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Procedural Default: A De Facto Exception to Civility?

Ashley Flynn*

I. Introduction

Webster's Dictionary defines civility as "deference or allegiance to the social order befitting a citizen . . . observance of the forms of accepted social behavior or adequate perfunctory politeness."[1] Many scholars and observers note that this quality is especially lacking in modern American courtrooms among litigants, witnesses, observers, and members of the bar.[2] The decline in civility among lawyers has been attributed to many different factors, including: growth in the profession;[3] admission of poorly trained lawyers to the bar;[4] a general societal move toward incivility;[5] gender bias after the admission of women to the bar;[6] and a rise in "hardball" litigation tactics.[7]

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1. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 413 (1993).

2. *See generally* Kara Anne Nagorney, *A Noble Profession? A Discussion of Civility Among Lawyers*, 12 GEO. J. LEGAL ETHICS 815 (1999) (discussing the decline in lawyer civility); John W. Frost, *The Topic is Civility- You Got a Problem With That?*, FLA. B. J., Jan. 1997 (suggesting ways to combat incivility in the legal profession); Catherine Therese Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945 (1991) (surveying courtroom etiquette in Maryland).

3. *See* Thomas Gibbs Gee & Bryan A. Garner, *The Uncivil Lawyer*, 15 REV. LITIG. 177 (1996) (discussing the dramatic expansion of the bar as one explanation for incivility in the courtroom). The authors propose that the decline in the sense of community among members of the bar lessens the need to behave civilly. With the growth in the bar, the necessity of continuing professional relationships is diminished. *Id.* at 181.

4. *See* Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62. Burger proposed that one-third to one-half of attorneys are not qualified: "[T]his contributed to large cost and delays in the courts. We know that a poorly trained, poorly prepared lawyer often takes a week to try a one- or two-day case." *Id.* at 64.

5. *See* Frost, *supra* note 2, at 8. Frost argues that societal ill is not an excuse for incivility in the bar. *Id.*

6. *See* Clarke, *supra* note 2, at 1009-11 (noting that some judges hold female attorneys to a higher standard of courtroom etiquette than they do male attorneys).

7. *See* Stephanie B. Goldberg, *Playing Hardball*, A.B.A. J., July 1987, at 48. ("Hardball is the name of the legal game. It explains why lawyers do things that might strike those

This article explores the relationship between this perceived rise in lawyer incivility and the heightened procedural bars that Virginia courts employ for claims on appeal. Section two of the article focuses on the historical ideal of civility in the courtroom; section three discusses modern conceptions of civility; and sections four and five consider how procedural bars factor into the declining standard of civility.

II. History

In the nineteenth century there was little regulation of the legal profession apart from common law precedent.[8] Aspirational essays such as George Sharswood's "An Essay on Professional Ethics"[9] offered some informal structure to the ethical and professional considerations during this time.[10] Sharswood formulated the "gentleman-lawyer" ideal that served as the model for many early ethics codes.[11] Implicit in these early standards of the legal profession was this ideal of the lawyer-statesmen.[12] This ideal served as a goal for those studying to become lawyers.[13]

Around the turn of the century, states began to adopt formal ethics codes, which were written in very broad language.[14] However, these codes were not viewed so much as rules; rather, they were looked upon as goals.[15] In fact, there is a sense that lawyers in the past ascribed to unwritten rules of tradition in their courtroom behavior. In 1984, Former Chief Justice Warren E. Burger noted:

> The professional standards and traditions of the bar in the past served to restrain members of the profession from practices and customs common and acceptable in the rough-and-tumble of the marketplace. Historically, honorable lawyers complied with traditions of the bar and refrained from doing all that the laws or the Constitution allowed them to do.[16]

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outside the profession as mean spirited and just plain tacky.").

8. GEOFFREY C. HAZARD ET AL., THE LAW AND ETHICS OF LAWYERING 13 (3d ed. 1999).

9. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed., Fred B. Rothman & Co. 1993) (1896).

10. James E. Moliterno, *Lawyer Creeds and Moral Seismography*, 32 WAKE FOREST L. REV. 781, 787 (1997).

11. *Id.* at 788. *See* Sharswood, *supra* note 9.

12. Nagorney, *supra* note 2, at 817. Nagorney cites the gradual change in law, from a profession to a business, as a reason for the disappearance of this ideal. *Id.*

13. *Id.*

14. Hazard, *supra* note 8, at 13.

15. Moliterno, *supra* note 10, at 788. One problem with articulating the standards of conduct for past generations of the bar is that these traditions and standards of courtroom etiquette were largely unwritten.

16. Burger, *supra* note 4, at 63.

These professional traditions of the bar encompassed, to a large extent, the concept of civility or good sportsmanship between the adversaries. Specific examples of behavior encouraged in the past include: absolute silence in the courtroom, addressing all spoken words to the judge rather than opposing counsel, standing when making an objection, using formal titles when addressing the bench as well as witnesses, and refraining from interrupting opposing counsel in the midst of an argument.[17]

Much of the evidence of a higher standard of civility in the past is anecdotal.[18] However, there is no shortage of such accounts. For example, in a 1939 journal the legal profession was seen to embody good sportsmanship: "[N]o profession is so imbued with the chivalry of combat as is the law. . . . It does not engender hatreds, jealousies, and envy. It does produce respect, proper appraisement of ability, and warm friendship."[19] Evidence of a previously higher standard is also reflected in the current press and public's perception of the profession.[20] For example, lawyers are often perceived as being personally antagonistic when they employ "hardball litigation" tactics.[21]

III. Current Notions of Civility

In spite of this much-discussed rise in incivility, bar associations still pay homage to these ideals of civility. For instance, the preamble to the Virginia Bar Association[22] Creed states:

> The practice of law is and must remain a profession. As members of an honored profession, lawyers are expected to exhibit the highest standards of honesty and integrity. In addition, lawyers must strive to achieve a sense of personal honor which should be manifested, in part, by a vigorous devotion to civility in the courts, to clients and to other lawyers. Courtesy is neither a relic of the past nor a sign of less than fully committed advocacy. Courtesy is simply the mechanism by which lawyers can deal with daily conflict without damaging their relationships

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17. Clarke, *supra* note 2, at 987-997. Clarke surveyed Maryland judges for their opinions on courtroom etiquette. The above examples are some of the areas in which the judges recognized a decline in the unwritten standards of courtroom etiquette.

18. Gee & Garner, *supra* note 3, at 191.

19. *Id.* at 178 (quoting D.A. Frank, *Good Sportsmanship*, 2 TEX. B.J. 357 (1939)).

20. *See* Burger, *supra* note 4, at 62-63. *See also* Moliterno, *supra* note 10, at 782-84 ("Lawyers, as well as the public, recognize the need for more integrity and civility in the legal profession.").

21. *See* Goldberg, *supra* note 7, at 48. Goldberg quotes a Chicago attorney's definition of hardball as "when a lawyer, whether plaintiff's or defense, is personally antagonistic or insistent on all of the procedural rules being followed." *Id.*

22. The Virginia Bar Association is a voluntary professional association, not the regulator of the state bar.

> with their fellow lawyers. Toward that end, lawyers should aspire to the . . . Principles of Professionalism.[23]

Attorneys in Virginia also receive guidance about courtroom behavior from the Ethical Considerations included in the Virginia Code of Professional Responsibility.[24] These ethical considerations are aspirational in nature and "represent the objectives toward which every member of the profession should strive."[25] For example, Ethical Consideration 7-33 suggests that courtroom proceedings should be "dignified" and "orderly" and that a lawyer "should not engage in any conduct that offends the dignity and decorum of proceedings."[26] In addition, the recently adopted Rules of Professional Conduct (which modify the Code of Professional Responsibility) will serve to guide courtroom behavior.[27]

IV. Double Standard in Gray v. Netherland

One of the most pointed examples of the decline in civility is seen in *Gray v. Netherland*.[28] In *Gray*, the prosecutor informed defense attorneys

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23. *Virginia Bar Association Creed* (visited Apr. 4, 2000) <http://www.vba.org//creed.htm>.

24. The Virginia Code of Professional Responsibility was amended by the adoption of The Virginia Rules of Professional Conduct, effective January 1, 2000. *See* VA. SUP. CT. R. PT. 6 § 2.

25. Preamble, VA. CODE PROF. RESP. (1999).

26. VA. SUP. CT. R. PT. 6 § 2, CODE PROF. RESP., EC 7-33. This section is amended by VA. SUP. CT. R. PT. 6 § 2, R. PROF. CONDUCT 3.5. Rule 3.5(f) states that a "lawyer shall not engage in conduct intended to disrupt a tribunal." This paragraph is new and its application is broader than that of the Code section it amends. The Code proscribes such conduct only if it would violate a rule of evidence or procedure. VA. CODE PROF. RESP. DR 7-105 (C)(5). The comment to Rule 3.5 states:

> The advocate's function is to present evidence and arguments so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. . . . An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

VA. SUP. CT. R. PT. 6 § 2, R. PROF. CONDUCT 3.5(f) cmt. 2. As this rule is so recently adopted, no reported cases have yet interpreted it.

27. *See supra* note 26. The Rules of Professional Conduct omit the Code requirement that lawyers "zealously" represent their clients. VA. CODE PROF. RESP. DR 7-101. Rule 1.3 (a) states that "a lawyer shall act with reasonable diligence and promptness in representing a client." VA. SUP. CT. R. PT. 6 § 2, R. PROF. CONDUCT 1.3. Thomas Spahn has noted that the "diligence requirement represents a broader concept than the zealous representation standard of the . . . Code and includes use of collaborative strategies when appropriate." Thomas E. Spahn, *Detailed Comparison Chart: Substantive Differences Between the Virginia Rules of Professional Conduct and Code of Professional Responsibility*, *in* THE NEW VIRGINIA RULES OF PROFESSIONAL CONDUCT-A COMPARISON WITH THE CODE, VIRGINIA C.L.E., Apr. 1999, at 8.

28. Gray v. Netherland, 518 U.S. 152, 166-170 (1996) (holding that petitioner's notice

at the start of the trial that if Gray were found guilty, the Commonwealth would introduce at sentencing Gray's statements about his participation in an unsolved murder.[29] On the evening that Gray was convicted of capital murder, however, the prosecutor told Gray's attorneys that the Commonwealth now intended to introduce additional evidence about the unsolved murder.[30] The sentencing phase of the trial began the next morning.

Gray's attorney made two motions to exclude this additional evidence.[31] In addition, the attorney explained that he was not "prepared for any of this [additional evidence], other than [that the petitioner] may have made some incriminating statements" and that the "defense was taken by surprise."[32] Although Gray asked for more time to prepare for the additional evidence, he did not specifically request a continuance.[33] The court denied the motions to exclude and did not provide Gray's attorney any more time to prepare. A jury sentenced Gray to death based upon the future dangerousness predicate of the Virginia capital murder statute.[34]

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of evidence claim was barred because it was not raised in earlier proceedings).

29. *Id.* at 156-57. Defense counsel requested disclosure of evidence relating to the unsolved murder pre-trial:

> Your Honor, this is my concern. We will probably at the very best stop in the middle of the day or late in the afternoon and start the penalty trial the next day. . . [W]e have good reason to believe that [the prosecutor] is going to call people to introduce a statement that our client supposedly made to another inmate that he murdered [the Sorrells] which were very violent and well-known crimes throughout this entire area. If it comes in we are going to want to know it in advance so we can be prepared on our argument. . . . It's absolute dynamite.

Id. at 172 (Ginsburg, J., dissenting) (internal citations omitted). In response to this request, the prosecutor specifically told defense attorneys that the only evidence he would introduce on this point were statements made by Gray to Tucker (his co-defendant) or fellow inmates about the unsolved murder. *Id.* at 157. The following conversation took place between the prosecutor and defense counsel in chambers before the trial commenced:

> MR. MOORE: Is it going to be evidence or just his statements?
>
> MR. FERGUSON: Statements that your client made.
>
> MR. MOORE: Nothing other than statements?
>
> MR. FERGUSON: To other people, that's correct. Statements made by your client that he did these things.

Id. at 173 (Ginsburg, J., dissenting) (internal citations omitted).

30. *Id.* at 174. This evidence included crime scene photos, testimony of a state medical examiner, and testimony of the investigating detective. *Id.*

31. *Id.* at 157. Counsel argued the evidence transcended the unadjudicated-crime evidence allowed under Virginia law because "[i]n essence, what [the prosecutor is] doing is trying [the unsolved] case in the minds of the jurors." *Id.* (internal quotation marks omitted).

32. *Id.* (internal citations and quotation marks omitted).

33. *Id.*

34. *Id.* at 158 & n.1. *See* VA. CODE ANN. § 19.2-264.2 (Michie 1999).

Gray's conviction and sentence were affirmed on appeal and his petition for state habeas relief was denied.[35]

In federal habeas proceedings, Gray alleged that the Commonwealth's late disclosure of the additional evidence made it impossible for defense counsel to prepare for or defend against the evidence.[36] The United States District Court for the Eastern District of Virginia granted the writ of habeas corpus on the grounds that Gray was denied due process of law.[37] The Fourth Circuit reversed.[38] The United States Supreme Court subsequently granted certiorari and split the issue.[39] The Court reasoned that Gray's due process claim was actually two distinct claims: a misrepresentation claim and a notice-of-evidence claim.[40] The Court held that the notice-of-evidence claim was barred because it would require application of a new rule of law.[41] The misrepresentation claim was remanded to the Fourth Circuit to determine both whether Gray raised the issue in earlier proceedings and whether the Commonwealth preserved any defenses to the claim.[42] On remand, the Fourth Circuit held that the misrepresentation claim was procedurally defaulted because it was not raised prior to being raised before the United States Supreme Court.[43]

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35. *Gray*, 518 U.S. at 158-59.

36. *Id.* at 159.

37. *Id.* at 160. The court stated that the Commonwealth's failure to provide fair notice of the evidence it intended to use denied Gray due process. *Id.*

38. Gray v. Thompson, 58 F.3d 59, 67 (4th Cir. 1995).

39. *Gray*, 518 U.S. at 162.

40. *Id.*

41. *Id.* at 169-70. *See* Teague v. Lane, 489 U.S. 288, 309 (1989) (concluding that application "of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality"). The *Gray* Court reasoned that defense counsel conceded to the admission of the additional evidence and further that his plea for additional time to prepare a defense did not constitute a motion for continuance. *Gray*, 518 U.S. at 167 nn.3-4. For that reason, the only way for Gray to have prevailed on this claim would have been to establish (1) that due process requires more than one day's notice of the evidence the Commonwealth intended to present and (2) that due process required a continuance regardless of whether counsel sought one. *Id.* at 167. *See generally* C. Cooper Youell, IV, Case Note, CAP. DEF. J., Fall 1996, at 4 (analyzing Gray v. Netherland, 518 U.S. 152 (1996)).

42. *Gray*, 518 U.S. at 166.

43. Gray v. Netherland, 99 F.3d 158, 159 (4th Cir. 1996). The court examined both the state and federal records and determined that Gray had not raised this claim in either forum. The court specifically noted that Gray did not claim he had been misled by the Commonwealth at the trial level. The court found that Gray's motion for exclusion of the evidence was insufficient to constitute a misrepresentation claim. *Id.* at 162. On the federal record, the court held that if Gray had previously raised the misrepresentation claim, the Commonwealth would have been required to assert the affirmative defense of procedural default, or waive it. *Id.* at 164. However, the court found that the claim had not been raised in the lower courts and, accordingly, the "Commonwealth [was] free to maintain its defense of procedural default." *Id.* at 166.

Gray v. Netherland is indicative of the decline in civility in two respects: (1) the prosecutor apparently lied to defense counsel about the evidence he intended to present during the sentencing phase of the trial;[44] and (2) Gray's notice claim was defaulted because his attorney did not use the specific word "continuance" in his request for additional time to prepare a defense to the surprise evidence.

A. *Permitting Prosecutorial Misconduct Leads to Incivility*

On the first point, section 19.2-264.3:2 of the Virginia Code mandates that upon request of the defendant, the Commonwealth shall give notice in writing of the "evidence of defendant's unadjudicated conduct" it intends to use during the sentencing phase.[45] Because the code section does not specifically state the time by which the notice must be given, it is incumbent upon defense counsel not only to request the information, but also to pressure continually the Commonwealth to comply with the request.[46] By placing this burden to "check up" on the prosecutor's work on the shoulders of defense counsel, *Gray* and its progeny have heightened the nature of the adversarial relationship between defense counsel and the Commonwealth. Defense counsel are effectively required to nag the prosecutor in order to avoid being surprised by new evidence at sentencing.

Gray illustrates the present disregard for the "gentleman-lawyer" ideal of old. Specifically, while the Commonwealth is permitted to be less than up-front when dealing with defense counsel, defense counsel is denied redress because of a technicality–because the attorney stated that he was not "prepared for any of this [additional evidence]" and that he "was taken by

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44. *See supra* note 29-30 and accompanying text.

45. VA. CODE ANN. § 19.2-264.3:2 (Michie 1999). The statute specifically requires notice of the *evidence* of defendant's unadjudicated conduct. *Id.* The statute was enacted in 1993, after Coleman Gray's trial.

46. Section 19.2-263.3:2 of the Virginia Code states in part: "[T]he court shall specify the time by which such notice shall be given." In addition, defense counsel may have to make further motions on this point. *See* Barnabei v. Commonwealth, 477 S.E.2d 270 (Va. 1996) (holding notice sufficient to allow admission of testimony about acts not specifically stated in Commonwealth's notice to defendant). In *Barnabei*, the Commonwealth filed notice, pursuant to section 19.2-264.3:2, that Barnabei had "engaged in a continuous course of threatening and assaultive conduct against [his wife], said conduct occurring on such a continuous and regular basis that [his wife could not] recall each and every specific date and occasion." *Id.* at 280. The court found the Commonwealth's notice sufficient to allow the admission of testimony about incidents not specifically alleged in the notice. *Id.* Therefore, if the Commonwealth's response to defendant's request for notice of evidence is vague, defense counsel may need to make further motions in order to clarify exactly what evidence the Commonwealth intends to use at sentencing. *See* Lisa M. Jenio, Case Note, CAP. DEF. J., Fall 1996, at 41 (analyzing Barnabei v. Commonwealth, 477 S.E.2d 270 (Va. 1996)). Furthermore, defense counsel should make it explicit that the Commonwealth must provide evidence of the acts, not just notice of which acts it intends to introduce. *See* VA. CODE ANN. § 19.2-264.3:2 (Michie 1999).

surprise" rather than specifically requesting a "continuance."[47] Such a dichotomy places opposing counsel in roles more adversarial than in the past.

B. Operation of Procedural Default to Increase Incivility

The rules of professional conduct and traditional notions of courtroom etiquette are not the only influences on a lawyer's in-court behavior. Attorneys are obviously bound by procedural and evidentiary rules as well.[48] Of particular concern to the criminal defense attorney are the procedural rules governing the preservation of claims for future appeal.[49] In light of the nearly impossible showing of "cause and prejudice" necessary to overcome procedural default and obtain federal habeas review of a claim, it is critical that attorneys "preserve the record" at the trial-court level.[50]

Gray highlights exactly how easy it is to default a claim in Virginia. The ease with which the courts find claims to be defaulted has a large impact on courtroom civility.[51] In *Gray*, the Court's refusal to infer that defense counsel desired a continuance from his plea for additional time to prepare enhances the need to create an adequate record for future review of the claim.[52] Defense attorneys who find themselves in this situation now have to make a myriad of objections and motions in order to make sure the claim is properly preserved. Counsel should seek additional time to pre-

47. *Gray*, 518 U.S. at 157.

48. *See, e.g.*, VA. CODE ANN. § 8.01-678 (Michie 1999) (allowing for harmless-error review of errors at the trial court level); VA. CODE ANN. § 8.01-654 (Michie 1999) (setting forth procedural default rules for habeas review).

49. *See generally* Matthew K. Mahoney, *Bridging the Procedural Default Chasm*, 12 CAP. DEF. J. 305 (2000) (suggesting method by which defense counsel can "make record" and avoid procedural default); Carey L. Cooper, *The Never Ending Story: Combating Procedural Bars in Capital Cases*, CAP. DEF. J., Spring 1997, at 38 (discussing developments in Virginia's interpretation of procedurally barred claims).

50. *See* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977) (holding that a cause and prejudice exception to procedural default will allow review of federal constitutional claims when, in the absence, defendant would suffer a miscarriage of justice); United States v. Frady, 456 U.S. 152, 167 (1982) (stating that proper standard of review for a procedurally defaulted motion is "cause and actual prejudice") (citation omitted); United States v. Maybeck, 23 F.3d 888, 891 (4th Cir. 1994) (citing "actual prejudice" standard employed in *Frady*). *See generally* Strickler v. Greene, 119 S. Ct. 1936, 1952-55 (1999) (holding that Strickler did not establish the requisite prejudice necessary to excuse the procedural default of his *Brady* claim). In *Strickler*, the United States Supreme Court found that evidence known to the Commonwealth and requested by, but not disclosed to, defense counsel was prejudicial to defendant. *Strickler*, 119 S. Ct. at 1954. However, this finding was not enough to overcome the "prejudice" requirement necessary to excuse procedural default of a claim. *Id.* at 1954-55.

51. *See infra* notes 56-86 and accompanying text.

52. The Court relied upon the reasoning employed by the Fourth Circuit: "If the defense felt unprepared to undertake effective cross-examination, one would think a formal motion for continuance would have been forthcoming, but none was ever made." *Gray*, 518 U.S. at 167 n.4 (citing Gray v. Thompson, 58 F.3d 59, 64 (4th Cir. 1995)).

pare, move to exclude the surprise evidence, move for a continuance in order to adequately prepare for cross-examination of witnesses or to build a defense to evidence, and perhaps argue that due process requires more notice of the Commonwealth's evidence.[53] Furthermore, the procedural default rules, as evidenced in *Gray*, serve to preclude defense counsel from enjoying some of the recognized benefits of civility, such as not alienating the judge or jury.[54] Criminal defense attorneys frequently find themselves faced with a difficult choice: zealous representation versus civility.[55]

V. Overcoming Procedural Default: A De Facto Exception to Civility

Gray is not the only case that illustrates the conflict between traditional notions of civility and the incessant objections required to preserve the criminal trial record for review. Though some scholars and writers are careful to distinguish between incivility and zealous representation,[56] the line is not always clear. In criminal cases, defense attorneys must make more objections than ever before. In recent years, it has become clear that to avoid default of the issue, trial counsel must promptly make every motion, objection, and proffer during trial.[57] Specifically, to preserve a claim, attorneys are required to interrupt opposing counsel during argument,[58] make multiple objections to some evidence,[59] and state the grounds for objection narrowly and broadly.[60] Considering these requirements for

53. *See* Youell, *supra* note 41. The majority opinion declined to recognize the argument that due process requires more notice, stating that only the adoption of a new constitutional rule could establish this proposition. *Gray*, 518 U.S. at 167. *But see id.* at 181 (Ginsburg, J., dissenting) ("There is nothing 'new' in a rule that capital defendants must be afforded a meaningful opportunity to defend against the State's penalty phase evidence.").

54. *See* discussion *infra* part V.

55. The prosecution also has an obligation to act civilly. However, some authors have suggested that the harmless error rule promotes prosecutorial misconduct. *See* Addison K. Goff, *Mixed Signals: A Look at Louisiana's Experience with Harmless Error in Criminal Cases*, 59 LA. L. REV. 1169, 1177 (1999) (examining Louisiana's standard of appellate review). Goff states that "in cases in which the evidence does not weigh heavily against the defendant, the increasing possibility of an error being said to be harmless can give the prosecutor an incentive to act unethically." *Id.* Goff cites *United States v. Sblendorio*, 830 F.2d 1382, 1395 (7th Cir. 1987) (derogatory remarks about defense attorney not proper, but harmless) and *United States v. Lowenberg*, 858 F.2d 295, 302 (5th Cir. 1988) (improper, but harmless, to call defendant a "filthy pimp" and defense counsel a "jack-in-the-box" for making repeated objections) to show situations in which federal courts found prosecutorial misconduct to be harmless. *Id.* at n.55 (citing Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 428 n.226 (1992)).

56. *See* Goldberg, *supra* note 7.

57. *See* Cooper, *supra* note 49.

58. *See* discussion *infra* Part V.A.

59. *See* discussion *infra* Part V.B.

60. *See* discussion *infra* Part V.C. Additionally, counsel must be aware of the default traps on appeal. For example, counsel must: specifically allege each assignment of error both

preserving the record, it is no surprise that defense attorneys are criticized for demonstrating a lack of civility.[61]

A. Objection During Argument

The following cases illustrate that, in the capital defense context, defense counsel must interrupt the Commonwealth immediately when an error or prejudicial statement occurs during argument. This practice is problematic for many reasons. First, in creating and maintaining such rules, the courts remove much tactical decision-making power from the attorney. Clearly, attorneys might desire not to interrupt opposing counsel during argument in order that they not anger either the prosecutor or the bench.[62] They might also fear antagonizing the jury with seemingly rude conduct. However, these considerations must be weighed against the need to make the record for future appeals.

In Clarke's survey of Maryland judges, some respondents reported that they believed it was an egregious breach of courtroom etiquette to interrupt opposing counsel in the midst of his or her argument: "Such behavior distracts the decision maker's collection of information, interrupts the flow of the proceedings, and causes inefficiency in court proceedings."[63] In Virginia, however, criminal defense attorneys have no choice *but* to interrupt opposing counsel during argument.

In *Russo v. Commonwealth*,[64] for example, the Supreme Court of Virginia held that defendant waived his objection to an improper statement

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narrowly and broadly and advance the same argument used at trial in support of an objection on appeal. *See infra* notes 80-86 and accompanying text. After preserving a claim at trial and properly assigning the claim as error, the claim will still be defaulted unless fully briefed. This task is made difficult by the constraints of Rule 5:26 which imposes a fifty-page limit on appellate briefs. VA. SUP. CT. R. 5.26(a). *See also* appendix to this article.

61. *See* Goldberg, *supra* note 7, at 48-50 (noting that much of what the public deems "hardball" in criminal cases is actually necessary in order to build a defense).

62. *See* Bennett v. Angelone, 92 F.3d 1336, 1349 (4th Cir. 1996) (recognizing that refraining from objecting is a reasonable trial practice if done in order to avoid an overly antagonistic appearance to the jury). In *Bennett*, the defendant claimed on habeas that his trial counsel were ineffective for failing to object to the Commonwealth's sentencing arguments. *Id.* The court found trial counsel's explanation for the failure to object to be standard trial practice: "Trial counsel, on the other hand, explain in their affidavits that they intentionally refrained from objecting, not out of despair, but because they did not want to appear overly antagonistic to the jury and wanted to portray themselves as 'the good guys.'" *Id. See also* Darden v. Wainwright, 477 U.S. 168, 183 n.14 (1986) (finding that defense counsel's decision not to object to prosecutor's improper closing was tactical).

63. *See* Clarke, *supra* note 2, at 997. *See also* James McElhaney, *When to Object*, A.B.A. J., June 1989, at 98. McElhaney notes that the general rule is that counsel must object immediately or lose the objection. However, he cites a 1936 case to suggest that this was not always the case. In that case, the court "said the objection could be made at the time of the remark or at the close of the argument– which has the advantage of encouraging civility." *Id.* at 99 (citing London Guarantee & Accident Co. v. Woelfle, 83 F.2d 325 (8th Cir. 1936)).

64. 148 S.E.2d 820 (Va. 1966).

made by the Commonwealth during its opening statement because he waited until the conclusion of the statement to object to it.[65] In the same trial, the Commonwealth's Attorney improperly offered his own opinion about the defendant's guilt during the closing argument.[66] Defense counsel objected to this statement and the court admonished the prosecutor to keep his opinions out of the argument. Defense counsel did not renew his objection at the end of the argument and the claim was deemed waived on appeal.[67]

More recently, *Brandon v. Commonwealth*[68] reemphasized the importance of making a timely objection during argument.[69] In *Brandon*, defense counsel waited until the end of the Commonwealth's opening statement to move for a mistrial on the grounds that the Commonwealth improperly discussed acts which were not included in the indictment and charges.[70] The court affirmed the trial court's ruling that the objection was untimely.[71]

B. Renewing Objections

Frequent objections are another area in which attorneys must be concerned with alienating the jury. There is some suggestion that juries interpret objections as an attorney's attempt to "keep something from the

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65. Russo v. Commonwealth, 148 S.E.2d 820, 824-25 (Va. 1966). In *Russo*, the prosecutor speculated during his opening statement about events that would occur if defendant were to be acquitted of the charge. *Id.* at 825. The defendant stated that he preferred not to interrupt the Commonwealth during argument and the court held that his motion for mistrial was properly overruled because the objection occurred too late. *Id.* at 825.

66. *Id.* The prosecutor stated: "[I]f I did not believe the evidence in this case proved his guilt, of Dr. Russo, beyond a reasonable doubt, I would withdraw right here and now." *Id.*

67. *Id.* The court relied on *Gall v. Tea Company*, 120 S.E.2d 378, 381 (Va. 1961) ("The failure of counsel to save the point, or take an exception, may well lull the court into believing that counsel acquiesced in its ruling").

68. No. 2434-98-2, 2000 WL 14183 (Va. Ct. App. Jan. 11, 2000).

69. Brandon v. Commonwealth, No. 2434-98-2, 2000 WL 14183, at *1 (Va. Ct. App. Jan. 11, 2000).

70. *Id.* The court further held the objection made after opening statement did not constitute a timely objection when defendant failed to object to the same evidence when it was introduced at trial. Therefore, there was no problem with the admission of the acts not included in the indictment at trial because defendant did not object at that point. *Id.*

71. *Id.* The court dismissed this claim summarily, relying upon *Yeatts v. Commonwealth*, 410 S.E.2d 254 (Va. 1991) and *Russo*, 148 S.E.2d at 825. In *Yeatts*, the court stated that "[m]aking a timely motion for mistrial means making the motion when the objectionable words are spoken." *Yeatts*, 410 S.E.2d at 264 (internal citations omitted). *See also* Mack v. Commonwealth, 454 S.E.2d 750, 752 (Va. Ct. App. 1995) (holding defendant's objection untimely when made at the conclusion of the Commonwealth's closing argument); Cheng v. Commonwealth, 393 S.E.2d 599, 606 (Va. 1990) (holding that defendant's motion for mistrial was untimely when made after the jury retired).

judge and jury."[72] Understandably, counsel might desire to limit the number of objections in order to avoid the appearance of attempting to deceive the jury or to avoid annoying the judge. However, in Virginia, one objection may not always be enough to protect the record.

In *Beavers v. Commonwealth*,[73] the court held that the defendant waived any objection to exclusion for cause of three jurors who expressed opposition to the death penalty because he objected only after the jury had been selected and sworn. Beavers did not object at the time each juror was excused.[74]

Additionally, when counsel fails to renew an objection, the court may assume that defendant has acquiesced and no longer wishes to raise that objection. In *Breard v. Commonwealth*,[75] defense counsel moved to strike a juror for cause during voir dire.[76] The judge denied the motion but told counsel that he would rehear the motion at the close of voir dire.[77] The defendant failed to renew the motion at that time and the objection was deemed waived.[78] The Supreme Court of Virginia affirmed the denial, stating that the judge "reasonably could have assumed that Breard acquiesced in seating [the juror]."[79] In light of these cases, counsel must make two objections when challenging a juror for cause–once at the initial grant or denial and then again at the time the jury is sworn.

C. *Grounds for Objection*

Counsel's concern about the number of objections made during trial is compounded not only by the need to object several times to certain pieces of evidence, but also by the requirement that the same objection be framed several ways. Frequently, counsel will need to state objections narrowly and broadly in order to avoid procedural default of the issue.[80]

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72. McElhaney, *supra* note 63, at 98. McElhaney argues that an attorney has "a limited good-will account with the judge and jury at the start of the trial. Everything you do in the trial affects the account . . . [and an objection] usually counts as a withdrawal." *Id.*

73. 427 S.E.2d 411 (Va. 1993).

74. Beavers v. Commonwealth, 427 S.E.2d 411, 418 (Va. 1993); *see also* Spencer v. Commonwealth, 384 S.E.2d. 785, 793 (Va. 1989).

75. 445 S.E.2d 670 (Va. 1994).

76. Breard v. Commonwealth, 445 S.E.2d 670, 677 (Va. 1994).

77. *Id.*

78. *Id.*

79. *Id.* Breard also defaulted another motion for mistrial by waiting to object to the testimony of a witness he felt was prejudicial. *Id.* at 678. He objected to the testimony of the victim's mother before she took the stand. The mother was allowed to take the stand and Breard made no further objection. As she left the witness stand, she was crying. Breard waited until the court recessed for lunch and then objected on the grounds that the testimony was prejudicial and irrelevant. The court held the motion was untimely. *Id.*

80. *See supra* note 60.

In *Yeatts v. Angelone*[81] the United States Court of Appeals for the Fourth Circuit affirmed the Supreme Court of Virginia's finding of procedural default of an ineffective assistance of counsel claim.[82] The court agreed that the claim for ineffective assistance of counsel was defaulted because it did not specifically challenge the lower court's substantive ruling.[83] Conversely, in *Sheppard v. Commonwealth*,[84] the Supreme Court of Virginia held that the defendant procedurally defaulted his specific claim because he made no general assignment of error.[85]

Although those cases deal with habeas review of claims, they are instructive for trial counsel because the same reasoning could easily apply at trial. After these cases, it is clear that counsel must allege every claim, narrowly and broadly, in order to preserve the record for meaningful appeal because the issue will be defaulted if not properly raised at trial. As a result, counsel is effectively required to make every objection on every available ground, in order that the best arguments and issues remain available for future review.[86]

V. Conclusion

Courtroom civility is not as prevalent as it once was. This decline has been attributed to many factors.[87] In Virginia, procedural bars have contributed to the decline of civility in the courtroom by forcing counsel to be at times rude and overly-persistent. In order to properly protect the record for appeal, counsel must offer numerous objections of every aspect for which there might be a claim of error. In this way, procedural default hurts the

81. 166 F.3d 255 (4th Cir. 1999).

82. Yeatts v. Angelone, 166 F.3d 255, 264-65 (4th Cir. 1999); *see also* Matthew K. Mahoney, Case Note, 11 CAP. DEF. J. 393 (1999) (analyzing Yeatts v. Angelone, 166 F.3d 255 (4th Cir. 1999)).

83. *Yeatts*, 166 F.3d at 264-65.

84. 464 S.E.2d 131 (Va. 1995).

85. Sheppard v. Commonwealth, 464 S.E.2d 131, 139 (Va. 1995). In *Sheppard*, the defendant made several specific assignments of error arising in the sentencing proceeding, but did not allege generally that the jury's finding of future dangerousness was in error. *Id.* at 138-39. *See also* Alix M. Karl, Case Note, 11 CAP. DEF. J. 373 (1999) (analyzing Sheppard v. Taylor, No. 98-12, 1998 WL 743663 (4th Cir. Oct. 23, 1998)) (suggesting that after the United States Court of Appeals for the Fourth Circuit's habeas review of this case, counsel are now required to include general objections along with every specific one).

86. *See* Youell, *supra* note 41. In addition, counsel must be careful to support claims on appeal with the same arguments made at trial. *See* Goins v. Commonwealth, 470 S.E.2d 114 (Va. 1996). In *Goins*, the defendant objected at the trial court to the admission of evidence on the grounds of relevancy. *Id.* at 128. On appeal, he argued both relevancy and prejudice. *Id.* The court declined to rule on the assignment of error on the grounds of prejudice because the argument was not advanced at trial. *Id.* This rule underscores the importance of objecting to a claim with multiple arguments so that counsel can use the best argument on appeal.

87. *See supra* notes 2-7 and accompanying text.

system and the defendant. The system is subjected to more "hardball litigation" which engenders negative perceptions in the public and encourages attorneys to be uncooperative with their opponents. Additionally defense counsel is faced with a very difficult choice: if he is perceived as rude, he risks antagonizing the judge and jury, but if he tries to behave politely, he risks procedural default of the issue. Finally, the procedural bars have placed opposing counsel in heightened adversarial roles, which by requiring numerous and repetitive objections at the trial level, in effect create inefficient trial proceedings.

APPENDIX

Avoiding Procedural Default

Objection During Argument: Defense counsel must immediately object in order to preserve any claim of improper argument. Additionally, counsel must object to each offensive part of the argument. In order to make a timely objection, counsel must interrupt opposing counsel immediately when an error or prejudicial statement occurs. *See generally* Mack v. Commonwealth, 454 S.E.2d 750, 751 (Va. Ct. App. 1995) (holding that objection at the close of Commonwealth's argument was not timely); Cheng v. Commonwealth, 393 S.E.2d 599, 606-07 (Va. 1990) (holding that defendant's motion for mistrial was untimely when made after the jury retired); Russo v. Commonwealth, 148 S.E.2d 820, 824-25 (Va. 1966) (holding that defendant waived objection to improper statement made by the Commonwealth during opening argument because he waited until the conclusion of the argument to object to the statement).

Renewal of Certain Objections: Counsel must renew objections to jurors. If counsel wishes to object to exclusion of jurors for cause, he must object at the time each juror is excused, and again when the jury is empaneled. Likewise, if defense counsel wants to strike a juror for cause, he must object during voir dire and again when the jury is sworn. *See generally* Beavers v. Commonwealth, 427 S.E.2d 411 (Va. 1993); Breard v. Commonwealth, 445 S.E.2d 670 (Va. 1994).

Objecting Narrowly and Broadly: In framing an assignment of error, counsel should state the specific claim narrowly and also make a general assignment of error as to the finding. *See* Yeatts v. Angelone, 166 F.3d 255, 264 (4th Cir. 1999); Sheppard v. Commonwealth, 464 S.E.2d 131 (Va. 1995). Furthermore, counsel needs to preserve both claims at the trial court level. Failure to do so may preclude review under Rule 5:25. VA. SUP. CT. R. 5:25 ("Error will not be sustained as to any ruling of the court unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice."). *See generally* Fisher v. Commonwealth, 374 S.E.2d 46, 50 (1988) (holding assignments of error defaulted because defendant failed to make contemporaneous objections at trial). Frequently, this requires the same objection to be stated several different ways. In addition, all objections should be federalized.

Assigning and Briefing All Non-Frivolous Claims: Under Rule 5:17, all claims must be assigned and briefed. *See* VA. SUP. CT. R. 5:17. This procedure is constrained by the fifty-page limit on appellate briefs imposed by Rule 5:26. *See* VA. SUP. CT. R. 5:26. Counsel needs to address all claims,

narrowly and broadly, on state and federal grounds, within the fifty-page limit. Ironically, this may not even be enough. In *Weeks v. Angelone*, the United States Supreme Court suggested that the claim before the Court was a low priority for defendant as it was the forty-fourth claim of forty-seven assigned. Weeks v. Angelone, 120 S. Ct . 727, 734 (2000). *See* Heather L. Necklaus, Case Note, 12 CAP. DEF. J. 387 (2000) (analyzing Weeks v. Angelone, 120 S. Ct. 727 (2000)).

<u>Advancing the Same Argument on Appeal</u>: Counsel must use the same argument in support of an objection on appeal as was used at trial. *See* Goins v. Commonwealth, 470 S.E. 2d 114, 128 (Va. 1996) (declining to rule on an assignment of error on the grounds of prejudice because that argument was not advanced at trial). As is the case with choosing the grounds for the objection, counsel may need to object on the same point with different arguments in order to preserve the appropriate issue for appeal.