Give Credit where Credit is Due

We write briefly in response to the much-appreciated letter from Donald Logerwell in the June/July *Virginia Lawyer,* concerning our representation of Zacarias Moussaoui, to give credit where credit is due. Frank W. Dunham Jr., the federal defender for the Eastern District of Virginia, led the defense team until Mr. Moussaoui's guilty plea, and Mr. Dunham's illness, in 2005. In addition, Anne M. Chapman and Kenneth P. Troccoli of the federal public defender's office, along with court-appointed counsel, Alan Yamamoto, were essential members of the defense team; in fact, Mr. Troccoli worked on the case from arraignment in 2001 until the verdict this May. Finally, if there were ever a case in which the nonlawyer members of the team were essential to the result, this was it—Pam Bishop, Sandra Schidlo, Linda McGrew, Jim Allard and Michelle Jenkins.

Sincerely,
Gerald T. Zerkin
Edward B. MacMahon Jr.

Correction

A headline in the June/July *Virginia Lawyer* incorrectly located Howard W. Martin Jr.'s practice. He is a Norfolk attorney. We regret the error.

Send Us Your Feedback

Send your letter to the editor* to:
coggin@vsb.org;
fax: (804) 775-0582;
or mail to:
Virginia State Bar,
Virginia Lawyer Magazine,
707 E. Main Street, Suite 1500,
Richmond, VA 23219-2800

*Letters published in *Virginia Lawyer* may be edited for length and clarity and are subject to guidelines available at **http://www.vsb.org/site/publications/valawyer/**.

Should the MCLE requirement be abolished?

by Karen A. Gould, 2006–2007 VSB President

Last fall I heard a lawyer say that the bar should eliminate the mandatory continuing education requirement. It was late October, and he was unhappy that he had to attend multiple MCLE programs to get his required twelve hours. He said that this took valuable time away from his other work. He reasoned as follows: he was current with developments in his area of practice, and he read legal publications, talked with other attorneys and followed statutory developments. Attendance at continuing legal education programs left less time for his clients' business, which was counterproductive to the purpose of MCLE. When asked if the MCLE requirement might be helpful to other attorneys who did not try to stay current with developments in the law, he asked me if I thought the MCLE requirement served that function for those individuals who procrastinated. He said that many of the lawyers in the program which he had attended that day were not attentive and were reading newspapers, working on laptop computers or revising documents.

On October 1, 2005, approximately 15,000 lawyers of the almost 25,000 licensed active attorneys in the commonwealth had complied with the MCLE requirement of twelve hours of CLE, including two hours of ethics. However, more than 10,000 lawyers had not filed their compliance with the MCLE requirement just thirty days prior to the deadline. On November 1, 2005, the day after the deadline, 2,448 lawyers still had not complied, meaning that the bar was paid $230,000 in late fees last fall by lawyers certifying compliance with the MCLE requirements in order to remain licensed. Every year the bar budgets revenue from MCLE noncompliance and late fees, and every year this income rises. There were even 173 lawyers administratively suspended for failing to comply with the MCLE requirements.

Does this mean we should abolish the MCLE requirement? At the risk of being stoned by the approximately ten thousand Virginia lawyers who delay until the last minute to get their CLE credits, the answer is no—emphatically no. The MCLE rules serve a laudable purpose: to improve the quality of legal services in Virginia, which is one of the core missions of the VSB as dictated by the Supreme Court of Virginia. That some lawyers do not take these requirements seriously does not mean that we should abolish them. Instead, I would respectfully suggest that the procrastinators change their lifestyles and schedule attendance at relevant CLE programs throughout the year, rather than waiting till the last minute to attend programs or online courses that are irrelevant to the lawyer's practice.

> **The MCLE Board has made it easy for Virginia's lawyers to meet their MCLE obligation . . .**

Many quality programs are available throughout the year—especially in the months leading up to October 31—through which one can fulfill the MCLE requirement. The hardworking MCLE Board, chaired by Richmond's Eric Page this year, and the VSB MCLE staff, under the able directorship of Gale Cartwright, approved more than 19,000 CLE courses in 2005, of which 5,400 were delivered by distance learning, such as telephone seminars and the Internet. Virginia was one of the first states to adopt a rule permitting the delivery of distance learning for CLE courses, while requiring that there be a component of interactivity in those programs. Being able to select from the large inventory of approved Internet offerings at a time convenient for the lawyer may mean that lawyers will look for and take courses relevant to their practices, rather than attending whatever live program may be available when they are short of hours near the end of a reporting cycle.

The MCLE Board has made it easy for Virginia's lawyers to meet their MCLE obligation in many different ways with minimum regulation of their choices, through the approximately 19,000 approved courses. Attorneys submitted more than 2,600 course applications for courses that were not preapproved in Virginia (preapproval requires planning and action well in advance of the MCLE deadline). Kudos is owed to the many Virginia lawyers who complete their required attendance of MCLE courses in advance. For those who have had problems meeting this obligation in the past, given the available options, the Virginia State Bar hopes that lawyers will fulfill the MCLE requirement in a way that enhances their practices. ⚖

VSB Partners with State to Promote Conservation Easements

In April 2006, Governor Timothy M. Kaine announced that the centerpiece of his environmental agenda was an ambitious goal of permanently preserving four hundred thousand acres by the end of his administration.

In his speech, the Governor noted that time is of the essence for land conservation in Virginia: "Of all the development that has occurred in the last four hundred years, more than a quarter of it has taken place in the last fifteen years." He warned that if development continues at this pace ". . . Virginia will develop more land in the next forty years than in the last four hundred years. I will set and meet this goal during my term, not just because it's the right thing to do. I will do it because if I don't, the opportunity to do it will not be there for future governors and future Virginians."

The Virginia State Bar will have an important role this proactive conservation policy. With the past as prologue, one may assume that 75 percent of the land conservation needed to reach the Governor's goal will be in the form of conservation easements.

A conservation easement is a voluntary, legally binding agreement that limits certain types of uses or prevents development from taking place on a piece of property now and in the future, while protecting the property's ecological or open-space values.

Virginia has an innovative tax credit program to encourage the donation of conservation easements, and the federal income tax benefit associated with such donations has recently been made more generous.

But relatively few attorneys across the commonwealth currently have expertise in advising clients concerning the legal and tax ramifications of donating or selling conservation easements. The VSB will be partner with the Office of the Secretary of Natural Resources and the Virginia Outdoors Foundation (VOF), a state agency that holds more than 80 percent of the conservation easements recorded in Virginia's courthouses, to offer continuing legal education courses pertinent to conservation easement structure and practice.

The most authoritative text on conservation easements is *The Conservation Easement Handbook*, published in 2005 by the Land Trust Alliance and the Trust for Public Lands.

To learn more about the VOF and view its guidelines and document entitled "10 Steps to Conveying a VOF Conservation Easement" and draft conservation easement template, go to: **http://www.virginiaoutdoorsfoundation.org/**.

Discipline Department Holds Summer Conference

The Virginia State Bar's twenty-sixth Disciplinary Conference took place July 14 in Williamsburg. About one hundred volunteers from across Virginia gathered to learn the process through which the Disciplinary Board and district committees adjudicate misconduct charges against attorneys.

1: Chief Justice Leroy R. Hassell Sr. (left) and William L. Babcock Jr. of Alexandria, 2006–2007 chair of the Committee on Lawyer Discipline. The Chief Justice was the luncheon speaker for the gathering.

2: Peter A. Dingman of Alexandria (left), chair of the Disciplinary Board, and VSB Deputy Bar Counsel Harry M. Hirsch.

Voluntary Bars Offer Senior Law Day Programs

Out of the Alleghany-Bath-Highland Bar Association comes a public service project that is proving itself very adaptable to different localities.

It has a ready-made textbook (the *Senior Citizens Handbook*) and an avid audience (seniors, hungry for information on estate matters, health law, caretaking issues and end-of-life questions).

All sponsors need is a meeting place and lawyer volunteers.

The Senior Law Day program was first offered in May 2005 at the Covington Court House. More than one hundred seniors attended and sat for more than two hours, rapt, while local lawyers, a judge and community leaders addressed issues important to people in late life.

The event was praised by attendees and garnered significant publicity in the region, said William T. Wilson, the 2005–2006 chair of the Senior Lawyers Conference. Wilson practices in Covington, and he helped create and lead the bar association project.

Since then, the Alleghany-Bath-Highland Bar Association has circulated its project notebook as a model for future programs elsewhere. So far, the Loudoun County, Arlington County, Harrisonburg-Rockingham, Roanoke and Rockbridge County bar associations have presented Senior Law Day programs.

Bonnie L. Paul of the Harrisonburg-Rockingham bar said 150 people attended that program, which was held in a local high school on May 20.

The association budgeted money to underwrite expenses—primarily rent and refreshments. But the costs were offset by sponsors—for-profit and nonprofit business and government agencies that serve seniors. In fact, extra money was generated, which the bar association will either donate to legal services for seniors or save for the next Senior Law Day program, Paul said.

The vendors helped increase participation by telling their clients about the program, she added.

Six lawyers on the Harrisonburg panel addressed topics such as Medicare and Medicaid, long-term care insurance, nursing home care, wills and trusts, and abuse of and crime against seniors.

The program received good publicity, in advance and after the fact. Overall, "We were pleased," Paul said.

The *Senior Citizens Handbook*—a joint project of the Senior and Young lawyers conferences—can be obtained from the VSB for three dollars each or a box of forty-four for thirty dollars. The book can be viewed online at www.vsb.org/site/publications/. To order, call (804) 775-0548 or e-mail harvey@vsb.org.

The Covington "blueprint" and other resources for organizing the program can be ordered by contacting Patricia A. Sliger at (804) 775-0576 or sliger@vsb.org.

Visit the Virginia State Bar online at www.vsb.org.

Find information on MCLE, professional regulation, free and low-cost pro bono training and volunteer opportunities, bar news, meetings and events, publications and more.

Edmonds Concludes NABE Presidency; Fairfax's Yvonne McGhee Receives Award

Virginia State Bar Executive Director Thomas A. Edmonds ended his year as president of the National Association of Bar Executives on August 3 at the NABE annual meeting in Honolulu, Hawaii. There, he passed the gavel to Allan B. Head, executive director of the North Carolina Bar Association.

Edmonds's tenure was dominated by Hurricane Katrina's effect on the legal systems of the Gulf Coast states—particularly Louisiana. Bar associations throughout the country responded with gifts of money and legal teams that went to New Orleans to help restore law practices, court systems and bar association services disrupted by the storm.

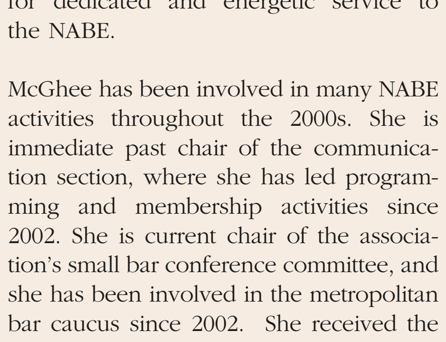
In Virginia, attorneys and law firms contributed about one hundred thousand dollars in response to a call by the VSB and The Virginia Bar Association.

Also under Edmonds's leadership, NABE formed a Section on Information Technology that drew eighty-five members in its first year. The section joins others on administration and finance, communications and government relations in helping member bar associations with the challenges they share.

Edmonds also set up a Professionalism Task Force, which presented programs and prepared materials on professionalism for bar association executives.

The NABE presented Edmonds with a print of a Virginia landscape painted by Fred Nichols of Barboursville.

During the NABE meeting, Yvonne McGhee, executive director of the Fairfax Bar Association, received a Peer Excellence Award for dedicated and energetic service to the NABE.



McGhee has been involved in many NABE activities throughout the 2000s. She is immediate past chair of the communication section, where she has led programming and membership activities since 2002. She is current chair of the association's small bar conference committee, and she has been involved in the metropolitan bar caucus since 2002. She received the Anne Charles Award and the "You Made a Difference" Award in 2005.

1: Edmonds (left) and his successor as NABE president, Allan B. Head.

2: McGhee, recipient of a Peer Excellence Award from the NABE, was congratulated by Edmonds.

Mandatory Continuing Legal Education

MCLE DEADLINE: October 31, 2006

Failure to complete 12 CLE hours including 2 hours in ethics/professionalism by October 31, 2006 will result in a $50 non-compliance fee. (See the Rules of the Supreme Court of Virginia Part 6, Section IV, Paragraph 19)

Check your MCLE Record on-line with the Member Login at **www.vsb.org**

Watch for your Form 1, End of Year Report in November and be sure to follow the new instructions for proper completion.

Local and Specialty Bar Elections

Alexandria Bar Association
Foster Samuel Burton Friedman, President
Eugene Andrew Burcher, President-elect
Barbara Sattler Anderson, Secretary
Gwena Kay Tibbits, Treasurer
Seth Mark Guggenheim, Director
Todd Allen Pilot, Director
Arthur Erwin Peabody Jr., Director
Nancie Gallegos Kie, Director

Augusta County Bar Association
Paul Aaron Dryer, President
John Charles Wirth, President-elect
Rupen Rasiklal Shah, Vice President
Michelle Kelsay Bishop, Secretary
David Leslie Meeks, Treasurer

Chesterfield County Bar Association
Mary Phillips Adams, President
Duane Gregory Carr, President-elect
Alton Russell Watson, 1st Vice President
Melissa H. Hoy, 2nd Vice President
Robert Craig Hopson, Secretary-Treasurer

Fairfax Bar Association
Steven William Ray, President
Daniel Howard Ruttenberg, President-elect
Julie Harry Heiden, Vice President
David John Gogal, Secretary
Corinne Neren Lockett, Treasurer

Grayson-Galax Bar Association
Roger Dean Brooks, President
Monica Dawn Davis Cox, Vice President
Karen Marie Lado Loftin, Chancellor of the Exchequer

Harrisonburg-Rockingham Bar Association
John Connor Holloran, President
William Wesley Helsley, President-elect
Mary Beth May Bostic, Secretary
Robert William Stone, Treasurer

Henrico County Bar Association
John Kimpton Honey Jr., President
Ellen Ruth Fulmer, President-elect
Christopher Hunt Macturk, Vice President
James Walter Hopper, Secretary
Stanley Paul Wellman, Treasurer

Local Government Attorneys of Virginia
Stuart E. Katz, President
Jan Leslie Proctor, Vice President
Joseph L. Howard Jr., Secretary-Treasurer

Metropolitan Richmond Women's Bar Association
Catherine Crooks Hill, President
Leslie Ann Takacs Haley, President-elect
Vanessa Laverne Jones, Vice President
Tracy H. Spencer, Secretary
Ashley Carlyn Beuttel, Treasurer

Newport News Bar Association
Barbara Hays Kamp, President
Edward Ira Sarfan, President-elect
Michael Scott Stein, Secretary
Helena Sue Mock, Treasurer

Norfolk & Portsmouth Bar Association
James Ashford Metcalfe, President
Donald Charles Schultz, President-elect
David Wayne Lannetti, Secretary
John Lockley Deal, Treasurer
Derek Francis Myers, YLS Chair

Northern Virginia Chapter, VWAA
Mary Catherine H. Gibbs, President
Debra Lynn Powers, President-elect
Cynthia Kaplan Revesman, Secretary
Mary Grace Anne O'Malley, Treasurer

Old Dominion Bar Association
Samuel Howard Woodson III, President
Beverly J. A. Burton, President-elect
Robert Allen Williams, Vice President
Regina Hope Turner, Secretary

Richmond Criminal Bar Association
William Pinckney Irwin V, President
Michael Arlen Jagels, Vice President
Christopher Anthony Bain, Treasurer

Roanoke Bar Association
Kenneth Brett Marston, President
George Alfred McLean Jr., President-elect
Mark Kenneth Cathey, Secretary-Treasurer

Salem-Roanoke County Bar Association
Aaron Tremayne Lavinder, President
Thomas Edward Bowers, 1st Vice President
John Stuart Koehler, 2nd Vice President
Leisa Kube Ciaffone, Secretary-Treasurer
John Christopher Clemens, Judge Advocate

The Bar Association of the City of Richmond
Hugh McCoy Fain III, President
Carolyn Anne France White, President-elect
William Reilly Marchant, Vice President
The Honorable James Stephen Buis, Hon. Vice President
Gregory Franklin Holland, Secretary-Treasurer

Virginia Association of Commonwealth Attorneys
Michael Edward McGinty, President
Harvey Lee Bryant III, President-elect
Joel Robert Branscom, Vice President
Stephen Randolph Sengel, Secretary-Treasurer

Virginia Trial Lawyers Association
Gerald Arthur Schwartz, President
Charles Joseph Zauzig III, President-elect
Matthew B. Murray, Vice President
Andrew Michael Sacks, Vice President
Edward Lefebvre Allen, Vice President
Sandra Martin Rohrstaff, Vice President
Lisa Palmer O'Donnell, Treasurer

Virginia Women Attorneys Association
Cathleen Kailani Memmer, President
Sheila Mary Costin, President-elect
Barbara Margaret Rewald Marvin, Secretary
Chandra Dore Lantz, Treasurer

Washington County Bar Association
Monroe Jamison Jr., President
Gregory Warren Kelly, Vice President
Cameron Scott Bell, Secretary-Treasurer

Winchester-Frederick County Bar Association
Phebe Kay Adrian, President
Thomas Alan Louthan, President-elect
Lt. James David Black, Secretary
James Anthony Klenkar, Treasurer
Michelle Morris Jones, Member At-Large

In Memoriam

James T. Adams
Lexington
November 1928–May 2006

Nathan Webster Albright
Las Vegas, Nevada
August 1955–August 2006

Daniel A. Cerio
Falls Church
January 1918–March 2006

James Edward Cervenak
Alexandria
June 1950–July 2006

Edwin S. Cohen
Charlottesville
September 1914–January 2006

James Frank De Deo
Vienna
February 1943–February 2006

Robert R. Dively
McLean
October 1935–July 2006

Jon Lee Duncan
Abingdon
November 1946–February 2006

Joseph C.V. Ferrusi
Clinton, Maryland
November 1926–January 2006

Jean Rouault Galloway
Fairfax
May 1925–May 2006

The Honorable William S. Goode
Durham, North Carolina
December 1914–July 2006

Carter Tredway Gunn
Norfolk
May 1947–March 2006

Roy G. Harrell Jr.
Saint Petersburg, Florida
September 1944–January 2006

Ernest S. Heisley
Fairfax
November 1934–February 2006

Roger Bryant Hunting
Richmond
September 1920–June 2006

The Honorable Randall G. Johnson
Richmond
June 1947–August 2006

John H. Kennett Jr.
Roanoke
June 1929–July 2006

Svein Jarl Lassen
Newport News
March 1947–January 2006

Edward A. Linden
Tucson, Arizona
February 1943–November 2005

Salvatore Frank Lorello
Midlothian
September 1943–January 2006

Nancy Lang Lowndes
Richmond
April 1958–June 2006

Sally Perritt McConnaughey
Amelia
January 1951–August 2006

William R. Perlik
McLean
May 1925–June 2006

Scott Arthur Richie
Mineral
December 1949–November 2005

Kenneth Leon Roberts
Wiliamsburg
July 1965–July 2006

Frank Satta
Alexandria
May 1937–September 2005

Murray W. Seagears
Fairfax Station
January 1932–June 2006

Robert Gordon Shepherd Jr.
Reston
May 1941–October 2005

Stephen Kenneth Simpson
Reston
December 1955–July 2006

Richard W. Smith
Staunton
March 1920–May 2006

Timothy Robert Walters
Chatham Township, New Jersey
July 1956–November 2005

Paul Weeks II
Arlington
September 1943–May 2006

Robert Emmett Wegmann
Corpus Christi, Texas
April 1953–June 2006

Well-Placed Plaint Leads to $1 Million Gift for Richmond Legal Charity

by Dawn Chase

The Richmond-based Community Tax Law Project is one million dollars richer because an alumna kvetched to the right people, and a purse opened.

At the beginning of 2006, the nonprofit program was in its fourteenth year. With a budget of under two hundred thousand dollars, its executive director, full-time staff attorney, part-time assistant, dedicated board members and volunteer attorneys continued their struggle to explain the project's mission to would-be donors.

What does the project do? It helps low-income people who have federal and state tax problems.

Why would low-income people have tax problems?

More than 64 percent of taxpayers earning twenty-five thousand dollars or less were audited by the Internal Revenue Service in 2002.

Elaine Javonovich, the project's executive director, described the type of problems the project's clients encounter:

There was, for example, the migrant worker who agreed to let his employer deposit the crew payroll into his personal account. He then withdrew the money to pay his coworkers. Guess who was subjected to tax repercussions he in no way could afford?

There was the father who was owed twelve thousand dollars in tax refunds for three years. The IRS wouldn't release the money because it did not believe he had custody of his children, who lived with him. He and his family were faced with eviction.

There was the woman whose ex-husband was in prison. Because the IRS was unaware of her divorce, it assessed her for ten thousand dollars she didn't owe. She didn't have the communication skills to advocate for herself.

These are people with low-paying jobs—construction workers, cashiers, field hands—who don't have the luxury of closing office doors and spending afternoons battling the bureaucracy. From January to June this year, the project took up 166 representations with stories like these, and helped 147 other taxpayers with private consultations or outreach sessions.

Dilemmas faced by poor taxpayers led Nina E. Olson, an accountant, to obtain a law degree and begin trying to meet the need. She opened the Community Tax Law Project in Richmond in 1992. The stories led her to testify before Congress, which responded by authorizing funds that seeded the formation of similar clinics throughout the nation. The stories led her to leave Richmond for Washington, to become the National Taxpayer Advocate.

While Olson was still at the Richmond project, she mentored a young lawyer, Anita Soucy. Soucy eventually left the nonprofit for law firm work in Washington, D.C. Now she works for the U.S. Treasury Department.

"Anita is the kind of person that, when something is bothering her, she'll just talk and talk about it—and people will listen to her," Javonovich said.

In Washington, Soucy told the story of the little agency, the people it was trying to help and the difficulty describing why it was needed.

Word of the project's dilemma reached the ears of people in a position to help.

Anita Soucy

A donor who wishes to remain anonymous pledged one million dollars, to be paid over two years. Part of the money is to support the Community Tax Law Project's programs. The other part is to provide grants to other low-income taxpayer clinics, which now number more than 150 nationally.

The Community Tax Law Project received confirmation of the donation around tax time this year. Since then, the agency hired a part-time case coordinator and is in the process of hiring a part-time staff attorney, Javonovich said.

The project is setting up a process for soliciting and awarding grant requests from the other low-income taxpayer clinics. Part of the money will be used to rejuvenate the Richmond program's role as the National Resource Center, a clearinghouse of information for other clinics. And the Richmond project will use its part of the money to establish an endowment "so that the future of our program and the positive impact it has on the lives of Virginia's low-income families will be secure for years to come," Javonovich wrote in a May 30 letter to project supporters.

Javonovich said she has learned a lesson that she passes on to other nonprofits: "Never underestimate the power of a passionate persuader."

Matrimonial Lawyers Embark on New Pro Bono Program with Northern Virginia Legal Aid Program

Virginia fellows of the American Academy of Matrimonial Lawyers are providing pro bono services in complex family law matters to the Family Legal Assistance Project in Northern Virginia, through a new Pro Bono Partnership program.

Through the program, each volunteer attorney agrees to accept at least one case per year and provide full representation in matters such as divorce, child support, spousal support and adoption.

The clients are referred by the Family Legal Assistance Project, which screens them for financial need and what level of representation they will require. Eligible cases include those that cannot be accepted by local legal aid providers due to conflicts, case priorities and insufficient staffing. The Family Legal Assistance Project is a program of the Fairfax Bar Association and Fairfax Law Foundation.

The Northern Virginia partnership is the first of what leaders of the Virginia AAML hopes will be a statewide opportunity for its fellows to help meet the growing need for family law representations for the poor.

Dennis M. Hottell, an AAML fellow from Fairfax, suggested the idea, and worked out the details in Northern Virginia with his partner, Christopher F. Malinowski, and Arlene Beckerman of the Family Legal Assistance Project. Carol Schrier-Polak, President of the AAML Virginia Chapter, steered the proposal through the organization's approval process.

"Family law is the greatest area of need for pro bono assistance throughout the United States," according to a press release from the Pro Bono Partnership. "Indigent and low-income clients frequently have nowhere to turn to obtain access to justice for the most basic and important matters in their lives.

"Many are forced to go to court without legal advice or representation, without and education or even knowledge of the language, and struggle to present issues involving their family, marriage, abuse and children."

Fellowship in the AAML recognizes achievement in family law and a commitment to the highest standards of practice. There are forty-four Virginia fellows and sixteen hundred nationwide.

So far, cases have been taken by four fellows or members of their firms: Brian M. Hirsch of Craig & Hirsch PC in Reston; J. Patrick McConnell of Odin Feldman & Pittleman PC in Fairfax; Dennis M. Hottell of Hottell Malinowski Group PC in Fairfax; and Carol J. Schrier-Polak of Bean Kinney & Korman PC in Arlington.

Other attorneys who are not members of the AAML also have taken cases through the partnership. They are David L. Ginsberg of Shoun Back & Walinsky PC in Fairfax, Mary E. White of Surovell Markle Isaacs & Levy PLC in Fairfax and Luis A. Perez of Luis A. Perez-Pietri in Falls Church.

Pro Bono Attorneys Honored

Legal Services of Northern Virginia gathered June 13 to honor its pro bono attorneys with a reception and awards. (1) Fairfax Circuit Judge Michael P. McWeeny introduced the guest speaker. (2) Virginia Supreme Court Justice Barbara Milano Keenan (left), the guest speaker, poses with Nora Raum, a National Public Radio newscaster and an Arlington attorney. Raum received an award for her volunteer legal work. (3) Lawyers from Troutman Sanders LLP were recognized for pro bono commitment. (L–R) Richard E. Hagerty, Richard M. Pollak, Elizabeth A. Billingsley, Justice Keenan, Mary C. Zinsner and Stephen A. Northup.

Ferguson is LSNV Director

James A. Ferguson of Falls Church is the new executive director of Legal Services of Northern Virginia Inc. LSNV assists clients in Arlington, Fairfax, Loudoun and Prince William counties and the cities of Alexandria, Fairfax, Falls Church, Manassas and Manassas Park.

Ferguson received his undergraduate degree from the University of Virginia and his law degree from the University of Notre Dame. He previously directed the National Crime Victim Bar Association, a network of attorneys who represent victims in civil actions.

Ferguson succeeds Charles K. Greenfield, who is now executive director for the Legal Aid Society of Hawaii.

Call for Nominations

2007 Oliver White Hill Law Student Pro Bono Award

The Oliver White Hill Law Student Pro Bono Award was inaugurated by the Virginia State Bar in February 2002. Established to honor extraordinary law student achievement in the areas of pro bono publico and under-compensated public service work in Virginia, the Hill Law Student Award is administered by the bar's Special Committee on Access to Legal Services.

Presentation of the award is reserved for extraordinary achievements of outstanding students. The Access Committee will annually review nominations to determine if there should be a designee. The committee presented the initial law student award at the 2002 Pro Bono Conference during the Lewis F. Powell, Jr., Pro Bono Award Ceremony.

The deadline for receipt of nominations by the bar is 5:00 P.M., Friday, January 19, 2007. The Access Committee invites submissions from law school deans, law school professors and others, including non-bar members and organizations, who are sufficiently familiar with candidates whose work meets or exceeds the criteria found at **www.vsb.org/site/members/awards-and-contests**.

There is no nomination form to complete. Please forward narratives and references, identifying the candidate and the candidate's law school, and explain how the nominee meets award criteria. **All entries, including endorsements and other supporting material, are due by 5 P.M., Friday, January 19, 2007**. Electronic submissions may be e-mailed to the Virginia State Bar Special Committee on Access to Legal Services, c/o Maureen Petrini at **petrini@vsb.org** or faxed to Mrs. Petrini at (804) 775-0582. Mailed submissions must be received by the deadline at the bar's main address, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800. Please inquire by telephone, (804) 775-0522, if you have not received acknowledgment of receipt of a nomination within five days.

CALL FOR NOMINATIONS

2007 Lewis F. Powell, Jr., Pro Bono Award

The Lewis F. Powell, Jr., Pro Bono Award was established by the Special Committee on Access to Legal Services of the Virginia State Bar to honor those attorneys and attorney groups that have made outstanding pro bono contributions. The Access Committee annually reviews all nominations and decides upon the recipient. **All entries, including endorsements and other supporting material, are due by 5 P.M., Friday, January 19, 2007.** The award, a framed, limited edition print of the painting "Patrick Henry Arguing the Parson's Cause," will be presented at a ceremony during the seventeenth Annual Pro Bono Conference in the Spring of 2007.

CRITERIA

The recipient of the award must meet one or more of the following criteria:

- Demonstrated dedication to the development and delivery of pro bono legal services in the Commonwealth of Virginia;
- Contributed significantly toward the development of innovative approaches to the delivery of volunteer legal services;
- Participated in an activity that resulted in satisfying previously unmet needs for legal services or in extending services to underserved segments of the population;
- Successfully handled pro bono cases that favorably affected the provision of other services to the poor in Virginia;
- Successfully supported legislation that contributed substantially to providing legal services to the poor; or
- Devoted significant time to furthering the delivery of legal services to the poor in Virginia by handling pro bono matters or providing training or recruiting volunteer attorneys for pro bono programs.

The nominee must be a member of the Virginia State Bar or an organization or group comprised of such persons. Persons whose livelihood is derived from delivering legal services to the poor are not eligible. Please submit your nomination, describing how the nominee meets the above criteria, in writing to the Virginia State Bar Access to Legal Services Committee, c/o Maureen Petrini, 707 East Main Street, Suite 1500, Richmond, Virginia 23219 by **Friday, January 19, 2007.** (There is no official entry form to complete.) Please be sure to include your name, the name and address of the nominee and phone numbers with your nomination. For more information, please contact **Maureen Petrini, Access to Legal Services Director, (804) 775-0522.** For past recipients see **www.vsb.org/site/members/awards-and-contests**.

Legal Issues and Risk Allocation in Design-Build

by Jack Rephan

The design-build project delivery method has caught on, especially during the past ten years. Of three hundred billion dollars spent on nonresidential construction in the United States in 1996, 23 percent or sixty-nine billion dollars was spent on design-build projects.

According to a 2005 survey conducted by Pinnacle One, a construction management and consulting firm in Phoenix, Arizona, more than 37 percent of the public owners participating in the survey either currently use or are planning to use design-build on some of their projects.

The percentage of municipal governments using or planning to use design-build was 45 percent according to the survey. Design-build has become the preferred delivery method for many federal projects. In Virginia, the Department of Transportation and other state and local public entities have begun to increase their use of design-build. Industry analysts expect that, ultimately 50 percent of nonresidential construction will be design-build.

Design-build involves different and potentially greater risks than more traditional forms of construction contracting. This article will examine the benefits, risks, liability and other legal issues relating to design-build.

Design-Build Defined

Design-build is a construction delivery method in which one entity has responsibility for both the design and construction of a project.

Virginia Code § 11-37 defines a design-build contract as "a contract between a public body and another party in which the party contracting with the public body agrees to both design and build the structure, roadway or other item specified in the contract."

Advantages

- Single contract simplifies the lines of liability and responsibility for design and construction.
- Owners do not have to deal with disputes between designer and contractor.
- Design-builder warrants all of the work, including the design.
- Opportunity for shortening project duration and reducing costs.

Disadvantages

- Designer no longer in the role of protecting owners' interest.
- Possibility of adverse relationship between designer and builder.
- Not suitable for competitive bidding.
- Bonding requirements may be more difficult to meet because of exposure beyond that normally undertaken by a performance or payment bond surety.
- Different insurance requirements must be met. The contractor's commercial general liability policy may not cover liability for design errors. Design team should have its own errors and omissions policy. The cost of insurance may be more than in traditional construction methods. Gaps in coverage may exist and coverage may not be available for added risks.

The Design-Build Contract

For public projects, the form of contract usually will be the one prescribed by the public agency. Opportunities for modification may be limited because of the competitive requirements of federal or state law. On federal projects, the form of the design-build contract may also be dictated to some extent by the Federal Acquisition Regulations.

For private projects, there are a number of standard form agreements available for use in a design-build project, including those promulgated by American Institute of Architects, American General Contractors of America, Engineers Joint Contract Documents Committee, and Construction Management Association of America. These can be modified to meet the requirements of a project.

The American Institute of Architects has issued a new design-build form, AIA A-

141. The new A-141 adopts certain risk shifting provisions, such as when part of the design is proposed by the owner before the engagement of the design-builder. The A-141 anticipates that the owner will provide some "design criteria" for which the owner will remain responsible. However, the design-builder must certify that the design documents are consistent with the design criteria. Unlike the traditional AIA documents, which designate the architect as the party with authority to initially resolve disputes, A-141 allows the parties to nominate a "neutral," for this purpose but if no neutral is named in the contract, the owner is charged with resolving disputes.

Pricing of Design-Build Contracts

Design-build contracts are, in most all cases, awarded on either a fixed-price or a cost-plus fixed fee, with or without guaranteed maximum price, basis.

In Virginia, design-build contracts with the commonwealth must be awarded on a fixed-price basis.[1] Other public bodies may award contracts on a fixed-price or a "not to exceed price" basis.

Licensing Requirements

Design Team

In Virginia, all architects and engineers or any person or entity offering to practice architecture, engineering or land surveying services must be licensed.[2]

Licensed contractors are not required to be licensed to perform architectural, engineering, or land surveying services under design-build contracts as long as the architect, engineer or land surveyor offering and rendering such services is licensed.[3]

A person or entity offering architecture, engineering or land surveying or landscape architecture must register with the Board of Licensing of Architects, Professional Engineers, Land Surveyors and Landscape Architects.[4]

Contractor

The contractor must be licensed under Chapter 11 of Title 54.1 of the Virginia Code.

Contracting for or bidding upon construction services without a license is a Class 1 misdemeanor.[5]

Contracting for construction services without a license, but with actual knowledge of the licensing requirement, may also result in a forfeiture of the contractor's right to payment.[6]

The Design-Build Entity

There does not seem to be a specific requirement in Virginia for the licensing of the design-build entity as long as both the designer and contractor licensing requirements are met.

Design-Build on Public Projects in Virginia

Contracts with the Commonwealth

Only fixed-price design-build contracts are authorized.[7]

The department, agency or institution wishing to award a design-build contract must first request authority to use design-build. The request must justify that design-build is more advantageous to the state than competitive sealed bidding.

There does not seem to be a specific requirement in Virginia for the licensing of the design-build entity as long as both the designer and contractor licensing requirements are met.

The design-build procurement requires the offeror to submit its qualifications and then the commonwealth selects not more than five offers.

Thereafter, a request for proposals is issued and the offerors then submit technical and cost proposals. The commonwealth then evaluates the technical proposals and may negotiate an amendment to the cost proposals. An award may then be made to the offeror submitting "an acceptable technical proposal at the lowest cost . . . "

Contracts with Other Public Bodies

Design-build contracts may be awarded by public bodies other than the commonwealth on a "fixed price or not-to-exceed price."[8]

The public body must first obtain approval of the Design-Build/Construction Management Review Board.[9] Additionally, the public body must make a determination that design-build is more advantageous than competitive sealed bidding.

The public body must also adopt procedures for award of design-build contracts, including a two-step competitive negotiation process consistent with that required in the case of contracts with the commonwealth.

The award must be made "to the fully qualified offeror who submits an acceptable proposal at the lowest cost" in response to the request for proposals.[10]

Legal Basis for Design-Build on Federal Contracts

Design-build is expressly authorized by statute for executive agencies.[11] Contracting officers must make a determination that "two-phase selection procedures are appropriate for use in entering into a contract for design and construction of the project."

After development of a scope-of-work statement, proposals are requested from prospective offerors who first submit technical proposals without any detailed design or cost information.

The technical proposals are reviewed and the agency selects the offerors to participate in the second phase, in which the offerors submit the design concepts and cost proposals. After evaluation of the phase-two proposals, the agency will negotiate with one or more of the offerors and then make its selection. Note that price alone will not necessarily result in an award as would normally be the case under traditional sealed bidding.

Risk Shifting and Legal Liability in Design-Build

Owner's Responsibilities and Liabilities

Under what is known as the *Spearin* doctrine, which has evolved from the 1918 case of *United States v. Spearin*, 248 U.S. 132 (1918), and which is followed in Virginia,[12] a contractor is not responsible for defects in the plans and specifications furnished by the owner. In essence, the owner impliedly warrants that the plans and specifications are accurate and that the owner may be liable to the contractor for any damages resulting from the defective plans and specifications. Under the design-build method, because the contractor agrees to design and build the project, the *Spearin* doctrine generally will not apply. Nevertheless, if the owner provides faulty preliminary information on which the design is based, the owner may be liable to the contractor for any added costs resulting from the defective design.[13]

Contractor's Risks and Liabilities

Under the traditional competitive-bid method of delivery, the *Spearin* doctrine generally relieves the contractor of any responsibility for defects in design. In design-build, however, the design-build team, not the owner, warrants the accuracy of the design. The plans and specifications are created by the team, while the owner merely provides the design goals or program and some basic information. However, if the information furnished to the design-build team by the owner is inaccurate, there can be a shifting of risk back to the owner.

In Virginia, a contractor impliedly warrants that the building will be erected in a reasonably good and workmanlike manner, and when completed will be reasonably fit for its intended purpose.[14] This warranty may be voided, however, by the terms of the contract.[15] Also, a basic principle on any construction project is that the contractor must perform its work in accordance with the requirements of the plans and specifications. An exception to this rule in federal and other construction is known as the doctrine of substantial completion—minor deviations from the requirements of the contract will not be

An architect or an engineer can be held liable for professional negligence in the design of the project where the defect causes injury to persons or property.

considered to be a breach of contract, especially where the cost of correcting or replacing the nonconforming work is disproportionate to the damages resulting from the nonconforming work.

Designer's Risks and Responsibilities

An architect or an engineer can be held liable for professional negligence in the design of the project where the defect causes injury to persons or property. The architect may also be liable to the owner for defective design that causes damages to the owner.

In Virginia, the law states that the architect does not guarantee a perfect plan or satisfactory result. However, in the contract of employment, the architect impliedly warrants that he or she possesses the necessary competency and ability to enable him to furnish plans and specifications prepared with a reasonable degree of technical skill.[16]

In addition to design responsibility, an architect in a traditional agreement may also have an obligation to oversee compliance by the contractor with the plans and specifications. The architect may also have an obligation to detect any defects in the design and to recommend to the owner any necessary changes and corrections as construction progresses.[17] In design-build, the architect's contract is often no longer with the owner, but with the contractor. As a result, duties that the architect normally owes to the owner will be owed to the contractor, and the architect may have liability to the contractor for those instances of negligence or defective design that would normally result in the liability of the architect to the owner. Where the architect is not insulated from liability by the design-build entity selected—such as a joint venture or general partnership—the architect may still have liability to the owner.

Economic Loss Rule

Under the traditional owner/architect/contractor arrangement, there is a common-law legal principle in many jurisdictions, including Virginia, known as the "economic loss rule."

Under this rule, absent privity of contract between the parties, one party may not hold another party liable for economic damages based upon a negligence or other theory. Thus, an architect has no duty to protect the contractor from purely economic loss, and, absent a contract between the architect and the contractor, an architect has no liability for the contractor's damages caused by the architect's negligent performance.[18] Consequently, under the traditional construction delivery method, while the owner may be liable to the contractor for defective design under the *Spearin* doctrine, in most jurisdictions the contractor will not be able to look to the architect for damages caused by the architect's defective design.

In design-build, because a contractual relationship generally exists between the contractor and the designer, the lack of privity of contract will no longer insulate the designer from liability or preclude the contractor for looking to the designer for damages resulting from the designer's defective design. Moreover, the designer may be exposed to liability for defective design to subcontractors where a contractual relationship exists between the design-build team entity and the subcontractor(s). This would not be the case under the traditional owner/architect/contractor relationship.

The Design Build Entity

Contractor/Subcontractor

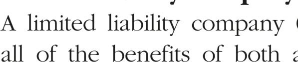
Under this arrangement, the contractor awards a subcontract to the design firm for architectural/engineering services. Under the economic damage rule, the designer may be insulated from liability to the owner for design errors, but the contractor will not be.

Joint Venture

This type of entity is used frequently in design-build team arrangements. The contractor and the architectural/engineering firm form a joint venture for the purpose of entering into a contract for design-build services. A joint venture is generally governed by the same rules of law as a partnership,[19] and there need not be much evidence of the existence of a joint venture other than a few formalities and the parties' conduct in light of other facts and circumstances.[20] Each party is liable for the debts and obligations of the joint venture.

Limited Partnership

Under this concept, the contractor and an architectural/engineering firm form a limited partnership. Generally, only the general partner will be liable for the debts or obligations of the partnership. Because of the necessity of having active participation in the project by both the contractor and the designer, a limited partnership may not be practical.



Limited Liability Company

A limited liability company (LLC) affords all of the benefits of both a partnership and a corporation. Under this arrangement, the contractor and design firm form a limited liability company and the contractor and designer become members of the company. The business of the LLC is conducted by its manager or managers. An LLC is treated as a partnership for tax purposes but as a corporation for all other purposes. Generally members of an LLC are not liable for debts and obligations of the LLC. However, it is uncertain whether the designer can fully insulate himself from liability through the use of an LLC.

Employer/Employee

Under this option, the contractor hires the architect or engineer as an employee. Both the contractor and the architect must meet licensing requirements. Under the doctrine of *respondeat superior*, the contractor will be liable for design errors.

Conclusion

Because design-build offers advantages to owners not found in more traditional construction delivery methods, there is an increasing interest in the use of the design-build rather than competitive sealed-bidding or other methods of awarding contracts for construction. However, it is important that owners, designers and contractors be aware of the changes in their relationships which will occur under the design-build concept, and the parties also must be aware of the different and potentially greater risks and liabilities that the designers and contractors will be assuming. If the team concept is to work, its members must be carefully selected, and the documents that serve as the foundation of their relationship must be carefully drafted to define their rights and responsibilities. ⚖

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Endnotes:

1 Virginia Code § 11-41.2(a).

2 Virginia Code § 54.1-406.

3 Virginia Code § 54.1-406(f).

4 Virginia Code § 54.1-411

5 Virginia Code § 54.1-1115.

6 Virginia Code § 54-1-1115(c).

7 Virginia Code § 11-41.2.

8 Virginia Code § 11-41.2:2(A).

9 Virginia Code § 11-41.2:5.

10 Virginia Code § 11-41.2:2(B).

11 41 U.S.C. § 253m.

12 *Southgate v. Sanford & Brooks Co.*, 147 Va. 554, 137 S.E. 485 (1927)

13 Two decisions of the Armed Services Board of Contract Appeals illustrate this principle. In *Pitt-Des Moines Inc.*, ASBCA 42838,96-1#BCA ¶ 27, 941 (1995), the contractor was allowed to recover its increased costs under the differing site conditions clause because the actual wall thickness of the existing building was found to be thicker than shown in four (4) drawings depicting the existing building which were supplied with the Request for Proposals. In the earlier case of *M.A. Mortenson Co.*, ASBCA 39978, 93-3#BCA ¶ 26, 189 (1993), the government was held liable for a design-builder's increased costs in constructing the foundation of a building as a result of faulty information contained in the government's drawing which was included in the RFP.

14 *Mann v. Clowser*, 190 Va. 887, 59 S.E. 2d 78 (1950).

15 33 Va. Cir. 265, 267 (Citing 184 Va. 588).

16 *Surf Realty Corp. v. Standing*, 195 Va. 431, 78 S.E. 2d 901 (1953).

17 *Virginia Military Institute v. King*, 217 Va. 751, 232 S.E. 2d 895 (1997).

18 *Blake Construction Co. Inc. v. Alley*, 233 Va. 31, 35 S.E. 2d 724 (1987) See also Sensenbrenner v. Rust, Orling and Neale, Architects Inc., 236 Va. 419, 374 S.E. 2d 55 (1988).

19 *See, e.g., Roark v. Hicks*, 234 Va. 470, 475, 362 S.E.2d 711, 714 (1987).

20 *Smith v. Grenadier*, 203 Va. 740,744, 127 S.E.2d 107, 111 (1962).

No Rest for the Weary: Bid Protests in Virginia

by Jonathan D. Shaffer and David S. Stern

Competing for business from Commonwealth of Virginia agencies can be a time-consuming and challenging process. Potential contractors must closely follow lengthy solicitations to ensure strict compliance while working feverishly to develop the lowest possible competitive price. Given the need to get the best quotes from subcontractors, the contractor often works until the last possible moment to finalize its price. Once the bid or offer is submitted, however, the work is not done. If the competition is a negotiated procurement, there may be further negotiations or discussions with agency personnel and the submission of a best and final offer.

Once the agency announces award, there is a short limitation period in which to take action. For the unsuccessful offerors—unlike in the commercial marketplace—there is an opportunity to file a bid protest to challenge the agency procurement action. By this time, the contractor's bid personnel are tired of the old procurement and working intensively on new business opportunities. Yet there is no rest for the weary. If the award appears arbitrary or otherwise in violation of law, the contractor must act quickly to preserve its rights.

A bid protest is a challenge to a public agency's procurement action and is unique to public procurements. The law of commercial contracts does not provide a basis for a seller to challenge a private buyer's decision to choose another supplier.[1] In contrast, Virginia state agencies are subject to the Virginia Public Procurement Act (VPPA).[2] There is a strong public interest in ensuring confidence in the integrity of the procurement process.[3] Accordingly, Virginia grants administrative and judicial bid protest remedies to prospective contractors.[4]

Time Is Running

If a contractor believes the award of a Virginia public contract is arbitrary or otherwise in violation of law, the contractor must submit its protest to the contracting agency within ten days of the award or an announcement of a decision to award—whichever occurs first.[5] There is an exception when documents are produced by the agency for public review. Generally, the ten days will run from the date of production of public records.[6] However, the need to file before award to obtain a stay must also be considered and may shrink the ten-day window.

All public records relating to the procurement are available for inspection by the contractor in accordance with the Virginia Freedom of Information Act (FOIA), subject to limited exceptions.[7] A competitive negotiation offeror, upon request, shall be afforded the opportunity to inspect proposal records within a reasonable time—after the evaluation and negotiations of proposals are completed but prior to award—except in the event that the contracting agency decides not to accept any

of the proposals and to reopen competition. A competitive sealed-bid bidder has the same rights after the opening of all bids but before award. The general public is entitled to inspect the same documents only after award of the contract.[8]

The Virginia FOIA limits disclosure. Cost estimates relating to a proposed procurement prepared by or for a contracting agency shall not be open to inspection.[9] Also, trade secrets and proprietary information are protected so long as the entity submitting such information declares protection before its submission.[10]

Contractors must be vigilant. The starting point for the protest period depends in part on information available under Virginia's FOIA. The ten-day clock begins from the moment the records are available for inspection. If the documents that give rise to a protest are produced well before award, the contractor may not be able to wait until ten days after award to file its protest.

What Went Wrong: Typical Substantive Protest Issues

Typical substantive protest grounds include failure to follow the solicitation evaluation criteria, failure to document the source selection decision and other critical determinations, improper cost/technical trade-offs, improper exclusion from the competitive range, lack of meaningful discussions, errors in the cost evaluation; improper disclosure of competitive information and unmitigated conflicts of interest.[11]

For sealed bid procurements, a frequent protest issue is bid responsiveness. The Virginia Code defines "responsive bidder" as "a person who submitted a bid that conforms in all material respects to the invitation to bid."[12] A bid may be responsive notwithstanding a minor informality. A minor informality is "a minor defect or variation of a bid or proposal from the exact requirements of the Invitation to Bid or the Request for Proposal, which does not affect the price, quality or delivery schedule for the goods, services or construction being procured." [13]

Responsiveness is sometimes confused with responsibility. A responsible bidder or offeror is defined as a person who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability that will assure good faith performance, and, where required, has been prequalified.[14]

Under the VPPA, a protester may not protest another offeror's responsibility.[15] This is in sharp contrast to the federal procurement system which permits protests regarding an offeror's responsibility to the Court of Federal Claims or Government Accountability Office, under limited circumstances.[16]

The VPPA provides a separate procedure for an offeror to challenge any adverse finding as to its own responsibility.[17] As with other areas of protest, an offeror must challenge a finding of nonresponsibility within ten days of notice.[18]

Is There a Remedy?: Avoiding a Pyrrhic Victory

In the event of a timely protest or the filing of a timely legal action before award, no further action to award the contract shall be taken unless there is a written determination that proceeding without delay is necessary to protect the public interest.

In a bid protest proceeding under the VPPA, the court may set aside agency procurement action that is arbitrary or capricious, or in violation of state law or the terms of the solicitation.[19] Virginia law gives the circuit court the power to award injunctive relief in a bid protest case.[20]

If the agency determines before award that the decision to award is arbitrary, then the sole relief shall be a finding to that effect and the cancelling of the proposed award.[21] If the agency determination is made after award but before performance, then the contract may be enjoined by the agency.[22] Finally, if the award is made and performance begins, the contracting agency may declare the contract void upon a finding that this action is in the best interest of the public.[23] The prohibition against injunction after performance has begun does not apply to a circuit court's exercise of equitable powers on appeal of a protest decision.[24]

The great fear for a protester is that the protest expense will result in a Pyrrhic victory if the pending award is not stayed. If the contract or award is not stayed, the agency may obtain the equipment or services from the awardee and may then later argue that, even if the protest is sustained, the protester should not obtain equitable relief since the contract has been substantially performed. Because the bid protest procedures do not permit a protester to recover lost profits caused by an improper award, the protester's only effective remedy is often award of the contract. However, if the equipment or services are purchased by the agency in the meantime, this remedy may be unavailable.[25]

The problem is heightened when the goods or services procured are not easily reversed. For example, if the procurement is for computer equipment, once the equipment is installed, no court is likely to order the agency to buy computers from another bidder. Similarly, for a construction project, once the awardee has mobilized and started work, a court may be reluctant to act. On the other hand, if the contract is long term with options, or the contract is a service contract where it is relatively easy to transition from one con-

Contractors must be vigilant. The starting point for the protest period depends in part on information available under Virginia's FOIA.

tractor to another, the absence of a stay may not be dispositive.

Even where a stay is not mandatory, some agencies will voluntarily agree to stay performance of the contract during the protest litigation—particularly if the court will agree to expedite proceedings. Many bid protests can be resolved quickly on cross motions for judgment on the administrative record on an accelerated basis. The key is apprising the court as early as possible of the specific basis for a request for expedited relief. Courts may consider a bid protest on an accelerated schedule, particularly where the parties reach agreement on maintaining the stay pending review, and there is an immediate upcoming event that requires action. For example, in a construction project, a procurement for one part of the project may have a ripple impact on other parts of the project, and a delay due to a bid protest that is not resolved quickly can impact numerous other procurements or even the entire project.

Where to File

The protest must be filed initially with the procuring agency. After filing a protest, the contracting agency has ten days to issue a written decision stating the reasons for its actions. The protester has ten days from receipt of the written decision to challenge the protest decision.[26]

If the protester is not satisfied with an agency's decision, it has two options for appeal: administrative appeal or judicial review. The administrative appeal option is only available when an agency establishes a procedure for hearing protest appeals.[27]

Appeal Procedure

An administrative appeal provides a contractor the opportunity to present pertinent information to a disinterested person or panel.[28] The disinterested person or panel cannot be an employee of the agency.[29]

The appeal authority must issue a written decision containing findings of fact. These

Filing a protest is time-consuming, disruptive and expensive.

findings can only be set aside by a court when they are fraudulent, arbitrary or capricious, or so grossly erroneous as to imply bad faith.[30] Unlike findings of fact, any determination on an issue of law is reviewable de novo by the appropriate appellate court.[31]

Both the protester and the agency are entitled to judicial review of the appeal decision. Such action must be brought within thirty days of receipt of the written decision.[32]

Circuit Court Proceeding

The protester's second option for appealing an adverse protest decision is filing in the applicable circuit court.[33] While a contractor is not required to avail itself of the administrative appeal procedure before filing in court, a protester that does utilize these procedures is required to let the administrative appeal run its course. Also, despite any contrary contract language, a contractor is entitled to proceed directly to court without utilizing the contracting agency's appeal procedures.[34]

**Risks of a Protest:
No Absolute Privilege**

The Supreme Court of Virginia has ruled that contractors do not have an absolute privilege for statements made during agency-level bid protests.[35] In that case, the awardee had sued the protester alleging conspiracy and tortiuous interference arising from actions during the agency protest process. The awardee ultimately received substantial monetary damages. This decision should ring alarm bells for contractors considering bid protests to fully investigate the factual basis for their allegations before filing.[36] Protesters could be faced with an increased burden given the short time limits applicable to protests. The Court held that the absolute privilege for statements made during a judicial proceeding does not apply to an agency-level bid protest because bid protest proceedings do not provide safeguards similar to those inherent in a judicial proceeding. Those safeguards include the power to issue subpoenas, liability for perjury, and the applicability of the rules of evidence.

**Is There a Better Way?:
Avoiding Bid Protests**

Filing a protest is time-consuming, disruptive and expensive. If a contractor pursues a protest unsuccessfully, the agency may be less inclined to do business with the contractor in the future. Even if the protest is sustained, the protester will likely antagonize the agency and may not ultimately receive award of the contract. Accordingly, any contractor should exercise due care to avoid the need for protests by ensuring that its proposal or bids are submitted timely are responsive to the solicitation, and do not contain material ambiguities.

On the other hand, if the contractor discovers that the agency has not dealt fairly with the contractor, a protest may be the only reasonable alternative. In some cases, the agency may not be aware of the procurement defect giving rise to the protest, or senior agency officials may not agree with decisions made by agency evaluators or other procurement personnel. These protests could be resolved through alternative dispute resolution, and result in a contract award that would otherwise have been lost.[37] Many agency personnel respect a protest brought in good faith.

In other cases, pursuing the protest may be the only means to remedy a significant procurement error or violation of law. Preparing a proposal for a negotiated procurement often involves substantial expenditure of time and money by a contractor. In light of that significant investment, a protest may be the only

reasonable means of protecting the contractor's interests.

The protest process is also time consuming and disruptive to the agency. If a protest is sustained, the agency may be prevented from timely project completion. Accordingly, the agency must exercise due care to avoid successful protests by ensuring that procurements are conducted in accordance with legal requirements.[38] The agency must make sure that personnel conducting the procurement follow the solicitation evaluation criteria and award provisions strictly. Protests are often sustained where personnel do not follow the published rules. While "men must turn square corners when they deal with the government," "it is no less good morals and good law that the government should turn square corners in dealing with the people . . . ."[39]

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Endnotes:

1 *See Washington-Dulles Transportation Ltd. v. Metropolitan Washington Airports Authority*, 263 F.3d 371 (2001), n.1 (referring to Virginia Court rulings; finding Federal District Court has jurisdiction over a claim that the airport authority violated the terms of its lease from the federal government). The Authority, although otherwise subject to Virginia law, is not an agency of the Commonwealth and is specifically exempt from the VPPA. The Fairfax County Circuit Court held there is no cause of action at Virginia common law for a disappointed bidder. The Virginia Supreme Court subsequently refused a petition for appeal, finding there was no reversible error in the Circuit Court's judgment.

2 Va. Code § 2.2-4300.

3 Va. Code § 2.2-4300(C). *See, e.g., MFS Network Technologies Inc. v. Commonwealth of Virginia*, 33 Va. Cir. 406, 410 (City of Richmond 1994) (stating that it is in the public interest to know that procurement laws are administered properly).

4 Va. Code §§ 2.2-4360; 2.2-4364.

5 Va. Code § 2.2-4360.

6 Va. Code §§ 2.2-4360(A); 2.2-4342.

7 Virginia Freedom of Information Act § 2.2-3700 et seq.

8 Va. Code § 2.2-4342(D).

9 Va. Code § 2.2-4342(B).

10 Va. Code § 2.2-4342(F).

11 *See, e.g.*, Va. Code Ann. §§ 2.2-4300(A), 2.2-4300(C); *Public Assembly Facility Guide: A Guide for Managers of Arenas, Auditoriums, Convention Centers, Performing Arts Centers, Race Tracks and Stadiums*, Chapter 3, Bid Protests (1st ed. 1998); *First Health Services Corp. v. Commonwealth of Virginia*, 35 Va. Cir. 184 (City of Richmond 1994); *MFS Network Technologies, Inc. v. Commonwealth of Virginia*, 33 Va. Cir. 406 (City of Richmond 1994); *Cubic Toll Systems, Inc. v. Virginia Department of Transportation*, 37 Va. Cir. 522 (Fairfax County 1993).

12 Va. Code § 2.2-4301. (emphasis added). *See also Doyle Inc. v. Loudoun County School Board*, 1989 Va. Cir. LEXIS 429 (Loudoun County October 10, 1989) (submission of names of subcontractors to be used on the project is not an issue of responsiveness).

13 Va. Code § 2.2-4301; *Peninsula Therapy Center, PLC v. Commonwealth of Virginia*, 2002 VA Cir. LEXIS 271 (Newport News Cir. Ct. August 1, 2002) (delay in submitting a required license under terms of the solicitation was a minor informality not required to demonstrate responsiveness).

14 Va. Code § 2.2-4301; *Doyle, supra.*

15 Va. Code § 2-2.4360(A).

16 4 C.F.R. § 21.5(c).

17 Va. Code § 2.2-4359.

18 Va. Code § 2.2-4359(2).

19 Va. Code § 2.2-4364.

20 Va. Code §§ 8.01-620, 628; *see also* Va. Code § 2.2-4364(D).

21 Va. Code § 2.2-4360(B).

22 Va. Code § 2.2-4360(B).

23 Va. Code § 2.2-4360(B).

24 *MFS Network Technologies, Inc. v. Commonwealth of Virginia*, 33 Va. Cir. 406 (City of Richmond 1994).

25 *Cubic Toll Systems, Inc. v. Virginia Department of Transportation*, 37 Va. Cir. 522 (Fairfax County 1993); *Aydin Corp.*, B-224908, May 19, 1987, 87-1 CPD ¶ 527; *Quality Transport Servs. Inc. v. United States*, 12 Cl. Ct. 276, 277 (1987).

26 Va. Code § 2.2-4360(A).

27 Va. Code § 2.2-4365(A).

28 Va. Code § 2.2-4365(A).

29 Va. Code § 2.2-4365(A).

30 Va. Code § 2.2-4365(A).

31 Va. Code § 2.2-4365(A).

32 Va. Code § 2.2-4365(B).

33 Va. Code § 2.2-4364.

34 *W.M. Schlosser Co. v. Fairfax County Redevelopment & Housing Auth.*, 975 F.2d 1075 (4th Cir. 1992).

35 *Lockheed Information Management Systems Company, Inc. v. Maximus, Inc.*, 259 Va. 92, 524 S.E.2d 420 (2000).

36 *See also* Pachter and Shaffer, "Communications during Agency Level Protests Not Subject to Absolute Privilege," *The Procurement Lawyer*, Volume 35, No. 4 at 4-5, Summer 2000.

37 Va. Code § 2.2-4366.

38 *See also Public Assembly Facility Guide: A Guide for Managers of Arenas, Auditoriums, Convention Centers, Performing Arts Centers, Race Tracks and Stadiums*, Chapter 3, Bid Protests (1st ed. 1998).

39 *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 61, n.13 (1984).

Deal Or No Deal?

Clarifying Gray Areas in Construction Contracting

by K. Brett Marston and J. Barrett Lucy

"Do we have a deal?"

This may seem like a simple question, but it can be a difficult issue when posed by a construction client to its attorney. In a business focused on margins and progress, paperwork often lags behind. Knowing if there is a deal and understanding its terms can be challenging. In an environment where a "handshake" was "a bond," the movement toward enhanced use of written price quotes, contract documents and change orders ought to help clarify the existence and boundaries of the deal, right? Not so fast.

In three common aspects of construction contracting, the answer to the question of whether there is a deal is a resounding "maybe." When a subcontractor submits a price quote that the general contractor relies upon to bid on a project, is there a deal? When a proposed contract is sent by the general contractor to a subcontractor but is not signed even though work has begun, is there a deal? If so, what are its terms? When an owner tells a contractor to proceed with extra work during the course of a project but a written change order is not signed, is there a deal, and what is it? Understanding the legal analysis of those issues in advance can help attorneys educate clients so they will understand the risks inherent in each of those situations, and help them prepare better to handle those situations.

"Let's Make a Deal . . . to Make a Deal"

Before the first shovel of soil is moved on a construction project, agreements and contracts between general contractors and bidding subcontractors and suppliers can be confusing. What is the impact of a subcontractor providing the lowest quote for a portion of the work to the general contractor and then the general contractor

using that quote as a part of its successful bid on the project at large? Can the subcontractor withdraw that price with impunity at any time prior to signing a formal subcontract? Can the general contractor "shop" that price with other potential subcontractors?

To resolve that issue, remember that Virginia courts distinguish between intention to contract and an actual agreement.

> The whole question is one of intention. If the parties are fully agreed, there is a binding contract, notwithstanding the fact that a formal contract is to be prepared and signed; but the parties must be fully agreed and must intend the agreement to be binding. If though fully agreed on the terms of their contract, they do not intend to be bound until a formal contract is prepared, there is no contract, and the circumstance that the parties do intend a formal contract to be drawn up is strong evidence to show that they did not intend the previous negotiations to amount to an agreement.

Boisseau v. Fuller, 96 Va. 45, 46, 30 S.E. 457 (1898) (citation omitted); *see also Atlantic Coast Realty Co. v. Robertson's Ex'r*, 135 Va. 247, 116 S.E. 476 (1923) ("when it is shown that the parties intend to reduce a contract to writing, this circumstance creates a presumption that no final contract has been entered into, which requires strong evidence to overcome."). Conversely, the Court has differentiated that "[w]here the minds of the parties have met and they are fully agreed and they intend to be bound there is a binding contract, even though a formal contract is later to be prepared and signed." *See Agostini v. Consolvo*, 154 Va. 203, 153 S.E. 676 (1930).

Focusing on whether the general contractor's use of a subcontractor's quote is a binding agreement, parties trying to enforce those as "deals" have tried to rely upon the theory of promissory estoppel, with at least one circuit court prior to 1997 suggesting this approach would constitute a viable claim. *See R. L. Dixon Inc. v. Hendrick Constr. Co.,* 19 Va. Cir. 503, 505 (1980). However, the Supreme Court of Virginia held in 1997 that a claim for promissory estoppel is not cognizable. *See W.J. Schafer Assocs. v. Cordant Inc.,* 254 Va. 514, 521, 493 S.E.2d 512, 516 (1997); *Virginia Sch. of the Arts v. Eichelbaum*, 254 Va. 373, 377, 493 S.E.2d 510, 512 (1997); *Ward's Equip. v. New Holland N. Am.,* 254 Va. 379, 385, 493 S.E.2d 516, 520 (1997). The Court did not adopt the Restatement (Second) of Contracts §90(1) (1981) approach that provides, in part, that a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Even once parties have agreed to work together, the contract paperwork can drag far behind.

In reaction to this, some general contractors send "letters of intent" to award subcontracts to subcontractors to try to bind subcontractors to the submitted price. Care should be taken in drafting these, as Virginia courts are suspect of these efforts. *See, e.g., Marketplace Holdings Inc. v. Camellia Food Stores Inc.* 64 Va. Cir 144, 145 (2004) (in sale of a business situation, "an agreement to negotiate is not enforceable in Virginia," as "there must be mutual assent of the contracting parties to terms reasonably certain under the circumstances in order to have an enforceable contract"); *Nuline Industr. Inc. v. Media General Inc.,* 32 Va. Cir. 352, 354 (1994) ("[a]n agreement to make an agreement fails because there is no mutual commitment").

"A Handshake . . . and a Prayer"

Even once parties have agreed to work together, the contract paperwork can drag far behind. Work might even begin before the signatures on the bottom line. What then, if anything, forms the basis of the deal between those parties? What are the terms of the deal if some dispute or accident occurs before the contract is signed?

Several considerations determine the state of that relationship. It may be that the parties have an oral agreement (subject to any Statute of Frauds considerations) to perform the work, and that the paperwork is just documentation of that deal. In *Brooks & Co. Gen. Contrs. Inc. v. Randy Robinson Contr. Inc.,* 257 Va. 240, 245, 513 S.E.2d 858, 860 (1999), the Supreme Court confirmed that an oral agreement was formed by the subcontractor saying that it "stood by its" prior bid and the general contractor responded that the subcontractor "would be given the work."

In the *Brooks* decision, the general contractor also sent a proposed written contract to the subcontractor. The subcontractor never signed that contract and the general contractor later tried to enforce an arbitration provision embedded in it. The Court concluded that the general contractor had not informed the subcontractor of its intent to replace their oral agreement with the written contract, and there had been no "meeting of the minds" on the written form or that the case would be arbitrated. *Id.* at 245, 513 S.E.2d at 860. The Court concluded, based upon the existence of the oral agreement and the failure to agree on the replacement with a written contract, that the subcontractor's performance would not be deemed to be acceptance of the written document. *Id.*

Even though the *Brooks* decision resolved that last issue in the negative, ignoring a proposed written contract that is tendered by the other party but beginning to perform the work is not risk-free. To the contrary, a subcontractor that begins its work may be deemed to have accepted an otherwise unfavorable subcontract. Under Virginia law, acceptance of a contract proposal "need not be given in express words,

but may be inferred from the acts and conduct of the offeree." *Bernstein v. Bord,* 146 Va. 670, 675, 132 S.E. 698, 699 (1926).

This principle was applied in the construction context in *Galloway Corp. v. S.B. Ballard Constr. Co.,* 250 Va. 493, 464 S.E.2d 349 (1995). There, the Supreme Court explained that "[t]he absence of an authorized signature does not defeat the existence of the contract . . ." *Id.* In *Galloway*, the Court held that a subcontractor had accepted the terms of the modified American Institute of Architects subcontract by performance, despite the fact that the subcontractor had failed to sign the written agreement as a result of an oversight.

There remain instances, though, where a court may determine that there was not any express contract, whether written or oral, between the parties, or any unsigned contract that has been accepted by performance. What then? Most likely those cases will require a *quantum meruit* analysis. In *Hendrickson v. Meredith*, 161 Va. 193, 170 S.E. 602 (1933), the Supreme Court of Virginia explained the general rule of law "that he who gains the labor or acquires property of another must make reasonable compensation for the same. Hence, when one furnishes labor to another under a contract which, for reasons not prejudicial to the former, is void and of no effect, he may recover the value of his services on a *quantum meruit*." *Id.* at 198, 170 S.E. at 604. (internal citations omitted).

"The Show Must Go On"— The Change Order Two-Step

Even where businesses have taken care to sign a formal, written construction contract containing myriad provisions about changes, extra work, oral directives and modifications to the contract, those are frequently ignored or discarded in the heat of the moment. Disputes arise because oral directives are given, promises are made, and execution of a written change order—which is usually a contractual requirement—is deferred. Under this typical scenario, disputes arise later because the price and related time extensions have not been agreed to.

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The determination of what effect these changes may have on the obligations of the parties involves issues of modification, waiver and estoppel. The Supreme Court of Virginia faced whether and how a written construction contract can be modified in the absence of an express agreement to that effect in *Cardinal Development Co. v. Stanley Constr. Co. Inc.,* 255 Va. 300, 497 S.E.2d 847 (1998). Stanley Construction claimed it was entitled to payment of additional funds because the developer, Cardinal, had increased the number of lots being developed and had promised verbally and in written communications to pay Stanley Construction. Cardinal took the position that Stanley Construction was bound to the fixed-price contract amount.

The Supreme Court concluded that Stanley Construction had proved by "clear, unequivocal, and convincing evidence . . . that Cardinal and Stanley Construction intended to modify the terms of their contract and that Cardinal agreed to pay for the additional work that Stanley Construction had performed." *Id.* at 306, 497 S.E.2d at 851 (citing *Stanley's Cafeteria Inc. v. Abramson,* 226 Va. 68, 73, 306 S.E.2d 870, 873 (1983)). The Court found the necessary, sufficient consideration for the modification in Cardinal's agreements to pay for the additional work and in Stanley Construction's actual performance of that work.

It is unclear from the *Cardinal* decision whether the written contract between those parties contained a "changes" clause requiring that any changes to the contract be made in writing by means of a change order or a construction change directive—the two general processes contained in most construction industry form contract documents. This requirement is often lost in the mix of oral directions and need for progress.

In those circumstances, if the party performing the work does not get paid in the way it anticipated, it may argue, in addition to modification, that the party who owes the money has "waived" the writing requirement through the verbal directions or course of conduct that occurred. Some courts refer to the results of these situations as "constructive" change orders. There are numerous reported decisions across the nation resolving those issues in many different ways depending upon the facts. *See, e.g., McKeny Constr. Co. v. Town of Rowlesburg,* 187 W.Va. 521, 420 S.E.2d 281 (1992) (rejecting contractor's argument that owner had abandoned the written change order process where there were written change orders for some parts of the work); *cf. Huagn Int'l Inc. v. Foose Constr. Co.,* 734 P.2d 975 (Wyo. 1979) (finding waiver of written change order requirement by owner based upon statements that they were not necessary).

In Virginia, the Supreme Court has not addressed a specific situation where an owner is alleged to have waived a written change order requirement; however, a longstanding decision by the Court provides what may be surprising guidance on how the Court might rule in such a debate. *See Zurich General Accid. & Liab. Insur. Co. v. Baum,* 159 Va. 404, 165 S.E. 518 (1932). That case involved a provision in an insurance policy that stated that

> No change in the agreements, general conditions, special conditions or warranties of this policy, either printed or written, shall be valid unless made by endorsement signed by the manager and attorney or an assistant manger . . . nor shall notice to or knowledge possessed by any agent or any other person be held to waive, alter or extend any of such agreements,

> general conditions, special conditions or warranties.

Id. at 408, 165 S.E. at 519. The issue addressed by the Court was

> Where it is stipulated in a contract that changes or modifications must be made in only one way, can the parties by mutual agreement change or modify the contract in any other way?

Id. Citing the general, common-law principle that "the provisions of a simple contract in writing, by subsequent parol agreement of the parties before breach, may be waived, rescinded, added to, changed or modified" the Court concluded that the principle would still apply "notwithstanding the fact that the parties have stipulated in the contract that it can be changed or modified in only one specific way." *Id.* at 409, 165 S.E. at 519 (citing Williston on Contracts, Vol. 3, Section 1828, other citations omitted).

Since its decision in the *Baum* case, the Supreme Court of Virginia has cited, though infrequently, that decision with approval. *See, e.g., Reid v. Boyle,* 259 Va. 356, 527 S.E.2d 137 (2000); *Keepe v. Shell Oil Co.,* 220 Va. 587, 260 S.E.2d 722 (1979). In *Reid,* the contract contained an integration clause with the following language: "This Agreement may not be modified in any way unless by a written instrument signed by both the Company and the Executive." Despite that clear provision, the Court concluded that the parties had modified the written contract both orally and by their "course of dealing." 259 Va. at 370, 527 S.E.2d at 145.

Conclusion

While it is easy to identify these issues and predict that they will continue to occur for as long as there are construction projects, it is more difficult to predict their outcomes and to fully prepare clients to perform preventative maintenance. The details of the conversations, directions, promises and "deals" all factor into the analysis of whether there is a binding agreement and what the terms are. Communication and documentation of a party's understanding is essential to trying to establish whether there really is "a deal . . . or no deal." ⚖

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Cost-Plus Contracts *continued from page 37*

Contracts, § 19; 17A Am. Jur. 2d *Contracts* § 495; Freeman, 968 P.2d at 253; Lytle, 120 A. at 413-16.; *Nolop v. Spettel*, 64 N.W.2d 859, 863-64 (Wis. 1954); *Wymard v. McCloskey & Co.*, 342 F.2d 495 (3rd Cir. (Pa.) 1965) (subcontractor was not entitled to add charge for overhead based on custom of the trade, because such custom did not trump rule of law that such overhead charges, unless specified in the agreement, are not recoverable under cost-plus contract); *Keever & Associates Inc. v. Randall*, 119 P.3d 926, 929 (Wash. App. 2005); *Conditioned Air Corp.*, 114 N.W.2d at 309.

25 *Id.*

26 *Freeman*, 968 P.2d at 253; *Lytle*, 276 Pa. at 413, 120 A. at 413. *See also Nolop*, 64 N.W.2d at 863-64 (overhead expense must be expressly provided in the contract, and the overhead must be defined.); *Foster v. Soule*, 310 So.2d 170, 172 (La.Ct.App. 1975); *Peru Associates Inc. v. State of New York*, 70 Misc.2d 775, 334 N.Y.S.2d 772, 780 (N.Y.Ct.Cl. 1971).

27 *Freeman*, 968 P.2d at 252-53.

28 *J.E.T. Development v. Dorsey Const. Co. Inc.*, 642 P.2d 954 (Idaho App. 1982).

29 *Hitt*, 147 Va. at 787, 133 S.E. at 506.

30 *John W. Danial & Co. v. Janaf Inc.*, 169 F.Supp. 219, 225 (E.D. Va. 1958) (citing Hitt).

31 AIA A111, Article 3.

32 For articles discussing a contractor's potential fiduciary duty to owners, *see* Robert M. Wright, *Cost-plus Constrs: The Construction Contractor—Is He a Fiduciary?*, 7-Jan CONSTRUCTION LAWYER, 3 (Jan. 1987); Paul J. Walstad, Sr. & Camille Williams, *Contracting on a Cost-Plus Basis: The Owner's Relationship of Trust with the Contractor*, Construction Briefings No. 2000-12 (Dec. 2000).

33 484 A.2d 302 (Md.App.1984).

34 *Id.*, at 304.

35 *Id.*, at 305.

36 956 P.2d 1213, 1219-20 (Alaska, 1998).

37 *Id*. *See also, Eastover Ridge LLC v. Metric Construction Inc.*, 553 S.E.2d 827 (N.C. App. 2000) (no fiduciary duty).

38 *See* 2 Stein, *Construction Law*, ¶ 3A.03[2]; AIA A111, § 5.1.2; EJCDC C-525, ¶ 7.01.

39 AIA A111, § 5.1.2.

40 *See* EJCDC C-525, ¶ 7.01.

41 *See* EJCDC C-525, ¶ 7.02.

42 222 Va. 15, 278 S.E.2d 793 (1981).

43 *Id.*, 222 Va. at 17, 278 S.E.2d at 794-95.

44 *Id.*, 222 Va. at 17-18, 278 S.E.2d at 795.

45 13 Am. Jur. 2d *Building & Construction Contracts*, § 19. *But, compare* EJCDC 1910-8 (1990) (General Conditions), ¶11.5.5 (this prior version of the General Conditions excluded costs of correction from reimbursable costs) *with* EJCDC 1910-8 (1996 ed.) (General Conditions), ¶11.01(A)(5)(f) (costs for damage to work reimbursable provided such damage not caused by negligence of contractor or those for whom contractor is responsible).

46 AIA A111, § 7.7.3; EJCDC 1910-8 (1996 ed.) (General Conditions), ¶11.01(A)(5)(f).

47 AIA A111, § 12.2.5.

48 See, e.g., AIA A111, Article 6; and EJCDC C-525, Article 9.

Cost-Plus Contracts: Fair Deal or License to Steal?

by Randall H. Wintory

Whenever an owner and contractor enter into a construction contract, cost will likely be the most important issue for both parties. Two common pricing methods are fixed-price contracts and cost-plus contracts. A fixed-price contract is inappropriate when there are too many uncertainties over the work to be performed, whether from unforeseen conditions, design changes, or volatile material prices. For such projects, a cost-plus contract is more appropriate. In a cost-plus contract, the contract price is the costs incurred by the contractor plus a fee for the contractor's services and profit.[1]

A cost-plus contract may eliminate some price uncertainties involving the price, but it can raise unforeseen problems. With a cost-plus contract, the owner benefits by paying for the work free from contingencies, but assumes the risk that such costs may be higher than anticipated.[2] Cost-plus contracts provide little incentive for the contractor to control or minimize costs. A cost-plus contract with a fee based on a percentage of the costs creates an incentive for the contractor to increase costs, thereby increasing the contractor's profits. Calling cost-plus contracts "very dangerous," one court noted that the case presented "another example of a contract where the contractor's chief aim seems to be to make the price as high as possible" to increase the contractor's profits.[3] Unless the parties draft their agreement carefully, a cost-plus contract can be either a fair deal or license to steal.[4]

Cost-plus contracts have been the subject of few reported opinions in Virginia. But some cases in Virginia, as well as from other jurisdictions and authorities, provide an overview of issues in a cost-plus contract.

Cost-Plus Contracts in Virginia

Hitt v. Smallwood[5] considers cost-plus contracts in Virginia. In *Hitt*, the homeowner hired a contractor under a fixed-price contract to build a stone garage and, under a cost-plus contract to perform extra work. The owner fired the contractor and disputed the accuracy of his final bill. The contractor filed an action to collect. In a separate suit against the contractor, the owner claimed that the contractor's account was erroneous, grossly excessive or fraudulent. The matter was referred to a commissioner for an accounting. The commissioner's report was confirmed, and judgment was entered in the contractor's favor.

On appeal, the owner argued that the cost of the extra work performed under the cost-plus contract was so excessive and unreasonable as to amount to fraud, deliberate overcharging or padding of the accounts, and that the contractor was only entitled to receive the reasonable cost of the work.[6] The contractor's bill was approximately twelve thousand dollars. To prove the reasonable cost of the work, the owner had two contractors testify before the commissioner. One expert testified the cost should have been a little over four thousand dollars. The other expert claimed the cost should have been less than four thousand dollars.[7]

The court rejected the owner's argument that the contractor was only entitled to its reasonable costs. Instead, if the costs appear excessive, the contractor would be bound to prove the "bona fides" of its work. The court declined to create a standard for the cost of construction work by which to measure a contractor's performance. The court reasoned that contractors are so different in their experience, judgment and methods of doing the work, and the conditions under which they work vary to such extent that the law does not and cannot standardize the cost of work.[8]

Although the contractor did not have to show the reasonableness of its costs, the contractor did have a duty, when performing work on a cost-plus basis, to "keep accurate and correct accounts of all material used and labor performed, with the names of the materialmen and laborers, so that the owner may check up the same."[9] The *Hitt* court found no fraudulent purpose on the part of the contractor and that the contractor had used the same skill and ability for both the fixed-price and cost-plus work. Instead, the court concluded that, at most, the contractor lacked experience and efficiency to perform the work economically, and, although the owner was disappointed in the cost, that was a risk the owner assumed in having the contractor do the work on a cost-plus basis.[10]

Significant Cost-Plus Contract Terms

No technical language is required to create a cost-plus contract. The agreement stipulates that the contractor will be paid its costs for performing the work plus a fee.[11] The devil, of course, is in the details. If the parties fail to sufficiently articulate the details of their agreement in the cost-plus contract, disputes are likely. For example, the parties may be months into a project when they discover that they disagree on the "cost" and the "plus" the owner agreed to pay. Four standard forms of cost-plus contracts are the American Institute of Architects (AIA) Document A111, the Engineers Joint Contract Documents Committee (EJCDC) Document C-525 (formerly 1910-8-A-2), the Associated General Contractors of America (AGC) Document 230, and the Design-Build Institute of America Document 530. The benefit of these or similar form agreements is that they address types of costs that may be incurred, whether costs are chargeable to the owner, the contractor's fee and the contractor's duties regarding the costs.[12]

Guaranteed Maximum Price

One of the most important terms, from the owner's perspective, a cost-plus contract can include is a guaranteed maximum price (GMP). A GMP limits or caps the amount the owner will pay for the work—it is a "not to exceed" cost of the work provision.[13] A GMP means that the owner is not at risk of contracting for the proverbial "money pit." With a GMP, the contractor accepts the risk that if the project results in unanticipated costs, the owner will not pay more than the GMP.[14] Thus, a GMP converts the cost-plus contract into a fixed-price contract if the contractor's costs exceed the GMP. Of course, a GMP is subject to modification if changes are made to the scope of work, and the contract should provide a procedure for such a modification.

So there is no confusion, the contract must make clear that the GMP is the total of the cost of the work plus the contractor's fee.[15] Also, the GMP must be clearly stated. Providing an estimate of the ultimate cost of the work or a schedule of values may not establish a GMP.[16]

By including a GMP, the owner creates an incentive for the contractor to minimize the total costs. The incentive is created by including a shared savings provision, pursuant to which the owner and the contractor divide the savings if the cost of the work and contractor's fee total less than the GMP.[17]

What Are the "Costs" in a Cost-Plus Contract?

An owner and a contractor using a cost-plus contract may dispute the costs charged to the owner. When construction costs exceed the owner's expectations, the owner may suspect that the contractor is inflating the cost to increase its profit or charging the owner for labor and materials furnished to other projects.

So that the owner can verify the contractor's costs, the contractor must keep accurate, detailed records, whether required by the contract or not.

Generally, the contractor may charge only for the actual direct costs of work performed in furtherance of the project, absent explicit provisions in the contract that provide otherwise.[18] "Costs" means actual costs—not average costs, approximate costs, estimates or costs from a catalogue.[19] The costs that may be charged include materials and supplies furnished to the project, the wages of workers, the salaries of superintendents, and the premiums for accident and indemnity insurance.[20]

So that the owner can verify the contractor's costs, the contractor must keep accurate, detailed records, whether required by the contract or not.[21] "Presentation of invoices and statements of account, accompanied by proof of payment, is the proper method of proving expenses or costs; the presentation of an invoice *in globo* will not meet that requirement."[22]

Even if not required, keeping good records, segregating costs for the particular project and providing detailed, frequent itemized statements and copies of invoices and bills constitute good contracting practices. Good records protect the owner from concerns over vague or duplicative charges by verifying the costs, and records protect the contractor from unfounded claims of overcharging or false billing.

Is Indirect Overhead Included in Costs?

Overhead is the contractor's indirect cost of to the management, supervision, and conduct of its business, which include general and administrative costs not attributable to a specific job, as opposed to the contractor's operating costs.[23] The contractor is not entitled to include as "costs" the contractor's indirect overhead expenses, such as salaries, telephone service and office supplies; for time overseeing the work; or for cost of tools not used in the job.[24] These general or indirect overhead

costs are deemed to have been included in the contractor's fee.[25] If the contractor intends to include indirect overhead costs as a reimbursable cost, then the contractor must expressly provide for that in the contract.[26] The argument that it is customary in the trade to charge the owner for indirect overhead as part of the costs is generally unsuccessful, based on the rule that trade customs are not binding on those who are not in the trade.[27]

Contractor's Duty to Control Costs —Is the Contractor a Fiduciary?

Under a cost-plus contract—particularly if there is no GMP—the owner may have given the contractor a blank check, and the sky is the limit. Not surprisingly, by the end of the project the owner may question the contractor's costs, efficiency, skills and ability, as in *Hitt.* The owner may justifiably believe that the contractor had a duty to the owner to control the costs of the work. The extent of such duty may depend on the parties' contract and the facts of the case.

Even in the absence of a written agreement, a contractor under a cost-plus contract has some duty to reasonably control his costs.[28] In *Hitt*, the contractor's duty to control costs was to use the same skill and ability in performing the cost-plus work as it used in performing fixed-price work, for which a contractor must work efficiently and cost effectively to secure a profit.[29] Provided the contractor satisfies its duty to use the same skill and ability, and that the contractor can prove its costs, the reasonableness of the contractor's costs under a cost-plus contract may not be subject to challenge unless the owner shows the "work was done in such ruthless disregard of the contractor's obligations as to be tantamount to fraud or gross negligence."[30]

The AIA A111 addresses the contractor's duty to control costs by defining the owner-contractor relationship as follows:

> The Contractor accepts the relationship of trust and confidence established by this Agreement and covenants with the Owner to cooperate with the Architect and exercise the Contractor's skill and judgment in furthering the interests of the Owner; to furnish efficient business administration and supervision; to furnish at all times an adequate supply of workers and materials; and to perform the Work in an expeditious and economical manner consistent with the Owner's interests. The Owner agrees to furnish and approve, in a timely manner, information required by the Contractor and to make payments to the Contractor in accordance with the requirements of the Contract Documents.[31]

Absent contractual provisions to createa relationship of trust and confidence, an owner may be unsuccessful in claiming the contractor breached a fiduciary duty to control costs.

This definition has been interpreted to give rise to a fiduciary duty on the part of the contractor to the owner.[32] In *Jones v. J.H. Hiser Const. Co. Inc.*[33] (a Maryland case), the contractor agreed to build a house for the owners under a cost-plus contract. There, the contract provided that the contractor accepted a "relationship of trust and confidence" with the owners and agreed to further owners' interests by performing work in an economical manner and keep full and detailed accounts.[34] These terms of the contract imposed a fiduciary duty on the contractor, and the owners were entitled to rely on his expertise, good faith and fair dealing to protect their pocketbook.[35]

Absent contractual provisions to create a relationship of trust and confidence, an owner may be unsuccessful in claiming the contractor breached a fiduciary duty to control costs. In *Munn v. Thornton*[36] (an Alaska case), the court rejected the owners' argument that a cost-plus contract alone, without a contract provision such as the one in *Jones*, creates a fiduciary duty on the part of the contractor to the owners, and declined to create such a relationship.[37]

What Is the "Plus" in Cost-Plus?

Under a cost-plus contract, the contractor's compensation is the "plus" added to the costs, which is either a percentage of the costs or a fixed fee.[38] A fixed fee is intended to eliminate any incentive to increase costs to increase fees. The AIA A111 contract provides blanks to fill in the fee percentage or state a fixed fee.[39] The EJCDC C-525 offers a fixed fee or a fee based on percentages of certain enumerated types of costs, rather than a single percentage on all costs.[40] The EJCDC form also offers a guaranteed maximum contractor's fee provision for fees based on percentage of costs, which caps the amount of fees the owner must pay.[41]

Jessee v. Smith[42] illustrates the importance of clearly stating the "plus" to be added to the costs. In *Jessee*, a carpenter agreed to do finishing work in the owner's store for "cost-plus 25 percent." When the work was completed, the carpenter submitted a bill for the cost of materials, plus 125 percent of that cost for his labor based on his interpretation of their agreement. The owner refused to pay and the carpenter sued for breach of contract. The trial court struck the contractor's evidence, concluding that there was no meeting of the minds on the contractor's markup for labor, and that the added costs were exorbitant and against public policy.

On appeal, the Supreme Court of Virginia held that the trial court erred by striking the contractor's evidence. The jury had to determine if there was a meeting of the minds related to the contractor's labor charge.[43] Also, public policy was not a proper basis on which to strike the contractor's evidence. The parties were free to contract as they chose and courts cannot

relieve a party of its contractual obligations merely because that party subsequently rues the bargain or considers it unwise.[44]

Who Pays to Fix the Defective Work?

The contract should state which party pays for correcting defects. Under a fixed-price contract, the contractor unquestionably bears the cost of correcting defects in its work. With cost-plus contracts, the contractor must also be responsible for bearing the costs of correction.[45] This is not always true, however. The AIA and EJCDC contracts permit the contractor to charge the owner for costs of repairing or correcting defective work caused by the contractor's negligence.[46] The AIA-A111 goes even further by allowing the contractor to charge the owner for corrective work during the warranty period, provided the cost does not exceed the GMP.[47]

Change Orders

Like other contracts, changes in the work impact the work performed under a cost-plus contract, and can be a source of dispute between the owner and contractor. Changes in the work that add to or deduct from the contractor's scope of work will affect the GMP and the contractor's fee. A change order will likely address the change in the cost and contract time associated with the change. To avoid disputes at the end of the project, the parties must also include in the change order terms addressing changes to the GMP and the contractor's fee.[48]

Conclusion

In the proper circumstances, cost-plus contracts can be the best agreement for both the contractor and the owner if they understand the benefits and risks. The dangers of such contracts can be easily avoided if the parties ensure that their agreement reflects their expectations and intentions on key terms. ⚖

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Endnotes:

1 *See* 13 Am. Jur. 2d *Building & Construction Contracts,* § 19; 17A Am. Jur. 2d *Contracts* § 495. In some cases, parties seem to use "cost-plus" and "time and materials" interchangeably. A time-and-materials contract, however, is generally distinguished as not including overhead or a percentage for profit. *See, e.g., Petersen Painting & Home Improvement Inc. v. Znidarsic*, 267, 599 N.E.2d 360, 361 (1991); *Lenslite Co. v. Zocher*, 388 P.2d 421 (1964) ("labor and materials plus 10 percent is distinguishable from cost-plus 10 percent in that former term limits contract to wages and actual costs of material, without overhead expenses"); *Kubela v. Schuessler Lumber Co.*, 492 S.W.2d 92, 95 (Tex.Civ.App.-San Antonio 1973); *Dougherty v. Iredale*, 108 N.E.2d 754, 755 (Ohio App. 1952).

2 *See Hitt v. Smallwood*, 147 Va. 778, 133 S.E. 503 (1926). See also Medina v. Sunstate Realty, Inc., 889 P.2d 171, 173 (N.M. 1995); 2 Steven G.M. Stein, Construction Law, § 11.06[B].

3 *Lytle, Campbell & Co. v. Somers, Fitler & Todd Co.*, 276 Pa. 409, 417-18, 120 A. 409, 417-18 (Pa. 1923).

4 Robert M. Wright, *Cost-plus Contracts: The Construction Contractor—Is He a Fiduciary?*, 7-JAN, Construction Lawyer, 3 (Jan. 1987).

5 *Id.*, 147 Va. 778, 133 S.E. 503.

6 *Id.*, 147 Va. at 786-87, 133 S.E. at 506.

7 *Id.*, 147 Va. at 787, 133 S.E. at 506.

8 *Id.*

9 *Id.*, 147 Va. at 788-89, 133 S.E. at 506.

10 *Id.*, 147 Va. at 789-91, 133 S.E. at 507.

11 *See, e.g.*, AIA A111, Article 5; EJCDC C-525, Article 5. Obviously, the other necessary elements of a binding contract must be stated, *e.g.*, the precise work to be performed. A contractor, believing he had a cost-plus contract to remodel a farmhouse, spent approximately eighteen thousand for labor and materials. When the owners' financing came through, they fired the contractor and hired his employees to do the work instead. The contractor sued the owners for breach of contract, but the court dismissed the claim on demurrer, concluding that the contractor's proposal was "incomplete" because it did not describe the work to be done, so there was no binding contract. *See Lanier, Inc. v. Pagan*, 45 Va. Cir. 258, 259-261 (Spotsylvania County, March 30, 1998).

12 *See* AIA A111, Article 7 ("Costs to Be Reimbursed") and Article 8 ("Costs Not to Be Reimbursed"); EJCDC C-525, ¶ 6.01, which incorporates the provisions for determining the reimbursable and non-reimbursable costs set forth in the Standard General Conditions of the Construction Contract, EJCDC C-700 (formerly 1910-8).

13 *See, e.g.*, AIA A111, § 5.2; EJCDC C-525, Article 8. *See also, D.A. Davis Const. Co., Inc. v. Palmetto Properties Inc.*, 315 S.E.2d 370 (S.C. 1984); *TRW Inc. v. Fox Development Corp.*, 604 N.E.2d 626, 630 (Ind.App. 4 Dist., 1992).

14 *Bohman v. Berg,* 54 Cal.2d 787, 797, 8 Cal.Rptr. 441, 447 (1960) (work involved conversion of Greyhound bus into "land yacht"—both parties knew this was an unusual, experimental venture and there might be some trial and error, so when the contractor accepted a GMP, he accepted the risk that the nature of the project might result in unanticipated costs and, therefore, contractor was not entitled to payment of more than the GMP).

15 *Matos v. Rohrer*, 661 P.2d 443 (Mont., 1983) (contract was ambiguous regarding whether or not the total cost included the contractor's fee, Court held fee was included where owners made clear they could afford no more than total cost).

16 *Jones v. Rose,* 1990 WL 751135 (Loudoun County, April 26, 1990) (holding that draw schedule with estimates did not set a ceiling on the total contract price); *T.W. Morton Builders v. Buendingen*, 450 S.E.2d 87 (S.C. Ct. App. 1994) (contractor's estimate did not establish GMP in cost-plus contract).

17 Glower W. Jones, Alternative Clauses to Standard Construction Contracts (2nd ed.), § 17.5, (suggested provision and commentary regarding AIA A111 § 5.2.1).

18 *See, e.g.*, AIA A111, § 7.1 (defining "Cost of the Work" as costs necessarily incurred in the proper performance of the Work); 13 Am. Jur. 2d *Building & Construction Contracts*, § 19; 17A Am. Jur. 2d Contracts § 495.

19 *Freeman & Co. v. Bolt*, 968 P.2d 247, 254 (Idaho App., 1998) (in the absence of a contractual definition of costs, the court construed the contract against the contractor who prepared it, and interpreted the term to include only those costs directly associated with the performance of the contract, such as materials and supplies actually furnished, and wages, Workman's Compensation, liability insurance, health insurance, FICA, Medicare, State Employment Insurance, and FUTA, which were costs that comprised a percentage of the wage that the employer was required to pay every time his employee was paid a wage); *House*, 51 A.2d at 671-72; *Nolop v. Spettel*, 64 N.W.2d at 863-64; *Arc Electric Co. v. Esslinger-Lefler Inc.*, 591 P.2d 989, 991-92 (Az.Ct.App. 1979) ("costs" means actual costs, not average costs or costs from a catalogue and approximations and averages are insufficient).

20 *See, e.g.*, AIA A111, § 7.1; 13 Am. Jur. 2d *Building & Construction Contracts*, § 19; 17A Am. Jur. 2d *Contracts* § 495; *House v. Fissell*, 51 A.2d 669, 671-72 (Md. 1947).

21 *See Hitt*, 147 Va. at 787-88, 133 S.E. at 506; AIA A111 Article 11 (requiring contractor to keep and maintain cost records), § 12.1.4 (requiring submittal of records to support contractor's costs for progress payments); EJCDC C-525, ¶ 13.01 (requiring contractor to keep and maintain cost records).

22 17A Am. Jur. 2d *Contracts* § 495; *Burdette v. Drushell*, 837 So.2d 54, 59-62 (La.App. 1 Cir., 2002).

23 Black's Law Dictionary (6th ed.); Freeman, 968 P.2d at 251 n. 4; *Conditioned Air Corp. v. Rock Island Motor Transit Co.*, 114 N.W.2d 304, 309-310 (Iowa 1962); *Lytle*, 120 A. at 412-416.

24 13 Am. Jur. 2d *Building & Construction*

Cost-Plus Contracts *continued on page 33*

Procedural Defaults in Virginia Trial Courts:

The Adversarial Model & The Imperative of Neutrality

by The Honorable D. Arthur Kelsey

The Underlying Rationale

Procedural default law is sometimes thought of as little more than a spoiler—an antonym of justice made worse by its occasional arbitrary application. Without expressly acknowledging it, some judges subscribe to this thesis. They may enforce procedural defaults, but only reluctantly, as if to signal their disapproval of this seemingly necessary evil. I do not share this view of the subject. Though not every procedural default rule can be justified as a balanced application of higher principles, I believe most can. These justifying principles cluster around two core features of American law, neither of which we can do without.

The first arises out of the very structure of our courts. Unlike continental courts governed by civil law codes, common law judicial systems use an adversarial model of adjudication. The litigants—not the judges—determine the issues to be decided, the facts to be presented, and the range of remedies to be sought. By necessity, the adversarial model "is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring). In contrast to the "inquisitorial legal system" prevalent in European countries, where the civil law judge conducts the "factual and legal investigation himself," the American adversarial model "relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication." *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2685 (2006) (Roberts, C.J.) (emphasis in original and citation omitted).

Procedural default rules "take on greater importance" in an adversarial model because they assign the sole responsibility for carrying out a litigable task to the person assigned the task: the litigant. *Id.* at 2686. In this sense, procedural default rules represent the carefully calculated price litigants pay for the freedom of participating in self-directed litigation. Those who think the price too high should consider the alternative: a system where the judge acts more like an "inquisitor," *id.*, unilaterally selecting the facts to be heard, the issues to be addressed, and the law to be considered. True, an inquisitorial judge would hardly countenance a procedural default. Doing so, after all, would be an admission of his mismanagement of the litigation. But a common law judge should have no such disinclination, since he merely decides the case solely "on the basis of facts and arguments pro and con adduced by the parties." *Id.* (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991)). To many, myself included, the neutrality of the judge in our litigant-centric model of justice is well worth the price we pay for it.

The second justifying principle also involves the concept of neutrality—not of the judge as the decisionmaker, but of the law as the rule of decision. No competitive contest takes place without time limits, boundaries, and agreed-upon methods of recording the score. The existence of these rules is a truism we accept as inherent to any contest. Truly neutral procedural rules allow courts to set limits and mark off boundaries without regard to which side stands to gain or lose. At whatever time the official clock stops, it does so at the appointed moment no matter which side has the higher score. And at whatever place the out-of-bounds lines have been marked, they remain fixed no matter who steps over them.

This is as it should be, for procedural rules lose their legitimacy the moment they lose their neutrality. Selectively suspending procedural rules in the hope of achieving some abstract notion of as-applied fairness in every case would devolve, if consistently done, into an *ad hoc* exercise of subjective justice: one which would not only armor-up any outcome-determinative biases of jurists, but also deploy these predispositions into open conflict with neutral principles of law.

On the other hand, when courts apply procedural rules neutrally to every litigant, to every lawyer, to every case—without partiality—everyone else knows exactly what is expected of them. To be sure, there is little point in having procedural rules "if they amount to nothing more than a juristic bluff—obeyed faithfully by conscientious litigants, but ignored at will by those willing to run the risk of unpredictable enforcement."[1] The more unbending the rules, therefore, the less likely anyone will ever be tempted to bend them.

That said, the courtroom contest presumes advocates know well the rules of engagement. This presumption includes not only the many written rules, but also the interlinear caveats and qualifications that bedevil even the best among us. I offer no opinion on whether any given rule faithfully represents the shared ideals of our adversarial model or best serves the imperative of neutrality. I leave that judgment to others. Instead, I hope merely to restate some (but not all) of the rules that often result in procedural default in one form or another—so that, if for no other reason, the presumption of knowledge not be in vain.

Waiver Before Trial[2]

Affirmative Pleadings

Virginia law treats the affirmative pleading as the "*sine qua non* of every judgment or decree,"[3] making a litigant's pleading "as essential as his proof."[4] A "court may not award particular relief unless it is substantially in accord with the case asserted" in the pleadings.[5] "Thus, care must be taken that the pleading sets forth all of the material facts."[6] Both in principle and in practice, Virginia courts take seriously the maxim that "every litigant is entitled to be told by his adversary in plain and explicit language what is his ground of complaint or defense."[7]

Raise-or-waive examples include claims for punitive damages,[8] spousal support,[9] implied and express warranties,[10] fraud,[11] express contract,[12] quasi-contract,[13] as well as claims inadequately addressing specific types of easements,[14] whether a trespass occurred on surface waters rather than submerged land,[15] property boundaries,[16] unlawful exclusion from access to corporate records,[17] and mistaken interpretation by county officials of a zoning ordinance.[18]

If a litigant discovers his mistake early in the litigation, the liberality of rules authorizing amendments may save him. But if he forgets altogether or simply waits too late in the process, he may find the claim forever forfeited. A jury verdict in an amount higher than the *ad damnum* request, for example, must be vacated to the extent of the excess because the *ad damnum* cannot be remedied by a post-verdict amendment.[19]

Even the amendment process, however, involves the risk of procedural default. If a plaintiff loses a demurrer and chooses to file an amended pleading in conformity with the trial court's ruling, he does not forfeit any later appeal of the adverse demurrer ruling if the order reflects his objection to it. "On any appeal of such a case the demurree may insist upon his original pleading, and if the same be held to be good, he shall not be prejudiced by having made the amendment."[20] The Virginia Supreme Court, however, has held that "when a circuit court sustains a demurrer to an amended motion for judgment which does not incorporate or refer to any of the allegations that were set forth in a prior motion for judgment, we will consider only the allegations contained in the amended pleading to which the demurrer was sustained."[21]

Another variant of procedural default, *res judicata*, should also be considered. In 2003, a divided Virginia Supreme Court held the narrow "same evidence test" exclusively governed claim preclusion principles under Virginia law.[22] That holding has been superseded by the recent promulgation of Rule 1:6, which broadened *res judicata* to cover, with some

exceptions, all unpled claims arising out of the same "conduct, transaction, or occurrence."[23] Such unpled claims will be "extinguished regardless of whether the claimant is prepared in the second action to present evidence or theories of the case not presented in the first action, or to seek remedies or forms of relief that were available but not demanded in the first action."[24]

Defensive Pleadings

Not filing any defensive pleadings triggers one of the most notorious of all procedural defaults: a default judgment. A party in default, if not relieved from it, will be deemed to have admitted liability, conceded the facts in the complaint, waived all objections to the admissibility of evidence, and waived any right to a jury trial.[25] The default, moreover, can be partial. If the defendant files a demurrer as to some counts in a complaint, but not others, the others will be in default absent a timely responsive pleading directly addressing them. "Rule 3:8 provides no shelter from the obligation to draft and file a timely answer with respect to the counts that are not demurrable."[26]

Procedural default principles likewise extend to matters of personal jurisdiction, service of process and venue. A general appearance waives "defects in the process and the service thereof"[27] unless an "objection to jurisdiction is made prior to or simultaneously with" a responsive pleading addressing the merits.[28] Venue too "is a privilege which may be waived" and, if it is not claimed, "will be lost."[29] Similar forfeitures result from the failure to plead affirmative defenses like contributory negligence[30] and the statute of limitations.[31] A request for a jury trial may also be forfeited if not timely made. As applied to any party, "the failure to serve and file a demand as required by Rule 3:21 constitutes a waiver of the right to jury trial."[32]

Discovery Defaults

A claim or defense can be forfeited during the discovery process almost as easily as in the pleadings stage. Violation of an order compelling discovery can lead to a dismissal or default.[33] Short of that, discovery violations may cause the trial court to deem facts "as established" or to prohibit a party "from introducing designated matters in evidence."[34]

A claim or defense can be forfeited during the discovery process almost as easily as in the pleadings stage.

Seeking to provide uniformity and predictability, Rule 1:18 authorizes the use of pretrial scheduling orders. They appear to be "gaining favor among the bar and the trial courts" of Virginia.[35] "To be effective," however, "pretrial deadlines in Rule 1:18 scheduling orders must be enforced by Virginia trial courts."[36] "To be sure, a policy of not enforcing such orders would undermine the reliability of the judicial process and jeopardize the legitimacy of a host of other procedural rules which, like a mere scheduling order, provide a quieting predictability to litigants and courts alike."[37]

Before the advent of Rule 1:18's pretrial scheduling order, the most common defaults involved the untimely disclosure of expert witnesses. Even when the order is used, this problem persists. Some litigants mistakenly treat the scheduling order's expert witness cutoff date as a failsafe, providing protection against a charge of untimeliness irrespective of the earlier due date of an interrogatory seeking expert disclosures or the receipt of an opinion from a retained expert. Instead, "the deadlines in the Pretrial Order serve as ultimate limits. Depending on the circumstances, the duty to supplement required by Rule 4:1(e) may nonetheless require an earlier disclosure."[38]

Similarly, some who violate the expert discovery deadlines appear to think the exclusion of an inadequately or untimely disclosed expert opinion should still be the exception, not the norm. Rule 1:18's pretrial scheduling order, however, warns that experts "will not *ordinarily* be permitted to express any non-disclosed opinions at trial . . . . To determine if [your case] is an ordinary case (where the non-disclosed opinion should be excluded) or the extraordinary case (where it should not), at least five factors should be taken into account:

- the 'surprise' to the other party;
- the ability of the offending party to 'cure that surprise';
- the possibility that the 'testimony would disrupt the trial';
- the party's 'explanation' for not providing a timely disclosure; and
- the alleged 'importance' of the testimony."[39]

Motions That Must Be Raised Before Trial

In civil cases, Rule 3:8(a) covers the timing of preliminary defense motions. Rule 3:20 addresses motions for summary judgment. Two lesser-known deadlines, however, appear in Rule 1:18's pretrial scheduling order. This order provides that any motion in limine "which requires argument *exceeding five minutes*" must be noticed for a hearing and presented to the trial court for decision before the day of trial.[40] The order also requires that all "dispositive motions shall be presented to the court for hearing as far in advance of the trial date as practical."[41]

In criminal trials, challenges asserting defects in the written charge or prosecution "shall be filed before a plea is entered and, in a circuit court, at least 7 days" before trial.[42] "The motion shall include all such defenses and objections then available to the accused. Failure to present any such defense or objection as herein provided shall constitute a waiver thereof."[43]

Similarly, motions to suppress alleging constitutional violations are to be filed no later than seven days before trial.[44] "Absent a showing of good cause and the interests of justice, trial courts should not relieve defendants of this statutory mandate because doing so compromises the Commonwealth's right to an interlocutory appeal of an adverse ruling."[45]

Waiver At Trial

Contemporaneous Objections

The contemporaneous objection rule has casualty rates among the highest of all procedural default rules. It requires a litigant to object to any perceived error in the trial court to preserve appellate review of that error. "Not just any objection will do. It must be both *specific* and *timely*—so that the trial judge would know the particular point being made in time to do something about it."[46]

Sometimes, an objection alone is not enough. It often must be followed with a request for some kind of remedial response by the court. When opposing counsel makes objectionable comments during closing argument, for example, "the objecting party must expressly seek the action that it desires the judge to take."[47] If the objecting party disagrees with the court's ruling, the objecting party must also, in order to preserve the point for appeal, move for a cautionary instruction or for a mistrial.[48]

Expert testimony involves some anfractuous applications of the contemporaneous objection rule. Objections to an expert's qualifications go to the "admissibility of the expert's opinion."[49] "The law recognizes no 'degrees' of qualifications" for expert witnesses.[50] The failure to object to an expert's qualifications waives the issue on appeal.[51] In addition, all objections to an expert's testimony because it "is not stated to a reasonable degree of medical probability, lacks an adequate factual foundation, or fails to consider all the relevant variables" go to the *admissibility* of the evidence—requiring the objection to be made "when the evidence is presented. The objection comes too late if the objecting party remains silent during its presentation and brings the matter to the court's attention by a motion to strike made after the opposing party has rested."[52]

Sometimes, though not "true in most instances," the objectionable quality of an expert's testimony "may not be apparent until the testimony of that witness is completed. Hence, an objection raised at that first opportunity is timely."[53] This unusual situation, however, should not lure a litigant into thinking a missed opportunity to object during the testimony can be cured later by moving to strike the testimony. A litigant may not, in a motion to strike evidence, "raise for the first time a question of admissibility of evidence. Such motions deal with the sufficiency rather than the admissibility of evidence."[54] Even so, a motion to strike an expert's testimony (after it has been delivered without objection from the witness stand) might be adequate if the moving party previously alerted the trial judge to the anticipated objection.[55]

Finally, the contemporaneous objection rule can almost never be satisfied merely by indorsing a court order "seen and objected to."[56] Only if "the ruling made by the trial court was narrow enough to make obvious the basis of appellant's objection" will the otherwise inadequate indorsement suffice to preserve the issue on appeal.[57]

> Innumerable cases reaffirm that Virginia "appellate courts will not entertain matters raised for the first time on appeal."

New or Different Arguments on Appeal

Innumerable cases reaffirm that Virginia "appellate courts will not entertain matters raised for the first time on appeal."[58] A criminal defendant, for example, cannot argue a hypothesis of innocence not presented to the factfinder in the trial court.[59] This prohibition applies to all types of arguments and imposes a high degree of specificity. "A general argument or an abstract reference to the law is not sufficient to preserve an issue."[60] And, even if specific, the argument at trial must be the same as that asserted on appeal. Thus, "though taking the same general position as in the trial court, an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court."[61]

Virginia appellate courts recognize an exception in cases where "good cause" or "ends of justice" excuse the waiver.[62] The exception, however, is "narrow" and "used sparingly."[63] In criminal cases, for example, the exception can be invoked only if the defendant can "affirmatively show that a miscarriage of justice has occurred, not that a miscarriage *might* have occurred."[64] Thus, the ends-of-justice argument for avoiding waiver of a sufficiency challenge cannot be simply the assertion of a valid sufficiency challenge. Such a "tautological construct" would require the appellate court, as a precondition to finding waiver, to "rule the sufficiency challenge invalid on the merits—which would make the presence or absence of a Rule 5A:18 waiver entirely superfluous, since waiving a losing argument is no better or worse than losing it outright."[65] In this respect, Virginia appellate courts "do not simply review the sufficiency of the evidence under the usual standard, but instead determine whether the record contains affirmative evidence of innocence or lack of a criminal offense."[66] This showing cannot be made except in "extraordinary" situations.[67]

Even a change in law is insufficient to overcome the contemporaneous objection requirement. "The perceived futility of an objection does not excuse a defendant's procedural default at trial."[68] Moreover,

"the fact that the law in effect at the time of a trial sets out a particular method for proceeding does not prevent a defendant from arguing that method should be different and does not excuse him from registering an objection in order to comply with Rule 5A:18."[69]

Beware, too, of double waiver. An appellant must argue for the application of the good-cause and ends-of-justice exception. Appellate courts do not invoke the exception *sua sponte* on behalf of the defaulting party.[70] Doing so "would compromise the Court's role and place it in the position of becoming a *de facto* advocate."[71]

Proffering Rejected Evidence

Appellate courts will not consider error assigned to the rejection of testimony unless the proffered testimony has been "made a part of the record."[72] An appellate court has "no basis for adjudication unless the record reflects a proper proffer."[73] A proper proffer may consist of "a unilateral avowal of counsel, if unchallenged, or a mutual stipulation of the testimony expected."[74] It may also take the form of questions and answers from a witness, conducted out of the presence of the jury. The proffer must identify the specific testimony or other evidence precluded by the sustained objection. Offering only counsel's theory of his case usually will be deemed an insufficient proffer.[75]

Failure to Obtain a Ruling

A litigant must specifically request a trial court to rule on any pending, but unaddressed, matters because failing to do so may forfeit an appellate challenge to the trial court's indecision.[76] This result stems from the proposition that the complaining party has been "denied nothing by the trial court" since "there is no ruling" against him.[77] Despite the natural reluctance not to do so, therefore, a litigant simply must "insist that the court rule" in order to preserve the issue for appeal.[78]

"Same Character" Evidence Waiver

A litigant may waive an objection to evidence at trial, and *a fortiori* on appeal, when he unsuccessfully objects to evidence offered by his opponent and then

In jury trials, a litigant must assert a motion to strike at the close of all the evidence or, failing that, a motion to set aside after the verdict.

offers evidence of the same character.[79] As the Virginia Supreme Court recently explained, the rule applies when the same-character evidence appears in the objecting party's "own case-in-chief,"[80] but does not apply to matters elicited in the "cross-examination of a witness or the introduction of rebuttal evidence."[81] Nor does the rule apply when the objecting party offers evidence on a "different subject."[82]

The rule relies on no particular sequence. "Although the rule is most often applied in cases when the party making the objection later introduces the same evidence, 'it is properly and logically applicable in any case, regardless of the order of introduction, if the party who has brought out the evidence in question, or who has permitted it to be brought out, can be fairly held responsible for its presence in the case.'"[83] This particular procedural default can be understood as either an application of the "harmless" error doctrine or as a simple "waiver of the objection."[84] "Whether it be placed upon one ground or the other," the Virginia Supreme Court has explained, "the result is the same."[85]

Challenging the Sufficiency of the Evidence

Lower court factfinding, whether by a trial judge or jury, receives on review "the highest degree of appellate deference."[86] This deferential standard "comes from Code § 8.01-680—the basis for our appellate review of factfinding in civil and criminal cases as well as bench and jury trials."[87] The standard examines only the threshold rationality of the factfinder's decision.

"When a jury decides the case," the Virginia Court of Appeals has explained, "Code § 8.01-680 requires that we review the jury's decision to see if reasonable jurors could have made the choices that the jury did make. We let the decision stand unless we conclude no rational juror could have reached that decision."[88] "The same standard applies when a trial judge sits as the factfinder because the 'judgment of a trial court sitting without a jury is entitled to the same weight as a jury verdict.'"[89] In perfect symmetry, the same threshold rationality standard also applies to a trial court's review of a motion to strike evidence as insufficient[90] and a motion to set aside a jury verdict as factually insupportable.[91]

As hard as it is to win a sufficiency challenge, it becomes nearly impossible if the litigant fails to preserve the issue for appeal by making the appropriate motion at trial. In jury trials, a litigant must assert a motion to strike at the close of all the evidence or, failing that, a motion to set aside after the verdict. Unlike federal practice, however, Virginia law does not require a motion to strike at the close of the opponent's case in chief as a precondition for later sufficiency challenges in civil[92] or criminal[93] cases.

On the other hand, if a litigant unsuccessfully moves to strike at the close of his opponent's case-in-chief and then introduces evidence on his own behalf, he must renew his motion to strike separately at the conclusion of all evidence.[94] In bench trials, the waiver rule relaxes somewhat to permit a defendant to assert a sufficiency challenge in closing argument in addition to arguing the merits of the case. "To be effective, however, the sufficiency challenge must be clear enough for a trial judge to discern its presence and be able to distinguish it from the argument on the merits. Not every closing argument accomplishes this objec-

tive."[95] In a criminal case, for example, a "mere contest over the 'weight of the evidence' favoring or disfavoring a conviction does not suffice. If arguments of this sort were adequate, the rule would be rendered meaningless, for every closing argument in a criminal case (short of a concession of guilt) does as much."[96]

In sum, a defendant in a bench trial can preserve a sufficiency challenge for appeal by making "a motion to strike at the conclusion of all the evidence," by presenting "an appropriate argument in summation," or by making "a motion to set aside the verdict."[97] In jury trials, only a motion to strike or a motion to set aside will suffice. And in bench and jury trials, the presentation of evidence after an unsuccessful motion to strike waives that motion and requires the sufficiency issue to be renewed by other means.

**Invited Error—
Approbate & Reprobate**

A litigant who fails to raise the right argument at trial waives it on appeal. All the more, successfully raising the wrong argument at trial precludes the litigant from later complaining about it. "The principle is long standing in Virginia that an appellate court will not 'notice error which has been invited by the party seeking to take advantage thereof on appeal.'"[98] The invited error doctrine originated with the Scottish maxim that a man shall not be allowed to approbate and reprobate. He cannot "invite error" and then later attempt to "take advantage of the situation created by his own wrong."[99]

Sometimes this occurs when a litigant argues an incorrect legal theory at trial and then challenges on appeal the trial court's acquiescence to the error.[100] Other examples include complaining about prejudicial answers to one's own "strategic" *voir dire* questions[101] or overly "energetic"[102] or "unreasonable"[103] cross-examination. Invited error has also been found when a litigant invites the trial court to improperly take factual issues from the jury,[104] when a criminal defendant voluntarily chooses to appear at trial in jail clothing,[105] and when a criminal defendant "himself injected into the trial reference to [his] other offenses" and then later complains evidence of these offenses should not have been admitted against him.[106]

A litigant failing to raise the right argument at trial waives it on appeal.

Invited Error—Jury Instructions

An agreed jury instruction, even if it imposes an "inappropriate" legal standard,[107] becomes the law of the case and thus "binding" on the parties as well as the courts.[108] "Right or wrong," an agreed instruction cannot be challenged on appeal.[109] This doctrine applies to both "civil and criminal" cases.[110] "Under a corollary principle, a litigant waives any evidentiary sufficiency challenge to a particular issue by not objecting to submitting that issue to the jury and by expressly agreeing to an instruction directing the jury to decide the issue."[111] To avoid this form of waiver, a litigant should ensure "the record is clear" that his acquiescence to the jury instruction does not waive his objection to any prior ruling.[112] A post-verdict motion to set aside, by itself, "does not relieve a litigant from this form of procedural default."[113]

The inverse proposition is likewise true. A litigant must object to the trial court's failure to give an instruction.[114] A trial court "ordinarily does not have an affirmative duty to give a jury instruction" not requested by either party.[115] An exception is sometimes made when "the principle of law is materially vital to a defendant in a criminal case."[116] But that exception applies only in "extraordinary" circumstances and does not apply merely because the jury instructions may "improperly" state the elements of an offense.[117]

Conclusion

The only alternative to a judicial system that permits procedural defaults, as bad as that may be, is one that does not, which is worse by far. For there to be no procedural defaults in the trial court, litigants would have to concede control over their cases to inquisitorial trial judges and depend upon them to raise the winning arguments which only the judges (so far as the decision is theirs) know in advance to be winners. Understandably so, those on the losing side of this form of *sua sponte* intervention would be tempted to question the impartiality of the judges and their commitment to neutral principles of law. The adversarial model wisely preserves the neutrality of the judges and the law by placing the responsibility to litigate solely on the litigants.

That said, I have no doubt that some procedural default principles may need to be recalibrated, either more tightly or loosely, to better balance the equities of particular forms of waiver. But whether that is true or not, this much is certain: No procedural default principle has ever produced even the slightest injustice to litigants who know the principles well enough to stay out of trouble. The benign goal of procedural default law, therefore, is to render itself harmless by being so well known. ⚖

The endnotes for this article begin on page 57.

Judge D. Arthur Kelsey serves on the Virginia Court of Appeals. He previously served as a judge in the Fifth Judicial Circuit of Virginia and as a litigation partner with Hunton & Williams LLP. (Author's note: The views advanced in this essay represent commentary "concerning the law, the legal system, [and] the administration of justice" as authorized by Virginia Canon of Judicial Conduct 4(B). These remarks, therefore, should not be mistaken for any official view of the Court of Appeals or my opinion as an appellate judge in the context of any specific case.)

New Projects Aim to Increase Diversity, Provide Pro Bono Assistance

by Maya M. Eckstein, 2006–2007 Young Lawyers Conference President

The Young Lawyers Conference has a wonderful and extensive history of doing "good works" for the community. The YLC will continue or expand the following projects:

- The YLC has championed the rights of domestic violence victims, offering safety and legal information and training lawyers how to provide pro bono help to victims. The YLC has distributed more than two hundred thousand safety and legal brochures and has provided free continuing legal education programs to pro bono attorneys. This year, the YLC will distribute one hundred thousand safety and legal brochures and will conduct additional free CLEs.

- The YLC has provided free legal services to true American heroes—first responders—through its Wills for Heroes program. We provided wills, advance medical directives and powers of attorney to four hundred police officers, sheriffs and firefighters across the commonwealth. This year, the YLC will provide these pro bono services to first responders in Charlottesville, Richmond and elsewhere in Virginia.

- The YLC has helped advance the status of women and minorities by celebrating their elevation to the bench through its annual Celebration of Women and Minorities Bench/Bar Dinner. The YLC encouraged college students to consider law school and the legal profession by sponsoring the Minority Pre-Law Conference, and it held the Oliver Hill/Samuel Tucker Law Institute, a free, one-week overnight camp for at-risk high school students. We will expand the Minority Pre-Law Conference by offering it in both Northern Virginia and Southwest Virginia.

- The YLC partnered with the State Board of Elections to distribute "Know Your Rights and Responsibilities" pamphlets. We will continue doing so before the November elections.

The YLC will implement the Choose Law program of the American Bar Association Young Lawyers Division.

This year, the YLC will distribute a *Juvenile Rights Handbook*, developed in a partnership with the JustChildren program of the Legal Aid Justice Center. The handbook will provide those under the age of 18, as well as their parents, information regarding their rights and responsibilities in schools, with the police and in the courts.

Last year, for the first time, the YLC offered a free CLE in conjunction with the National Center for Refugee & Immigrant Children for the provision of pro bono representation in asylum cases. This year, we are working with Virginia's Juvenile and Domestic Relations judges to advance implementation of federal laws that allow them to grant special immigrant status to children.

The YLC will implement the Choose Law program of the American Bar Association Young Lawyers Division. The program seeks to educate high school and junior high school students about lawyers and the legal profession and to encourage students of color to consider a legal career. We hope to increase diversity in the legal profession by assisting and encouraging young individuals of color to become attorneys.

We are excited about the year ahead and hope that you are, too. ⚖

Senior Lawyers Conference—To Promote the Public Good

by Jack W. Burtch Jr., 2006–2007 Senior Lawyers Conference President

The Senior Lawyers Conference has a full agenda for the coming year. The outstanding leadership of Bill Wilson and the prior board and volunteers made our continuing programs grow. We started new programs, which have proved to be very popular. This year we plan to keep the momentum and energy flowing.

Working with the Conference of Local Bar Associations and the League of Older Americans, our conference will promote Senior Law Day presentations for senior citizens. Last year, conferences were offered in Roanoke, Harrisonburg, and Fairfax, Rockbridge and Loudoun counties. Through these programs we distributed the *Senior Citizens Handbook*. (To help your local bar association sponsor a Senior Law Day, we have an information package. To get one, contact Patricia A. Sliger at **sliger@vsb.org**.)

We received a generous grant from the Virginia Law Foundation to reprint the *Senior Citizens Handbook*. Our challenge this year is to revise the handbook. Working with the Young Lawyers Conference and volunteer researchers and editors, we strive to keep this resource current and vital.

Our program at the Virginia State Bar 2006 Annual Meeting, "So You're Going to a Nursing Home/Assisted Living Facility," was well-attended and sparked lively discussion. The speakers came from regulatory, legislative and industry backgrounds.

Former SLC Chair Frank O. Brown Jr. received the VSB General Practice Section's 2006 Tradition of Excellence Award. Frank was a founder of the Senior Lawyers Conference, is editor of our newsletter and, unofficially, makes sure our leadership keeps on track. Frank has traveled the state, teaching lawyers what to do to protect clients when lawyers die or become disabled. He is a constant source of encouragement and inspiration for this conference.

Of special interest to senior lawyers is the Emeritus Rule, which allows otherwise retired senior lawyers to practice in certain pro bono matters.

Of special interest to senior lawyers is the Emeritus Rule, which allows otherwise retired senior lawyers to practice in certain pro bono matters. Proposed changes to that rule and the rules concerning legal aid societies have been published for public comment.

One of our jobs as senior lawyers is "to apply the knowledge and experience of the profession to the promotion of the public good . . ." Please let us know how we can do this job even better. You may contact me directly at (804) 649-1543 or at **JB@MacBur.com**. ⚖

RISK MANAGEMENT CORNER

Engagement Agreements, Non-Engagement Letters and Termination Letters

by John J. Brandt

There are frequent misunderstandings about attorney-client engagement agreements, as well as nonengagement letters and termination letters.

Engagement Letters

When an attorney agrees to represent a client, he or she enters into a contract—frequently misnamed a "retainer agreement."[1] With rare exceptions, the contract between attorney and client is an "attorney-client engagement agreement." Agreements should be reduced to writing so there will be no misunderstandings after the representation.

Although there is no standard form, the engagement agreement should include the following:

- **A description of the work covered by the fee**—"The firm agrees to represent you in all matters relating to your claim against John Smith for bodily injuries sustained in an automobile accident in Arlington, Virginia, on January 1, 2005." By specifying the matter, the attorney will not be responsible for other matters the client may subsequently claim were also included.

- **The amount of the fee**—This describes the amount of compensation to the attorney, including a payment schedule and whether the fee is fixed or contingent.[2] It is recommended that the fee schedule include the lawyer's hourly fee—even in case of a contingency fee—because if the client later discharges the attorney, his fee must be determined via *quantum merit*.) The same logic encourages all lawyers to keep accurate time records (in tenths of hours).

- **Out-of-pocket costs**—"The fee quoted does not include any out-of-pocket costs incurred by the law firm in pursuit of the client's claim and which shall be in addition to other fees."

- **Agreement to cooperate and be truthful**—The attorney is entitled to the individual loyalty, truthfulness and cooperation of the client, and any failure in this regard is the basis for disengagement.

- **Right to terminate services**—Either party may terminate the contract. The attorney is bound by Disciplinary Rule 1.16 as it relates to ethical obligations; i.e., he may not withdraw from a matter in court without the leave of court. Also, he must return the client's file, whether or not any outstanding fees are paid. Also important is how fees already paid should be treated. If the engagement agreement recites the payment of advanced legal fees, they must be returned unless earned. Of course, advanced legal fees must be deposited in the attorney's trust account until earned.

- **No guarantees**—The client should be informed in writing that the firm does not guarantee any particular outcome of the representation.

- **Signature**—The agreement should be signed and dated by the firm or attorney and the client.

Nonengagement Letters

Where an attorney decides not to represent a potential client, it is a good practice to state so in writing. Failure to do so could lead to misunderstanding, or a claim by the potential client that there was an oral agreement to represent. Attorneys should write, "It was nice to meet you on [date] to discuss our possible representation of you in your property-line dispute with your neighbor. However, as I informed you at the end of our meeting, I will not be representing you in this regard. I wish you well with your case and recommend you contact another attorney promptly or contact the county/city lawyer referral service. I have returned to you all of the documents you showed me and I have not kept a copy of any of your papers. If I can be of assistance to you in another matter, feel free to call me."

Termination Letters

Termination letters make it clear to the client that the attorney's services are completed and there is no continuing duty to assist the client. Such a letter not only gives the lawyer an opportunity to summarize his successful efforts (hopefully), it also starts the statute of limitations running for any alleged errors.

Exit interviews with jurors in legal malpractice cases reflect that if a case demonstrates an "oral disagreement" between a client and an attorney, the lawyer loses. if a lawyer has documented his side of a dispute, he/she typically prevails.

Endnotes:

1 A true "retainer agreement" is an agreement by a client to pay an attorney's fee now to guarantee the attorney's availability in the future. "[R]etainers are earned when paid" and are immediately placed in the attorney's operating account, not trust account. *Virginia LEO* #1606 Fees.

2 The Virginia State Bar Professional Guidelines prohibit contingent fees in a domestic relations case (except in rare circumstances), and in defending an accused in a criminal case. DR 1.5(d)(1)(2).

Know Thy Enemy

by George W. Shanks, 2005–2006 Conference of Local Bar Associations Chair

From Sun Tzu to the modern corporate world, the admonition to those who would do battle has been to consider the opposition "the enemy." I would like to suggest that the application of the military model to the practice of law has been as cancer to collegiality within the bar. It is said that those we would destroy we first must demonize. No wonder that interpersonal relations between practicing attorneys tend to be strained at best. At worst, they become matters of common currency in the public arena, perpetuating the image of lawyers as attack dogs.

I confess I do not laugh aloud at lawyer jokes (not that some of them aren't humorous in a dark sort of way), nor do I forward lawyer jokes e-mailed to me. In this day of political correctness, I view any attack on a group as mean-spirited and an indication of poor upbringing, poor education or both. Perish the thought that we engage in repartee which is the verbal equivalent of eating our own. Walt Kelly could have been speaking to our noble profession when he had Pogo say, "We have met the enemy and he is us."

What does this have to do with the Conference of Local Bar Associations? Quite possibly, everything. As the one conference within the organized bar that reaches every geographical corner of the commonwealth, every area of practice and every size firm, we have it within our grasp to heal our image and ourselves.

In truth, the healing has already begun. The publication *Legally Informed*, begun under the aegis of Bernard J. DiMuro when he served as president-elect of the Virginia State Bar in 2001, lists the civic works of local bars across the state, detailing thousands of hours annually of donated time, effort, knowledge and leadership. This level of giving is remarkable for both its generosity of time and spirit and its stunning contradiction of the popular image of lawyers as self-serving, money-hungry pariahs. And those who toil together for a common good create a reservoir of goodwill toward each other that outlasts the project's moment. Two ideas come to mind: First, if your bar's project, large or small, sustained or one-time, is not listed, it should be. In this context, the chestnut "no good deed goes unpunished" applies only if you fail to bring it to the public's attention. Second, make it an annual project of your bar to see to the distribution of *Legally Informed* throughout your local community to newspapers, libraries, schools, civic organizations, senior centers, chambers of commerce and churches. For copies, contact the Virginia State Bar at (804) 775-0521; e-mail clba@vsb.org; or download a copy from the VSB Web site: www.vsb.org/site/publications/.

The conference is doing much more to promote understanding within the profession. Over the past two years, the CLBA has worked closely with the Chief Justice's Commission on Solo and Small-Firm Practice. The result of that cooperative effort has been the highly successful joinder of the Conference's Bar Leaders Institute with the Supreme Court's Solo and Small-Firm Forum and Town Hall Meeting. This summer the CLBA was honored to accept the invitation of Chief Justice Leroy R. Hassell Sr. to become the permanent home of this bar program. These presentations focus on matters of special concern to solos, including law office management, lawyer impairment and ethics. They provide attorneys across the state with the opportunity to ask the Chief Justice about matters of professional concern.

This openness within the profession is unique to Virginia, and it could not have come at a more critical time. As we ply our skill on a daily basis, our society is a study in cataclysmic forces of change: preservation of civil liberties versus overt efforts to destroy our democracy; a transition from a majority population of Anglo-European descent to a heterogeneous, pluralistic society of unassimilated cultures; an economy subject to sharp dislocations because of global forces far beyond the control of individuals, states or nations. We need to see each other as allies in times of historic challenge, not as adversaries on a small stage. Indeed, in discussing the pressures which confront all of us, we as a profession develop an appreciation that we are more alike than we are different. That we are not enemies. We are colleagues.

This year the Conference of Local Bar Associations will travel to localities for information, inspiration and fellowship. I want you and your local bar to be part of the experience. ⚖

THE ALPS CONNECTION

Where's the Beef?

by Mark Bassingthwaighte, mbass@alpsnet.com

A number of years ago this line was made famous in a Wendy's commercial that still makes me chuckle. An elderly woman and cohorts went into a burger joint. She bought a burger, removed the top bun, saw a tiny little burger and promptly exclaimed, "Where's the beef?" Today this commercial sticks in my mind because I view it as making a statement about quality control. In the burger joint that served with a cavalier attitude puny burgers on great big buns, there was no quality control. At Wendy's, rest assured, you would always get a big meaty burger served on a big bun. This point was well-made by virtue of the staying power of that one line over all these years.

A question that I often ask law firms during a risk visit is, "What are your quality control processes?" More often than not, I get blank stares. One principal quality control process that I look for in a firm is an established file review process. I am looking for a process that seeks to ensure any legal work that is accepted by a firm will be completed in a timely and thorough manner. What guarantees can you offer that no file is sitting in a cabinet or desk drawer at your firm completely forgotten about? That's the quality control issue.

Professional Liability Insurance
Captive Management Services
Risk Assessment Services
ALPS
A Family of Professional Service Companies
Investment Management
Foundation Services
IT and Business Solutions

There are more approaches to file review than I could possibly list. The point is not to suggest one particular way to accomplish file review. The point is to encourage you to establish a file review process, if such a process is not already in place. The lack of a file review process has and will continue to lead to claims within our profession. That said, let me share two basic file review processes in order to demonstrate the gist of what malpractice carriers look for.

You might institute a strict policy that provides that no active file can be filed away by anyone without a future date in the calendar or tickler system. If no other date is already in the calendar or tickler system within the next thirty to forty-five days, place a file review date into the calendar or tickler system for thirty to forty-five days out. This will ensure that every file is touched on a regular basis. Many case management systems are designed to do this automatically, and the program will allow you to set the frequency with which you wish to conduct file review. The key to making this work is that all files, regardless of type of matter, must be entered into the system—even flat-fee work such as a simple will or a small-business formation.

An alternative method of preventing a file from being overlooked is to develop a list of active files by attorney. Sometimes this can be accomplished by printing out a list of active files for each attorney from the time-and-billing program. Be careful, however, because a number of time-and-billing packages will not automatically print out the names of files that have had no work done on them during the most recent billing period. Once the list is created, each attorney will need to be responsible for his or her own list. During the review cycle, every time a file comes across an attorney's desk, the attorney will check off that name. If a new file is opened, the attorney will add that name to his or her list. If a file is closed, that name should be removed from the list. At the end of the cycle, a few files may be unchecked and these files should be located and reviewed. Again, this ensures that all files are touched at least once during every cycle. A staff member is often responsible for updating and providing clean copies of all lists each review period. Some attorneys will go one step further on these unchecked files and place a call or send a letter to the client, even if nothing is happening. Clients tend to appreciate the brief update and this could help limit the number of incoming calls from clients who may feel things have stalled.

Another quality control process that I value greatly is peer review. This really can be an effective method of continuing to improve a firm's ability to provide outstanding customer service. I recommend that every year, at a minimum, every attorney at a firm should have two or three closed files randomly selected for review by a committee or another attorney at the firm. This is not a process meant to train the associates. All attorneys in the firm, regardless of seniority, should participate. The review should focus on the entire course of representation. The file should document the conflicts check, critical date calendaring, client decisions, client communication and client satisfaction. There should be an

engagement letter and a letter of closure. The file should be reviewed for timeliness of work, work product, billing decisions and procedural choices. The purpose is not to look for mistakes, but to identify ways that representation or service could have been improved in order to provide higher quality representation and service to the next client. These discussions can be incorporated into a monthly meeting of attorneys. The attorney or attorneys being reviewed can rotate month to month so that every member of the firm is reviewed and conducts a review at least once a year. The value of this process is even more significant given recent American Bar Association statistics that identify 47 percent of all malpractice claims resulted from a substantive legal error. Few risk reduction practices address this area of concern as well as a peer review process.

There are certainly other appropriate procedures that a firm could implement; however, the two processes outlined capture the essence of quality control for a law firm. File review seeks to prevent a matter from falling through the cracks. Peer review seeks to ensure compliance with firm standards as well as continued professional development of all attorneys at a firm. Granted, it is unlikely that a client will ever utter the words, "Where's the beef?" in a law firm. With quality control processes in place, however, you hopefully won't ever hear statements such as, "What happened here?"

ALPS is the endorsed legal malpractice insurance carrier of the Virginia State Bar.

Endnotes:

1 *Rahnema v. Rahnema,* 47 Va. App. 645, 658, 626 S.E.2d 448, 455 (2006).

2 Scores of Virginia cases refer to procedural defaults as examples of the "waiver" concept. The better word would be forfeiture. While waiver denotes an "intentional relinquishment of a known right," forfeiture may occur either inadvertently or intentionally. 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 27.5(c), at 923 n.82 (2d ed. 1999) (citation omitted).

3 *Cirrito v. Cirrito*, 44 Va. App. 287, 315, 605 S.E.2d 268, 281 (2004) (citation omitted); *Potts v. Mathieson Alkali Works*, 165 Va. 196, 207, 181 S.E. 521, 525 (1935).

4 *Bd. of Supervisors v. Robertson*, 266 Va. 525, 538, 587 S.E.2d 570, 578 (2003) (quoting *Jenkins v. Bay House Assocs., L.P.*, 266 Va. 39, 43, 581 S.E.2d 510, 512 (2003)); *Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp.*, 221 Va. 1139, 1141, 277 S.E.2d 228, 229-30 (1981) (quoting *Potts*, 165 Va. at 207, 181 S.E. at 525). *See also Bd. of Supervisors v. Miller & Smith, Inc.*, 222 Va. 230, 238, 279 S.E.2d 158, 162 (1981) ("[Courts] have no power to adjudicate issues which are not presented by the parties in their pleadings unless the parties voluntarily try an issue beyond the pleadings." (quoting *Landcraft Co., Inc. v. Kincaid*, 220 Va. 865, 870, 263 S.E.2d 419, 422 (1980))).

5 *Robertson*, 266 Va. at 538, 587 S.E.2d at 578 (citation omitted); *see also Ted Lansing Supply Co.*, 221 Va. at 1141, 277 S.E.2d at 229-30 (citation omitted).

6 1 CHARLES E. FRIEND, FRIEND'S VIRGINIA PLEADING AND PRACTICE § 6-3, at 210 (1998).

7 *Jenkins*, 266 Va. at 43-44, 581 S.E.2d at 512 (indirectly quoting *Potts*, 165 Va. at 207, 181 S.E. at 525).

8 FRIEND, *supra* note 6, § 23-5, at 738 (1998) (citing *Harrell v. Woodson*, 233 Va. 117, 353 S.E.2d 770 (1987)).

9 *Fleming v. Fleming*, 32 Va. App. 822, 826, 531 S.E.2d 38, 40 (2000); *Reid v. Reid*, 24 Va. App. 146, 149-50, 480 S.E.2d 771, 772 (1997); *Boyd v. Boyd*, 2 Va. App. 16, 18-19, 340 S.E.2d 578, 580 (1986).

10 *Ted Lansing Supply Co.,* 221 Va. at 1142, 277 S.E.2d at 230 (finding the trial court could not consider an "implied warranty theory" where the pleadings alleged only a breach of express warranty).

11 KENT SINCLAIR & LEIGH B. MIDDLEDITCH, JR., VIRGINIA CIVIL PROCEDURE § 8.1(B), at 374 (3d ed. 2005) (citing *Tuscarora, Inc. v. B.V.A. Credit Corp.*, 218 Va. 849, 241 S.E.2d 778 (1978); *Koch v. Seventh St. Realty Corp.*, 205 Va. 65, 135 S.E.2d 131 (1964); *Lloyd v. Smith*, 150 Va. 132, 142 S.E. 363 (1928)). *See also Pittman v. Pittman*, 208 Va. 476, 479, 158 S.E.2d 746, 748 (1968) (finding assertions of fraud were "vague, involved and uncertain").

12 *City of Norfolk v. Vaden*, 237 Va. 40, 44, 375 S.E.2d 730, 732-33 (1989) (reversing trial court for enforcing a contractual agreement when no such agreement had been pleaded).

13 *Lee v. Lambert*, 200 Va. 799, 803, 108 S.E.2d 356, 358-59 (1959) (quoting and approving trial court's opinion that granting recovery based in quantum meruit would permit a recovery on a "different contract from the one alleged in the pleadings").

14 *Laughlin v. Morauer*, 849 F.2d 122, 126 (4th Cir. 1988) (finding a Virginia trial court's ruling that there was no public easement did not have a collateral estoppel or *res judicata* effect because the public easement issue had not been pleaded and thus the trial court's decision on that issue was not binding).

15 *Jenkins v. Bay House Assocs.*, L.P., 266 Va. 39, 44, 581 S.E.2d 510, 512-13 (2003) (finding the pleadings "did not contain any assertions" that the trespass occurred on the waters, only the "land beneath the pond").

16 *E.g., Matney v. McClanahan*, 197 Va. 454, 458, 90 S.E.2d 128, 130-31 (1955).

17 *Bank of Giles County v. Mason*, 199 Va. 176, 182-83, 98 S.E.2d 905, 909 (1957) (dismissing a petition for writ of mandamus to inspect corporate records because of failure to allege or prove a demand and refusal).

18 *Bd. of Supervisors v. Robertson*, 266 Va. 525, 537-38, 587 S.E.2d 570, 578-79 (2003) (ruling a court may not interpret zoning ordinance in a manner not pleaded by either party).

19 *Powell v. Sears, Roebuck & Co.*, 231 Va. 464, 467, 344 S.E.2d 916, 917 (1986).

20 VA. CODE § 8.01-273(B) ("Wherever a demurrer to any pleading has been sustained, and as a result thereof the demurree has amended his pleading, he shall not be deemed to have waived his right to stand upon his pleading before the amendment, provided the order of the court shows that he objected to the ruling of the court sustaining the demurrer. On any appeal of such a case the demurree may insist upon his original pleading, and if the same be held to be good, he shall not be prejudiced by having made the amendment.").

21 *Hubbard v. Dresser, Inc.*, 271 Va. 117, 119-20, 624 S.E.2d 1, 2 (2006) (citations omitted); *see also Fuste v. Riverside Healthcare Ass'n*, 265 Va. 127, 129-30, 575 S.E.2d 858, 860 (2003); *Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125, 129, 523 S.E.2d 826, 829 (2000). *But cf.* VA. CODE § 8.01-273(B) (granting protection against waiver "[w]herever a demurrer to *any pleading* has been sustained" (emphasis added)).

22 *See Davis v. Marshall Homes, Inc.*, 265 Va. 159, 166, 576 S.E.2d 504, 507 (2003).

23 VA. SUP. CT. RULE 1:6(a).

24 KENT SINCLAIR, GUIDE TO VIRGINIA LAW & EQUITY REFORM & OTHER LANDMARK CHANGES § 11.07, at 264 (2006) [hereinafter SINCLAIR, LAW & EQUITY].

25 W. HAMILTON BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE 266 (3d ed. 1997).

26 SINCLAIR, LAW & EQUITY, *supra* note 24, § 7.05, at 175.

27 MARTIN P. BURKS ET AL., BURKS PLEADING AND PRACTICE § 204, at 336 (4th ed. 1952).

28 BRYSON, *supra* note 25, at 142.

29 BURKS, *supra* note 27, § 37, at 45-46 (quoting *Moore v. Norfolk & W. Ry.*, 124 Va. 628, 634, 98 S.E. 635, 637 (1919)); *see also* VA. CODE § 8.01-264(A).

30 VA. SUP. CT. RULE 3:18(c).

31 VA. CODE § 8.01-235.

32 SINCLAIR, LAW & EQUITY, *supra* note 24, § 8.04, at 204.

33 *Am. Safety Cas. Ins. Co. v. C. G. Mitchell Constr., Inc.*, 268 Va. 340, 351, 601 S.E.2d 633, 639 (2004); *Brown v. Black*, 260 Va. 305, 309-11, 534 S.E.2d 727, 728-30 (2000) (defining discretionary authority to dismiss an action and distinguishing *Aziz v. Wright*, 34 F.3d 587, 589 (8th Cir. 1994) (interpreting FED. R. CIV. P. 37(d)). *Cf. NHL v. Metro Hockey Club*, 427 U.S. 639 (1976).

34 VA. SUP. CT. RULE 4:12(b)(2).

35 D. Arthur Kelsey & William H. Baxter II, *Judicial Supervision and Enforcement*, *in* CIVIL DISCOVERY IN VIRGINIA, ¶ 11.11, at 283 n.186 (Wyatt B. Durrette, Jr. et al. eds., 2d ed., 2005) ("The United States District Court for the Eastern District of Virginia is widely known as the 'Rocket Docket' in no small part because its judges have adopted and implemented very aggressive pretrial scheduling orders. While state court pretrial scheduling orders do not necessarily need to be as forceful, they can nevertheless achieve a desirable degree of uniformity that helps prepare cases for trial and promotes judicial economy 'by expediting discovery and eliminating the need to return to [trial courts] during the discovery process.'").

36 *Rahnema v. Rahnema,* 47 Va. App. 645, 658, 626 S.E.2d 448, 455 (2006). *Cf. Saudi v. Northrop Grumman Corp.*, 427 F.3d 271, 274 (4th Cir. 2005) ("Litigants who fail to comply with court scheduling and discovery orders should not expect courts of appeal to save them from the consequences of their own delinquence.").

37 *Riverside Hosp., Inc. v. Stroube*, 58 Va. Cir. 541, 543 (Williamsburg 2002).

38 *Kirk Timber & Farming Co. v. Union Camp Corp.*, 56 Va. Cir. 335, 339 (Suffolk 2001). Likewise, in federal court, the disclosure of experts who may testify must be submitted "at the times and in the sequence directed by the court." FED. R. CIV. P. 26(a)(2)(C). In the absence of other court instructions or stipulation by the parties, this disclosure must be made ninety days before the trial date or, if a rebuttal expert, within thirty days of the opponent's disclosure. *Id.*

39 *Kirk Timber & Farming Co.,* 56 Va. Cir. at 341-42 (citation omitted).

40 VA. SUP. CT. RULE 1:18 (accompanying Form 3) (emphasis added).

41 *Id.*

42 VA. SUP. CT. RULE 3A:9(c).

43 VA. SUP. CT. RULE 3A:9(b)(1); *see also Harris v. Commonwealth*, 39 Va. App. 670, 674, 576 S.E.2d 228, 230 (2003) (*en banc*).

44 VA. CODE § 19.2-266.2(B).

45 *Stevenson v. Commonwealth*, No. 1210-05-1, 2006 Va. App. LEXIS 245, at *3 n.1 (May 30, 2006) (unpublished).

46 *Thomas v. Commonwealth*, 44 Va. App. 741, 750, 607 S.E.2d 738, 742, *adopted on reh'g en banc*, 45 Va. App. 811, 613 S.E.2d 870 (2005); *see also Kelly v. Commonwealth*, 42 Va. App. 347, 354, 592 S.E.2d 353, 356 (2004) ("A trial court must be alerted to the precise 'issue' to which a party objects.") (citation omitted)).

47 *Bennett v. Commonwealth*, 29 Va. App. 261, 280-81, 511 S.E.2d 439, 448 (1999) (citations omitted); *see also Thomas*, 44 Va. App. at 751 n.2, 607 S.E.2d at 742 n.2; *Kingsley v. Commonwealth*, No. 0587-03-2, 2004 Va. App. LEXIS 384, at *8-9 (Aug. 10, 2004) (unpublished); *Southard v. Commonwealth*, No. 2706-02-4, 2003 Va. App. LEXIS 384, at *3-4 (July 8, 2003) (unpublished); *Morris v. Commonwealth*, 14 Va. App. 283, 287, 416 S.E. 2d 462, 464 (1992) (*en banc*).

48 *Thomas*, 44 Va. App. at 751 n.2, 607 S.E.2d at 742 n.2; *see also* CHARLES E. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA § 8-4, at 295 (6th ed. 2003) (citations omitted).

49 *Cook v. Waynesboro Police Dep't*, 225 Va. 23, 29, 300 S.E.2d 746, 749 (1983).

50 FRIEND, *supra* note 48, § 17-15, at 676; *see also* 1 JOHN W. STRONG, ET AL., MCCORMICK ON EVIDENCE § 13, at 71 (6th ed. 2006) ("The question is not whether this witness is more qualified than other experts in the field; rather, the issue is whether the witness is more competent to draw the inference than the lay jurors and judge.").

51 *See, e.g.*, *Vinson v. Commonwealth*, 258 Va. 459, 466, 522 S.E.2d 170, 175 (1999) (concluding defendant waived objection to testimony of mental health expert "for lack of proper objection in the trial court"); *Cook*, 225 Va. at 29, 300 S.E.2d at 749. *See generally* FRIEND, *supra* note 48, § 17-15, at 677.

52 *Bitar v. Rahman*, 272 Va. 130, 139, 630 S.E.2d 319, 324 (2006) (citation omitted).

53 *Id*. at 140, 630 S.E.2d at 324-25 (citations omitted).

54 *Id*. at 140, 630 S.E.2d at 325 (citations omitted).

55 *Vasquez v. Mabini*, 269 Va. 155, 162, 606 S.E.2d 809, 813 (2005) ("The trial court was advised, before any evidence had been presented, of the probability of an objection and the grounds for it. The trial court deferred a ruling until the evidence was presented. At the first opportunity, after the flaws in the expert testimony had become apparent on cross-examination, the defendants moved to strike it.").

56 *Lee v. Lee*, 12 Va. App. 512, 514-15, 404 S.E.2d 736, 737-38 (1991) (*en banc*) (finding that neither Code § 8.01-384 or Rule 5A:18 is "complied with merely by objecting generally to an order" as in stating the order is "seen and objected to"); *see also Courembis v. Courembis*, 43 Va. App. 18, 26, 595 S.E.2d 505, 509 (2004).

57 *Mackie v. Hill*, 16 Va. App 229, 231, 429 S.E.2d 37, 38 (1993).

58 *Commonwealth v. Hudson*, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003) (citing VA. SUP. CT. RULES 5:25, 5A:18); *see also Bell v. Commonwealth*, 264 Va. 172, 196, 563 S.E.2d 695, 711 (2002) ("Bell did not object to the seating of jurors . . . . Thus, any claim on appeal regarding those jurors is waived."); *Kelly v. Commonwealth*, 42 Va. App. 347, 354, 592 S.E.2d 353, 356 (2004) ("Kelly raised no constitutional arguments in his motion to strike the evidence. Accordingly, Rule 5A:18 bars our consideration of this question on appeal. The record reflects no reason to invoke the good cause or ends of justice exceptions to Rule 5A:18."). *Cf. Holly Hill Farm Corp. v. United States*, 447 F.3d 258, 267 (4th Cir. 2006) (finding "issues raised for the first time on appeal are generally not considered absent exceptional circumstances").

59 *Hudson*, 265 Va. at 514, 578 S.E.2d at 786; *Bolden v. Commonwealth*, No. 0500-03-4, 2004 Va. App. LEXIS 585, at *9-10 (Nov. 30, 2004) (unpublished).

60 *Edwards v. Commonwealth*, 41 Va. App. 752, 760, 589 S.E.2d 444, 448 (2003) (*en banc*), *aff'd by order*, No. 040019 (Va. Sup. Ct., Oct. 15, 2004).

61 *W. Alexandria Props., Inc. v. First Va. Mortgage & Real Estate Inv. Trust*, 221 Va. 134, 138, 267 S.E.2d 149, 151 (1980) (citations omitted); *see also Buck v. Commonwealth*, 247 Va. 449, 452-53, 443 S.E.2d 414, 416 (1994) (holding that appellant's failure to raise the same specific arguments "before the trial court precludes him from raising them for the first time on appeal"); *Floyd v. Commonwealth*, 219 Va. 575, 584, 249 S.E.2d 171, 176 (1978) (holding that appellate courts will not consider an argument that differs from the specific argument presented to the trial court, even if it relates to the same general issue); *Shenk v. Shenk*, 39 Va. App. 161, 169, 571 S.E.2d 896, 900 (2002) (ruling that the "specific argument" made on appeal must have been made below); *Clark v. Commonwealth*, 30 Va. App. 406, 411-12, 517 S.E.2d 260, 262 (1999) (preserving one argument on sufficiency of the evidence does not allow argument on appeal regarding other sufficiency questions).

Far different concerns, however, govern arguments by appellees in criminal cases. As the Virginia Court of Appeals has stated *en banc*, an "appellate court cannot vacate a criminal conviction that violates no recognizable legal principle simply on the ground that the prosecutor (or, for that matter, the trial judge) did not articulate the proper legal basis for it." *Logan v. Commonwealth*, 47 Va. App. 168, 172 n.4, 622 S.E.2d 771, 773 n.4 (2005) (*en banc*) (quoting *Blackman v. Commonwealth*, 45 Va. App. 633, 642, 613 S.E.2d 460, 465 (2005)). "Thus, an appellee may argue for the first time on appeal any legal ground in support of a judgment so long as it does not require new factual determinations, or involve an affirmative defense that must be asserted in the pleadings, or serve as a subterfuge for a constitutionally prohibited cross-appeal in a criminal case. This disparity in treatment under Rule 5A:18 between appellants and appellees stems from the presumption of correctness of trial court rulings and the corresponding burden on appellants to rebut that presumption." *Blackman*, 45 Va. App. at 642-43, 613 S.E.2d at 465 (citations, footnotes, and internal quotation marks omitted).

62 VA. SUP. CT. RULES 5:25, 5A:18. In contrast, federal courts apply the "plain error" standard to determine exceptions to the waiver principle. *Jones v. United States*, 527 U.S. 373, 389 (1999) (reiterating that, under the federal standard, a party who has not properly preserved the issue will be denied relief "unless there has been (1) error; (2) that is plain, and (3) affects substantial rights"). Even if a party establishes all three requirements, "correction of the error" remains within the sound discretion of the appellate court, a discretion that should not be exercised "unless the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Shaw*, 313 F.3d 219, 223 (4th Cir. 2002) (criminal appeal). *See generally United States v. Olano*, 507 U.S. 725, 736 (1993); *United States v. Shorter*, 328 F.3d 167, 172 (4th Cir. 2003).

63 *Tooke v. Commonwealth*, 47 Va. App. 759, 764-65, 627 S.E.2d 533, 536 (2006) (citation omitted).

64 *Redman v. Commonwealth*, 25 Va. App. 215, 221, 487 S.E.2d 269, 272 (1997) (citing *Mounce v. Commonwealth*, 4 Va. App. 433, 436, 357 S.E.2d 742, 744 (1987); *see also Copeland v. Commonwealth*, 42 Va. App. 424, 442, 592 S.E.2d 391, 399 (2004); *Andrews v. Commonwealth*, 37 Va. App. 479, 494, 559 S.E.2d 401, 409 (2002).

65 *Kingsley v. Commonwealth*, No. 0587-03-2, 2004 Va. App. LEXIS 384, at *16-17 (Aug. 10, 2004) (unpublished).

66 *Tooke,* 47 Va. App. at 765, 627 S.E.2d at 536.

67 *Thomas v. Commonwealth*, 44 Va. App. 741, 751-52, 607 S.E.2d 738, 743, *adopted on reh'g en banc*, 45 Va. App. 811, 613 S.E.2d 870 (2005) (quoting *Bazemore v. Commonwealth*, 42 Va. App. 203, 218-19, 590 S.E.2d 602, 609-10 (2004) (*en banc*)).

68 *Commonwealth v. Jerman*, 263 Va. 88, 94, 556 S.E.2d 754, 757 (2002) ("Thus, we hold that Jerman's failure to state a timely objection to the circuit court's instruction bars his present challenge to that instruction. Rule 5:25. Our conclusion is not altered by the fact that the rule in *Coward* was still in effect on the date of Jerman's trial.").

69 *Riner v. Commonwealth*, 40 Va. App. 440, 456, 579 S.E.2d 671, 679 (2003), *aff'd*, 268 Va. 296, 601 S.E.2d 555 (2004). *But cf. Talbert v. Commonwealth*, 17 Va. App. 239, 246, 436 S.E.2d 286, 290 (1993); *Darnell v. Commonwealth*, 12 Va. App. 948, 953, 408 S.E.2d 540, 542 (1991).

70 *Luginbyhl v. Commonwealth*, 48 Va. App. 58, 63 n.3, 628 S.E.2d 74, 77 n.3 (2006) (*en banc*); *Widdifield v. Commonwealth*, 43 Va. App. 559, 564, 600 S.E.2d 159, 162 (2004) (*en banc*).

71 *Widdifield*, 43 Va. App. at 564, 600 S.E.2d at 162; *see also Luginbyhl*, 48 Va. App. at 63 n.3, 628 S.E.2d at 77 n.3.

72 *Evans v. Commonwealth*, 39 Va. App. 229, 236, 572 S.E.2d 481, 484 (2002).

73 *Id*. (quoting *Whittaker v. Commonwealth*, 217 Va. 966, 968, 234 S.E.2d 79, 81 (1977)); *see also Holles v. Sunrise Terrace, Inc.*, 257 Va. 131, 135, 509 S.E.2d 494, 497 (1999); *Williams v. Harrison*, 255 Va. 272, 277, 497 S.E.2d 467, 471 (1998); *Chappell v. Va. Electric & Power Co.*, 250 Va. 169, 173, 458 S.E.2d 282, 285 (1995); *Spencer v. Commonwealth*, 238 Va. 295, 305, 384 S.E.2d 785, 792 (1989); *Barrett v. Commonwealth*, 231 Va. 102, 108, 341 S.E.2d 190, 194 (1986); *Molina v. Commonwealth*, 47 Va. App. 338, 367-68, 624 S.E.2d 83, 97 (2006) ("The failure to proffer the expected testimony is fatal to his claim on appeal."); *Smith v. Hylton*, 14 Va. App. 354, 357-58, 416 S.E.2d 712, 715 (1992); *Klein v. Klein*, 11 Va. App. 155, 160, 396 S.E.2d 866, 869 (1990).

74 *Evans,* 39 Va. App. at 236, 572 S.E.2d at 484 (citation omitted).

75 *See Lockhart v. Commonwealth*, 34 Va. App. 329, 340, 542 S.E.2d 1, 6 (2001) (finding proffer inadequate where counsel provided argument rather than an individual's expected answers to potential questions).

76 *Juniper v. Commonwealth*, 271 Va. 362, 383, 626 S.E.2d 383, 398 (2006). *See, e.g.*, *Riner v. Commonwealth*, 268 Va. 296, 325, 601 S.E.2d 555, 571-72 (2004); *Lenz v. Commonwealth*, 261 Va. 451, 463, 544 S.E.2d 299, 306 (2001) (finding no evidence in the record that trial court had ruled on defendant's pretrial motion, his claim on appeal was waived); *see also United States v. Graves*, 11 Fed. Appx. 324, 325 (4th Cir. 2001) (unpublished) (finding that defendant "abandoned the issue and forfeited a ruling" by "failing to pursue a ruling on motion for a criminal history departure"); *Rice v. Cmty. Health Ass'n*, 203 F.3d 283, 286 (4th Cir. 2000) (finding waiver of objection to denial of motion *in limine* where "district court never 'ruled' on the issue" asserted by the party on appeal).

77 *Fisher v. Commonwealth,* 16 Va. App. 447, 454, 431 S.E.2d 886, 890 (1993) ("Fisher failed to obtain a ruling from the court. He requested no relief. Because he was denied nothing by the trial court, there is no ruling for us to review.") (citations omitted); *Otey v. Roanoke City Dep't of Soc. Servs.*, No. 2558-05-3, 2006 Va. App. LEXIS 324, at *6 (July 18, 2006) (*per curiam*) (unpublished) (stating a "circuit court's failure to rule" is treated "no differently than a ruling challenged on appeal" and both require a "specific, contemporaneous objection in the trial court") (citations omitted).

78 *Taylor v. Commonwealth*, 208 Va. 316, 324, 157 S.E.2d 185, 191 (1967) ("There was no ruling by the court on the objection. Counsel for defendant did not insist that the court rule, nor did he request

the court to instruct the jury to disregard the remarks of the Commonwealth's attorney. Moreover, counsel did not move for a mistrial. Hence, the objection was not saved for our consideration.").

79 *Drinkard-Nuckols v. Andrews*, 269 Va. 93, 102, 606 S.E.2d 813, 818 (2005) (citation omitted); *see also Combs v. Norfolk & W. Ry.*, 256 Va. 490, 499, 507 S.E.2d 355, 360 (1998); *Hubbard v. Commonwealth,* 243 Va. 1, 9, 413 S.E.2d 875, 879 (1992).

80 *Pettus v. Gottfried*, 269 Va. 69, 79, 606 S.E.2d 819, 825 (2005) (citing *Drinkard-Nuckols,* 269 Va. at 102-03, 606 S.E.2d at 819 (holding plaintiff's use of testimony regarding physicians' expectations created waiver of objection to defendant's use of testimony on same subject); *Combs,* 256 Va. at 499, 507 S.E.2d at 360 (finding plaintiff's use of same exhibits in presenting demonstrative evidence created waiver of objection to defendant's use of those exhibits in presenting evidence); *Hubbard,* 243 Va. at 9-10, 413 S.E.2d at 879 (concluding defendant's use of reconstruction opinion evidence regarding speed of defendant's vehicle created waiver of objection to Commonwealth's use of evidence on same subject)); *see also Saunders v. Commonwealth*, 211 Va. 399, 401, 177 S.E.2d 637, 638-39 (1970) (holding that defendant attempted to turn the evidence to his advantage); *Stevenson v. Commonwealth*, No. 1210-05-1, 2006 Va. App. LEXIS 245, at *11-13 (May 30, 2006) (unpublished); *Abdul-Wasi v. Commonwealth*, No. 2901-03-1, 2005 Va. App. LEXIS 180, at *9-11 (May 3, 2005) (unpublished).

Though the Virginia Supreme Court has rejected arguments by appellants claiming they were "merely attempting to rebut" during their case-in-chief, *see, e.g., Hubbard*, 243 Va. at 9, 413 S.E.2d at 879, two Virginia Court of Appeals opinions have gone a different direction. *Compare Riner v. Commonwealth*, 40 Va. App. 440, 477-78, 579 S.E.2d 671, 689-90 (2003), *aff'd on other grounds*, 268 Va. 296, 601 S.E.2d 555 (2004) (stating, while nonetheless mooting the point by rejecting the objection on the merits, that the appellant did not waive his evidentiary objection by offering "rebuttal" evidence in his case in chief), *and McGill v. Commonwealth*, 10 Va. App. 237, 244, 391 S.E.2d 597, 601 (1990) (noting "the defendant only attempted to rebut the Commonwealth's evidence" during his case in chief) *with Bynum*, 28 Va. App. at 459, 506 S.E.2d at 34 (finding waiver where the defendant introduced in his case-in-chief the same evidence he had objected to in Commonwealth's case-in-chief).

81 *Drinkard-Nuckols,* 269 Va. at 102, 606 S.E.2d at 818 (citing *Snead v. Commonwealth*, 138 Va. 787, 801-02, 121 S.E.2d 82, 86 (1924) (other citations omitted)); *see also Combs*, 256 Va. at 499, 507 S.E.2d at 360; *Brooks v. Bankson*, 248 Va. 197, 207, 445 S.E.2d 473, 478-79 (1994).

82 *Pettus,* 269 Va. at 79-80, 606 S.E.2d at 826.

83 *Id.* at 79, 606 S.E.2d at 825 (quoting *Whitten v. McClelland*, 137 Va. 726, 741, 120 S.E. 146, 150 (1923)).

84 *New York Life Ins. Co. v. Taliaferro*, 95 Va. 522, 523, 28 S.E. 879, 879 (1898); *see also Bynum*, 28 Va. App. at 459, 506 S.E.2d at 34 ("Having testified about the substance of his previously suppressed statement, Mr. Bynum rendered harmless any error that may have occurred from the introduction of the statement in the Commonwealth's case-in-chief.").

85 *New York Life Ins.*, 95 Va. at 523, 28 S.E. at 879.

86 *Thomas v. Commonwealth*, 48 Va. App. 605, 608, 633 S.E.2d 229, 231 (2006).

87 *Barnes v. Commonwealth*, 47 Va. App. 105, 110, 622 S.E.2d 278, 280 (2005) (quoting *Seaton v. Commonwealth*, 42 Va. App. 739, 747 n.2, 595 S.E.2d 9, 13 n.2 (2004)).

88 *Crowder v. Commonwealth*, 41 Va. App. 658, 662, 588 S.E.2d 384, 386 (2003) (quoting *Pease v. Commonwealth*, 39 Va. App. 342, 355, 573 S.E.2d 272, 278 (2002) (*en banc*), *aff'd*, 266 Va. 397, 588 S.E.2d 149 (2003) (*per curiam* order adopting reasoning of the Court of Appeals)).

89 *Crowder*, 41 Va. App. at 662-63, 588 S.E.2d at 386 (citations omitted).

90 *Rahnema v. Rahnema,* 47 Va. App. 645, 662 n.7, 626 S.E.2d 448, 457 n.7 (2006) (citations omitted).

91 *Blake Constr. Co./Poole & Kent v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 571, 587 S.E.2d 711, 715 (2003) (holding that the power to set aside a verdict under Code § 8.01-680 can be exercised only if no "reasonable" jurors could "differ in their conclusions of fact to be drawn from the evidence"). *See generally Seaton*, 42 Va. App. at 747 n.2, 595 S.E.2d at 13 n.2.

92 BRYSON, *supra* note 25, at 455 (citing *Gabbard v. Knight*, 202 Va. 40, 116 S.E.2d 73 (1960)); *see also Cotter v. Commonwealth*, 21 Va. App. 453, 454, 464 S.E.2d 566, 567 (1995) (*en banc*); *Brown v. Commonwealth*, 8 Va. App. 474, 480, 382 S.E.2d 296, 300 (1989). In contrast, federal civil law requires a party to raise "the reason for which it is entitled to judgment as a matter of law in its Rule 50(a) motion before the case is submitted to the jury and reassert that reason in its Rule 50(b) motion after trial if the Rule 50(a) motion proves unsuccessful." *Price v. City of Charlotte*, 93 F.3d 1241, 1248-49 (4th Cir. 1996) (citing *Singer v. Dungan*, 45 F.3d 823, 828-29 (4th Cir. 1995)); *see also Dennis v. Columbia Colleton Med. Ctr.*, 290 F.3d 639, 644-45 (4th Cir. 2002) (explaining standard for Rule 50(b) motion for judgment as a matter of law). The Rule 50(b) motion is equally indispensable to preserve the sufficiency argument for appeal. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 126 S. Ct. 980, 987 (2006) ("[R]espondent's failure to comply with Rule 50(b) forecloses its challenge to the sufficiency of the evidence.").

93 *Fontaine v. Commonwealth*, 25 Va. App. 156, 162, 487 S.E.2d 241, 244 (1997) ("Generally, the sufficiency of the evidence to support a conviction may be challenged by a motion to set aside the verdict, even where no motion to strike the evidence was filed at trial."), *overruled in part on other grounds by Edwards v. Commonwealth*, 41 Va. App. 752, 765, 589 S.E.2d 444, 450 (2003); *see also McGee v. Commonwealth*, 4 Va. App. 317, 321, 357 S.E.2d 738, 739-40 (1987) ("A prior motion to strike the evidence, however, is not a prerequisite to a motion to set aside the verdict." (citing *Gabbard*, 202 Va. at 43, 116 S.E.2d at 75)).

94 *Starks v. Commonwealth*, 225 Va. 48, 55, 301 S.E.2d 152, 156 (1983); *McQuinn v. Commonwealth*, 20 Va. App. 753, 755-56, 460 S.E.2d 624, 625-26 (1995) (*en banc*); *White v. Commonwealth,* 3 Va. App. 231, 233-34, 348 S.E.2d 866, 867-68 (1986).

95 *Jarvis v. Commonwealth*, No. 1634-04-1, 2005 Va. App. LEXIS 415, at *4 (Oct. 18, 2005) (unpublished) (citation and footnote omitted).

96 *Id.* (citations omitted).

97 *Barnes v. Commonwealth*, 33 Va. App. 619, 628-29 n.2, 535 S.E.2d 706, 711 n.2 (2000); *Howard v. Commonwealth*, 21 Va. App. 473, 478, 465 S.E.2d 142, 144 (1995); *see also Copeland,* 42 Va. App. at 441, 592 S.E.2d at 399; *Campbell v. Commonwealth*, 12 Va. App. 476, 478-81, 405 S.E.2d 1, 1-3 (1991) (*en banc*); *Jarvis*, 2005 Va. App. LEXIS 415, at *3.

98 *Rahnema v. Rahnema,* 47 Va. App. 645, 663, 626 S.E.2d 448, 457 (2006) (quoting *McBride v. Commonwealth*, 44 Va. App. 526, 529, 605 S.E.2d 773, 774 (2004)); FRIEND, *supra* note 48, § 8-14, at 56 (6th ed. Supp. 2005) (quoting *Saunders v. Commonwealth*, 211 Va. 399, 400, 177 S.E.2d 637, 638 (1970)); *see also Cangiano v. LSH Bldg. Co.*, 271 Va. 171, 181, 623 S.E.2d 889, 895 (2006); *Powell v. Commonwealth*, 267 Va. 107, 144, 590 S.E.2d 537, 559-60 (2004).

99 *Powell*, 267 Va. at 144, 590 S.E.2d at 560 (quoting *Fisher v. Commonwealth*, 236 Va. 403, 417, 374 S.E.2d 46, 54 (1988)).

100 *Rahnema,* 47 Va. App. at 663, 626 S.E.2d at 457 ("No litigant can 'be permitted to approbate and reprobate, ascribing error to an act by the trial court that comported with his representations.' (quoting *Boedeker v. Larson*, 44 Va. App. 508, 525, 605 S.E.2d 764, 772 (2004) (other citations omitted))); *see also* Garlock Sealing Techs., *LLC v. Little*, 270 Va. 381, 388, 620 S.E.2d 773, 777 (2005).

101 *Powell*, 267 Va. at 144, 590 S.E.2d at 560.

102 *Clark v. Commonwealth*, 202 Va. 787, 791, 120 S.E.2d 270, 273 (1961).

103 *Hundley v. Commonwealth*, 193 Va. 449, 453, 69 S.E.2d 336, 338-39 (1952).

104 *Edmiston Homes, Ltd. v. McKinney Group*, 241 Va. 263, 268, 401 S.E.2d 875, 877-78 (1991).

105 *Moore v. Hinkle*, 259 Va. 479, 491, 527 S.E.2d 419, 426 (2000).

106 *Saunders v. Commonwealth*, 211 Va. 399, 400, 177 S.E.2d 637, 638 (1970).

107 *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 136, 413 S.E.2d 630, 635 (1992).

108 *Miles v. Commonwealth*, 205 Va. 462, 468, 138 S.E.2d 22, 27 (1964); *see also Owens-Illinois, Inc. v. Thomas Baker Real Estate, Ltd.*, 237 Va. 649, 652, 379 S.E.2d 344, 346 (1989); *Med. Ctr. Hosps. v. Sharpless*, 229 Va. 496, 498, 331 S.E.2d 405, 406 (1985).

109 *Hilton v. Fayen*, 196 Va. 860, 867, 86 S.E.2d 40, 43 (1955) (citations omitted); *see also Holles v. Sunrise Terrace, Inc.*, 257 Va. 131, 137-38, 509 S.E.2d 494, 498 (1999); BURKS, *supra* note 27, § 299, at 536.

110 *Jimenez v. Commonwealth*, 241 Va. 244, 249-50, 402 S.E.2d 678, 680-81 (1991).

111 *Aylor v. Commonwealth*, No. 3366-02-2, 2004 Va. App. LEXIS 183, at *7-8 (Mar. 2, 2004) (unpublished) (citing *Holles,* 257 Va. at 137-38, 509 S.E.2d at 498 ("We observe the general rule that, when an issue has been submitted to a jury under instructions given without objection, such assent constitutes a waiver of any contention that the trial court erred in failing to rule as a matter of law on the issue.")).

112 *WJLA-TV v. Levin*, 264 Va. 140, 159, 564 S.E.2d 383, 395 (2002); *see also King v. Commonwealth*, 264 Va. 576, 582, 570 S.E.2d 863, 866 (2002) (holding appeal not procedurally barred for failure to object to a proffered jury instruction because appellant had clearly preserved his objections in the form of a motion to strike); *Chawla v. BurgerBusters, Inc.*, 255 Va. 616, 623, 499 S.E.2d 829, 833 (1998) (holding that the appellant preserved an issue for

appeal despite his failure to object to a proffered jury instruction implementing a prior ruling of the court, reasoning that "counsel made clear to the trial court his objection to the [challenged] ruling . . . and never abandoned or evidenced an intent to abandon the objection"); FRIEND, *supra* note 48, § 1-4, at 15.

113 *Aylor*, 2004 Va. App. LEXIS 183, at *8 (citing *Spitzli v. Minson*, 231 Va. 12, 19, 341 S.E.2d 170, 174 (1986) ("Here, the defendant did make a motion to set aside the verdict, but this does not save him from his failure to object to the instructions which submitted the issues . . . to the jury.")).

114 *See Breard v. Commonwealth*, 248 Va. 68, 83, 445 S.E.2d 670, 679 (1994) (explaining how defendant waived any allegation of error by not objecting to the denial of his proposed instruction).

115 *Commonwealth v. Jerman*, 263 Va. 88, 93, 556 S.E.2d 754, 757 (2002); *see also* Bazemore v. Commonwealth, 42 Va. App. 203, 214-15, 590 S.E.2d 602, 608 (2004) (*en banc*) ("Bazemore did not ask the judge to instruct the jury concerning the definition of 'wanton.' Therefore, we will not review the issue for the first time on appeal."); *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 448 (4th Cir. 2001) ("When the party asserting a legal theory could have requested a jury instruction on an alternate theory but did not, the argument that a jury charge which instructed on such a theory would have been valid becomes unavailable on appeal." (citations omitted)); *United States v. Carroll*, 710 F.2d 164, 169 n.2 (4th Cir. 1983) ("Because [the defendant] failed to request such an instruction, however, he has waived his objection to its omission, absent plain error. While such an instruction clearly would have been appropriate, neither this court nor any other court has ever held that the failure to give such instruction is plain error." (citations omitted)).

116 *Fishback v. Commonwealth*, 260 Va. 104, 117, 532 S.E.2d 629, 635 (2000) (finding "it is reversible error for the trial court to refuse a defective instruction instead of correcting it and giving it in the proper form" when the "principle of law is materially vital to a defendant in a criminal case" (quoting *Whaley v. Commonwealth*, 214 Va. 353, 355-56, 200 S.E.2d 556, 558 (1973))); *Campbell v. Commonwealth*, 14 Va. App. 988, 991-92, 421 S.E.2d 652, 654 (1992) (*en banc*) (holding trial court has an affirmative duty to properly instruct jury as to elements of offense).

117 *Bazemore*, 42 Va. App. at 219, 590 S.E.2d at 610 (citation omitted).