Sovereign Immunity Update — Factual Distinctions Make the Difference

by John P. Fishwick, Jr.

Based on the factual distinctions of each case, the Virginia Supreme Court continues to incrementally expand sovereign immunity protections. Its struggle to differentiate amongst case facts "has occasioned much difficulty" for the last century, and is unlikely to simplify anytime soon.1 This article will update the decisions within the past year to help guide practitioners to develop case facts to follow recent precedents on the issue of sovereign immunity.

Unlike the law in other states, the defense of sovereign immunity in Virginia does not bar suit; rather, it elevates the standard of negligence a plaintiff must prove from simple to gross.2 Ostensibly, Virginia courts premise immunity on a "rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities."3 Colby v. Boyden sets out a four-part test:

1) the nature of the function the employee performs; 2) the extent of the government's interest and involvement in the function; 3) the degree of control and direction exercised over the employee by the government; and 4) whether the act in question involved the exercise of discretion and judgment.4

Viewing the fourth prong, Virginia courts have traditionally granted a state employee the defense of sovereign immunity if he is performing a discretionary function, but not a ministerial function.

The comparison of Colby v. Boyden (1991) with Heider v. Clemons (1991) illustrates the Court's traditional distinction in the test between discretionary and ministerial actions. Each case discusses the issue in a suit against a police officer for negligent driving. Heider denied immunity to a deputy sheriff involved in an accident while out serving judicial process, reasoning that "while every person driving a car must make myriad decisions, in ordinary driving situations the duty of due care is a ministerial obligation."5 Colby granted immunity to an officer involved in the pursuit of a suspect, because "[u]nlike the driver in routine traffic, the officer must make difficult judgments about the best means

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Many Virginia attorneys remain uninformed about Multidisciplinary Practice or “MDP.” Just the same, MDP tends to illicit a vague, negative response from the practicing bar. Although the term “MDP” is bandied about broadly, there are various MDP models, ranging from the somewhat extreme scenario of lawyers splitting equity shares in law firms with non-lawyers, to the less startling concepts of lawyer involvement with non-lawyers in businesses ancillary to the practice of law such as title companies and consulting businesses, or lawyers contracting with other professional entities to provide services. At the heart of the pro-MDP movement is a desire to weaken restrictions on lawyers teaming with, and sharing fees with, non-lawyers.

The camp that favors expanding MDP essentially argues that, in reality, the practice is already well-established in Virginia. The question is simply where lines should be drawn. Proponents note that MDP helps attorneys better meet their clients’ needs. To be sure, lawyers work with accountants, financial planners and title insurance companies on a daily basis. There is every reason to believe that a lawyer working in conjunction with a “full-service financial team” will better serve his client than a lawyer who lacks financial expertise and is working alone. Under this logic, MDP merely solidifies, and legitimizes, ties that already bind.

There are, however, some troublesome aspects regarding MDP. Notably, opponents point out that it is questionable whether a lawyer can truly exercise independence in an environment governed by non-lawyers: for example, if an architectural or accounting firm stands to make millions on a deal, how likely is it that an attorney employed within their firm would be able to operate independently to raise legal concerns that would nix the deal? How difficult will it be for lawyers working together in a firm with non-lawyers to maintain client confidences and to avoid waiving the attorney-client privilege? If a non-lawyer is supervising an attorney, how respectful will the non-lawyer be toward the strict ethical duties governing lawyer conduct? Finally, perhaps from the perspective of unvarnished lawyer self-interest, many opponents to MDP point out that when MDP restrictions were loosened in Europe and Asia, the result was that many law firms on these continents were inhaled by large accounting firms.

Until these concerns are resolved, there will likely remain stiff opposition to broad changes in the rules that currently limit MDP. However, as more and more attorneys practice outside the traditional law firm setting, calls for such change may well increase. Proponents of MDP are quick to point out that barbarians have not gathered at the gates of the courthouse based upon the proliferation of in-house counsel (who answer to corporate hierarchies) or insurance defense attorneys (who are paid from one source, but represent another) — situations which pose moral conflicts similar to those raised by MDP.

While MDP has swept through other parts of the world, resistance has carried the day in America. An ABA Commission in 1999 recommended loosening restrictions against MDP; the recommendation was flatly rejected by the ABA. The Commission returned the following year with a watered-down proposal that still would have weakened limitations against MDP; again, the ABA disemboiwled the proposal. In Virginia, a Joint Commission has been created to study the question. Its report is anticipated to be released later this year.

While many of us have failed to focus on the issue, numerous commentators suggest that the debate regarding MDP will be one of the biggest clouds over the legal landscape in coming decades. It would be wise for all Virginia lawyers to contemplate the controversy, and to make an informed decision on how MDP might affect their practice and profession. Burying our heads in the sand will result in other people making the decision for us.

Frank K. Friedman
Chair, Litigation Section
When Does A Cause Of Action For Personal Injury Accrue?

by N. Reid Broughton

Traditionally, a cause of action for personal injury accrues, and the statute of limitations begins to run, when the plaintiff suffers an injury as a result of the defendant’s negligence. However, the Virginia Supreme Court apparently rejected this traditional rule in its most recent decision on accrual, *Nunnally v. Artis.* In *Nunnally,* the court determined that a plaintiff’s cause of action did not accrue until she suffered the injury for which she brought suit. Though it has garnered little attention in the intervening years, the *Nunnally* decision may have profound implications for Virginia litigants.

Virginia Code § 8.01-243 provides that a personal injury action must be brought within two years of the date the cause of action accrues. Under Virginia Code § 8.01-230, a right of action for personal injury accrues and the period prescribed by the statute of limitations begins to run when the injury is sustained. The Supreme Court has long construed “injury” to mean “positive, physical or mental hurt to the claimant.” The court has further recognized that while a legal wrong and resultant injury may occur simultaneously, they need not, and that a cause of action may, therefore, accrue after the legal wrong.

However, the focus of a cause of action has always been on the wrong. The cause of action for that wrong simply does not accrue until all of its elements — duty, breach, and resulting injury — are present. The *Locke* Court explained:

We construe the statutory word ‘injury’ to mean positive, physical or mental hurt to the claimant, not legal wrong to him in the broad sense that his legally protected interests have been invaded. Thus, the running of the time is tied to the fact of harm to the plaintiff, without which no cause of action would come into existence; it is not keyed to the date of the wrongful act, another ingredient of a personal injury cause of action.

Thus, in *Locke,* the court held that the statute of limitations began to run when the plaintiff suffered some harm proximately caused by the defendant’s breach because at that point the plaintiff had a cause of action for the breach.

In its more recent cases, the Supreme Court continued to follow this traditional view of accrual. In *St. George v. Pariser,* for example, the court held that a cause of action for misdiagnosis of a cancerous mole did not accrue until the cancer changed form. The court stated the traditional rule, “an injury is deemed to occur, and the statute of limitations period begins to run, whenever any injury, however slight, is caused by the negligent act.” Accordingly, the court determined that the issue was when “the injury St. George suffered as a result of the misdiagnosis occurred.” The court further explained:

In every misdiagnosis case, the patient has some type of medical problem at the time the physician is consulted. But the injury upon which the cause of action is based is not the original detrimental condition; it is the injury that later occurs because of the misdiagnosis and failure to treat.... The ‘injury’...is the development of the problem into a more serious condition which poses greater danger to the patient or which requires more extensive treatment.

Explaining that her original cancer could not have been caused by the physician’s negligence, the court concluded that the plaintiff’s cause of action accrued when the cancer altered its status and entered the dermis.

The Supreme Court applied the traditional rule in *Scarpa v. Melsig,* and held that a patient who underwent an ineffective sterilization procedure had no right of action though she did not discover the surgery had failed until she became pregnant years after the procedure. The court explained that although the majority of the plaintiff’s harm (i.e. the pregnancy) followed long after the procedure, she had endured “trauma, pain and inconvenience...when, due to the defendants’ alleged wrongful conduct, she was subjected to a wholly inadequate procedure and denied the adequate and

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complete sterilization which she requested." The court concluded, "Therefore, immediately upon completion of the negligently performed 1980 surgery, the plaintiff had a cause of action and a right of action to recover for the trauma, the harm, and the hurt caused during the failed procedure." As the plaintiff’s motion for judgment was filed more than two years after the procedure was performed, it was barred by the applicable statute of limitations.

Obviously, this was a harsh result. It is not fair that a woman’s right of action should be extinguished before she even knows it exists, but this is the nature of statutes of limitation. Statutes of limitation are inherently unfair, and their very purpose is to cut off potential claims, confine the liability of potential defendants, and prevent stale litigation. Further, the Virginia court has repeatedly refused to adopt a “discovery” rule, and the plaintiff’s knowledge of her injury is not a consideration in determining when her cause of action accrued. The Scarpa decision, though harsh, was in keeping with these principles.

In Nunnally v. Artis, the plaintiff presented a factual situation identical to that in Scarpa, but the court overruled Scarpa and determined that the limitations period did not begin to run until Ms. Nunnally became pregnant. The court based its decision on the fact that Nunnally had alleged a cause of action for wrongful conception. Because Nunnally sought to recover for wrongful conception, rather than the wrongful surgery, the court found that she was not injured until she suffered the injury for which she brought suit, the wrongful conception. The court explained:

Here, the injury of which Nunnally complains is not “trauma, pain, and inconvenience” that may have been associated with the negligent sterilization procedure. Rather, she complains of the consequences of the wrongful conception and the subsequent pregnancy which, for medical reasons, she sought to avoid. Indeed, we fail to understand how a plaintiff could have a cause of action for wrongful conception if there has been no conception.

Even though a legal wrong may have occurred in 1989 when the defendants performed the negligent sterilization procedure on Nunnally, we hold that no injury under the Locke accrual rule occurred at that time because Nunnally had suffered no “positive, physical or mental hurt” related to her cause of action, wrongful conception. The Nunnally Court changed the traditional rule that a cause of action accrues “whenever any injury, however slight, is caused by the negligent act” by requiring an injury “related to her cause of action.” The court treated the concept of a cause of action, not as a remedy for a wrong, but as a remedy for a particular injury, and indicated that the cause of action for a particular injury begins to run at the time of that injury. The court was correct that it is not possible to have a cause of action for wrongful conception before conception. However, this truth is relevant only because the court labeled Nunnally’s claim an action for a particular injury, wrongful conception. Had it been labeled what it also was — an action for medical malpractice — her cause of action certainly could have accrued before conception. This change in focus is potentially profound in effect.

Nunnally may be limited to the narrow circumstances at issue in that case, i.e. a cause of action for wrongful conception following an ineffective sterilization. In a defamation case decided the year after Nunnally, Jordan v. Shands, 255 Va. 492 (1998), the Supreme Court restated its traditional view regarding accrual, “We have held that when an injury is sustained in consequence of the wrongful or negligent act of another and the law affords a remedy, the statute of limitations immediately attaches.” Id. at 498. However, Jordan involved a cause of action for defamation and, arguably, a single, indivisible injury. It does not clearly impact the Nunnally decision. To date, the Supreme Court has given no indication that its reasoning in Nunnally should be limited to the facts presented therein.

Potentially, Nunnally permits a plaintiff in a proper case to determine when her cause of action accrues by choosing the injury for which she will sue. In Ms. Nunnally’s case, she sued not for Dr.
Cyber-Jurisdiction

by Ellen S. Moore

Introduction
Over the past few decades, use of the World Wide Web has risen dramatically, and the Internet itself has evolved and grown more complex. So, too, have the legal issues surrounding the Internet evolved. Two decades ago, there were less than 300 computers linked to the Internet.\(^1\) As of last year, there were more than 175 million people accessing the Internet.\(^2\) Communications between Internet users are routed throughout the United States, notwithstanding the origin and destination of the communication. These communications take a variety of forms, from the passive posting or receiving of information, to the use of interactive sites to buy and sell goods or services. As of 1999, “e-commerce” sites are estimated to have generated $18 billion in on-line commerce.\(^3\) These developments, in turn, have generated an increasing number of legal disputes, putting the onus on courts to determine how to apply historic concepts regarding the basis for personal jurisdiction to the boundary-less world of the Internet.

The courts’ latest, and now most common, approach has been to apply basic personal jurisdiction analysis to Internet activities on a “sliding scale” analysis of the interactivity of the site. Virginia courts, too, have recently integrated this sliding scale analysis in their review of Internet-related jurisdiction. Many of these same courts, however, have not diminished their focus on the perceived harm to the Virginia plaintiff or what is known as the “effects doctrine.” Indeed, application of the sliding scale analysis itself has been inconsistent from court to court, leaving potential defendants with little by way of bright-line tests with which to judge their risk of being haled into a foreign court.

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General Bases for Jurisdiction
The basic premise of personal jurisdiction analysis utilizes a two-part review under the state’s long-arm statute and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. In many states, including Virginia, this analysis is simplified by the courts’ interpreting the long-arm statute\(^4\) to be satisfied whenever the constitutional requirements are met.\(^5\)

Briefly stated, the Due Process Clause requires that no defendant be haled into court unless he has “certain minimum contacts” with the forum state “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”\(^6\) The defendant must have “purposely avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”\(^7\) Also, the exercise of jurisdiction must be “fair and reasonable” under the circumstances of the case and the “defendant’s conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there.”\(^8\)

Personal jurisdiction further may be founded on either of two theories, general or specific jurisdiction. A court exercises general jurisdiction when an action “does not arise out of the defendant’s activities in the forum state,...[but] the requisite ‘minimum contacts’ between the defendant and the forum state are ‘fairly extensive.’”\(^9\) In such a case, the defendant’s contacts must be “continuous and systematic.”\(^10\) A court may exercise specific jurisdiction when the suit arises out of the defendant’s activities in the forum state.\(^11\) When exercising specific jurisdiction over the defendant, the courts need not find extensive contacts between the defendant and the forum state, but the “fair warning” requirement of the Due Process Clause requires that the defendant have “purposely directed” its activities at the forum.\(^12\)

Judicial Analysis of Cyber-Jurisdiction
The Internet has not altered the courts’ use of traditional jurisdictional concepts; instead, the Internet merely has added a new medium, and a different dimension, to the analysis of such con-
The immunity of local government also continues to demonstrate the Court’s distinction of factual minutiæ. Traditionally, a city is immune for the regulation of traffic or a similar activity intended to protect the general public safety, that being a governmental function of a municipality, but not immune for the maintenance of city streets, a proprietary function. This past year, the Court awarded the protection to a city in a suit for tortious interference arising from its actions in acquiring real properties. The plaintiff argued essentially that the city acquired the property in question with proprietary motives, and the Court admitted that the policy at issue had some proprietary components, but found that “the principal purpose of that policy is to resolve, efficiently and without resort to litigation, disputes over the proposed use of vacant land within the City in order to control and direct development consistent with the City’s public safety concerns of vehicular traffic impacted by that development.”

Two other recent cases illustrate this willingness to interpret the facts so as to bring them within the umbrella of immunity. In *Whitley v. Commonwealth*, the court granted immunity to the defendant nurses for allegations of simple negligence arising from specific duties that were arguably ministerial, including executing physician orders regarding medication, monitoring medical records, scheduling the plaintiff for periodic review of his seizure medications, and assisting physicians in support roles. Despite the specific and objective nature of the nurse’s responsibilities, the Court found that “[a]lthough the nurses’ acts described in this record have some ministerial components, the acts themselves are discretionary in nature and require the exercise of judgment when considered in the context of the treatment rendered.” While the distinction between the discretion necessary for executing specific tasks as a nurse (discretionary, immune) and doing the same as a deputy sheriff in a squad car (ministerial, not immune) is by no means clear, there may be a logical distinction in the level of professional judgment necessary, or the level of care involved. The Court, unwilling to immunize employees from simple negligence due to ordinary driving mishaps, may see a greater state interest in protecting state employees engaging in more specialized tasks such as medicine, no matter how routine or specific.

of effectuating the governmental purpose by embracing special risks in an emergency situation.”

Within the last year, the Court faced a situation in the middle of these two cases, where an officer drove into the back of another vehicle when he was at the threshold moment of initiating pursuit of a vehicle, but where there was a factual question as to whether he had actually begun the pursuit. The Court held that because the officer “was required to exercise discretion and judgment in executing” the decision to pursue, he qualified for the defense. Thus, the Court premised immunity upon conclusions as to the state of mind of the defendant. This forecasts cases where the award of immunity comes down to the defendant’s word as to what he was thinking, and contemplates situations where there may be no other objective evidence.

Another of the Court’s recent decisions illustrates the same liberalized view toward awarding immunity. In *Whitley v. Commonwealth*, the court granted immunity to the defendant nurses for allegations of simple negligence arising from specific duties that were arguably ministerial, including executing physician orders regarding medication, monitoring medical records, scheduling the plaintiff for periodic review of his seizure medications, and assisting physicians in support roles. Despite the specific and objective nature of the nurse’s responsibilities, the Court found that “[a]lthough the nurses’ acts described in this record have some ministerial components, the acts themselves are discretionary in nature and require the exercise of judgment when considered in the context of the treatment rendered.” While the distinction between the discretion necessary for executing specific tasks as a nurse (discretionary, immune) and doing the same as a deputy sheriff in a squad car (ministerial, not immune) is by no means clear, there may be a logical distinction in the level of professional judgment necessary, or the level of care involved. The Court, unwilling to immunize employees from simple negligence due to ordinary driving mishaps, may see a greater state interest in protecting state employees engaging in more specialized tasks such as medicine, no matter how routine or specific.
Court concluded that the celebration could not qualify as a "recreational facility" under § 15.2-809.

Although numerous recent cases are finding immunity, the Court does continue to uphold the legislature's abrogation of immunity for certain actions against state agencies, even where the individual defendants responsible for the alleged harm enjoy immunity. While Whitley v. Commonwealth, above, immunized the nurses, the Court still allowed the action to proceed against the state through the Tort Claims Act. In another recent case, Linhart v. Lawson, the Court allowed suit to proceed against the defendant school board due to the abrogation of immunity in Va. Code § 22.1-194, which authorizes suit against school boards for simple negligence even if the employee responsible can be sued only for gross negligence. The Virginia Supreme Court also still respects established limits upon the award of immunity to individuals. The Court reaffirmed the standard rule that immunity will not extend to independent contractors performing services for the state in Atkinson v. Sachmo.15

Overall, it is apparent that the Virginia Supreme Court is granting immunity in most of the cases it considers. Particularly worth noting is that the Court will grant immunity in situations where the actions alleged occur in a context that has obvious ministerial components, but where some legitimate argument can be made that discretion is still a necessary component or, in the case of municipalities, that the objective involves the protection of public safety. The Court essentially rationalizes this protection as insurance that public servants will continue to put themselves into positions of individual responsibility without fear of liability, and that the state will continue to act in the public good, at least in terms of stated intent. Regardless, defense attorneys should rejoice in the factual elasticity of the court's decisions, and plaintiff's attorneys should beware of facts suggesting discretion or underlying policy clearly directed toward the public good.

Analysis

This hypothetical involves the requirement that lawyers and clients treat their communications with discretion and confidentiality if they hope to preserve the privileged nature of the communications.

A number of courts have indicated that corporations which reveal privileged information beyond those with a "need to know" risk either: (1) having the privilege not apply at all (because there is no "expectation of confidentiality"); or (2) waiving the privilege.

Although it might make sense to allow management to involve themselves in all legal matters facing the company, a corporation probably waives the privilege by widely disseminating privileged information beyond those in corporate management with a "need to know."

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

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1 Ashbury v. City of Norfolk, 152 Va. 278, 282, 147 S.E. 223, 224 (1929).
4 Colby, supra, 241 Va. at 128-9, 400 S.E.2d at 186-7.
6 241 Va. at 130, 400 S.E.2d at 187.
9 Transportation Inc. v. Falls Church, 219 Va. 1004, 1006, 254 S.E.2d 62, 64 (1979).
tacts. Some courts, especially the early reviewers of
these issues, compared the Internet with more rec-
ognized forms of communication and commerce.
For example, courts have analogized the use of
electronic mail to that of the regular postal service,
or Internet advertising to that of advertising a
product via paper communications and thereby
inserting that product into the stream of com-
merce. This analysis often falls short, however, in
taking into account the potential interactivity
allowed by the Internet and the fact that the
Internet reaches a much broader and more geo-
graphically diverse audience than do most paper-
based advertisements or publications. Many courts
therefore have adopted a sliding scale or contin­
um of characteristics of Internet presence and
inter-activity to assist in resolving the question of
just when and how much Internet presence is
enough for jurisdiction in a given forum.

As set forth in the seminal case of Zippo Mfg.
Co. v. Zippo Dot Com, Inc., 13 three general cate-
gories of Internet presence have emerged, creating
three general lines of case law addressing personal
jurisdiction issues. The first category includes pas­
sive websites, i.e., those that merely present infor­
mation without accepting information from the
viewer, taking orders, or selling or offering services
or products. Generally no jurisdiction is found
with passive sites. The second category concerns
websites with both passive and active characteris­
tics, i.e., those that allow for the exchange of some
information between the site and the viewer. Here
the court will analyze the level of inter-activity
with the customer or user in that state to deter-
mine jurisdiction. The third category includes
those websites where the provider actively con-
ducts business over the Internet, for example, by
allowing the user to enter into contracts or pur-
chase products advertised on the site. Jurisdiction
is generally found where the website is highly
interactive.

Jurisdictional determinations, however, are
very fact-dependent, and courts have not hesitated
to mold the sliding scale analysis or utilize differ­
ent jurisdictional analyses to take into account the
specific facts of a case. As revealed below, what
some courts interpret to be a purely passive web­
site, other courts hold to be at least partly active
— resulting in very different rulings concerning
very similar websites. Still other courts have set
aside the sliding scale analysis, at least on occasion,
to utilize “effects doctrine” or other analysis in
determining whether to exercise jurisdiction over a
non-resident defendant. Thus, there are no bright
line rules by which Internet users can measure
their risk of being haled into court in a foreign
jurisdiction.

Passive Websites
Courts generally find insufficient evidence to sup­
port personal jurisdiction based solely on a plain­
tiff’s accessing the passive website of a nonresident
defendant in the forum state, absent some addi­
tional showing that the nonresident defendant
purposely attempted to conduct or solicit business
in the forum state. The following sections present
a survey of cases reviewed concerning passive web­
sites.

Cases Finding No Jurisdiction
In the most recent case reviewed from April 2001,
Revell v. Lidor, 14 the United States District Court
for the Northern District of Texas, Dallas Division
followed the path set by the Fifth Circuit in adopt­
ing the sliding scale analysis with respect to juris­
diction based on Internet activities. Specifically, the
court noted that a determination must be made of
the level of interactivity and commercial nature of
the exchange of information, with active sites,
through which business is conducted, supporting a
finding of jurisdiction and passive sites, which
merely advertise or place information on the
Internet, not supporting a finding of jurisdiction.
In the case at hand, an individual had posted an
allegedly defamatory article on a website hosted by
the Columbia University School of Journalism.
The court found that this website clearly fit into
the passive website category, as there was no direct
contact between the people who post information
on the site and those who read the information.
The possibility of someone from that state reading

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Recent Law Review Articles

by R. Lee Livingston

The following are recently published Law Review articles that may prove useful to you in your practice:

Agency


Commercial Law


Evidence


Insurance Law


Jurisdiction


Legal Profession


Medical Jurisprudence


Practice and Procedure


the article was merely fortuitous circumstance, and insufficient to provide grounds for jurisdiction.

The case cited by the Revell court was the 1999 decision in Mink v. AAAA Development, LLC, by the Fifth Circuit, which followed the sliding scale analysis in determining that a Vermont company was not subject to jurisdiction in Texas for its use of a website advertisement accessible in Texas. In that case, the company did not take orders over the Internet but, instead, provided users a printable order form to mail in, the mailing address, electronic mail address and a toll free telephone number. The court found no jurisdiction over the defendant in Texas based on this passive advertisement.

In 1997, the Second Circuit in Bensusan Restaurant Corp. v. King, found jurisdiction lacking in a trademark infringement action where the Missouri-based defendant's home page was passive in nature, and merely gave the Internet user information without selling or offering to sell services or products. In this action, the plaintiff owned a New York City nightclub while the defendant owned Columbia, Missouri, nightclub of same name. The plaintiff sued in New York for trademark infringement, dilution and unfair competition due to defendant's advertisement of his business on a home page using references to plaintiff's club along with its logo and even a hyperlink to plaintiff's own home page. The defendant's website; however, contained a disclaimer distinguishing it from the New York club. New York's long-arm statute, much like Virginia's, contains provisions for finding jurisdiction over defendants who (1) commit tortious acts while inside the state or (2) commit tortious acts outside state causing injury inside state. The court found no personal jurisdiction in New York under the first provision, holding that the defendant was not physically present in New York, despite the presence of its website on the Internet. The court also found no personal jurisdiction under the second provision, noting that the New York long-arm statute also required that the defendant derive substantial revenue from the state and foresee that its conduct would have consequences in New York. The court found that the defendant derived its revenue from its local customers in Missouri and that its website was directed at Missouri residents, not New York residents.

Also in 1997, the Ninth Circuit in Cybersell, Inc. v. Cybersell, Inc., found jurisdiction lacking in a case in which the plaintiff Arizona company, with the service mark "Cybersell," brought suit in Arizona against a defendant Florida company who was using the same name and advertising it on the world wide web. The Ninth Circuit relied heavily on the district court's opinion in Bensusan, distinguishing between websites that passively provide information for any Internet user, such as the defendant's, and those interactive sites where users can exchange information. The court noted that the defendant's site provided information, including the company's local phone number and electronic mail address, but found the amount of interactivity allowed was limited to the defendant being able to receive a browser's name and address — no services could be provided, no contracts could be consummated and no products could be sold via the Internet. The court also considered the fact that there was no evidence that any Arizona resident other than the plaintiff had accessed the defendant's website, signed up for the defendant's services or entered into any contracts with the defendant, and there was no evidence that the defendant had sent any electronic mail messages to, or earned any income from, Arizona residents. Stating that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet," the court declined to exercise jurisdiction over the defendant.

Other courts that year reached similar determinations. The District Court in Kansas, in SF Hotel Co., L.P. v. Energy Investments, Inc., adopting the test found in Zippo, similarly found no jurisdiction over a nonresident defendant who maintained a passive website providing general information about its hotel with no provision for direct communication between the defendant and the Internet user. A Northern District of Illinois court, in Transcraft Corp. v. Doonan Trailer Corp.,
found no jurisdiction over a defendant based on a website providing general advertisement about defendant’s business, finding that the defendant had not thereby “entered” into Illinois in a way that contributed to the plaintiff’s injury nor specifically intended its advertisements to reach Illinois customers. A District of New Jersey court, in *Weber v. Jolly Hotels*,24 found no jurisdiction over a defendant where general information was placed on defendant’s website as an advertisement and “not as a means of conducting business,” and likening advertisements on the Internet to advertising in a national magazine, which “does not constitute ‘continuous and substantial’ contacts with the forum state.” In *Smith v. Hobby Lobby Stores, Inc.*,25 an Arkansas court found no jurisdiction in the forum where the Hong Kong-based defendant’s advertisement in a trade publication merely appeared on the Internet and was not directed at Arkansas residents and the defendant did not contract to supply any goods or services to Arkansas residents over the Internet. Finally, in *McDonough v. Fallon McElligott, Inc.*,26 the District Court for the Southern District of California found no jurisdiction over a non-resident defendant whose Internet advertising merely was accessible in the forum state.

**Cases Finding Jurisdiction**

In an early case from 1996, *Inset Systems, Inc. v. Instruction Set, Inc.*,27 the United States District Court for the District of Connecticut held that it had jurisdiction over a defendant who had supplied catalogs, provided products and initiated telephone solicitations to Connecticut customers. The plaintiff, a Connecticut corporation and holder of the trademark “INSET” sued the defendant, a Massachusetts corporation, in Connecticut, alleging trademark infringement, dilution and unfair competition as a result of Defendant’s procurement of “INSET.COM” as its Internet domain address and as part of its toll free telephone number. The court held that jurisdiction existed over the nonresident defendant based on its continuous advertisement over the Internet, which included at least 10,000 potential access sites in Connecticut, and the use and advertisement of a toll-free number on its website. The court specifically found that the exercise of this jurisdiction was satisfied under Connecticut’s long-arm statute by the defendant’s continuous advertisements over the web, which could be repeatedly accessed, and this also comprised the basis for the defendant’s minimum contacts, purposeful availment and reasonable anticipation of being haled into a Connecticut court.28

Most courts now find no jurisdiction based on this passive level of activity. *Inset* was the first published case addressing this jurisdictional issue vis-à-vis the Internet, therefore the court had little guidance at the time. However, an August 2001 Virginia case reached much the same conclusion as *Inset*, marking a split in Virginia decisions regarding so-called passive websites.29

**Websites with Both Passive and Active Characteristics**

The second type of website is the “intermediate” interactive site, where the provider allows for the exchange of certain information between it and those Internet users accessing the site. This type of site may provide various services on-line to the user. Most courts hold that these cases require an evaluation of the “level of interactivity and commercial nature of the exchange of information that occurs on the [website] before a determination of jurisdiction can be made. Cases generally find jurisdiction based on interactive websites, although a handful have found no jurisdiction on the facts presented.

**Cases Finding Personal Jurisdiction**

**Not Utilizing the Sliding Scale Analysis**

In a case falling outside of the sliding scale analysis, the Ninth Circuit, in its 1998 decision in *Panavision International L.P. v. Toeppen*,30 elected instead to follow an “effects doctrine” analysis to determine its jurisdiction over a defendant. The defendant was a “cyber-squatter,” one who registers domain names under others trademarks and offers to sell the domain names to the trademark owners for exorbitant prices. Noting that “simply registering someone else’s trademark as a domain name and posting a website on the Internet is not

*Cyber-Jurisdiction — cont’d on page 14*
Back to Basics: Some Practice Tips for Young Litigators

by The Honorable Jane Marum Roush

I am sometimes asked to speak to young lawyers about what judges like and don’t like to see in their courtrooms. Pet peeves. Do’s and don’ts. Bees in our bonnets. Practice tips. Call them what you will, every judge has “unwritten rules” that every young lawyer should follow in order to present his or her case in the best possible light. At the request of the Young Lawyer’s Committee of the Litigation Section of the Virginia State Bar, I am committing my heretofore unwritten rules to writing:

Know the Local Rules, Practices and Procedures
If you are new to the practice of law in a jurisdiction, talk to experienced practitioners. They are always willing to assist a young lawyer in learning the lay of the land. Join the Bar Association. Take advantage of CLE’s, particularly at the local level.

Observe the Highest Standards of Professionalism
Remember: you are young and will be around for a long time. Too often, young lawyers mistake nastiness and aggression as zealous representation of their clients. Always be fair and courteous to opposing counsel, you’ll meet him or her again in many contexts throughout your career. As a wise person once told me: “Be nice to those you meet on your way up, you’ll meet them again on your way down.”

Don’t Snipe at Opposing Counsel
Don’t direct any comments at all to opposing counsel at all. Direct all your comments to the Court.

Don’t Adopt the Client’s Case as Your Own
Be careful to maintain the line between zealous representation of your client and adopting the client’s case as your own. A lawyer loses all effectiveness as an advocate for the client when he or she overly identifies with the client’s position.

Be Forthright in Your Representations to the Court; Your Reputation is Everything
Judges talk about you! (For good and for bad.) Point out adverse controlling authority to the court. You may lose your motion, or even your case, but you will have fulfilled your obligations as an officer of the Court and impressed the judge with your candor. Conversely, if you get caught in representing a half-truth (or worse) to the Court, your name will be mud very quickly. From my experience, there appears to be no statute of limitations for such misconduct. The judge will always consider you as someone whose word cannot be trusted. There is nothing more devastating for an attorney than to be known as one who plays fast and loose with his or her representations to the Court.

Always Introduce Yourself and Identify Your Client to the Judge
Don’t assume the judge knows you. Introduce yourself to the judge even if you are the judge’s former law clerk. It’s common courtesy to introduce yourself at the beginning of every court proceeding and tell the Court whom you represent.

Take Your Cues from the Judge
All judges try to help out young lawyers. Listen closely—the judge is usually trying to tell you something if you are floundering. For example, the judge might say, “I’m inclined to grant the motion to strike, unless you would like to make a motion first.” The judge is sending you a big hint that you might want to take a nonsuit.

Don’t Expect the Judge to Make Your Motions or Objections for You
Lawyers sometimes expect judges to make their motions for them or to correct objectionable matters without anyone having objected. For example, if a

The Honorable Jane Marum Roush is a judge with the Circuit Court of Fairfax County, Virginia.
potential juror states in voir dire that he can’t be fair, don’t just look at the judge pleadingly and expect the judge to excuse the juror. You need to move to exclude the juror for cause. Don’t ask or expect the judge to rehabilitate jurors for you. If a prosecutor makes an improper argument that warrants a mistrial, the defense attorney needs to do more than object and say “However you honor wants to handle it.” It’s counsel’s job to make a motion for a mistrial and ask the judge to rule on that motion.

Don’t Ask the Judge to Let You Know What Evidence Will Prove Your Case
The judge is not your senior partner, there to guide you in selecting the evidence that will win your case. Lawyers frequently ask me whether or not I want to hear from a particular witness. In a child custody case, a lawyer will say: “You honor, I have the children here if your honor would like to hear from the children.” Don’t ask the judge if the judge would like to hear from a witness. Call your witness!

Know The Rules Of Evidence
Study the treatises Friend on Evidence and Virginia Evidentiary Foundations in your spare time. If you practice in federal court, read and reread the Federal Evidence Manual just for fun. Go to CLEs on trial practice and evidence.

Be Nice to the Clerk’s Office
Get to know the court clerks. They are a young lawyer’s best friends. Practically every clerk’s office in Virginia has a sign posted prominently warning that the “Clerks are Not Allowed to Give Legal Advice.” What the signs don’t say is that the clerks are not allowed to give legal advice to non-lawyers. Court clerks can and frequently do give very sound legal advice to lawyers (and judges).

Don’t Harangue the Judge’s Courtroom Staff
Our law clerks, our courtroom clerks and our bailiffs are our staff. We are very close to them. We are loyal to them and protective of them. If you are rude or abusive to them, the judge will hear about it and will find it difficult to forget.

Loose Lips Sink Ships
Watch what you say in and around the courthouse. The bailiff and other court personnel will report everything. Don’t ask the bailiff (as a lawyer once asked my bailiff): “Is there any way we can get any other judge besides Judge Roush?” It will be reported to the judge in a nanosecond. Watch what you say in elevators, lunch lines, rest rooms, etc. at the courthouse and advise your clients to do the same.

Familiarize Yourself With the Judge’s Rules of Courtroom Decorum
Ask the bailiff ahead of time what the judge likes and dislikes. Don’t be afraid to ask the judge. For example, “Does Your Honor mind if I leave the podium when I am making my opening statement?”

Be True to Your Time Estimates
It shows respect for the Court, the court personnel and your fellow attorneys. When in doubt, overestimate how long your case will take. No judge ever got mad at an attorney for completing his or her case ahead of schedule.

Don’t Argue with the Court After an Adverse Ruling Is Made
There is no need to make “vigorously” or “strenuously” objections. Don’t whine. If you think the judge has made a mistake, file a motion to reconsider. If you disagree with the judge’s ruling, file an appeal. Particularly in a civil case, you need not say “Note my exception” after every adverse ruling.

Don’t Make Every Objection Known to Man
It only annoys the fact finder, whether it’s a judge or the jury. Don’t object to hearsay if it’s good hearsay that helps your case.

Don’t Make Speaking Objections
Stand up and state the legal grounds for your objection. It’s usually one or two words. “Hearsay.” “Irrelevant.” “Beyond the scope of direct.” “Assumes facts not in evidence.” “Leading.” “Argumentative.” “Badgering.” “Bolstering.” If the judge wants more argument, the judge will ask for it. The most egregious violation of this rule I ever heard was: “Objection, he knows that’s a lie!” Hint: “Self-serving” is never a winning objection. Of course the evidence is self-serving. Why else would your opponent be introducing it?

View from the Bench — cont’d on page 21
sufficient to subject a party domiciled in one state to jurisdiction in another," the court nevertheless found jurisdiction over the defendant based on his scheme to register the domain name for the purpose of extorting money from the plaintiff in California. The Ninth Circuit Court of Appeals further found that the defendant knew his actions would injure the plaintiff in California, and, based on "effects doctrine," i.e., the defendant's conduct was aimed at or had an effect on the plaintiff in the forum state, the purposeful availment requirement necessary for specific jurisdiction was thus satisfied. 31 The court further found that the claim "at[ose]" out of the defendant's forum related activities in that Panavision's injuries in California arose from his registration of the domain names on the Internet.32

The United States District Court for the Western District of North Carolina, Shelby Division, in Superguide Corp. v. Kogan decision,33 also found jurisdiction over a nonresident defendant based on the defendant's website advertisement of products to forum state residents. From that advertisement, the court inferred that the defendant had conducted "substantial activity" in North Carolina, assuming that it would have had a large number of "hits" or visits to its Internet site by North Carolina residents and that a number of the North Carolina visitors would have utilized the defendant's services.34 The court observed: "Similar to a fisherman on the bank with his line in the water, a website is established, a product is offered, and the business waits for customers."35 As with the Panavision case, the Superguide court held that the defendant's Internet contacts were related to the action at hand, in this case a declaratory judgment action concerning a trademark dispute.

The author notes that the partly "active" nature of these cases appear only in the allegedly illicit activities of the defendants and not in the nature of the websites, which were not reported as being interactive. Under a sliding scale examination of the above websites, however, they likely would have been viewed as passive sites by other courts.

Utilizing the Sliding Scale Analysis
The Ninth Circuit thus ignored what is perhaps the most recognized case, which created the sliding scale analysis of Internet jurisdiction, Zippo Manufacturing Co. v. Zippo Dot Com, Inc.36 In Zippo, the Pennsylvania-based Zippo Manufacturing Company sued the California-based Zippo Dot Com, an Internet news service that had created the domain names zippo.com, zippo.net, and zipponews.com, all of which Zippo contended infringed its trademarks. Zippo Dot Com's websites contained an on-line application by which subscribers could complete the application, make payment to Zippo Dot Com for its news service, obtain a password, and view or download news. Zippo Dot Com had 3,000 subscribers in Pennsylvania and had agreements with seven Internet Service Providers in Pennsylvania to permit access to their subscribers. The court found jurisdiction based on Zippo Dot Com's "conducting of electronic commerce with Pennsylvania residents," which constituted a "purposeful availment of doing business in Pennsylvania."37

Massachusetts, in Hasbro v. Clue Computing, Inc,38 found jurisdiction over a Colorado corporation that utilized a partially-interactive website that could be accessed by Massachusetts citizens. Hasbro, a Rhode Island corporation, with facilities in Massachusetts and owner of the "Clue" trademark for its popular board game, sued Clue Computing, a Colorado corporation, in Massachusetts for trademark infringement arising from Defendant's Internet domain name "Clue.com." Hasbro's largest facility was in Massachusetts, and Parker Brothers and Hasbro Interactive, the developers and marketers of the board and electronic versions of the Clue game were in Massachusetts, as would be all of plaintiff's witnesses. Although the court recognized that Defendant's website was published from Colorado, it was available 24 hours a day to Massachusetts residents and offered to provide services to any customer site, including for Massachusetts residents. Noting that a conceded purpose of the home page was to attract more customers from all
states, including Massachusetts, and that the defendant’s website was interactive, encouraging and enabling users to communicate with the company via electronic mail, the court found that the defendant was regularly soliciting business in Massachusetts, sufficient for the imposition of jurisdiction over the defendant under Massachusetts’s long-arm statute. 39

Similarly, in American Network, Inc. v. Access America/Connect Atlanta, Inc.,40 the Southern District of New York found jurisdiction over a non-resident defendant who was attempting to reach the New York market through its website and had signed up subscribers to its business in the forum state. Also, in Heroes, Inc. v. Heroes Foundation,41 the District of Columbia court found jurisdiction based on a non-resident defendant’s solicitation of donations through its home page.

**Cases Finding No Jurisdiction**

**Not Utilizing the Sliding Scale Analysis**

In Kubik v. Route 252,42 the Pennsylvania Superior Court upheld the Philadelphia Court of Common Pleas finding that a Delaware restaurant’s on-line advertisements, which included driving directions to the restaurant, a newsletter and the on-line sale of gift certificates, were not sufficient to elicit jurisdiction over the restaurant in Pennsylvania. The plaintiff in that case allegedly had been injured when his chair collapsed while he was dining at the restaurant. The state court declined to follow the sliding scale analysis adopted by the Eastern District Court of Pennsylvania in Blackburn v. Walker Oriental Rug Galleries, Inc.43 and instead analyzed whether the activities on the website constituted “regularly conducted business” in Pennsylvania. Likening the web-site advertisements to phone book and newspaper advertisements, the court held that the web-site advertisements did not constitute “regularly conducted business” in that state. The court analyzed the sale of gift certificates via the Internet separately, however, but rejected that as a basis for jurisdiction where the sale of gift certificates was merely incidental to the restaurant’s regular business.

In CD Solutions, Inc. v. Tooker,44 the District Court for the Northern District of Texas merely looked for, and found lacking, the basis for specific jurisdiction over the defendant, although the defendant advertised and sold its services over the Internet. The court found that the plaintiff’s claims did not arise from defendant’s Internet contacts with the forum state and thus declined to exercise jurisdiction over the defendant.

**Utilizing the Sliding Scale Analysis**

The District Court for the Northern District of Alabama, in Butler v. Beer Across America,45 reviewed a case in which the plaintiff’s minor son in Alabama ordered beer from the defendant Illinois company’s website to be delivered to his Alabama residence. The court concluded the defendant’s semi-interactive website was insufficient to satisfy minimum contacts requirements under the Due Process Clause. The defendant’s website did not provide for the regular exchange of information by users; instead, it simply had a limited order form that could be completed and submitted like a reply card in the mail. The court further found no general jurisdiction over the defendant because it was not registered to do business in Alabama, did not own property in Alabama, did not have offices in Alabama, key employees had never visited Alabama and it did not advertise with Alabama media. The court also found no specific jurisdiction because the defendant never directly solicited the plaintiff’s son; instead, it made a single sale to him based on the minor’s contact with the defendant.

In Hearst Corp. v. Goldberger,46 the District Court for the Southern District of New York found no jurisdiction over the non-resident defendant because, although forum state residents accessed the defendant’s website, the defendant had not contracted to sell or sold any products or services in New York. The defendant merely maintained the website to advertise future services available through a business the defendant planned to create. The court discounted the fact that the defendant had sent electronic mail messages to New York, analogizing them to telephone calls or
correspondence too insignificant to establish jurisdiction. Further, the court expressed concern about creating a national, or even world-wide, jurisdiction based on the establishment of a website.

**Active Websites**
The third type of website is one by which the provider actively conducts its business over the Internet, by displaying product or service information and allowing the user to enter into contracts and purchase the products or services advertised, most often charged to a credit card number given by the user. Courts generally have no trouble finding personal jurisdiction over providers of such sites.

The Tenth Circuit Court of Appeals, in *Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*, found jurisdiction over a Delaware company that “purposefully availed” itself of the plaintiff, an Oklahoma server, for months after receiving notice from the plaintiff that it was mistakenly routing its customers electronic mail messages through the plaintiff’s server. The plaintiff Oklahoma company was an Internet service provider for Internet and electronic mail services under the domain name icon.net. The defendant Delaware company offered dial-up Internet service through global service providers, including a company called Icon CMT that used the iconnet.net domain name. The defendant mistakenly routed its customers' emails through the plaintiff’s server rather than through Icon CMT’s server. The plaintiff complained repeatedly, but the defendant failed to correct the problem for many months. Based on these facts, the Tenth Circuit Court of Appeals concluded that jurisdiction was appropriate in Oklahoma.

The Sixth Circuit, in *Compuserve, Inc. v. Patterson*, found jurisdiction to be appropriate in a suit for trademark infringement based on the highly interactive nature of the defendant’s Internet contacts with the forum state. The court held that, unlike a passive website provider, the defendants in this case had “reached out” from Texas to Ohio and had “originated and maintained” contacts with Ohio sufficient to satisfy due process analysis. Specifically, the defendant had entered into an agreement with Compuserve by which the defendant transferred its software products to the Compuserve system in Ohio, Compuserve stored and displayed those items to its customers and facilitated the sale of those items in Ohio and elsewhere, and Compuserve subsequently transmitted the resulting purchase money from Ohio to Texas. The court also concluded that jurisdiction over the non-resident defendants was reasonable given that the defendants knowingly contracted with plaintiff, an Ohio corporation, for Internet access and to distribute the defendants’ computer software via its Internet network.

**Cyber-Jurisdiction In Virginia Courts**
Virginia court decisions, within themselves, mimic the spread of determinations found throughout the rest of the United States’ courts. Some Virginia courts clearly have adopted the sliding scale analysis, while others have chosen not to.

**Active Websites**

**Case Finding No Jurisdiction (Utilizing the Sliding Scale Analysis)**
In *Weinstein v. Todd Marine Enterprises*, the District Court for the Eastern District of Virginia dismissed the action for lack of jurisdiction over the defendant. The case was for breach of contract and fraud in connection with the sale of seven cruisers to a Virginia plaintiff. The court found jurisdiction to be inappropriate because the defendant had not even advertised its own web page in Virginia. Rather, its information had been made available on an on-line classified advertisement site.

**Case Finding Personal Jurisdiction (Utilizing the Sliding Scale Analysis)**
In a not-yet-published August 9, 2001, decision by Judge Williams in the District Court in Big Stone Gap, it appears that the court found jurisdiction over a defendant for its use of a passive website based on the application of the effects doctrine. In that case, the plaintiff, Wallens
Ridge State Prison warden Stanley Young, sued two Connecticut newspapers for making allegedly false statements against him depicting him as bigoted, lying and unfit to run a prison. The court stated that the case revolves around “where acts and omissions conducted in cyberspace actually occur.” In this case, according to the court, the acts or omissions took place in Virginia. The court noted that the defendants referred to the Virginia plaintiff and the Virginia correctional system in the articles that are the subject of this claim, and therefore the defendants should have been aware that any harm suffered by the plaintiff would occur in Virginia. Rejecting the defendants’ argument that it would be unfair to subject them to worldwide jurisdiction for merely posting information on the Internet, the court noted that the defendants are part of the news media, and therefore the product that they offer to the public is information. This information, according to the decision, could be accessed by people in Virginia and thus was “present” in Virginia.

**Websites with Both Passive and Active Characteristics**

**Case Finding Jurisdiction**

In *Telco Communications v. An Apple A Day*, the District Court for the Eastern District of Virginia utilized something of a hybrid sliding scale and effects doctrine analysis in holding that the nonresident defendant was subject to Virginia’s jurisdiction in a suit alleging defamation, tortious interference with contract and business conspiracy. Plaintiff Telco, a Virginia corporation, sued defendant Apple, a Missouri corporation, in Virginia for two press releases over the Internet that the plaintiff allegedly defamed its business. In conducting its jurisdictional analysis, the court recognized the distinction between a passive website “that does little more than make information available to those who are interested in it,” and which does not provide grounds for personal jurisdiction over the provider, and an “active” site, which, in this case, gave readers a phone number to call in order to solicit their business. The court found that the defendant’s “posting a Website advertisement or solicitation constitutes a persistent course of conduct, and that the two or three press releases rise to the level of regularly doing or soliciting business” under subsection (A)(4) of Virginia’s long arm statute; also, the court found jurisdiction under subsection (A)(3) providing for personal jurisdiction over a person who causes “tortious injury by an act or omission in” Virginia. The court further found that the service defendants used distributed the information to several Virginia consumer information facilities, including America Online, which is headquartered in the forum district, and NationsBank. Thus the allegedly defamatory speech was made available in Virginia, plaintiff was a Virginia resident, and its effects were felt in Virginia. The court further found that the defendants should have known that the material would be distributed to Virginia, where the plaintiff was located, and therefore could have reasonably expected to be haled into court in Virginia, such that no Due Process concerns arose in the case.

**Active Websites**

**Case Finding Jurisdiction**

In *Designs88, Ltd. v. Power Uptik Productions, LLC*, the District Court for the Western District of Virginia adhered to the sliding scale analysis in holding that jurisdiction was appropriate over defendants involved in a membership-based website on day trading. The court noted that “mere access to a passive website in the forum state is insufficient to support a finding of personal jurisdiction.” In this case, however, the defendants allegedly solicited and maintained a relationship with the plaintiff to design, implement and maintain the defendants’ website, which the plaintiff worked on in Virginia. The court rejected the defendants’ argument that the physical location of the plaintiff was irrelevant to his work, which existed “only in cyberspace,” noting that “[t]here being no District Court of Cyberspace, the defendants’ argument that laboring on the Internet defeats traditional personal jurisdiction is unpersuasive; Defendants will have to settle begrudgingly for the Western District of Virginia.”

*Cyber-Jurisdiction — cont’d on page 18*
In *Alitalia-Linee Aeree Italiane v. Casinoalitalia.com*, the District Court for the Eastern District of Virginia applied a hybrid analysis in holding that it could exercise jurisdiction over a non-resident defendant who operated a highly interactive website that allowed for the formation of contracts, gambling on-line and the generation of profits from Virginia customers. In this case brought under the Anticybersquatting Consumer Protection Act, the plaintiff, an Italian airline, sued the defendant, a Dominican Republic entity, for using a similar domain name for its on-line gambling business. Analyzing the case first under the “effects doctrine,” the court found that the defendant had caused tortious injury in Virginia by its commission of a tortious act outside of Virginia, by infringing on the plaintiff’s trademark, causing the likelihood of confusion and mistake by Virginia customers and diluting the quality of plaintiff’s mark. The court further found that a defendant who conducts advertising and soliciting over the Internet, which can be accessed by a Virginia resident 24 hours a day, does so regularly for purposes of Virginia’s long-arm statute. Lastly, the Virginia court applied the sliding scale or “continuum” analysis of Internet jurisdiction, looking at the level of interactivity and the commercial nature of the website. Here, the defendant had online casino gambling that was very interactive in nature, five Virginia customers and had earned money from its interactions with such customers. The court held that the defendant thus had engaged in ongoing business transactions in Virginia and the minimum contacts required by the Due Process Clause were satisfied.

In the 1999 case of *Coastal Video Communications Corp. v. The Staywell Corp.*, the District Court for the Eastern District of Virginia raised the possibility that general jurisdiction could be exercised over a defendant where its Internet-based contacts with the forum state were so “continuous and systematic” that the “defendant may be subject to suit for causes of action entirely distinct from the in-state activities.” The court found that the defendant, in this case a website owner offering the sale of its publication over the Internet, offered an “on-line storefront that is readily accessible to every person in Virginia” who could access the world wide web, but held that further discovery would be necessary to determine whether there was sufficient activity between Virginia residents and the website to justify general jurisdiction. It should be noted that the defendant also conducted non-Internet business in Virginia. The court further held that specific jurisdiction was lacking because the there was no evidence that the publication subject to the copyright dispute between the parties was ever sold in Virginia.

Conclusion
As evidenced by the cases above, while the sliding scale formula provides some guidance to counsel and their clients, even so-called passive websites can expose an Internet user to suit in a foreign jurisdiction. Many courts still utilize the “effects doctrine” in their analysis of Internet-related cases, whether or not they also recognize the sliding scale analysis established in *Zippo*. Moreover, courts have been somewhat inconsistent in applying the sliding scale analysis when they do utilize that test; for example, what one court deems to be a passive website, another court finds to be active in nature. Counsel should keep this in mind when advising individuals and businesses seeking to expand their audience for advertisements or information via the Internet. There are no sure answers for those utilizing the Internet regarding where they may be haled into court.

4. See, e.g., § 8.01-328.1 of the Code of Virginia.
5. See, e.g., Asahi Metal Indus. v. Superior Court, 480 U.S. 102, 106 (1987); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414
Across America, diction when the website provides a telephone number, and holding that the website was an “active” site); [28] 161 F.3d 1316 (9th Cir. 1998).

31 Id. at 1322.

32 Id. (stating that the plaintiff Panavision would not have been injured “but for” the defendant’s conduct which was directed towards the plaintiff in California).


34 Id. at 14-15.

35 Id. at 13.

36 1997 F. Supp. 1119 (W.D. Pa. 1997). As stated above, this court was the first to expressly recognize the sliding scale of Internet activity, separating cases in which: (1) the defendant clearly does business over the Internet, as signaled by “the knowing and repeated transmission of computer files over the Internet,” where jurisdiction clearly exists; (2) the defendant conducts some limited business via its website, where the jurisdictional inquiry is determined by the “level of interactivity and commercial nature of the exchange of information” on the website; and (3) the defendant has a purely passive website that does nothing more than advertise, where jurisdiction generally will not exist based on the existence of the website alone. Id.

37 Id. at 1124-1127.


Cyber-Jurisdiction — cont’d on page 20
Transcraft did not target its advertisements to customers in the plaintiff's forum or conduct business in that forum via the Internet).

42 PICS Case No. 00-2252 (Pa. Super. Nov. 17, 2000) (discussed in Lori Litchmanof, Civil Practice, LAW WEEKLY (Nov. 27, 2000)).
45 1997 F. Supp. 17 (N.D. Tex May 9, 1997).
46 See also Mink v. AAAA Development, LLC, 190 F.3d 333 (5th Cir. 1999) (finding website advertisements with toll free numbers to be passive websites).
49 977 F. Supp. at 407.
51 Id. at 877.
54 Id. at 565.
55 Id. at 568.
56 Id. at 569.
57 Id. at 570.
58 Id. at 571.
59 Id. at 572.
60 Id. at 573.

Cyber-Jurisdiction

Artis’ allegedly negligent surgery and her immediate injury but for her later conception. Under Locke, her cause of action would have accrued when she suffered the first injury as a proximate consequence of the defendant’s breach, i.e., at the time of her surgery, but the Nunnally court held that it did not accrue until she suffered the injury for which she sued. Obviously, this is a dramatic change in the law.

Unfortunately, no reported decisions have examined Nunnally in the several years since it was decided. Those decisions that have cited Nunnally have done so only in passing. Thus, it is difficult to determine exactly how far reaching Nunnally’s effect might be. However, it has the potential to mark a profound change in the law of accrual.

3 Id.
4 Id. at 957.
5 Id. at 957-58.
6 Id. at 959. See also Richmond Redevelopment and Housing Authority v. Laburnum Constr. Corp., 195 Va. 827, 839 (1954) (“Therefore, as a general rule, where an injury, though slight, is sustained in consequence of the wrongful or negligent act of another and the law affords a remedy therefore the statute of limitations attaches at once.”).
8 Id. at 332.
9 Id.
10 Id. at 334 (citations omitted).
11 Id.
13 Id. at 513.
14 Id.
17 Nunnally, 254 Va. at 252 (emphasis added).
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Don’t Make Objections that Signal the Witness How to Answer
During cross-examination, lawyers often object in such a way that is patently designed to let the witness know how to answer a question. For example, “Objection, your honor, there’s no way he could know that — he’s not a doctor.” The witness then (surprise, surprise!) answers: “I don’t know, I’m not a doctor.”

Maintain a Poker Face
No frowns, glares, grimaces, smirks, rolling eyes, furrowed brows, signaling your witness. Instruct your clients and witnesses to do the same.

Don’t Make a Motion to Strike in the Presence of the Jury
If the judge denies it, the jury will think the judge (who knows the law better than they do) thinks there is merit to your opponent’s case.

Avoid Ex Parte Communications with the Court
Avoid letters to the judge, even if you “c.c.” the other side, unless it is about a purely administrative matter. If your opponent is writing improper letters to the court, don’t feel you need to match their letter with your letter. If you have something to say to the judge, put it in the form of a motion (or other pleading), file it with the clerk’s office and notice your opponent.

Get into Court as Much as You Can
Take court appointed work. Do pro bono work. Observe the experienced attorneys in action every chance you can get.

If you follow these simple, time-tested rules, I guarantee you that you will be considered (at least by me) as a fine, upstanding, ethical, and effective lawyer. Of course, there are 385 other state court trial judges in Virginia, and each has his or her own unwritten rules.
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Ethics at a Glance

**Ethics in the Information Age**

by Thomas E. Spahn

**Hypothetical**

You have taken several months to set up a computer network that links your company’s law department with senior management at all of your company’s locations. Although not all of the management is involved in every issue on which there will be communications over the network, you think it makes sense for management to “stay in touch” with company problems even if they are not involved.

Are communications over the network likely to be protected by the attorney-client privilege?

*(Analysis inside on page 7)*