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A Basic Guide to Sexually Violent Predator Civil Proceedings in Virginia

By James C. ("Jim") Martin

Prologue

Whether you a highly experienced and knowledgeable civil litigator with decades of experience under your belt, or a recent law school graduate just getting your feet wet, you will probably not make many new friends at cocktail parties by mentioning that you defend sexually violent predators – otherwise known as "SVP's". However, you should consider doing so if:

- You believe that basic constitutional rights apply to everyone, even convicted rapists; and
- A $5,000.00 yearly trial court maximum at a rate of $90.00 per hour (plus expenses and Virginia Supreme Court court-appointed fee awards if applicable) – for a case that is quite likely to last several years –

  is acceptable to you

  OR somebody hires you.

Definitions & Basics

Chapter 9 of Title 37.2 of the Code of Virginia (§§ 37.2-900 through 37.2-921) describes the SVP process in Virginia. The somewhat convoluted definition of a sexually violent predator is:

> "*Sexually violent predator*" means any person who (i) has been convicted of a sexually violent offense, or has been charged with a sexually violent offense and is unrestorably incompetent to stand trial … and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts.[1]

Sexually violent offenses include rape, forcible sodomy, object sexual penetration, abduction with intent to defile, carnal knowledge of a child between 13 and 15, abduction of a child under 16 for concubinage or prostitution, carnal knowledge of a minor while in custody, aggravated sexual battery, and certain types of murder with a sexual element, or conspiracy or attempt to commit any of the above crimes.[2] A revocation of probation stemming from any of these charges will also qualify.

Only a prisoner currently being incarcerated or held for a sexually violent offense can be declared an SVP.[3]

There is a constitutional right to counsel for a Respondent trying to avoid confinement as an SVP.[4] In addition, other statutory rights exist for a Respondent.[5]

SEXUALLY VIOLENT PREDATOR — cont'd on next pages

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The basic idea of an SVP civil case has been upheld against constitutional challenges alleging double-jeopardy type issues (because of the previous criminal conviction) on the federal level and in Virginia.[6] However, many other constitutional problems and potential questions remain to be resolved.

The initial issue in an SVP case is, of course, whether your client qualifies as an SVP, and, if so, whether he needs in-patient treatment at the Virginia Center for Behavioral Rehabilitation (the "VCBR") in Burkeville, Virginia (about 50 miles west of Richmond), or whether he can be placed on a very strict form of probation known as "conditional release."

The Review Process Prior to Filing an SVP Petition

A database of prisoners about to be released from the Department of Corrections ("DOC") is reviewed by a Commitment Review Committee consisting of DOC personnel, Behavioral Health and Developmental Services ("DBHDS") personnel and an assistant or deputy attorney general and, after a mental evaluation of the prisoner by a psychiatrist or clinical psychologist, the Attorney General may file a petition to have the prisoner declared an SVP.[7]

If the Attorney General files a petition, a copy will be sent to the prisoner – hereinafter the "Respondent" – along with an explanation of the process, including his right to counsel and his right either to cooperate with the state's evaluator or to refuse to do so, but with a "catch" (see next sub-paragraph). The Respondent's release from prison can be delayed for a time until the SVP process is complete.

Respondent's Initial Decision: Whether to Cooperate with the State Evaluator: Before & After Counsel is Appointed or Retained

The Respondent will initially have to decide on his own, without the right to appointed counsel, whether or not to cooperate with the state's doctor who will be sent to interview him. However, as a result of a Virginia Supreme Court decision overruling prior law,[8] the Respondent can rescind an initial decision not to cooperate within 21 days of obtaining counsel.[9] The significance of this is that if he refuses to cooperate, any second opinion doctor appointed to evaluate him will not be able to testify, nor will that doctor be able to submit a report to the court.[10] (A second opinion doctor can, however, advise counsel on possible avenues of attacking the state doctor's report).

Attorney Preparation Before the First Client Interview: Reviewing Papers, the DSM "Checking Out the Landscape," & Second Opinion Doctor Searching

The initial evaluation recommending commitment – if it didn't, no petition would have been taken out – must be thoroughly reviewed in conjunction with the Diagnostic and Statistical Manual of Mental Disorders (5th edition 2013)(hereinafter the "DSM-5"), which is published by the American Psychiatric Association. At a minimum, the specific diagnoses in the report, especially those which the examiner believes qualify your client as an SVP, must be compared with the specific sections of the DSM-5, which describe any such mental abnormalities and/or personality disorders. The general descriptions of categories at the beginning of chapters such as "paraphilic disorders" or "personality disorders" should also be reviewed. Weaknesses in the expert's position are often found in this way, such as the fact that anti-social personality disorder is only supposed to be diagnosed when there is evidence of "conduct disorder" before age 15.

Efforts should be made to determine the legal "landscape" of the particular jurisdiction. Although SVP cases are prosecuted by the Attorney General's Office – not by the local Commonwealth's Attorney – it would be very helpful to find out who the likely trial judge will be, how "tough" he or she is in criminal cases, and/or such a judge's attitude to psychiatry and possibly to constitutional issues. Do not assume that you necessarily want a "liberal" judge, since in my experience, attitudes on how to deal with sex offenders cannot be neatly pigeon-holed according to political ideology or by the degree of toughness on crime. Finding out what you can in these matters will help you decide if you should get a jury or not.

Whether or not your client chooses to cooperate with the state's expert, I would always ask for a second expert (even if your expert won't be able to testify), unless the client adamantly wants to accept treatment without such an opinion (which I have never encountered). If possible, you should discuss any relevant information you have been able to find out about who might be a

good second opinion doctor to use, or at least to mention your recommendation to him. It is important to choose a second opinion expert who is objective, although you may not be able to get one who actually agrees that your client is *not* an SVP. A list of doctors can be obtained through the Attorney General's Office or the VCBR, but not all the qualified doctors are on it, and it includes in my opinion some that you should avoid for various reasons. Call other attorneys who have done these cases to get advice on this (I will be glad to provide assistance in these and other such related matters at 434-792-1861 or martinlawva@verizon.net).

Attorney Preparation: The Initial Client Interview, Decisions on Cooperation, and Other Matters

Since your client probably has a pending SVP petition, you will usually have to conduct your initial meeting with him at a facility that is part of the Virginia DOC, i.e., in prison. If you do not do criminal work, you may not have had that experience, the quality of which varies widely from facility to facility. Go online to the Virginia Inmate Locater (even if you know where your guy is) or Vinelink for information on the specific facility, call them up, and figure out what their procedure is – preferably several days in advance. Also get clear instructions regarding what you can and cannot take into the facility, such as phones, computers, money, etc. Also, find out whether they can hold things for you, or if you must leave certain things in your car.

A final decision on cooperation must be made if the client has initially refused to cooperate with the state's expert. (If he has already cooperated, it is too late to change that). This can be a difficult decision. Your client should not cooperate (for example) if there is anything heretofore unrevealed in his past – especially his juvenile past – which would thereby be revealed and which would give the state's doctor an opportunity to diagnose him with conduct disorder and, therefore, an anti-social personality disorder.

Other matters (discussed later herein) that may require early attention include decisions on whether to waive the probable cause hearing; whether any pre-trial motions are needed; discussion of how the client's life will be if he is sent to the VCBR (including such procedures as polygraphs and plethysmograph); and at least some initial discussion of whether this case is likely to be a bench trial, jury trial, or a waiver of trial and acceptance of at least a year's in-patient treatment.

The Probable Cause Hearing

The probable cause hearing is held in the circuit court by statute, despite the fact that this is the same court that will try the case if probable cause is found.[11] A decision on whether this will be waived must be made. Waiver of the probable cause hearing is probably not a good idea. No discovery is allowed until after the probable cause hearing.[12] Full civil discovery methods are allowed thereafter. By statute, the probable cause hearing may be conducted with the Respondent appearing by video.[13]

14-Day Rule on Certain Motions

Any defense or objection based on "defects in the institution of proceedings" is waived unless raised in a written motion filed with the court at least 14 days before the hearing or trial.[14] This includes procedural defects, and any constitutional issues or challenges.[15]

Prohibition on Collateral Attack

The underlying criminal conviction or convictions of the client for sexual offenses must be proven by the Commonwealth by producing an admissible copy of the conviction and/or sentencing order. However, the validity of such convictions cannot be collaterally attacked, e.g., by trying to prove the client really wasn't guilty of rape or that he had some legal defense which the original court rejected.[16]

Bench, Jury or Waiver Decision

A decision must also be made as to whether to have a bench trial, a jury trial, or to waive the trial and accept treatment in the VCBR for an initial one-year period. If the trial is waived, the right to a jury will no longer be available for subsequent annual (or biennial after five years) hearings.[17]

Attorney Preparation After the Client Interview: Reports, Witness Lists & Transportation Orders

For the initial SVP trial, the report of the doctor – plus that of the second opinion doctor, if any – must of course be reviewed. In addition to this, the original criminal trial documents – including the trial transcript if there is one – plus any available DOC or mental commitment records, should be consulted for anything

relevant to the client's mental health history, pattern of offending, and personality. For example, has he been violent apart from sex crimes? Are alcohol and/or drugs generally involved in his offenses, which might provide an argument against diagnosing a personality disorder since the substance abuse would perhaps be a better explanation of his behavior? Did he ask his victim(s) for consensual sex first and then take what he wanted when they refused, which would be an argument against the diagnosis of a paraphilic disorder that basically indicates the client takes pleasure in the lack of consent?

Your witness list for the SVP phase of the trial will probably only include your second opinion doctor. But in the event that the case is continued for a conditional release report (see below), you will also need to prepare a potential witness list for this purpose, which would include family members, friends, bosses, or anyone who might be able to testify to a reasonable home plan for the client in lieu of in-patient treatment at Burkeville.

It is important to note that a transportation order will be needed to authorize your client to be transported from whichever facility he is now being held at in the DOC to attend the hearing or trial. Failure of the attorney to have this order entered, and to make sure it is being implemented, will avoid much embarrassment and a possibly angry judge in a situation where an assistant attorney general and two doctors have travelled great distances to attend a hearing or trial that must now be re-scheduled!

The Trial

The burden of proof at trial is by clear and convincing evidence.[18] The normal rules of hearsay apply.[19] An expert's opinion must have an adequate factual foundation, and it cannot rely on speculation or unsubstantiated assertions such as accusations of crime which were *nolle prosequied* and never prosecuted to trial.[20] It is hard to imagine a scenario when testimony by a Respondent at trial, when he is a convicted sex felon and subject to all manner of psychiatry-related cross-examination would be a good idea. It is a good idea, however, to ask your client to confirm in front of the judge that he knows he can testify or not, and what his decision regarding that is. Of course the jury must be taken out for this inquiry if there is one.

Conditional Release Reports

If the judge (or a jury) decides the Respondent is an SVP, the judge may order a report to study the possibility of conditional release. This will make a second hearing necessary, which must be done within 45 to 60 days.[21]

Appeals

Either your client,[22] or the Attorney General can appeal an unfavorable decision as to SVP status or conditional release to the Supreme Court of Virginia.[23] The Attorney General can also appeal a finding of no probable cause.[24]

Preparing the Case for Next Year while the Client is at the VCBR

While your client is at the VCBR, whether or not you appeal, you can file any discovery as needed by any of the normal civil means. You should periodically stay in touch with the client's family, as they may be needed as conditional release witnesses next year. You need to know if things have changed regarding the best place to argue that your client could stay if granted conditional release. It is best to have one contact person for a large family. Also, of course, you should keep in touch with the client by at least responding to any inquiries or letters. Phone calls and/or visits can be arranged at the VCBR when needed.

The Full-Disclosure Polygraph and Other Procedures that Seem Odd for a Free Society

Built into the statutory scheme for the VCBR, and for any subsequent conditional release or probation, is the use of polygraphs, both maintenance polygraphs (basically asking questions about what's happening now), and full-disclosure polygraphs (asking everything sexually the client has ever done).[25] Penile plethysmograph testing may also be required.[26] Maintenance polygraphs are, in my opinion, not objectionable. Full-disclosure polygraphs are another matter. There is a good chance your client has committed other sex crimes. Although polygraph results are inadmissible, anything he says in a polygraph interview or otherwise can be passed along to a prosecutor – and any prosecutor worth two cents would at least consider bringing charges if he could corroborate what your client said in such a serious matter. Refusal to complete the full-disclosure

polygraph, however, has been considered a lack of cooperation by the VCBR. This has, in turn, caused the VCBR to deny advancement in the three-phase sequence needed to complete the in-patient program and progress on to conditional release – where after his release he will also face the possibility of a full-disclosure polygraph and a possible violation of probation if he refuses. This is an issue that needs to be brought before the Supreme Court of Virginia. As for the penile plethysmograph, I think the client should be made aware that this kind of thing will be done, which, although it is certainly not unconstitutional interrogation, would have seemed very bizarre in any previous society!

Recommitment Hearing Procedure: Another Hearing with Even More Reports

Recommitment hearings are held annually for the first five years and biennially thereafter.[27] Annual or biennial rehearings may be conducted with the Respondent appearing by video.[28] In these hearings the Respondent's second opinion doctor can submit a report to the court and testify, regardless of whether Respondent cooperated with the state doctor in the VCBR – but he has a huge incentive to cooperate since they already "have him" and any refusal to cooperate is very unlikely to help his situation.

At the VCBR, a veritable plethora of reports will be generated. These include quarterly progress reports, release plans, observation notes, notes from groups attended, and the like. These, in addition to the annual reports from the VCBR and your second opinion doctor, must be reviewed prior to the annual (and later biennial) review hearings. And again, preparations for a possible conditional release report should be made.

Achieving & Surviving Conditional Release: Eco Hearings

Conditional release to the community is an option for the court either in the original SVP proceeding or a later recommitment. A conditional release report is prepared if the court so orders, which in effect "trifurcates" the proceedings into three phases: First, is the Respondent an SVP (or in a recommitment does he remain so)? Second, should a conditional release plan be ordered for the court's consideration? If so, third, should the conditional release plan be approved by the court with the result that the Respondent is actually released into the community? A viable home plan will be needed to obtain conditional release, and the Respondent's family and/or potential housemates will be subjected to intense scrutiny in the form of questions such as:

1. Who lives in the home? (No children in the home)
2. Will the offender have his own room?
3. Ages of the persons in the home?
4. Do children visit or spend night there? If so, need to know their sex & ages.
5. What type of dwelling? (single family, apartment, etc.; owned or rented);
6. What type of neighborhood? (not in a high crime area or near subsidized housing)
7. Any schools, day care centers, nursing homes, or recreation centers in the vicinity?
8. Who visits the home on a regular basis, do they spend the night, sex/ages.
9. Composition of the neighborhood (really same as #6)
10. Known history of alcohol, drug use or legal issues for chaperone/parents/other residents of the home
11. Level of acceptance of offender's guilt on part of the family or household (*This is considered very important)
12. Availability of transportation to appointments with probation officer, psychologists, counselors, polygraphists, and so forth
13. Job / income status (ability to pay for medications and other fees)
14. Adequate phone service (land /cell) to permit GPS monitoring
15. Is there a computer in the home and will the offender have access to it?
16. Any guns or other weapons in the home?
17. Any toys or appearance of children's items in home or yard?
18. Availability of pharmacists to provide medications
19. Do the people in the house know they can no longer celebrate Halloween?

Problems with one of more of these factors are not automatically disqualifying, because the decision is up to the judge. But too many problems will certainly make it less likely that the judge will approve the plan.

If at any point your client does get conditional release,

he will be on an intensive kind of probation (contracted through the Virginia DOC) with very strict conditions, including GPS, more polygraphs, and various forms of outpatient treatment. If he violates any condition he may be proceeded against by an Emergency Custody Order (ECO),[29] resulting in another hearing which lands him first in jail until the case is considered, and potentially back in the VCBR (from which custody he can only petition to be released after six months). If he doesn't violate, there will still be periodic reports (at least every 6 months),[30] but no automatic periodic hearing for those already on conditional release is conducted.

Petitions for Conditional Release

The Commissioner of the DBHDS may at any time petition for a Respondent to be released to conditional release, and the Respondent himself may so petition once annually during years when no recommitment hearing is mandated.[31]

Petitions for Modification or Removal of SVP Status/Conditions

Upon petition, the court may modify SVP conditions, remove them, or even order the Respondent released from SVP status. The Respondent, however, may only so petition after six months of actual conditional release, and thereafter annually.[32]

Epilogue

Defending SVP's is not the same as defending rape or other crimes. The sex offense trial was over before your client went to the penitentiary, and you are prohibited from challenging its conclusion. Your focus now is to insist on clear and convincing proof of a mental abnormality or personality disorder that fits the statutory definition, and to protect constitutional rights of persons who have not led exemplary lives, despite the opinions of people who think the Constitution is only for people they like. Not too bad a job for a lawyer! ❊

(Endnotes)

1. Va. Code § 37.2-900.
2. *Id.*
3. *Commonwealth v. Squire*, 278 Va. 746, 685 S.E.2d 631 (2009).
4. *Jenkins v. Director of the Va. Center for Behavioral Rehabilitation*, 271 Va. 4, 624 S.E.2d 453 (2006).
5. Va. Code § 37.2-901.
6. *See Kansas v. Hendricks*, 521 U.S. 346 (1997); *Kansas v. Crane*, 534 U.S. 407 (2002); *Shivaee v. Commonwealth*, 270 Va. 112, 613 S.E.2d 570 (2005), *cert denied*, 546 U.S. 1005 (2005).
7. Va. Code § 37.2-902 through 905.
8. *Hood v. Commonwealth*, 280 Va. 526, 701 S.E.2d 421 (2010).
9. Va. Code § 37.2-906(D).
10. Va. Code § 37.2-907(A).
11. Va. Code § 37.2-906.
12. Va. Code § 37.2-901.
13. Va. Code § 37.2-906(B).
14. Va. Code § 37.2-901.
15. *But see* Va. Code § 37.2-905.1 (substantial compliance provision).
16. Va. Code § 37.2-901.
17. Va. Code § 37.2-910.
18. Va. Code § 37.2-908(C).
19. *See Commonwealth v. Wynn*, 277 Va. 92, 671 S.E.2d 137 (2009); *Lawrence v. Commonwealth*, 279 Va. 490, 689 S.E.2d 748 (2010).
20. *See Commonwealth v. Garrett v.*, 276 Va. 590, 667 S.E.2d 739 (2008); *see also Lawrence*, 279 Va. 490, 689 S.E.2d 748.
21. Va. Code § 37.2-908 (D) and (E).
22. *See* Va. Code § 8.01-670.
23. Va. Code § 37.2-920.
24. *Id.*
25. *See* Va. Code § 37.2-910.
26. *Id.*
27. Va. Code § 37.2-910(A).
28. *Id.* (upheld against constitutional attack in *Shellman v. Commonwealth*, 284 Va. 711, 733 S.E.2d 242 (2012)).
29. Va. Code § 37.2-913 (actually a sort of SVP revocation hearing).
30. Va. Code § 37.2-912.
31. Va. Code § 37.2-911.
32. *See* Va. Code § 37.2-914. ✦

What is left of a *Bowman* claim under Virginia law after *Francis*?

By James R. Theuer

While Virginia law recognizes the employment at will doctrine, as the Supreme Court of Virginia recently reiterated, a claim for wrongful discharge in violation of public policy as an exception to that doctrine is only available in three circumstances:

> (1) When "an employer violated a policy enabling the exercise of an employee's statutorily created right" (hereinafter Scenario 1). *See Bowman [v. State Bank of Keysville*, 229 Va. 534, 331 S.E.2d 797 (1985)].
> (2) When "the public policy violated by the employer was explicitly expressed in the statute and the employee was clearly a member of that class of persons directly entitled to the protection enunciated by the public policy" (hereinafter Scenario 2). *See Bailey v. Scott-Gallaher, Inc.*, 253 Va. 121, 480 S.E.2d 502 (1997); *Lockhart, [v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 104, 439 S.E.2d 328, 331 (1994)]; and
> (3) When "the discharge was based on the employee's refusal to engage in a criminal act." (hereinafter Scenario 3). *See Mitchem v. Counts*, 259 Va. 179, 190, 523 S.E.2d 246, 252 (2000).[1]

The Court "has consistently characterized such exceptions as 'narrow.'"[2] Following the Court's opinion in *Francis*, however, it is doubtful that a *Bowman* claim, i.e., Scenario 1, exists on anything but the specific circumstances presented in *Bowman*.

In *Bowman*, two employees were terminated after complaining to the employer that the employees' votes as shareholders in support of a merger of the employer with another bank had been coerced and illegally obtained.[3] The employees "were performing their jobs in a satisfactory and capable manner."[4] While acknowledging the employment at will doctrine, the plaintiffs argued "that the question for decision is . . . whether this employer can, with absolute immunity, discharge these employees in retaliation for the proper exercise of rights as stockholders, a reason which has nothing to do with the employees' job performances."[5] The Court held the employer could not. The Court explained its holding as follows:

> In the present cases, the retaliatory discharges were based on violations of public policy by the defendants. Code § 13.1-32 conferred on these plaintiffs as stockholders the right to one vote, for each outstanding share of stock held, on each corporate matter submitted to a vote at a meeting of stockholders. This statutory provision contemplates that the right to vote shall be exercised free of duress and intimidation imposed on individual stockholders by corporate management. In order for the goal of the statute to be realized and the public policy fulfilled, the shareholder must be able to exercise this right without fear of reprisal from corporate management which happens also to be the employer. Because the right conferred by statute is in furtherance of established public policy, the employer may not lawfully use the threat of discharge of an at-will employee as a device to control the otherwise unfettered discretion of a shareholder to vote freely his or her stock in the corporation.[6]

Since the *Bowman* opinion, the Court has circumscribed the parameters of a *Bowman* claim to exclude, for example, generic whistleblower retaliatory discharge claims,[7] or claims based on retaliation for exercising private rather than statutory rights.[8] Which brings us to *Francis*.

The plaintiff in *Francis*, while at work, was verbally assaulted and physically threatened by Blow, a co-worker, who had to be physically restrained by others.[9] The employer counseled everyone involved to improve their behavior but conducted no other investigation and took no action against Blow.[10] Francis complained to the employer that her concerns for her physical safety had not been addressed.[11] A week after the incident, Francis

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applied for and obtained a preliminary protective order in general district court against Blow pursuant to Virginia Code Section 19.2-152.9(A).[12] Two workdays after Blow was served with the protective order at the workplace, the employer fired Francis because she "did not fit the vision of the organization."[13] On appeal from the circuit court's dismissal of her claim on demurrer, Francis argued that she had asserted a claim under *Bowman*.[14] Justice Goodwyn, writing for the unanimous Court, disagreed.

"To analyze such a claim, it is important to discern what right was conferred on an employee by statute, and then whether the employer's termination of employment violated the public policy underlying that right."[15] In Francis' case, the protective order statutes granted her the right to obtain a protective order to further their "clearly state[d] policy 'to protect the health and safety of the petitioner or any family or household member of the petitioner.'"[16] But "a viable *Bowman* claim in this context would require a showing that the termination of employment *itself* violated the stated public policy of protection of health and safety [and h]ere it does not."[17]

The distinction the Court goes on to draw between Francis' claim and *Bowma*n is unconvincing and, upon analysis, inadequate. While the Court held that "[t]he Protective Order Statutes grant an individual the right to seek a protective order,"[18] it continued "there exists no [] public policy in the Protective Order Statutes protecting the exercise of the right to seek a protective order."[19] Instead, the Court narrowly defined the public policy in the protective order statutes as protection of health and safety. Since Francis' termination itself did not threaten her health and safety, no public policy was violated by the termination.

This holding on its face is irreconcilable with *Bowman*, though, ironically, the opinion in *Francis* purported to rely on *Bowman* in reaching its conclusion. The statute at issue in *Bowman* simply gave the shareholder the right to vote her shares,[20] just as the statute at issue in *Francis*, as the Court acknowledged, simply "grant[ed] an individual the right to seek a protective order."[21] Bowman was entitled to vote her shares; Francis was entitled to petition for a protective order. The Court does not explain how the statute in *Bowman* contains a public policy to protect the right to vote one's shares while the statute in *Francis* does not contain a public policy to protect the right to obtain a protective order, making the disparate holdings difficult to reconcile based on the language of the statutes alone.

But it did give a hint: The *Francis* Court quoted in full the holding in *Bowman* set forth above in this article and even italicized the phrase "*In order for the goal of the statute to be realized and the public policy fulfilled, the shareholder must be able to exercise this right without fear of reprisal from corporate management which happens also to be the employer.*"[22] So the question is why, in the case of Francis' claim, she had no corresponding right to obtain a protective order against a co-worker without fear of reprisal from corporate management. The answer must be that, in her case, the corporate employer was not *both* the party to the protective order *and* the party terminating the employment.

In *Bowman*, the employer was on both sides of the transaction, if you will: corporate management presented the merger proposal to the shareholders and coerced employee-shareholders to vote for it and corporate management terminated the employee-shareholders. By contrast, the employer in *Francis* was a stranger to the petition for a protective order. Fear of reprisal for exercising a right is not enough, *Francis* teaches, as that is nothing but "a generalized cause of action for the tort of 'retaliatory discharge'" rejected by the Court as the basis for a *Bowman* claim.[23] Instead, the target of the protective order must be the employer terminating the employee.[24] While the Court did not state this directly in its opinion, that is the only conclusion that reconciles the disparate results for the different plaintiffs in *Francis* and *Bowman*.

The employer as actor in both transactions is the particular circumstance of *Bowman*, and, after *Francis*, apparently the only situation in which a *Bowman*, Scenario 1, claim exists as an exception to the doctrine of employment at will. That is a very narrow exception, indeed. ❋

(Endnotes)

1. *Francis v. National Accrediting Comm'n of Career Arts & Sciences, Inc.*, 293 Va. 157, 172-73, 796 S.E.2d 188, 190-91 (2017) (citing *Rowan v. Tractor Supply Co.*, 263 Va. 209, 213-14, 559 S.E.2d 709, 711 (2002)).
2. *Francis*, 293 Va. at 172, 796 S.E.2d at 190 (citing *Lawrence Chrysler Plymouth Corp. v. Brooks*, 251 Va. 94, 97-98, 465 S.E.2d 806, 808-09 (1996); *Lockhart v. Commonwealth Educ. Sys. Corp.*, 247 Va. 98, 104,

439 S.E.2d 328, 331 (1994); *Bowman v. State Bank of Keysville*, 229 Va. 534, 540, 331 S.E.2d 797, 801 (1985)).

3. *Bowman*, 229 Va. at 537-38, 331 S.E.2d at 799-800.

4. *Id.* at 538-39, 331 S.E.2d at 800.

5. *Id.* at 539, 331 S.E.2d at 800.

6. *Id.* at 540, 331 S.E.2d at 801. Virginia Code Section 13.1-32, now recodified at Section 13.1-662, provides simply that "each outstanding share, regardless of class, is entitled to one vote on each matter voted on at a shareholders' meeting." Va. Code § 13.1-662.A.

7. *Dray v. New Mkt. Poultry Prods, Inc.*, 258 Va. 187, 191, 518 S.E. 2d 312, 314 (1999).

8. *Miller v. SEVAMP, Inc.*, 234 Va. 462, 468, 362 S.E.2d 915, 919 (1987).

9. *Francis*, 293 Va. at 170, 796 S.E.2d at 189.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 170, 796 S.E.2d at 189-90.

14. Francis also argued, unsuccessfully, that she asserted a claim under Scenario 2. *Id.* at 175, 796 S.E.2d at 192.

15. *Id.* at 173, 796 S.E.2d at 191.

16. *Id.* at 174, 796 S.E.2d at 191 (quoting Va. Code § 19.2-152.9(A)).

17. *Francis*, 293 Va. at 174, 796 S.E.2d at 191 (emphasis in original).

18. *Id.*

19. *Id.*

20. *See, supra*, n. 1.

21. *Francis*, 293 Va. at 174, 796 S.E.2d at 191.

22. *Id.* at 173-74, 796 S.E.2d at 191 (quoting *Bowman*, 229 Va. at 540, 331 S.E.2d at 801) (emphasis in original).

23. *Francis*, 293 Va. at 174, 796 S.E.2d at 192 (quoting Miller, 234 Va. at 467-68, 362 S.E.2d at 918).

24. In light of potential individual liability for wrongful discharge following the Court's decision in *Van Buren v. Grubb*, 284 Va. 584, 733 S.E.2d 919 (2012), such a scenario is possible. ✦

Message from the Chair • James C. Martin

Our section has a number of beneficial projects and activities planned for the coming year.

Of particular note are: 1) the joint Showcase CLE entitled "Successful Appellate Practice from the Trial Court to the Appellate Court," which is being sponsored jointly by the Litigation Section and the Construction and Public Contracts Law Section and will be held in Virginia Beach in June (with panelists including Justice Goodwyn of the Supreme Court of Virginia); 2) a revision of the Appellate handbook; 3) cooperation and support for the Young Lawyers Committee in their "Rule of Law" programs; 4) a Spring CLE and 5) planning for a dedicated issue of *Virginia Lawyer* magazine.

We are the largest of the Virginia State Bar's sections with 3,114 members. The Section Board welcomes all members, and particularly those who may be interested in participating in, or, better yet, assisting with our activities.

Any offers to help and/or suggestions for activities will be gratefully accepted. We are particularly desirous of suggestions for CLE topics. You are all encouraged to contact me or another Board member with any comments, questions or suggestions. ✦

James (Jim) Martin is a partner, with his wife Susanne, in Martin & Martin Law Firm, Danville. Mr. Martin represents respondents in sexually violent civil proceedings in Virginia, both at the trial court level and on appeal. Both of the Martins also defend involuntary mental commitment hearings and judicial authorizations of medical treatment.

A VIEW FROM THE BENCH

A Better Day in Court: Avoiding the Most Troubling Errors of Trial Attorneys and Their Consequences

By The Honorable Gary A. Mills, Seventh Judicial Circuit of Virginia
Assisted by Trayce Hockstad, Law Clerk

Google any phrase pertaining to preparation for a day in court and up will come an inexhaustible wellspring of guides, checklists, and tips to assist any reader, from the befuddled pro se defendant to the meticulous, experienced attorney. Any number of detailed seminars, blogs, and forums are dedicated to eliminating embarrassment and frustration in the courtroom, if not achieving success in the outcome. Most entries focus on presentation, demeanor, and wardrobe choices,[1] while a few broach more nuanced topics like specific forum filing deadlines and discovery procedures.[2]

The thoroughness and availability of resources in this vein suggest that a great number of attorneys appearing in court are committed to not only demonstrating effective and professional legal etiquette but assisting their clients in doing so as well. One should be safe in assuming that the average courtroom representative is, at least, moderately proactive and successful in his or her attempts to be well-prepared for a day of courteous dispute resolution. Unfortunately, daily observation suggests that a significant minority of attorneys appear in court not fully prepared for the challenges of litigation.

It is no secret that judges disfavor lawyers who display arrogant, deceptive, or unorganized behavior before the bench. Inadequate lawyering can seriously derail even a relatively straightforward trial, and courts are limited in their options to level the playing field for clients suffering from the use of poor tactics.[3] While the range of factors that contribute to ineffectual representation varies from case to case, research indicates that a surprising amount of hiccups in court proceedings come from a lack of either (or both) civility or diligence on the part of attorneys. Although not always apparently related, the interplay between civility and the ethical obligations imposed on members of the legal profession has become the subject of an entire field of study and scholarship aimed at encouraging and guiding new attorneys toward a more productive method of interaction.[4]

In the last decade, statistics from the American Bar Association indicate that less than one percent of attorneys are annually disbarred.[5] That is good news – but a closer examination of the given reasons for attorney deficiency has taken away the comfort that might be derived from a low expulsion rate. Because the legal profession functions on a system of internal investigation and self-regulation, state bars have historically made extensive efforts to provide attorneys a full knowledge of performance expectations and how to meet them.[6] In response to an increasingly hostile work atmosphere, however, these efforts to guide behavior have recently expanded beyond the normal ethical duties associated with law practice and into the world of good manners.

In the 1990s, various bar associations and factions of the national legal community began forming "committees on civility" in an attempt to address the growing sentiment that law had become a very uncivil profession which not only took a toll on practitioners' qualities of life, but also impeded the functionality of the judicial system.[7] Since then, the discussion has continued and often turned to debate regarding the role of civility as part of a lawyer's ethical obligations.[8] Some fear that punishing discourteousness in lawyers will inevitably lead to a chilling of zealous advocacy,[9] while others argue civility should be considered a "unique

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obligation distinct from ethics and professionalism."[10] Various theories speculate on the root of the issue, including blaming the law school environment,[11] the dissociative nature of electronic communication,[12] an unawareness that civility is expected between parties,[13] and perhaps most disturbingly, a belief that duties are owed to the client alone at the expense of the integrity of the legal system as a whole.[14]

Putting aside the issue of causation, there is a strong consensus that a lack of cooperation and politeness has become prevalent in the legal field, and that it has a heavy impact on the profession nationwide. At the outset of the recent civility reform, studies in New York and D.C. showed ninety-seven percent of lawyers reported experiencing hostility when dealing with other attorneys,[15] and more than eighty percent of judges had witnessed open incivility between lawyers.[16] Undoubtedly, the most concerning aspect of such a pervasive issue is the degree to which it impacts the functionality of the entire judicial system. Disagreements often lead to unnecessary delays, cost increases, and abuses in the discovery process. Even more unfortunately, this atmosphere of increasingly open discourteousness intersects with an all too common unpreparedness in attorney behavior that severely frustrates efficient justice.

From January of this year to date, over 37% of the attorneys disciplined in Virginia were punished for reasons related to competence, diligence, or communication/discovery abuse violations[17] – that is at least twenty out of fifty-three attorneys disciplined, including those suspended solely based on concurrent license revocations/suspensions in other jurisdictions. Some of these cases deal with facially egregious behavior, like skipping court in excess of eight times,[18] but many stem from seemingly smaller mistakes. In the last few months, the Newport News Circuit Court has seen multiple appeals and motions fail for missed deadlines, appearances, and a lack of preparation for court proceedings. At the best of times, last minute lawyering hinders effective cooperation and coordination between counsel and the court. But the most devastating effects of attorney misconduct, whether the wrongful behavior triggers official state bar discipline or not, are generally felt by the client ¬– sometimes to a shocking degree.

In 1996, the Anti-Terrorism and Effective Death Penalty Act imposed a one-year statute of limitations on, among other filings, habeas corpus petitions in capital cases.[19] Subsequently, an online news organization, the Marshall Project, conducted a nationwide investigation of attorney performance in death penalty habeas petitions.[20] The Marshall Project concluded that, as of 2014, attorneys in at least eighty capital cases had missed that filing deadline, costing those inmates "arguably the most critical safeguard in the United States' system of capital punishment" – federal court review of their cases.[21]

While it is true that most cases are not matters of life and death, many with dramatic and permanent consequences hanging in the balance hinge on the diligence and efficacy of one or more attorneys. Inexplicably, one area of practice in which ill-prepared courtroom proceedings manifest most frequently is juvenile and domestic relations matters. Particularly in cases concerning child abuse or neglect, indigent parents often find themselves relying on overworked, underpaid, court-appointed counsel for the restoration of parental rights or reunification with their children. Throughout the nation, many courts agree that an inordinate amount of child protection and parental rights proceedings are plagued by attorneys and caseworkers who appear late, unprepared to testify, unfamiliar with the case, or fail to appear altogether.[22] Some states have gone so far as to set up public support accounts for parents involved in these cases to help them hold their attorneys accountable for ineffective representation.[23]

In short, attorneys are not the only ones paying high costs for their own incivility and unpreparedness in legal proceedings. Lack of thoroughness and cooperation in the discovery and other precursory processes inevitably precedes an ineffective presentation in the courtroom. The fallout of such poor judgment and subpar diligence produces devastating results in the financial, professional, and personal lives of lawyers and their clients.

The good news is that having previously been attorneys themselves, most judges have not forgotten the extreme and demanding environment in which lawyers exist on a daily basis. They are also not eager to come to the conclusion that an attorney is uncivil, unprepared, or fails to meet the ethical standards so crucial to the proper practice of law. The truth is that

judges love seeing cooperative, professional, efficient lawyers succeed in the courtroom. The best method for becoming one of these successful attorneys is perhaps difficult, but not complicated. Be proactive. Be courteous. Be prepared.

Attorneys who get the most reward out of their careers are ones who have learned how to balance fervor and competitiveness with politeness and humility to provide the most effective representation for their clients. The most persuasive proponents are those who realize that zealous advocacy is not at odds with civil discourse and a willingness to be accommodating. The most convincing arguments are ones that are built upon an exhaustive comprehension of the facts and issues in play in a particular case. If you do not understand something crucial, keep studying it until you do. Cooperation from your client, and especially with opposing counsel, is key to navigating a smooth and effective discovery process. Communicate openly, honestly, promptly, and pleasantly with every party involved in the case, as well as the court. And never forget that being a successful attorney is about more than getting to a great win/loss record – it is about how you treat people along the way. ✦

(Endnotes)

1. John Walsh, *Preparing for Your Day in Court*, DENBIGH LAW CTR., http://www.denbighlaw.com/divorce/preparing-for-your-day-in-court (last visited Oct. 2, 2017).

2. *How to Take a Civil (Non-Criminal) Lawsuit to General District Court*, CENT. VA. LEGAL AID SOC'Y, http://cvlas.org/wp-content/uploads/2016/04/how-to-sue-in-GDC.pdf (last visited Oct. 2, 2017).

3. Judge Mel Dickstein, *What Do Judges Think of Lawyers?*, MINNPOST (Jan. 15, 2015), https://www.minnpost.com/community-voices/2015/01/what-do-judges-think-lawyers (last visited Oct. 6, 2017).

4. *See* Thomas Gibbs Gee & Bryan A. Garner, *The Uncivil Lawyer: A Scourge at the Bar*, 15 REV. LITIG. 177 (1996).

5. Andrew Wolfson, *Disbarred Lawyers Face Career, Personal Hurdles*, USA TODAY, (Jan. 19, 2014), https://www.usatoday.com/story/news/nation/2014/01/19/disbarred-lawyers-face-career-personal-hurdles/4651761/ (last visited Oct. 2, 2017) ("According to the American Bar Association, 1,046 lawyers were disbarred nationally in 2011, or about 0.08% of the roughly 1.27 million practicing lawyers.").

6. *Professional Guidelines*, THE VA. STATE BAR, http://www.vsb.org/pro-guidelines (last visited Oct. 2, 2017).

7. *See* Gee & Garner, *supra* note 4, at 177.

8. *See* Katherine Sylvester, *Current Developments 2012-2013: I'm Rubber, You're Sued: Should Uncivil Lawyers Receive Ethical Sanctions?*, 26 GEO. J. LEGAL ETHICS 1015 (2013).

9. *See* Alice Woolley, *Does Civility Matter?*, 46 OSGOODE HALL L.J. 175, 175–76, 179–82 (2008).

10. *See* Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 Gonz. L. Rev. 99 (2012).

11. Gee & Garner, *supra* note 4, at 188.

12. *Id.* at 185.

13. Bronson D. Bills, *To Be or Not to Be: Civility and the Young Lawyer*, 5 CONN. PUB. INT. L.J. 31, 35 (2005) ("The tradition of civility that used to be transmitted to young lawyers is [now] gone.").

14. Mark D. Nozette & Robert A. Creamer, *Professionalism: The Next Level*, 79 TUL. L. REV. 1539, 1545 (2005).

15. Gee & Garner, *supra* note 4, at 179 (*citing* Daniel Wise, *Remedies for "Uncivil" Litigation Weighed*, N.Y. L.J., 1, 4 (Nov. 7 1991)).

16. Saundra Torry, *Disorder in the Court! New Codes Call for Good Behavior*, WASH. POST (June 24, 1996), https://www.washingtonpost.com/archive/business/1996/06/24/disorder-in-the-court-new-codes-call-for-good-behavior/aa9d8c5b-5dbe-4558-a27d-2258e2e4b866/?utm_term=.8dc721023a38.

17. Some discipline actions were not disclosed in any detail. *See* Va. State Bar, http://www.vsb.org/site/regulation/disciplinary-system-actions (last visited Oct. 2, 2017).

18. *Lawyer Facing Priority Ethics Hearing Accepts Suspension*, VA. LAW. WKLY., Vol. 32, no. 17 (Sept. 25, 2017).

19. *Unprepared or Inexperienced Lawyers and Harsh Deadlines Deny Appeals to People on Death Row*, EQUAL JUSTICE INITIATIVE (Nov. 19, 2014), https://eji.org/news/dozens-condemned-to-death-denied-appeals-after-lawyers-missed-deadlines (last visited Oct. 6, 2017).

20. *Id.*

21. *Id.*

22. *Symposium: The State Construction of Families: Foster Care, Termination of Parental Rights, and Adoption: Justice Denied: Delays in Resolving Child Protection Cases in New York*, 12 VA. J. SOC. POL'Y & L. 546, 567 (2005).

23. Sara VanMeter, *Comment: Public Access to Juvenile Dependency Proceedings in Washington State: An Important Piece of the Permanency Puzzle*, 27 SEATTLE U. L. REV. 859, 894–95 (2004). ✦

Contemporaneous Objection Rule

By Kevin Gerrity

Trial is often a fast moving, stressful environment where an attorney's immediate focus is obtaining a successful outcome for their client. Unfortunately, even for the most veteran of trial attorneys, when an unfavorable ruling is made, preserving the right to have that ruling challenged on appeal is forgotten. Virginia's appellate courts can be unforgiving when an issue is not preserved, and summary denials of appeals are often the result. In order to avoid the difficult discussion with a client as to why their appeal was denied, it is crucial that, at all times, attorneys remember a few simple rules.

The Contemporaneous Objection Rule demands that objections must be timely made and with reasonable certainty.[1] A timely objection will allow the trial court to be, "in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error."[2] The goal "is to avoid unnecessary appeals, reversals and mistrials by allowing the trial judge to intelligently consider an issue and, if necessary, to take corrective action."[3] Reasonable certainty is achieved with specificity in one's objection as to its basis. If more than one reason can be given for the objection then each ground for the objection must be clearly stated. Finally, it is important to state the relief sought from the trial court. If one wants evidence excluded, a cautionary instruction issued, a mistrial, or any other relief, one's desire must be made clear at the time of the objection.

Making a motion to strike and renewing such motion at every trial is crucial to preserve your client's right to appeal. I often encourage newer attorneys to make and renew motions to strike at preliminary hearings and misdemeanor trials to form the habit of doing so in every case. I have been present when trial judges complained that an attorney should not waste the court's time with a motion to strike that is considered routine. Judges have similarly complained about renewed motions to strike which they consider repetitive and unnecessary. Attorneys should never concern themselves with a court's impatience for objections and motions to strike at trial. Failing to so move at trial often results in a summary dismissal of the subsequent appeal.

When making or renewing a motion to strike, remember that as with any objection a motion to strike must be timely and specific. Also remember that if you are raising an affirmative defense you must also address the sufficiency of your own evidence during your renewed motion to strike.[4] It is also worth noting that if you choose to introduce evidence during the Plaintiff's or Commonwealth's case-in-chief, you will have waived your right to make an initial motion to strike. This tactic is almost never advisable.

If you realize after trial that you failed to make or renew a motion to strike, do not automatically assume that your client's ability to appeal is forfeit. While a motion and renewal of that motion is required in any jury trial, at a bench trial a sufficiently specific closing argument may sufficiently preserve the record for appeal as the court is also the trier of fact.[5]

It is also important to remember that you may file a motion to set aside a verdict after trial. I encourage attorneys to file this motion routinely, whether or not they believe they sufficiently preserved all issues for appeal at trial. A motion to set aside allows an attorney to step back and reflect upon the trial, conduct additional research and make a detailed plea in writing which is often more complete than what was argued at trial. It is surprising how often such research reveals additional precedent for your position. One should not waive their right to present any additional arguments to the trial court, and a motion to set aside is an effective way to do so. Additionally, a motion to set aside is often an effective remedy for an attorney's failure to move to strike or make an objection.[6]

As a last resort, if an appellate court rules, or is likely to find, that an issue appealed was not adequately preserved for appeal you can ask the court to consider

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it under the Ends of Justice or Good Cause exceptions. In order for an Ends of Justice Exception to be found, an appellant must, "present not only a winning argument on appeal but also one demonstrating that the trial court's error results in a 'grave injustice' or a wholly inexcusable 'denial of essential rights.' In criminal cases, this usually requires a showing that the defendant was 'convicted for conduct that was not a criminal offense or the record must affirmatively prove that an element of the offense did not occur.'"[7]

The Good Cause Exception applies when "some objective factor external to the defense impeded counsel's efforts to comply with [a] State's procedural rule."[8] Similar to the Good Cause Exception is what could be styled the No Opportunity to Object Exception which as stated in Virginia Code § 8.01-384(A), "[I]f a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection shall not thereafter prejudice him … on appeal."[9] Any of these exceptions must be requested by the Appellant and all are measures of last resort and rarely successful.

Finally, if an objection is successfully made to evidence which you are trying to introduce, always make a proffer of the evidence or ensure the rejected submission is marked and made part of the record. Proffers can be made by a unilateral avowal of counsel (provided it is unchallenged), by stipulation, or by sworn testimony of a witness outside the presence of the jury.[10] It is preferable that the proffer be made at the time of the adverse ruling. If a judge does not allow for that, however, it is important to make sure the proffer is made during the course of the trial or, as a measure of last resort, in a post-trial submission (usually in conjunction with a motion to set aside a verdict). Finally, the party offering the evidence must establish the basis upon which it is offered, and the materialness and relevancy to the proceeding, at the time of the proffer. [11]

A timely review of the trial record is necessary to avoid having to ask an appellate court to find that an extraordinary exception applies in your case. Clear and timely objections along with detailed and timely motions to strike, reinforced by a motion to set aside a verdict, will often times be sufficient. If there is doubt as to whether you have sufficiently preserved an issue, reviewing the trial record promptly and prior to the final order will allow you to implement one or more of the remedies above to help ensure your client a chance of a successful appeal.

The author would like to recognize the Virginia IDC whose training and resources I drew from for this article and in my practice over the years. ✦

(Endnotes)

1. VA. SUP. CT. R. 5:25, 5A:18 and VA. CODE § 8.01-384(A)

2. *Scialdone v. Commonwealth*, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010).

3. *Campbell v. Commonwealth*, 12 Va. App. 476, 480, 405 S.E.2d 1, 2 (1991)(citing *Head v. Commonwealth*, 3 Va. App. 163, 167, 348 S.E.2d 423, 426 (1986)).

4. *Campbell*, 12 Va. App. at 481, 405 S.E.2d at 3.

5. *Dickerson v. Commonwealth*, 58 Va. App. 351, 357-58, 709 S.E.2d 717, 720 (2011).

6. *See Murillo-Rodriguez v. Commonwealth*, 279 Va. 64, 688 S.E.2d 199 (2010).

7. *Winslow v. Commonwealth*, 62 Va. App. 539, 546-47, 749 S.E.2d 563, 567 (2013)(citations omitted).

8. *Murray v. Carrier*, 477 U.S. 478, 488 (1968) (cited in *Flanagan v. Commonwealth*, 58 Va. App. 681, 694, 714 S.E.2d 212, 218 (2011)).

9. *See Maxwell v. Commonwealth*, 287 Va. 258, 754 S.E.2d 516 (2014).

10. *Galumbeck v. Lopez*, 283 Va. 500, 508, 722 S.E.2d 551, 555 (2012).

11. *Creamer v. Commonwealth*, 64 Va. App. 185, 196, 767 S.E.2d 226, 231 (2015). ✦

Case Summaries • Robert E. Byrne, Jr.

Case: *Moonlight Enterprises, LLC v. Mroz, et al.*, 293 Va. 224, 797 S.E.2d 536 (2017).
Author: D. Arthur Kelsey, J.
Date Decided: March 30, 2017
Lower Ct.: Schell, David, J.

Facts: Moonlight retained Mroz to assist with the purchase of three retail condo units in 2008. Moonlight contended that it suffered injuries due to Mroz's failure to review a disclosure packet and because Mroz misrepresented the number of parking spaces for the units. Then, in 2010, Moonlight had Mroz file suit against the condo association challenging certain fees. The condo association prevailed and Moonlight was ordered to pay fees in the amount of nearly $60,000. Two sketch final orders were submitted to the court for entry, and the trial court entered the order for the 2010 litigation on February 10, 2012.

In 2013, Moonlight filed a malpractice action against Mroz for the 2008 and 2010 representations. The trial court dismissed the complaint regarding the 2008 representation on the grounds that it was barred by the statute of limitations, and Moonlight nonsuited the claim regarding the 2010 representation.

On February 10, 2015, Moonlight filed a second malpractice action against Mroz and Zachary related to the 2010 representation. Mroz and Zachary contended that the claim was barred by the statute of limitations. The circuit court agreed and dismissed the case.

Analysis: A cause of action for legal malpractice arises when the malpractice occurs, regardless of whether the client is aware of that. This is subject to the continuous representation rule, however, which states that a cause of action for legal malpractice extends to the date when the attorney renders his last professional services for the client on a matter.

Here, Zachary's work on the matter at issue continued until February 10, 2012, as he consulted with the circuit court's clerk and requested which order be tendered to the court. These things, Zachary contends, were mere immaterial courtesies that should not extend the tolling period. The Supreme Court disagreed, finding the actions to be continued legal work. Mroz, however, did not perform such services. And the work performed by Zachary to finalize the matter cannot be imputed to Mroz.

Result: Affirmed in part, reversed in part, and remanded.

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Case: *Manu v. GEICO Casualty Company*, 293 Va. 371,798 S.E.2d 598 (2017).
Author: S. Bernard Goodwyn, J.
Date Decided: April 27, 2017
Lower Ct.: Ortiz, Daniel, J. (Fairfax County)

Facts: In 2010, Plaintiff Manu was a passenger in an automobile that was involved in a collision. Manu, who incurred more than $27,000 in medical bills and more than $6,300 in lost wages, made a claim for uninsured motorist coverage under his GEICO insurance policy, which provided coverage in the amount of $25,000. GEICO elected to defend the John Doe driver, the case proceeded to trial, and the jury awarded $68,528.24 to Manu.

Plaintiff filed suit against GEICO, alleging that GEICO's failure to settle the claim within the policy limits violated GEICO's duty to act in good faith. GEICO filed a demurrer and the trial court eventually sustained the demurrer and dismissed Manu's claim with prejudice.

Analysis: The issue for appeal was whether a UM insurer's duty to pay what the insured is "legally entitled to recover" requires the insurer to settle an insured's demand for payment before the insured obtains a judgment against the defendant driver. The plain language of the UM statute requires a UM carrier to pay an insured damages that an uninsured driver has been ordered by a court to pay the insured. This requires the entry of a judgment against the uninsured tortfeasor.

Manu next argued that Code § 8.01-66.1(D)(1), the bad faith insurance provision, requires a UM carrier to attempt to settle and adjust a claim prior to judgment being obtained. The Court concluded that the Code provision did not impose additional

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duties on insurers but that, instead, it provided a remedy against insurers who arbitrarily refuse to pay claims that are owed under an insurance policy. Because no amount is owed in the UM context until a judgment is obtained against the uninsured tortfeasor, the statute does not come into play unless a judgment is first obtained.

Result: Affirmed.

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Case: *Lambert v. Sea Oats Condo. Assoc., Inc.*, 293 Va. 245, 798 S.E.2d 177 (2017).
Author: William C. Mims, J.
Date Decided: April 13, 2017
Lower Ct.: Lewis, James, J. (Virginia Beach)

Facts: Plaintiff condo owner, Lambert, filed suit against Sea Oats Condominium Association (Association) in general district court for its failure to fix her exterior door, an alleged common element. Lambert lost in district court and appealed. In the circuit court, Lambert prevailed and was awarded $500, and Lambert presented an affidavit seeking attorney's fees in the amount of more than $8,000. The Association claimed that the amount of the requested fees were unreasonable because they were 16 times greater than the amount of the judgment, and because circumstances of plaintiff's representation caused the fees to be excessive. The trial court awarded plaintiff $375 in fees.

Analysis: Code § 55-79.53, upon which plaintiff relied, mandates the court to award attorney's fees. Trial courts are to examine seven factors when determining the reasonableness of a fee: (1) the time and effort expended; (2) the nature of the services; (3) the complexity of the services; (4) the value of the services to the client; (5) the results obtained; (6) whether the fees incurred were consistent with fees generally charged for such services; and (7) whether the services were necessary and appropriate. A trial court abuses its discretion by determining an award without considering relevant factors.

The "results obtained" factor permits the trial court to compare the damages awarded to the damages sought, but the court cannot use the amount of damages sought as a limit to cap attorney's fees. A trial court cannot simply reject a request for an award of attorney's fees based only the apparent lack of proportion between the amount awarded and the amount of fees incurred.

The trial court has the discretion per Rule 3:25(D) to determine a procedure before trial for deciding attorney's fees. A party seeking attorney's fees need not provide an estimate of the amount of such an award before the case is resolved on the merits, but the party must provide notice that it seeks an award of fees.

Result: Affirmed in part, reversed in part, and remanded.

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Case: *Toraish v. Lee*, 293 Va. 262, 797 S.E.2d 760 (2017)
Author: William C. Mims, J.
Date Decided: April 13, 2017
Lower Ct.: Kassabian, Brett, J. (Fairfax County)

Facts: At the trial of a medical malpractice action in a death case, defendant doctor, who was not offered or qualified as an expert witness, was alleged to have offered expert testimony. The defendant doctor also presented an expert who provided a "differential diagnosis" to explain the deceased's likeliest cause of death, and that expert admitted that he lacked the expertise to exclude all potential causes of death. The plaintiff objected, contending that because the expert lacked qualifications to opine on the deceased's cause of death, the expert's testimony lacked an adequate factual foundation. The trial court overruled the objection and the jury found for the defendant doctor.

Analysis: Code § 8.01-401.1 has liberalized the admissibility of expert testimony, but expert testimony must still have a sufficient factual basis. The trial court erred by allowing the defense expert to testify because, although he was entitled to rely on the opinions of other experts, no other expert reached the conclusion he reached. As such, his opinion lacked factual foundation. This opinion could not be bolstered by the opinion offered by the video-taped testimony of another defense expert at trial because that expert's conclusion was reached after the unqualified expert reached his conclusion.

As far as the defendant's expert opinion is concerned, Virginia law permits a defendant in a medical malpractice case to offer expert testimony and to offer lay testimony on any matter upon which he had personal knowledge. The doctor's testimony of what he would not have done was not expert testimony, as factual testimony regarding circumstances that impacted or would have impacted decision to

perform surgery is factual, not opinion, testimony.

Result: Reversed and remanded.

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Case: *Nationwide Mut. Fire Ins. Co. v. Erie Ins. Exchange*, 293 Va. 331, 798 S.E.2d 170 (2017)
Author: Cleo E. Powell, J.
Date Decided: April 13, 2017
Lower Ct.: Weimer, Carroll, J. (Prince William County)

Facts: Nationwide brought a declaratory judgment action against Erie Insurance to determine the priority of five separate insurance policies, three by Nationwide and two by Erie. The dispute was based on an underlying automobile accident where an employee of a subcontractor, who was driving the contractor's vehicle, injured another driver in an accident. The trial court determined that the contractor's agreement with the subcontractor contained an indemnification provision, and that provision gave the contractor the right to indemnification against the subcontractor. The trial court ruled that the subcontractor's insurance, as a result, had priority.

Analysis: Courts interpret insurance policies according to the intent of the parties. Based on the plain language of the policies, an exclusion precluded coverage of one of the Nationwide policies. An indemnification provision in a contract can shift responsibility for a loss between insurers, but here, the indemnification provision is irrelevant because coverage for the party to be indemnified was not at issue. The Court then examined the language of the policies at issue to determine the order of priority of coverage. As far as the excess policies were concerned, the court noted that when excess policies were of equal effect, neither of the policies will provide primary coverage and pro-rata distribution is appropriate.

Result: Reversed and final judgment.

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Case: *Westlake Legal Group v. Flynn*, 293 Va. 344, 798 S.E.2d 187 (2017).
Author: Charles S. Russell, S.J.
Date Decided: April 13, 2017
Lower Ct.: Irby, Jeannette, J. (Loudoun County)

Facts: In 2008, Flynn entered a fee agreement whereby she retained Westlake Legal Group ("Westlake") to represent her in a domestic relations matter. Flynn agreed to pay Westlake's attorneys their hourly rates, agreed to be responsible for costs, and, in the event collection efforts were necessary, agreed that her entire balance would become due and Westlake would charge $400 per hour for collection efforts. Flynn additionally agreed that her unpaid balance would accrue interest at 18% per annum.

Westlake confessed judgment against Flynn for an unpaid balance, an order of judgment was entered, and Westlake instituted garnishment proceedings. Flynn was never served with the confession of judgment paperwork, so she challenged the judgment on the grounds that it was void. Westlake moved for a nonsuit.

The circuit court granted the nonsuit, quashed the judgment, ordered the clerk to remit to Flynn the funds held in the garnishment, and awarded sanctions to Flynn against Westlake for the fees she incurred.

Analysis: The trial court had jurisdiction per Code § 8.01-271.1 to award sanctions even though the underlying order was void. The Supreme Court declined to examine whether the trial court abused its discretion to impose sanctions because that assignment was not preserved for appeal.

Result: Affirmed and remanded.

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Case: *Lafferty v. Sch. Bd. of Fairfax County*, 293 Va. 354, 798 S.E.2d 164 (2017).
Author: Leroy F. Millette, Jr., S.J.
Date Decided: April 13, 2017
Lower Ct.: Kassabian, Brett, J. (Fairfax County)
Facts: Student filed declaratory judgment by and through parents as next friends against the Fairfax County School Board ("Board"), for the board's purported unlawful expansion of its anti-harassment and anti-discrimination policies to include the categories of "sexual orientation" and "gender identity." Plaintiffs sought a declaratory judgment that the policies in question were void under Virginia law, including Dillon's Rule, due to the plaintiff student's feelings of distress and inhibition while trying to maneuver the uncertainties of the policies. The Board contended that the Plaintiffs lacked standing and the case was dismissed.

Analysis: The declaratory judgment statute does not create or change any substantive rights. Plaintiffs must have

a justiciable interest to have standing to pursue a declaratory judgment action. Here, insofar as the student is concerned, the plaintiff's complaint fails to allege (1) an actual or potential injury in fact based on "'present rather than future or speculative facts'"; (2) specific "adverse claims of right," such as an identified or actionable right belonging to the student. If the student becomes aggrieved as a result of a school board decision related to the policies, the student can bring a claim in the circuit court pursuant to Va. Code § 22.1-87.

The parents also lack taxpayer standing to pursue the action. Taxpayer standing to challenge actions of local governments is tied to challenging government expenditures. The complaint in this case did not allege any costs or expenditures, and the mere fact that the student's parents are taxpayers is insufficient to confer taxpayer standing.

Result: Affirmed.

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Case: *Desai v. A.R. Design Group, Inc.*, 293 Va. 426, 799 S.E.2d 506 (2017).
Author: Stephen R. McCullough, J.
Date Decided: June 1, 2017
Lower Ct.: Smith, Robert, J. (Fairfax County)

Facts: A.R. Design Group performed work for Ulka Desai, the executrix of the estate of Lakshmi Desai, and recorded mechanic's liens on two properties. The property owner claimed that the liens had a number of fatal defects, namely that lien listed the Ulka Desai in her personal, but not representative, capacity; the claimant was listed as an officer of A.R. Design Group, Inc., not the entity itself; and the memoranda did not list a date from which interest was due or the "time or times" when the amount is or will become due. The trial court determined that the liens were nevertheless valid.

Analysis: Mechanics liens are creatures of statute. Per Virginia Code § 43-15, inaccuracies in a lien memoranda or property description will not invalidate the lien "if the property can be reasonably identified by the description given and the memorandum conforms substantially to the requirements of §§ 43-5, 43-8, and 43-10, respectively, and is not willfully false."

As to the purported defects of the liens at issue, the property in question was in a trust, and Ulka Desai also serves as the successor trustee. As the trustee, the legal title to the property is vested in Desai's name, and adding the title "trustee" is not necessary for the memorandum to be valid. This is especially true given that the name properly provides notice to prospective purchasers of the property.

The fact that the corporation's agent signed the memorandum as the claimant does not rise to the level of the type of defect that would prejudice a party or thwart one of the statute's underlying purposes. Because no prejudice occurred in the form of the memorandum being misleading or confusing, no statutory purpose was thwarted and the identification of the agent as the claimant did not invalidate the lien.

Finally, the fact that the lien does not list a date for calculating interest is irrelevant because A.R. Design Group, Inc. was not claiming interest. As far as the due date is concerned, the Court determined that the standard form for mechanics liens contains language that the sum listed was "payable as therein stated," which indicates that the amount is due as of the date of the memorandum. As such, the memoranda substantially complied with the Code.

Result: Affirmed.

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Case: *Summers v. Syptak, et al.*, 293 Va. 606, 801 S.E.2d 422 (2017).
Author: Stephen F. McCullough, J.
Date Decided: July 20, 2017
Lower Ct.: Wilson, IV, Thomas, J. (Rockingham County)

Facts: Plaintiff, a sexual abuse survivor, brought suit against her doctor and his medical practice due to defendant doctor's inappropriate and offensive sexual remarks that caused her to suffer exacerbation of her PTSD. Plaintiff did not retain an expert to testify regarding whether the defendant doctor's statements were appropriate or imputed to the practice, and Defendants moved for summary judgment, contending that Plaintiff's failure to designate an expert on the standard of care and causation required dismissal.

Analysis: An expert is required in a medical malpractice action to establish the standard of care. This is not necessary in the rare situation when the issues of the doctor's negligence fall within the jury's common

experience and knowledge.
Here, the plaintiff alleged that she suffered from preexisting PTSD, and she alleged that the defendant doctor's conduct exacerbated her symptoms from that emotional injury. Other states have concluded that establishing the causal connection between a preexisting condition and an exacerbation of that condition "is a complicated medical question" that requires expert testimony. Plaintiff's failure to produce a causation expert justified the trial court's dismissal.

Result: Affirmed.

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Case: *Allison v. Brown*, 293 Va. 617, 801 S.E.2d 761 (2017).
Author: Stephen R. McCullough, J.
Date Decided: July 27, 2017
Lower Ct.: Smith, Robert, J. (Fairfax County)

Facts: Brown, a breast cancer survivor, was to have revision surgery. Brown contended the surgery was to occur on her right breast only, and Defendant argued that a bilateral breast surgery was scheduled. Defendant operated on both breasts, Brown suffered significant complications to her left breast, and then had to undergo multiple additional repair surgeries.

Brown filed a malpractice action alleging negligence and, later, battery. Defendant claimed the battery count was untimely, and the trial court dismissed the battery count. At trial, defendant sought to exclude evidence of consent, claiming that the issue of battery was no longer in play. The trial court allowed evidence of consent and instructed the jury on battery, negligence, and informed consent. The jury returned a verdict for Brown, and Defendant appealed.

Analysis: Notice pleading requires a plaintiff to plead an action so that the defendant cannot mistake the true nature of the claim. The original complaint made no mention of battery. A surgery on the wrong body part can constitute either battery or negligence, and nothing in the original complaint informed Defendant that Brown was asserting battery.

The trial court erred by instructing the jury on the battery count. The battery claim had been dismissed with prejudice, and a claim that has been dismissed cannot be submitted to the jury for consideration. This is true even if the defendant has actual notice that a plaintiff is pursuing a claim for battery.

Brown's claim that there was a lack of consent for the surgery is not tantamount to a lack of informed consent. Battery is a claim that the doctor performed an operation against the patient's consent or substantially at variance with it. The lack of informed consent, in contrast, means that the doctor deviated from the standard of care by failing to disclose material risks to treatment or a procedure, or the alternatives available to a procedure. A plaintiff must also show that the doctor's negligence was a proximate cause of the plaintiff's injury. With no evidence to establish causation, Plaintiff's consent claim must fail as a matter of law and the jury should not have been instructed on that issue.

Ruling: Reversed and remanded.

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Case: *City of Danville v. Garrett*, 294 Va. 36 , 803 S.E.2d 326 (2017).
Author: S. Bernard Goodwyn, J.
Date: August 31, 2017
Lower Ct.: Milam, Jr., Joseph, J. (City of Danville)

Facts: Plaintiff Garrett, a disabled police officer, brought suit against the City of Danville for failing to pay her the amount of benefits she was entitled to receive. The City was paying Garrett according to the City's Code, and Garrett contended that she was entitled to a larger amount based on a Virginia Code provision.

The trial court conducted a hearing to determine what provision governed. The trial court determined that the Virginia Code provision governed and that it required that Garrett receive a higher compensation rate. The City appealed.

Analysis: On appeal, the City claimed that the trial court failed to consider the statutory scheme governing local retirement systems or the preconditions to applying the Virginia Code provision at issue. The provision in question indicates that it does not apply to localities except those counties utilizing a county manager plan of government or those counties that choose to opt-in and adopt the provisions. Here, the City did not opt-in, and the City does not have a county manager form of government.

The trial court therefore erred by applying the Virginia Code provision.

Ruling: Reversed and final judgment.

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Case: *Denton v. Browntown Valley Associates, Inc.*, 294 Va. 76, 803 S.E.2d 490 (2017).
Author: J. William C. Mims
Date Decided: August 31, 2017
Lower Ct.: Hupp, Dennis, J. (Warren County)

Facts: Denton agreed to sell property to Browntown, with the closing to occur one month later. The parties entered a series of amendments which changed the closing date to several months later. Browntown was unwilling to close on the amended date, and it notified Denton that is was seeking to terminate the contract due to its inability to agree with an adjacent property owner about improvements to a right-of-way. Denton refused to sign the release of the contract presented by Browntown and indicated he would not release Browntown unless he received a better offer to sell the property.

Denton eventually filed suit against Browntown for specific performance, also seeking an award of his attorney's fees and costs due to Browntown's breach. Browntown contended that Denton was unable to confer marketable title as required by the contract and sought to present a boundary settlement deed to support its argument. Denton filed a motion in limine to exclude the deed, which the trial court overruled.

The matter proceeded to a bench trial, and the trial court granted Browntown's motion to strike and awarded judgment to Browntown, including an award of attorney's fees, expert fees, and costs. Denton appealed.

Analysis: A party seeking an equitable award of specific performance is required to show that he has done all that is required of him. A trial court's decision regarding specific performance is subject to an abuse of discretion standard of review.

The trial court's evidentiary ruling on the boundary line deed will not be overturned as Denton did not assign error to the hearsay ruling regarding the deed. The deed was relevant, as it directly addressed the marketability of the title as required by the contract of sale.

The trial court did not err in sustaining the motion to strike. Even though the contract required the buyer to conduct a title examination, the seller bore the ultimate burden of providing clean title. Denton failed to carry this burden of persuasion when he did not challenge the evidence presented by Browntown.

Next, Denton is incorrect that the ownership dispute over just a portion of the total property was immaterial. To determine whether a title defect is so immaterial that specific performance is nevertheless warranted, courts must consider (1) the magnitude of the title deficiency, and (2) the value of the disputed portion in relation to the whole property to be conveyed. Here, the trial court properly weighed these factors.

Finally, the trial court did not abuse its discretion in awarding Browntown its attorney's fees. Although Browntown's first material breach of the contract would have prevented it from receiving attorney's fees, Denton did not plead this defense and cannot rely upon it. The trial court properly evaluated the Chawla factors for the reasonableness of the fees and the award was supported by the evidence. In addition, the fee award was justified regardless of the merits and good-faith basis of Denton's claim, as the award was not a sanction and the good-faith basis of the action was thus not relevant.

Ruling: Affirmed and remanded.

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Case: *Cole v. Norfolk Southern Railway Co.*, 294 Va. 92, 803 S.E.2d 346 (2017).
Author: William C. Mims, J
Date Decided: August 31, 2017
Lower Ct.: Dorsey, Charles J. (City of Roanoke)
Facts: Cole worked for Norfolk Southern Railway (NSR) for more than 35 years, and he was regularly exposed to toxic substances, including asbestos. Cole filed a complaint in 1996 alleging that he developed asbestosis. The parties settled the matter in 2000, and Cole signed a release.

In 2009, Cole developed lung cancer and he died in 2010. Cole's executor filed a complaint for death under the Federal Employers' Liability Act ("FELA"). NSR argued that the complaint should be dismissed because the claim was released in 2000. Cole contended that the release in question was void under § 5 of FELA. The circuit court granted NSR's plea in bar and Cole appealed.

Analysis: FELA prohibits employers from exempting themselves from FELA through contract. Federal circuits are split on interpreting releases, with one view following a bright-line test while the other applies a risk-of-harm test. Both views state that a release can survive scrutiny only if executed as part of settling an existing controversy. Even then, a release cannot extinguish future claims that might be unknown to the employee.

Virginia adopts the risk of harm test, whereby a release will apply not only for specific injuries already manifested at the time the release is executed, but for known risks of future injuries from the same accident or exposure. Here, when Cole signed the release, he contemplated his injuries and knew of the possible future effects of them. Also, the release's language is similar to the wording of Cole's 1996 complaint. Taken together, the evidence indicates that Cole waived the present claims even though the release contained boilerplate language.

Ruling: Affirmed.

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Case: *Graham v. Community Management Corporation*, ___ Va. ___, 805 S.E.2d 240 (2017).
Author: Stephen R. McCullough, J.
Date Decided: October 12, 2017
Lower Ct.: Brodie, Jan., J., (Fairfax County)

Facts: Graham's employment contract with Community Management Corp. (CMC) contained a confidentiality provision and a separate Confidentiality Agreement entitled the prevailing party to attorney's fees in the event an action was brought for relief under the Agreement. Graham obtained another job and CMC filed suit, contending that Graham breached the Confidentiality Agreement. Graham filed a number of responsive pleadings, none of which requested attorney's fees, and Graham prevailed. Graham later filed a separate action seeking the attorney's fees she incurred in her successful defense. CMC demurred, claiming that Graham's failure to seek fees in the original action waived her right to fees. The trial court agreed, sustained the demurrer, and Graham appealed.

Analysis: Rule 3:25 required Graham to make a demand for attorney's fees in a counterclaim, cross-claim, or other responsive pleading, and the Rule states that failure to do so waives the right to attorney's fees. A party has a right to seek fees even before they are awarded, similar to how a defendant can claim indemnification or contribution before being held liable to pay a claim. Graham's argument that she did not have a claim for fees until a final verdict would defeat the purpose of Rule 3:25. Thus, Graham waived her claim for attorney's fees.

Ruling: Affirmed.

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