Docket Call

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Christopher E. Gatewood, Ed.

The newsletter of the Young Lawyers Conference of the Virginia State Bar

in this issue

Pitfalls of Appellate Advocacy: Preservation of Error

M. Christine Klein

It has often been observed that appellate practice begins at trial. Virginia's "preservation of error" rule is an excellent illustration of the truth of that observation - and a dangerous trap for the unwary. Rule 5:25, governing "Questions to be Considered," says:

> Error will not be sustained to any ruling of the trial court . . . before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice.[ii]

As the Supreme Court of Virginia explained in *Riverside Hospital, Inc. v. Johnson*, the purpose of Rule 5:25 is to "afford the trial court the ability to address an issue. If that opportunity is not presented to the trial court, there is no ruling by the trial court on the issue, and thus no basis for review or action by this Court on appeal." [iii] In other words, any objection has been waived — a concept that should strike fear in the hearts of all litigators.

The ways in which an attorney can run afoul of Rule 5:25 are numerous, but here are a few pointers to avoid some of the more common mistakes.

- Do not rely on a "continuing objection." There are no "continuing objections" in Virginia courts. In *Riverside Hospital*, the executor of the estate of an elderly woman who was injured in a fall sued the hospital and nurse responsible for her care. The defendants objected unsuccessfully when the plaintiff, during his opening statement, relied on bar graphs displaying statistical information about hospital falls. The plaintiff later relied on the same bar graphs during the testimony of his expert witness and during closing argument. Both times, the defendants failed to object. Thus, the Court ruled that "only the [plaintiff's] reference to the bar graphs made in opening argument is before us." As a result, even if the trial court committed error by overruling the defendants' objection, it was "harmless" — the jury was exposed to the same information later in the trial without objection.[iv]

The inability to rely on a continuing objection can lead to awkward situations. Few cases demonstrate that better than *Rose v. Jaques*. Defendants objected numerous times to plaintiff's questioning of her treating physician, which sought to elicit testimony regarding the plaintiff's truthfulness and character. Finally, the trial court stepped in, questioning the witness along the same lines to which defendants had already objected. On appeal, the defendants argued that the trial court's actions showed bias. The Supreme Court held that Rule 5:25 required the defendants to object yet again once the trial court took over questioning on the plaintiff's behalf.[v]

in this issue
Guide to Procedure in the Supreme Court of Virginia
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find it inside

- Do not assume objections raised pre-trial will carry through to trial. *Riverside Hospital* is again illustrative. The defendants filed a pre-trial motion *in limine* to exclude fall-related data compiled in an internal report written by the hospital. The trial court ruled that the data was admissible as to the plaintiff's punitive damages claim, but that a cautionary instruction clarifying the purpose of the

continued on page 6

see you in court

Michael R. Spitzer II

News and Practice Tips for Virginia Litigators

New Federal Rules Change Discovery Landscape

Electronic Discovery Obligations More Defined and Quite Hefty

On December 1, 2006, amendments to certain Federal Rules of Civil Procedure went into effect. The most important amendments pertain to the discovery of electronically stored information. Pursuant to the amendments to Rule 26, a party must, without awaiting a discovery request, provide to other parties a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the party may use to support its claims or defenses, unless solely for impeachment. New Rule 26 therefore mandates automatic disclosure of electronically stored information, without receipt of any discovery request.

An exception to the automatic discovery of electronically stored information is contained in Rule 26(b)(2)(B). Under that section, a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. However, upon motion to compel discovery or for a protective order, the burden is on the party refusing production to demonstrate that the information sought is not reasonably accessible. Even if the non-disclosing party demonstrate that the requested information is not reasonably accessible because of burden or cost, the court may nonetheless order discovery from such sources if the requesting party shows good cause.

With the immense amount of information stored and communicated electronically, the new amendments to the Federal Rules will have significant impact on federal discovery practice.

Rule 34, pertaining to requests for production of documents, has also been updated. The new Rule 34 allows parties to request to inspect documents stored electronically. To inspect electronically stored documents, the party requesting inspection must specify the items to be inspected with reasonable particularity, a reasonable time for conducting the inspection, and may specify the form in which electronically stored information is to be produced.

One of the most important changes involves Rule 37, which governs discovery sanctions. Rule 37 was amended, in subsection (f), to state that absent exceptional circumstances, a court may not impose sanctions under the rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. Though it must be balanced against document-retention requirements while litigation is likely or is pending, the amendment to Rule 37 provides some shelter for parties who have data management systems that automatically delete information. Under Rule 37, parties are not held quite as strictly to account for failing to provide documents that were destroyed in the normal course of document management.

With the immense amount of information stored and communicated electronically, the new amendments to the Federal Rules will have significant impact on federal discovery practice. Be sure to familiarize yourself with the new rules so that you can appropriately advise clients, make the proper early disclosures, and be prepared for the electronic discovery disputes that are sure to arise under the new federal rules.

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message from the president

Maya M. Eckstein

According to U.S. Census data, the percentage of foreign-born residents of Virginia increased by 82.9 percent between 1990 and 2000, while the average percentage increase in the United States was 57.4 percent. Virginia obviously is experiencing a significant increase to its immigrant population. Immigrants come to this country, and to the Commonwealth of Virginia, for a variety of reasons — to reunite with family, to fill skilled and unskilled employment positions, or to find protection from persecution. Whatever the reason, immigrants clearly are a significant, and growing, segment of Virginia's population.

The Immigrant Outreach Committee of the Young Lawyers Conference is seeking to address issues raised by the influx of immigrants. In fact, it is one of the most active of the YLC's committees. The committee is focused on helping judges, practitioners, and immigrants alike understand immigration laws and other laws that affect immigrants. This year, the committee has scheduled an impressive array of programs.

For example, on October 19, 2006, the committee held a panel discussion at the Regional Judicial Conference for Juvenile and Domestic Relations Judges of Alexandria, Arlington, Fairfax, Prince William and Loudoun Counties. The discussion focused on the Special Immigrant Juvenile ("SIJ") status afforded some minors under 8 U.S.C. § 1101(a)(27)(J). SIJ status is appropriate for some undocumented and unaccompanied minors who have been abused, abandoned, or neglected and, if granted, allows them the possibility of permanent residency in the United States. Acknowledging that immigration officials typically lack expertise in dealing with children and family issues, Congress explicitly sought the help of the nation's juvenile and domestic relations courts in determining whether certain minors are entitled to such status. The October 19 panel discussion focused on SIJ status and the role of Virginia's Juvenile and Domestic Relations judges in determining whether such status is appropriate.

The Immigrant Outreach Committee is focused on helping judges, practitioners, and immigrants alike understand laws that affect immigrants.

The committee has at least two other programs scheduled for this bar year. First, the Immigrant Outreach Committee is hosting a CLE on March 7, 2007 at Regent University School of Law, in Virginia Beach, on the immigration consequences of criminal convictions. The CLE is scheduled for 1:30-4:30 p.m., and speakers will include immigration attorneys, criminal attorneys, and immigration officials. The primary goad of the CLE is to familiarize attorneys who represent non-U.S. citizens in criminal court of the immigration consequences of various criminal convictions and to promote the effective assistance of counsel for non-citizens. For many non-citizens, deportation often is a worse punishment than imprisonment. Thus, the CLE will include an overview of immigration laws as they relate to criminal convictions, how to avoid adverse immigration consequences, and post-conviction measures that can be taken to resolve adverse immigration consequences. Those interested in registering for this CLE should contact Hugo Valverde at (757) 422-8472 or hugo@valverderowell.com.

The committee also is scheduling for Spring 2007 in Northern Virginia a CLE program that will include a mock immigration trial. Like the panel discussion offered the Juvenile and Domestic Relations judges, this program, offered to attorneys and others, will focus on the Special Immigrant Juvenile status. It will feature a Juvenile and Domestic Relations judge, as well as an immigration judge with the U.S. Bureau of Citizenship and Immigration Services ("CIS"). The CLE will be held in the morning and the mock trial in the afternoon. The mock trial will address both the J&DR and the CIS aspects of the process.

The YLC's Immigrant Outreach Committee is committed to helping Virginia's lawyers and judges address the myriad issues raised by the increasing number of immigrants in the Commonwealth. It also is committed to helping immigrants understand their rights and responsibilities as residents of Virginia. Anyone interested in working with the committee should contact either of its co-chairs, Sarah Louppe Petcher (sarahlouppe@yahoo.com) or Hugo Valverde (hugo@valverderowell.com).

legal ethics corner

Jeffrey Hamilton Geiger

You Make the Call

Q *Looking across the table at Ms. Moneypenny, you realize that she still could not make up her mind as to whether to take the deal. Given the videotape showing her stealing the goldfinger from Dr. No, accepting a plea bargain with a two year prison sentence was a "no brainer." As you signal the deputy that you are ready to leave, Ms. Moneypenny looks up: "James, as you know, I am without funds given my current circumstances and wonder if you would be so kind as to provide me with, perhaps, ten dollars for the jail commissary?" As if I don't get paid too little as it is, now my clients want me to pay them. Oh well, I feel a certain bond with Ms. Moneypenny.*

A At issue is whether making a *de minimus* cash gift to a client for jail commissary purchases runs afoul of Rule 1.8(h), which prohibits a lawyer from providing certain financial assistance to a client. Specifically, a "lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation" except (1) to advance court costs and expenses for a client, or (2) to pay court costs and expenses on behalf of an indigent client. In Legal Ethics Opinion 1830, the Standing Committee on Legal Ethics opined that such a payment was not improper under very narrow circumstances.

In doing so, the Committee proffered three questions in analyzing whether making a cash gift for commissary purchases is improper. First, is the attorney providing financial assistance to his client? Second, is the assistance "in connection with" litigation? Third, if the answer to the second query is "yes," does the assistance fall within one of the exceptions? While James provided "financial assistance" to Ms. Moneypenny, it was not provided directly in connection with the defense of her criminal case. As the Committee noted: "The rule does not on its face prohibit providing *all* types of financial assistance to clients who are involved in litigation; rather the prohibition is narrower, precluding only assistance that is rendered *in connection with the client's litigation*." Indeed, "the spirit of the prohibition is that financial assistance is problematic when it over-involves the attorney in the client's case to such a degree that the attorney's professional judgment is compromised."

Do not, however, reach for your checkbook and start sending money to your clients. Gifts to clients should be no more than occasional, *de minimus* and humanitarian in nature. An advancement to a client for living expenses or loaning money to a client with no delineation as to how the funds would be spent (personal versus litigation expenses) remain prohibited practices. The bottom line: "If ever the *de minimus* gift occasions the lawyer to reexamine either his/her relationship with the client or his/her own personal interests of settling or handling the case, then the gift is improper."

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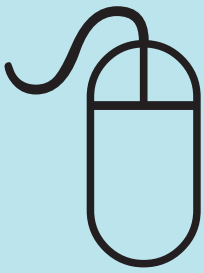

Sign up!

YLC's listserv at www.vayounglawers.com

YLC's Domestic Violence Safety Project Seeks Volunteers

Kenneth L. Alger, II

Every day, women, men and children are physically assaulted by a family member across the Commonwealth. There is no way to know the exact number of individuals that have been assaulted in a domestic relationship. The Violence Against Women Survey found that 1 in 4 women and 1 in 13 men had experienced some type of physical assault by a current or former partner. Certain public surveys indicate that less than fifty percent of the victims of domestic assault ever tell anyone about this crime.

Even more alarming is the impact that this type of abuse has on the family unit. It is estimated that as many as 10 million children witness domestic violence each year. While the exact number is unknown, many of these children will also be the victim of abuse. Child abuse has been found to be 15 times more prevalent in families where domestic violence occurs.

The Young Lawyers Conference has responded to this National crisis by founding the Domestic Violence Safety Project. This project has a two pronged line of "attack" against domestic violence. First, we distribute a legal pamphlet detailing the rights of a victim of domestic violence as well as a Safety Brochure for victims and their families. Second, the Conference trains attorneys to provide *pro bono* representation to domestic violence victims.

I am an Assistant Commonwealth's Attorney who prosecutes domestic violence cases. Everyday, I see victims that are lost in the system and have no idea how to protect themselves or other family members from the abuser. I can see a noticeable impact when the victim has been appointed or hired an attorney.

My anecdotal observations are further supported by quantitative research in the field. For example, a recent study found that of those victims that had legal representation at some point in the proceedings, sixty-six percent found it extremely helpful. Many other victims indicated to shelters across the Commonwealth that they wish they had an attorney with them in court.

This year, the Domestic Violence Safety Project is devoting our time and resources to training attorneys to help victims of domestic violence. Specifically, in the spring we will offer a CLE to attorneys to prepare them to represent victims in protective order hearings. It is our belief, that an attorney for victims in these hearings is essential to protect their rights and to help prevent future abuse against the entire family.

I am writing to you to solicit your help in the campaign against Domestic Violence. Please contact me if you would be willing to serve on the DVSP and help to put on the CLE training.

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Save the Date!

Virginia State Bar Young Lawyers Conference

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A High Tech Lawyer: Top things clients need to know about electronic evidence and retention.
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Edward B. Lowry

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Michael R. Shebelskie

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Maquiling R Parkerson
Catherine L. Muir
James A. Gorry, III

To register, contact Bill Porter at wporter@blankeith.com or Julia Sexton at jsexton@hunton.com

Appellate Advocacy continued from page 1

evidence could be given to the jury. At the close of evidence, the plaintiff nonsuited his punitive damages claim. The defendants, however, did not renew their objection to introduction of the data (although they had raised their objection again during one witness's testimony) or request a cautionary jury instruction. On appeal, they argued that once they had noted their exception to the denial of their motion *in limine*, they were not required to renew their objection to the evidence during trial. The Supreme Court disagreed, holding that, because the punitive damages claim was nonsuited, the defendants were required to raise their objection again and thereby "bring to the attention of the trial court the irrelevance of the [evidence] in light of the changed circumstances of the case . . . ."[vi]

- Make all objections as specific as possible. In *Jones v. Ford Motor Co.*, the defendant in a product liability case presented the testimony of an expert witness who discussed experiments he conducted to test driver reaction time. On appeal, the plaintiff argued that the testimony should have been excluded because the conditions at the time of the experiments were not similar to the conditions at the time of her injury, and because the expert witness based his opinions on the opinions of others. But at trial, the plaintiff had said nothing more than: "Objection, foundation." The Supreme Court ruled this was not sufficient to encompass the plaintiff's appellate arguments.[vii]

A similar result was reached in *Oden v. Salch*. There, the plaintiff objected to a jury instruction, arguing that he did not "believe that it's an accurate statement of law, nor that it's a proper instruction to give based on the facts of this case." The Supreme Court held that the plaintiff's objection was "too general to be of any assistance to the trial court" and was a "plain violation of the letter and spirit" of Rule 5:25. Thus, the jury instruction — whether or not it correctly stated the law — became the law of the case, and its content could not be considered on appeal.[viii]

- A proffer may be necessary. When a trial court decides to exclude evidence, trial counsel must be sure to put on the record what that evidence would have shown. For example, in *Spencer v. Commonwealth*, the defendant argued on appeal that the trial court erred in limiting his cross-examination of an expert witness. The Supreme Court held that because the defendant failed to proffer the questions he wanted to ask the witness and the answers the witness would have made, it could not review the issue.[ix]

- Follow up. When a trial court takes a motion under advisement, or indicates that its ruling may not be final, it is trial counsel's responsibility to bring the matter once more to the court's attention. For example, in *Riner v. Commonwealth*, the trial court took under advisement the defendant's pre-trial motion for change of venue based on pre-trial publicity. The defendant did not renew its motion or remind the trial court that the motion was still pending before the jury was seated. Accordingly, the Supreme Court held that the motion was waived on appeal.[x] And in *Breard v. Commonwealth*, the trial court denied the defendant's motion to strike a juror for cause "for the moment" but offered to rehear the motion once *voir dire* was complete. The defendant did not renew the motion, however, and so the issue was waived on appeal.[xi]

Although there are countless other ways in which appellate arguments can be waived at trial,[xii] counsel who is alert to the need to make objections with both speed and specificity - and to make those objections as often as necessary, even if it seems redundant to do so - will stand a good chance of avoiding the pitfalls of Rule 5:25.

End notes

[i] Ms. Klein is a litigator and appellate advocate with Hunton & Williams LLP.

[ii] Rule 5:25 of the Rules of the Supreme Court of Virginia (2006). A similar rule is applied in the Virginia Court of Appeals. *See* Rule 5A:18 of the Rules of the Supreme Court of Virginia (2006) ("No ruling of the trial court or the Virginia Workers' Compensation Commission will be considered as a basis for reversal unless the objection was stated together with the grounds therefor at the time of the ruling, except for good cause shown or to enable the Court of Appeals to attain the ends of justice. A mere statement that the judgment or award is contrary to the law and the evidence is not sufficient to constitute a question to be ruled upon on appeal.").

[iii] — Va. —, 636 S.E.2d 416, 420 (Nov. 3, 2006).

[iv] *Id.*; — Va. at __, 636 S.E.2d at 419. *See also Fisher v. Commonwealth*, 236 Va. 403, 414, 374 S.E.2d 46, 52 (1988) (holding that "the defendant's "continuing" objection was insufficient to meet the requirements of "reasonable certainty" contained in Rule 5:25").

[v] 268 Va. 137, 152-153, 597 S.E.2d 64, 73 (2004).

[vi] *Id.*; — Va. at __, 636 S.E.2d at 421. Justices Agee, joined by Justice Keenan, penned a lengthy dissent from this portion of the Court's ruling. — Va. at —, 636 S.E.2d at 427-30.

[vii] 263 Va. 237, 259, 559 S.E.2d 592, 603-04 (2002).

[viii] 237 Va. 525, 533, 379 S.E.2d 346, 351 (1989) (citation omitted).

[ix] 238 Va. 295, 305, 384 S.E.2d 785, 792 (1989). *See also Campbell v. Corpening*, 230 Va. 45, 48, 334 S.E.2d 589, 591 (1985) (refusing to consider whether introduction of parol evidence should have been allowed because no proffer was made).

[x] 268 Va. 296, 309-10, 601 S.E.2d 555, 562 (2004). The Supreme Court implied that, had the defendant objected to the trial court's decision to take the matter under advisement, the result might have been different. *Id.*, 268 Va. at 310, 601 S.E.2d at 562-63.

[xi] 248 Va. 68, 80, 445 S.E.2d 670, 677-78 (1994).

[xii] The 2006 edition of *Virginia Rules Annotated* includes 15 pages of double-columned, small-font annotations after Rule 5:25.

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Clip & Use

	Timing and Other Notes	No. of Copies, Page Limit (if any), Cover	Rule
Notice of Appeal (filed with Clerk of Trial Court)	30 days after the appealable order, see Rule 5:9 for content	1 copy	5:9
Record on Appeal	Appellant must file transcripts of proceedings with the trial court within 60 days of the appealable order, and file notice of filing of transcript within the later of 10 days from filing or 10 days from the Notice of Appeal. If a written statement of facts is filed in lieu of a transcript, the deadline is 55 days.		5:10, 5:11
Petition for Appeal	3 months after the appealable order, with $50 filing fee (lack of fee is jurisdictional), and a statement in the Certificate electing either reply brief or oral argument	7 copies, 35 pp., White	5:17
Opposition Brief	21 days after Appellee counsel is served with Petition (add 3 days to date of mailing if served by mail)*	7 copies, 25 pp., White	5:18
Reply Brief (filing waives Oral Argument if Appellee does not assign Cross-Error)	7 days after filing of Brief in Opposition	7 copies, 15 pp., White	5:19
Reply Brief (if Appellee assigns Cross-Error)	7 days after filing of Brief in Opposition with Cross-Error (will not waive oral argument on Petition if limited to opposition to cross-error)	7 copies, 10 pp., White	5:19
Argument on Petition	Appellant gets a 10-minute argument before 3-Justice writ panel, typically the second panel following the reply brief deadline (see the writ panels schedule at the Calendar section of www.courts.state.va.us/scv/). A letter from the Court staff attorney's office will inform counsel of the date and time (appellee counsel must request notice in writing).		
Petition for Rehearing if Petition Denied	14 days after Order denying Petition	7,500 words (filed electronically)	5:20, 5:20A

Guide to Procedure in the Supreme Court of Virginia

	Timing and Other Notes	No. of Copies, Page Limit (if any), Cover	Rule
Grant of Appeal or Denial of Appeal	Certificate of Appeal or Denial of Appeal issued, approximately two weeks after oral argument (or reply brief that waives the argument).		
Bonding	• $500 appeal bond, within 15 days of grant of appeal, Va. Code Ann. § 8.01-676.1(B) • suspension bond, if and when needed, per Va. Code Ann. § 8.01-676.1(C)		
Joint Appendix (contents can be designated jointly or in turn by each side)	If all contents quickly agreed, joint filing 10 days after issuance of Certificate of Appeal	1 copy	5:32
Appellant designation	To be filed 15 days after issuance of Certificate of Appeal	1 copy	5:32
Appellee designation	To be filed 10 days after filing of Appellant designation	1 copy	5:32
Brief of Appellant	40 days from date of Certificate of Appeal	20 copies filed,3 copies served, 50 pp., White	5:26, 5:27, 5:31
Appendix	40 days from date of Certificate of Appeal	20 copies filed, 3 copies served, Red	5:26, 5:31, 5:32
Brief of Appellee	25 days after filing of Brief of Appellant*	20 copies filed, 3 copies served, 50 pp., Blue	5:26, 5:28, 5:31
Reply Brief of Appellant	14 days after filing of Brief of Appellee	20 copies filed, 3 copies served, 15 pp., Green	5:26, 5:29, 5:31
Oral Argument	Approximately two months after filing of Appellant's reply brief, (see the Court's session schedule at the Calendar section of www.courts.state.va.us/scv/), with a letter from the Court clerk's office informing counsel of the date and time.		
Decision of the Court	Generally issued on the last day (typically a Friday) of the next scheduled argument session (see Calendar section of www.courts.state.va.us/scv/).		
Petition for Rehearing	Notice of intent to file within 10 days of opinion/order, Petition for Rehearing due within 30 days of opinion/order.	7,500 words (filed electronically)	5:39, 5:39A

* Note that with the one exception of the Opposition to Petition, all other deadlines are calculated from the date of the previous filing with the Court, not from service upon counsel.

Bench and Bar Schooled in Special J

Unaccompanied Juveniles Involve State J&DR Courts in Federal Immigration Matters

On October 19, the YLC's Immigrant Outreach Committee hosted a panel discussion at the Regional Judicial Conference for Juvenile and Domestic Relations Judges of Alexandria, Arlington, Fairfax, Prince William and Loudoun Counties on the subject of Special Immigrant Juvenile Status.

Federal immigration laws provide a framework under which undocumented children who have been abused, abandoned, or neglected can petition for Special Immigrant Juvenile ("SIJ" or "Special J") status from the U.S. Bureau of Citizenship and Immigration Services ("CIS"). This status, if granted, provides juveniles the possibility of permanent residency in the United States. Recognizing, however, that immigration officials lack expertise in dealing with children and family issues, Congress required the assistance of government bodies with such expertise – namely, state courts with the authority "to make judicial determinations about the custody and care of juveniles." 8 U.S.C. § 1101(a)(27)(J).

Under the two-step system created by Congress, juveniles seeking to meet the eligibility requirements for SIJ status first petition a state court—in Virginia, the Juvenile and Domestic Relations District Court ("J & DR")—to establish determinations regarding their custody and care. Specifically, the court must determine: (a) whether a child has been abused, abandoned, and neglected; (b) whether family reunification is a viable option; and (c) whether it is in the child's best interest to return to his country of nationality or last habitual residence. Depending on the J & DR court's findings, the child may proceed to the second step and apply for SIJ status with immigration authorities. CIS officials then review the child's application and make final decisions on SIJ status based on their own determinations.

When Congress delegated this responsibility to the J&DR courts, it failed to provide to the courts the procedural and jurisdictional guidelines needed for the courts to make the required factual findings. Virginia J & DR courts must therefore work within the statutory bounds placed by the Virginia Code and, as these cases are appearing in courtrooms across the commonwealth, judges are finding themselves without the tools necessary to adjudicate these cases.

As the immigrant population in Virginia increases, J & DR judges will be confronted with a growing number of these cases. The Immigrant Outreach Committee of the Young Lawyers Conference offered the J &DR judges an opportunity to ask questions and attempt to resolve some of the procedural issues generated by the interface of the Federal and Virginia statutes. Andrew Morton, an associate at Latham & Watkins and a frequent speaker on the issue of SIJ status, began the discussion by offering a background for the Federal statute, Mollie C. Barton, an associate at Colten Cummins Watson & Vincent, P.C., framed the issues within Virginia law and Sarah Louppe Petcher, an associate at Colten Cummins Watson & Vincent, P.C. and the co-chair of the Immigrant Outreach Committee, moderated the presentation. During this productive discussion, the Judges suggested means to resolve some of the outstanding issues while the panel provided the bench an insight on the problems advocates encounter when representing these immigrant children, particularly in the state-court portion of a federal immigration matter.

▲ The YLC Immigrant Outreach Committee hosted a panel discussion on Special Immigrant Juvenile Status at the Regional Judicial Conference on October 19, 2006. Judges and court personnel in attendance were, from left to right: Judge William Allen Becker (Prince William); Ms. Lillian Brooks, Director of Court Services (Alexandria); Judge Nolan B. Dawkins (Alexandria); Judge Kimberly J. Daniels (Fairfax); Judge Michael J. Valentine (Fairfax); Judge Constance H. Frogale (Alexandria); Judge Thomas P. Mann (Fairfax); and Mr. James S. Dedes, Director of Court Services (Fairfax).

corporate corner

R. Willson Hulcher, Jr.

Issues of Interest for Virginia Transactional Attorneys

Best Incorporation Location May Be Your Back Yard

Delaware is Nationally Popular, But Not Necessarily Better Than Virginia

It is a slight peculiarity of corporate law, sometimes taken for granted, that corporations are free to choose their state of incorporation, or of reincorporation. Delaware has been the great beneficiary of this freedom. In fact, Delaware has attracted – according to its Department of State website – "more than 50% of all U.S. publicly-traded companies and 60% of the Fortune 500." But what is it about Delaware that makes it dominate the market for out of state incorporation; and what does that mean for Virginia clients considering where to incorporate?

It's frequently argued that Delaware is a corporate haven because its corporate law protects and entrenches a company's management at the expense of shareholders. The opposite argument has also been made – that companies choose Delaware because its corporate law is accretive to corporate value. The assumption underlying these arguments is that there is a market in corporate law among the states efficient enough for Delaware to dominate for reasons having to do with its positive law.

As a practical matter, there is no such market. Firms consider two states when incorporating or reincorporating: their home state and Delaware. It is an unusual client or special situation that broadens the options under consideration. One study of all firms going public between 1978 and 2000 found that approximately 95% were either incorporated in the state where the company's headquarters was located or in Delaware.[1] This is understandable. Home states have the benefit of being familiar. Without a compelling reason to go elsewhere, management will generally gravitate toward its state of residence and will use local lawyers. Those local lawyers are also likely most familiar with the law, and unwritten procedures, of their home state and unlikely push for incorporation elsewhere, which could lead to the client later securing counsel in its state of incorporation.

Without a compelling reason to go elsewhere, management will generally gravitate toward its state of residence and will use local lawyers.

If there is a reason to incorporate outside of a client's home state—if, for instance, the home state's corporate code has significant drawbacks or the client expects to raise money from investors in a number of states and wants to avoid incorporation in an unfamiliar state—then Delaware's dominance of corporate law makes it a comfortable, conservative option. Non-lawyers—to the extent they are sensitive to the issue—will know about Delaware and corporate lawyers will know more about Delaware law than any state other than their own. And incorporation in Delaware is, at the very least, not a drag on a corporation's value.[2] It is unlikely, absent special circumstances, that incorporation in a state other than the client's home state or Delaware will increase value enough to exceed the associated educational costs to lawyers and non-lawyers alike.

Virginia corporations benefit from a corporate code that does not handicap a business relative to Delaware's law. A full comparison of Delaware and Virginia corporate law would take more room than is available here, but Virginia law is particularly favorable in the important area of director fiduciary duties. So, there is, at least, no compelling legal reason to avoid Virginia in favor of Delaware. It is also important to note that incorporation and annual fees are significantly lower in Virginia. While non-legal considerations may argue for incorporation or reincorporation in Delaware, in their absence, and despite the freedom clients have to incorporate anywhere, Virginia is a solid first choice for any Virginia-based client considering incorporation.

End notes

1 Robert M. Daines, *The Incorporation Choices of IPO Firms (Initial Public Offerings)*, 77 New York University Law Review 1559, 1573 (2002).

2 *See id.* at 1560.

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Review of *Win Your Case*, Gerry Spence, St. Martin's Press, 2005

By Christopher L. Spinelli

Gerry Spence's *Win Your Case* is a helpful and useful book for both criminal and civil trial lawyers, with some fresh advice for jury trial work.

The first portion of the book is primarily autobiographical. Anyone who is familiar with any of the author's other books will find a lot that has been repeated elsewhere. You may recognize his sometimes folksy, sometimes querulous tone in the following passages, "Presumably we lawyers learned how to try a case in law school.... What we really experienced in law school was a lobotomy of sorts," and "If we have never been to the prison in which the state wishes to cage our client, never seen how it is to lie down to sleep in a concrete cell where our head nearly touches the toilet stool, we can never make a final argument." As always, Spence asks us throughout our careers to keep our sense of outrage crackling.

More specifically, some good tips he makes at this early point in the book include the following:

1. Listen!

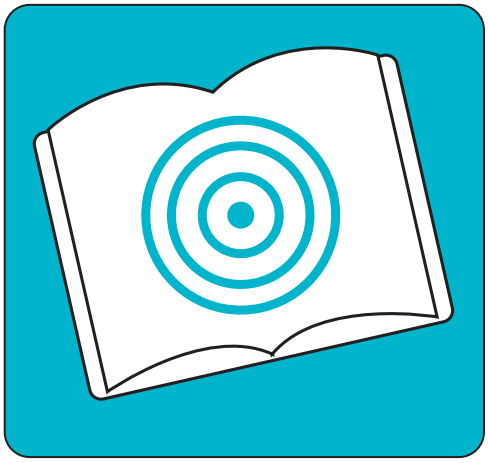
2. You can put together your own trial prep focus group simply by running an ad that invites people to come and hear a good story (lunch provided).

3. Performing a "psychodrama" is an important part of successful jury trial preparation. This is casting various staff members in roles to perform the story behind the facts of the trial. The actors can provide insight into what each character is feeling and what motivations exist.

4. Spence emphasizes the critical importance of thoroughly working with and preparing witnesses before trial. He advises witnesses to think of someone who would tell a story well, and then to absorb and project that person's mojo before speaking.

Notwithstanding all this good advice, I took issue early on with one tip. During trial, he recommends that counsel direct questions to witnesses that are fundamentally objectionable, if not outright contemptuous. For example, in voir dire, he asks about whether big verdicts will mean insurance rates will go up! Some of his questions come uncomfortably close to lacking any legitimate legal basis.

Also, some attorneys might find all the references to "psychodrama" and theater a little off-putting or "touchy-feely." But the point of the book is that, to win as lawyers, we should be fully receptive to all of the human experience.



In the second half of the book, things really pick up. Spence employs the usual 'trial how-to' format of walking readers through a trial, but his tips and anecdotes are fresh, and he holds his habit of preachiness in abeyance.

Some points I found worthwhile:

1. When defending in a criminal jury trial, use *voir dire* to emphasize the importance of each juror's opinion, and that jurors should not try to overwhelm or bully each other into a shared finding.

2. Also, the defense in a criminal jury trial should explain to the jury that the prosecutor gets to speak last because, true or not as a practical matter, the presumption is that it is the prosecutor who has the real burden at trial. The defense attorney should make it clear to the jury that he will not be permitted to argue against the state's rebuttal, though he may very well want to do so.

3. Attorneys should not spend too much time appreciating any attractive member of the jury. The other jurors tend to resent it.

4. We should spend time making direct comments individually to every single juror during the course of the trial. Look directly at each juror a little bit; bring them into the case. This direct contact shouldn't be done mechanically, one by one in line. Attorneys shouldn't use the cop-out method of looking above the heads of the jurors, either.

5. The common denominator of cross-examinations is courtesy. Coming on too strong will only alienate the bench and the jury.

6. In civil cases, prepare the rebuttal first. Then it can be tweaked at trial based in part on what evidence opposing counsel emphasizes. If opposing counsel mumbles or speeds through what you think is a key point of his case, don't give that evidence any more emphasis by talking about it again (other things being equal).

In the final chapter of the book, readers may find that Spence gets a little too sweet in his exhortations to beware "soul cramp" and "heart traps." Spence can be forgiven any stylistic excess because in *Win Your Case* he also gives some solid advice. And he makes a valuable point that we must sustain our early indignation at a system that sometimes fails. I recommend that any attorney who historically gets value out of such 'how-to' guides check out this book, regardless of experience level.

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01/27 | VSB YLC Board Meetingr, Richmond

02/17 | Minority Pre Law Conference
George Mason School of Law, Arlington
Contact sahuja@wcsr.com for more info.

03/07 | YLC Immigration Seminar, Virginia Beach
The Immigration Consequences of Criminal Convictions.
Contact hugo.valverde@gmail.com for more info.

03/16 | VSB YLC Professional Development Conference
Darden School of Business, UVa, Charlottesville

04/14 | Minority Pre Law Conference
Washington & Lee School of Law, Lexington
Contact shyrell_reed@gentrylocke.com for more info.

06/15 | YLC Annual Meeting, Virginia Beach

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Docket Call

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