Judges' Panel:

Winning Your Point Without Losing Your Appeal

The Honorable Junius P. Fulton, III
The Honorable Stacey Williams Moreau
The Honorable J. Michael Gamble (Ret.)
Mark S. Lindensmith, moderator

Winning Your Point Without Losing Your Appeal

(What Causes Judges to Resist an Advocate Who Has Gone Too Far?)

Circuit Court Judges Panel – 2015

I've gotta get it right the first time
That's the main thing
I can't afford to let it pass
You get it right the next time that's not the same thing
Gonna have to make the first time last.

-- Billy Joel, "Get It Right the First Time"
From *The Stranger* album (1977)

Sometimes attorneys don't get it right the first time, and sometimes judges don't get it right the first time. It is important, however, that the trial judge be given **the opportunity** to get it right. Otherwise, you have not preserved the issue properly for appeal. An appellate court cannot review a lower court's failure to do what it was not asked to do. *See Williams v. Gloucester Sheriff's Department*, 266 Va. 409, 411 (2003); and *Reid v. Baumgardner*, 217 Va. 769, 773 (1977). The Supreme Court in the *Williams* case said:

> The contemporaneous objection rule, embodied in Rule 5A:18 in the Court of Appeals and Rule 5:25 in this Court, is based on the principle that **a litigant has the responsibility to afford a court the opportunity to consider and correct a perceived error before such error is brought to the appellate court for review**. *Reid v. Baumgardner*, 217 Va. 769, 773, 232 S.E.2d 778, 781 (1977). The contemporaneous objection rules in each court exist "to protect the trial court from appeals based upon undisclosed grounds, to prevent the setting of traps on appeal, to enable the trial judge to rule intelligently, and to avoid unnecessary reversals and mistrials." *Reid v. Boyle*, 259 Va. 356, 372, 527 S.E.2d 137, 146 (2000) . . . . These rules are not limited to evidentiary rulings and require objection while the tribunal is in a position to correct a claimed error. *Id*.; *Reid v. Baumgardner*, 217 Va. at 774.

266 Va. at 411 (emphasis added; some citations omitted).

In order to help the trial court get it right the first time, you will have to do certain things:

1. **Make your objection and make sure the judge understands your objection.**

-- Your objection must be raised with enough specificity to the put the trial court on notice and the opposing party on notice as to what the objection is, and the grounds for the objection. *See Harlow v. Commonwealth*, 195 Va. 269, 273 (1953). As stated in *Maxwell v. Commonwealth*, 287 Va. 258, 264-265 (2014):

> The purpose of the contemporaneous objection rule "is to avoid unnecessary appeals by affording the trial judge an opportunity to rule intelligently on objections." *State Highway Comm'r v. Easley*, 215 Va. 197, 201, 207 S.E.2d 870, 873 (1974). **For the circuit court to rule intelligently, the parties must inform the circuit court "of the precise points of objection in the minds of counsel."** *Gooch v. City of Lynchburg*, 201 Va. 172, 177, 110 S.E.2d 236, 239-40 (1959).

(emphasis added).

-- Make sure the court fully understands your objection. *See Reid v. Baumgardner*, 217 Va. at 773; and *Marshall v. Goughner*, 221 Va. 265, 269 ((1980) (in case involving objection to proffered jury instruction, "[t]here could have been no misunderstanding by the trial court of the basis of the objection").

2. Make your objection <u>and</u> get a ruling.

Making your objection and making sure the court understands it is part of the job. The rest of the job is to make sure you get a ruling from the trial court. *See Taylor v. Commonwealth*, 208 Va. 316, 324 (1967) (objection was not preserved for appellate review; there was no ruling by the trial court on the objection, and counsel for defendant did not insist that the court rule).

-- Note that you **do not** have to keep repeating your objection or make a formal exception to the court's ruling in order to preserve the objection to the ruling. *See* Va. Code § 8.01-384 (A); and *King v. Commonwealth*, 264 Va. 576, 581 (2002). But you do, at a minimum, have to

actually get a ruling from the trial court on the record. If it's not clear that you have obtained a ruling on the point (either positive or negative), then respectfully ask for one.

3. If evidence you sought to introduce is excluded, make a proffer.

If your proposed evidence is excluded, or if your proposed argument on a particular point is not allowed and you want to preserve the issue for a possible appeal, you must proffer the evidence or argument to the trial court and put it in the record to show what you would have done or what the evidence would have been. *See Dade v. Anderson*, 247 Va. 3, 8 (1994) (where record failed to show what amendments to pleadings a party would have made, appellate court could not determine whether the trial court abused its discretion); and *Niese v. Klos*, 216 Va. 701, 705 (1976) (same). If you make the proffer during a sidebar or out of the presence of the jury, be sure to remember to have the court reporter put the colloquy with the court and the proffered testimony or argument into the record. If it's not in the record, then the appellate court cannot rule on it.

4. Do not waive your objection.

Va. Code § 8.01-384 (A) makes reasonably clear that you **will not** have waived your objection as long as you've made it and obtained a ruling (i.e., you do not have to make your objection again). And a party will not be deemed to have agreed to or acquiesced in any written order of the court "except by express written agreement in his endorsement of the order." § 8.01-384 (A). In other words, as long as you have made your objection and obtained a ruling, you will not be deemed to have waived your objection by simply endorsing the final order as "seen," without further objection. *See Helms v. Manspile,* 277 Va. 1, 6 (2009). As state by the *Helms* Court:

> Once a litigant informs the circuit court of his or her legal argument, "[i]n order for a waiver to occur within the meaning of Code § 8.01-384(A), the record

> must affirmatively show that the party who has asserted an objection has abandoned the objection or has demonstrated by his conduct the intent to abandon that objection." *Shelton v. Commonwealth*, 274 Va. 121, 127-28, 645 S.E.2d 914, 917 (2007); *see King v. Commonwealth*, 264 Va. 576, 581, 570 S.E.2d 863, 865-66 (2002) . . . .
>
> Clearly, pursuant to Code § 8.01-384(A), the Helms preserved their right to challenge on appeal the ruling of the circuit court. As agreed upon by the circuit court, the Helms submitted a written memorandum and argued that they owned the title to Parcel 2 by adverse possession. The trial court was well aware of the Helms' legal positions and the Helms did not expressly withdraw or waive their arguments.

277 Va. at 6 (some citations omitted).

-- So, even though the endorsement of an order as "seen" should be sufficient to preserve an objection or argument that was stated with reasonable certainty at the time of the ruling, it can't hurt to endorse the order as "seen and objected to."

-- Unless you have made a clear objection on the record, though, even a general endorsement objection such as "seen and objected to" might be considered a waiver under § 8.01-384 (A).

-- To be safe rather than sorry, the better practice would be to note your specific objections and exceptions when endorsing the order pursuant to Rule 1:13.

5. Move for reconsideration by the trial court.

You have made your objection or argument to the trial court, you think you've given the right reasons for your position and made yourself reasonably clear, and you have obtained a ruling on the record. Unfortunately, the ruling did not bounce your way, and you still reasonably believe that the trial court did not get it quite right. Maybe you **did not** make your objection or argument as clearly as you thought you did. Maybe the judge's letter opinion now suggests that you should have emphasized these facts rather than those, or discussed this line of cases rather than those you cited in your brief to the court.

If you are still convinced that either you or the court didn't get it right the first time, you might try a motion for reconsideration (or call it a motion to reconsider) before the final order is entered or before the 21 days runs from entry of the final order. *See* Va. Sup. Ct. Rule 1:1 (trial court loses jurisdiction after 21 days from entry of the final order in the case).[1]

There are limitations, though, on a motion for reconsideration:

(a) You are not entitled to an oral argument hearing on a motion to reconsider. Oral argument will be granted only upon request of the trial court. *See* Va. Sup. Ct. Rule 4:15 (d).

(b) It has been stated time and again that motions to reconsider **are not favored**.

-- *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 403 (1985), where the Supreme Court stated:

> It is true that **a trial court may always, in its discretion, decide to reconsider a ruling** and that, when a demurrer is sustained, leave to amend should be liberally granted to further the ends of justice. . . . The trial court, however, retains discretion to deny a motion for leave to amend when it is apparent that such an amendment would accomplish nothing more than provide opportunity for reargument of the question already decided. ***The trial courts labor under increasing burdens, and judicial economy requires that litigants have one, but only one, full and fair opportunity to argue a question of law. The time required to hear a litigant reargue a question a second time must be taken from other litigants who are waiting to be heard. For this reason, motions to reconsider are not favored.***

(emphasis added).

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[1] Some judges might not take kindly to a motion for reconsideration immediately upon receipt of the letter opinion giving you the adverse ruling. *See, e.g.,* The Hon. Everett A. Martin, Jr., "Some Observations on Civil Motions in Circuit Courts," *The Journal of the Virginia Trial Lawyers Association,* Vol. 24, No. 2 at 9 (2013) ("The judge does not want to make an erroneous ruling. However, if you just do not like the judge's ruling – tough luck – no one wins all the time. Motions to reconsider are, it seems, sometimes filed immediately after receipt of the judge's letter opinion. **This is insulting**") (emphasis added).

Note, however, that if this motion is not done right away, or if a party waits until the final order is entered, then it is usually problematic whether the court would actually have time to set a hearing date (in the event he exercises his discretion and allows it under Rule 4:15 (d)), set a briefing schedule, receive briefs and consider them, and then decide the motion and issue a ruling all within the 21 days provided by Rule 1:1. As a practical matter then, you almost always have to file a Motion for an Order Suspending Judgment pursuant to Rule 1:1 simultaneously with your motion to reconsider – in order to give the parties and the trial court time to actually dispose of the motion to reconsider. And regardless of whether the judge might be insulted by the rather quick response to his letter ruling, you have to move fairly quickly if you want the court to consider your motion suspending judgment and your motion to reconsider.

-- *Board of Directors of the Tuckahoe Association, Inc. v. City of Richmond*, 43 Va. Cir. 358, 362, 1997 Va. Cir. LEXIS 391 (City of Richmond Cir. Ct. 1997) (Judge Markow) ("Motions for Reconsideration are not favored," the trial court citing and quoting *Hechler Chevrolet*; "[n]onetheless, the defendant now asks the court to consider various new factual and legal contentions in its Motion for Reconsideration;" despite his statement that such motions are not favored, however, Judge Markow went on to consider and address the arguments raised in the motion).[2]

-- *See Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983) (under Federal Rules, a plaintiff improperly uses a motion to reconsider to ask the court to rethink what the court has already thought through, "rightly or wrongly"). In *Above the Belt, Inc.*, the district court judge stated:

> It is clear, then, that there are circumstances when a motion to reconsider may perform a valuable function. **In this case no function at all, other than reiteration, was served by the motion.**
>
> Plaintiff asked the Court to reconsider that portion of the 6 July 1983 opinion which dealt with the legal significance, with respect to implied warranties absent privity, in the sale of goods vice the sale of services. In so doing, plaintiff simply reargued its previous argument. **Perhaps its new brief was better than its former brief but that is not significant. Plaintiff improperly used the motion to reconsider to ask the Court to rethink what the Court had already thought through -- rightly or wrongly.**
>
> The motion to reconsider would be appropriate where, for example, the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would

[2] Note, some colleagues have suggested that, because motions for reconsideration are not favored, and the term "reconsideration" carries the connotation that the judge did not "consider" the issue adequately or properly the first time around, you should label this kind of motion a "Motion for Rehearing." Query: Does that really make a difference? If you label the motion one for "rehearing," isn't the connotation that the judge didn't properly or adequately "hear" your argument or objection the first time? How is that better? Nevertheless, as stated by Judge Everett A. Martin, Jr.: "You should certainly file a motion to reconsider if the judge has made a *clear* error of existing law, if you have overlooked a controlling statute or case, or if *significant* facts have come to light after the hearing that were not known or could not have been discovered with diligence before the hearing." Hon. Everett A. Martin, Jr., *supra*, note 1 (emphasis in original).

be a controlling or significant change in the law or facts since the submission of the issue to the Court. **Such problems rarely arise and the motion to reconsider should be equally rare.**

(emphasis added).

-- *Buzzell v. JP Morgan Chase Bank*, 2014 U.S. Dist. LEXIS 128276 at *3-4 (E.D. Va. 2014):

> Plaintiff cannot simply "ask the Court to rethink what the Court ha[s] already thought through." *Above the Belt, Inc.* . . . And, "[w]hatever may be the purpose of Rule 59(e) it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge." *Durkin v. Taylor*, 444 F. Supp. 879, 889 (E.D. Va. 1977). . . .
>
> Plaintiffs have used Rule 59 inappropriately as suggested by their Motion. Plaintiffs are essentially trying to "get a second bit[e] of the apple" because they are seeking reconsideration of their prior motion for reconsideration. Indeed, Plaintiffs have filed a successive motion because they simply repeat the arguments made in the first motion for reconsideration. Unfortunately for Plaintiffs, "Rule 59(e) does not entitle [Plaintiffs] to a second bite at the apple"). *Hanover Ins. Co. v. Corrpro Cos*., 221 F.R.D. 458, 460 (E.D.Va. 2004).

2014 U.S. Dist. LEXIS 128276 at 3-4.

-- *King v. Capital One Bank (USA)*, 2012 U.S. Dist. LEXIS 172682 at *2-4 (W.D. Va. 2012), the district court denying plaintiff's motion to reconsider and stating:

> "Motions for reconsideration of interlocutory orders are not subject to the strict standards applicable to motions for reconsideration of a final judgment." . . . However, courts consider the same factors and generally do not grant such motions unless:
>
> > [T]he Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension . . . [or] a controlling or significant change in the law or facts since the submission of the issue to the Court [has occurred]. Such problems rarely arise and the motion to reconsider should be equally rare.
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> *McAfee v. Boczar*, No. 3:11cv646, 2012 U.S. Dist. LEXIS 90216, 2012 WL 2505263, at *2 (E.D. Va. June 28, 2012) (quoting *Above the Belt, Inc*. . . .); *see also Pender*, 2011 U.S. Dist. LEXIS 1838, 2011 WL 62115, at *1 ("Though motions for reconsideration of interlocutory orders are subject to a lower standard,

> they are appropriately granted only in narrow circumstances: (1) the discovery of new evidence, (2) an intervening development or change in the controlling law, or (3) the need to correct a clear error or prevent manifest injustice."). Furthermore, the power to reconsider "is committed to the discretion of the district court." *American Canoe*, 326 F.3d at 515 (citing *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp*., 460 U.S. 1, 12, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)).
>
> After a careful review of Plaintiff's arguments and my November 15 opinion, I find that Plaintiff has not met the high burden required to prevail on a motion for reconsideration. In the brief supporting her motion, **Plaintiff simply repeats the same arguments rejected in the November 15 opinion, or she seeks to introduce new arguments that she could have presented either in her earlier briefs or at the September 24 hearing held to discuss what issues could be decided prior to trial.**

2012 U.S. Dist. LEXIS 172682 at *2-4 (emphasis added).

-- *Durkin v. Taylor*, 444 F. Supp. 879, 889 (E.D. Va. 1977) (denying motion to reconsider under Fed. R. Civ. P. 59 (e), pertaining to motions to alter or amend judgments, because it was based on grounds that should have been brought up before judgment was entered, the court stating: "Since the plaintiff has brought up nothing new . . . this Court has no proper basis upon which to alter or amend the order previously entered. The **judgment may indeed be based upon an erroneous view of the law, but, if so, the proper recourse is appeal – not re-argument**") (emphasis added).

(c) Whether to grant a litigant's motion to reconsider is left to the discretion of the trial court, and the trial judge's decision whether to allow the parties to be heard (either orally or on briefs) will be reviewed on appeal under the abuse of discretion standard. *See Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. at 403-04 ("the trial court did not abuse its discretion by refusing to reconsider its ruling"); *see also Hawthorne v. VanMarter*, 279 Va. 566, 577 (2010) ("the circuit court's ruling declining to reopen the record and reconsider its ruling on the plea in bar was a discretionary determination").

Conclusion

Sometimes errors are harmless, and "[i]t has been well said that there is no such thing as a perfect trial. Every man is entitled to a fair trial and to nothing more . . . ." *Oliver v. Commonwealth*, 151 Va. 533, 541 (1928). Nevertheless, as serious minded men and women, attorneys and jurists, don't we have an obligation to at least aspire to "getting it right the first time?" That's the main thing. With that in mind, we can explore some additional and specific questions with our panel of judges – to determine, among other things, what causes judges to resist an advocate who has gone too far in trying to "get it right," and what going too far looks like from a judge's perspective.

Materials Prepared by Mark S. Lindensmith, moderator.

Potential Questions for Panel of Judges

1. Obviously, advocates must adequately preserve issues or errors for appeal. What do we mean when we say that an advocate has "gone too far" in attempting to correct a perceived error by the trial judge?

2. What do we mean when we say that an advocate has gone too far in attempting to preserve an issue or error for a potential appeal?

3. How far are you willing to go to let advocates repeat objections?

4. How far are you willing to go to let advocates state matters for the record?

5. How specific do you like objections to be? For example, do you prefer: "Objection. Hearsay."? Or do you prefer: "Objection. Hearsay and does not come within any exception. It's not a business record made in the regular course of business."?

6. If an advocate's argument (and tone) makes clear that he or she does not think you fully understand the objection or argument, is that insulting to you?

7. At what point do you cut off that argument?

8. How do you view a trial judge's responsibility to "get it right the first time," even in hard cases?

9. If an advocate objects, she must get a ruling from you on the record in order to preserve the issue for appeal. If you defer a ruling to some later time, do you rely on the attorneys to remind you make the ruling?

10. Do you have your own "tickler" system to remind you to actually rule on outstanding issues during a trial?

11. How far are you willing to go to let advocates make a proffer of evidence or an argument that you've excluded?

12. Do you let the attorney proffer the entire testimony or evidence you've excluded, or do you cut if off at some point? For example, at the point where, in your judgment, the gist of the evidence or argument should be sufficiently clear for appellate review?

13. Can you really make that call, or do you think you should allow the attorney to put on the entire portion of the evidence you've excluded?

14. Do you regularly allow the court reporter to record sidebar conferences and proffers of excluded evidence in order to make them part of the record, or do you rely on the attorneys to make sure that happens?

15. Do you regularly allow motions for reconsideration in your court?

16. If you do entertain motions for reconsideration, do you usually allow an oral argument hearing? Seldom allow them? Never allow them?

17. Do you agree with this statement?: "Judicial economy requires that litigants have one, but only one, full and fair opportunity to argue a question of law." *Hechler Chevrolet, Inc. v. GMC*, 230 Va. 396, 403 (1985).

18. Do you think an advocate should ever be allowed to use a motion to reconsider to ask a court to rethink what the court has "already thought through – rightly or wrongly"? *See Above the Belt, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983).

19. What does it take for you to make the determination that you didn't get it right the first time, and that a motion to reconsider should be granted and your original ruling should be reversed?

20. Do you consider it insulting if a party files a motion for reconsideration as soon as he or she get's your adverse letter ruling?

21. When a party files a motion to reconsider, do you usually automatically grant a motion for an order suspending judgment under Rule 1:1?

22. Do you ever grant such motions for an order suspending judgment?

23. Do you think it matters or should matter that a motion is labeled a "Motion for Rehearing" rather than a "Motion to Reconsider?"

24. Not everybody has their best day all the time when briefing or arguing motions or objections. Do you think a motion for reconsideration should ever be allowed simply because a party now has an opportunity to present a more coherent brief or argument on the motion for reconsideration?

25. What if it seems apparent from a review of the motion that allowing further briefing and argument might allow you to get the issue right (if not the first time, at least before you lose jurisdiction), without the necessity of appeal by the parties?

26. Are you a strict adherent to the view that motions to reconsider are not favored, and that a party should be allowed one fair chance to make their argument, but not two?