Virginia’s “New” New Business Rule
by Robert E. Scully, Jr.

For more than 70 years it has been a truism of Virginia damage law that a plaintiff cannot recover lost future profit damages caused by a defendant’s destruction of his new or unestablished business. Clark v. Scott, 258 Va. 296, 520 S.E.2d 366 (1999); Scheduled Airlines Traffic Offices, Inc. v. Objective: Inc., 180 F.3d 583 (4th Cir. 1999); Mullen v. Brantley, 213 Va. 765, 195 S.E.2d 696 (1973) (collecting cases).


Damages for lost profits of a new or unestablished business may be recoverable upon proper proof. A party shall not be deemed to have failed to prove lost profits because the new or unestablished business has no history of profits. Such damages for a new or unestablished business shall not be recoverable in wrongful death or personal injury actions other than actions for defamation.

Will this statute revolutionize contract and business tort damages in Virginia? Will the proverbial floodgates open up, resulting in huge lost future profit damage awards to plaintiffs? Only time will tell. However, the experience in other jurisdictions suggests that the answer is no.

The new Virginia statute eliminates the per se rule that a new or unestablished business without a history of profits cannot recover lost future profits. 

New Business — cont’d on page 12

Table of Contents

Virginia’s “New” New Business Rule........... 1
by Robert E. Scully, Jr.
Letter from the Chair.......................... 2
Blue-Pencil Clauses in Covenants Not to Compete: Be Careful What You Ask For...... 3
by William H. Shewmake
Legal Malpractice Claims After O’Connell v. Betts: “Contort” or Contortion?....... 10
by William E. Schmidt
Appellate Alley:
Selecting the Right Issue for Review........... 10
by William H. Shewmake
Recent Law Review Articles.................... 11
Litigation Section Board of Governors......... 18
Young Lawyers Committee........................ 19
Ethics at a Glance:
Ethics in the Information Age.................. back cover
by Thomas E. Spahn
The Year in Review

They say the years go by faster as we grow older. If my year as chairman of the Litigation Section’s Board of Governors is any indication, they are right.

As I look back on my time on the board, I think mostly of how fortunate I have been to have had the opportunity to work with such a wonderful and talented group of people. The current board is outstanding and has certainly made my job easy. As this issue of Litigation News goes to print, the Litigation Section’s web page is being set up. It will contain, among other things, all of the informative articles from past issues of the newsletter. Lee Livingston has provided another year of excellent work as editor of the newsletter. Ann Crenshaw has been instrumental in getting the web page up and running.

Every member of the board has provided valuable service to the Section over the course of the year. Board meetings have been well attended, and board members have diligently sought out and written newsletter articles, taken part in special projects, and discussed and resolved a wide variety of Section business.

Practice Subcommittee, which just completed a very successful program featuring comments from Justice Lacy; Kevin Mottley is spearheading efforts for the Young Lawyers Committee to sponsor an informative and ambitious CLE program next year; Paul Black has helped put together (with the Bench-Bar Committee) the Section’s CLE workshop program at the Summer Bar Conference in Virginia Beach entitled “Jury Orientation and Management: Practical and Ethical Issues and Solutions”; Sam Meekins has been our financial guru; Glenn Pulley, the Section’s past chair, took responsibility for the Section’s excellent issue of the Virginia Lawyer published earlier this year. All of the members of the board have played an active role in keeping the Section on track. In addition, our Section liaison, Pat Sliger, offered invaluable assistance, for which I have been very grateful.

I pass on the ceremonial gavel to Tom Albro. I know that he will do an outstanding job as chair of the Board of Governors for 2002-03. For me, it has been an enjoyable job because of the people who have been around me. But the time went by very quickly...
Blue-Pencil Clauses in Covenants Not to Compete: Be Careful What You Ask For

by William H. Shewmake

Drafting a covenant not to compete in an employment contract is a difficult and perilous task because of special rules that apply to such covenants. Covenants not to compete in employment contracts are disfavored under Virginia law, and consequently the covenant will be strictly construed against the employer. *Motion Control Systems Inc. v. East*, 262 Va. 33, 546 S.E.2d 424 (2001).

Because covenants not to compete are disfavored, courts will allow an employee to perform post-employment competitive activities so long as there is any plausible basis to strike down the covenant or narrow the scope of the covenant so that it does not apply to the activity in question. This strict construction can take two radically different forms. If the covenant is capable of being narrowly interpreted not to cover the former employee’s subsequent activities, the Court will adopt that interpretation. *Clinch Valley Physicians, Inc. v. Garcia*, 243 Va. 286, 414 S.E.2d 599 (1992) (The covenant not to compete prohibited similar employment in a defined geographic location if the employment was terminated for any reason whatsoever. The Court construed the contract to mean that the covenant applied only if the employment contract was terminated by the employer for cause.) *Linville v. Servisoft of Va., Inc.*, 211 Va. 53, 55, 174 S.E.2d 785, 787 (1970). (Covenant not to compete that prohibited employee from working with any competitor does not prohibit employee from competing as a sole proprietor.) Conversely, if the covenant not to compete is susceptible to two interpretations, one of which would be enforceable and the other which would not, the Court will adopt the broader interpretation in order to strike down the covenant as invalid and unenforceable. *Power Distribution, Inc. v. Emergency Power Engineering, Inc.*, 569 F.Supp. 54 (E.D.Va. 1983). (Court will adopt the broader interpretation in order to strike down the covenant. Subjecting employee to an ambiguous covenant violates sound public policy.)

Faced with such strict construction, many drafters include language in the covenant not to compete that gives a court authority to reduce the scope of the covenant not to compete if the court determines that the covenant is overbroad. This is commonly referred to as a blue-pencil provision. These drafters understand that absent such a provision, Virginia courts will not rewrite an overly-broad covenant but will instead simply strike it down. *Cliff Simmons Roofing, Inc. v. Cash*, 49 VCO 156 (1999).

Drafters will include a blue-pencil provision in the hope that such an express contractual provision will confer upon a court the ability to rewrite the contract. Having included a blue-pencil provision, some drafters will proceed to write a draconian covenant not to compete, relying upon a court to modify it if necessary. These drafters believe such a strategy will maximize the scope of the covenant and intimidate former employees because they will be uncertain as to their rights. Other drafters recognize that the blue-pencil provision may well be unenforceable, but will include the provision in an otherwise narrow covenant in the belief that it will not hurt and might help. As set forth below, both rationales are flawed.

Deciding whether to include a blue-pencil clause in a contract involves a two-step process. The draftsman must first decide whether the clause is enforceable and, if not, whether including the clause represents any risk to the validity...
of the entire covenant not to compete. Although the Supreme Court of Virginia has not decided the issue directly, it likely will find that a contractual blue-pencil provision violates sound public policy. In turn, because the blue-pencil provision is invalid, the entire covenant may well be struck down. Thus, a proper analysis leads to the conclusion that the risks associated with such a clause outweigh the possible benefit.

The Supreme Court of Virginia Probably Will Hold that a Blue-Pencil Clause Is Unenforceable

In the absence of a blue-pencil clause in the covenant not to compete, courts uniformly have held that Virginia public policy prohibits a court from rewriting or narrowing an unenforceable covenant in order to render it enforceable. Alston Studios, Inc. v. Lloyd V. Gress Associates, 492 F.2d 279, 283-85 (4th Cir. 1974) (Declining to narrow the covenant.) Grant v. Carotek, Inc., 737 F.2d 410, 412 (4th Cir. 1984). Other federal and Virginia circuit court decisions have followed and adopted this interpretation of Virginia law. Cliff Simmons Roofing Inc. v. Cash, 49 VCO 156 (1999); Roto-Die Co. v. Lesser, 899 F.Supp. 1515, 1523 (W.D.Va. 1995).

While the Supreme Court of Virginia has not expressly rejected the blue-pencil rule, the Court, in striking down covenants, has cited and quoted with approval a federal decision that rejected the blue-pencil rule. Meissel v. Finley, 198 Va. 577, 579, 95 S.E.2d 186, 188 (1956); Richardson v. Paxton, 203 Va. 790, 794, 127 S.E.2d 113, 117 (1962). The special rules of construction applicable to covenants not to compete, which the Supreme Court of Virginia has enunciated, also implicitly reject any ability to “blue-pencil” an invalid covenant. For example, the Court has held that in addition to general rules of contract construction, special legal principles apply to covenants not to compete, because such covenants are disfavored as restrictions on trade. Under these special legal principles, the employer must prove that the covenant is not overbroad in light of the employer’s legitimate interests. The employer must also prove that the covenant is not unduly harsh on the employee. Motion Control Systems, supra, 262 Va. at 37, 546 S.E.2d at 425-26.

In applying the above legal principles, the Supreme Court of Virginia has not hesitated to strike down a covenant not to compete that could be interpreted as overbroad. The Court also has refused to analyze the subjective intent of the parties whenever it construes the covenant. Linville v. Servisoft of Va., Inc., 211
Legal Malpractice
Claims After O’Connell v. Bean: “Contort” or Contortion?

by Arthur E. Schmalz

The Supreme Court of Virginia’s January 22, 2002 decision in O’Connell v. Bean represents a noteworthy development in the law of legal malpractice and professional negligence. The Court’s ruling establishes that legal malpractice claims are, fundamentally, breaches of contract, despite having some distinctly tort-like attributes. As a result, punitive damages are now unavailable in most legal malpractice cases, and likely other professional negligence suits as well. They can be recovered only where the misconduct at issue amounts to a willful tort that is independent from the professional’s duty to follow the appropriate standards of care. O’Connell likely will be warmly received by the defense bar and malpractice insurance carriers.

As explained below, just seven years earlier, the Supreme Court had appeared to embrace a tort-oriented view of legal malpractice claims, holding that contributory negligence could be asserted as a defense to such claims. While O’Connell did not reverse that earlier decision, it nonetheless seems to evidence the Court’s intent to preclude other tort concepts and remedies from further permeating professional negligence claims. After O’Connell, the standards governing legal malpractice claims appear to be an odd blend of tort and contract concepts — a “contort,” perhaps. It is also unclear to what extent that the Court’s rationale may be applicable to other causes of action, such as breach of fiduciary duty claims against corporate officers and directors.

The Supreme Court’s Decision in O’Connell

O’Connell involved claims of professional negligence, breach of fiduciary duty and fraud arising out of O’Connell’s representation of Bean in a divorce suit. Bean’s professional negligence and breach of fiduciary duty claims were based upon O’Connell’s alleged breach of the appropriate standard of care. By contrast, Bean’s actual and constructive fraud counts alleged that O’Connell had misrepresented her skill and ability to handle divorce cases.

The trial court initially entered a default judgment against O’Connell. O’Connell moved to set aside the default on the ground that she had not been properly served with process. Although the trial court refused to set aside the default altogether, it did vacate the damages award, and conducted a jury trial limited to the issue of damages. The jury returned an award of $71,535.68 in compensatory damages and $110,000 in punitive damages, which the trial court confirmed in a final judgment order.

On appeal, the Supreme Court reversed the trial court and vacated the default judgment, holding that O’Connell had not been validly served with process. Since that ruling was dispositive of the appeal, the Court did not need to reach any other issues. Yet, because questions concerning an award of punitive damages might arise during the new trial, the Court decided to take an excursion into the propriety of such an award under the facts of the case.

O’Connell claimed that punitive damages were unavailable as a matter of law because the negligence, breach of fiduciary duty and constructive fraud claims were all founded upon alleged breaches of duty arising from the contract between attorney and client. Bean, on

Arthur E. Schmalz is a partner with Hunton & Williams in McLean, Virginia.

Legal Malpractice — cont’d on page 6
Legal Malpractice
cont'd from page 5

the other hand, asserted that punitive damages were an available remedy. Her motion for judgment had alleged no contract claims, only tort claims, including fraud and breach of fiduciary duty, which, she argued, were independent from any contractually-based duties.\textsuperscript{13}

The Supreme Court sided with O'Connell and rejected Bean's arguments. Although the “implied duties of due care and fiduciary responsibility” that O'Connell owed to her client, Bean, “employ[ed] tort concepts,” the Supreme Court concluded that, “[b]ut for the contract, O'Connell would have had no duties to Bean. Whatever duties O'Connell owed Bean arose from their attorney-client relationship, which was created by their contract.”\textsuperscript{14}

The Court held, therefore, that “Bean's assertions of breaches of fiduciary duty and constructive fraud, while sounding in tort, are actions for breaches of the implied terms of O'Connell's contract. For this reason, punitive damages may not be awarded for any such breaches in the absence of an independent, willful tort giving rise to such damages.”\textsuperscript{15}

This analysis suggests that punitive damages are now unavailable in practically all legal malpractice cases. This is particularly evident from the Court's ruling on Bean's fraud claims. Bean alleged that O'Connell had misrepresented her competence to handle divorce cases, and that she had, therefore, committed fraud, a tort arguably independent of any contractual duties owed by the attorney.\textsuperscript{16} The Supreme Court disagreed, however, holding that this sort of alleged misconduct fell within the duties founded upon the contract between attorney and client and was, therefore, insufficient to support an award of punitive damages.\textsuperscript{17} If O'Connell is applied as expansively as it is written, seemingly few legal malpractice claims would be deemed to include willful torts beyond the scope of the contractually-based attorney-client relationship.

Indeed, by definition, tortious conduct falling outside the scope of the attorney-client relationship would not be actionable as legal malpractice, because the existence of an attorney-client relationship is a necessary element of such a claim.\textsuperscript{18}

A Departure from the Court's Earlier Ruling?

The Court's apparent effort to confine legal malpractice claims to a breach of contract context appears to contrast somewhat with its 1995 decision in \textit{Lyle, Siegel, Crowshaw \& Beale v. Tidewater Capital Corp.}\textsuperscript{19} In \textit{Lyle, Siegel}, the Court held that contributory negligence—a venerable fixture of tort law—is a viable defense to a legal malpractice claim.\textsuperscript{20} That holding, and other aspects of the Court's decision, suggested a willingness to allow other tort-based concepts to waft into the law of professional negligence. For example, the Court in \textit{Lyle, Siegel} observed that:

\begin{quote}
[T]he attorney-client relationship is formed by a contract. Nonetheless, the duty upon the attorney to exercise reasonable care, skill, and diligence on behalf of the client arises out of the relationship of the parties, irrespective of a contract, and the attorney's breach of that duty, i.e., the appropriate standard of care, constitutes negligence.\textsuperscript{21}
\end{quote}

The Court further stated that “we discern no logical reason for treating differently legal malpractice and medical malpractice actions. Both are negligence claims, and actions against attorneys for negligence are governed by the same principles applicable to other negligence actions.”\textsuperscript{22} Medical malpractice claims are, seemingly, quintessential tort claims.\textsuperscript{23} Legal malpractice claims would also appear to be torts, under the \textit{Lyle, Siegel} rationale.

The Court in \textit{O'Connell} acknowledged that the “implied duties of due care and fiduciary...
Blue-Pencil cont'd from page 4

Va. at 55, 174 S.E.2d at 787 (1970). Consequently, a court’s decision to rewrite the covenant in order to enforce it would contradict the principles of strict construction that the Supreme Court of Virginia has espoused. Roto-Die Co, Inc., v. Lesser, supra, 899 F.Supp. at 1523. (Although the Supreme Court of Virginia has not directly addressed the blue-pencil rule, the special legal principles the Court has adopted are contrary to the blue-pencil rule.)

The issue then is whether a blue-pencil clause contained in the covenant not to compete will alter the above analysis. It almost certainly will not, for several reasons. The same public policy that prevents courts from narrowing the covenant absent a blue-pencil clause continues to apply if the covenant contains a blue-pencil clause. A blue-pencil clause likely violates public policy because it attempts to force a court to draft a contract for the parties. Courts do not render advisory opinions; nor should they be in the business of writing contracts for private parties. Moreover, because covenants are disfavored, courts should not subject themselves to rewriting disfavored covenants in order to enforce the disfavored covenant. In addition, a contract cannot compel a disinterested third party to rewrite a contract absent his agreement to do so. This is true whether the third party is a private person or a court. Further, courts have consistently held that ambiguous contracts are unenforceable. Public policy requires that an employee be able to ascertain what his rights and obligations are, and ambiguity frustrates that public policy.

Because the likely benefit of a blue-pencil provision is small compared to the risk associated with such a provision, the draftsman should give serious consideration to omitting such a provision.

As the court in Power Distribution, supra, explained:

Therein lies the in terrorem effect on an employee, who must try to interpret the ambiguous provision to decide whether it is prudent, from a standpoint of possible legal liability, to accept a particular job or whether it might be necessary to resist plaintiff’s efforts to assert that the provision covers a particular job. The mere act of subjecting the employee to such uncertainty offends “sound public policy.”

569 F.Supp. at 57-58. See also, Roto-Die, supra, 899 F.Supp. at 1521 (“The mere act of subjecting the employee to the uncertainty of an ambiguous provision offends public policy.”)

An unambiguous covenant not only enables an employee to ascertain what the contract does and does not permit, but it also allows him to seek legal advice concerning whether a covenant is enforceable. A covenant that permits a court to rewrite a covenant at some later date to an undetermined scope, which would vary from judge to judge, is by definition ambiguous. To allow such an ambiguous covenant would render any legal advice concerning the rights and duties of the employee meaningless, and would unduly impair the employee’s ability to earn a living.

Blue-Pencil Clauses Threaten the Enforceability of the Entire Covenant Not to Compete

As the above analysis demonstrates, a draftsman should not write an overly-broad covenant not to compete based on the expectation that a court will narrow the covenant and then enforce it. The remaining issue then is whether there is
Legal Malpractice
cont’d from page 6

responsibility” it had recognized in Lyle, Siegel “employ tort concepts.”24 Yet, the Court retreated from the tort concepts it had previously embraced, concluding that “an action for the negligence of an attorney in the performance of professional services, while sounding in tort, is an action for breach of contract.”25 The Supreme Court borrowed the quotation in the previous sentence directly from its 1976 decision in Oleyar v. Kerr, which held that the statutes of limitations applicable to breaches of contract governed legal malpractice claims.26 The Court in Lyle, Siegel, however, took great pains to distinguish that same passage from Oleyar in order to hold that contributory negligence was a valid defense to a legal malpractice claim.27

Steering Away from a Sea of Tort?

In concluding that punitive damages are unavailable in legal malpractice claims except where an attorney’s conduct gives rise to an independent, willful tort, the O’Connell Court relied heavily upon its 1983 decision in Kamlar v. Haley.28 In Kamlar, the Court held that punitive damages may not be awarded for breaches of a contractual duty in the absence of an independent, willful tort.29

As the Court in Kamlar wearily observed, the potential bonanza of punitive damages, and other more open-ended relief available in tort, has “led to the ‘more or less inevitable efforts of lawyers to turn every breach of contract into a tort.”30 Echoing somewhat similar concerns, the Supreme Court has more recently sought to prevent “‘contract law [from] drown[ing] in a sea of tort,”31 and to “safeguard against turning every breach of contract into an actionable claim for fraud.”32

It is possible that O’Connell is simply the Supreme Court’s latest attempt to maintain the traditional barriers between tort and contract. As previously observed, since the Supreme Court vacated the trial court’s decision on improper service grounds, the Court did not have to address the thorny tort vs. contract issue. That the Court would reach out to expound upon such matters could suggest a particularly keen interest among the present Justices in stemming tort law’s encroachment upon the domain of contract law.

Regardless of the Supreme Court’s intentions, legal malpractice claims in Virginia now appear to be a “contort” — an odd blend of tort and contract concepts. For example, because legal malpractice claims are fundamentally viewed as breaches of contract, punitive damages generally will be unavailable,33 and the statutes of limitations applicable to contract claims govern such claims.34 Yet, the Supreme Court still recognizes that legal malpractice claims “sound in tort,” “employ tort concepts,”35 and may be defeated outright upon a showing that the plaintiff was guilty of contributory negligence.36
Other Implications of O'Connell

Although O'Connell addressed only legal malpractice claims, the Court's rationale appears equally applicable to professional negligence claims involving fields other than the law. In fact, in explaining that professional duties ultimately arise out of a contractual relationship, the Court cited to a case involving the professional negligence of an architect. Since the duties of accountants, architects, brokers, and many other professionals are also founded upon a contractual relationship between the client and the professional, the principles of O'Connell seem equally apposite to malpractice claims against members of those professions.

Similarly, it remains to be seen whether the rationale of O'Connell will infiltrate causes of action other than professional negligence. For example, could the Court's rulings as to Bean's breach of fiduciary duty claim against O'Connell be applied to bar punitive damages in breach of fiduciary duty claims against officers and directors of corporations? Under the principles set out in O'Connell, an attorney's fiduciary and other duties to his or her client ultimately arise "from [the] attorney-client relationship, which [is] created by their contract." One might argue that the fiduciary duties owed by an officer or director of a corporation similarly arise from the relationship created by the contract between the officer or director and the corporation that he or she serves.

In any event, it is unlikely that O'Connell will be the last word in the struggle to keep contract law from drowning in a sea of tort. Indeed, the battle is sure to continue if it is true, as the Supreme Court has theorized, that lawyers will inevitably try to turn every breach of contract into a tort.
Selecting the Right Issue for Review

by William H. Shewmake

The jury just returned a verdict against your client. You are dumbfounded. How could the jury have gone against you? The evidence was overwhelmingly in your favor. Justice demands an appeal.

Justice may demand an appeal but, if at all possible, the appeal had better not rely upon the insufficiency of the evidence. When an appellate court determines whether sufficient evidence exists to support the verdict, all evidence and any inferences upon it are construed in the light most favorable to the prevailing party. Clark v. Commonwealth, 30 Va. App. 406, 409-10, 517 S.E.2d 260, 261 (1999). While your successfully attacking the sufficiency of evidence is perhaps not impossible, the attempt is usually futile. Nor can you overcome such an onerous standard of review by ignoring it and hoping your opponent and the Court will not realize what the applicable standard is. Your ignoring the applicable standard of review also will raise sharp questions from the bench during oral argument when you begin reciting favorable facts while omitting those you prefer not to discuss. While you may know in your heart the jury erred, an appellate court will not share your outrage, and it will not substitute its judgment for the jury's verdict.

In short, attacking the sufficiency of the evidence is an argument of last resort and is seldom worth the effort. Instead, you should carefully review the record to determine if an issue exists that involves a standard of review more favorable to your client. Finding such an issue will greatly improve your chances of success and will allow you to rely on favorable facts that would be disregarded if inferences were construed against your client.

For example, in the above hypothetical, did the trial court refuse a jury instruction you submitted, which the evidence supported? Indeed, the judge subconsciously may have refused an instruction in order to avoid a possible appeal from your opponent whose prospects had appeared dim until the verdict was announced. Rely upon the refused instruction instead of the sufficiency of the evidence because it involves a much better standard of review. The evidence and inferences relating to the jury instruction will be construed in the light most favorable to your client. Blondel v. Hays, 241 Va. 467, 469, 403 S.E.2d 340, 341 (1991). By discarding the insufficiency argument and concentrating on the refused jury instruction, you can turn the tables and write a statement of facts that supports your theory of the case.

Finally, once you select an issue that involves a more favorable standard of review, emphasize to the Court what the standard of review is. Do not make the Court guess. The Federal Rules of Appellate Procedure require a standard of review section; the Rules of the Supreme Court of Virginia do not. However, in state court it remains imperative that you identify the standard of review involved, with a short explanation why the standard applies along with an appropriate legal citation. Moreover, clearly identify the standard of review before the statement of facts section. The standard of review can be placed as a separate section immediately preceding the statement of facts, or in state court it can be set forth in the first two or three sentences of the statement of facts section. But regardless of your preference concerning how to identify the standard of review, you want the appellate judges to know what the applicable standard of review is before you begin citing...
The following are recently published Law Review articles that may prove useful to you in your practice:

**Commercial Law**


**Communications Law**


**Computer Law**


**Courts**


**Employment Practice**


**Evidence**

New Business
cont'd from page 1

profit damages as a matter of law. In so doing, it removes a bar to recovery frequently enforced at the motion to dismiss or summary judgment stage of the proceedings. In a business tort or breach of contract case, a defendant's first line of defense has been to establish that the plaintiff is a new or unestablished business, thereby eliminating lost profits as an item of damages. See, e.g., Interactive Return Serv., Inc. v. Virginia Polytechnic Inst. State Univ., 52 Va. Cir. 161 (Richmond 2000). In the future, Virginia judges will simply apply the existing standard for sufficiency of the evidence of lost profit damages based on the testimony at trial. Under that well-established standard, the evidence must be sufficient to allow the trier of fact to estimate the damages with reasonable certainty. The award cannot be based on speculation or conjecture. Lockheed Information Management, 259 Va. at 110; 524 S.E.2d at 430. The existing standard of evidence is the "proper proof" required by the new statute. In essence, the prior rule of substantive law limiting damages awardable to a certain category of plaintiffs has given way to a "sufficiency of the evidence" standard applicable to everyone. As a leading commentator explained:

What the earlier cases perceived as a rule of law has been replaced in the cases cited by a rule of evidence. The rule of evidence is far preferable. It is impossible for anyone, including an appellate court, to foresee all the possible situations in which meritorious claims could be asserted for lost profits even though the business to which those profits might accrue had not yet commenced operation. Nor is any worthwhile end to be achieved by permitting one party to breach its contracts with impunity -- giving that person an option as it were -- because the other party has not yet commenced operation. The trend of the modern cases is plainly toward replacing the old rule of law with a rule of evidence -- the unquestionable principle that damages for loss of profits must be proven with reasonable certainty and that the evidence must support that finding by the trier of fact.

Will this statute revolutionize contract and business tort damages in Virginia? Will the proverbial floodgates open up, resulting in huge lost future profit damage awards to plaintiffs? Only time will tell. However, the experience in other jurisdictions suggests that the answer is no.


Enactment of the new statute in Virginia does not guarantee a lost profits free-for-all. There is no reason to conclude that every charlatan with an alphabet soup of letters after his or her name will be allowed to project decades of lost future profit damages for interference with the next purported Harry Potter novel, Trivial Pursuit game or Amazon.com website. As the redoubtable Judge Richard Posner put it in a recent opinion: "Damages must be proved, and not just dreamed...." MindGames, Inc. v. Western Publishing Co., 218 F.3d 652 (7th Cir. 2000) (a game inventor with no proven track record had no basis for projecting sales of 10 million copies of his game "Clever Endeavor" if properly promoted by defendant).

An incomplete survey of several illustrative cases from other jurisdictions, the majority of which abandoned the New Business Rule some time ago, reveals that many start-up companies are still denied recovery because of the inadequacy of their lost future profits evidence.

1998), the Supreme Court of Connecticut reversed a $15 million legal malpractice judgment because the plaintiff did not meet the burden of proof regarding lost future profit damages. In *Beverly Hills Concepts*, the plaintiff sold fitness equipment under a distinctive color scheme and logo. It decided to offer franchises to open fitness clubs under the “Beverly Hills Concepts” trademark. It approached the defendant law firm to handle its franchise documentation and governmental compliance. The defendants failed to register the franchises as “Business Opportunities” under the Connecticut Business Opportunity Investment Act. As a result, the Connecticut Attorney General sought and obtained a permanent injunction barring franchise sales.

The plaintiff presented an expert witness at trial named Thomas Ferreira. Ferreira was a CPA. He testified that the plaintiff would have sold 20 franchises per year for the first five years and 40 franchises per year by the 12th year of the program. He projected these future franchise sales based on a comparable company — World Gym Licensing, Ltd. — that he had admitted was not actually comparable. The lack of comparability was due to several troubling facts. The model franchise opened by Beverly Hills Concepts failed shortly after it opened. Beverly Hills never sold a single franchise. It needed $300,000.00 in additional financing, which it could not get because it had been turned down by several banks and denied a loan guaranty by the Small Business Administration. Plaintiff owed $80,000.00 in unpaid federal and state payroll taxes and had never paid any unemployment taxes. The court held that Ferreira’s projection of 12 years of future profits for a franchise program under these circumstances was completely baseless.

Similarly, in *Lithuanian Commerce Corp. v. Sara Lee Hosiery*, 23 F. Supp.2d 509 (D. N.J. 1998), the District Court denied lost profit damages sought by the plaintiff in what the court described as “a bitter and acrimonious dispute over the sale and distribution of L'eggs® pantyhose in Lithuania.” *Id.* at 511.

**Hypothetical situation is presented on the outside back cover**

**Analysis**

The attorney-client privilege protects communications between a lawyer and client to the extent that they reflect the client’s request for legal advice or the lawyer’s providing of legal advice.

A number of courts have indicated that communications in which the lawyer acts simply as a “conduit” for facts will not be protected by the attorney-client privilege. This “conduit” approach sometimes arises when lawyers prepare filings for regulatory agencies, or when lawyers assist with patent applications.

Unless the communications from the corporate employees reflect some request for legal advice or unless you revise them before including them in corporate securities filings, the privilege probably will not apply.

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

**Appellate Alley**

cont’d from page 10

facts favorable to your cause. Your failing to clearly identify the standard of review at the outset increases the risk that the favorable facts and inferences you rely upon will be met with skepticism.

So always remember that, when selecting an issue for appeal, seize the standard of review “high ground” whenever possible. Because as history demonstrates, while uphill battles can be won, the casualty rates are usually high.
New Business
cont'd from page 13

Sara Lee had filed a successful Daubert motion to exclude plaintiff’s sole damage expert, Charles Cummiskey. See Lithuanian Commerce Corp. v. Sara Lee Hosiery, 179 F.R.D. 450, 458 (D. N.J. 1998). At trial, plaintiff tried to convert one of its fact witnesses into an expert — without success. The court held that the minimum evidence necessary to allow a rational calculation of lost future profits on the sale of pantyhose in Lithuania would have been (1) the number of pantyhose received from Sara Lee; (2) the price at which the pantyhose would be sold; (3) the amount of time they would take to sell; (4) the expenses incurred in selling the pantyhose over time; and (5) the means to discount to present value the future years’ profits. 23 F.Supp.2d at 516. Because the plaintiff failed to offer that evidence, the court granted Sara Lee’s Rule 50(a) motion for judgment as a matter of law at the close of the plaintiff’s evidence. Id. at 518.

Conversely, there are numerous cases from other jurisdictions awarding lost future profit damages based on evidence that would probably be considered excessively speculative in Virginia. See, e.g., Energy Capital Corp. v. United States, 47 Fed. Cl. 382 (Cl. Cl. 2000) (an award of $8.787 million as the present value of the plaintiff’s lost profits on a proposed program to provide energy optimization rehabilitation loans to owners of affordable housing projects); Independent Business Forms, Inc. v. A-M Graphics, Inc., 127 F.3d 698 (8th Cir. 1997) (plaintiff’s expert should have been allowed to testify that a new business was merely a continuation or spin-off of a prior successful business); Cardinal Consulting Co. v. Circo Resorts, Inc., 297 N.W.2d 260 (Minn. 1980) ($71,500.00 damage judgment for lost profits caused by breach of a promise to guarantee 50 rooms per night at the Circus Circus Hotel in Las Vegas at $18.00 per night to a tour operator); Employee Benefits Plus, Inc. v. Des Moines Gen'l Hosp., 535 N.W.2d 149 (Iowa Ct. App. 1995) ($38,000.00 damage award to insurance salesman denied the opportunity to make sales presentations to a hospital’s employees); Nebraska Nutrients, Inc. v. Shepherd, 626 N.W.2d 472 (Neb. 2001) ($5,000,000.00 judgment in favor of partners excluded from the opportunity to build an ethanol plant using a new and unproven technology).

The cases from other jurisdictions are collected in a helpful annotation, Todd R. Smyth, Annotation, Recovery of Anticipated Lost Profits of New Business: Post-1965 Cases, 55 ALR4th 507 (1987). The authors of the Annotation suggest that the factors affecting recovery of lost profits in a particular case for which there is no comparable company or “yardstick” include: the readiness of the business to begin operation; its location; the economic and market conditions; the type of business (i.e. is it an “instant maturity” business like McDonald’s); financial strength; reputation of promoter; publicity; prior profit history; manifestation of the promoter’s ability based on prior projects; and the existence of contracts or orders with calculable profitability.

In other cases, economic experts do a comparable company comparison. These cases are quite difficult because of the uniqueness of most businesses. Nevertheless, with persuasive expert testimony that accounts for all of the variables affecting profitability of both companies, some courts have permitted recovery of lost future profits based solely on a comparison to another comparable business. See, e.g., Olivetti Corp. v. Ames Business Sys., Inc., 344 S.E.2d 82 (N.C. Ct. App. 1986).

While a new day is dawning in Virginia as a result of the enactment of Va. Code Ann. § 8.01-222.1, the outcome of most cases may not change at all. If the plaintiff cannot establish a rational and non-speculative basis for projecting lost future profits, he will be denied recovery. Success will no longer depend on the characterization of the plaintiff as new or unestablished, but instead on the ingenuity, diligence and preparation of plaintiff’s counsel and his or her economic expert consultants. That is as it should be.
Law Review Articles
cont'd from page 11


Insurance Law


Medical Jurisprudence


Practice and Procedure


Torts


any danger if the draftsman includes a blue-pencil clause in an otherwise narrowly-tailored covenant. The downside is substantial. As discussed above, a court will strictly construe an ambiguous covenant against the employer and will strike down a covenant that fails any prong of what is commonly referred to as the Roanoke Engineering or Paxton test:

1. Is the restraint, from the standpoint of the employer, reasonable in the sense that it is no greater than is necessary to protect the employer in some legitimate business interest?

2. From the standpoint of the employee, is the restraint reasonable in the sense that it is not unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood?

3. Is the restraint reasonable from the standpoint of a sound public policy?


Thus, if a drafter includes a blue-pencil clause in an otherwise valid covenant, then the invalid blue-pencil clause may well render the entire covenant unenforceable. By including the clause, the drafter has made the covenant ambiguous and unduly harsh on the employee, and the restrictive covenant could violate public policy for the reasons set forth in section one above.

Some drafters try to overcome this dilemma by inserting a severability provision that purports to sever each clause of the covenant from all other covenants in the contract. The drafter hopes that, by inserting the severability provision, the covenant not to compete will survive a material breach of the agreement by the employer. He also hopes that the severability provision will insulate an invalid provision of the covenant not to compete from the remaining parts of the covenant not to compete. If the remaining provisions of the covenant are reasonable, then the drafter hopes the valid provisions of the covenant will remain enforceable, assuming that the remaining provisions can stand on their own.

Once again, such an approach is not without risk. A thorough analysis of a severability clause is beyond the scope of this article, but several risks are worth noting. It does not take much consideration to uphold a covenant not to compete. Paramount Termite Control Co., Inc., v. Rector, 238 Va. 171, 380 S.E.2d 922 (1989) (Covenant not to compete that becomes part of employment agreement that is signed after employment commences has consideration if continued employment is conditioned on the covenant and employment, in fact, continues.) But completely severing the covenant not to compete from all other provisions and covenants of the employment agreement may jeopardize the covenant not to compete because a court may find that the covenant not to compete fails for lack of consideration. See, Mona Electric Group, Inc. v. Truland Service Corp., Civ. Action 01-895-A (E.D.Va. 2002) (Under Virginia law, covenant not to compete that is signed after employment commences and is divorced from and not conditioned on other conditions of employment fails for lack of consideration.) Second, it is unclear whether a court will find that a blue-pencil clause is severable from the remaining provisions of the covenant not to compete. The blue-pencil clause, by its express terms, applies and intends to affect the scope of the covenant not to compete because it essentially modifies each clause in the covenant not to compete. It is therefore intertwined with the other provisions of the covenant and may not be severable from the remaining provisions in the covenant, despite language to the contrary. See, e.g., Roto-Die, supra, 899 F. Supp. at 1522-23. (In determining whether an invalid clause is severable...
and independent of other clauses, the court should ascertain whether the invalid clause relates to the other clauses, or whether they are independent, stand alone, and protect different interests.) Third, the Supreme Court of Virginia may find that such a severance clause itself violates public policy because it prohibits an employee from competing against his former employer despite material breaches by the employer. Fourth, the Supreme Court of Virginia may strike down the entire clause as a result of the blue-pencil provision because its existence and relation to the remaining restrictive covenants subjects the employee to too much ambiguity.

This does not suggest that the impact of a severability clause is certain. In fact, it is not, and the Supreme Court of Virginia has not expressly addressed the issue in a published opinion. But uncertainty on the subject exists, and any potential benefit of a blue-pencil provision would have to be substantial in order to justify the risk.

Conclusion
Despite his best efforts, a draftsman of a covenant not to compete cannot eliminate all risk that the covenant will be declared unenforceable. The purpose of this article is to underscore that a blue-pencil clause is no panacea for a draftsman's fears. Because the likely benefit of a blue-pencil provision is small compared to the risk associated with such a provision, the draftsman should give serious consideration to omitting such a provision. Instead, he should model the covenant not to compete on language that the Supreme Court of Virginia has upheld and enforced in a similar context. It is often safer to navigate a difficult but clearly marked channel than to strike out on a superficially appealing but uncharted course.
Virginia State Bar Litigation Section
Board of Governors

Frank Kenneth Friedman
Chair
Woods, Rogers & Hazlegrove, PLC
10 St. Jefferson Street, Suite 1400
P.O. Box 14125
Roanoke, VA 24038-4125
540/983-7692
Fax: 540/983-7711

Thomas E. Albro
Vice Chair
Tremblay & Smith, L.L.P.
105-109 East High Street
P.O. Box 1585
Charlottesville, VA 22902-1585
434/977-4455
Fax: 434/979-1221

Paul Markham Black
Secretary
Wetherington Melchionna, et al.
310 First Street, Suite 1100
Roanoke, VA 24011
540/982-3800
Fax: 540/342-4480

Glenn Walthall Pulley
Immediate Past Chair
Clement & Wheatley, P.C.
549 Main Street
P.O. Box 8200
Danville, VA 24543-8200
434/793-8200
Fax: 434/792-8200

Susan Carol Armstrong
Past Chair
Troutman, Sanders, Mays & Valentine
1111 East Main Street
P.O. Box 1122
Richmond, VA 23218-1122
804/697-1220
Fax: 804/697-1339

Vicki Hansen Devine
Furniss, Davis, Rashkind, et al.
P.O. Box 12525
Norfolk, VA 23541-0525
757/461-7100
Fax: 757/461-0083

Jacqueline G. Epps
Morris and Morris, P.C.
P.O. Box 30
Richmond, VA 23218-0030
804/344-8300
Fax: 804/344-8359

Philip G. Gardner
Gardner, Gardner & Barrow
1st Citizens Bank Building, 4th Floor
231 East Church Street
Martinsville, VA 24112-2840
540/638-2455
Fax: 540/638-2458

Harry Margerum Johnson, III
Hunton & Williams
951 East Byrd Street
Richmond, VA 23219-4074
804/788-8200
Fax: 804/344-7999

Samuel W. Meekins, Jr.
Wolcott, Rivers, Wheary, et al.
One Columbus Center, Suite 1100
Virginia Beach, VA 23462
757/497-6633
Fax: 757/497-7267

Michael G. Phelan
Cantor, Arkema & Edmonds, P.C.
823 East Main Street
PO Box 561
Richmond, VA 23218-0561
804/644-1400
Fax: 804/644-9205

Robert Emmett Scully, Jr.
Rees, Broome & Diaz, P.C.
8133 Leesburg Pike, Ninth Floor
Vienna, VA 22182
703/790-1911
Fax: 703/48-2530

Hon. Mosby Garland Perrow III
Ex-Officio Judicial
Lynchburg Circuit Court
Twenty-fourth Judicial Circuit
900 Court Street
Lynchburg, VA 24504
434/847-1490
Fax: 434/847-1864

Hon. Lydia Calvert Taylor
Ex-Officio Judicial
Norfolk Circuit Court
Fourth Judicial Circuit
100 St. Paul's Boulevard
Norfolk, VA 23510-2721
757/664-4593
Fax: 757/664-4581

R. Lee Livingston
Newsletter Editor
Tremblay & Smith, L.L.P.
105-109 East High Street
P.O. Box 1585
Charlottesville, VA 22902
434/977-4455
Fax: 434/979-1221

Kevin Walker Holt
Co-Chair – Litigation TLC
Gentry, Locke, Rakes & Moore
10 Franklin Road S.E.
P.O. Box 40013
Roanoke, VA 24022-0013
540/983-9300
Fax: 540/983-9400

Kevin Wayne Mottley
Co-Chair – Litigation TLC
Troutman, Sanders, Mays & Valentine
1111 East Main Street
P.O. Box 1122
Richmond, VA 23218-1122
804/697-1263
Fax: 804/697-1339

Ann Kiley Crenshaw
Computer Task Force Liaison
Suite 103
160 Exeter Drive
Winchester, VA 22603
540/665-0050
Fax: 540/722-4051

William H. Shewmake
Chair – Appellate Practice Subcommittee
Shewmake & Baronian, P.C.
5413 Patterson Avenue, Suite 101
Richmond, VA 23226
804/282-8800
Fax: 804/285-4542

Patricia Sliger
Liaison
Virginia State Bar
707 East Main Street, Suite 1500
Richmond, VA 23219-2803
804/775-0576
Fax: 804/775-0501
### Virginia State Bar Litigation Section
#### Young Lawyers Committee

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
<th>Phone</th>
<th>Fax</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kevin W. Holt</td>
<td>Gentry, Locke, Rakes &amp; Moore</td>
<td>540/983-9421</td>
<td>540/983-9400</td>
</tr>
<tr>
<td></td>
<td>10 Franklin Road S.E.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>P.O. Box 40013</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Roanoke, VA 24022-0013</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kevin Wayne Mottley</td>
<td>Troutman, Sanders, Mays &amp; Valentine</td>
<td>804/697-1263</td>
<td>804/697-1339</td>
</tr>
<tr>
<td></td>
<td>1111 East Main Street</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>P.O. Box 1122</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Richmond, VA 23218-1122</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Megan E. Burns</td>
<td>Williams, Mullen, Clark &amp; Dobbins, P.C.</td>
<td>757/473-5352</td>
<td>757/473-0395</td>
</tr>
<tr>
<td></td>
<td>900 One Columbus Center</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Virginia Beach, VA 23462</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mary Catherine H. Gibbs</td>
<td>Hart &amp; Calley, P.C.</td>
<td>703/836-5757</td>
<td>703/548-5443</td>
</tr>
<tr>
<td></td>
<td>307 North Washington Street</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Alexandria, VA 22314</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Christopher J. Robinette</td>
<td>Tremblay &amp; Smith, L.L.P.</td>
<td>434/977-4455</td>
<td>434/979-1221</td>
</tr>
<tr>
<td></td>
<td>105-109 East High Street</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>P.O. Box 1585</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Charlottesville, VA 22902-1585</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Calvin Spencer</td>
<td>Harris, Matthews &amp; Crowder</td>
<td>434/676-2405</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Post Office Box G</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Kenbridge, VA 23944</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If you are a young trial lawyer under the age of 36 and are interested in joining the Litigation Section Young Lawyers Committee, please contact either Kevin Wayne Mottley or Kevin W. Holt, Co-Chairs, Litigation YLC, at their respective addresses above.
Publish Your Work

*Litigation News* welcomes the submission of litigation-oriented articles. If you have researched or argued an interesting point of Virginia law, or have practice tips to share, consider condensing them into an article for *Litigation News*. The contact for submission of these articles is:

R. Lee Livingston, Esq.
Tremblay & Smith, L.L.P.
105–109 East High Street
PO Box 1585
Charlottesville, VA 22902
434/977-4455
fax 434/979-1221
e-mail lee.livingston@tremblaysmith.com

---

Ethics at a Glance

Ethics in the Information Age

by Thomas E. Spahn

Hypothetical

As the junior person in your company’s law department, you are often in charge of securities filings. Because your law department’s computer seems better equipped to handle the actual filing, corporate employees send you the facts that must be included in the securities filings. You compile these e-mails on your computer and then forward them to the SEC.

Are the communications you receive from the corporate employees protected by the attorney-client privilege?

*(Analysis inside on page 13)*