



The Demurrer: A Pleading in Search of a New Identity in Virginia Courts

by *W. Bradford Stallard and P. Danielle Stone*

A delicate balance exists in our judicial system between protecting a plaintiff’s interest in receiving “their day in court” for meritorious claims and protecting a defendant’s interest in disposing of unmeritorious claims without enduring the time-consuming and expensive prospect of full blown discovery and litigation. The important task of protecting this delicate balance falls to our courts. It appears the Supreme Court of Virginia has recently taken sides, placing its thumb on one side of the scales regarding an important procedural device known as the demurrer. The end result may be fewer demurrers being sustained than ever before.

At common law, there were two types of demurrers: special demurrers, which raised questions of form, and general demurrers, which raised questions of substance. Special demurrers were abolished by statute, leaving the sole remaining form of demurrer as one that challenges the pleadings and raises issues of law.¹

The Virginia Circuit Court demurrer is closely analogous to a motion to dismiss for failure to state a claim under the Federal Rules of Civil Procedure.² By statute, a demurrer challenges

whether a pleading states a cause of action or whether a pleading fails to state claims upon which the relief demanded can be granted.³ Demurrers must state specifically the grounds on which the pleading is insufficient. Moreover, if the ground for challenging the pleading is not stated in the demurrer, the court will not consider it.⁴

The demurrer occupies an even more important role in Virginia procedure as compared to other jurisdictions because, practically speaking, summary judgment is not realistically available in Virginia.⁵ Consequently, if a claim asserted at the pleading stage survives demurrer, there is a high probability, bordering on certainty, that the case will be tried and ultimately submitted to a jury if the parties are unable to resolve their dispute outside court. For this reason, demurrers take on even greater significance in claims involving issues such as punitive damages. For example, if a punitive damages claim survives the pleading stage, the presentation of evidence that becomes admissible

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Letter from the Chair • Kristan B. Burch

The Litigation Section has been a repeat contributor to the CLE content at the VSB Midyear Legal Seminar which has been held in various locations across the globe. After the 2015 seminar was cancelled, the Litigation Section started to evaluate other options for using the funds designated to provide CLE speakers for the seminar. One of the ideas which came out of those discussions is to offer a free webinar to Section members in the Spring 2016.

The webinar is scheduled for May 11, 2016 from 10:30 am to 12:30 pm, and the topic is a 2015 book published by Judge J. Samuel Johnston (Ret.) and Irvin V. Cantor entitled The Art and Science of Mastering the Jury Trial. We are honored to have Judge Johnston, Mr. Cantor, and Stephanie E. Grana agree to speak about jury trials at the webinar. McGuire Woods has graciously agreed to host the webinar at its office in Richmond, and Section members may attend in person or join the webinar online. More details will follow on this upcoming webinar.

Thanks to Board member Nathan Veldhuis for organizing the speakers for the upcoming webinar. Nathan also recently published a book review of The Art and Science of Mastering the Jury Trial in the December 2015 edition of the Virginia Lawyer. If you missed the book review in hard print, it can be viewed online at the VSB website.

It is not too early to start planning to attend this year's Annual Meeting in Virginia Beach. The 78th Annual Meeting will be held from June 15 to 19, 2016, and the Litigation Section will co-present one of the showcase CLEs on Friday, June 17 from 9:00 to 11:00 a.m.

This year's CLE is entitled "Official Acts and Honest Services in the Wake of U.S. v. McDonnell

– A Discussion of Permissible Rules of Engagement for Virginia Public Officials and the Public." The Litigation Section will present the CLE with the Local Government Law and Construction Law and Public Contracts Sections. Our speakers include the Honorable Thomas K. Norment, Jr. (Senate of Virginia), Thomas T. Cullen (Woods Rogers), Hunter W. Sims, Jr. (Kaufman & Canoles, P.C.), and Roger C. Wiley (Hefty Wiley & Gore PC) with the panel moderated by Christopher S. Boynton (Deputy City Attorney, Virginia Beach).

If you are interested in the participating in the Section, please contact one of the Board members for additional information. ♦

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and considered by the jury will undoubtedly taint the tone and tenor of the trial.

Because demurrers provide the only realistic opportunity for litigants to challenge a claim set forth in a pleading, the standard by which demurrers are adjudicated and the approach taken by courts when evaluating and dispensing issues raised by demurrer is of critical importance. A traditional formulation of the legal standard for deciding a demurrer is as follows:

The purpose of a demurrer is to determine whether a [complaint] states a cause of action upon which the requested relief may be granted. A demurrer tests the legal sufficiency of facts alleged in the pleadings, not the strength of proof. Accordingly, we accept as true all properly pled facts and all inferences fairly drawn from those facts....In order to survive a demurrer, we have held that a complaint must allege [] sufficient facts to constitute a foundation in law for the judgment sought, and not merely conclusions of law. To survive a challenge by demurrer, a pleading must be made with sufficient definiteness to enable the court to find the existence of a legal basis for its judgment.⁶

A demurrer does not admit the correctness of the pleader's conclusions of law and the court is not bound by conclusory allegations when the issues involved raise questions of law and fact.⁷ Moreover, the Supreme Court of Virginia has long followed the rule that "a plaintiff must allege all facts necessary to establish" a cause of action.⁸

While these are the rules traditionally associated with demurrers, there are additional rules governing pleadings that are taking on new significance. For example, Supreme Court of Virginia Rule 1:4(d) states that a pleading "shall be sufficient that it clearly informs the opposite party of the true nature of the claim or defense." This rule is now

relied upon by courts with greater frequency when deciding whether a claim is sufficiently pled, notwithstanding whether it actually states a claim.⁹ This formulation, part of the rules governing the general provisions of pleadings, has not been part of the traditional formulation for evaluating demurrers, but has now become a greater variable in the judicial equation.

Another rule courts employ in evaluating negligence claims, Rule 3:18(b), provides that "an allegation of negligence or contributory negligence is sufficient without specifying the particulars of the negligence." Courts applying Rule 3:18 are reaching differing outcomes, depending upon whether they interpret the rule as not requiring specifics with respect to the negligence alleged (the particular duties owed and how they were breached), or whether the pleader may state a claim of negligence generally without detailed facts underscoring the particular duties breached and without any accompanying explanation of the basis for the negligence.¹⁰ This leads to the question: Is a general allegation of negligence sufficient without stating the basis of the claims and the facts needed to support the claim? For example, one court concluded allegations in a complaint's statement of facts failed to inform the defendants of the true nature of the claim and were thus insufficient to state a claim.¹¹ The court held general allegations of negligence with very few facts are insufficient to withstand demurrer.¹² Other courts have held to the contrary, adopting a more lenient standard and interpreting the language of Rule 3:18 liberally.¹³

The Supreme Court of Virginia addressed the question of whether a pleading states a claim throughout the modern era. The assiduousness with which it has approached this question has varied, depending upon the period and the claims under analysis. However, there has been a noticeable evolution in recent opinions, and the Supreme Court of Virginia has recently espoused a policy that disfavors disposing of claims by demurrer,

instead expressing an inclination toward submitting all matters for trial.¹⁴ Virginia Circuit Courts have heard the message loud and clear, as these courts have explicitly taken note of the Supreme Court's instructions not to "short circuit" the litigation, and allow cases to survive the pleading stage and proceed to trial.¹⁵

This policy has far-reaching effects because it may result in claims surviving that should not survive and trials being tainted with claims that affect the outcome of other claims. As mentioned above, a claim of punitive damages is an easy example. If the punitive damages claim is not dismissed at the pleading stage, a wider range of evidence will be admissible at trial bearing upon the defendant's state of mind, assets, and ability to pay.¹⁶ Another example is a claim of civil conspiracy, which allows a plaintiff to seek, and juries to consider, an award of attorney's fees and treble damages.¹⁷

The judicial policy advocated by the Supreme Court of Virginia stands in stark contrast to the federal system approach. The United States Supreme Court recently decided a pair of cases which were game changers in the federal system. Originally, motions to dismiss for failure to state a claim in federal court were analyzed under the standard of review from *Connelly v. Gibson*,¹⁸ with claims rarely dismissed at the pleading stage. However, the United States Supreme Court's decisions in *Iqbal* and *Twombly* collectively place a higher burden on a plaintiff to state all the elements of their claims along with the facts to support them and an overriding plausibility requirement.¹⁹ These decisions resulted in a greater number of cases being disposed of on the pleadings, rather than going through the time and expense of discovery to have those cases addressed on summary judgment.²⁰ In contrast, under Virginia procedure, no similar opportunity exists because parties may not use affidavits or depositions to support a motion for summary judgment.²¹ This means even greater

expense for a Virginia defendant unable to dispose of an unmeritorious claim at the pleading stage, as well as the unnecessary expenditure of scarce judicial resources.

A recent Supreme Court of Virginia case demonstrates the court's evolving position on demurrers. In *Patel v. Williamsburg Indoor Sports Complex*,²² the court reversed the trial court's decision sustaining a demurrer. The facts cited in the court's order indicate that the plaintiff, a two-year old, attended daycare at the Williamsburg Indoor Sports Complex ("Complex"). There were no signs of physical injury prior to her arrival. She showed the first signs of discomfort after she was placed inside of a foam pit. A Complex employee called the plaintiff's mother to inform her that the plaintiff was experiencing pain. When her mother arrived, plaintiff was taken to the hospital where it was discovered she had a fractured thigh bone.

The plaintiff's complaint relied in large part upon the doctrine of *res ipsa loquitur* and suggested the Complex had control over the meaningful circumstances of the accident and had, or should have had, knowledge of how the child suffered an injury. The court cited portions of the complaint alleging the child's thigh was fractured while under the exclusive supervision, custody, and control of employees of the Complex. The plaintiff further alleged that the Complex had a duty to exercise reasonable care and that the child's injury would not have occurred had the defendant exercised ordinary care. The Supreme Court of Virginia held that these allegations, devoid of any factual allegations regarding how the plaintiff was injured or in what manner the defendant was negligent, were sufficient to state a claim for negligence.

When citing the standard of review, the Court emphasized that a complaint contains sufficient allegation if it informs the defendant of the nature and character of the claim, making it unnecessary for the pleader to specify the particulars of the negligence in order to withstand demurrer.²³

This standard of review emphasizes notice to the defendant over whether the complaint states a claim upon which relief can be granted. The Court also cited Rule 3:18 regarding the pleader's ability to allege negligence generally without specifying the particulars of the negligence. Based upon this standard of review, the Court concluded that the complaint was sufficient.

The dissent criticized the majority opinion's departure from the Court's prior precursors and the shortcomings of such an approach, noting that the plaintiff failed to allege how she came to be injured or that an accident even occurred. The complaint pled only that the injury would not have happened had the Complex been exercising ordinary care. The dissent noted the fact that the plaintiff had merely alleged conclusions of law which the trial court was not bound to accept as true on demurrer. Further, the dissent suggested that the majority's application of the doctrine of *res ipsa loquitur* at the pleadings stage was a departure from earlier precedents.

The result in the *Patel* case may become the new norm in Virginia.²⁴ What is unique is the contrast between the juxtaposed positions of the state and federal systems. In the federal system, plaintiff's "unadorned, the-defendant-unlawfully-harmed-me accusation"²⁵ is no longer sufficient to force defendants to endure full blown litigation. In our state system, however, the lower courts are now being instructed to give the benefit of the doubt, all close calls and ties to the pleader, with a preference for trial by jury trumping other means of adjudication. Until there is further clarification and guidance from the Supreme Court of Virginia as to what standard our trial courts will apply in future disputes, the jury is out (forgive the pun) on the fate of the demurrer. Future decisions from our highest court will resolve this debate and determine whether the demurrer will continue to be a viable tool for the courts to employ in disposing of unmeritorious claims, or whether by judicial

decision, the Supreme Court of Virginia has made it a dinosaur, outdated and disfavored, and no longer viable as a means of challenging the legal sufficiency of a claim. ♦

(ENDNOTES)

1. W. Hamilton Bryson, *Bryson on Virginia Civil Procedure* § 6.03 (4th Ed. 2005).
2. *NRC Mgmt. Servs. Corp. v. First Virginia Bank-Southwest*, 63 Va. Cir. 68 (Roanoke 2003) (analogizing a demurrer to a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure).
3. Virginia Code Ann. § 8.01-273.
4. *Id.*
5. See Kent Sinclair & Patrick Hanes, Summary Judgment: A Proposal for Procedural Reform in the Core Motion Context, 36 Wm. & Mary L. Rev. 1633, 1635-36 (1995) (calling Virginia's summary judgment rule "a terse, bare-boned provision" and noting that "[l]imitations on the types of evidence that the trial court may consider in ruling on [summary judgment]...have hampered the use of the summary judgment mechanism. As a result of these limitations, present Virginia courts rarely employ summary judgment as a general matter.")
6. *Dunn, McCormick & McPherson v. Connelly*, 281 Va. 553, 557-58, 708 S.E.2d 867, 869 (2011) (citations and internal quotation marks omitted).
7. *Russo v. White*, 241 Va. 23, 24, 400 S.E.2d 160, 161 (1991).
8. *Ely v. Whitlock*, 238 Va. 670, 677, 385 S.E.2d 893, 897 (1989).
9. See, e.g., *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 143, 747 S.E.2d 804, 808 (2013) (reversing a trial court that sustained a demurrer stating that "when [a complaint] is drafted so that defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer") (citations and internal quotation marks omitted); *Narayanswarup, Inc. v. Doswell Hosp., LLC*, 80 Va. Cir. 650 (Hanover Cnty. 2010) (citing Rule 1:4 when overruling demurrer); *Strategic Enter. Sols., Inc. v. Ikuma*, 77 Va. Cir. 179 (Fairfax Cnty. 2008) (citing Rule 1:4 when overruling demurrer to cause of action under Virginia Uniform Trade Secrets Act).
10. *Compare Cunningham v. Roanoke Reg'l Airport Comm'n*, 70 Va. Cir. 273 (Roanoke 2006) (overruling defendant's demurrer to a gross negligence claim because "[t]he pleadings are not required to assert anything more than a general allegation of negligence"); *with Supchak v. Fuller Const. Corp.*, 86 Va. Cir. 517 (Chesapeake 2013) (sustaining defendants' demurrers where the "[c]omplaint does not contain any facts of how any duty was breached by these defendants and does not alert them to the true nature of the claim, except that the Plaintiff fell on the premises that these defendants were providing services to during or after the time those services were provided").
11. *Elliott v. Cook*, 60 Va. Cir. 1 (Loudon Cnty. 2002).
12. *Id.*
13. E.g., *Cunningham*, 70 Va. Cir. 273.

14. *See, e.g., Fultz v. Dell Haze Am., Inc.*, 278 Va. 84, 677 S.E.2d 272 (2009) (noting that the Court was “increasingly confronted” with cases “in which a trial court incorrectly has short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits”) (citations omitted); *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 747 S.E.2d 804 (2013) (“This case is an example in which the trial court incorrectly...short-circuited litigation pretrial and...decided the dispute without permitting the parties to reach a trial on the merits.”) (citations and internal quotation marks omitted).

15. *See, e.g. Xerox Realty Corp. v. Abbett*, 1998 WL 972227 (Loudoun Cnty. June 8, 1998) (“Thus, the Court is cautioned by the plaintiff that to sustain the demurrer would render this another case, ‘...in which a trial court incorrectly has short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits.’”) (citations omitted); *Realstar Realtors, L.L.C. v. Glenn*, 53 Va. Cir. 177 (Salem 2000) (overruling a demurrer, noting that to sustain the demurrer would “incorrectly have short-circuited litigation pretrial”) (citations and internal quotation marks omitted); *Britt Constr., Inc. v. Magazzine Clean LLC*, 69 Va. Cir. 478 (Loudoun Cnty. 2006) (overruling a demurrer, noting that “the Court must be sensitive to the admonition not to create, ‘... another case in which a trial court incorrectly has short-circuited litigation pretrial...’”) (citations omitted); *Government Strategy & Tech., LLC v. O'Donnell*, 84 Va. Cir. 223 (Loudoun Cnty. 2012) (holding that “dismissing this case without affording the plaintiff the opportunity to put on evidence would be improper” and citing the Supreme Court’s language regarding “short-circuit[ing]” litigation) (citations omitted).

16. While there are many discussions about the plaintiff deserving his or her day in court and having cases decided in a trial by jury, the reality is that very few cases are disposed of at the pleading stage. Moreover, courts give little consideration to the resources being devoted to cases that have no merit or the cost to defendants to defend claims that have no merit.

17. Virginia Code Ann. § 18.2-500(A).

18. *See NRC Management Servs. Corp. v. First Virginia Bank-Southwest*, 63 Va. Cir. 68 (Roanoke 2003) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) for the proposition that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”)

19. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”) (citations omitted); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

20. In the federal system, there is a meaningful opportunity for summary judgment under Rule 56 because affidavits and depositions may be used.

21. Va. Code § 8.01-420.

22. Rec. No. 130237 (November 22, 2013).

23. The court also noted that even though a complaint may be imperfect, if a defendant cannot mistake the nature of the claim

the trial court should overrule the demurrer. This differs from the structure of whether the complaint states a claim.

24. *See K.L., a Minor v. Jenkins*, Rec. No. 1307986 (May 9, 2014) (reversing a trial court that sustained a demurrer to an infant’s complaint that alleged the defendant was grossly negligent for failing to protect the infant from a sexual assault by another infant); *Valladares v. Lilly Law Group, P.C.*, Rec. No. 132039 (Oct. 3, 2014) (reversing a trial court that sustained defendant’s demurrer to a legal malpractice claim).

25. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

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When is Contempt an Appropriate and Effective Remedy for a Party in Litigation?

by Adam G. Swann

Both legal professionals and people unaffiliated with the legal system probably have a basic understanding of contempt. Anyone who has watched a courtroom drama on television or in a movie has seen the judge at one time or another banging the gavel and warning someone in the courtroom to change his or her behavior or risk being held in contempt. What is probably less well known is that while contempt deals principally with an affront to the dignity of the court, it may also be used to provide remedial relief to a party injured by another party's failure to abide by a court order. Virginia courts, however, are reluctant to hold a party in contempt unless there has been a violation of a court order containing a clear, definite command or prohibition. This provides yet another reason for litigation attorneys to carefully draft and review proposed orders.

There are two classes of contempt: criminal and civil. They are distinguished according to their character and purpose.¹ Criminal contempt proceedings serve a punitive function and are prosecuted to "preserve the power and vindicate the dignity of the court"²; such proceedings are "between the public and the defendant" and are "not part of the original cause."³ Civil contempt proceedings, in contrast, are "prosecuted to preserve and enforce the rights of private parties" and "are civil, remedial, and coercive."⁴ Civil contempt is a "sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance"⁵ It is not only "instituted at the instance of the injured parties, but they are parties to it."⁶ Civil contempt

involves the "original parties to litigation and is instituted and tried as a part of the main cause."⁷ The punishment for civil contempt is tailored to provide "the injured party remedial relief for the injury or damage done by the violation" of the court order.⁸ The punishment is intended to benefit the complainant and may involve a fine payable to the complainant, as well as imprisonment, in order to coerce the contemnor to comply.⁹

Virginia courts have authority to hold a party in contempt under both the Virginia Code and common law. Virginia Code Section 18.2-456 sets forth five circumstances authorizing the court to punish someone summarily for contempt when the act is committed in the presence of the court.¹⁰ These acts include the following:

- (1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;
- (2) Violence, or threats of violence, to a judge or officer of the court, or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court;
- (3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;
- (4) Misbehavior of an officer of the court in his official character;

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(5) Disobedience or resistance of an officer of the court, juror, witness or other person to any lawful process, judgment, decree or order of the court.

When the act is not committed in the presence of the court, the court has authority under common law to punish a person for contempt through plenary hearings conducted on the basis of a show cause or other formal process (rather than through an immediate adjudication).¹¹ When a court utilizes its common law authority for this indirect/constructive contempt, the court is not bound by Virginia Code § 18.2-456 (or §§ 18.2-426 or 18.2-457).¹² The court may also choose to use plenary procedures for contempt even when it has statutory authority to proceed summarily.¹³

Common law provides civil litigators with the best opportunity for using contempt to enforce a court order. When a litigator believes that a party has violated a court order that benefits his or her client, the litigator can file a motion to show cause as to why the party should not be held in contempt. “In a show cause hearing, the moving party need only prove that the offending party failed to comply with an order of the court. The offending party then has the burden of proving justification for his or her failure to comply.”¹⁴ Civil contempt in Virginia does not require a finding that a party intended to violate the court order; there is no *mens rea* element.¹⁵ In the words of the Supreme Court of Virginia: “The sanctity and enforceability of a civil judgment should not hinge upon the mental state of an unsuccessful litigant.”¹⁶ When the court does hold a party in contempt, it is reviewed using an abuse of discretion standard.¹⁷ The finding will not be overturned unless “plainly wrong” or “without evidence to support it.”¹⁸

Many of the Virginia state court cases addressing contempt involve domestic relations issues, but Virginia courts have authorized the use of contempt to provide remedial relief to parties in other contexts,

including the enforcement of injunctions. Virginia courts also have awarded attorneys’ fees and costs against parties held in contempt. The *Buxton v. Murch* line of cases demonstrates how contempt can be used to enforce an injunction and collect attorneys’ fees and costs.¹⁹ On June 21, 2001, the Middlesex County Circuit Court issued an opinion holding the Buxtons in contempt for repeatedly interfering with the Murches’ use of an express easement to access the Rappahannock River—an easement that had previously been affirmed by the Supreme Court of Virginia in 1995.²⁰ The circuit court issued the contempt order in response to a petition for a show cause order filed by the Murches.²¹ In addition to holding the Buxtons in contempt, the Middlesex County Circuit Court imposed sanctions and ordered the Buxtons to pay the Murches the “total costs of these proceedings, including the amount of attorneys’ fees and other costs that the Murches have expended since the [1995] Virginia Supreme Court decision [affirming the existence of the easement] and will expend as a result of the Buxtons’ conduct.”²² The contempt finding and sanctions issued by the Middlesex County Circuit Court were affirmed by the Court of Appeals of Virginia on July 2, 2002.²³

The Murches utilized the June 21, 2001 contempt order again on January 23, 2003 when they filed a petition to recover attorneys’ fees and costs incurred while defending against the Buxtons’ unsuccessful appeals in the Court of Appeals of Virginia and Supreme Court of Virginia.²⁴ The Middlesex County Circuit Court granted the petition on July 10, 2003 and ordered the Buxtons to pay the Murches \$8,149.08, which was the amount of money the Murches had spent since June 21, 2001 to enforce the decree and injunction.²⁵ The Court of Appeals for Virginia affirmed the award on May 18, 2004, holding “that the actual expenses incurred by the Murches in enforcing the contempt citation against the Buxtons, including the costs for attorneys’ fees in defending the Buxtons’ appeal of the contempt

citation, are part of the damages suffered as a result of the contempt and may be included by the trial court as part of the sanctions.”²⁶

The *Buxton v. March* cases show that contempt can be used by a party to enforce an injunction and recover the attorneys’ fees and costs incurred while doing so. Can contempt be used to enforce a civil monetary judgment outside the context of domestic relations? The answer to this question is not clear. The Supreme Court of Virginia expressly declined to address the “appropriateness” of using civil contempt proceedings in this manner in the recent case *DRHI, Inc. v. Hanback*.²⁷ The case arose when DRHI, Inc. filed suit against William W. Hanback in June 2002 in Fairfax Circuit Court, seeking specific performance of a land purchase contract.²⁸ The circuit court ruled against DRHI on June 9, 2004 and ordered the company to pay Hanback \$400,000 at settlement (less the \$10,000 already paid) and “at the time any subdivision plans submitted by DRHI, Inc. for the development of the property sold by Mr. Hanback are approved by the City of Fairfax, in the event that the plans submitted by DRHI, Inc. permit the construction of six or more individual residences, DRHI, Inc. shall pay to Mr. Hanback \$70,000 for the sixth lot and \$70,000 for each additional approved lot.”²⁹ After the court issued the order, DRHI purchased a parcel adjoining Hanback’s former property and obtained approval from Fairfax City for an integrated development comprising Hanback’s former property and the adjacent parcel, the combination of which would allow DRHI to build fifteen homes.³⁰ When DRHI refused to pay Hanback for five additional houses Hanback claimed were attributable to his property, Hanback filed a petition to show cause and asked the circuit court to hold DRHI in contempt for violating the June 9, 2004 order.³¹ The Fairfax Circuit Court granted the petition and entered a decree on September 20, 2013 finding DRHI in contempt of the June 9, 2004 decree and granting a judgment for Hanback against DRHI in the amount

of \$350,000, which represented the outstanding amount owed under the June 9, 2004 decree.”³²

DRHI appealed the circuit court’s contempt finding, and the Supreme Court of Virginia certified DRHI’s appeal, which transferred jurisdiction from the Court of Appeals of Virginia to the Supreme Court of Virginia.³³ The Supreme Court of Virginia reversed the Fairfax County Circuit Court’s judgment and dismissed the rule to show cause.³⁴ The Court held that the circuit court abused its discretion by holding DRHI in contempt and by ordering DRHI to pay Hanback \$350,000.³⁵ The Court explained that the “2004 order was not an enforceable judgment in favor of Hanback, and no finite amount of damages was identified. The additional amount DRHI might owe to Hanback was left open and was dependent on numerous factors which had not occurred as of June 9, 2004.”³⁶

The Supreme Court of Virginia’s decision in *DRHI, Inc.* that a contempt finding requires violation of a clear, definite order mirrors its prior holdings.³⁷ As far back as 1822 the Supreme Court of Virginia declared that “[t]he process for contempt lies for disobedience of what is decreed, not for what may be decreed.”³⁸ The issue of definiteness arose in a 2007 Supreme Court of Virginia case, *Petrosinelli v. People for the Ethical Treatment of Animals, Inc.*³⁹ In this case, the Court reversed a contempt judgment against an attorney who directed that a subpoena be issued to a witness in *PETA II* who was also a key witness in *PETA I*.⁴⁰ The attorney issued the subpoena after the Fairfax Circuit Court had denied two motions by the attorney to consolidate *PETA I* and *PETA II* for discovery purposes and had also denied the attorney’s motion to access discovery in *PETA I*.⁴¹ The Supreme Court of Virginia explained that although the orders had declared the rights of the parties in the two cases, they had not expressly prohibited the attorney from deposing a witness in *PETA II*.⁴² The Court further explained that any

duty not to depose the witness in *PETA II* “was, at best, an implication from general remarks of the court made in prior hearings” and that “[m]ere implication of a duty cannot form the basis of a contempt judgment.”⁴³

Litigators should be aware that not only has the Supreme Court of Virginia required specificity for enforcement of written orders, but the Court of Appeals of Virginia has applied this standard to oral orders and indicated that contempt requires violation of a judicial order rather than a judicial request.⁴⁴ In *Aratoon v. Roberts*, a case arising from a request to reduce spousal support payments, the Fairfax County Circuit Court asked “both counsel to ‘find out’ exactly what disability benefits and public assistance might be available to Aratoon if, in fact, he is truly disabled. The court added: ‘Find out the information, stipulate to it, and have it ready to present. Is that clear?’ The court did not enter any written order further clarifying its request.”⁴⁵ At a later hearing, the circuit court concluded Aratoon’s attorney had not sufficiently complied with the court’s request and held him in contempt, ordering him to pay for a guardian ad litem to perform the work.⁴⁶ The Court of Appeals of Virginia reversed the circuit court’s finding of contempt, explaining that although willful violation of an “oral pronouncement from the bench” can be the basis for a contempt finding⁴⁷, the oral order must be a “direct command” with “definite terms”⁴⁸—“one that allows no reasonable doubt as to whether, how, and why it must be obeyed.”⁴⁹ The Court of Appeals of Virginia further declared: “[a] mere judicial request, even when strongly worded, is insufficient because ‘a duty that arises by implication cannot sustain a finding of contempt.’”⁵⁰

In addition to requiring a definite, clear order, there is evidence suggesting that Virginia courts will not hold a party in contempt for expressing an intent to violate an order. In the 2010 case *Henderson v. Commonwealth*, the appellant received a jury summons ordering him to report

to the jury assembly room at Norfolk Courthouse every Tuesday in July 2009.⁵¹ The appellant appeared at the Norfolk Courthouse on June 2, 2009 and repeatedly told the jury administrator that “he did not want to and did not intend to serve on a jury”⁵² The appellant was subsequently held in contempt for resisting lawful process.⁵³ The Court of Appeals of Virginia reversed the decision on appeal, holding that “appellant expressed his intention to disobey the jury summons sometime in the future; the record does not establish whether he actually did so.”⁵⁴ As the Court of Appeals explained: “If the actions of the alleged contemnor do not violate a clearly defined duty imposed upon him, those actions do not constitute contempt.”⁵⁵ Although *Henderson* involves criminal contempt and addresses violation of judicial process rather than a judicial order, there is no reason to believe Virginia courts would apply a different standard in a civil contempt proceeding for violation of a judicial order. Therefore, a litigator should refrain from filing a motion to show cause until an order is actually violated.

Conclusion

Civil contempt is a helpful tool practitioners may be able to use to enforce a judicial order and obtain remedial relief from an opposing party. Civil contempt can be utilized to enforce discovery orders and injunctions, as well as recover attorneys’ fees and costs incurred while enforcing and defending judicial orders. Whether civil contempt is an appropriate proceeding to enforce civil monetary judgments outside domestic relations practice is unclear due to the Supreme Court of Virginia’s decision in *DRHI, Inc. v. Hanback*.⁵⁶ What is clear is that for a practitioner to have civil contempt available as an option in litigation—and in order to avoid becoming the target of a contempt proceeding—a practitioner should make sure every court order, written or oral, is clear and contains a definite command or prohibition. ♦

(ENDNOTES)

1. *United Steelworkers of Am. v. Newport News Shipbuilding & Dry Dock Co.*, 220 Va. 547, 549-50, 260 S.E.2d 222, 224 (1979) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911)).
2. *Id.* at 549, 260 S.E.2d at 224 (citing *Local 333 B, United Marine Div. v. Commonwealth*, 193 Va. 773, 780, 71 S.E.2d 159, 163, cert. denied, 344 U.S. 893 (1952)).
3. *Id.* at 550, 260 S.E.2d at 225 (citing *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 425 (1911)).
4. *Id.* at 549, 260 S.E.2d at 224 (citing *Local 333 B, United Marine Div. v. Commonwealth*, 193 Va. 773, 780, 71 S.E.2d 159, 163, cert. denied, 344 U.S. 893 (1952)).
5. *Buxton v. Murch*, No. 2026-03-2, 2004 Va. App. LEXIS 228, at *13 (Va. Ct. App. May 18, 2004) (quoting *Leisge v. Leisge*, 224 Va. 303, 308, 296 S.E.2d 538, 540-41 (1982)(citation omitted)).
6. *Id.* at *12-13 (quoting *Leisge v. Leisge*, 224 Va. 303, 308, 296 S.E.2d 538, 540-41 (1982)(citation omitted)).
7. *United Steelworkers of Am.*, 220 Va. at 550, 260 S.E.2d at 225 (citing *Gompers*, 221 U.S. at 445).
8. *Buxton v. Murch*, No. 2026-03-2, 2004 Va. App. LEXIS 228, at *14 (quoting *Rainey v. City of Norfolk*, 14 Va. App. 968, 974, 421 S.E.2d 210, 214 (1992)(citations omitted)).
9. *United Steelworkers of Am.*, 220 Va. at 549-50, 260 S.E.2d at 224 (quoting *Gompers*, 221 U.S. at 425).
10. Virginia Code Ann. § 18.1-292; 1960, c. 358; 1975, cc. 14, 15.
11. *Robinson v. Commonwealth*, 41 Va. App. 137, 145-46 (2003).
12. *Id.* at 146.
13. *Henderson v. Commonwealth*, No. 2383-09-01, 2010 Va. App. LEXIS 451, at *6-7 n.3 (Va. Ct. App. Nov. 16, 2010).
14. *Alexander v. Alexander*, 12 Va. App. 691, 696, 406 S.E.2d 666, 669 (1991) (internal citation omitted).
15. See *Leisge*, 224 Va. at 308-09, 296 S.E.2d at 540-41.
16. *Id.* at 308, 296 S.E.2d at 541.
17. *DRHI, Inc. v. Hanback*, 765 S.E.2d 9, 12 (Va. 2014)(citing *Petrosinelli v. People for the Ethical Treatment of Animals, Inc.*, 273 Va. 700, 706, 643 S.E.2d 151, 154 (2007)).
18. *Brown v. Commonwealth*, 26 Va. App. 758, 762, 497 S.E.2d 147, 149 (1998)(citation omitted).
19. *Buxton v. Murch*, Record No. 2026-03-2, 2004 Va. App. LEXIS 228 (Va. Ct. App., May 18, 2004); *Buxton v. Murch*, Record No. 1805-01-2, 2002 Va. App. LEXIS 373 (Va. Ct. App. July 2, 2002).
20. *Buxton v. Murch*, Record No. 1805-01-2, 2002 Va. App. LEXIS 373 (Va. Ct. App. July 2, 2002); see also *Buxton v. Murch*, 249 Va. 502, 507-08, 457 S.E.2d 81, 84-85 (1995) (affirming the existence of an express easement).
21. *Buxton v. Murch*, Record No. 1805-01-2, 2002 Va. App. LEXIS 373, at *3 (Va. Ct. App. July 2, 2002).
22. *Buxton v. Murch*, Record No. 2026-03-2, 2004 Va. App. LEXIS 228, at *4-5 (Va. Ct. App. May 18, 2004).
23. *Buxton v. Murch*, Record No. 1805-01-2, 2002 Va. App. LEXIS 373 (Va. Ct. App. July 2, 2002).
24. *Buxton v. Murch*, Record No. 2026-03-2, 2004 Va. App. LEXIS 228, at *6-7 (Va. Ct. App. May 18, 2004).
25. *Id.* at *7-8.
26. *Id.* at *1-2.
27. *DRHI, Inc.*, 765 S.E.2d at 13 n.2 (Va. 2014).
28. *Id.* at 10.
29. *Id.*
30. *Id.*
31. *Id.* For more details regarding the land purchase contract between Hanback and DRHI, Inc. and the subsequent development of the property, see *Hanback v. DRHI, Inc.*, No. 1:14-cv-1789, 2015 U.S. Dist. LEXIS 30897 (E.D.Va. Mar. 11, 2015), which involves a breach-of-contract claim concerning the property that was filed against DRHI, Inc. by Hanback.
32. *DRHI, Inc.*, 765 S.E.2d at 11.
33. *Id.* at 11-12.
34. *Id.* at 13.
35. *Id.*
36. *Id.*
37. See, e.g., *Winn v. Winn*, 218 Va. 8, 10, 235 S.E.2d 307, 309 (1977) (cited in *DRHI, Inc. v. Hanback*, 765 S.E.2d 9, 13 (Va. 2014)).
38. *Taliaferro v. Horde's Administrators*, 22 Va. 242, 247 (1822).
39. 273 Va. 700, 643 S.E.2d 151 (2007).
40. At the time the subpoena was issued in *PETA II*, the attorney was aware that the witness was already scheduled for a deposition in *PETA I* on the same date and at the same time. *Petrosinelli*, 273 Va. at 704, 643 S.E.2d at 153.
41. *Id.* at 703-704, 643 S.E.2d at 152-153.
42. *Id.* at 708-709, 643 S.E.2d at 156 (citing *French v. Pobst*, 203 Va. 704, 710, 127 S.E.2d 137, 141 (1962)).
43. *Id.* at 709, 643 S.E.2d at 156 (citing *Winn v. Winn*, 218 Va. 8, 10-11, 235 S.E.2d 307, 309 (1977)).
44. *Aratoon v. Roberts*, No. 0529-14-4, 2015 Va. App. LEXIS 23 (Va. Ct. App. Jan. 27, 2015).
45. *Id.* at *17-18 (internal citations omitted).
46. *Id.* at *18.
47. *Id.* at *19-20 (quoting *Amos v. Commonwealth*, 61 Va. App. 730, 739, 740 S.E.2d 43, 48 (2013)(en banc), *aff'd*, 287 Va. 301, 754 S.E.2d 304 (2014)).
48. *Id.* at *20 (quoting *Petrosinelli*, 273 Va. at 707, 643 S.E.2d at 154).
49. *Id.* at *20.
50. *Id.* at *20 (quoting *Petrosinelli*, 273 Va. at 709, 643 S.E.2d at 156).
51. No. 2383-09-1, 2010 Va. App. LEXIS 451, *2-3 (Va. Ct. App. Nov. 16, 2010).
52. *Id.* at *3.
53. *Id.* at *5.
54. *Id.* at *14.
55. *Id.* at *13 (citing *Michael v. Commonwealth*, 32 Va. App. 601, 609, 529 S.E.2d 822, 826 (2000)).
56. *DRHI, Inc.*, 765 S.E.2d at 13 n.2.

* * *

Sealing Documents: Revisions to Local Civil Rule 5 in the Eastern District

by *Kristan B. Burch*

Those practicing in United States District Court for the Eastern District of Virginia (“Court”) should be aware of a recent amendment to Local Civil Rule 5 which affects the process for sealing court filings.

On November 13, 2015, the Court proposed amendments to Local Civil Rule 5 which is titled “Request to File Documents under Seal and the Handling of Documents under Seal.” Based on comments received after November 13, 2015, the Court made some additional changes to the proposed amendments, and the revised local rule became effective January 11, 2016. The Announcement issued by the Court along with the revised local rule are accessible from the Court’s website.¹ The Court also revised the Electronic Case Filing Policies and Procedures for the electronic filing of sealed documents in civil cases to address the changes to Local Civil Rule 5.²

The revisions to Local Civil Rule 5 include, but are not limited to, the following:

- Local Civil Rule 5(B) addresses when documents are filed under seal pursuant to a governing statute, rule, or order. In response to comments received after November 13, 2015, it was revised to exempt cases filed under seal pursuant to the False Claims Act, 31 U.S.C. § 3730(b), from a party’s requirement to file a notice available to the public stating that a filing has been made under seal and describing what information is being filed under seal when filing a portion or all of documents under

seal. The last sentence of Local Civil Rule 5(B) states that if the Court determines that the cited statute, rule, or order does not provide for filing under seal, the Court “may order that the document or a portion of it be filed in the public record.”

- Local Civil Rule 5(C) addresses motions to file under seal and states in the first sentence that such motions “to file under seal are disfavored and discouraged.” Additional new language indicates that an agreement of the parties that a document should be filed under seal or designated as confidential during discovery “is not, by itself, sufficient justification for allowing a document or other material to be filed under seal.” The last sentence of the first paragraph of Local Civil Rule 5(C) states that “[b]lanket sealing of entire briefs, documents, or other papers is rarely appropriate.”
- An additional sentence has been added to Local Civil Rule 5(C), indicating that failure to file a timely motion to seal “may result in the document being placed in the public record.” Also a sentence has been added which states that if the Court determines that “the appropriate standards for filing material under seal have not been satisfied,” the Court “may order that the material be filed in the public record.”
- In addition to the prior requirement for a memorandum supporting a motion to file under seal, under Local Civil Rule 5(C), a party

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must provide “appropriate evidentiary support for the sealing request” and “an analysis of the appropriate standard to be applied for the specific filing, and a description of how that standard has been satisfied.”

- When a party files a motion to file materials under seal because another party has designated those materials as confidential, the designating party must file a response to the motion to seal which complies with the requirements of Local Civil Rule 5(C) along with a proposed order.
- The non-confidential notice filed with the motion to file under seal must inform the parties and non-parties that they may submit memoranda in support or in opposition to the motion within seven (7) days after the filing of the motion to seal.
- In addition to complying with the prior requirements for any document delivered to the Clerk’s Office or a judge’s chambers that contains information which is subject of an existing sealing order or a motion to seal, the party must include the ECF docket number of the sealed materials.

The revisions to the Electronic Case Filing Policies and Procedures include the following:

- Chapter Three was revised to add blocks for “Criminal Case Sealed Documents” and “Civil Case Sealed Documents”. Under the “Civil Case Sealed Documents” block on page 19, a distinction is made between “sealed civil cases” and “public civil cases.” In sealed civil cases, sealed filings are exempt from electronic filings and must be filed in paper form in a sealed envelope. In public civil cases, sealed documents must be electronically filed.
- Chapter Three was revised on page 21 in the

Civil Case Exceptions chart to clarify that only documents in sealed civil cases are submitted in paper by the filer and not made available electronically.

- Chapter 7 was revised at page 57 to add “Sealed Documents in public cases” as one of the categories of civil documents that may be filed electronically.

The best way to ensure compliance with Local Civil Rule 5 is to review the revised Local Civil Rule 5 and revised Electronic Case Filing Policies and Procedures before requesting to file documents under seal in the Eastern District. ♦

(ENDNOTES)

1. <http://www.vaed.uscourts.gov/notices/Announcement%2001072016.pdf>
2. <http://www.vaed.uscourts.gov/ecf/E-FilingPoliciesandProcedures-new.htm>

A VIEW FROM THE BENCH • The Honorable John M. Tran

On July 1, 2013, in my 29th year as a small firm lawyer, I accepted the remarkable privilege of joining the Fairfax Circuit Court, which is part of the 19th Judicial Circuit covering Fairfax County and the City of Fairfax.

The Virginia State Bar's Litigation Section asked me to share some perspectives I have gained from my first year on the bench. I list ten perspectives below. I suspect most seasoned lawyers already know these perspectives, but I repeat them here as I have been surprised how relevant they remain.

1. Civility. The concern that there has been a decline in civility has been slightly exaggerated. While uncivil behavior exists, the majority of lawyers who have appeared before me practice the craft of professionalism. These practitioners ably walk the line between aggressiveness and advocacy, and avoid mistaking the former for the latter. Although ineffective attorneys and litigants continue to take their frustrations out on the court and court personnel, they are in the distinct minority. I credit the presence of professionalism to the hard work of the various bar association that invest time and energy into promoting civility.
2. Commitment. The sacrifices made by Virginia lawyers on behalf of their clients or causes continue to be the highlights of any day I spend on the bench. Over the past year, I have witnessed the legal profession's commitment to public service regularly played out in the courtroom, whether it involved lawyers waiving their hard earned fees, accepting court appointed work at severely reduced rates, or participating

in bar activities designed to improve access to the courts.

3. Respect. As trial judges, we are called upon to choose one side over another. Inevitably, choosing sides often gives rise to a feeling of disappointment until such time as the disappointed lawyer utters the dreaded phrase . . . "With All Due Respect . . ."

That phrase, regardless of any good intentions in its use, is heard by most judges as a questioning of the judges' intelligence, as in "I just can't believe you're [fill in the blank] . . . with all due respect . . ." It is the equivalent of "Pardon my French." See also, Jeremy Butterfield's "Damp Squid!" in which he lists the ten most irritating phrases in the English language including "with all due respect."

The phrase "with all due respect," unlike such salutary phrases as "May it please the Court" or "Your Honor", is not a sign of respect because it implies that the judge could be personally offended if shown contrary legal authority.

No rational jurist takes personal offense when presented with contrary legal authority. In chambers, a bookcase holding Virginia Reports serves as a daily reminder that throughout history there were legions of brilliant men and women who were, at times, wrong. Decisions are made in accordance with the judge's understanding of the law and the ruling becomes binding on the parties - not necessarily because the judge is absolutely right, but because at the moment it is made, it is made with the higher authority.

It is not personal. If it were personal, the court would recuse itself. If it has not, the decision may be unwelcome, but it is not personal.

Genuine respect between the bench and

Judge Tran is a Circuit Court Judge in Fairfax County where he was sworn in on June 27, 2013. Prior to joining the Circuit Court, he served as a substitute judge in the General District Courts and Juvenile Domestic Relations District Courts for five years.

the bar is shown more through conduct and not words.

Respect is shown by lawyers who stand up to address the court, competently argue their case, remain considerate of the work of the court clerks, accept that black robes do not cure human imperfections, and accept adverse decisions gracefully.

Respect is returned by the court when counsel's pleadings are read, oral arguments are considered, and decisions, whether ultimately right or wrong, are promptly and thoughtfully delivered.

Written legal opinions do contain the phrase that the author "respectfully dissents." In written opinions, it is helpful to add such language to soften the coldness of a contrary written analysis. An in-person argument simply requires a professional demeanor.

4. Vouching. Too often in the heat of battle, lawyers will insert their personal credibility into the argument - peppering statements with "I believe" or characterizing a legal argument as being the "first they ever experienced in all their [fill in the blank] years of their practice."

The insertion of counsel's personal belief into an argument, especially as it touches on factual issues, or the credibility of a client, is improper (Va. R. Prof. Con. 3:3, Comment (1)).

A forceful argument is immediately weakened when counsel steps over the line. The court's negative visceral reaction to vouching is similar to its reaction when confronted with the other spectrum, which is when an impolite or hyperbolic comment is directed at opposing counsel.

Even if someone has "lied," calling that person a "liar" has no place in a court of law. Credibility determinations are ultimate conclusions resting within the province of the fact finder. It is more effective to allow the fact finder to reach the conclusion that your opponent

is not worthy of belief. Reliance on name calling is misplaced and evidence of poor judgment.

5. Impressions. A lawyer once asked whether I had "prejudged" the case when I shortened the time estimate for oral argument. I admitted that I had indeed formed an impression of the argument to be given. My impression had come, however, from reading the briefs, and that the only way to avoid having any prejudgments of an argument was to not read the briefs. Yet, I have discovered that initial impressions can and do, in fact, change during oral arguments or during the presentation of the evidence. In a short period of time, new trial judges learn to withhold final judgment until all non-repetitive evidence and arguments have been submitted because experience has shown that any case can hold surprises.

6. Stamina. I spent many more hours working in private practice than I have on the bench, but the effort required for judging has been more intense. The responsibility of making correct decisions weighs on the judges. In Fairfax, Friday motions day or sentencing days are especially exhausting. I realize this job would be easier if we simply did not care. Yet, I have regularly observed the physical toll it takes on the judges, and even our most experienced colleagues, who care to do it the right way.

The "grind" of life on the bench comes from having to respond to parties who consistently fall below the standard of excellence practiced by most members of the Bar. The court expends substantial resources processing, and when necessary or possible, correcting their misdirected submissions. Ironically, those who are the least competent are often the least civil and unwilling to accept an opposing point of view. The unpleasantness and chaos they create are tolerable only because the members of the Bar who do it the right way outnumber them and keep the courthouse a pleasant place to work.

7. **Simplicity.** The best story tellers are the ones that can make the most sense out of the most complex issues. Keep it simple.
8. **Courage.** Exceptional lawyers show no fear of the courtroom. Why should they be fearful? The courthouse is a place where the people who work there are guided by the mission to do the right thing within the rule of law. Exceptional lawyers know this and are unafraid to ask for relief. They are not born more courageous, but they know we are just trying to get it right and it is within their ability to give us reasons to grant the relief their client seeks, whether that relief comes at trial, at the appellate level or through the legislature.
9. **Rebuttal.** Effective advocacy is a two part process in our adversarial system of justice. The first part is setting up and defending your position. The second is rebutting your opponent's argument. All too often, lawyers will exhaust their entire effort on the first part and ignore their opponent as though the court will be dismissive of the opposing point of view. The strategy of ignoring an opposing view is unwise.

It is similarly unwise to rely on string citations. Dumping a number of cases into a legal brief causes a false sense of security that stacking sheer numbers on any legal principle will be persuasive. This approach actually has the opposite effect insofar as a string citation will either refer to undisputed legal principles (such as the standard on demurrers) or will almost always include a case containing negative treatment of the point for which the case is cited, or is so factually or procedurally different as to be unreliable.
10. **Reputation.** The best trial lawyers are not necessarily the most eloquent or the most learned. The best lawyers are the ones who are consistently trustworthy. How are they trustworthy? They are ones who have a reputation of pursuing motions

only after exploring all reasonable avenues of resolving conflict. They are the ones who come prepared at every appearance to explain why their client should prevail and are ready to engage in meaningful dialogue if called upon. They are the ones who hold the court's attention.

Over the past few years, I have also come to see the parallels between golf and the successful practice of law.

The recreational golfer knows that each of the eighteen holes has a par value, measured by the maximum strokes to be hit. This golfer also knows that actually hitting those numbers would leave you a stroke or two away from playing professionally.

Consequently, when starting a round of golf, recreational golfers fully expect to suffer through eighteen instances of disappointment, punctuated with only the occasional success that keeps hope alive.

Golfers understand that competence at any undertaking requires commitment to practice and repetition of good habits. They also accept that they are only as good as the next hole.

Good golfers know that the rules and integrity matter and how you conduct yourself when no one is watching is the true measure of integrity.

Finally and most importantly, golfers understand that to play the game well, they have to be happy. A good golf swing is impossible to experience if the arms are tense.

During this past year on the bench, I have seen lawyers who happily work hard at their craft and walk in and out of my courtroom with a spring in their steps, despite the rulings issued from the bench, as though they know they should be proud of what they have done - no matter the final result.

When I come across those lawyers, I am reminded how much of a privilege it was to have been a lawyer and how much of a privilege it is now to be their judge. ♦

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