented and rendered meaningless if Conner could maintain her common law action based upon an alleged violation of a policy enunciated in the VHRA by simply citing a different Code section or other source of public policy which enunciated the same policy.

Therefore, after **Conner**, a **Bowman** claim could not be based on any public policy “reflected in” the VHRA, “regardless of whether the policy is articulated elsewhere.”

The Court’s next **Bowman** case, **Dray v. New Market Poultry Products, Inc.**12 appeared to finally eliminate wrongful termination actions based on violations of public policy in the Commonwealth. In **Dray**, the Court addressed whether the Virginia Meat and Poultry Products Inspection Act (“the Act”) provided a public policy on which Dray could base a claim for wrongful termination. Dray claimed that her termination violated the Commonwealth’s public policy behind the Act. She relied on this public policy to support her wrongful termination claim.

Dray worked as a quality control inspector for New Market Poultry Products (“New Market”). In this position, she was responsible for assuring that New Market did not distribute any adulterated poultry products. Two months prior to her termination, Dray reported any other problems to government inspectors. The government inspectors confirmed the deficiencies and required New Market to correct the problems. In response to her report to government inspectors, New Market informed Dray that she was not to report any other problems to the government inspectors, and that if she did, she would be immediately terminated.

One week prior to her termination, Dray and other quality control inspectors condemned some contaminated poultry products. On the day of her termination, a government inspector required...
Law Review Articles
cont’d from page 12

Professional Ethics


Miller, Christopher C. Note. For Your Eyes Only? The Real Consequences of Unencrypted E-mail in Attorney-Client Communication. 80 B. U. L. REV. 613-633 (2000).

Torts


Ethics at a Glance—cont’d on page 21

Ethics at a Glance

Ethics in the Information Age
by Thomas E. Spahn

Hypothetical
You practice in a California firm and primarily handle commercial litigation. You received an e-mail from a prospective client who wants to hire you to pursue a commercial litigation lawsuit. You do some quick research while waiting for the conflicts report, and you discover that the prospective client’s statute of limitations is about to run out. The conflicts report reveals that you already represent the potential defendant, so you advise the prospective client that you cannot handle the case. However, you do not tell the prospective client that the statute of limitations will soon expire.

You thought that you had heard the last of the prospective client, but you were just served with a complaint. It seems that by the time the prospective client saw another lawyer, the statute of limitations had lapsed. The prospective client alleges that you had a duty to advise him to quickly see another lawyer.

Does the prospective client’s complaint state a cause of action?

(See continuation for analysis).

Ethics at a Glance — cont’d on page 21

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R. Lee Livingston

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Bowman
cont’d from page 14

New Market to reprocess a large quantity of poultry products. Believing that Dray had informed the government inspector of the adulterated products in violation of its earlier instructions, New Market terminated Dray. Dray brought suit against New Market alleging wrongful termination in contravention of the public policy set forth in the Act.

The trial court held that Dray had failed to “extrapolate” from the broad intent in the Act, which was to protect the general public, a specific public policy intended to benefit the class to which she belonged. Therefore, the trial court held that Dray’s claim did not qualify for the public policy exception. Agreeing with the lower court, the Supreme Court of Virginia reinforced the “narrow” scope of its Bowman decision. The Court held that (1) common-law “whistleblower” claims are not recognized in Virginia and (2) the Act, on which Dray relied, did “not confer any rights or duties upon her or any other similarly situated employee.”

At the end of the millennium, the Court had eliminated the VHRA as a public policy basis for a wrongful termination claim, and had stated that an employee must find an “express statutory right” conferred on the class of which the plaintiff is a member “that is in specific furtherance of the state’s public policy regarding inspections of meat and poultry products.”

A New Millennium

Just when it looked as if Bowman claims had been permanently retired, the Supreme Court of Virginia issued its decision in Mitchem v. Counts. In this 4-3 decision, the Court revived the common-law wrongful termination claim first recognized in Bowman. The Court considered two questions. First, it addressed whether § 2.1-725(D) of the VHRA bars a wrongful termination claim based on a violation of a public policy not reflected in the VHRA when the conduct in question also violates a public policy articulated in the VHRA. Second, it addressed whether a violation of the public policies contained in two state criminal statutes supports a common-law action for wrongful termination.

Mitchem worked for Counts as an insurance marketing representative. During her employment, Counts pressured Mitchem in an attempt to lure her into having a sexual relationship with him. Mitchem asserted that Counts promised her “nice things” if she would have a “sexual affair” with him and that Counts, on multiple occasions, touched her against her will. Mitchem then alleged that when she refused to enter into a sexual relationship with Counts, he retaliated in several ways culminating with her termination in May 1998.

In count one of her motion for judgment, Mitchem claimed “that her discharge violated the Commonwealth’s public policy ‘that all persons...are entitled to pursue and maintain employment free of discrimination based upon gender.’” She further argued that “the Commonwealth’s public policy is violated when a female employee ‘must either consent to the commission of a crime against her person, or engage in a conspiracy to commit a crime, or both, to maintain her employment.’”

The trial court sustained the demurrer Counts filed. It held that the 1995 amendments eliminated the VHRA as a source of public policy on which a plaintiff can base a cause of action for wrongful termination and that the Code sections on which Mitchem relied do not articulate public policies supporting a wrongful termination claim.

On appeal, Mitchem argued that:

“[T]he criminal statutes identified in her motion for judgment embody a public policy against the commission of the stated acts of a sexual nature and, thus, that an employer is subject to a common law wrongful termination claim if he discharges an at-will employee because she refuses to commit these criminal acts.”
Mitchem did not argue on appeal that her termination was based on gender. Instead, she claimed that she was terminated because she rejected Counts' demands that she violate the Commonwealth's laws against fornication and lewd and lascivious cohabitation. She claimed that her wrongful termination claim was based on the Commonwealth's public policies against fornication and lewd and lascivious cohabitation.

In response, Counts argued that § 2.1-725(D) and the court's Conner decision abrogated Mitchem's cause of action because any claim for wrongful termination based on his behavior is necessarily based on a violation of the public policies reflected in the VHRA. He argued that the criminal statutes on which Mitchem relied do not announce specific public policies in their texts. According to Counts, such a use of the Commonwealth's criminal statutes would "eviscerate the employment-at-will doctrine."24

On review, the court distinguished this case from Conner and Doss. The plaintiffs in those decisions relied on public policies stated in the VHRA; while in this case, Mitchem was able to "identify [a] public policy different from those reflected in the VHRA as the basis for [her] common law claim[.]"25 Accordingly, the Court stated that the question presented in this case was whether § 2.1-725(D) bars a wrongful termination claim based on public policies not reflected in the VHRA, when the same conduct also violates public policies articulated in the VHRA.26

The Court applied a narrow construction to § 2.1-725(D) and held that because the Commonwealth's public policies against fornication and lewd and lascivious behavior are not reflected in the VHRA, the language of § 2.1-275(D) did not prohibit a wrongful termination claim based on those public policies. The Court found Counts' argument "untenable" because it would permit an employer to terminate any employee refusing to commit a crime at the employer's direction as long as the employer's conduct also violated a public policy reflected in the VHRA. The Court held that although the criminal statutes do not articulate a specific public policy, laws enacted to protect the general public "may support a wrongful discharge claim if they further an underlying, established public policy that is violated by the discharge from employment," as long as the employee is a member of the class of persons protected by the specific public policy.27 Mitchem was able to rely on the public policies found in these criminal statutes because the statutes were enacted to protect the general public and Mitchem is a member of the protected class.28

It appeared as if Mitchem opened the door to a new wave of wrongful termination claims based on public policies found in the Commonwealth's criminal statutes. However, according to the Court's decision in City of Virginia Beach v. Harris,29 decided on the same day as Mitchem, this new found source of public policy is not an absolute.30 In Harris, the Court addressed "whether Code § 18.2-460 and former § 15.1-138 embody sufficient public policies to support Harris' cause of action for wrongful discharge based on the public policy exception to the employment-at-will doctrine."31

Harris, while on duty as a police officer, was called to an apartment to investigate a burglary complaint. Along with Harris at the scene, were the owner of the apartment, Grey, her sister, Gamble and a second officer. During the investigation, Gamble attacked Harris. Harris subdued and handcuffed his attacker and transported her to the hospital. On the way to the hospital, he reported the incident to his supervisor, Lieutenant Gary Van Auken. The second officer present at the scene provided Van Auken with a different version of the events that transpired. Due to these conflicting stories, Van Auken determined that no formal charges should be filed until a full investigation of the incident was completed.

Van Auken informed Harris that no charges should be filed against Gamble and that she should be released. Harris initially complied with this order. However, he later had warrants sworn out for Gamble and Grey. Harris gave the warrant for Gamble to another officer to be served. This war-
rant was served on Gamble. When Van Aukén later learned that Harris had sworn out warrants against Grey and Gamble, he instructed Harris to turn over the unserved Grey warrants. Harris did this, and he observed Van Aukén place the warrant for Grey in his desk drawer. The Grey warrant was never served. Gamble was brought to trial on the warrant that was served, and Van Aukén requested that the charges against her be nolle prossed. Harris was ordered to take no further action with regard to this incident in his capacity as a police officer.

In July 1993, Harris, while on duty and in uniform, appeared before a magistrate and obtained warrants charging Van Aukén with violations of Code §18.2-460 and §18.2-469, respectively. He observed that Harris had sworn out warrants against Grey in his desk drawer. The Grey warrant was never served. Gamble was brought to trial on the warrant that was served, and Harris requested that the charges against her be nolle prossed. Harris was ordered to take no further action with regard to this incident in his capacity as a police officer.

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In analyzing this question, the Court stated that, although all statutes of the Commonwealth announce public policies to some extent, “termination of an employee in violation of the policy underlying any one of them does not automatically give rise to a common law cause of action for wrongful discharge.” Citing Dray, the Court again held that in order to assert a valid wrongful termination claim a plaintiff must not only show a public policy that was violated; but must also prove that he is a member of the class of individuals that the public policy is intended to benefit.

Following this rule, the Court stated that Harris could not rely on these Code sections in support of his claim. While §18.2-460 has as its underlying public policy the protection of the public’s safety and welfare, Harris’ actions were taken in his capacity as a police officer. His attempt to rely on the public policy of the protection of the public in general is “not in accord with that policy.” The Court held that Harris could not rely on this statute to protect himself from the consequences of his decision to swear out warrants against Van Aukén, in defiance of the instruction to take no further action in his official capacity. Much like the plaintiff in Dray, the Court held that Harris could not rely on a general public policy to evade the employment-at-will doctrine. In addition, the Court held that §15.1-138 provided Harris with a private right, as in Miller v. SEVAMP, Inc., the violation of which could not support a wrongful discharge claim. In accord with these holdings, the Court determined that Harris could not pursue his claim for wrongful termination.

What’s Next?

For years, the courts and the General Assembly chipped away at Bowman wrongful discharge claims until it appeared as if nothing remained to supply the public policies necessary to maintain a claim. Then, with the turn of the century, the Supreme Court of Virginia opened a new avenue for plaintiffs seeking to pursue wrongful termination claims. Mitchem establishes a new source of public policies that will allow a new group of plaintiffs to pursue Bowman claims. Plaintiffs will now attempt to articulate public policies different from those established in the VHRA, without concern for the fact that the same conduct violates a public policy articulated in the VHRA. However, plaintiffs will be limited in this endeavor by the requirement that they established membership in the class of persons that the public policy seeks to protect.

What is the next step? Will the general public policy of protecting property rights and the general public’s health and welfare support a claim for wrongful termination? It appeared as if the Court in Dray had established that this was not possible, but Mitchem seems to call that conclusion into question. If such a general public policy can be the basis of a wrongful termination claim, is it barred by §2.1-275(D)? We shall see.

In the next few years, there will be a scramble as employees try to articulate public policies that, while they are similar to those announced in the VHRA, are not the same as the specific public policies articulated therein. Employers, on the other hand, will continue to try to show that the
public policy on which an employee relies is contained in the VHRA. Employers will also likely argue that the employee asserting a claim is not a member of the protected class covered by a public policy. Where these new lines will be drawn remains to be seen, but it is likely that the courts will be presented with plenty of opportunities to consider the new issues.


2Id. at 540, 331 S.E.2d at 801. Former Code § 13.1-32, on which Bowman is based, is now Code § 13.1-662.

3In Miller v. SEVAMP, Inc., 234 Va. 462, 362 S.E.2d 915 (1987), the Supreme Court of Virginia clarified its Bowman decision by holding that the narrow exception recognized in Bowman is limited to violations of public policy only. Such an action cannot be based on an individual's private rights. The court further narrowed its Bowman decision in Lawrence Chrysler Plymouth Corp. v. Brooks, 251 Va. 94, 465 S.E.2d 806 (1996). There, the Court held that an employee asserting a wrongful termination claim must identify a Virginia statute establishing the public policy on which he relies.

4247 Va. 98, 439 S.E.2d 328 (1994).


7Id. at 365, 492 S.E.2d at 442. The question presented in Doss was certified to the Supreme Court of Virginia from the United States District Court for the Western District of Virginia. Doss' federal claim alleged violation of public policies in the VHRA, Title VII and elsewhere. However, the matter certified to the Supreme Court of Virginia was limited to review of the public policy reflected in the VHRA.


9Id. at 288, 513 S.E.2d at 398-99.


11Id. at 290, 513 S.E.2d at 400.


13Va. Code Ann. § § 3.1-884.17 to -884.36. The objective of the Virginia Meat and Poultry Inspection Act is to provide for meat and poultry products inspection programs in the Commonwealth.

14There is no indication in the opinion that Dray articulated a particular public policy contained in the Act. She generally relied on provisions of the Act that forbid the distribution of uninspected meat and poultry products.

15258 Va. at 191, 518 S.E.2d at 313-14.

16Id. at 192, 518 S.E.2d at 314.

17Id.


19Id. at 182, 523 S.E.2d at 248.

20Id. at 183, 523 S.E.2d at 248.

21Id.

22Id. In support of her argument, Mitchem cited the VHRA and Code §§ 18.2-57, -344 and -345 as sources of the public policies on which she based her claim.

23Id. at 184, 523 S.E.2d at 249.

24Id. at 185, 523 S.E.2d at 249.

25Id. at 186, 523 S.E.2d at 250 (emphasis added).

26Id.

27Id. at 189, 523 S.E.2d at 251.

28In Anderson v. ITT Industries Corp., 92 F. Supp. 2d 516 (E.D. Va. 2000), the court addressed whether Anderson could base a claim for wrongful termination on state statutes against forgery. The court followed Mitchem and held that a state claim for wrongful discharge could be founded on Code §§ 18.2-172 and -175 which protect the general public from forged documents and placed on Anderson "a duty not to engage in the conduct ordered by the employer."


30In Mitchem, the Court distinguished the two cases by stating that "the officer in Harris was not a member of the public for whose benefit the statute was enacted and, thus, could not state a claim for wrongful discharge based on the public policy embodied in that statute." 259 Va. at 191, n. 8, 523 S.E.2d at 253, n. 8.

31259 Va. at 224, 523 S.E.2d at 240. The court also considered a res judicata argument. That argument, however, is not addressed in this article.

32Id. at 228, 523 S.E.2d at 243. Harris initially filed suit in the United States District Court for the Eastern District of Virginia. The court eventually dismissed that case without prejudice and Harris filed this action in state court.

33Id. at 232, 523 S.E.2d at 245.

34Id.

35Id. at 233, 523 S.E.2d at 246.
Finality
cont'd from page 10

example. Setting an appeal bond or fixing a clerical error will routinely occur after final judgment.


27 See 1B M.J. Appeal and Error, § 72 (citing cases).

28 There also may be times when a decision simply hovers, insulated from appeal, beyond the reach of a would-be appellant. For example, in Virginia Citizens Consumer Council v. C&P Tel., 247 Va. 333, 443 S.E.2d 157 (1994), a citizens group appealed from an order extending an experimental regulatory plan. Because the order did not finally dispose of the plan (but put it on hold), it was deemed non-final and the appeal was dismissed. A vocal dissent observed that continued extensions of the expiration date of a regulatory scheme allowed the Commission to evade judicial review.


33 Budinich, 486 U.S. at 200.


35 Note also that in federal court the record is not transferred to the appellate court except in unusual circumstances; in Virginia state courts the opposite is true. Hence, shipping the record out before conclusion of the case would leave the Circuit Court in a bind if it wanted to resolve the fee question during the pendency of the appeal.


37 Virginia could draw on several federal rules to make appellate life easier. For example, under federal law (F. R. Civ. Pro. 54(b)) a trial judge can certify a case to the appellate court, a tool which in some instances would be useful to state trial judges. Federal Rule of Appellate Procedure 4 provides that a premature notice of appeal can, in proper instances, be preserved and deemed filed upon entry of final judgment, and allows for extensions of the time to file a notice of appeal in rare instances.
Procedure Quiz

cont’d from page 13

Answers and Explanations to Questions

1. b Rule 12
2. b Rule 4:6A
3. b Rule 30
4. b U.S. Supreme Court publishes all opinions
5. b Rules 3:5 and 3:7 permit Bills of Particulars in law cases but the corresponding rules in equity do not permit same
6. b Va. Code Section 8.01-38.1
7. b Removal period starts upon actual service of process; See Murphy Brothers v. Michetti Pipe Stringing, 526 U.S. 344 (1999)
8. b Va. Code Section 8.01-626
9. b U.S. v. Morgan, 193 F.3d 252 (4th Cir. 1999)
10. b No Fourth Circuit case is on point but under current precedent its decision would be that you cannot appeal a competency finding. See Miller v. Simmons, 814 F.2d 962 (4th Cir. 1987); state court and other federal courts have held that competency is not appealable

So, How Did You Do?

10 Correct: Why are you a practicing attorney and not a judge?
7–9 Correct: Pretty solid.
1–6 Correct: Who needs the law when the facts are on your side?
0 Correct: Only a genius could miss all of them!

Ethics at a Glance (cont’d)

Analysis

This hypothetical involves the duty of loyalty, and when it first arises if a lawyer deals with a prospective client.

The hypothetical comes directly from a recent California case. In Flatt v. Superior Court, 885 P.2d 950 (Cal. 1994), the California Supreme Court addressed a fascinating situation involving a lawyer’s duties to existing clients and prospective clients. Flatt called a lawyer about a potential malpractice action against his former law firm. Flatt met with the lawyer for an hour and was told that he “definitely” had a legal malpractice claim against his former firm. However, a week later the lawyer advised Flatt that she could not represent him in the malpractice action because her firm was representing Flatt’s former firm in an unrelated matter. Flatt waited approximately eighteen months before contacting another possible lawyer to pursue the malpractice action, but by then the statute of limitations had run.

Flatt sued the lawyer he had interviewed, claiming that she should have advised him of the possible expiration of the statute of limitations and urged him to quickly interview another prospective lawyer.

The California Supreme Court weighed the lawyer’s duty to her existing client (the law firm) and her duty to a prospective client (Flatt). The court held that the lawyer’s duty to her existing law firm client outweighed any possible duty to Flatt, and that Flatt therefore could not pursue a malpractice action against the lawyer.

At least in California, therefore, the prospective client would not have a cause of action against you.

Therefore, the best answer to this hypothetical is PROBABLY NO.
LITIGATION NEWS

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