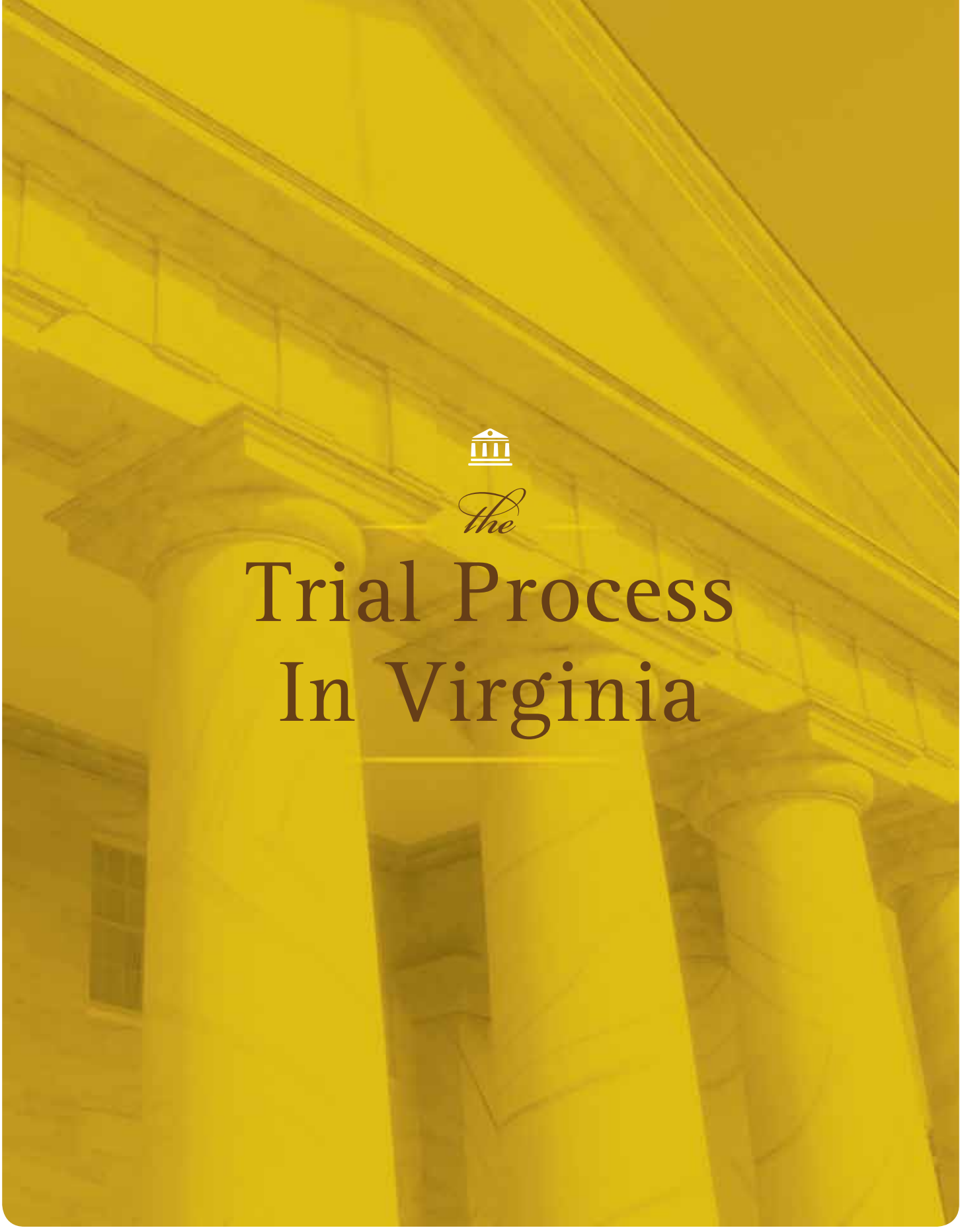

the

Trial Process In Virginia

Cameron McEvoy PLLC

A Litigation Boutique

TABLE OF CONTENTS

OVERVIEW

The trial of a civil case in Virginia takes most of its central features from the English court system that was introduced into the "Virginia Colony" in the early 1600s.

The core principles of confrontation, the right to a trial by one's peers, hearsay principles and many other doctrines had already been originated, extensively debated and refined in English courts and Inns of Court long before the first gavel fell in a Virginia case.

It is clearly a privilege to practice law in the historically important court system of the Commonwealth of Virginia, and everyone who "passes the bar" and earns the right to sit inside the well of the court literally follows in the footsteps of such groundbreaking pioneers as Thomas Jefferson, George Mason, George Wythe, John Marshall, Lewis Powell and Oliver Hill. However, this booklet is not designed to address either the history or the policy of the law, or to discuss the contributions of these and other legal giants whose legacy is the living system that we enjoy today as professional attorneys. Rather, we hope this booklet serves as a useful and practical guide that the Virginia practitioner may turn to from time to time for guidance as to the basic points of the trial process in Virginia.

TIMOTHY J. MCEVOY
Attorney at Law

EDWARD W. CAMERON
Attorney at Law

JOHN PATRICK SHERRY
Attorney at Law

SIGNIFICANT MOTIONS IN VIRGINIA

It may seem odd to begin a discussion of trial practice with the law applicable to preliminary motions.

However, summary judgment in Virginia is generally frowned upon and rarely granted. Indeed, it is impermissible to support a summary judgment motion with deposition testimony. Thus, preliminary motions can have an enormous impact on the manner in which a case is tried to a jury. Furthermore, in Virginia there is one preliminary motion (the plea in bar) which may involve a mini-jury trial (in recent years, for example, the Supreme Court of Virginia was called upon to rule on issues stemming from a plea in bar that was tried to a jury in Fairfax County for several weeks).

Virginia motions practice maintains common law traditions that defy easy categorization. Among these are the aforementioned pleas in bar, demurrers and motions to crave *oyer*. These are the most common "defensive" motions in Virginia, and they are designed to help prune a case down to those well-pled aspects that merit a jury's time. Failure to appreciate the distinctions can have disastrous consequences, *e.g.*, Va. Code § 8.01-235 (limitations defense may not be raised by demurrer).

PLEA IN BAR

A plea in bar is a pleading which alleges a single state of facts or circumstances (usually not disclosed or disclosed only in part by the complaint) which, if proven, constitutes an absolute bar to a claim or claims. Typical examples of matters appropriate for a plea in bar involve affirmative defenses such as statute of limitations, statute of frauds, and accord and satisfaction. *See, e.g., Nelms v. Nelms*, 236 Va. 281, 289 (1988); *Kelly v. R.S. Jones & Assocs.*, 242 Va. 79 (1991). Many practitioners fail to recognize that the plea in bar can be just as powerful as a motion for summary judgment in federal practice. Virginia permits the court to hear matters outside the pleadings with respect to pleas in bar, through trial-style evidence, and the issues may be tried to a jury. While Virginia prohibits the use of depositions and affidavits in support of a motion for summary judgment, there is no similar prohibition for pleas in bar. It is important, however, to keep in mind that there is no prohibition against the use of depositions to oppose summary judgement. The burden of establishing the grounds of defense asserted in a plea is on the party raising it. *Cooper Indus., Inc. v. Melendez*, 260 Va. 578 (2000).

DEMURRER

A demurrer is a pleading in which a party challenges the legal sufficiency of the opposing pleading and demands the judgment of the court on the matter before proceeding further. Va. Code Ann. § 8.01-273(A); *Dean v. Dearing*, 263 Va. 485 (2002); *Fuste v. Riverside Healthcare Association*, 265 Va. 127 (2003). Similar to a federal motion to dismiss, a demurrer tests whether the plaintiff's pleading states a cause of action upon which relief can be granted. *See Welding, Inc. v. Bland County Service Authority*, 261 Va. 218 (2001). On demurrer, a court may consider the substantive allegations of the pleading, in addition to any documents that accompany or are mentioned in the pleading. *See Flippo v. F&L Land Co.*, 241 Va. 15 (1991) (citing Va. Sup. Ct. R. 1:4(i)).

A court must take as true all material facts properly pled in a claim, including facts explicitly alleged and those fairly inferred from the facts alleged. *See Catercorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22 (1993). While the Supreme Court of Virginia has repeatedly instructed that cases are not to be "short-circuited" if the pleadings inform the other side of the nature and character of the claim, demurrers nevertheless are an important tool in dismissing flawed claims. Moreover, they are routinely more effective than motions for summary judgement even where the same discrete legal arguments are presented.

> *"The burden of establishing the grounds of defense asserted in a plea is on the party raising it."*
>
> *- Cooper Indus., Inc. v. Melendez, 260 Va. 578 (2000)*

CRAVING *OYER*

Virginia common law has a long history of applying the well-established doctrine of "craving *oyer*" whenever a pleading references a document that forms the basis of any of the plaintiff's claims but is not annexed to the pleading. *See, e.g., Colinsky Consulting Inc. v. Rickjoy Automotive, Inc.*, 57 Va. Cir. 403 (City of Norfolk, 2002) ("Defendants can crave *oyer* of all documents mentioned in the pleadings, as long as the document forms a basis for any of the plaintiff's claims"). Though often overlooked by practitioners, judges tend to be favorably disposed to these motions and they are an important procedure tool because they tend to limit disputes over the operational documents.

VOIR DIRE AND JURY SELECTION IN VIRGINIA

The Virginia Declaration of Rights recognizes a right to be tried by a jury from a person's "vicinage" and to the "sacred" right to a jury trial in all matters impacting property rights.

To implement these rights, Va. Code § 8.01-358 provides that *voir dire* may be employed to determine whether each potential juror can fairly and impartially decide a case. Of course, picking such a jury is a very human enterprise. Thus, *voir dire* (Old French, *to speak the truth*) is the advocate's chance to dismiss those jurors whom she believes may be less-than-favorable to her client's position. It is an essential function of the private bar, without which a jury trial loses a great deal of meaning.

Many articles have been written about the nature of *voir dire* and a full treatment of this topic is not possible here. Suffice it to say that *voir dire* involves an opportunity to generally probe jurors' attitudes and predispositions in order to weed out those who do not care, those who care too much and those who simply do not like your client or the facts you must explain. *Voir dire* is not an opportunity for counsel to testify or to argue facts or law, and doing so will likely draw an objection. *Smith v. Commonwealth*, 40 Va. App. 595 (2003). However, intelligent questions can lay the foundation for the facts of the case and the themes you intend to present at trial.

In Virginia, attorneys for each side can strike jurors based on challenges for cause. Challenges for cause are those challenges that seek to remove potential jurors for failure to meet certain statutory qualifications for jury service or because of perceived or actual bias or prejudice. In this regard, counsel may ask any questions relevant to the jurors' ability to serve. Va. Code Ann. § 8.01-358. The test of relevancy is whether counsel's questions relate to whether the potential juror: (1) is related to any party, (2) has any interest in the case, (3) has formed an opinion about the case or (4) is conscious of any bias or prejudice that would affect his or her ability to hear the case. *LeVasseur v. Com.*, 225 Va. 564 (1983), cert. denied, 464 U.S. 1063 (1984). Questions must

be permitted if the answer to such question will necessarily disclose or clearly lead to a disclosure related to any of the four criteria listed above. *Id*. Counsel is wise to filter all potential *voir dire* questions through these criteria when preparing for trial.

The second way to remove a potential juror is through the peremptory challenge. Under Virginia law, each side is allowed three peremptory challenges. See Virginia Code § 8.01-359. Because the trial court has wide discretion to allow or overrule a peremptory challenge, counsel should have a reasonable, articulable basis for any attempted strike on peremptory grounds ("your honor, juror #3 has acknowledged that he could not view my client's position fairly as a result of his service as a military police officer..."). While peremptory challenges need not be for perceived bias or prejudice, there are increasingly strict limitations on peremptory challenges as well. For example, after *Batson v. Kentucky*, 476 U.S. 79 (1986), peremptory challenges exercised against minorities, women and persons of certain national origins may be strictly scrutinized to ensure that they are not being wielded for discriminatory reasons.

Counsel who believes that a juror has been struck for illegitimate reasons must first establish a *prima facie* case of purposeful discrimination by showing that the juror is a member of a cognizable racial, gender or ethnic group. This showing is significantly enhanced if there are other factors present, such as a pattern of similar strikes or if the client is a member of such a class. If counsel succeeds in raising an inference of discrimination, the burden shifts to the opposing party to provide a neutral explanation for the apparently discriminatory challenges. If counsel can articulate a neutral reason ("your Honor, the juror came to court in cut-off shorts and I do not feel she is taking the process seriously"), the third step is the determination by the trial court as to whether or not the peremptory challenges at issue were a result of purposeful discrimination. A party must raise an objection establishing a *prima facie* case of discriminatory intent before the jury is empanelled, the jury venire is dismissed and the trial begins.

"Thus, voir dire (Old French, to speak the truth) is the advocate's chance to dismiss those jurors who she believes may be less-than-favorable to her client's position."

OPENING STATEMENT

It is customary for a court to permit parties an opening statement that allows each side to forecast what they believe "the evidence will show."

Counsel must have a good faith basis to believe the facts and evidence he refers to in his opening statement will be offered and admitted into evidence during the trial. *Arrington v. Commonwealth*, 10 Va. App. 446 (1990). However, opening statements do not constitute evidence, and the introduction of irrelevant or prejudicial issues by counsel during opening statements can be grounds for a mistrial. *Westlake Properties, Inc. v. Westlake Pointe Prop. Owners Ass'n, Inc.*, 273 Va. 107 (2007). Further, it may be error to attempt to "forecast" what the evidence will show if that evidence will be subject to a legitimate objection by the other side. *Riverside Hosp., Inc. v. Johnson*, 272 Va. 518 (2006) (where plaintiff displayed bar graphs with information about patient falls and trial court overruled defendant's objection, error occurred but it was harmless under the circumstances). Because matters in opening statements are not evidence, improper comments made in opening cannot "open the door" for the other side to introduce otherwise inadmissible material into the record. *Bynum v. Commonwealth*, 28 Va. App. 451 (1998).

Counsel may not use opening statements to argue questions of law. *Lam v. Lam*, 212 Va. 758 (1972). However, it is an error for a court to interrupt counsel during opening statement to advise that counsel is misstating the law. *Id.* Rather, the trial judge should admonish counsel to not argue questions of law at all during the opening. *Id.* This does not necessarily preclude counsel from discussing the elements of a claim or defense, so long as the discussion is couched in terms of what evidence is expected to relate to the relevant points. Counsel should be very wary, however, if there is any disagreement about what jury instructions are likely to govern the case at the conclusion of the evidence. It is also appropriate to mention which side has the burden of proof, though a short and plain statement to this effect should suffice.

The deliberate mention of insurance in the opening statement is not permitted and may be reversible error, and thus any reference to insurance should be avoided. *Forsberg v. Harris*, 238 Va. 442 (1989); *compare Lombard v. Rohrbaugh*, 262 Va. 484 (2001) (finding that when a witness consults for or is employed by an insurance company that has potential liability in the case, cross-examination to show the witness's interest or bias is appropriate). However, Plaintiff's counsel may mention the *ad damnum*, the amount sued for in an action. *Phillips v. Fulghum*, 203 Va. 543 (1962); Virginia Code § 8.01-379.1.

"Counsel may not use opening statements to argue questions of law."

- Lam v. Lam, 212 Va. 758 (1972)

Counsel must take care to remain balanced in her remarks, and prejudicial statements made in an opening statement may be grounds for mistrial. *Carter v. Shoemaker*, 214 Va. 16 (1973). Prejudice is best measured by whether the remarks involve matters that may reasonably be expected to come into evidence; if yes, the prejudice may be nil or *de minimis*; if no, then counsel should expect her remarks to be interrupted or subject to a motion for mistrial. *Id*. It is not appropriate to appeal to the personal circumstances or prejudices of the jurors themselves, nor is it appropriate to urge jurors to "teach lessons" to one party or another. A useful rule for opening and closing statements is based on the notion that jurors are empanelled to be the judges of the facts. Asking them to step outside of that well-established role is probably going to cause a problem.

It is improper for a trial court to grant a motion to strike the plaintiff's evidence after opening. *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P'ship*, 253 Va. 93 (1997).

THE RECEIPT OF EVIDENCE

The order of proof in a civil case typically follows the protocol that the party with the overall burden of proof (the plaintiff) presents evidence first, followed by the defendant's evidence and a rebuttal case by the plaintiff.

The judge retains complete discretion, however, to order the proceedings as he sees fit under the circumstances. *Floyd v. Commonwealth*, 219 Va. 575 (1978). Judges are free, for example, to make preliminary determinations that evidence is relevant. *Claytor v. Anthony*, 27 Va. (6 Rand.) 285 (1828).

The "general rule is that a litigant is entitled to introduce all competent, material and relevant evidence which tends to prove or disprove any material issue raised." *Hepler v. Hepler*, 195 Va. 611 (1954). Evidence is offered in numerous ways, most typically through live testimony, reading *de bene esse* depositions, receiving documents and through judicial notice. Typically counsel must object contemporaneously to the receipt of any evidence thought to be objectionable or the objection will be waived. Va. Rules 5:25 and 5A:18; *Burns v. Board of Supervisors*, 224 Va. 354 (1984).

Relevance, and the mode and manner of presenting the various forms of evidence, is outside the scope of these materials. However, as a general matter evidence will be excluded if it is irrelevant, unfairly prejudicial, confusing, misleading, wasteful or cumulative.

"If counsel loses an argument objecting to evidence, she may request a limiting instruction."

- Hall v. Commonwealth, 233 Va. 369 (1987)

If counsel is denied the opportunity to introduce particular evidence, a proffer should be made. A proffer is an oral recitation, outside the presence of the jury, of what the evidence "would have shown." *See Whittaker v. Commonwealth*, 217 Va. 966 (1977). A proffer must either be an unchallenged avowal of counsel, a stipulation or it must involve the receipt of documents or testimony outside the presence of the jury. *Id.* Be wary, however. If counsel objects to evidence but then offers evidence on the same subject matter, the initial objection is waived. *Pettus v. Gottfried*, 269 Va. 69 (2005). This rule generally does not apply, however, to matters elicited in cross-examination or with respect to the introduction of rebuttal evidence. *Id.*

If counsel loses an argument objecting to evidence, she may request a limiting instruction. *Hall v. Commonwealth*, 233 Va. 369 (1987). This may be important where the evidence is relevant for one purpose but not another, or where it is relevant as to one party but not another (i.e., in conspiracy cases). *Meyer's Sons v. Falk*, 99 Va. 385 (1901).

› RECURRING ISSUES

Counsel on both sides of an issue should also be mindful of rules of fairness related to oral, written and recorded statements. It is not proper to use a portion of a statement under the impression that the court will keep the remainder of the statement out of evidence. Courts will not allow statements to be used out of context, so typically an entire statement will be admitted into evidence at the request of the other side if only part of a statement is offered in the first instance, *e.g., Stonestreet v. Doyle*, 75 Va. 356 (1881).

Under *Massie v. Firmstone*, 134 Va. 450 (1934), a party can be bound by material statements of fact within his personal knowledge and he cannot ask a factfinder to accept evidence that rises higher than his own testimony. However, *Massie* should not be applied mechanically, and stray remarks, interrogatory answers and deposition testimony are not conclusively binding on a party at trial so long as the witness has a reasonable explanation for any discrepancies. *Transilift Equipment Co. v. Cunningham*, 234 Va. 84 (1987). Testimony that is inconsistent with discovery responses should be weighed by the jury. *Id.*

MOTIONS TO STRIKE THE EVIDENCE

Motions to strike test the sufficiency of a party's evidence. Va. Rule 1:11. In ruling on such a motion, the trial court is not to weigh the evidence or judge its credibility, but instead should assume that it is true and draw all fair inferences in favor of the non-moving party. *Williams v. Vaughan*, 214 Va. 307 (1973).

The motion should be granted whenever it plainly appears that the trial court would have to set aside any jury verdict in favor of the party against whom the motion is made. *Meador v. Lawson*, 214 Va. 759 (1974); *CUNA Mut. Ins. Soc. V. Navy Yard Credit Union, Inc.*, 237 Va. 679 (1989). In short, the question may be restated as whether a reasonable jury, viewing the evidence in the light most favorable to the plaintiff, could return a verdict in favor of the plaintiff. It bears noting that factfinders are never required to consider evidence that defies logic and common sense. *Austin v. Shoney's, Inc.*, 254 Va. 134 (1997).

Motions to strike the evidence may be raised at least two times in the course of a trial, and three times if the motion for judgment *non obstante veredicto* is considered. The failure to make such a motion, at the proper time, can operate as a waiver. See *Daniels v. Morris*, 199 Va. 205 (1957).

1. **Motion to strike at the conclusion of the plaintiff's case.**

> *"A trial court in a civil action may enter a judgment notwithstanding the jury's verdict where the verdict is 'contrary to the evidence, or is without evidence to support it.'"*
>
> *– Va. Code Ann. § 8.01-430*

The Supreme Court discourages motions to strike before all the evidence has been received, and it has instructed trial courts not to grant motions to strike at this stage unless there is "no doubt" that the plaintiff has not proven any cause of action against the defendant. *Higgins v. Bowdoin*, 238 Va. 134 (1989); *West v. Critzer*, 238 Va. 356 (1989).

2. **Motion to strike at the conclusion of all the evidence.**

A defendant whose motion to strike at the conclusion of the plaintiff's case is denied must renew its motion after presenting its case; a defendant's failure to renew its motion to strike waives any objection to the sufficiency of the evidence. *McQuinn v. Commonwealth*, 20 Va. App. 753 (1995). When a defendant's motion to strike plaintiff's evidence is made or renewed at the end of all the evidence, in considering the motion the trial court may also consider the evidence presented during the defendant's case. *Austin v. Shoney's, Inc.*, 254 Va. 134 (1997). Nonetheless, the court must still view the evidence in the light most favorable to the plaintiff. *Id.*

3. **Motion for judgment non *obstante veredicto* after the jury returns a verdict.**

A trial court in a civil action may enter a judgment notwithstanding the jury's verdict where the verdict is "contrary to the evidence, or is without evidence to support it." Va. Code Ann. § 8.01-430. However:

> *[The trial court's power to set aside a jury's verdict] can only be exercised where the verdict is plainly wrong or without credible evidence to support it. If there is a conflict in the testimony on a material point, or if reasonable men may differ in their conclusions of fact to be drawn from the evidence, or if the conclusion is dependent on the weight to be given the testimony, the trial judge cannot substitute his conclusion for that of the jury merely because he would have voted for a different verdict if he had been on the jury.*
>
> – *Commonwealth v. McNeely*, 204 Va. 218 (1963); *Lane v. Scott*, 220 Va. 578 (1979); *Carter v. Lambert*, 246 Va. 309 (1993).

The recipient of the favorable verdict is entitled to the benefit of the doubt with respect to all substantial conflicts in the evidence, as well as all favorable inferences which may be reasonably drawn from the evidence. *Rogers v. Marrow*, 243 Va. 162 (1992).

CROSS-EXAMINATION

Cross-examination is at the core of the adversarial process. It is the heart of the Constitutional right to confront adverse witnesses, particularly insofar as the legal system permits adverse judgments to rest solely on the testimony of one or more fallible human beings whom the jury believes.

There are several basic rules to cross-examination:

- Questions are generally limited to the scope of direct examination.
- Questioning beyond the scope of direct may forfeit the ability to strike the evidence at the conclusion of the plaintiff's case.
- Impeachment of witnesses must occur by prescribed methods depending on whether the witness has made a prior inconsistent statement or is vulnerable to impeachment through collateral sources such as conviction of a felony or crime of moral turpitude. Counsel should be careful to observe the different rules applicable to these forms of cross-examination.

Solid cross-examination begins with a thorough understanding of the case at hand, distilled further to the *handful* of key points the lawyer must establish to win. These points must be thought through and identified before the questions begin, and preferably as early as possible in the life of the case. In this way, counsel can filter everything a witness says through his or her theory of the case and decide whether it is even necessary to ask any questions at all. Sometimes the "best cross is no cross." Wasting time, asking tangential questions about fringe issues or trying to score points by revealing minor inconsistencies in a witness' story will usually backfire.

It is not possible to detail the many extremely effective techniques that can be used to deal with a given witness or issue. Like a mechanic's tools, the litigator's arsenal includes styles and formats of questioning that should vary depending on such factors as: (a) whether the witness is a *bona fide* liar or just forgetful; (b) whether the witness is an eyewitness or just a representative; (c) whether the witness is necessary to establish the accuracy of test results or the content of

reports; (d) whether the witness will likely be cooperative or not; (e) whether the surprise statement the questioner just heard should be ignored, or whether the statement needs to be isolated (damage control) or expanded upon (if helpful); (f) any bias of the witness. Just as important, the questioner should always consider whether each and every question is really necessary. Even helpful questions should sometimes be jettisoned if a reasonable judgment is made that the case is not going to get much better if the question is asked.

CLOSING ARGUMENT

Few professional activities have achieved the status of closing argument in American popular culture, at least as evidenced by innumerable movies and television programs.

The problem with such portrayals, however, is that actors can say and do just about anything. Lawyers are governed by particular rules that, while relatively loose, are nonetheless important to know and understand. Among them are the following:

- Although closing statements involve argument, the evidence that is argued must be in the record, or fairly inferred from the record. *Velocity Express Mid-Atlantic v. Hugen*, 266 Va. 188 (2003).
- It is improper for counsel to ask the jury to place themselves in the position of the plaintiff (i.e., the "Golden Rule" argument). *Seymour v. Richardson*, 194 Va. 709 (1953).
- It is improper for counsel to make arguments that inflame a jury's economic fears and passions. *Southern Railway Co. v. Simmons*, 105 Va. 651 (1908) (discussing relative poverty of counsel's client vs. the wealth of the defendant and citing it as a reason to reward the plaintiff). A variant is the "per diem" argument, which asks the jury to award damages based upon a daily, weekly, yearly or other fixed basis. *Reid v. Baumgardner*, 217 Va. 769 (1977). The law requires that a plaintiff be fairly compensated on the basis of the facts in evidence if the defendant is liable; it forbids an award based on irrelevant economic circumstances. *Velocity Express, supra.*

- It is improper for counsel to argue his/her personal beliefs to the jury. *Jones v. Commonwealth*, 218 Va. 732 (1978).
- It is improper to "bolster" the credibility of a witness or the facts of a case by, for example, arguing facts that counsel suggests are known only to her but not to the jury. *United States v. Sanchez*, 118 F.3d 192 (4th Cir. 1997).
- It is improper to vouch for the credibility of a witness, for example by stating that "I've known Mr. Jenkins since he was three. He never lies." *See Ward v. Commonwealth*, 264 Va. 648 (2002); *United States v. Sanchez, supra.*

If there is a single unifying principle to closing law, it is that the factfinder (jury or judge) has a duty to receive and consider admissible *evidence of record* neutrally and to return a fair-minded verdict based on that neutral evaluation. Therefore, any attempt to cause a factfinder to stray from that neutral role, or from the record, is almost certainly going to be improper and may lead to an objection or even a motion for a mistrial. As the Virginia Supreme Court stated approximately 90 years ago, in a summary of closing law that has scarcely been equaled:

> *[An attorney] must be just to opposing litigants and witnesses and always respect their rights. His liberties in argument are large but they are not unlimited. He has no right to testify in argument nor to assume that there is evidence which has no existence, nor to urge a decision which is favorable to his client by arousing sympathy, exciting prejudice, or upon any ground which is illegal. Sometimes the impropriety is so serious in character that its evil effect cannot be corrected by the trial judge. If this ethical rule is not sufficient to control those who fail to observe it, the courts, however reluctant they may be to limit the freedom of discussion, or to penalize a litigant for the transgression of his attorney, will be forced to curb this growing evil.*
>
> – *Atlantic Coast Realty v. Robertson's Executor*, 135 Va. 247 (1923).

JURY INSTRUCTIONS

Despite many cases over many decades addressing the question of whether a particular jury instruction was proper, an oft-overlooked element of trial preparation concerns jury instructions.

In Virginia, there are fairly standard instructions for most issues. However, even the model instructions sometimes fail to keep up with changes in the law and must be considered carefully. More importantly, there is a statutory right for counsel to draft and submit custom instructions. Va. Code §8.01-379.2 ("a proposed jury instruction submitted by a party, which constitutes an accurate statement of the law applicable to the case, shall not be withheld from the jury solely for its nonconformance with the model jury instructions").

MAKING A RECORD FOR APPEAL

In some instances, counsel get so caught up in the trial that they forget to create a record that would aid their appeal.

When a record is sparse, it is more difficult for the Supreme Court of Virginia to make a determination of whether an appeal is actually warranted. Examples of pitfalls follow.

In *Smith v. Byungki Kim*, 277 Va. 486 (2009), both parties cited a jury instruction that, while more than likely had been proffered to the trial court, had not been entered into the court's record. Although both parties cited to the same language in the jury instruction, and both parties' briefs were based on that jury instruction, the Supreme Court of Virginia refused to consider the arguments of either side.

The appellant is responsible for ensuring the record is complete on appeal. *See Prince Seating Corp. v. Rabideau*, 275 Va. 468 (2008); *Pettus v. Gottfried*, 269 Va. 69 (2005). To ensure a record is complete, appellants should review the trial court's record prior to appealing their case. If appellant finds the record deficient, he may petition the trial court to correct the matter. *Cf.* Rule 5:10(b).

"When a record is sparse, it is more difficult for the Supreme Court of Virginia to make a determination of whether an appeal is actually warranted."

In addition to a paper record, and as discussed in the section on the receipt of evidence, counsel need to ensure they preserve objections on the record during a trial as well. In *Graham v. Cook*, 278 Va. 233 (2009), appellant argued that the trial court improperly limited his cross-examination of a witness. Although appellant, in his brief, indicated the questions he would have asked the witness, the Supreme Court of Virginia could not make a determination of whether that exclusion was improper because the appellant did not proffer on the record the questions and testimony he wished to elicit from the witness. *See also King v. Cooley*, 274 Va. 347 (2007); *Williams v. Harrison*, 255 Va. 272 (1998); *Chappell v. Virginia Elec. and Power Co.*, 250 Va. 169 (1995).

TIME LIMITS FOR NOTING AND PERFECTING AN APPEAL

The time limits proscribed in the Rules of the Supreme Court of Virginia are mandatory, and, therefore, an appeal will be denied if the attorney fails to perform the tasks required of him within the applicable time limits.

KEY TIME LIMITS FOR THE SUPREME COURT OF VIRGINIA

The notice of appeal, petition for appeal, and petition for rehearing deadlines are mandatory, and will result in a dismissal of the appeal if they are not adhered to. See Rule 5:5.

- You must file your notice for appeal within 30 days of the final order. Rule 5:9.
- You must file your petition for appeal within 3 months of the entry of the final judgment. Rule 5:17(a).
- You must file your petition for rehearing within 14 days of the Court's denial of your appeal. Rule 5:20(a).
- **Remember:** If you need an extension of time, it must be filed within the original deadline, cannot exceed 30 days, and will only be granted if two Justices of the Court concur. Rule 5:5.

A petition for appeal must be filed within three months of the entry of the final judgment in the circuit court. Rule 5:17(a). The petition must contain a separate heading, under which lists the Assignments of Error below, with reference to the pages of the transcript, record, or written statements of fact. Rule 5:17(c)(1). Additionally, the petition should have a Table of Contents and Table of Authorities section, a section outlining the Nature of the Case and Material Proceedings Below, a Statement of Facts, and an Authorities and Argument and Conclusion section. Rule 5:17(c)(3)–(7). A filing fee should accompany seven copies of the petition. Rule 5:17(d), (e). The petition should not exceed 35 pages, excluding the cover page, table of contents, table of authorities, and certificate. Rule 5:17(f). If the Court denies the petition for appeal, the petitioner may file a petition for rehearing within fourteen days of the date of the notice of denial. Rule 5:20.

"That in controversies respecting property, and in suits between man and man, the ancient trial by jury is preferable to any other and ought to be held sacred."

– VIRGINIA DECLARATION OF RIGHTS, ART. 11

"That those alone may be servants of the law who labor with learning, courage, and devotion to preserve liberty and promote justice."

– INSCRIPTION, C. 1932, THE OLD LAW SCHOOL (CLARK HALL) AT THE UNIVERSITY OF VIRGINIA

Cameron / McEvoy PLLC

Cameron/McEvoy, PLLC
11325 Random Hills Road, Suite 200
Fairfax, Virginia 22030

703.273.8898

www.CameronMcEvoy.com