### Civility—Always Warranted?

While almost everything in Mr. Frank O. Brown Jr.'s article, "A Modest Proposal," (*Virginia Lawyer,* April 2005) which advocates civility in the practice of law, can only be greeted with approval, it ought not go without limitation. Civility is not always warranted. For example, one may not always protect the life of a victim of violent attack with civility—a lawyer may and, perhaps should, resort to violence—even if the attack occurs in a courtroom.

There may be other times, even in the practice of law, when the conduct of others does not warrant, nor even morally permit, civility. To remain within the bounds of civility is, in some contexts, to provide morally repugnant behavior a shield it ought not be given by any human being—even those of us who are lawyers. Furthermore, to strip incivility from every communication may prevent the communication of professional counsel to those psychologically incapable of comprehending advice, warning, factual illumination or argument when it is couched in civility.

Yes, civility is a wonderful thing and ought to be promoted in the context of *almost* every single conceivable circumstance arising in the context of law practice. However, to require an oath of civility in *every* circumstance—when advising a client of a personality defect clouding her judgment, cross-examining a police officer giving perjured testimony, or even addressing the bench when custom and culture interfere with its efforts at dispensing justice—would be wrong.

Sincerely,
W. Steven Paleos

## We want to hear from you.

Send your letter to the editor* to:
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Richmond, VA 23219-2800

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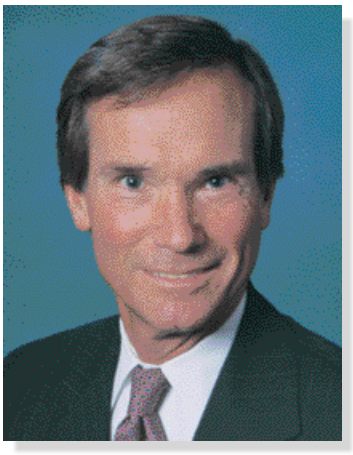
# Year of the Rooster



**by David P. Bobzien, 2004–2005 VSB President**

The Chinese calendar is based on a repeating cycle of twelve years, with each of the twelve years named for an animal. The system has practical benefits. Because of the respect and deference accorded the elderly in China, old people are rarely asked their current age, and they sometimes lose track of how old they are. But if they remember the animal attached to the year in which they were born, they can calculate their age fairly easily.

On February 9, 2005, we began the Year of the Rooster, an appropriate animal for the Virginia State Bar and the VSB's revitalized relationship with its parent, the Supreme Court of Virginia.

As I pass the gavel to Phil Anderson in this summer of 2005, I recall Virginia Chief Justice Leroy R. Hassell Sr.'s address to Bar Council at last year's annual meeting. The Chief Justice challenged the State Bar to work more closely with the Court and to provide greater service to the lawyers of Virginia.

Roosters are regarded as hardworking, resourceful, talented, and courageous, and I have seen all of those characteristics at work in meeting that challenge.

In the last issue of *Virginia Lawyer*, I recounted the extraordinary effort that was extended in March by Chief Justice Hassell, Justice Cynthia D. Kinser, the Conference of Local Bar Associations, the bar staff, and many others to bring a high-quality training program to Abingdon—aimed at lawyers who practice solo or in small firms, the practice setting for almost all of the lawyers in southwestern Virginia. Plans are well under way to bring the program to Harrisonburg on September 21, 2005, and then to Fredericksburg and Hampton Roads before the end of the bar year and to Danville the following year.

The rooster-like hard work, talent, and resources that were brought to bear in Abingdon in March were evident once again on May 20 when the Chief Justice's Indigent Defense Training Initiative was presented live to some three hundred lawyers at the Richmond Convention Center and simulcast to another one hundred lawyers gathered at the Southwest Virginia Higher Education Center in Abingdon. Chief Justice Hassell, Court of Appeals Judge Walter S. Felton Jr., President-elect Phil Anderson and others arranged a continuing legal education program that some regarded as the best they had ever attended. Engendering that kind of praise does not come by accident. Bar staff, led by Bet Keller and Maureen Petrini, worked countless hours to ensure the success of the program— even though CLE production is not their daily fare and preparation for the annual meeting vied for their time and talent.

Hard work, talent, and resources will be marshaled once again by the State Bar on December 9 in Richmond, in an exploration of ways to improve the involuntary commitment process in Virginia, with specific emphasis on the physical treatment of individuals who are the subjects of the proceedings. This issue is of particular concern to Chief Justice Hassell and members of the Senior Lawyers Conference who recognize that an aging population and the dementia that often afflicts the elderly will result in more individuals coming into contact with a system that can charitably be described as troubled.

Did I mention that roosters are regarded as courageous? On June 13, 2005, five days before the end of my year as president—the Supreme Court issued a rule of Court authorizing and directing the Virginia State Bar to provide an online computerized legal research service to its members. The compelling reasons for providing this service are recited eloquently in the purpose section of the rule:

> It is the policy and objective of the Commonwealth of Virginia to improve the quality and reduce the costs of legal services available to the citizens of Virginia. It is also the policy of this Commonwealth to enhance the availability of legal services to poor litigants and indigent criminal defendants. The provision of online computerized legal research tools to

*continued on page 51*

# Roanoke Attorney Is New VSB President

**by Dawn Chase**

When Phillip V. Anderson was just out of college, before he went to law school, he spent some time working in the district office of U.S. Representative W.C. "Dan" Daniel Jr. from Virginia's Fifth District.

Anderson recalled how the congressman would bring his staff from Washington to Southside Virginia and hold town hall meetings. "He would go to every county seat and nook and cranny in the district, every little crossroads in Southside Virginia."

Daniel, a sharecropper's son who never lost his connection to the people he represented, listened carefully to his constituents, Anderson said. "About seventy-five percent of things they complained about were state or local matters which he could do little about." But people left the meetings satisfied. "He listened patiently, treated people with respect and directed them in the right direction even when he could not help them."

The lessons he learned from the late congressman will serve Anderson well in his new job. He was sworn in as president of the Virginia State Bar on June 17, at the bar's annual meeting in Virginia Beach. He will spend the year visiting some of Virginia's nooks and crannies, and hearing the concerns of twenty-four thousand Virginia lawyers.

"The first thing I hope to accomplish is to listen to Virginia's lawyers and then try to respond," he said. He wants to be remembered as "somebody who treated people with respect, who listened to their concerns and did his best to address their concerns."

If Anderson strays from his intended path, his community in the Roanoke area likely will set him straight. In Southwest Virginia, schmoozing and self-promotion—particularly by people who represent an agency in Richmond—are looked on with suspicion. "People here expect you to not forget who you are and where you come from," Anderson said.

Where he came from was a working farm that has been in his family for three generations in the Climax community of Pittsylvania County. He worked alongside the hired help to raise tobacco, grain and beef cattle. He was the first Anderson male in over three generations to go to college—Hampden-Sydney, Phi Beta Kappa magna cum laude, 1980; University of Virginia School of Law, 1994—but he learned his work ethic from the farm.

"My summers were spent engaged in hard manual labor," he said. "My parents believed that I should have a healthy respect for hard work and a realization that there was no task that was beneath me."

Anderson also credits U.S. District Judge Jackson L. Kiser, for whom Anderson clerked, as helping develop a proper respect for judicial institutions.

"Judge Kiser always treats those who appear before him, whether lawyers or litigants, with dignity and respect and expects the same respect from them for our courts and institutions of justice," Anderson said.

"I will always remember the day a juror tried unsuccessfully to get excused from jury duty because it was the first day of deer season. Having failed to get excused, he decided that he would just answer during *voir dire* that he could not be fair so he would be struck. Although he succeeded in not sitting as a juror, the judge had him sit through the trial anyway. He left the court that day with a special appreciation for the civic responsibility of jury service and the importance of our institutions of justice."

Anderson is a cofounder of the law firm Frith Anderson & Peake in Roanoke, where his practice focuses on civil litigation, including insurance defense, professional liability and commercial litigation.


He and his wife, Beth, have three sons—Ben, 19, who just finished his freshman year at Furman University; Jordan, 17, a rising senior in high school; and Will, 15, a rising sophomore. Beth Anderson is a registered dietician and certified diabetes educator.

Anderson has found that educating is part of the bar president's job as well. In his duties as president-elect, preparing to succeed David P. Bobzien in the presidency, Anderson repeatedly explained that, "We're not an association. We're not a trade organization. We're a state agency."

His view of the agency: "We have two very distinct constituencies, and I don't think we can promote one over the other. The lawyers of the commonwealth are certainly our constituency; however, the public is also our constituency. We didn't come into being for the lawyers. We came into being to protect the public."

In his inaugural speech at the annual meeting, he talked about the 235 lawyers who gathered sixty-seven years ago to witness the swearing-in of the first VSB president.

"They understood the role [lawyers] had played in the creation and maintenance of the economic and governmental structures of this state," he said. "They understood that, if not properly regulated, there would always be a few unscrupulous ones to prey upon the vulnerable in our society. They understood that, over time, the public would lose confidence and respect for our profession."

Then Anderson came out swinging on issues the bar faces today: Virginia's low compensation of court-appointed lawyers who defend indigent people in criminal cases, judicial independence and public service work.

"Today and for years, Virginia lawyers appointed by courts to represent indigent defendants have faced choices: . . . Do they discharge their professional obligations and zealously represent their clients? Or do they only go as far and only do as much as they are compensated? While we would hope that they would make the right choices, no Virginia lawyer should face that dilemma.

"This circumstance, if left unaddressed, not only jeopardizes a full and adequate representation of those charged with crimes but it reinforces the notion that justice in Virginia is not for all but only for those who can afford a full defense."

He urged lawyers in all areas of practice to speak out against "this intolerable situation."

"Will we decide that all of Virginia has a stake in this matter, because of the perception that justice in Virginia partially rendered to any citizen is a threat to justice for all Virginians?"

Likewise, the system is threatened by attacks on judges, he said.

Judges face "the choice to exercise their independence, to follow the rule of law and judicial precedent, and decide cases on the basis of facts . . . or the choice to bow to external pressures of public opinion, the media or other branches of government.

"When criticism abounds because a decision, while legally well reasoned and legally sound, strikes chords of unpopularity, will we be heard to respond?"

And lawyers must recommit to their traditional roles as public servants. "Public service comes with great professional and personal sacrifice," he said. But lawyers must contribute their "unique" perspective to legislative bodies and other civic work.

He called on the voluntary bars to join the VSB in addressing the problems. "The challenges before our profession are

*continued on page 28*

# Highlights of Virginia State Bar Council Meeting

## June 16, 2005

At its regular meeting on June 16, 2005, at Virginia Beach, the council of the Virginia State Bar heard the following significant reports and took the following actions:

### On-Line Legal Research Member Benefit

President David P. Bobzien reported on the status of the proposed on-line legal research member benefit for all lawyers in Virginia. Acting on legal advice obtained from the Office of the Attorney General and outside antitrust counsel, the Supreme Court of Virginia adopted new Paragraph 21, Part Six, Section IV of the Rules of the Court declaring it to be the policy of the commonwealth to increase access to legal services for the citizens of the commonwealth and lower the costs of the services. On the basis that an on-line legal research member benefit program will help accomplish those policy objectives, the rule authorizes and directs the Virginia State Bar to contract for such services for its members. The rule becomes effective July 13, 2005, after which the bar will solicit proposals from vendors. The program could become operative this fall or early next year.

### *Code of Virginia* Revision Under Way

The chair of the Virginia Code Commission, Senator William C. Mims, and the director of the Division of Legislative Services, E. M. Miller, described the planned publication in 2007 of a new *Code of Virginia*. The project will streamline the code, move provisions in some instances from one title to another, and significantly renumber code sections. This will be accomplished at no net increase in cost to the subscribers to the *Code of Virginia*, since a number of years will pass before any replacement volumes will be needed for the new code of 2007.

### New Rules for Non-Virginia Lawyers

Chair Marni Byrum provided information on the work of her Multijurisdictional Practice Task Force, which continues to develop rule changes that would more clearly delineate the circumstances under which lawyers from other states in this country and foreign lawyers could temporarily and occasionally deliver legal services in Virginia. The task force is also working on revisions to the *pro hac vice* admission rule in Virginia. Proposed rule changes are expected to be ready by February 2006 for action by the council.

### Advertising Legal Specialties

The council voted unanimously to approve and recommend to the Supreme Court of Virginia amendments to Rule of Professional Conduct 7.4, which would allow a lawyer to advertise his or her specialty without the disclaimer now required by the rule if the lawyer is certified as a specialist by an organization accredited by the American Bar Association. The rule change was recommended by the Standing Committee on Lawyer Advertising and Solicitation.

### Limited Right of Appeal Proposed

Upon recommendation of the Standing Committee on Lawyer Discipline, the council, by a vote of 46-10, approved and recommended to the Supreme Court of Virginia proposed amendments to Paragraph 13 of the Rules of Court which would create a limited right of appeal by bar counsel in instances where a decision of a tribunal in the disciplinary system is plainly contrary to the law. The bar would not be able to challenge on appeal the sanction imposed on a respondent or the sufficiency of the evidence supporting the findings of the tribunal.

### Unbundling of Legal Services

The council unanimously approved changes proposed by the Standing Committee on Legal Ethics and the Special Committee on Access to Legal Services in Rules of Professional Conduct 1.2 and 1.5, as well as Supreme Court of Virginia Rule 1:5. The changes would explicitly authorize Virginia lawyers to assist persons with discrete-task, limited representation under certain circumstances. The proposed changes will now be recommended to the Supreme Court of Virginia.

### VSB Budget Approved

The council unanimously approved the 2005-2006 budget for the Virginia State Bar, projecting revenues of $9,873,735 and expenditures of $11,574,631. Funds from the bar's reserve in the amount of some $1 million will be used to complete the bar's extensive computer software rewrite and integration project during the 2005–2006 bar year, enabling the bar finally to retire its antiquated VAX hardware.

### Resolutions

The council unanimously adopted resolutions thanking and honoring David P. Bobzien for his service as president during 2004–2005, the Office of the Fairfax County Attorney for supporting David in his bar work, Theophlise L. Twitty of Portsmouth and Marcus D. Minton of Petersburg for many years of service as Virginia State Bar volunteer leaders, and Carlos Wilson for his many years of welcoming Virginia State Bar members to their annual meeting in his capacity as guest services manager of the Cavalier Hotel in Virginia Beach.

# Richmond Attorney Named President-Elect of Virginia State Bar

Karen A. Gould, an insurance defense lawyer who practices in Richmond and a longtime volunteer for the Virginia State Bar, has been chosen president-elect of the VSB.

She will serve in the position for a year, and then be installed as bar president for the 2006–2007 fiscal year.

Gould, born in Cleveland and raised in Richmond from the age of six, began her legal career as a law clerk for U.S. District Judge Glen Williams of Abingdon before joining the Virginia Attorney General's Office in 1980. She entered private practice in 1984. She is now with the firm Childress, Gould & Russell PC.

Her practice focuses on professional liability defense of health-care providers, workers' compensation defense, defense of employers in employment matters and other litigation, as well as defense of health-care providers before health regulatory boards.

She received a bachelor's degree from the University of Virginia in 1976 and a law degree from the University of South Carolina in 1979.

Gould has served on the VSB Council since 2000, and was put on the Executive Committee in 2002. She has been chair of the VSB's Budget and Finance Committee, Disciplinary Board and Mandatory Continuing Legal Education Board. She also served on the disciplinary committee that hears matters in the Third District.

She is married to Malcolm Rudolph West, a lawyer and corporate secretary for the New Market Corporation. They have a daughter.

She is a member of St. Stephen's Episcopal Church, and she serves on the President's Advisory Committee for Minnesota Lawyers Mutual Insurance Company.

Gould ran unopposed for the president-elect office. She succeeds Phillip V. Anderson, who was installed as the sixty-seventh president of the VSB on June 17 during the bar's annual meeting in Virginia Beach.

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## IN MEMORIAM

**Ellen Spring Moore [Balarzs]**
Christiansburg
March 1966–March 2005

**Ernest A.E. Gelhorn**
Washington, D.C.
March 1935–May 2005

**Ross James Kellas**
Manassas
December 1951–November 2004

**Calvin Forrest Tiller**
Richmond
November 1953–April 2005


Participating in Senior Law Day in Covington on May 24 were William A. Parks Jr., president of the Alleghany-Bath-Highland Bar Association; Clifton Forge attorney R. Meade Snyder; and William T. Wilson of Covington. The seminar, held in the Alleghany County Courthouse, was attended by one hundred persons who heard presentations on senior citizens topics by an eight-member panel of attorneys. Wilson moderated the panel.

## LOCAL AND SPECIALTY BAR ELECTIONS

**Campbell County Bar Association:**
George William Nolley, President
Bryan Kenneth Selz, Vice President
Frank Austin Wright Jr.,
Secretary-Treasurer
George William Nolley, Conference Rep.

**Henrico County Bar Association:**
Andrew Michael Condlin, President
John Kimpton Honey Jr., President-elect
Ellen Ruth Fulmer, Vice President
Christopher Hunt Macturk, Secretary
James Walter Hopper, Treasurer
William Jacob Viverette, Conference Rep.

**Norfolk & Portsmouth Bar Association:**
Stanley Graves Barr Jr., President
James Ashford Metcalfe, President-elect
John Lockley Deal, Secretary
Donald Charles Schultz, Treasurer
John Y. Richardson Jr., Conference Rep.

**Bar Association, City of Richmond:**
Michael Nehemiah Herring, President
Hugh McCoy Fain III, President-elect
Walter W. Stout III, Hon. Vice President
Carolyn Anne France White,
Secretary-Treasurer
Vernon Eugene Inge Jr., Conference Rep.

**Virginia Beach Bar Association:**
Jeffrey Hugh Gray, President
Robert Martin Tata, President-elect
Elizabeth S. Hodges, Secretary
Glen Alton Huff, Treasurer
Timothy Sean Brunick, Conference Rep.

**Virginia Trial Lawyers Association:**
Richard E. Railey Jr., President
Sandra Martin Rohrstaff, Vice President
Andrew Michael Sacks, Vice President
Charles Joseph Zauzig III, Vice President
Gerald Arthur Schwartz, Vice President
Edward Lefebvre Allen, Treasurer
Matthew B. Murray, Treasurer

## Greater Richmond Bar Foundation Elects Officers

The Greater Richmond Bar Foundation has elected the following officers for the 2005–06 year: John M. Oakey Jr., president; Anne D. McDougall and Brian R. Marron, vice presidents; Daniel L. Rosenthal, treasurer; and D. Gregory Carr, secretary. Reelected to two-year terms on the foundation's board were Rosenthal, Charles F. Witthoefft, Gina M. Burgin, Carr, Stephanie E. Grana, Jack L. Harris and Christopher M. Malone.

The foundation operates the Pro Bono Clearinghouse, which provides free legal services to nonprofit groups in the Richmond area. The foundation also helps fund pro bono legal services through the Central Virginia Legal Aid Society, and it supports law-related educational projects. More information can be obtained by calling Carol K. Murray at (804) 780-2600.

Governor Mark R. Warner (seated) declared May 2–6 Juror Appreciation Week in Virginia. Looking on were (l–r) Fourth Circuit Court of Appeals Judge Roger L. Gregory; David Craig Landin and C. Edward Betts, former presidents of The Virginia Bar Association; Virginia State Bar President David P. Bobzien; and Virginia Chief Justice Leroy R. Hassell Sr. The proclamation is part of an educational effort by the American Bar Association, under the presidency of Richmond lawyer Robert Grey. Gregory and Landin served on Grey's Commission on the American Jury. The commission's work is described on the ABA's Web site, **www.abanet.org/jury/home.html**.

CHIEF JUSTICE'S INITIATIVE TO IMPROVE THE INVOLUNTARY COMMITMENT PROCESS IN VIRGINIA

**SAVE THE DATE**
**Friday, December 9, 2005**

REFORMING THE INVOLUNTARY COMMITMENT PROCESS: A MULTIDISCIPLINARY CONFERENCE

for
Sheriffs, Judges, Special Justices, Lawyers, and Mental Health Practitioners

Holiday Inn Select Koger Conference Center, Richmond

See more info on page 61.

# O'Kelly E. McWilliams III Named Young Lawyer of the Year

O'Kelly E. McWilliams III, a former president of the Virginia State Bar's Young Lawyers Conference, is the 2005 recipient of the R. Edwin Burnette Jr. Young Lawyer of the Year. The award recognizes dedicated service to the conference, the legal profession, and the community. It is named for a former president of the YLC and the VSB, who is now a Lynchburg judge.

McWilliams was raised in Richmond and was graduated from Longwood University in 1990. He received a law degree from George Mason University in 1993. He practices employment law with the firm Mintz, Levin, Cohn, Ferris, Glovsky and Popeo PC in Washington, D.C.

From the beginning of his career, McWilliams assumed leadership positions not only at the VSB, but also with the American Bar Association, which awarded him a Minority in the Profession Committee scholarship. He since has worked to encourage other minority lawyers to apply for the funding and get involved in issues on a national level.

During his tenure as president of the VSB's Young Lawyers in 2001–2002, McWilliams helped the conference launch the Oliver HillSamuel Tucker Pre-Law Institute to encourage minority youth to consider legal careers, a Tolerance Education Program, and a Professional Development Conference geared toward newly licensed lawyers.

He was nominated for the award by the Reverend Dr. Norman A. Tate, his pastor at Heritage Fellowship United Church of Christ in Reston. McWilliams teaches a financial management course and counsels congregants at the church, and he mentors young men in the congregation. He also coaches mock trial teams of African American boys from Southeast Washington, through a camp sponsored by his fraternity, Kappa Alpha Psi, and he supports Fairfax County's Medical Care for Children Partnership.

McWilliams, 36, and his wife, attorney Karen Turner McWilliams, recently celebrated their 10th wedding anniversary. They have two children.

# The Virginia Office for Protection & Advocacy: Advocating for the Rights of Persons with Disabilities

**by Pamela J. Branch, Acting Managing Attorney, VOPA**

For over twenty years, Virginia has been in the business of providing legal and advocacy services to persons with mental, physical and cognitive disabilities. The Virginia Office for Protection and Advocacy, formerly the Department for Rights of Virginians with Disabilities, continues to work hard to educate the public about the rights and contributions of persons with disabilities so they will one day experience life without abuse, neglect and discrimination, and realize their goals of full societal participation.

Since July 16, 2002, we have been an independent state agency doing business all over the commonwealth. Our major accomplishments include fighting for an effective reporting system to identify persons in state facilities who have experienced a serious injury or death; implementing a statewide accessibility campaign to insure persons with disabilities are able to vote; and making state agencies own responsibility for providing appropriate community supports and services to children and adults who desire to and are able to live in the community. We represent parents with children in special education, advocate for persons who have employment-related barriers due to disability, and we reach out to persons whose cultural and language barriers derail effective disability-related services.

As we honor the twentieth anniversary of the passage of the Virginians with Disabilities Act this year and reflect on all of the work still to be done, we hope that the Virginia bar will look to our agency for guidance in representing persons with disabilities. We also have attorneys and advocates available to speak at bar association events and for continuing legal education courses.

The main office of Virginia Office for Protection and Advocacy is located at 1910 Byrd Avenue, Suite 5, Richmond, Virginia 23230. For more information, call (804) 662-7243 or 800-552-3962 (TTY/Voice).

# Roanoke Bar Leader Gene Elliott Is "Local Bar Leader of the Year"

Eugene M. Elliott Jr., an active Roanoke Bar Association member for thirty-three years and president in 2003, has been named "Local Bar Leader of the Year" by the Virginia State Bar's Conference of Local Bar Associations.

The award recognizes dedication of local bar leaders who offer important service to the bench, bar and public. It also emphasizes close cooperation between the Virginia State Bar and local bar leaders. The award was presented during the Virginia State Bar's annual meeting June 17 in Virginia Beach.

Elliott's work has led to—among other things—thousands of dollars in James N. Kincanon Scholarships awarded to students who are pursuing a career in law. He has been a trustee and currently is chair of the Roanoke Bar Association Foundation, which, since its formation in 1997, has awarded over $22,000 in scholarships and community grants. Faced with declining returns on investments in recent years, Elliott led the Roanoke Bar Association to offer continuing legal education classes to its members at a discount, with the money going to the good works of the foundation. The association drew from local lawyers and judges to teach the classes, thus adding a regional note to the education the lawyers received.

"As a result of changes in investments and proceeds from the CLE programs, this year the foundation will award $12,500 in scholarships to students pursuing a career in the law," according to the nomination letter from Roanoke lawyer Steven L. Higgs.

Elliott's other volunteer activities include:

- Helping to establish the commonwealth's first Youth Court program, in association with the Greater Roanoke Valley Character Coalition. The "court" is a peer-run tribunal that holds youth offenders accountable to victims and the community and encourages problem-solving, communication and development of analytical skills.

- Setting up Barrister Book Buddies in Roanoke. The program, through which seventy-five attorneys read to elementary school classes, serves the dual purpose of encouraging reading and improving the image of lawyers.

- Rescuing the Mill Mountain Zoo when it fell into financial trouble. When the City of Roanoke targeted the zoo for closing, Elliott became the zoo's first president.

Serving as president and a member of the executive board of the Virginia Museum of Transportation. Elliott is leading an effort to preserve and restore steam and diesel locomotives dating back to the early 1900s.

Elliott and his wife Laura have three children. He is a graduate of Marshall University and Washington and Lee School of Law. He practices commercial real estate, domestic relations and estate planning law.

# Donald Butler Wins Family Law Section's Lifetime Achievement Award

Contributions to the development of family law in Virginia have won Richmond lawyer Donald K. Butler a Lifetime Achievement Award from the Virginia State Bar's Family Law Section. The award, established in 1993, honors an individual who has made a substantial contribution to the practice and administration of family law in the commonwealth.

Attorneys Matthew N. Ott and Nancy Douglas Cook of Richmond nominated Butler. According to materials submitted with the nominations, Butler's legal career reflects singular and numerous instances of professional achievement and recognition by the VSB and the legal community for over thirty years.

"Donald Butler is a professional among professionals," Ott said in his nomination letter. "He has been a dedicated mentor to many family law attorneys throughout Virginia, and has made a significant contribution to the practice of family law as it is today," Cook said in her letter to the VSB.

Butler holds a bachelor's degree from the University of Richmond. He received his law degree from the T.C. Williams School of Law at the University of Richmond in 1970. Butler has experience as a trial lawyer since 1970, handling civil, criminal and family law cases in Virginia, including the Virginia Court of Appeals, the Supreme Court of Virginia, the U.S. District and Circuit courts and the U. S. Supreme Court. He lectures frequently on family law to other lawyers. He has spoken at seminars sponsored by the Virginia Trial Lawyers Association, the Continuing Legal Education Committee of the Virginia State Bar, the Bar Association of the City of Richmond, the Arlington Bar Association and the Tidewater Family Law Bar Association. He has also lectured at the University of Richmond and George Mason University law schools. He has lectured on the subject of equitable distribution to the judges and justices of the Virginia circuit courts, Court of Appeals and Supreme Court of Virginia. Butler also speaks at churches and civic organizations in Virginia on the subject of marriage and divorce.

# Lawrence Hoover Jr. Given Tradition of Excellence Award

In recognition of his outstanding service to the legal profession and to the community, the General Practice Section of the Virginia State Bar has selected Lawrence H. Hoover Jr. of Harrisonburg as the recipient of its eighteenth annual Tradition of Excellence Award for 2005.

The award is presented annually to an attorney who has dedicated time and effort to activities that assist the community while improving the standing and image of general practice attorneys in the eyes of the public.

Hoover was nominated for the award by the partners at his firm, Hoover Penrod PLC: Richard A. Baugh, John N. Crist, Dale A. Davenport, Dillina W. Stickley, David A. Penrod, Jacob T. Penrod and M. Bruce Wallinger.

Hoover received his bachelor's degree from Hampden-Sydney College and his law degree from the University of Virginia School of Law. He worked as an attorney advisor and legal officer at the U.S. Department of State until 1971, when he joined the Harrisonburg office of Hoover Penrod as a mediator, trainer and teacher; he is now of counsel. His professional emphasis is in the areas of dispute resolution and estate planning and administration.

Hoover has taught negotiation and mediation skills at Bridgewater College, Washington and Lee University Law School and the University of Virginia School of Law. He is recognized in the mediation community as the "father of mediation in Virginia." In June 2004, he was one of the first recipients of the Virginia Alternative Dispute Resolution Founder Award, presented by the Chief Justice of the Supreme Court of Virginia, Leroy R. Hassell Sr.

"During his forty-five years of active law practice, he has unselfishly served his clients, profession, community and church. He is a committed community servant who serves as a model of excellence for the general practitioner of law," the letter of nomination said.

# Hade Is New Supreme Court Executive Secretary

Karl R. Hade, a veteran employee at the Supreme Court of Virginia since 1982, has been named executive secretary of the court beginning July 22.

Hade most recently has directed the Judicial Information and Technology Department in the executive secretary's office. He holds a bachelor's degree in biology and a master's in business administration from the University of Richmond.

In announcing the appointment, Chief Justice Leroy R. Hassell Sr. said of Hade: "He has demonstrated a high level of skill in managing the largest department within the [Office of the Executive Secretary] to ensure the delivery of vital technology services to all courts throughout the commonwealth."

Retired Fairfax Circuit Judge F. Bruce Bach served as acting executive secretary until the post could be filled permanently.

Hade succeeds Robert N. Baldwin, who retired this year after serving as executive secretary since 1976. Baldwin, a lawyer, now is executive vice president and general counsel to the National Center for State Courts in Williamsburg.

Hade

Baldwin

Mays

He is a former president of the Conference of State Court Administrators, and had served as co-chair of the NCSC's Board of Directors.

Another long-time Supreme Court employee who recently retired, Kathy L. Mays, also is working for the National Center as a consultant. Mays's former job—director of judicial planning—was split into two titles: director of judicial planning and director of legislative and public relations.

Dr. Cyril Miller, who has worked in the Court's judicial planning department for sixteen years, was promoted to the director's post. Doris "D.J." Geiger, most recently an assistant city attorney in Virginia Beach, is the new legislative and public relations director. Her résumé includes serving as a legislative aide to Virginia Senator Kenneth W. Stolle, R-Virginia Beach and chair of the Senate Courts of Justice Committee.

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# VBA Names Executive Director

Guy K. Tower has been named executive director of The Virginia Bar Association.

Starting on September 1, he will work with the current VBA director, Charles B. "Breck" Arrington Jr., who has been the association's executive vice president since 1991. Arrington will retire in February 2006.

Tower, who lives in Virginia Beach, is a former shareholder and director of the law firm Kaufman & Canoles PC, in the Norfolk and Virginia Beach offices. He previously practiced with Hunton & Williams in Richmond and Norfolk. He is married to the Honorable Winship C. Tower, a juvenile and domestic relations judge in Virginia Beach.

Guy Tower also is a certified mediator and co-founder of the McCammon Group, an alternative dispute resolution service. He has been an adjunct law professor at the College of William and Mary, and he served on the faculty of Old Dominion University's master of business administration program.

He holds bachelor's and law degrees from the University of Virginia.

At the VBA, he helped found and chaired the Law Practice Management Section. He served as chair of the Virginia State Bar's Business Law Section, and he was vice chair of the Virginia Joint Committee on Alternative Dispute Resolution.

# Park Images Evoke Memory of Ansel Adams

**by Rozanne Epps**

The second half of life is often about claiming parts of ourselves we could not bring to life during the first half.

No one knows that better than Hullihen Moore. A graduate of Washington and Lee University and the University of Virginia Law School, he spent twenty-five years in the practice of law and twelve years as a member of the State Corporation Commission of Virginia. He taught public utility law at the College of William and Mary, W&L and U.Va. All of these occupations involved aspects of law that require a talent for and interest in statistics and economics. They required cognition of a special logical sort.

But, fortunately for us and for Virginia's Shenandoah Park, another part of Moore's personality was waiting.

It had bided its time since his teens, when he had worked as a stringer for the *Richmond Times-Dispatch,* earning five dollars for each of his pictures the paper published.

In 1978, his wife gave him a view camera and a ten-day seminar of study with Ansel Adams. With these as inspiration, and his love of nature, and talent as an artist, photography became his avocation.

The result of the years since then is *Shenandoah: Views of Our National Park.*

The fifty-one images of the park, all developed and printed by Moore in his own darkroom, range from splendid vistas to an image of a single leaf or a simple view of "Seeds." They give us easily recognizable views of trees or waterfalls and several, such as "Mayapples, Rain" and "False Hellebore," that could stand tall in a room of abstract art.

The prints are framed by two essays by Hullie Moore. The second one gives us a history of the park beginning with a geological explanation of its formation and how, in the mid-1930s, it became a national preserve. The essay concludes with an exposition of the environmental troubles that currently beset the park.

But the first essay, "Mountain Days," draws us into his feeling for the park—a park that he tells us "holds more than fond memories, childhood adventures, and deer too numerous to count. Wonder, beauty, wildness and peace live here. The park offers solitude so deep that the visitor can be one with the earth.

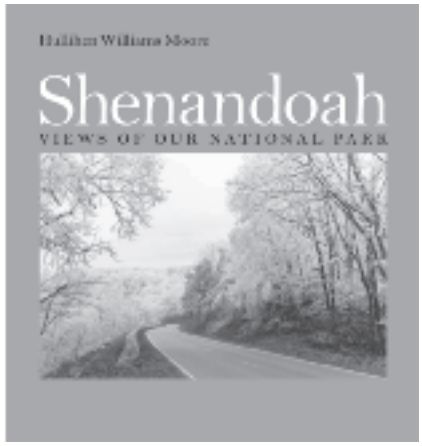
And at Shenandoah each season is special. Each has gifts for those who go and watch and listen."

For those of us who can't make the trip—and indeed for those who can—this book of beautiful photographs is a special gift.

SHENANDOAH: Views of Our National Park

by Hullihen Williams Moore

90 pages. University of Virginia Press




The book is available in various editions—paper, $22.95; hardbound, $55.00; and several limited editions that include an original print. Copies of the book and original prints may be found on line at **www.hullihenmoorephotography.com** and paper and hardbound editions are also available at most Virginia bookstores. The Virginia Museum of Fine Arts has mounted a one-person show of original prints from the book that will tour Virginia for several years. In November and December, the exhibit will be showcased at the U.S. Department of the Interior in Washington, D.C.

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**Rozanne Epps** is copy chief at *Style Weekly* magazine in Richmond. She writes the column "Rosie Right." Epps was married for fifty-seven years to the late A.C. Epps, a partner at Christian & Barton LLP in Richmond.

# The Citizen/Lawyer of the Past, Present and Hopefully, the Future

**by the Honorable Dennis W. Dohnal**

*The following are remarks made by the Hon. Dennis W. Dohnal, Magistrate Judge, U.S. District Court for the Eastern District of Virginia, at the VSB Pro Bono award ceremony at the University of Richmond School of Law on May 12, 2005.*

The theme of my remarks is the role of the citizen/lawyer in our society—past, present, and, I hope, in the future. I confess from the outset that I will be borrowing heavily from other sources, including the remarks of Dean W. Taylor Reveley III of the Marshall-Wythe School of Law at the College of William & Mary. Please remember that ours is the only profession in which plagiarism is referred to as research.

As to the citizen/lawyer of the past, it never ceases to amaze me to consider that crazy bunch of renegades—that band of brothers—who literally invented a new order, a fundamentally different form of representative government that distinguished our society at the time, if not still in certain respects, from all others throughout time. Of course, it would have been better if they had also enlisted the help of a band of sisters, for the task probably would have been done quicker and in neater fashion. In any event, how did all that come about, culminating in the passage of the Constitution and its attendant Bill of Rights? Was it just a unique set of circumstances that converged and matured at just an opportune time? Was it just a group of unusually bright individuals who decided to train in the law and happened to make each others' acquaintance at some point?

To be sure, they were all that, and then some. Indeed, over one-half of the signers of the Declaration of Independence were lawyers. Thirty-one of the fifty-five geniuses who gathered in Philadelphia in 1787 and formulated the Constitution were trained in the law. But it wasn't just because of the specialized training that they had received that produced such results. There was much more to the picture.

The very concept that they espoused and lived—that of the citizen/lawyer—was at the center of all that happened in those formulative years. It was a concept that first emanated from near here, with George Wythe, Thomas Jefferson and "the rest of the gang." The concept of the citizen/lawyer was the very basis of Jefferson's urging of the Board of Visitors of William & Mary when he was governor of Virginia to create a law school away from the then-traditional apprentice model of the not-so-merry old England. To quote from a lecture given recently by Dean Reveley:

> Jefferson wanted law students at William & Mary to learn not simply how to be skilled practitioners of law, but also how to be leaders for the common good at the community, state and national levels; Jefferson wanted William & Mary law students imbued with a sense of responsibility to lead for the common good, recognizing the comparative advantages that lawyers have for such leadership and the importance of law in American society.

So what was this new concept of citizen/lawyer? The citizen/lawyer (or lawyer statesman, as it is sometimes called) was one who was possessed of practical wisdom and persuasive powers. He was devoted to the public good while being keenly aware of human frailties as well as political realities—what should be done, what could be done, what might be done in time. Significantly, the concept of citizen/lawyer was nurtured and promoted by a web of reenforcing professional attitudes and expectations. It was so important to our experiment in self-government that the citizen/lawyer assumed the role of leadership for all and that continued for some time to come. Over 70 percent of our presidents, vice presidents and cabinet members have been lawyers. Ours is the only profession with its own permanent cabinet position—that of attorney general. Ours is the only profession with its own separate and equal (at least for the present) branch of government—the judiciary.

What has happened over time if the citizen/lawyer was so central to our profession and our society? Why is the legal profession so ridiculed, if not despised? What other profession has so many jokes about it (have any of you heard any good CPA jokes lately?)? I don't mean to suggest that it is anything new. Even Shakespeare couldn't persuade the masses—at least the uninformed ones. Remember the phrase from the play: "First, kill the lawyers!" In fact, the Shakespearian aficionados tell us that it was a compliment meaning that the lawyers would be able to perceive the treachery first and therefore must be silenced.

Of course, there are practical reasons why we are the brunt and butt of such disdain. Consider that ours is the only profession based on conflict and adversity. If a client comes to you without a conflict or serious issue of concern, it is our job, or at least in our best interest, to create one. Remember, too, that we only see clients during what they surely think to be the worst times in

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Judge Dennis W. Dohnal delivering his remarks at the VSB Lewis F. Powell Jr. and Oliver White Hill Pro Bono award ceremony. Seated (l–r) were Linda M. Boykin, co-vice chair, VSB Access Committee; VSB President David P. Bobzien; Law Student Pro Bono Award winner Amandeep Singh Sidhu; and Powell Award winner Joseph W. Gorrell.

Ann Gorrell congratulates her husband Joseph W. "Joe" Gorrell (center) of Fredericksburg for his receipt of the 2005 Lewis F. Powell Jr. Pro Bono Award. Joining them is Donald F. Mela of Alexandria—recipient of the 1997 Powell Award. Recipients were acknowledged for their extraordinary contributions to low-income clients served by Rappahannock Legal Services and Legal Services of Northern Virginia, legal aid programs licensed by the Virginia State Bar. The award ceremony and reception were held May 12 at the University of Richmond School of Law.

At the awards ceremony were the winner of the 2005 Oliver White Hill Law Student Pro Bono Award winner Amandeep Singh Sidhu (center) and two prior Hill Award recipients, Réco A. Thomas (right) and Angela A. Ciolfi.

their lives, including the business entity in the throes of some economic crisis. But this concept of the citizen/lawyer has seemingly lost its power to inspire. It had a ring to it for quite awhile, but the concept seems to have shifted, lost focus.

Sure, there are still a few around and, indeed, we are blessed with the presence of two this very day in the persons of our award recipients. But such fine examples of the best of our profession no longer appear to command the continuing attention and respect of the whole profession, let alone those outside our ranks. The emphasis appears to be on the practical, immediate reward of self-satisfaction. Ah, "self," the common prefix—be it self-indulgence, self-aggrandizement, but certainly not self-deprecation.

Times have changed dramatically since those early years for any number of reasons, some more obvious than others. Most notably, perhaps, is that we have been accelerated into the information age, thanks, of course, to Al Gore who invented the Internet.

But, is there any room left—let alone time—to resuscitate the concept of the citizen/lawyer? To motivate others, if not refocus the profession on the values that are exemplified by our two award recipients? I say yes, and so, let me suggest the essence of the citizen/lawyer for tomorrow and beyond—the citizen/lawyer for all time, be it yesterday, today or tomorrow.

The citizen/lawyer cares about the public good and is prepared to sacrifice self-worth, at least in a sense of placing one's private objectives behind those of others. Enough of this "me first" stuff! But there must be more—an ability to marshal the talent and ability to espouse those very ideals. It requires a talent for discovering where the public good lies or where it should be found. A citizen/lawyer, for example, does not simply prepare the way for achieving objectives that others have already set; at the very least, if the goal is worthy and appropriate, the citizen/lawyer assists the traveler in reaching a better, fuller understanding of the objective's worth as the best among various alternatives so that achievement is even more meaningful.

A citizen/lawyer must have the temperament to go along with the talent. Just as you seldom, if ever, see the sports official change a call or ruling in the face of a raging player or coach, so must the citizen/lawyer pick his arena and method of delivery, remembering that there should be no pride of authorship in the sense of demanding credit for a job well done as long as the goal is reached; remembering, as well, that success is more palpable and meaningful when those directly impacted have the sense of self-achievement.

Being a citizen/lawyer means that one is a devoted citizen who understands and appreciates our good fortune in being able to select our own leaders, to be judged by our peers in the most important issues of our lives and times. Being a citizen/lawyer means that although we are governed and directed by the will of the majority, where, by definition, the extreme left or right is just that—outside the mainstream—the fact of the matter is that the citizen/lawyer understands that the median is defined in part by those parameters as well. Simply put, there is room for everyone and, again, by way of example, the citizen/lawyer respects everyone's right to worship whatever higher authority they may sincerely believe in. A citizen/lawyer does not think he or she is better than another—other than having a better opportunity by whatever circumstance to be part of a profession that has the capacity, if not the mission, to communicate the same sense of community to all regardless of their circumstance of race, religion, gender, age or national origin.

In the end, a citizen/lawyer is a person of not only impeccable character, but a virtuous one as well, an individual to be admired for those strengths that others lack, an individual whose opinion and efforts are admired and accepted more because of who he or she is as much as what they may know.

So what can one do? Should we all join a legal aid office or go into public service? I suggest not, because it isn't so much what you do in the profession. It's how you do it. Practice our profession with integrity and civility, mentor others by setting an aspiring example, by saying no when that is the right answer regardless of the pressures of the issue or the moment. Espouse what I call the Golden Rule of professionalism and life, the common thread of all true religions and our society—that you treat others as you would be treated yourself.

Yes, the citizen/lawyer will find time as well to donate those talents that he or she possesses to those who will reap a benefit far beyond whatever momentary satisfaction you may have achieved by using the same effort elsewhere. Above all, remember that being a lawyer in a society based on and defined by the rule of law, as is ours, is not simply something to do—it is something to do that matters, and it is therefore something worth doing well.

I began by reference to the Founding Fathers, let me conclude likewise by quoting a late citizen/lawyer, the Honorable Robert R. Merhige Jr., who opined as follows in an op-ed piece in 2000:

> In this country, every day is a special day of celebration and appreciation of the dedication and brilliance of our Founders whose foresight afforded us so much. The privileges and liberties that most of us enjoy, however, are not to be taken for granted and require not only an appreciation of them, but affirmative action to protect the principles of equality and justice under the law that came about from the dedicated efforts of individuals of great vision who saw to the incorporation of those rights and privileges in our Bill of Rights. They require constant appreciation and vigilance. Though they regrettably have not come to all of our people; they are coming to near-fruition by virtue of the courage and farsightedness of men and women of brilliance and belief.

*continued on page 25*

## Citzen/Lawyer *continued from page 24*

Let's conclude by rededicating ourselves to carry on that mission—to rekindle that concept of citizen/lawyer that served our profession, our country and our fellow human beings so well for so long. ⚖

# LSNV Names Carrico Award Winners

Legal Services of Northern Virginia announced the winners of its annual Harry L. Carrico Pro Bono Awards, which were presented at a reception on June 1, 2005, at the George Mason School of Law in Arlington.

The award is given to attorneys and others who have made significant contributions to the provision of pro bono legal services to area residents of limited means. Senior Justice Harry L. Carrico, former Chief Justice of the Supreme Court of Virginia, for whom the award was named, presented the awards. Johanna L. Fitzpatrick, Chief Judge of the Court of Appeals of Virginia, introduced Carrico.

This year's winners were George E. Tuttle, Jr. of Alexandria; Charles G. Flinn of Arlington; Karen A. Leiser of Fairfax; Bernadette R. O'Reilly of Loudoun; Barbara M. Stough of Prince William; and Nancy Pickover and Mario Rodriguez, both of Falls Church.

# Indigent Criminal Defense Training

The first Indigent Criminal Defense Seminar drew on leading defense attorneys in Virginia and nationally to present a program that focused on high-tech evidence such as DNA. Three hundred fifty attended at the Richmond Convention Center and another one hundred watching its live showing on screens in Abingdon.

The seminar, sponsored May 20 by the Virginia Chief Justice and the Supreme Court of Virginia, with support from the Virginia State Bar, was for experienced public defenders and criminal defense lawyers who take court-appointed cases. The lawyers were not charged for the program.

The conference grew out of Chief Justice Leroy R. Hassell Sr.'s concern over inadequate fees and resources provided to court-appointed lawyers in Virginia. He told the attendees that the United States has the best justice system in the world, "but our system remains imperfect . . . . Without your participation, we would be in bigger trouble."

Above: Virginia State Bar President-elect Phillip V. Anderson (l) and Judge Elizabeth A. McClanahan, of the Virginia Court of Appeals, at the Indigent Criminal Defense Training Seminar that was concurrently shown in Abingdon, Virginia.

Right: Among the experts speaking at the Richmond Convention Center on May 20 was Stephen B. Bright, director of the Southern Center for Human Rights.

# Williams Mullen Is First Designated Sponsor of VLF Public Service Internship Program

The Virginia Law Foundation announces that Williams Mullen law firm has become the first designated sponsor of the foundation's Public Service Internship Program, by sponsoring an internship at the University of Virginia School of Law each year for the next five years. The internship will be known as the Williams Mullen VLF Public Service Internship. The 2005 recipient of the Williams Mullen VLF Public Service Internship is Clermont Lee Fraser who is working at the Legal Aid Justice Center in Charlottesville.

"Public service is a vital aspect of our profession," said Julious P. Smith, Jr., Chairman and CEO of Williams Mullen. "It's critical that the best and brightest students with an interest in public service be given the opportunity to be exposed to its different facets. These internships make that happen."

Founded in 1974 as the charitable arm of Virginia's legal profession, the Virginia Law Foundation provides grant support to law-related projects throughout Virginia. Since 1989, its public service internship program has enabled over 325 selected law students to work at an approved public service employer in Virginia during their summer break. Through this process, students gain valuable insights into the challenges and rewards of pursuing a career in public service law.

For more information about sponsoring an internship at any of Virginia's seven American Bar Association-accredited law schools, please contact Sharon Tatum, Executive Director, Virginia Law Foundation, 700 East Main Street, Suite 1501, Richmond, VA 23219, or phone (804) 648-0112.

# NAACP Honors Oliver W. Hill with 90th Spingarn Medal

The National Association for the Advancement of Colored People (NAACP) Board of Directors named lawyer Oliver W. Hill as the ninetieth recipient of the Spingarn Medal, the NAACP's highest honor. Hill will receive the award during the ninety-sixth NAACP National Convention in Milwaukee, Wisconsin, in July.

Julian Bond, chair, NAACP board of directors, said: "Oliver Hill is a giant in civil rights law—for years, he was the Virginia civil rights lawyer, risking life and limb to defend civil rights in hostile circumstances. As the lawyer for the Virginia cases that became *Brown v. Board of Education*, his legal skills and dogged persistence won the landmark civil rights case of the Twentieth Century."

Hill retired from his law practice in 1998, at the age of 91. He currently resides in Richmond and continues to speak to students and others about his legal career and history of activism.

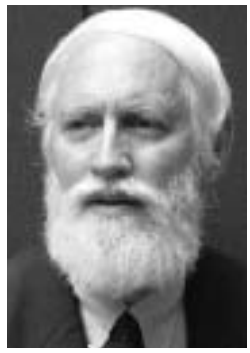
The Spingarn Award, first presented in 1915 by NAACP Chairman Joel E. Spingarn, is designed to highlight distinguished merit and achievement among African Americans. Previous Spingarn winners include Oprah Winfrey, Vernon Jordan, Earl G. Graves Sr., former Virginia Governor L. Douglas Wilder, Dr. Martin Luther King Jr., William H. Cosby Jr., Rosa Parks, Leontyne Price, Maya Angelou, General Colin Powell, Edward "Duke" Ellington, Carl T. Rowan, Alex Haley, Jacob Lawrence, Henry "Hank" Aaron, and Myrlie Evers-Williams, chair emeritus of the NAACP Board of Directors.

## Free and Low-Cost Pro Bono Training

Visit the Pro Bono page on the VSB Web site for free and low-cost pro bono trainings and volunteer opportunities: **www.vsb.org/probono/**.

If you have moved or changed your address, please see the VSB Membership Department's page on the Web for an **address update form** at **www.vsb.org/membership/**.

# Fredericksburg's William L. Botts III Wins Virginia State Bar's 2005 Legal Aid Award



William L. Botts III, executive director and chief counsel of Rappahannock Legal Services Inc. in Fredericksburg, is the 2005 recipient of the Virginia Legal Aid Award, presented by the VSB's Special Committee on Access to Legal Services.

The award recognizes innovation and creativity in advocacy, experience and excellence in service and impact beyond the winner's service area. It was presented on June 17 during the VSB's annual meeting in Virginia Beach.

Botts "has dedicated his adult life to helping those who are indigent or who have been left behind in our society," according to a nomination letter from Fredericksburg attorney Joseph W. Gorrell, who won this year's Lewis F. Powell Pro Bono Award.

Before Botts joined Rappahannock Legal Services in 1979, he was a Volunteers in Service to America volunteer. After he graduated from George Washington University Law School in 1973, he represented farm workers in Florida and served in a law reform unit in Pennsylvania.

His cases in Virginia include:

- A challenge to a Fredericksburg hospital's practice of forcing indigent pregnant patients who were in labor to go to Richmond for health care.
- A $100,000 settlement on behalf of sixty victims of a Maryland corporation that unlawfully sold defective home fire-safety products.
- Advocacy to force the federal Department of Health and Human Services to increase the "substantial gainful activity" standard in the Social Security Administration's disability programs.

Botts also took on federal, state and local governments over public benefits, transportation and housing issues.

During his vacations, Botts and his wife, Sue, have for several years taken mission trips to Central America and Western Indian reservations to help the needy.

"His tireless advocacy is rooted in his underlying faith in God and faith in the ability of the legal system to protect the disenfranchised from injustice," Gorrell wrote.

# UVA Law School Partners with Hunton & Williams To Serve Low-Income Residents in Charlottesville

The University of Virginia Law School and Hunton & Williams LLP have established a pro bono partnership between the law school and the law firm to provide free legal services to low-income Charlottesville residents. Volunteer lawyers and law school students will represent clients in the areas of immigration and domestic relations.

"Inspired by a partnership between a major Boston law firm and the Harvard Law School, we have teamed with Hunton & Williams so that our students will be able to participate with their attorneys on a pro bono basis for the representation of low-income persons referred primarily by The Legal Aid Justice Center [in Charlottesville]. We welcome this opportunity for our students to engage in important public service under the guidance of lawyers from a firm so highly respected as Hunton & Williams," said law school Dean John Jeffries.

Through a pilot program started last September, four Hunton & Williams lawyers and eight law school students began handling cases for immigrant clients seeking asylum in this country. The law school and the law firm will represent family law clients in such areas as child custody, support, divorce and cases arising out of abusive relationships. In addition to the free legal services of the volunteer lawyers from its Richmond office, Hunton & Williams will contribute office space and employ a full-time lawyer to develop the practice and manage the new office. The law school's assistant dean for pro bono and public interest, Kimberly Carpenter Emery, will represent clients, coordinate student volunteers and help supervise the case load in the pro bono office. Other volunteer lawyers will join the current four-lawyer team, and the law student volunteers will increase from eight to twenty.

A new and separate pro bono office will open in Charlottesville on the campus of the Legal Aid Justice Center at 1000 Preston Avenue. The partnership office will temporarily be located in the Legal Aid Justice Center offices until winter 2006 when it will be relocated permanently on the same campus in the nearby Rock House, which is being renovated.

## Anderson *continued from page 13*

greater than any one lawyer, and they are greater than any one bar. If any of us are to succeed in confronting these challenges before us, we must choose to work together . . . to ensure that we can respond to the ever-changing demands of our profession."

At home in Roanoke, Anderson's most recent commitment to public service was serving on a steering committee which assisted with the opening of Roanoke County's Hidden Valley High School.

"He just became an invaluable asset," said the principal, David Blevins. He drew up 501(c)(3) plans for three booster and parent support organizations, "just for a thank you." He raised "probably one hundred thousand dollars." And, when plans were being made to transfer athletes in their junior to Hidden Valley, Anderson was able to work with the feuding factions. "He is able to put people together," Blevins said.

Because of Anderson's work, Hidden Valley awarded its first athletic letter to Anderson, which he presented to the original Athletic Booster Club Board.

Roanoke accountant C. Drew Barrineau got to know Phil and Beth Anderson when their children were in middle school, and Barrineau was elected to the Roanoke County School Board with their help. "He and his wife are nearly professional volunteers," Barrineau said. "They don't get into things for recognition. They do it because it's the right thing to do."

From the things Anderson says about the bar, Barrineau has concluded, "This position isn't about him. It's about what he can promote to move the bar forward. He is proof of the old cliché, 'It's amazing what you can accomplish when you don't care who gets credit.'"

Phillip V. Anderson at his office in Roanoke.

# Law and Global Trade Today

by Stuart S. Malawer, Special Editor

The similarities between the situations the United States finds itself in during this time of war and the last time the U.S. was engaged in major warfare are both instructive and unsettling.

In the 1960s and 1970s, the United States was engaged in decade-long military operations in Southeast Asia. Now it is engaged on several fronts in a seemingly never-ending conflict in Southwestern Asia. Then, the United States was led into war by dubious claims of events in the Tonkin Gulf. Today, claims of seemingly nonexistent weapons of mass destruction and ties to global terrorism rationalized our use of force. Then and now, rights of individuals were restricted by executive actions in the name of national security. At both times, questions of constitutional and international law concerning use of force and rights of prisoners were fiercely debated. The Middle East and Arab-Israeli relations were then and now in a state of turmoil. The U.S. then blamed the United Nations for ineffectual peacekeeping and U.S. relations with the U.N. and our allies were antagonistic. We continue to blame the U.N. for much of the ills of that region. Then, the global trading system through the General Agreements on Tariffs and Trade (GATT) attempted to address the global economy that had not yet fully entered the era of globalization. The World Trade Organization (WTO) today is attempting to deal with those discontented with globalization.

But of course, events have changed. The Berlin Wall and the Iron Curtain have disappeared. Terrorism, not Soviet T-55 tanks, threatens the United States. Throughout the 1980s and 1990s, the importance of law to foreign policy and international trade grew significantly. Today, law and litigation are of immense importance in the field of global trade practice. The Internet, global telecommunications, information technology, biotechnology and outsourcing characterize our world. Global trade today is composed of electronic commerce in bits and bytes. Transformations have occurred in the world of global trade and transnational business—core interests of the Virginia State Bar International Practice Section.

The tectonic shift of economic power from Europe to Asia raises questions about trade, politics and foreign policy. India and China now help drive the global economy. Technology and services are the growth engines of global commerce. The WTO replaced the GATT in global trade and transactions. A new dispute resolution system provides compulsory and binding decisions with enforceable sanctions to the world of international trade relations for the first time. This development of adjudication and litigation affects national sovereignty as well as enhances the efficacy of the trading system. It benefits many by ensuring compliance with trade rules and by discouraging unilateral actions.

Yes, critics abound. The WTO has become controversial within and outside of the U.S. as part of a growing antiglobalization sentiment. While many industries and firms have become global, growing protectionist pressures now emanate primarily from workers, local politicians and traditionally protected sectors. In addition to the WTO, newer areas and institutions have become critical to global transactions. In the wake of U.S. and foreign corporate scandals, the transnational issue of corporate governance has emerged as a critical aspect of international trade relations. Addressing concerns with the export and reexport control of technology have emerged as crucial to globalization. This issue now treats the intellectual property rights, patents and copyrights as key elements of global trade in the twenty-first century.

This issue of *Virginia Lawyer* is dedicated to examining key international issues concerning the professional interest of lawyers grappling with global trade and transnational business in today's environment. It examines the history of U.S. litigation in the World Trade Organization during its first ten years (1995–2005); it assesses recent developments in U.S. corporate governance pertaining to foreign companies; and assesses newer U.S. rules regarding export controls. The authors' intents are to highlight these important areas and assist members of the Virginia State Bar to better understand these developments in the new world of global trade and transactions today.

# Litigation and Consultation in the WTO

## *10th Anniversary Review*

**by Stuart S. Malawer**

As the tenth anniversary of the World Trade Organization's (WTO) dispute resolution system was on January 1, 2005, it is truly amazing to review its historical emergence as the central pillar of the global trading system and as the WTO's most important contribution to the multilateral trading system. Renato Ruggiero, the former Director-General of the WTO, made this assessment in 1997.[1] Then his statement was premature, but now it is fully born out.

***The dispute resolution system, launched without much fanfare or recognition, has become the most effective system ever to adjudicate and implement global trade rules.***

The dispute resolution system, launched without much fanfare or recognition, has become the most effective system ever to adjudicate and implement global trade rules. The recent report of a committee of experts appointed by current Director-General Supachai Panitchpakdi to assess the WTO on its tenth anniversary declared that "The Dispute Settlement Understanding (DSU) is a significant and positive step forward in the general system of rules-based international trade diplomacy." [2] Indeed, the Director-General in introducing the report proclaimed that "The WTO was now a major player not only in the conduct of trade relations but in global governance."[3]

At the outset of the new system, global leaders hoped that it would develop through the application of rules negotiated and agreed on by consensus within the WTO. It was designed to be a system based not upon power politics or the law of the jungle, but on mutual consent; a global system where unilateralism would be restricted and rules would be adjudicated and enforced through a system of consultation and litigation. The new system would be governed by compulsory jurisdiction, binding decisions and effective sanctions. In other words, the WTO's dispute resolution system would be a truly global legal system benefiting all members. Initially, some diplomats and trade experts from both developing and developed countries feared that importing an American rule-of-law approach to the trading system—or the legalization of the system—would harm them. Even within the United States, concerns were raised over the historical American recalcitrance of recognizing foreign decisions as derogating American sovereignty.

The United States—the system's primary architect—intended for the system to interpret and to apply rules of global trade. As Director-General Panitchpakdi recently stated: "It was the United States, perhaps more than any other nation, which recognized the importance of the rule of law during the Uruguay Round and sought to broaden and deepen its relevance to international trade."[4] Recently, the new European Commissioner for Trade, Peter Mandelson, declared, "Smaller countries … are more protected because the system is based on the rule of law."[5]

The principal objective of this new system was to foster a rule-based trading system through consultations and litigation. The United States pictured a system that would lead to the rule of law within the multilateral trading system as well as, it hoped, in other areas of international relations, not to mention within transitional and developing states. To a great extent, those intentions for the trading system have become a reality. But as the United States has lost more cases recently, changes in the United States's practices have been required and sanctions have been authorized or threatened against it. As a result, challenges to the dispute resolution system have recently emerged, and antagonism toward the system has grown within Congress[6] and has influenced U.S. negotiations during the current Doha round of trade negotiations.[7]

This article reviews the evolution of litigation and consultation within the WTO during this ten-year period.[i] The evaluation is primarily from an empirical basis, relying heavily on statistical studies from the Office of the United States Trade Representative (USTR),[8] the WTO[9] and my prior statistical analysis appearing in the *Virginia Lawyer*.[10]

This article focuses on the general experience of the United States. The period covered begins with the first decision ever rendered by the WTO against the United

States in an action concerning importation of oil and U.S. environmental regulations[11] and ends with the adverse decision in November 2004, which involved Internet gambling.[12] (The U.S. case against the European Union concerning genetically modified foods[13] is yet to be determined as is the newer *Airbus-Boeing Cases*[14].) The article concludes with observations concerning the importance of WTO litigation to fostering better global governance in this era of global trade and worldwide economic integration.

**Background**

The dispute resolution procedure is fairly simple but detailed. The *Dispute Settlement Understanding (DSU)*,[15] one of the family of integrated agreements negotiated and concluded by countries during the Uruguay Round of trade negotiation in 1994, provides that states with a trade dispute may pursue a process of consultation, review by a panel and, if necessary, an appeal to the Appellate Body (AB). A decision is finalized when the Dispute Settlement Body (DSB), comprised of the entire membership of the WTO, adopts the report of the panel or the AB (if an appeal occurs).

As enunciated in Article 3 of the *Dispute Settlement Understanding,* the aims of the dispute resolution system are to provide security and predictability to the multilateral system. The system also attempts to provide prompt settlements as well positive solutions and the withdrawal of offending measures. Trade sanctions and retaliation are the last resort. With its launch in 1995, the system accomplished three historical achievements: compulsory jurisdiction, binding decisions and sanctions. Unlike many domestic legal systems providing for disjointed proceedings to decide the merits of a case and enforcement of the court's judgment, the WTO system retains competence to supervise the implementation of its decisions and to render additional determinations concerning compliance and sanctions ("post-judgment procedures"). This authority is a regular and permanent feature. The substantive determinations and enforcement proceedings are not disjointed but are one continuous process.

Article 19 of the DSU requires parties to bring an offending measure into conformity with the WTO agreement deemed applicable. The WTO does not override a domestic law, but requires the losing party to change the offending measure or eventually face sanctions. Thus, a state could continue to pay (in the form of higher tariffs on its exports) if it refuses to change the offending practice or law.

Article 21 of the DSU provides for surveillance of implementation. Recognizing the necessity for prompt compliance, parties must inform the WTO of their intentions to comply. Most importantly, an arbitration procedure is built into this process to determine a reasonable period for implementation if the parties cannot agree. And once compliance is accomplished, the WTO can determine whether the action is consistent with the decisions. (The EU recently announced it is filing a new action to determine if the 2004 corporate tax law, really lifts the offending export subsidies that the WTO ruled as invalid in the *Foreign Sales Corporation Case*[16].)

Article 22 of the DSU provides for the multilateral authorization of sanctions by the WTO, specifically by the DSB. Winning states must return to the WTO and request authorization, if implementation does not occur within a reasonable period. Unilateral decisions are prohibited. Most often this trade sanction is an authorization to impose tariff surcharges on imports from the offending country, technically known as a withdrawal or suspension of concessions. These tariff surcharges are being aimed at imports determined by the winning party. However, an arbitrator may decide the size or amount of sanctions. The genius of this system is that the imposition of sanctions would normally be targeted against selected imports to cause the maximum domestic political pressure within the targeted state and, thus, hopefully, the removal of the offending actions. (For example, the EU planned to target the orange growers in Florida to persuade the Bush administration to lift steel safeguard measures after the WTO ruled the measures to be invalid in 2003.)

**U.S. Experience within the Dispute Resolution System (1995–2004)**

When terms of the dispute resolution system were negotiated during the Uruguay Round, many in the United States were concerned with how it would affect actions brought against the United States. Likewise, many countries were concerned with whether the United States would use the system against them and if the United States would ever comply with decisions against it.

The United States has been involved a broad range of cases as the complaining party and responding party. For example, these cases have involved gasoline refining, fisheries, agricultural subsidies, steel import restrictions, telecommunications and corporate income taxation. Most recent cases have involved e-commerce (gambling), cotton subsidies and geographical indicators for food products. Newer and pending ones involve genetically-modified organisms, textile quotas and potentially outsourcing of information technology services. These issues are far removed from the traditional trade matters involving tariffs and quotas on goods and

***The United States has been involved a broad range of cases as the complaining party and responding party.***

commodities.

With ten years of experience, we can now assess the experience of the United States more fully. (For a chart of cases the U.S. was a party to see addendum.[ii])

The USTR's most recent data released on January 14, 2005, offers the following highlights for the ten-year period (January 1, 1995–January 1, 2005) under the dispute resolution system:

- The United States has gone through the full litigation process as a complainant 26 times. It won 22 cases and lost 4 cases.[17]

- The United States served as a respondent in 36 cases that went through the full litigation process including compliance procedures. It lost 26 cases and won 10. (Two decisions are still in the appellate stage.) **See chart 1.**

The statistics indicate that that the United States is extremely active as a complainant and respondent. In cases it initiated, the United States won most of the cases. In cases filed against it, the United States won about one-third. Not a bad record. This record is consistent with my evaluation for nearly the same period, published previously.[18]

But litigation is not the primary purpose of the dispute resolution system. The primary purpose is to resolve trade disputes, which involves the other part of the system—the required pre-consultation stage. Here the numbers are quite instructive. The following is the USTR data for when the United States was the complainant:

- The United States filed 75 complaints—meaning only 26 went through the litigation process. Therefore, about two-thirds of the cases filed (49) were resolved at the consultation stage, pending or are inactive.

- Exactly 22 of the cases addressed in the consultation stage were resolved in favor of the United States. Thus, almost half in consultation were resolved favorably to the United States. For example, the claim by the United States against China concerning its taxation of foreign produced integrated circuits was recently settled favorably to the United States.[19] This dispute had the potential of being the first litigated disputed between China and the United States in the WTO. The consultation cases settled favorably join the large number of cases the United States won after going through the full litigation process. (Since the consultation process is confidential, conducted in a traditional diplomatic context, and parties often do not disclose the outcomes, it remains unclear what happened to the balance. Probably most cases were dropped, and some remain pending.) **See chart 2.**

The USTR data further discloses the following when the United States was the respondent:

- The United States was a respondent in 102 cases, with less than one-third (36) requiring the whole litigation process. (Eight cases are still in the panel

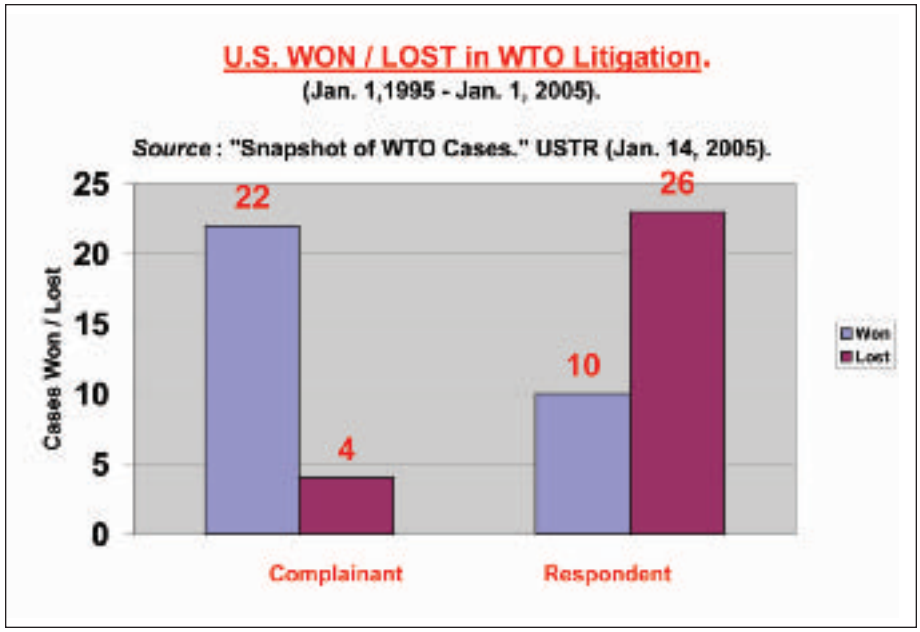



chart 1

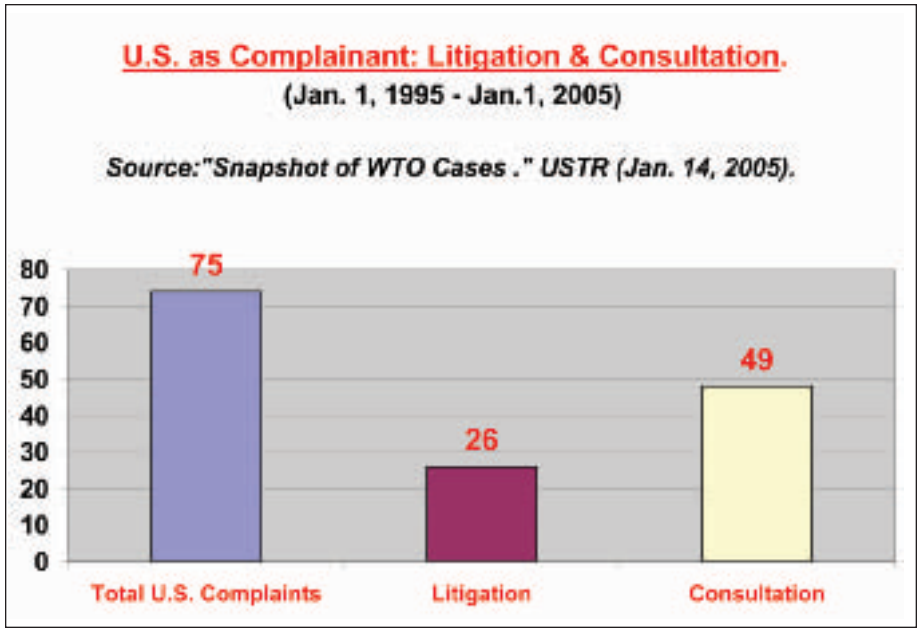



chart 2

process.) A total of 50 cases never made it out of consultations—or are inactive or in the panel process. The United States was served in more cases (102) than it brought (75). So much for the concern that other countries would not try to hold the United States accountable. **See chart 3.**

These last two numbers are the most enlightening. The United States filed 75 complaints; yet more than 102 complaints were filed against it. This trend clearly demonstrates that the trading community is not hesitant to enforce its WTO obligations against the most economically powerful member of the trading system. The recent panel decision this November against the United States concerning restrictions on Internet gambling, brought by Antigua and Barbuda, demonstrates that the smallest WTO members will bring actions to enforce WTO obligations against the United States.[20] How things have changed in ten years, from where developed and developing countries doubted the usefulness of the dispute resolution system in bringing actions against the United States to where they file more actions against United States filed than were filed against them. **See chart 4.**

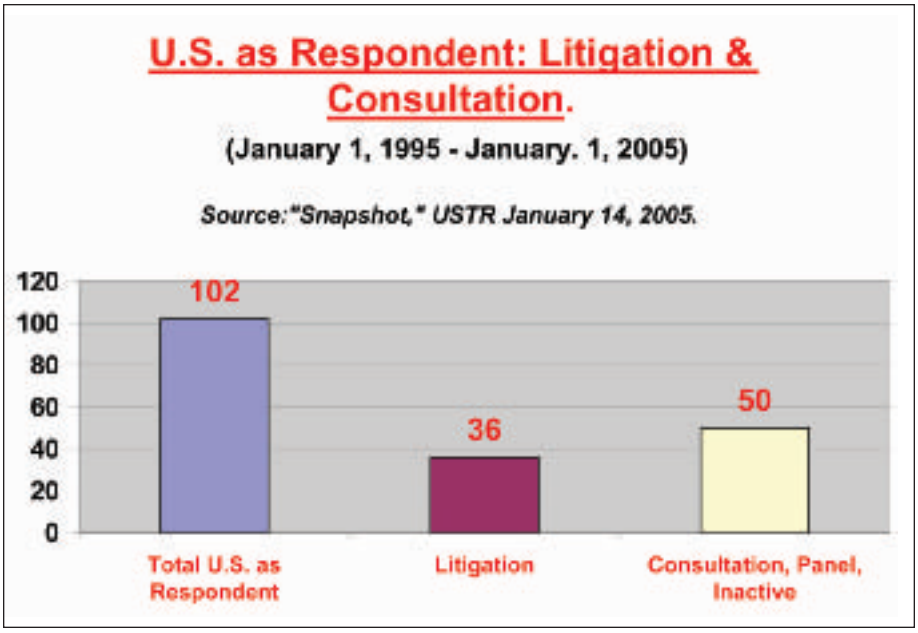



chart 3

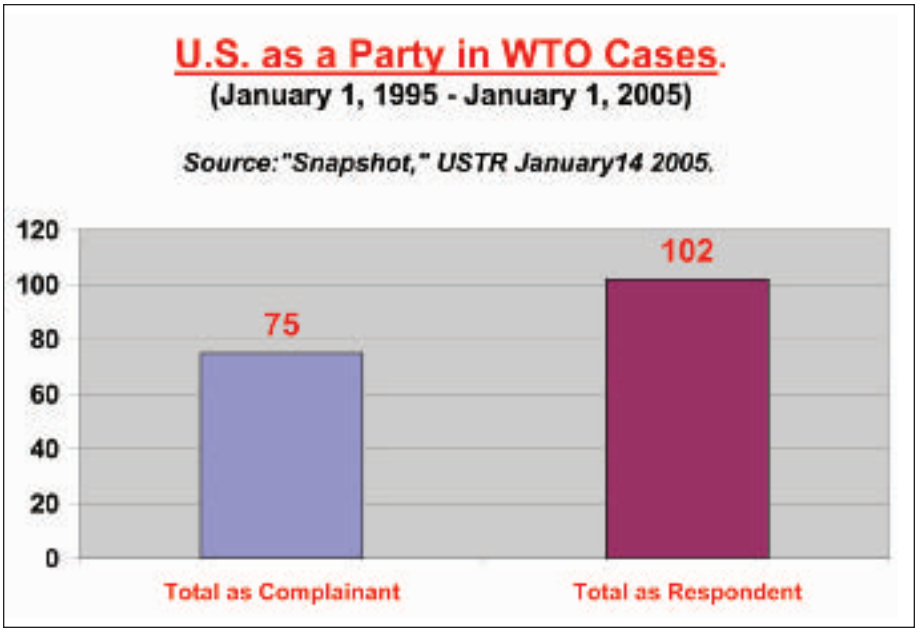



chart 4

The United States filed an action this October against the EU concerning subsidies provided Airbus. The EU immediately filed an action claiming invalid the United States and the State of Washington's subsidies to Boeing. In addition, the EU filed a new proceeding questioning the sufficiency of the recent removal of export subsidies by the United States. President Bush had signed new tax legislation designed to satisfy the WTO's decision in the *Foreign Sales Corporation Case* that declared various United States tax subsidies in violation of its WTO obligations. The United States has claimed that such EU actions are an unfortunate linkage of trade cases and in bad faith. WTO litigation seems to have gotten nastier, especially in transatlantic relations. But litigation is never viewed as a friendly act. Global trade litigation is beginning to look more like any mature system where parties become aggressively adversarial. But it is better to argue in court and have the issues settled in that forum then to have them unsettled.

**Use of the Dispute Resolution System by the Trading Community**

WTO statistics, released on October 14, 2004, indicate that 315 complaints have been filed in just under ten years since the inception of the dispute resolution system. The complaints resulted in 82 panel or Appellate Body decisions, meaning 233 cases were resolved, pending or considered inactive. As a result, we can infer that many cases are resolved outside of the strict litigation process and its harsh glare. Yet it is difficult to fully prove this conclusion, since the consultation process is a diplomatic one and extremely confidential. Little record exists on which to determine the motives of states in not pursuing litigation, resolving cases or dropping cases at the consultation stage. **See chart 5.**

The same WTO statistical release indicates that arbitration was used in 12 compliance procedures to determine consistency of

conforming actions and in another 16 instances to determine the amount of sanctions. However, the DSB actually authorized sanctions in only 7 cases—in ten years. (Sanctions were authorized in an additional case, the *Byrd Case against the United States*, after this statistical release and sanctions are being imposed.[21]) Sanctions were authorized against the EU in *The Banana Case*[22] and in *The Beef-Hormone Case*[23], and against both Canada[24] and Brazil[25] in their mutual actions regarding aircraft subsides. (However, neither Canada nor Brazil has imposed such sanctions.) In *The Banana Case* the sanctions were lifted, but Latin American countries have now gone back to the WTO under special provisions of the Doha declarations.[26] The sanctions in the beef case remain and the EU has filed a new case to remove them.[27] **See chart 6.**

In only two cases have sanctions been authorized against the United States—in the *Foreign Sales/ETI Case* and in the *Byrd Amendment Case,*[28] which involved payments for collected antidumping and countervailing duties to industry. In late 2004, the United States enacted legislation (American Jobs Creation Act) in order to comply with the WTO decision in the *Foreign Sales Case*. No legislation has yet been enacted to comply with the *Byrd Amendment Case*. The EU and Canada have recently imposed sanctions on the U.S. for its failure to repeal the Byrd Amendment.[29] However, the United States also in late 2004 enacted the "Trade Corrections Act" to comply with the WTO decision concerning the *1916 Antidumping Act Case*.[30]

A deadline for avoiding sanctions in the *Cuban Rum Case*[31], where the United States refuses to recognize certain Cuban trademarks as being illegally expropriated, expires shortly is causing concern in the Congress. This adds to Congressional angst over threatened sanctions by Canada in its lumber disputes with the United States.[32] Of course, Congress is already unhappy with the administration's recent refusal to bring an action against China because of its currency regulations that are viewed as restricting United States exports and encouraging more Chinese exports to the United States.[33] Congress is also concerned about the administration's failure to bring an action contesting China's labor practices as well as stopping the current surge of textile imports from China as a result of lifting its textile quotas on January 1, 2005.[34]

Greater analysis of the recently released case data by the WTO discloses that of the total number of cases filed, developed countries filed about two-thirds (195) while developing countries filed about one-third (120), including several that were filed jointly. Considering that most trade is between developed countries, this almost two-to-one ratio seems fairly balanced. It is interesting to note that developed countries filed 120 actions against other developed countries and 75 against developing countries, representing—a similar 2-to-1 ratio. Developing countries filed 66 actions against developed countries and 48 against other developing countries. This record is not surprising since much trade occurs between developing countries and they also maintain

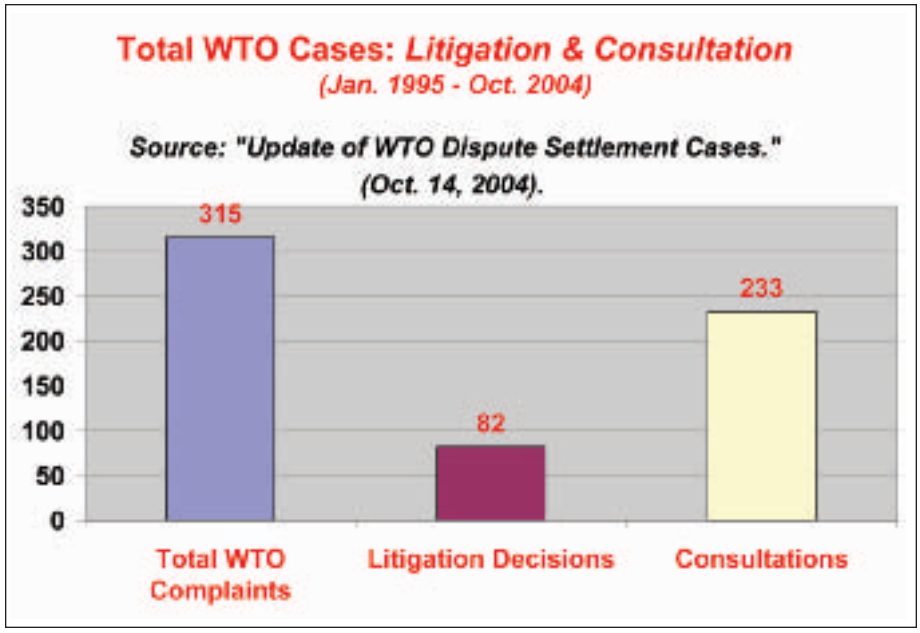



chart 5

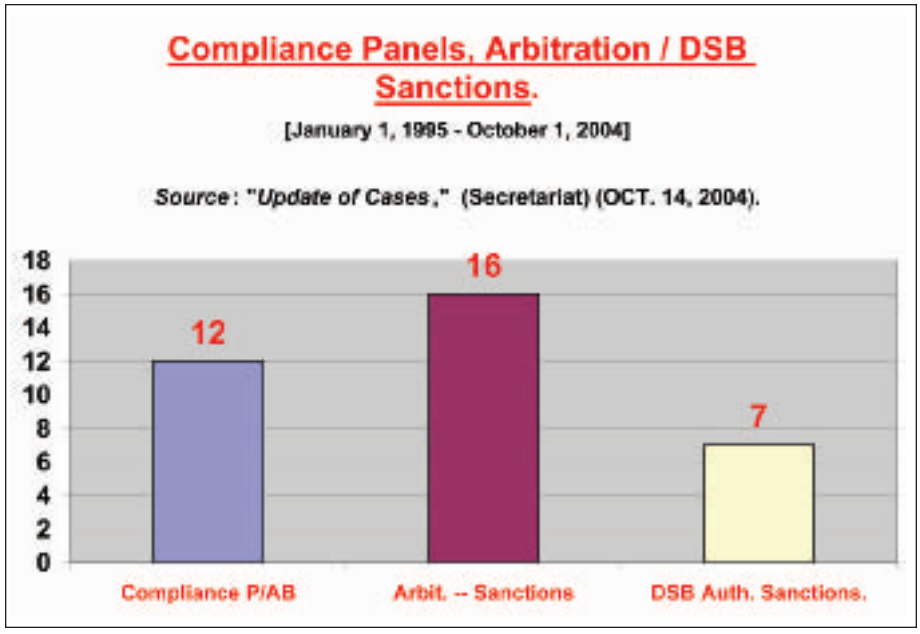



chart 6

significant trade barriers. Developing countries have become very aggressive in utilizing the dispute resolution system. In 2004 Brazil won two historical agricultural cases—one against the United States concerning its cotton subsidies[35] and one against the EU relating to its sugar subsidies[36]. The EU is now revamping its sugar regime. **See chart 7.**

*The system has matured into an effective means of resolving trade disputes among a wide range of parties over ever-increasing types of issues.*

Statistics recently released by the Appellate Body examines the ten-year history of appealing panel reports and offers additional valuable insight.[37] The early years (1996 and 1997) saw an appeal rate of 100 percent. By 2004, the appeal rate dropped to 75 percent. (In 2002, the appeal rate was at 50 percent.) **See chart 8.**

This data indicates that parties are becoming more accepting of the panel decisions, perhaps indicating a greater acceptance of substantive trade rules once they are more fully defined, and a greater acceptance of the legitimacy of the dispute resolution system. The data also indicated that the United States, the EU, Japan, India, Mexico and New Zealand appeared the most often in the appeals process.[38] **See chart 9.**

An assessment of the appeals and agreements relied upon in them, as indicated in the recent annual report of the DSB, disclosed that were primarily relied upon were those relating to goods, subsidies, antidumping and safeguards.[39] **See chart 10.**

chart 7

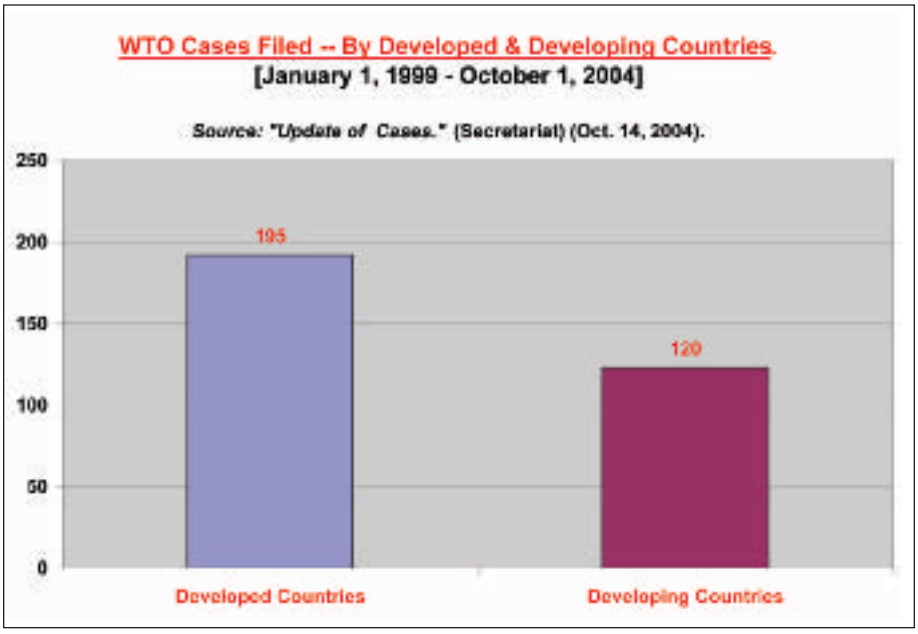
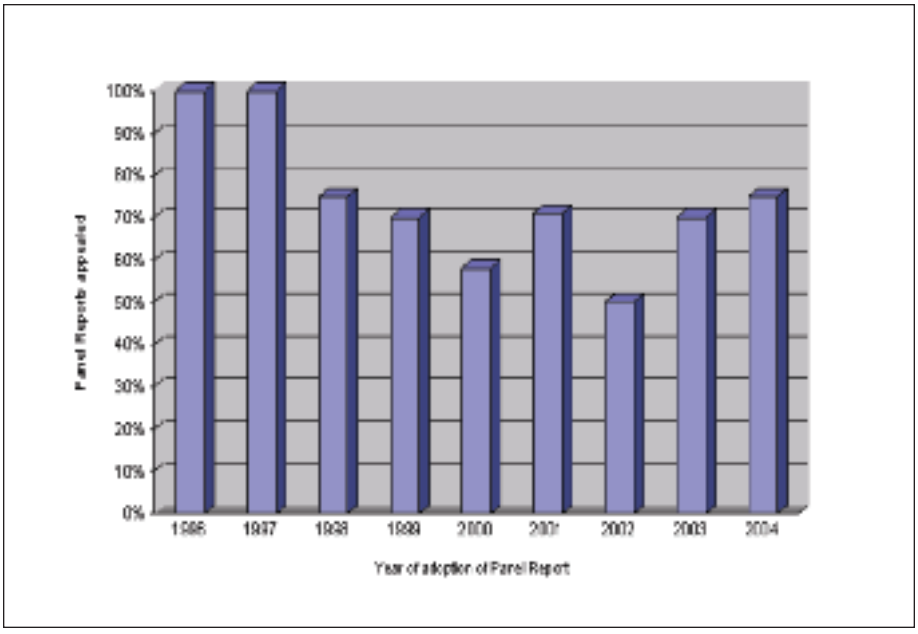



chart 8




**Observations & Suggestions:**

When the dispute resolution system commenced on January 1, 1995, it was a historically innovative idea with a number of skeptics in the United States and throughout the global trading system. Ten years later, many of the concerns expressed have largely disappeared. The system has matured into an effective means of resolving trade disputes among a wide range of parties over ever-increasing types of issues. However, some concerns remain, especially in the United States Congress as the United States continues to face existing sanctions and threatened new ones. Those concerns, as well as lingering ones from other states using the system, should be alleviated in light of the following, which is based on the experience and data collected about the dispute resolution system:

- Many countries from the developed world and the developing world use the system.

- Cases deal with a wide spectrum of issues, from traditional trade matters (such as dumping and subsidies) to

newer ones (Internet gambling, intellectual property rights, telecommunication and science-based trade actions).

- Few cases cause serious implementation problems.
- Even fewer cases lead to sanctions, and in those cases that lead to sanctions parties attempt to comply with decisions and at times do not even ask for or implement sanctions.
- The United States employs the system more than any other state and it wins most of these cases.
- Many cases are brought against the United States, which wins a significant number. Moreover, its winning has increased.
- Litigation plays a large role in the United States's wins, as do consultations. In fact, more cases are resolved successfully at that stage, thus eliminating the need to go through the full litigation process.
- To fully understand the system, we must learn more about the conduct and resolution of cases within the consultation process.

chart 9

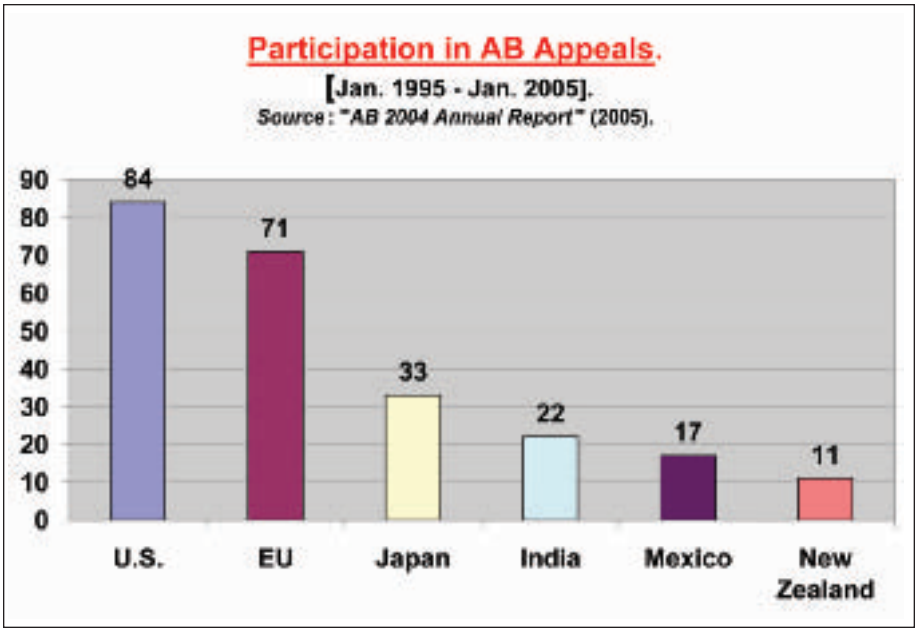
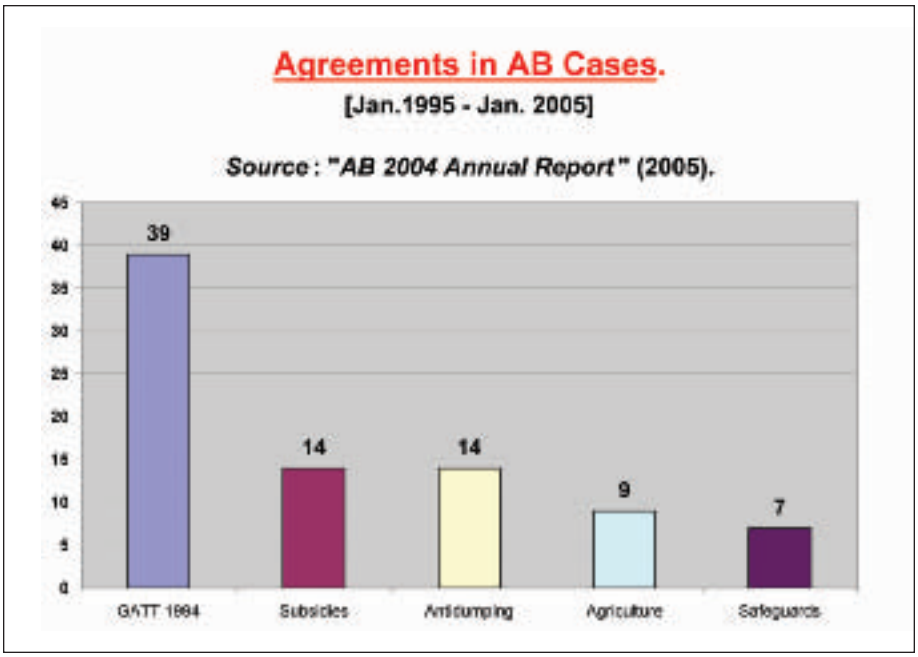



chart 10




What happens at consultations unfortunately remains unclear. The consultations are crucial to resolving disputes, but, unlike litigation, consultation outcomes are normally made public only if there is a mutually agreed solution under Article 3(6). It is most important to discover and to assess the full data concerning consultations. Only when this information is made public can a more accurate picture of the effectiveness of the WTO's dispute resolution system be ascertained. Unlike the cases that go through the full litigation process, which are eventually fully reported and disclosed, the results of consultation proceedings are much more difficult to unearth, since they are often shrouded in diplomatic secrecy and only disclosed by parties at their discretion. Yet, a further assessment of the number of litigation cases with the larger number of consultation proceedings is essential.

An ongoing tension exists between the traditional diplomatic aspects of trade negotiations and the newer legalization of trade dispute resolution. In the area of trade dispute resolution, it is in the interests of all parties to extend the rule-based system. This extension can occur by strengthening the consultation process and increasing its transparency, at least toward favorable conclusions.

It is important to emphasize that the dispute resolution system does not only settle cases between the immediate parties, but it further develops rules for the entire system. States change their practices in response to a binding decision; all other states benefit directly from that change. Other states might change their own rules to avoid violating WTO disciplines if they could accurately determine what is resolved in consultations. As a result, both the United States's and the global trading system's ability to further resolve conflicts would grow. At a minimum, all consulta-

tions leading to resolutions must be made public so they can be used by all parties and benefit every state taking part in the system.

Some states view linking trade disputes as an abuse of the system. For example, the EU contends that the filing of the Airbus case by the United States was caused by the United States's loss in the *Foreign Sales Corporation Case*. The EU argues that cases should be decided on their own merits and should not to be filed merely to gain leverage in another case. Likewise, the United States contends the recent EU case seeking review of the 2004 corporate tax legislation enacted by the United States to comply with the earlier FSC/ETI decision was an improper linking of cases. However, such linkages between trade cases, as well as trade cases and nontrade issues (for example, related foreign policy concerns), should not be viewed necessarily as an abuse of the system. In early January 2005, after filing initial pleadings, the EU and the United States decided to forego litigation in the Airbus-Boeing dispute and resort to international commercial diplomacy outside of the WTO framework. However, litigation was resumed shortly thereafter.

Time periods governing the litigation process within the WTO are short. Raising related issues within this context can result in a prompt resolution. Domestic litigation strategy has always included linkages between various issues involving private parties. Given the premise that resolving outstanding trade issues is the objective of the WTO, broadening the ability of states to resolve interrelated issues is an important goal whether the issues be trade or nontrade related (such as possible concerns over competition regimes and environmental matters). This approach expands rather than restricts the scope of dispute resolution in the trade arena and closely related matters of international relations generally.

States should also have a wide discretion whether to file cases. This discretion is a hallmark of any mature legal system. For example, the United States refused in November to file a WTO complaint concerning China's currency regulation. On the other hand, taking a questionable action and then defending a "losing case" sometimes has a certain merit. While some might view it as an abuse of the system, it serves a greater purpose: it allows the losing state to show domestic interest groups a good-faith attempt to defend its position in advance of modifying it to conform to WTO disciplines—thus, using the WTO as cover in order to make necessary domestic changes. To a certain extent this can be said of President Bush's use of safeguard measures on steel in 2002–2004 and his quick compliance with an adverse decision[40].

**Conclusion.**

A close examination of the WTO's record for dispute resolution should allay the fears expressed since its inception. The system's wide usage and acceptance, when implementation was required and in the few cases where sanctions were imposed, show it effectively addresses the most critical issues of international relations today. The system is restraining protectionist and unilateral measures. The system supports a rapidly globalizing system with great promises for resolving disputes concerning a growing range of global trade issues far beyond those that were known just ten years ago.[41] The United States should strengthen the global dispute resolution system to further its own interest in fostering a rule-based trading system with the intent of expanding such an approach as trade incorporates new issues.

Since post-World War II, trade has involved the shipping of goods and commodities between countries. The vision of lowering cargo into the hulls of ships is a fairly accurate characterization of early postwar trade. At that time issues of trade law primarily involved tariffs, quotas, dumping and export subsidies. These issues seem limited today. Global trade over the last sixty years has evolved quickly from containerization to bits and bytes over the Internet. Global trade today has moved from trade in goods to trade in services, such as financial services, information technology and telecommunications.

Newer issues of law have arisen concerning nontariff barriers (such as market access restrictions and commercial bribery) and a host of newer ones traditionally not considered related to trade law at all such as intellectual property rights, currency restrictions, direct investment, environmental, labor, corporate governance and antitrust. As technology has rapidly developed, new areas of trade relations have evolved, such as e-commerce and Internet trade. Each of these raises unique and novel questions in a multijurisdictional trading environment.

Global trade is the arena for entrepreneurial enterprises of the twenty-first century to strike out and to generate wealth for themselves and the global economy. Global trade has "transformational power" essential for economic growth, development of civil society and peaceful international relations.[42] Global trade serves as the principal engine of global change when there is a leveled playing field.[43] The WTO serves as the enhancer and enabler of global trade and as multiplier agent for the entrepreneurial and commercial drive of individuals and companies globally. The WTO dispute resolution system provides that mechanism for the global system. This system is a critical aspect of foreign affairs and international relations today.

The challenge is now for the United States and the global system to further develop rules and institutions to manage the expansion of global trade and to provide better global governance while recognizing the one principle that should guide their efforts: A stronger dispute resolution system is clearly in everyone's best interest. A stronger global institution is necessary to better manage economic globalization. The great success of the dispute resolution system reaffirms the earlier American vision. This success reaffirms the traditional reliance of American diplomacy of actively engaging in global institutions. Only through visionary leadership by the United States can the global community

successfully confront the critical issues posed by economic globalization. Greater trade today is the foe to greater disorder and a friend to greater prosperity. As terrorism is a threat to peace trade is a threat to terrorism.

> "There is no doubt that this jurisprudence will have an effect on general international law broader than the borderlines of the WTO system … . It is self evident that the better informed are diplomats, government officials and legislators on the fundamentals of international dispute settlement the better."
>
> . . . . *The Future of the WTO—Addressing Institutional Challenges in the New Millennium* 51, 81 (by the WTO Consultative Board, 2005).

Addendum i

**Important Summaries and Statistical Studies of WTO Cases.**

| | |
|---|---|
| "Snapshot of WTO Cases Involving the United States." (January 14, 2005) (by USTR). | http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/asset_upload_file287_5696.pdf |
| "Dispute Settlement Update." (January 14, 2005) (by USTR). | http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/asset_upload_file881_5697.pdf |
| "Update of WTO Dispute Settlement Cases."(October 14, 2004) (by the Secretariat). | http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm |
| "Overview of the State of Play of WTO Disputes." WT/DSB/37/Add 1 (December 3, 2004) (Addendum to *DSB Annual Report for 2004*). | http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#dsb |
| "Appellate Body Statistics." In AB *Annual Report* (2004) (Jan. 2005) | http://www.wto.org/english/tratop_e/dispu_e/wt_ab3_e.doc |
| "Chapter VI—The WTO Dispute Resolution System," *Future of the WTO—Addressing Institutional Changes in the New Millennium.* (2005) (WTO report). | http://www.wto.org/english/thewto_e/10anniv_e/10anniv_e.htm#future |

Endnotes:

1 Renato Ruggiero (Director-General of the World Trade Organization), *The Future of the Multilateral Trading System.* (Speech in Seoul, Korea on April 17, 1997). http://www.wto.org/english/news_e/sprr_e/seoul_e.htm

2 *The Future of the WTO—Addressing Institutional Challenges in the New Millennium* 80 (by the WTO Consultative Board, 2005).

3 *Id.* at page 2.

4 Supachai Panitchpakdi, "The WTO After 10 Years: The Lessons Learned and the Challenges Ahead." (March 11, 2005). http://www.wto.org/english/news_e/spsp_e/spsp35_e.htm.

5 Mandelson, "Towards a New Map for World Trade," *Financial Times* 15 (May 3, 2005).

6 *See generally*, Esserman and House, "The WTO on Trial—Global Law and Global Politics," 82 Foreign Affairs 130 (No. 1, January–February 2003). Congress is currently reviewing the U.S. participation in the WTO as part of its previously authorized ten-year review.

7 The U.S. has been addressing the issue of "overreaching" during these negotiations.

8 U.S. Trade Representative "Snapshot of WTO Cases Involving the United States." (January 14, 2005). http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/asset_upload_file287_5696.pdf. *See also*, "Dispute Settlement Update." (January 14, 2005). http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/asset_upload_file881_5697.pdf

9 World Trade Organization (Secretariat), "Update of WTO Dispute Settlement Cases." (October 14, 2004) (WT/DS/OV22). http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm. *See also*, "Overview of the State of Play of WTO Disputes." WT/DSB/37/Add 1 (December 3, 2004) (Addendum to DSB Annual Report for 2004) (covers January 1, 1995 to October 31, 2004). *See also*, Appellate Body Annual Report for 2004 (2005) (WT/AB/3) and its various statistical annexes. http://www.wto.org/english/tratop_e/dispu_e/wt_ab3_e.doc

10 Malawer, "The U.S. and the WTO: Lessons Learned for Trade Litigation and Global Governance," 51 *Virginia Lawyer* 12 (No. 9, April 2003). For an earlier version of this article, *see* Malawer, "World Trade Organization After 10 Years: Litigation and Consultation," 232 *New York Law Journal* 4 (No. 110) (December 18, 2005).

11 *Brazil & EU v. U.S.* (WT/DS2/9) (AB) (May 20, 1996).

12 *Antigua & Barbuda v. U.S.* (WT/DS285/R) (Panel, November 10, 2004).

13 *U.S. v. EU.* (WT/DS291) (filed 1993 and pending).

14 *EU v. U.S.* (WT/DS317) (WT/DS316) (filed October 6, 2004)).

15 "Understanding on Rules & Procedures Governing Settlement of Disputes." (Annex 2 of WTO Agreement). http://www.wto.org/english/docs_e/legal_e/28-dsu.doc

16 *EU v. U.S.* (WT/DS108/RW) (AB January 14, 2002).

17 USTR data doesn't include the recent U.S. win concerning geographical indicators against the EU in December 2004. (This is not indicated in the statistics in this article.) The final report was issued on March 15, 2005 (WT/DS174/R) at http://www.wto.org/english/tratop_e/dispu_e/174r_e.doc. The AB reversed much of the panel decision in *E-Gambling Case* in 2005. *See* note 20. The AB reversed a panel decision against the U.S. in the action by Korea concerning countervailing duties relating to DRAMS. *Korea v. U.S.* (WT/DS296/AB/R) (June 27, 2005). [This was in the panel stage in late 2004.]

18 Malawer, "The U.S. and the WTO: Lessons Learned for Trade Litigation and Global Governance," 51 *Virginia Lawyer* 12 (No. 9, April 2003) (excluded *compliance procedures* generally).

19 *U.S. v. China.* (WT/DS309) (July 14, 2004 settlement notified).

20 The Appellate Body upheld only a very limited portion of the panel on April 7, 2005. *Antigua and Barbuda v. U.S.* (WT/DS285/AB/R). While finding some violation by the U.S. under the GATS the AB found that U.S. and state restrictions on Internet gambling were within the "public morals exception." "U.S. Limits on Internet Gambling are Backed," *New York Times* C:14 (April 8, 2005). This case raises the crucial issue of the *federal-state issue* in international agreements and the WTO agreements in particular. State laws and practices are subject to the WTO disciplines. However, the federal government may not made able to change them. The United States itself may be found to violate its international obligations because of the inconsistent state laws. Portman, "Trade Agreements and States." (Press Release, USTR April 14, 2005). In early 2005 this issue has became even more important since states (such as Maryland and New Jersey) were in the process of enacting restrictions on outsourcing of information technology and other services to India and elsewhere.

21 "EU to Impose Sanctions on Certain U.S. Products." *Wall Street Journal* (April 1, 2005).

22 *U.S. v. EU.* (WT/DS27/49) (WT/DS27/59).

23 *U.S. v. EU.* (WT/DS28/AB/R) (WT/DS48/AB/R) (AB January 16, 1998).

24 *Brazil v. Canada.* (WT/DS46/10).

25 *Canada v. Brazil.* (WT/DS70/6).

26 "Banana Producers go to WTO Over EU Dispute." *Financial Times* (March 31, 2005).

27 *WTO News Items* (February 17, 2005).

28 *EU v. U.S.* (WT/DS217/Arb/EEC) (Arb. August 31, 2004).

29 "Duties to Rise on Some Items from U.S." *New York Times* (April 1, 2005).

30 *EU & Japan v. U.S.* (WT/DS136, 162) (AB August 28, 2000).

31 *EU v. U.S.* (WT/DS176/AB/R) (AB January 2, 2002).

Addendum ii

## U.S. — Won / Loss in WTO / DSU (January 1, 1995 – January 1, 2005)

| Case | Body / Date | Subject | Pl. | Won | Loss | Def. | Won | Loss |
|---|---|---|---|---|---|---|---|---|
| **Won as Complainant [Country - Issue ]** | | | | | | | | |
| Japan - Liquor Taxes | AB 1996 | Agriculture | x | x | | | | |
| Canada - Periodical Imports | AB 1997 | Entertainment | x | x | | | | |
| EU - Banana Imports | AB 1997 | Agriculture | x | x | | | | |
| …. Compliance Procedure | | | x | x | | | | |
| EU - Beef (Hormones) | AB 1998 | Agriculture | x | x | | | | |
| India - Patent (Drug & Agriculture) | AB 1998 | Pharmaceuticals | x | x | | | | |
| Argentina - Textiles Tax | AB 1998 | Textiles | x | x | | | | |
| Indonesia - Automobile | AB 1998 | Manufacturing | x | x | | | | |
| Korea - Liquor Taxes | AB 1999 | Agriculture | x | x | | | | |
| Japan - Agriculture (Testing) | AB 1999 | Agriculture | x | x | | | | |
| Canada - Dairy Sector | AB 1999 | Agriculture | x | x | | | | |
| …. Compliance Procedure | | | x | x | | | | |
| Australia - Auto Leather | Panel 1999 | Manufacturing | x | x | | | | |
| …. Compliance Procedure | | | x | x | | | | |
| India - Import Licensing (Textiles) | AB 1999 | Textiles | x | x | | | | |
| Mexico - A/D (Corn Syrup) | Panel 2000 | Agriculture | x | x | | | | |
| …. Compliance Procedure | | | x | x | | | | |
| Canada - Patent Law | AB 2000 | Intellectual Prop. | x | x | | | | |
| Korea - Beef Imports | Panel 2000 | Agriculture | x | x | | | | |
| India - Auto Sector | AB 2002 | Manufacturing | x | x | | | | |
| Japan - Apples | AB 2003 | Agriculture | x | x | | | | |
| Mexico - Telecom | Panel 2004 | Telecommunications | x | x | | | | |
| **Loss as Complainant [Country - Issue]** | | | | | | | | |
| EC - Computer Classification | AB 1998 | Customs / High Tech | x | | x | | | |
| Japan - Film Imports | Panel 1998 | Film | x | | x | | | |
| Korea - Airport Procurement | Panel 2000 | Gov't Procurement | x | | x | | | |
| Canada - Wheat | AB 2004 | Agriculture | x | | x | | | |
| **Won as Respondent [Country - Issue]** | | | | | | | | |
| EC - Section 301 ("Retaliation") | Panel 2000 | Trade Law | | | | x | x | |
| India - Shrimp Turtle (Compliance) | | | | | | x | x | |
| Canada - Subsidies (Exports SAA) | Panel 2001 | Subsidies | | | | x | x | |
| India - Steel | Panel 2002 | Steel | | | | x | x | |
| EU - German Steel (CVD) | AB 2002 | Steel | | | | x | x | |
| Canada - 129[c]1 of URAA | Panel 2002 | Trade Law | | | | x | x | |
| India - Textiles (Rules of Origin) | Panel 2003 | Textiles | | | | x | x | |
| Japan - Sunset Review (A/D) | AB 2003 | Steel | | | | x | x | |
| Canada - Lumber (Final)(CVD) | AB 2004 | Lumber | | | | x | x | |
| Canada - Lumber (Final) (A/D) | AB 2004 | Lumber | | | | x | x | |
| **Loss as Respondent [Country - Issue]** | | | | | | | | |
| Venezuela) - Gasoline | AB 1996 | Oil / Gasoline | | | | x | | x |
| Costa Rica - Textiles (Cotton) | AB 1997 | Textiles | | | | x | | x |
| India - Textiles (Wool Shirts) | AB 1997 | Textiles | | | | x | | x |
| India - Shrimp / Turtle (Fisheries) | AB 1998 | Environment | | | | x | | x |
| Korea - Semiconductors (DRAMS) | Panel 1999 | Computer Chips | | | | x | | x |
| EU - U.K. Steel | AB 2000 | Steel | | | | x | | x |
| EC - Sec. 110[5] Copyright Act (Music) | AB 2000 | Entertainment | | | | x | | x |
| Japan - 1916 A/D Act. | AB 2000 | Trade Law | | | | x | | x |
| EU - Bonding Requirements (Customs) | AB 2001 | Trade Law | | | | x | | x |
| EC - Wheat Glutten (Safeguards) | AB 2001 | Agriculture | | | | x | | x |
| Korea - Stainless Steel | Panel 2001 | Steel | | | | x | | x |
| New Zealand - Lamb Meat | AB 2001 | Agriculture | | | | x | | x |
| Japan - Steel | AB 2001 | Steel | | | | x | | x |
| Pakistan - Cotton Yarn (Safeguards) | AB 2001 | Textiles | | | | x | | x |
| EC - Section 211 of 1998 Trade Act. | AB 2002 | Trade Law | | | | x | | x |
| EU - Foreign Sales Corp. (CVD) | AB 2002 | Tax & Trade Law | | | | x | | x |
| …. Compliance Procedure | | | | | | x | | x |
| Korea - Lind Pipe (Safeguard) | AB 2002 | Steel | | | | x | | x |
| Canada - Lumber (Preliminary) | Panel 2002 | Steel | | | | x | | x |
| EU - Steel (CVD) | AB 2003 | Steel | | | | x | | x |
| Australia / EC Offset Act, 2000 ("Byrd") | AB 2003 | Trade Law | | | | x | | x |
| EU - Steel (Safeguards) ("Bush" Tariffs) | AB 2003 | Steel | | | | x | | x |
| Canada - Softwood Lumber (Injury) | AB 2004 | Lumber | | | | x | | x |
| Argentina - A/D | AB 2004 | Steel | | | | x | | x |
| Brazil - Subsidies (cotton) | Panel 2004 (appealed) | Agriculture | | | | x | | x |
| Antigua & Barbuda (E-Gambling) | Panel 2004 (appealed) | Entertainment | | | | x | | x |

*Includes compliance procedures.
Source: "USTR Snapshot …" (2005) and "WTO Update" (2004).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32 The recent loss by the U.S. in an action brought by Korea concerning countervailing duties on DRAM chips further adds to this congressional concern. *Korea v. U.S.* (DS296) (Panel February 21, 2005).

33 "Senate Slams China Currency Policy," *Wall Street Journal* A2 (April 7, 2005).

34 The U.S. has started the process of applying safeguard measures as provided for in the China Accession agreement. "U.S. Begins Steps to Limit Import Surge From China," *New York Times* (April 5, 2005).

35 *Brazil v. U.S.* (Panel WT/DS267/R) (September 8, 2004). The Appellate Body upheld the panel report with minor modification in early 2005. WTO/DS/267/AB/R (March 3, 2005). In response to this decision a U.S. representative stated, "Negotiation, not litigation, is the most effective way to address distortions in global agriculture," "WTO Backs Ruling on U.S. Cotton Programs," *Washington Post* E3:1 (March 4, 2005).

36 *Brazil v. EU* (Panel WT/DS266/R) (October 15, 2004). The Appellate Body fully upheld the panel report and even found that the panel erred by relying incorrectly on the notion of "judicial economy" in not deciding additional issues. WTO/DS265/AB/R (April 28, 2005). The Brazilian tactics in the WTO's dispute resolution system have been proclaimed as astute. "Astute Tactics Highlights the Role of the WTO," *Financial Times* 13 (June 23, 2005).

37 "AB Statistics" in the *AB Annual Report 2004* (January 25, 2005) (WT/AB/3) also published online by the Appellate Body (2005) at **http://www.wto.org/english/tratop_e/dispu_e/stats_e.htm**.

38 *Id.*

39 *Id.*

40 *EU v. U.S.* (WT/DS212). (AB January 8, 2003).

41 "The record of compliance has encouraged countries to become ever bolder in the disputes they refer to the WTO, reaching further down into politically sensitive issues of domestic taxation, regulatory and environmental issues." *See also*, "Tough Decisions Ahead on World Trade Rules," *Financial Times* (December 31, 2004). However, the future of globalization if far for ensured. Ferguson, "Sinking Globalization." *Foreign Affairs* (March / April 2005).

*continued on page 51*

# Governor Warner's Trade Mission to India

**by Stuart S. Malawer**

George Mason University professors Arun Sood (l) and Stuart Malawer(r) with Virginia Governor Mark Warner in India.

In late April, Governor Mark Warner led the largest state trade delegation ever to visit India. He was the first Virginia governor to visit India. Sixty-five private sector delegates and state officials accompanied the governor on this historic, one-week trade mission to Delhi, Bangalore and Mumbai.

The India trade mission signifies, as did the governor's trade mission to China last year,[1] Virginia's growing commitment to global trade as a key driver for enhancing the commonwealth's economy.[2] It was my privilege to participate in both trade missions.

India's infrastructure, information technology, telecommunications, energy, pharmaceuticals and biotechnology fields offer Virginia firms a great many economic opportunities. Virginia businesses can see great potential as India works to develop its manufacturing sector in the same manner as it has built its information technology sector. More chances for Virginia businesses to expand into India will arise as India brings down its high tariffs and opens to foreign investment other sectors such as retail, real estate, pharmaceuticals, infrastructure and agriculture.

With these trade missions, it is important to recognize that trade and transnational business is not conducted by states, but rather by individuals and corporations. Working as a facilitator, state governments often set the tone, play matchmaker and implement public policies that foster greater international transactions. Governor Warner's trade mission follows those of many other governors in the United States to many destinations over the years. Thirty-two governors have visited China in the last twelve months. Yet Governor Warner's visit to India was the first for any American governor during that period, giving Virginia businesses a jumpstart on this new, expanding market. No President of the United States has ever visited Bangalore. Governor Warner and the trade mission did so to explore trade opportunities.

As these Indian opportunities increase, local communities throughout the commonwealth have a critical stake in global economic integration. Some counties within Virginia, along with the state government itself, are active in promoting global trade. For example, Fairfax County has its own international division and an office in Bangalore. Global trade today is the arena for entrepreneurs of the twenty-first century to generate wealth for themselves and their communities. Warner made the point that first it was the multinational corporations and now it is the entrepreneur's turn to be the key player in the global economy. Recently private equity firms such as the Blackstone Group have allocated billions of dollars as initial investments.

The trade mission coincided with India's emergence as a critical player in global trade and international politics. For example, during the visit, the Indian Prime Minister Manmohan Singh was chosen to speak for Asia at the historic Asia-Africa Strategic Partnership Conference at Bandung, Indonesia. Also, Secretary of State Condoleezza Rice had recently visited Delhi and the Chinese Prime Minister Wen Jiabao also had gone to Delhi and concluded a series of historic trade and political agreements.

A newly emerging India is taking hold as Pakistan détente and a new open-skies agreement between the United States and India promote greater aviation and commerce between the countries. India and China are planning space exploratory missions in 2007. Additionally, Japan's Prime Minister Koizumi was scheduled to arrive in Delhi shortly after our trade mission's departure. India has recently signed a new formal defense pact with the United States. India continues to play a leading role in the World Trade Organization's Doha round of trade negotiations, representing the interests of the developing countries and emerging markets. A key interest is in the area of agriculture reform in which India and the G-20 have just submitted new proposals.

India is the world's largest democracy. With more than one billion people, India is projected to pass China within twenty years as the most populous nation. India has the fourth-largest and second-fastest growing economy in the world. For the first quarter of 2005 India's economy grew more than 7 percent. GDP growth for 2005 is expected to be 6 to 8 percent. Yet imports and exports from India make up less than 1 percent of global trade. American companies are among the largest investors in India. India has recently enacted new legislation enhancing patent protection for products, moving away from its process-focused approach. For the last ten years, 19 percent of Indian investment abroad has come to the United States. The United States has emerged as the leading investor in portfolio investment in India—40 percent of total net investments made since 1993. But India's share of total foreign direct investment from the United States is less than 1 percent. The election of the Congress Party in India last year, replacing the BJP, has continued the trade and economic liberalization policies that commenced in the early 1990s. India has proposed special economic zones, modeled after those in China, to foster greater investment and trade for parts of its nation. It is considering greater privitization and lowering of tariffs.

With these recent developments, a special moment in India's relations with the region and the world is occurring. Business and commerce is driving new geopolitical relations. The evolving India-China-Japan relationship has tremendous significance for Asia's future in a global geopolitical context and India's political and trade relations with the United States. Trade and business are emerging as the most important ties to potentially bind the world's two largest democracies. Newly developing business opportunities in India are transforming relations with U.S. firms. At the same time, India has moved from a critic of American foreign policy during the Cold War and the 1990s to a trading partner in the post-9/11 era. Now it is building trade relations to better confront regional instability and terrorism. The governor of Virginia, recognizing the importance of these changes, promoted Virginia exports to India and India's direct investment into Virginia—both crucial elements in furthering the economic development of Virginia and peaceful relations between India and the United States.

The diversity of the trade delegation's interests was well-matched to take advantage of the diversity of opportunities available in India. The private-sector delegates of the trade mission were introduced to a broad range of Indian entrepreneurs, and state officials met high-ranking city, state and national officials. Among the Virginia state officials accompanying the governor were the secretary of commerce and trade, the executive director of the Virginia Economic Development Partnership, the director of its international division, and the deputy executive director of the Virginia Port Authority. Representatives of the commonwealth's private sector included those from high-tech, telecom, manufacturing, financial and law, as well as three major Virginia universities (George Mason, Virginia Tech and Old Dominion).

The delegation participated in a series of high-ranking briefings and presentations by the U.S. Embassy, the Federation of Indian Chambers of Commerce and Industry (FICCI), the Confederation of Indian Industry (CII), and representatives of the India film industry in Bollywood. The U.S. counsel general was the official U.S. government host of the delegation's final reception at his residence in Mumbai.

The principal purpose of the trade mission was to encourage small and mid-size Virginia firms to increase their exports and transactions to India. In organizing the trade mission, the Virginia Economic Development Partnership, in addition to providing important briefings, organized many one-on-one meetings with representatives from Virginian and Indian firms with complementary interests. Ideally, those firms would assess each other, enter into negotiations and conclude agreements to export Virginia products and services. It appears that many invaluable commercial contacts were made at these meetings.

But global trade is a two-way street. Governor Warner forcefully promoted greater direct investment by Indian firms into Virginia—especially the rural areas—as a means of countering the growing backlash in the United States over information technology and other forms of outsourcing to India. He reminded audiences several times that this approach was taken by Japanese firms in the late 1980s with their investments into the U.S. Southeast, used as a means of countering growing resentment to Japanese auto imports. This strategy might prove successful since the

***The diversity of the trade delegation's interests was well-matched to take advantage of the diversity of opportunities available in India.***

Indian government now seems inclined to heed American interests and sensibilities. The recent decision by the state-owned Air India to purchase Boeing airliners, not the European Airbus, is widely considered to have been a decision attempting to restrict the growing protectionist backlash in the United States over outsourcing of information technology and other services to India. While this move may be criticized by some as an unjustified intrusion of national politics into trade matters, states have the right and obligation to encourage foreign direct investment through political advocacy. It does not cost the state taxpayer anything, and if successful, adds to the overall foreign investment in the United States. In fact, being closer to the American consumer, to provide better service and to develop a better understanding of the market, is a good business reason for a foreign or global firm to invest in a local economy.

A milestone during the trip was the governor's signing of a memorandum of understanding on behalf of the Virginia Economic Development Partnership with the Federation of Indian Chambers of Commerce and Industry to promote greater cooperation. The conclusion of a cooperative trade understanding by two such trade entities, one a quasi-public body and the other a foreign trade association, indicates the growing importance of such units in the global trading system today.

Matchmaking can only work and be a meaningful two-way relationship if both sides understand and appreciate their new partner. Governor Warner spoke often about the importance of education and knowledge in order to remain competitive in today's global environment, and he recognized the great importance that Indian society attaches to education at all levels. Similarly, he acknowledged that Virginia's universities must find ways to educate students to better understand India and the global economy. About seventy thousand Indian students are studying in the United States for a significant period of time, ranging from one semester to several years. The number of Americans studying in India is negligible. Governor Warner suggested that Virginia universities might better cooperate among themselves in developing means to assist students to study in India, thus creating a better understanding of this massive and diverse country. Expansion of trade, technology and investment comes as a natural corollary with a stronger understanding of a foreign market. Trade with India is no different.

Such programs and a better appreciation of Indian culture, politics and trade relations will help to ensure a more meaningful dialogue in the future among Americans in formulating more effective U.S. foreign and national security policies in coping with the tectonic shifting of power to Asia. The development of a new architecture of relations and institutions in Asia is essential to promoting both regional and global peaceful relations.

The legal profession, local jurisdictions, the private sector and Virginia's universities must grapple with the fact that globalization is here to stay. The twin revolutions of globalization and outsourcing are propelling India and China to center stage. We all need to find our place in and a way to prosper from this new global landscape and economic reality. A greater understanding of its effects and the major global players participating in this new reality is essential to creating more beneficial global trade and transactions. More commercial transactions lead to more peaceful relations, which is to everyone's benefit. Greater trade today is the foe to greater disorder and a friend to greater prosperity. ⚖

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Endnotes:

1 Malawer, "Governor Warner's China Trade Mission: Largest Ever & Points to Renewed Global Action," 23 *INTERNATIONAL PRACTICE NEWS* No. 1 (Virginia State Bar, Spring 2005) at **http://www.vsb.org/sections/in/publications/news/spring05/spring05.html**.

2 For an excellent series on India and China as the two key drivers of the global economy, see the special three-part series "India and China in the Global Economy" in the *Financial Times* (February 23 through February 26, 2005). *See also,* "India & Globalization" (*Financial Times* Special Report, March 22, 2005).

# Sarbanes-Oxley Section 404: Compliance Challenges for Foreign Private Issuers and Their Counsel

by Michael P. Kelley

Few provisions of the Sarbanes-Oxley Act of 2002 (SOX Act) are more challenging to companies, especially foreign companies, than compliance with Section 404. This section requires management to file an internal control report with its annual report. The internal control report must articulate management's responsibilities to establish and maintain adequate internal controls over financial reporting and management's conclusion on the effectiveness of these internal controls at year end. The report must also state that the company's independent public accountant has attested to and reported on management's evaluation of internal controls over financial reporting. In addition, the internal control report must be disclosed in the company's annual report. The U.S. Securities and Exchange Commission's (SEC) implementing rules also require management to disclose certain material changes to internal controls over financial reporting occurring during the most recent quarter.

Section 404 applies to companies filing annual reports with the SEC under either Section 13(a) or 15(d) of the Securities Exchange Act of 1934. These companies include banks, savings associations, small-business issuers and non-U.S. companies. Under the SOX Act, an "issuer" has a class of securities registered under Section 12 of the Exchange Act or is required to file reports under Section 15(d) of the Exchange Act or files or has filed a registration statement that has not yet become effective under the Securities Act of 1933 that has not been withdrawn. Section 404's internal control report requirement applies to all issuers because they are required to report under the securities laws. Foreign issuers (including Canadian issuers) must comply as well.

The original compliance deadline for "foreign private issuers" (*i.e.*, non-U.S. companies that file annual reports on Form 20-F or, for Canadian companies, Form 40-F) (FPI) was July 15, 2005. Earlier this spring, the SEC extended this deadline until July 15, 2006.

**Corporate Governance Becomes A Matter of Federal Law**

The Securities Act of 1933 and the Securities Exchange Act of 1934 protected U.S. capital markets through registration and financial disclosure requirements and through broad antifraud provisions. On the other hand, state law has largely dictated the organization of business entities. The legal and accounting professions have largely been self-regulating. However, a spate of corporate scandals, including Enron, unveiled some of the weaknesses inherent in the powers of boards of directors to govern corporations and the failures of accountants and attorneys to identify and report corporate improprieties. Congress drew from these large-scale corporate scandals to develop a framework of corporate government under federal regulation that would effectively create a floor for good governance of public companies. By imposing board audit committees, auditor service restrictions and attorney conduct standards, the SOX Act filled the gap between federal securities regulation, state law concerning corporate governance and professional self-regulation.

Prior to the SOX Act, foreign private issuers could get access to the U.S. capital markets by complying with registration and disclosure requirements. Following SOX, access to these markets further requires foreign corporations to reorganize their organizational structures and business practices in ways that may conflict with the requirements in their home jurisdictions and at great cost in terms of time and money. In essence, SOX requires foreign companies to opt into U.S. congressionally mandated corporate governance parameters or be excluded from access to U.S. capital markets.

**SOX's Deterrent Effect on Foreign Private Issuers**

Historically, foreign private issuers have hesitated to list in the United States out of concern over disclosure standards, accounting reconciliation requirements and costs in terms of time and money of maintaining their U.S. listings and liability. SOX has exacerbated these concerns. Although foreign companies have continued to list in the United States, there have been exceptions that have decided not to list, citing SOX. For example, Porsche and the Benfield Group Ltd. refused to list in the United States. Others, such as Daiwa Securities, originally postponed their listing to see how Sox caps would be finally implemented. LVMH decided to de-list in the wake of SOX. On the other hand, many other prominent foreign issuers have stepped into the U.S. market after passage of SOX. China Telecom listed after SOX was passed. Telkom SA Limited, a South African company, issued an initial public offering on the New York Stock

Exchange in 2003 after SOX became effective.

Recent studies have shown substantial compliance costs under Section 404 requirements. The Business Roundtable recently reported that 47 percent of 106 companies surveyed this year were reporting estimated costs of more than $10 million to implement Sarbanes-Oxley requirements. This number represents a substantial increase over the 22 percent reporting such compliance costs of $10 million or more in 2004.

**SEC Approves One-Year Compliance Extension for Foreign Private Issuers**

The SEC has recognized the potential deterrent effect SOX has had on foreign private issuers and has been working to reconcile conflicts between SOX and foreign private issuers' home country regulations and practices. In the context of Section 404, the SEC recognized last March the need for additional relief for foreign companies to overcome obstacles such as language, culture and organizational structures that are far different from what is typical in the United States. The SEC has also explicitly recognized the special burden on European companies having to comply simultaneously with the European Union's International Financial Reporting Standards, which came into effect on January 1, 2005, and Section 404 requirements.

Consequently, the SEC decided in March of this year to extend the compliance deadline for foreign private issues under Section 404 from July 15, 2005, until July 15, 2006. The SEC's decision to postpone foreign private issuer compliance with Section 404 recognizes the substantial compliance costs in terms of time and money for such companies.

Despite this respite, foreign private issuers face a number of significant compliance challenges that will keep them busy even under the new timetable. These challenges include:

- Creating and maintaining appropriate audit committees
- Developing effective financial closing and reporting processes
- Controlling service organizations
- Creating and maintaining effective internal audit departments
- Monitoring controls in multi-location environments (affiliates)
- Shortage of U.S. Generally Accepted Accounting Principles competencies
- Developing managerial experience in assessing internal control over financial reporting
- Language considerations
- Creating and maintaining information technology controls
- Assessing internal control in multiple geographical locations
- Designing effective fraud prevention programs

The SEC's one-year compliance extension for foreign private issues should not lead to complacency for affected companies and their legal counsel. The SEC has repeatedly suggested the extra year should help ensure "quality compliance." Consequently, counsel to foreign private issuers must maintain efforts to help their clients achieve compliance by July 15, 2006. Counsel should:

- *Monitor and participate in the SEC rule adoption process.* Although the landscape of SOX compliance has largely been set, counsel should constantly exchange interpretative guidance as to the scope and effect of Section 404. Counsel should also be aware of enforcement actions that have been initiated against corporate counsel in order to improve the provision of their services.
- *Establish appropriate controls and procedures for SEC disclosures.* Counsel must work with internal staff and external auditors to review internal controls to ensure comprehension and implementation of SEC disclosure requirements. The target should not be minimal compliance, but rather "quality compliance."
- *Prepare for new audit committee requirements.* Counsel should understand and review with management and the board all aspects of audit committee requirements, including independence and "financial expert" standards.
- *Discuss requirements with auditors.* Counsel should not be complacent by relying on guidance from auditors. Rather, counsel should proactively seek out an active and ongoing dialogue with the auditors and be prepared to question and document challenges to auditor guidance and conclusions. In other words, counsel should be a cooperative, but independent, source for the company regarding compliance obligations.
- *Evaluate compensation arrangements to ensure compliance.* Discovering and challenging compensation arrangements can be especially sensitive for counsel. Nevertheless, counsel should insist on disclosure and full understanding of all compensation arrangements to ensure full compliance with SOX requirements.
- *Review restrictions on insider transactions.* Much like compensation arrangements, it is essential for counsel to evaluate "insider" transactions. Counsel must be able to determine which insider transactions are appropriate under SOX and which need to be modified or terminated to achieve full compliance.
- *Ensure corporate governance provision implementation occurs prior to first IPO filing.* Counsel must make sure that corporate government compliance occurs *before* the first IPO filing. While this seem obvious, the desire to "rush to market" may drive management to push for IPO filings with not all corporate

governance compliance measures fully implemented under the argument that they will implemented shortly thereafter. However, SOX requires these measures to be in place prior to initial IPO filings. Moreover, it must be recognized that delays in implementation after filing will put the corporation at risk.

- *Review document retention*. SOX establishes new document retention rules. Counsel must understand the new requirements and take steps to develop appropriate guidance and protocols for all employee levels to ensure full compliance with such requirements.

- *Anticipate heightened SEC review.* Given the federalization of corporate governance inherent in SOX, counsel must anticipate even greater levels of SEC review. Consequently, once initial compliance is established, counsel cannot become complacent. Counsel must constantly monitor SEC directives and interpretative guidance, as well as changes within the company, to ensure the company would withstand SEC scrutiny.

**Conclusions**

Section 404 compliance requires the active engagement of counsel to the foreign private issuer. Cost and time issues, as well as the "rush to market" thinking of management will require counsel to adopt unpopular positions. However, enforcement actions against foreign private issuers under Section 404 requirements have yet to get under way and counsel will continue to face a compliance "moving target." Consequently, counsel should focus on achieving quality compliance and not basic compliance. In addition, counsel must ensure that management does not become complacent under the one-year compliance extension. Most companies will find quality compliance much more time consuming and expensive than they originally budgeted. ⚖

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# Export Control Laws Advance U.S. Security

by Lauren M. Camilli

Export control laws help protect our country by keeping goods and technologies from terrorists who would misuse them. The U.S. Department of Commerce's Bureau of Industry and Security (BIS) is responsible for administering most U.S. export control laws on dual-use items. Export control classification numbers are used by the BIS to describe controlled substances and the characteristics that make them controlled. The BIS administers and enforces U.S. export control laws to advance U.S. national security, foreign policy and economic interests.

The bureau has an enforcement arm, the Office of Export Enforcement (OEE)—an elite law enforcement organization recognized for its expertise and integrity. Export enforcement activities focus on the most significant threats facing our nation. The top priorities are to prevent and pursue illegal exports intended to facilitate the proliferation of weapons of mass destruction and missile delivery systems, or intended to support terrorist entities and state sponsors of terrorism. Many of these items are dual-use commodities that have a commercial application and could be used as weapons of mass destruction, conventional arms or terrorist weapons.

In fiscal year 2004, the OEE conducted more than 1,200 export enforcement investigations that resulted in forty-nine arrests, forty-two criminal convictions and criminal fines totaling $9.8 million. The BIS imposed more than $8.8 million in administrative penalties, thirty-one export denial orders, and other administrative sanctions. Sensitive dual-use items are on a Commerce Control List, which tracks U.S. commitments under multilateral export control regimes. The BIS works with numerous agencies, including the departments of State, Defense, Energy, Homeland Security and Justice, to promote and defend national security interests.

Most exporters are subject to export control laws. It is important that your clients understand U.S. export laws before proceeding with export transactions. Many items include not only sophisticated hardware and software, but also much more common items. Most of the dual-use export control system is set forth in the Export Administration Regulations (EAR).

**Potential Penalties**

The regulations cover all parties to export transactions, including exporters, carriers and consignees. There are both criminal and civil fines for violators of U.S. export control laws. Penalties include fines, imprisonment or denial of export privileges. The regulations apply to parties in the United States and foreign countries that are involved in transactions subject to the regulations.

Violations of the regulations are subject to criminal and administrative penalties. Fines for export violations can reach up to $1 million per violation in criminal cases, $11,000 per violation in most administrative cases and $120,000 per violation in certain administrative cases involving national security issues. Some criminal violators may be sentenced to prison and administrative penalties, which may deny export privileges. These denials may be temporary—depending on the severity of the violation. The names of persons who have had their export privileges denied are published in the *Federal Register*.[1] Violations of temporary denial orders may carry criminal penalties. Voluntary self-disclosures of violations by companies and individuals may increase the potential to negotiate a settlement with the BIS before any formal hearings are conducted. Voluntary self-disclosures are given great weight and can potentially save a company from public admonishment and severe penalties. Many settlement agreements with the BIS involve neither an admission nor denial of the charges and are therefore may be an attractive alternative.

**License Requirements**

License requirements for a particular transaction or item are based on a number of factors. These include the technical characteristics of the item to be exported, its destination, the end use and the end user. The following examples are ways in which exporters can run into trouble by violating U.S. laws: A professor illegally exported potentially deadly plague bacteria, which is a controlled substance. The professor was convicted of forty-seven counts and sentenced to two years in prison for those violations. In a less obvious case, a sports and recreation company exported night vision devices to Japan and fourteen other countries without an export license. In this criminal case, the company's executive was sentenced to five years of probation and fined $650,000. In contrast, an exporter of hydrogen fluoride to Mexico without the required licenses voluntarily disclosed its violations and fully cooperated with the investigation. The company paid a $36,000 administrative penalty—the extent of its liability.

Exports that require licenses—such as potentially dangerous bacteria, night vision devices or thermal imaging cameras—are products the U.S. government obviously should be concerned about for security reasons. Other products that are subject to penalties include firearm scopes, aluminum alloy rods, petroleum and various chemical compounds. In all of

these cases, self-disclosure and full cooperation were looked upon as mitigating circumstances that decreased potential criminal and civil violations.

A large area of concern and potential violation for companies is computer technologies. A well-known computer company in 2000 was found to have violated the EAR by exporting and reexporting computers and computer equipment without having the required export licenses. Exports of these commodities were destined for South Korea. Reexports of the U.S.-originated goods were transferred from Hong Kong to the Peoples Republic of China and from Singapore to India. Because of voluntary self-disclosure, the company agreed to pay $39,000 as an administrative penalty.

When an item does require a license, the exporter's responsibilities may not end there. License conditions may include restrictions in the way in which an item is used or may require subsequent reports to be filed. These additional requirements may also include the imposition dollar limit to a transaction from the BIS. Failing to file copies of certain documents with the BIS after the export transaction is completed may also impose subsequent liability and penalties.

**Deemed Exports**

A hot topic in today's export compliance framework is "deemed exports." This category of exports includes the release of technology or source code to a foreign national, even if the foreign national is in the United States. These exports are "deemed" to be an export to the home country or countries of the foreign national and may require a license. These types of technologies can be transferred through visual inspection, oral information exchanges or application to situations abroad of personal knowledge or technical experience accrued in the U.S. Many potential problems can develop when a U.S. company employs foreign nationals.

In one example, a communications company employed foreign nationals from China and the Ukraine to conduct research on the development and manufacturing of commercial digital fiber optic transmission of broadband switching equipment, software and technology. This research required a license under the export regulations. In a similar case, a semiconductor corporation also released technical data to Chinese nationals without a required license. In these two common examples of deemed exports, the companies faced fines of $125,000 and $560,000 respectively.

**Prohibited Destinations**

Many exports to countries that sponsor terrorism are prohibited. Laws in this area frequently change in accordance with foreign policy, so it is important to keep updated on the countries currently on the enforcement list. If a company ships goods to one country that does not require a license, but has knowledge that its ultimate destination is a prohibited country requiring preauthorization, the company may be subject to strict penalties. Currently, state sponsors of terrorism are Cuba, Iran, Libya, North Korea, Sudan and Syria.

Exporters cannot, therefore, attempt to go around the EAR requirements by shipping items through a third country to circumvent the prohibited destination controls. Even though an export does not go directly to a country, asking another party to reship the item could open the exporter to liability. The BIS has issued a description of how it determines appropriate penalties for violations. Each case is considered independently and the circumstances and the BIS's objectives.[2]

Factors include the destination of the export, the degree of willfulness involved, and the number of violations and criminal charges. Mitigating factors include voluntary self disclosure, an export compliance program in effect, cooperation with officials, and the absence of previous records of violations. Other factors, such as efforts to conceal violations or complete disregard for compliance responsibilities, can seriously adversely affect an exporter's case. Additionally, if an item is significant due to its sensitive nature or reason for control, that factor is given great weight during the investigation.

**Responsibility of Agents**

Although the primary responsibility for compliance is with the seller and the buyer in any transaction, other agents acting on behalf of the principals are responsible for their actions, including agents that sign export control documentation. Agents to a transaction must look for "red flags" and suspicious circumstances involved in any export transaction. Freight forwarding companies or customs agents have been held criminally liable for forwarding shipments despite being warned by agents of the BIS that such shipments would be in violation of export controls to prevent nuclear proliferation. Filing false shipping documents or shipping on behalf of a company that is denied export privileges has also resulted in liability for freight forwarders and customs brokers.

***A well-known computer company in 2000 was found to have violated the EAR by exporting and reexporting computers and computer equipment without having the required export licenses.***

**"Intended Use" or "End Use"**

Another important consideration when examining export transactions is the issue of "intended use" or "end use" of the product. If the exporter knows or has reason to know that any of the items will be used in a way that should concern the U.S. gov-

ernment, these items may require a license, although they might not ordinarily fall under any of the requirements. For guidance, the BIS has published a "Know Your Customer" guidance document in Supplement No. 3 to Part 732 of the EAR. An cntity list is published in the *Federal Register* so that an exporter can check to see if exports to certain end users present an "unacceptable risk" of being diverted to an end user that may cause concern.

**Antiboycott Provisions**

Under the EAR, there are antiboycott provisions, which prohibit exporters from complying with requirements of unsanctioned foreign boycotts. For example, a foreign country's requirement that exporters refuse to do business with persons on a boycott list would be prohibited. Exporters must report receipt of boycott requests to the BIS. During the mid-1970s, the U.S. adopted two laws to counteract the participation of us citizens in other nations' economic boycotts of countries friendly to the U.S. These "antiboycott" laws were the 1977 amendment to the Export Administration Act (EAA) (as carried over into the Export Administration Act of 1979) and the Ribicoff Amendment to the 1976 Tax Reform Act (TRA). These laws were put in place to require U.S. persons to refuse to participate in foreign boycotts that the U.S. did not sanction.

**Successor Liability**

If a business is about to acquire another company, it may be held responsible for export violations of that company. Successor liability is an important factor to consider if a business is doing "due diligence" on companies they plan to acquire. A thorough review should include a look at the company's export history, compliance practices in place, and any international contracts in effect.

**Recent Cases**

Within the last few months, a California biotech company agreed to pay $904,500 in civil penalties to settle charges that it exported biological toxins to Canada in violation of the EAR. Under the settlement agreement, the company's export privileges were denied for a period of two years. However, provided that the company commits no violations during the two year suspension, its privileges will be reinstated. The company allegedly exported biological toxins sixty-seven times without having obtained the required export licenses. Export controls of biological toxins are part of the U.S. obligations as a member of the Australia Group, a multilateral regime whose members are committed to the nonproliferation of chemical and biological weapons.

In April 2005, a Virginia company agreed to pay $10,000 in civil penalties to settle charges that it illegally exported optical sighting devices from the U.S. to Canada in violation of the EAR. On ten occasions, it was charged that the Virginia firm exported ten rifle scopes to Canada. Also in 2005, an Illinois company and its president were sentenced in connection with criminal violations of the act for illegally exporting polygraph machines to China. The company's president was sentenced to two and one half years probation, including six months of electronically monitored home confinement, and community service. The president knowingly exported the equipment without the required licenses.

**Recent Changes and Developments in BIS Regulations**

In 2004, the BIS updated its controls to reflect geopolitical developments. For example, the BIS published rules that transferred licensing responsibility for export to Iraq and Libya to the Department of Commerce, reduced the level of controls on commercial exports to Iraq, ended license requirements for the export of low-level items to Libya and updated controls for Cuba. That same year the BIS process had an increased number of exports license applications with shorter average times. The BIS completed the review of 15,534 license applications in fiscal year 2004, an increase of nearly 25 percent from the previous year. The average processing time was reduced from forty-four days in 2003 to thirty-six days in 2004.

On April 14, 2005, the BIS published a regulation that substantially increased the number of countries requiring a license for certain chemical biological controlled exports. The new rule requires a license to export these items to all countries worldwide except the Australia Group countries.[3] The U.S. government is considering tightening rules on deemed exports which require U.S. companies to get licenses for foreign nationals they hire to work with controlled technologies. The BIS could expand the list of foreign nationals subject to controls by making U.S. companies obtain license for hiring foreign nationals who are permanent residents of the U.S., a category that is currently exempted for licensing requirements. In the future, if the aim is to prevent China from gaining access to technologies, the U.S. could opt to impose tighter controls on foreign nationals from Taiwan, Europe or Southeast Asia because of their cooperation with projects in China. As another possible option, the Commerce Department could also tighten existing rules or increase the goods controlled on the commercial control lists.

**Red Flags and Important Questions for Clients To Ask**

When determining whether a license is required for a particular transaction, you should ask the following questions: What is being exported? Where is the item being exported? Who will receive the item? How will it be used? Once you have answered these questions, you can take preventative measures such as checking end users, checking end uses, and reviewing all shipping documentations and export declarations. For assistance in determining license requirements, you can also contact an export counselor at the BIS.[4]

Because of the changing requirements under the regulations, an exporter should frequently check the regulations for changes in prohibited destinations and products requiring a license. You should not assume that new regulations do not change your current obligations. Exporters should also always be aware of "red flags" and practice due diligence when working with a new buyer or acquiring a new busi-

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ness. Exporters should review their current export compliance programs to have good guidelines in place to avoid potential civil and criminal penalties.

Finally, when faced with a potential violation, an exporter should know that voluntary self-disclosures and cooperation with investigators are given great weight by the BIS when determining the appropriate level of penalties. ⚖

Endnotes:

1 This list can be found at **http://www.bis.doc.gov/**.

2 The penalty guidance is available online at: **http://www.access.gpo.gov/bis/ear/pdf/766.pdf**.

3 The Australia Group consist of Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, South Korea, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Switzerland, Sweden, Turkey, the United Kingdom and the U.S.

4 Check the BIS Web site at **http://www.bis.goc.gov**.

**WTO** *continued from page 41*

42 "Overview," in the 2005 Trade Policy Agenda/ 2004 Annual Report of the USTR 19-20 (2005) at **http://www.ustr.gov/assets/Document_Library/Reports_Publications/2005/2005_Trade_Policy_Agenda/asset_upload_file454_7319.pdf**.

43 "When you have to make things with your hands and then trade … it inevitably broadens imagination and increases tolerance and trust." T. Friedman, *The World is Flat—A Brief History of the Twenty-First Century* 462 (2005).

## Year of the Rooster *continued from page 8*

all Virginia lawyers will further these policies by increasing and improving the available knowledge and information base for attorneys, enhancing the quality of legal research and advice, making legal research more efficient for many attorneys, reducing the costs of legal services to the poor, and providing additional resources to lawyers who are appointed by courts to represent indigent criminal defendants. The provision of online computerized legal research services to all lawyers in Virginia will reduce the time spent and costs incurred in performing legal research, which will decrease the costs of legal services to consumers in Virginia and thereby increase access to attorneys. In addition, the provision of online computerized legal research will enable more lawyers to provide pro bono services since this research tool will lower their costs and reduce the amount of research time required.

Although not without controversy, the provision of this service will not only provide the very substantial benefits articulated in the rule, but also serve as a symbol of the new direction of the State Bar and the efforts that are firmly in place to meet Chief Justice Hassell's challenge that your State Bar do more for you, the members. ⚖

# Multijurisdictional Practice in Virginia

**Barbara J. Balogh, Virginia State Bar Assistant Ethics Counsel**
**James M. McCauley, Virginia State Bar Ethics Counsel**

In August 2004, the Virginia State Bar formed a Multijurisdictional Practice Task Force to develop new rules and revise rules to better accommodate limited practice in Virginia by lawyers licensed only in other U.S. jurisdictions or in foreign countries. The impetus for this task force came from recommendations issued in 2002 in the final report of the American Bar Association Commission on Multijurisdictional Practice and recommendations from another ABA panel tracking the General Agreement on Trade in Services (GATS).

In its final report issued in 2002, the ABA Commission on Multijurisdictional Practice (ABA MJP Commission) made several recommendations. Among these were: revision of Rules 5.5 (unauthorized practice of law) and 8.5 (disciplinary authority) in accordance with revisions adopted by the ABA to Model Rules 5.5 and 8.5; adoption of a foreign legal consultant rule consistent with the ABA Model Foreign Legal Consultant Rule; adoption of a *pro hac vice* rule consistent with the ABA Model *Pro Hac Vice* Rule; and adoption of a temporary practice rule for foreign attorneys, again, consistent with the ABA Model Rule.

The recommended revisions to the Model Rules of Professional Conduct were prompted by concerns expressed by the ABA MJP Commission in its final report with regard to increasing multijurisdictional practice and the importance of creating consistent rules and enforcement throughout the country for this practice:

> The predicate for this national study undertaken by the American Bar Association was the dynamic change and evolution in nature and scope of legal practice during the past century, facilitated by a transformation in communications, transportation and technology. In the early twentieth century, states adopted "unauthorized practice of law" (UPL) provisions that apply equally to lawyers licensed in other states and to nonlawyers. These laws prohibit lawyers from engaging in the practice of law except in states in which they are licensed or otherwise authorized to practice law. UPL restrictions have long been qualified by *pro hac vice* provisions, which allow courts or administrative agencies to authorize an out-of-state lawyer to represent a client in a particular case before the tribunal. In recent years, some jurisdictions have adopted provisions authorizing out-of-state lawyers to perform other legal work in the jurisdiction.
>
> Jurisdictional restrictions on law practice were not historically a matter of concern, because most clients' legal matters were confined to a single state and a lawyer's familiarity with that state's law was a qualification of particular importance. However, the wisdom of the application of UPL laws to licensed lawyers has been questioned repeatedly since the 1960s in light of the changing nature of clients' legal needs and the changing nature of law practice. Both the law and the transactions in which lawyers assist clients have increased in complexity, requiring a growing number of lawyers to concentrate in particular areas of practice rather than being generalists in state law. Often, the most significant qualification to render assistance in a legal matter is not knowledge of any given state's law, but knowledge of federal or international law or familiarity with a particular type of business or personal transaction or legal proceeding. Additionally, modern transportation and communications technology have enabled clients to travel easily and transact business throughout the country and even internationally. Because of this globalization of business and finance, clients sometimes now need lawyers to assist them in transactions in multiple jurisdictions (state and national) or to advise them about multiple jurisdictions' laws.
>
> Although client needs and legal practices have evolved, lawyer regulation has not yet responded effectively to that evolution. As the work of lawyers has become more varied, specialized and national in scope, it has become increasingly uncertain when a lawyer's work (other than as a trial lawyer in court) implicates the UPL law of a jurisdiction in which the lawyer is not licensed. Lawyers recognize that the geographic scope of a lawyer's practice must be adequate to enable the lawyer to serve the legal needs of clients in a national and global economy. They have expressed concern that if UPL restrictions are applied literally to United States lawyers who perform any legal work outside the jurisdictions in which they are admitted to practice, the laws will impede lawyers' ability to meet their clients' multistate and interstate legal needs efficiently and effectively.

*Client Representation in the 21st Century,* Report of the Commission on Multijurisdictional Practice, American Bar Association Center for Professional Responsibility, Aug. 12, 2002, p. 3.

The Model Foreign Legal Consultant Rule responded in part to the concern of foreign lawyers that, while American lawyers

enjoyed a broad right of practice in other countries (or sought such a right in countries that did not afford it), foreign lawyers generally could not engage in the practice of law in the United States, even if limited to advising on the law of their own countries, without attending an accredited American law school, sitting for the bar examination and becoming a full member of the bar. The ABA identified both a need for a streamlined admissions process for foreign lawyers seeking to establish a law practice providing limited legal services and a need for greater uniformity. Both the ABA and the United States Trade Representatives are asking the states to adopt foreign legal consultant (FLC) rules. Experience with these FLC rules in other states has revealed few if any disciplinary problems. Twenty-six jurisdictions currently have a foreign legal consultant rule.

### General Agreement on Trade in Services

In May, 2003, an ABA GATS Task Force was appointed to track negotiations on a little-known international trade agreement that could have a major impact on how much lawyers from the United States and other countries may practice in foreign jurisdictions. The General Agreement on Trade in Services (GATS) is among a number of agreements that were reached in conjunction with the creation of the World Trade Organization in 1994. Legal services are among the trade issues covered by GATS. The agreement calls for member nations, including the United States, to develop rules that will make it possible for lawyers from one country to practice in other countries. The agreement currently requires "transparency"—a foreign lawyer must be able to determine to what extent a host member permits a foreign lawyer to practice, and any restrictions or qualifications that apply. Member nations must publish "national treatment" rules, which explain how a host member treats domestic lawyers differently from foreign lawyers.

Negotiations for the U.S. are coordinated by the Office of the U.S. Trade Representative (USTR). U.S. representatives at GATS negotiations are basing their position with regard to regulating foreign lawyers on state ethics codes that already govern American lawyers. The USTR has indicated that the U.S. negotiators do not intend to displace state regulation of lawyers and have made efforts to consult with U.S. lawyers and to solicit input from U.S. jurisdictions regarding standards regulating foreign lawyers. Once these state standards form the basis of a trade agreement that the United States negotiates with other countries, however, the states will have less flexibility to change them. In August 2004, WTO members agreed to submit offers to the negotiations by May 2005. The U.S. plans to submit its offer, which will include a revised section on legal services, by this deadline. It is expected that member countries will continue to actively negotiate during the summer and fall of 2005.

Professor Laurel Terry is liaison from the ABA Center for Professional Responsibility to the ABA GATS task force. She wrote in the February 2005 issue of *The Bar Examiner*:

> Logic also suggests that even without international MJP regulation, there already may be significant activity by foreign lawyers in the U.S. One of the goals of the GATS is to facilitate and regularize this type of international legal services work. International MJP obviously raises important regulatory issues and concerns for U.S. states. But the failure of U.S. states to consider international MJP issues also raises important questions and concerns, such as U.S. clients' possible loss of access to their U.S. lawyers overseas and the possibility that international MJP may occur in the U.S. in an unregulated, rather than a regulated context.

### The Work of the Virginia State Bar Multijurisdictional Task Force

The VSB MJP Task Force has carefully considered the recommendations of the ABA MJP Commission and the ABA GATS Task Force. In addition, representatives from the VSB Task Force and officers of the Virginia State Bar met in Atlanta in August 2004 to discuss these recommendations with leaders from other state bars, leaders of the European Union Bar Association, representatives of International Bar Association, the ABA GATS Task Force and the ABA International Law Section. In November 2004, many of these same representatives met again in Washington D.C. to have a dialogue with representatives of the USTR, including Chris Melly, the chief U.S. negotiator on legal services. The VSB MJP Task Force is making the revisions it considers necessary to existing rules, as well as developing new rules to accommodate these recommendations. Since August 2004, the task force has created a Foreign Legal Consultant Rule, which was approved by the Virginia State Bar Council in February 2005 and which is now pending with the Supreme Court of Virginia for review and approval. The task force has drafted revisions to Virginia Rules of Professional Conduct 5.5 and 8.5 and an entirely new *pro hac vice* rule. The proposed revisions to Rules 5.5 and 8.5 will likely be presented to Bar Council for approval in October 2005 or February 2006. The *pro hac vice* rule is still under revision and review.

The proposed FLC Rule regulates non-U.S. attorneys who seek to establish a system-

***Although client needs and legal practices have evolved, lawyer regulation has not yet responded effectively to that evolution.***

atic and continuous foreign consultancy practice in Virginia. Rule 5.5 regulates temporary practice by both non-U.S. and U.S. lawyers not admitted in Virginia. Rule 8.5 creates disciplinary authority over both non-U.S. and U.S. attorneys not admitted in Virginia and choice of law provisions. Though not identical, the proposed rules are similar to and consistent with the ABA recommendations and recommendations from the U.S. Trade Representative.

### The Proposed Foreign Legal Consultant Rule

The Foreign Legal Consultant Rule allows Virginia clients access to foreign law expertise with accountability; foreign legal consultants (FLCs) will be subject to Virginia's ethics rules and the Virginia State Bar's disciplinary system. Under this rule, the FLC's practice will be limited to the law of his/her admitting country, other foreign countries where the FLC has expertise and public and private international law. The FLC cannot appear as counsel for or prepare pleadings for another before a Virginia court, cannot prepare legal instruments effecting transfer of real estate in the U.S., cannot prepare will or trust instruments or any instrument relating to administration of a decedent's estate in the U.S., cannot prepare any legal instrument relating to marital or parental relations in the U.S. or custody or care of children of a U.S. resident, cannot hold out as being a member of the Virginia State Bar and cannot render advice on the law of Virginia, the District of Columbia, or any other state or territory of the U.S. without association of a licensed lawyer duly qualified to render such advice (other than by virtue of a FLC rule admission).

The FLC can be a member, partner or shareholder in a Virginia law firm. He/she must have a Virginia office and provide to the Virginia State Bar a Virginia address of record for service of disciplinary process.

### Temporary Practice by a Foreign Lawyer Under the Proposed Revisions to Rule 5.5

Rule 5.5, as revised, is patterned after ABA Model Rule 5.5. It regulates unauthorized practice of law in Virginia by non-Virginia licensed attorneys, both those from other U.S. jurisdictions and those licensed in foreign countries. In contrast, ABA Model Rule 5.5 does not cover attorneys licensed in foreign countries. Instead, the ABA has a separate model rule addressing temporary practice in the U.S. by non-U.S. attorneys. The ABA Model rules are similar, but not identical, to Virginia's proposed Rule 5.5. Under current law, unauthorized practice of law by attorneys or non-attorneys is regulated and monitored by the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law (the UPL Committee) and governed by Virginia's Unauthorized Practice of Law Rules, the Definition of the Practice of Law in Virginia, and Part 6, § I (C), Rules of Supreme Court of Virginia. If adopted, proposed Rule 5.5 would make practice by non-Virginia licensed lawyers, other than as authorized by the rule, a disciplinary matter—Part 6, § I (C), Rules of Supreme Court of Virginia would be eliminated and the UPL Committee would deal only with unauthorized practice of law by non-attorneys.

The scope of practice allowed under proposed Rule 5.5 would be on a "temporary and occasional basis" only (similar to what is currently allowed under Part 6, § I (C), Rules of Supreme Court of Virginia) and: in association with a licensed Virginia lawyer who actively participates in the matter; (2) services related to a pending or potential proceeding in Virginia or another jurisdiction if the lawyer is authorized to appear or expects to be so authorized; (3) services related to mediation or arbitration in Virginia or another jurisdiction if such services are related to the lawyer's practice in his/her licensing jurisdiction and do not require *pro hac vice* admission; or (4) services related to representation of a client in the foreign lawyer's licensing jurisdiction or which are governed by international law or law of a non-U.S. jurisdiction.

The proposed rule prohibits a lawyer from establishing an office or other systematic presence in Virginia except as authorized by other Rules of Professional Conduct or other law. The proposed rule retains the long-standing restrictions regarding the employment of a lawyer whose license has been suspended or revoked.

### Disciplinary Authority and Choice of Law Under Proposed Revisions to Rule 8.5

Proposed Rule 8.5 addresses disciplinary authority and choice of law in disciplinary cases and provides enforcement authority for Rule 5.5. It expands the Virginia State Bar's disciplinary authority to include any lawyer who provides or holds out to provide legal services in Virginia, regardless of where the lawyer is licensed. Under this rule a lawyer not admitted in Virginia, who provides or holds out to provide legal services in Virginia, shall consent to appointment of the Secretary of the Commonwealth as his/her agent for disciplinary service of process. Under proposed Rule 8.5, the choice of law to be applied in a disciplinary matter will be: (1) the rules of the court, agency or tribunal if the conduct in question occurred in connection with a matter before such court, agency or tribunal; (2) for any other conduct, the rules of the jurisdiction where conduct occurred; or (3) the Virginia Rules of Professional Conduct, if the lawyer provides or holds out to provide legal services in Virginia. The ABA Model Rule provides for a choice of law where the conduct had its "predominant effect;" however, the task force chose not to include this in the Virginia rule revision because it believed that where the conduct occurred provided a brighter line for enforcement than the "predominant effect" test.

Nine states have adopted ABA Model Rules 5.5 and 8.5, in whole or in part, and fifteen others have endorsed and submitted proposed revisions consistent with ABA recommendations to their highest courts.

### Proposed Revisions to Rule 1A:4 Regarding *Pro Hac Vice* Practice

Revisions to Virginia's *Pro Hac Vice* Rule (Rule 1A:4, Rules of the Virginia Supreme Court) are currently under consideration by the task force. Proposed revisions to the rule seek to clarify the procedure for admittance *pro hac vice* of non-Virginia

lawyers. Included in these proposed revisions is a recommendation that a limit be place on the number of times an attorney, licensed in another U.S. jurisdiction, can appear *pro hac vice* in Virginia courts (the current recommendation is five cases within the year preceding current application). It is envisioned that the Office of the Executive Secretary of the Supreme Court of Virginia, in cooperation with the clerks of the trial courts of the commonwealth, would maintain a central repository of information about *pro hac vice* admissions and make the information available electronically to trial judges who will be ruling on motions for *pro hac vice* admission. Also, there is a recommendation to impose a fee for each *pro hac vice* application. There is ongoing discussion about the use to which the funds generated by the fees would be put. The proposed revisions would require a written motion for admission *pro hac vice* and would set out specific admission standards. The proposed rule would not permit foreign country lawyers to appear *pro hac vice*.

**Conclusion**

The task force believes adoption of these new rules and proposed revisions to existing rules will address the recommendations of the ABA Task Force, as well as respond to the exigencies of the U.S. Trade Representative for proposals to GATS. In addition, the proposed rules and revisions are necessary, as a practical matter, to keep up with reality that the practice of law has become globalized and multijurisdictional. ⚖

# Hello, Goodbye

**Manuel A. Capsalis, 2004–2005 Chair, Conference of Local Bar Associations**

As this column goes to print, I am completing my term as chair of the Conference of Local Bar Associations (CLBA), and beginning my tenure as immediate past-chair (in other words, forgotten, but not gone). In one of my last official acts, I am pleased to provide this inaugural column of the CLBA to *Virginia Lawyer* magazine. Soon, you will hear from my successor, Janet Palmer, about the vital work of the CLBA.

The CLBA has the responsibility of establishing and maintaining a mutually beneficial working relationship between the Virginia State Bar and 115 local and specialty bars in the commonwealth. As the connection between these bars and the VSB, the CLBA promotes lines of communication and receives input from the local and specialty bars to the VSB on issues affecting the legal profession. It disseminates information about law-related activities on the local and state levels. The CLBA is responsible for facilitating coordination and cooperation between the local and specialty bars and the VSB "in improving the practice of law in Virginia and in enhancing the public understanding and appreciation of law and the legal profession," according to its mission statement.

A lot of hard-working, dedicated lawyers in Virginia honorably serve the legal profession and their communities. This was ably proven on March 7, 2005, in Richmond, and again on March 18, in Abingdon, when the CLBA presented the twentieth annual Bar Leaders Institute (BLI), offering a full day of training and networking for bar leaders throughout the state. Thanks (as always) to the tireless efforts of our leaders, Barbara Allen and Paulette Davidson, the BLIs showcased many vital activities of Virginia's local and specialty bars. The diversity and outreach of the activities of these bars is mind-boggling. Bars of all sizes and resources routinely undertake programs such as blood drives, gathering and distributing food for those in need and providing mentoring programs for students from elementary through law schools. Fundraisers are offered for charitable causes. Scholarships, as well as youth courts and summer law camps are established throughout the state by many of these bars. Assistance with wills, free of charge, is offered by many bars for first responders, as are voter registration drives, educational pamphlets and videos to assist the public to better understand the legal system. At the BLIs, we were also instructed in some of the many things offered by local and specialty bars to further understanding, professionalism and collegiality within the profession, as well as with the judiciary and elected officials, including bench-bar conferences, continuing legal education, and public forums for political and other important issues affecting communities. I invite you to attend a BLI to better learn about these many activities, and perhaps to help you implement a worthy program in your area.

The BLI in Abingdon was special. Presented in coordination with the Supreme Court of Virginia's Solo and Small-Firm Practitioner Forum, it offered an opportunity for bench and bar to gather for a full day of training, education and comradery. It was a singular honor for me to be a part of such an important event. Of particular note were the tireless efforts of Justice Cynthia D. Kinser and Chief Justice Leroy R. Hassell Sr. in making this event successful. More than any other endeavor I have undertaken in my time working on the local or state bar levels, the BLIs this year proved the dedication and commitment of so many in our profession to the greater good of our communities. I came away from each BLI fully invigorated and privileged to be a part of the practice of law in Virginia.

Building on the success of Abingdon, the CLBA is proud to team with the Supreme Court of Virginia to take the BLI and the Solo and Small-Firm Practitioner Forum to other venues. On September 21, 2005, there will be a full-day forum in Harrisonburg. Another will soon follow in Fredricksburg. The CLBA also looks forward to presenting the twenty-first annual BLIs in March 2006, in Richmond and Abingdon. I hope many of you will be a part of these important events.

This bar year proved to be a banner year for *So You're 18,* the seminal publication of the CLBA. This handbook on legal rights and responsibilities is printed in English, Spanish and Vietnamese. This year we distributed over ten thousand copies throughout the state, and many others were downloaded from the VSB Web site. Particularly gratifying was the varied list of

*continued on page 55*

# CLBA Awards Given at Annual Meeting

The following bar associations received recognition from the Virginia State Bar's Conference of Local Bar Associations (CLBA) at the bar's annual meeting in Virginia Beach on June 17, 2005. The awards recognize excellence and high achievement in projects that serve the bench, the bar and the citizens of Virginia.

## Awards of Merit

Alexandria Bar Association—Beat the Odds scholarship/grant program

Bar Association of the City of Richmond—Pro Se Education Project: Landlord-Tenant pamphlet

Campbell County Bar Association—"Virginia's Foster Care Process and You" video project

Fairfax Bar Association (2)—General District Court Comparative Jurisdiction Seminar (in cooperation with the Alexandria, Arlington County and Prince William County bar associations) and Lawyer Referral & Information Service Criminal Law Subject Matter Panel

Henrico County Bar Association—Partners in Education project

Metro Richmond Women's Bar Association—Partnership with Thomas Jefferson High School

Norfolk & Portsmouth Bar Association (2)—Fourteenth Annual Legal Food Frenzy and a project to revitalize its Young Lawyers Section

Roanoke Bar Association (2)—Wills for Heroes and Youth Court programs

## Certificates of Achievement

Arlington County Bar Association—Free B. Friday (Free Breakfast Friday) project

Bar Association of the City of Richmond—John Marshall High School partnership program

Fairfax Bar Association (2)—Judicial Feedback Program and All Fairfax Reads program

Henrico County Bar Association—Pro Bono Protective Order project

Metro Richmond Women's Bar Association—Mentorship Program and Annual Pro Bono Luncheon

Northern Virginia Chapter of the Virginia Women Attorneys Association—Annual Legislative Reception

Prince William County Bar Association—Lawyer Referral Service

Roanoke Bar Association—Practice of Law in Southwest Virginia orientation program

Roanoke Chapter of the Virginia Women Attorneys Association—Quarterly Continuing Education Lunch Program

Virginia Beach Bar Association (2)—Past Presidents Council and Dialogue on Freedom project

Virginia Women Attorneys Association—The Future of Marriage in Virginia panel program

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recipients, including courts, counselors, social service departments, schools, bar associations, lawyers, law firms, police departments and parole offices. Beginning this fall, *So You're 18* will be updated and available for distribution at the start of each new school year. We are anticipating a substantial distribution and are happy to oblige all who ask. If you or your bar association wish to obtain any copies, please let me know.

This year also marked the inaugural year in which the CLBA assumed responsibility for *Legally Informed,* a VSB publication that details the many public service and pro bono activities offered by local and specialty bars in Virginia. This publication is an indispensable source of information, and is available in an updated edition. If you are interested, please let me know.

At the VSB Annual Meeting this June in Virginia Beach, the CLBA annual meeting included the Awards of Merit competition, recognizing outstanding projects and programs of local and specialty bar associations. The CLBA also presented the tenth annual Local Bar Leader of the Year Award, recognizing extraordinary dedication and service to the bench, bar and the public. It is truly impressive the array of projects and programs recognized, and the meeting was a great opportunity to gather with the best of the best in our profession.

I am grateful for the opportunity to have served as chair of the Conference of Local Bar Associations. I look forward to continuing to serve next year under the leadership of Janet Palmer, and in the years ahead as a graying past-chair. There are many challenges ahead for our profession. I am confident that the CLBA will continue to provide an invaluable service in meeting those challenges. ⚖

# YLC Served the Public and the Bar


**Savalle C. Sims, 2004–2005 Young Lawyers Conference President**

During the past year, I had the privilege to work with talented, creative and dedicated young lawyers across the commonwealth—all of whom have sacrificed time from their families and professional obligations. YLC volunteers answered the call and went above and beyond to honor our profession and to improve the perception of our profession in the community. The YLC year could not have been successful without our volunteers and the help of non-young lawyers.

Throughout the year, the YLC served the public with a number of programs. In September, the YLC partnered with the Virginia State Board of Elections in its voter education initiative. The YLC distributed a "Know Your Rights and Responsibilities" brochure to more than one hundred thousand citizens. In partnership with The Virginia Bar Association Young Lawyers Division, the YLC's Emergency Legal Services Committee provided assistance after tropical depression Gaston and hurricanes Frances and Ivan. The YLC also presented the American Bar Association's Diversity Tolerance Initiative to more than two hundred third-grade students at Varina Elementary School.

During Community Law Week, the YLC tailored the American Bar Association's "We the Jury" program to Virginia's judicial system and presented it to more than six hundred high school students. Students participated in a mock *voir dire* and deliberated in connection with a civil or criminal case. The YLC's Minority Pre-Law Conference in April at the University of Richmond's T.C. Williams School of Law exposed students to all phases of a legal career, from the law school admissions process to the selection of career opportunities. In May, the YLC partnered with the VBA young lawyers to implement "Wills for Heroes" in Williamsburg. The YLC provided wills, advance medical directives and powers of attorneys to approximately two dozen Williamsburg first responders.

The YLC also served the bar. In March, the YLC hosted its fourth annual professional development conference in Charlottesville, featuring courses on transactions, in-house counsel and litigation. One of the highlights of the conference was one of the YLC's jury-based initiatives for the year: "A View from the Box: A Panel Discussion of Judges, Trial Lawyers and Former Jurors." The panel consisted of jurors from state and federal criminal and civil trials and noted litigators Craig S. Cooley and Julia B. Judkins. The Honorable James P. Jones of the United States District Court for the Western District of Virginia served as moderator. In October and again in June, the YLC welcomed new attorneys to the Virginia State Bar at our admission and orientation ceremonies. At the VSB Annual Meeting in June, the YLC hosted an attorney general candidates' debate.

At its annual luncheon, the YLC honored this year's R. Edwin Burnette Jr. Young Lawyer of the Year award recipient, O'Kelly E. McWilliams III. O'Kelly exemplifies outstanding service to the YLC, the legal profession and the community.

As my year as president of the YLC comes to an end, it is my pleasure and privilege to pass the reigns of YLC leadership over to Jimmy F. Robinson Jr. Jimmy is a talented and creative lawyer with unending energy and dedication to the YLC. I am confident that you will enjoy working with him. ⚖

# Lessons Learned

**William B. Smith, 2004–2005 Senior Lawyers Conference Chair**

When my calendar reminded me that it was time to do a column for this issue of the *Virginia Lawyer*, I happened to be doing some reading about lessons learned by practicing trial lawyers. One source was an article in the May 2005 issue of the *ABA Journal* and the other was the book *Courting Justice* by David Boies—best known for his representation of Vice President Gore in the Bush-versus-Gore 2000 presidential election recount litigation.

In the American Bar Association article, J. Gary Gwilliam of Oakland, California, from his experience in losing a major plaintiff's jury trial, suggests:

- You cannot be truly successful without from the beginning being completely and honestly facing the fear of losing the case.
- The best way to get over a big loss is to immediately turn back to your work with renewed effort.
- You should recognize that even if you lose, you did the best you could and you shouldn't fault yourself for not doing better.

Glenn Bradford of Kansas City, Missouri, says that lawyers who say they have never lost a case give the public and young lawyers the wrong impression that if they lose a case, they are a failure. He thus opines:

- Any lawyer who tries a number of cases is going to lose one every now and then.
- You have to be honest with yourself in determining what you are able to accomplish with the law and the facts that you have been given to work with in a particular case.
- Trial lawyers should look at their cases as helping people one at a time.
- You can never really know how a particular juror is going to vote.

Chicago plaintiff's lawyer Christopher Hurley says:

- Never use an in-court demonstration unless you are absolutely sure it's going to work.
- If your client makes a poor witness, try to settle.
- Tell your client not to look at you during his cross-examination.

David Barber of Louisville, Kentucky, concludes from his experience that:

- While closing arguments longer than thirty minutes are not encouraged, if the particular case demands one, don't hesitate to give it.
- The real measure of trial success is whether the client looks at it as a win or loss.
- A disappointing verdict in a case that gets community publicity may lead to larger cases.

Mr. Boies's book, which I recommend to all lawyers, gives us the benefit of his experience in major litigation of all kinds. He tries his cases by applying five principles:

1. Evidence should explain to the fact finder that your client is good and successful. What the other side complains of should be applauded rather than criticized.
2. Go on the attack by finding the opponent's weak points and pressing them.
3. If possible, never seek and always oppose delay in the trial proceedings.
4. More cases are won or lost by lack of preparation than for any other reason.
5. Present your evidence to dramatize the key points of your case to the jury.

In discussing settlement, he suggests:

- Objectively analyze your case at the outset, and if it should be settled, do so.
- An aggressive position from the outset of the case often does not work in getting the case settled.
- If the case is one that should be settled, be quick to settle early, because failing to resolve the case early may result in missing an opportunity to settle before the client's costs have built up and positions have polarized.
- If your decision is that the case should be tried, be prepared to accept and live with the outcome.

In reflecting on these suggestions, it occurred to me that senior lawyers in Virginia would, of course, have their own "practice tips." Lessons learned in the practice of law are not limited to trial practice, but include those that relate to law practices that do not involve appearing in court or trying cases. There should be many wise and useful suggestions to guide the young lawyer relating to office management, client communication, how to arrive at appropriate fees, negotiation and other dealings with other lawyers and their staff, and interacting with nonlawyers who are involved in an office practice transaction such as bankers, real estate brokers and agents, politicians and medical professionals.

As the Senior Lawyers Conference continues to increase in size and in its activities, I would like to see it establish and maintain a "practice tips" database. These valuable bits of wisdom could then be made available to all Virginia lawyers by publication in Senior Lawyers News and Virginia Lawyer. ⚖

**CHIEF JUSTICE'S INITIATIVE**
**TO IMPROVE THE INVOLUNTARY COMMITMENT PROCESS IN VIRGINIA**

## SAVE THE DATE
## Friday, December 9, 2005

## REFORMING THE INVOLUNTARY COMMITMENT PROCESS: A MULTI-DISCIPLINARY EFFORT

**A conference to obtain input from**
Sheriffs, Judges, Special Justices, Lawyers, and Mental Health Practitioners

**Featured speakers:**
**Chief Justice Leroy R. Hassell, Sr.**
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**Noted Author and Past President, American Psychiatric Assoc.**
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Holiday Inn Select Koger Conference Center, Richmond

(6 CLE credits, luncheon provided, no charge to participants)

LOOK FOR DETAILS IN FUTURE ISSUES OF
*Virginia Lawyer* magazine and at www.vsb.org

# "An Ounce of Prevention . . . "

**by Janean Johnston**

Most of us have grown up with this sage piece of advice. We try to have an annual checkup, eat correctly and exercise regularly in order to protect our health and avoid the dreaded "… pound of cure." While we are concerned about maintaining our physical health, it can be easy to overlook the health of our legal practice and ignore warning signs that cause a lot of heartache.

The Virginia State Bar has tried to help attorneys maintain healthy practices through its management practice services. These include the ethics hotline, the risk management free hotline for professional liability insurance and related office management questions, law office and risk management articles published in *Virginia Lawyer* and confidential on-site preventive law practice management office reviews offered to solo and small firms. Many Virginia attorneys have taken advantage of these programs.

I occasionally meet with attorneys who want on-site assistance, but do not have time for a half-day practice management review. For that reason, I will begin a basic "Firm Fitness Check-up" series that can be followed as time allows.

Lawyers who are practicing law in an optimal manner will answer "yes" to the questions below. A "no" to any of the questions (some questions will not apply, depending on practice size), indicates a needed examination of that practice area to lessen the risk of a malpractice suit or ethical complaint.

Since lack of appropriate docketing/calendaring procedures can cause major problems for any firm, regardless of practice area, I will begin the questions by focusing on this issue.

**Docket Control/Calendering Procedures**

1. Do you have a "fail-safe" system for control of deadlines and other critical dates?
2. Does your system include all statutory dates, procedural dates or deadlines that apply to your practice areas?
3. Are at least two independent date controls kept on all matters?
4. Do you cross-check your system weekly?
5. Is one person responsible for maintaining the system?
6. Is there a back-up person for the docket/calendaring system?
7. Have you identified a lawyer who would take over your client matters if you are absent for an extended period of time? (applicable for solos)

8. Do you allow sufficient lead time for completion of tasks?
9. Is there a follow-up system to ensure completion of tasks?
10. Does your client intake form ask for "deadline" dates?
11. Does someone screen your incoming mail for calendar requirements before it is distributed?
12. Does everyone at your firm regularly use the system?

These questions are not comprehensive and do not cover every possible problem. They may, however, stimulate your thinking and bring a new awareness of your firm's risk management health. It can also alert you to the steps needed to maintain the fitness of your firm.

After answering these questions, if you wish assistance or direction, please contact me at (703) 567-0088. I will be happy to discuss your results and make appropriate suggestions on a confidential basis. I can also have applications to participate in the VSB's Confidential Law Practice Management Review program. There are a limited number of these reviews available during the current year.

I will continue to review other risk management areas in upcoming articles. Stay tuned and stay healthy.

# 2007 Code of Virginia: Time for Change

by Cheryl L. Jackson and E. M. Miller Jr.

*Question: What's 55 years old, and for two months every year goes in to be nipped, tucked, augmented and enhanced?*

*Answer: The Code of Virginia.*

**SJR 388**

The 2005 General Assembly unanimously agreed to Senate Joint Resolution 388, which advises the citizens of Virginia of the intention of the Code Commission to publish a 2007 Code of Virginia. The Code has not been completely renumbered and reformatted since 1950, when it was adopted by the General Assembly as the official Code of Virginia. Practitioners know all too well that the numbering system for the Code has become increasingly convoluted and disorganized as chapters and titles are inserted, renumbered or deleted entirely from the Code. It is not uncommon, for example, to see Code numbers as complex as: § 32.1-122.10:001. With more than one thousand bills passed each year, even newly-recodified titles quickly outgrow their numbering schemes.

**Codification history**

In 2007, the Code of Virginia will be fifty-seven years old, which is older than any previous Virginia Code. Hening's Statutes at Large carried the laws of Virginia from 1619 through the beginning of the 19th century. Building on that, statutory law was first codified in 1804, with new codifications following in 1819, 1849, 1887, 1904, 1919 and 1950. The average time between these codifications is twenty-six years, with thirty-eight years being the longest span of time before a new code was implemented. The 1950 Code of Virginia has far surpassed that mark, and is ripe for a makeover.

It is a subtle distinction that eludes many practitioners, but the Acts of Assembly, not the Code of Virginia, actually contains the law of the commonwealth. The Acts of Assembly hold all acts passed by the General Assembly, signed by the Governor and enacted into law. They are published annually in volumes arranged by chapter number, which is assigned when the Governor signs the bill. The Code of Virginia codifies all acts of a general and permanent nature (i.e., laws that apply commonly to all citizens), arranging them topically by title, chapter and article.

**Code Commission**

Pursuant to Virginia Code § 30-146, the Code Commission is charged with publishing and maintaining the Code. The Code Commission was established in 1946, when the General Assembly created the Commission on Code Recodification, to oversee the revision and recodification of laws that became the 1950 Code. Two years later its name was changed to the Virginia Code Commission.

The Code Commission is a permanent legislative branch commission staffed by the Division of Legislative Services. It consists of ten members: two current and one former Senator, two current and one former member of the House of Delegates, two circuit court judges, the Attorney General or her designee, and the director of the Division of Legislative Services.[1]

The Code Commission has full discretion to arrange for the publication of the Code of Virginia, as well as the Virginia Administrative Code and the Virginia Register of Regulations. The commission may decide all questions of form, makeup and arrangement pertaining to the Code, including title pages, prefaces, annotations, indices, tables of contents, appendices, paper, type, binding and lettering.[2] The Code Commission has broad authority to make minor changes to the Code of Virginia, and may renumber, rename, and rearrange any Code titles, chapters, articles, and sections. It may also correct printer's errors, misspellings and other unmistakable errors in the statutes, and make consequential changes necessary in terminology, references or language that is no longer appropriate.[3]

Individual titles of the Code are revised on an ongoing basis. Forty-six of the Code's sixty-six titles have been revised at least once since 1950, many of them twice. Title revisions are drafted by legislative services attorneys over a one- to two-year period. The Code Commission typically appoints a work group, composed of interested parties in the public and private sectors, to act as a sounding board and assist in developing policy during the revision process. The Code Commission reviews the revision draft, approves it, issues a recodification report, and a bill is introduced in the General Assembly to effectuate the changes. Title revisions contain both nonsubstantive or technical changes, as well as substantive additions and deletions. It is those substantive changes that trigger legislation.

**2007 Code Project**

The 2007 Code project is a nonsubstantive reorganization of statutory law. It will contain many cosmetic and technical changes, but there will not be substantive changes in the statutory law. Therefore, there will be no bill introduced in the General Assembly to enact the 2007 Code. The Code Commission is acting on its authority to make these changes. The project will also be done at little or no additional cost to the state, as the Division of Legislative Services staff will absorb the work with existing staff. Moreover, LexisNexis, the contract publisher, has agreed to provide the 2007 Code to current subscribers at no extra cost than they currently pay for Code maintenance, by amortizing the costs over several years.

Specifically, the 2007 Code will be revised in the following ways:

- Renumbering Code sections using a new numbering convention.
- Creating new titles and title numbers.
- Dividing lengthy sections and grouping like sections, articles and chapters more logically within their titles.
- Making global changes to archaic or inconsistent language.

*Numbering scheme*

In March, the Division of Legislative

Services' staff undertook a fifty-state analysis of numbering conventions used by other codes. That analysis led to three recommended options being presented to the Code Commission at its April 20 meeting. Commission members overwhelmingly endorsed what has become known as the "two-dash system." It is a convention used in one form or another by eighteen states, including Tennessee, Arkansas, Colorado, Montana, Utah, and Wyoming. The section number is broken down as follows:

Two-dash system: Title-Chapter-Section (with Article embedded).

Ex.: Wyoming Stat. §§ 11-19-101 through 11-19-117
Title 11, Chapter 19, Article 1, Sections 1-17

Tenn. Code § 26-2-309
Title 26, Chapter 2, Article 3, Section 9

Advantages of this system are numerous:

- It provides a clear visual distinction between 1950 Code sections and 2007 Code sections.[4]
- The number itself gives immediate reference to its placement within the title, chapter, and article. This eliminates the problem of not knowing where the article and chapter end when reading language such as: "as used in this article . . ." or "as used in this chapter . . ."
- It allows room to grow, in that there can be 100 sections per article, rather than 100 sections per chapter as allowed by our current system.

*New titles*

At this writing, no final decision has been reached on title numbering and arrangement. Several options are being considered. For example, it has been suggested that some titles could be consolidated (*e.g.,* creating a Transportation title by combining Title 46.2, Motor Vehicles; Title 33.1, Highways, Bridges and Ferries; Title 5.1, Aviation; and Title 62.1, Waters of the State, Ports and Harbors), and that new titles could be created (e.g., establishing an Interstate Compacts and Agreements title). The Code Commission will also decide if titles should be kept in alphabetical order, or grouped in another way.

*Dividing and grouping sections*

The whole-Code reorganization effort provides an ideal opportunity for simplifying areas that have grown out of control. Extremely lengthy sections will be broken into more manageable sections. Likewise, as the Code has grown, sections, articles, and chapters have been added in places where they don't "fit" well, so this will give the commission a chance to clean up each title.

*Global changes*

Before legislative services attorneys start the project, the editing staff will make certain language consistent throughout the Code. Examples of these changes include: changing spelled out numbers to numerals (ten and over), using monetary symbols rather than the words "dollars" and "cents," standardizing inconsistent wording throughout the Code, and so on.

**Work group**

Just as is standard for title recodifications, a work group has been established for the 2007 Code project within the Division of Legislative Services, and will report to the Code Commission monthly. The work group strives to be inclusive, and invites comment and participation from all interested parties. While still growing, the work group currently consists of representatives from the Supreme Court, Commonwealth's Attorneys' Services Council, Virginia State Bar, Virginia Bar Association, Virginia Association of Law Librarians, LexisNexis, Local Government Attorneys Association, Thomson West, Department of Motor Vehicles, and the Virginia State Police. A Web site has been established through which agendas, minutes and work group materials can be accessed.[5] Any person wishing to make comment to the work group is invited to do so. ⚖

**Cheryl L. Jackson** is the manager of information and resource services at the Division of Legislative Services. She oversees operation of the Legislative Reference Center, which is the law/public administration library for the General Assembly and provides legal, legislative and general research in every public policy area. She has worked for the state legislature in a variety of capacities for seventeen years. She holds a bachelor of arts degree in political science and a master's degree in public administration.

**E. M. Miller Jr.** has been the director of the Division of Legislative Services since 1988. Prior to that, he was a senior attorney at the division and staff director of the Senate Finance Committee. He has the distinction of serving as the principal drafter for the first title revised by the Code Commission by in-house counsel. Miller is a member of the Code Commission, and also serves as a Virginia commissioner of the National Conference on Uniform State Laws.

Endnotes:

1 *Code of Virginia*, 1950 § 30-145. Current members of the Code Commission are: Sen. William C. Mims, Chair; Del. R. Steven Landes, Vice-Chair; Del. Robert Hurt; Sen. John S. Edwards; Robert L. Calhoun; Thomas M. Moncure Jr.; Judge Diane M. Strickland; Judge S. Bernard Goodwyn; Frank S. Ferguson; and E.M. Miller Jr.

2 *Code of Virginia*, 1950 § 30-146.

3 *Code of Virginia*, 1950 § 30-149.

4 The chart below offers a comparison of 1950 Code numbering and 2007 Code numbering, based on Title 22.1, Chapter 5, Articles 1 - 8 (§§ 22.1-28 through 22.1-57.5). For purposes of this example, title numbering has remained the same, less the decimal point.

| | 1950 Code | 2007 Code |
|---|---|---|
| Article 1 | 22.1-28 through 22.1-33 | 22-5-101 through 22-5-107 |
| Article 2 | 22.1-34 through 22.1-40 | 22-5-201 through 22-5-209 |
| Article 3 | 22.1-41 through 22.1-46 | 22-5-301 through 22-5-306 |
| Article 4 | 22.1-47 | 22-5-401 |
| Article 5 | 22.1-47.1 through 22.1-47.3 | 22-5-501 through 22-5-503 |
| Article 6 | 22.1-48 through 22.1-51 | 22-5-601 through 22-5-604 |
| Article 7 | 22.1-52 through 22.1-57 | 22-5-701 through 22-5-706 |
| Article 8 | 22.1-57.1 through 22.1-57.5 | 22-5-801 through 22-5-810 |

5 **http://legis.state.va.us/codecomm/2007code/2007code.htm**

# 67th Annual Meeting

## June 16–19, 2005

1: Immediate Past President David P. Bobzien of Fairfax, 2005–06 President Phillip V. Anderson of Roanoke, and President-elect Karen A. Gould of Richmond, in the garden at the Cavalier Hotel.

2–3: American Bar Association President Robert J. Grey Jr. of Richmond (at podium and in front row, center) led the Showcase CLE program, "The ABA Modern Jury Principles and the Virginia Jury." The program featured a panel discussion of how the ABA's proposed jury reform would affect Virginia, and the ABA's Dialogue on the American Jury, which drew on students from the First Colonial High School Legal Studies Academy in Virginia Beach. Panel participants were (l–r) Bob Scully of Vienna, Jim Broccoletti of Norfolk, Circuit Judge Thomas S. Shadrick of Virginia Beach, Virginia Court of Appeals Chief Judge Johanna L. Fitzpatrick and Greg Giordano of Virginia Beach.

4: VSB President David Bobzien (second from left) awarded certificates to lawyers and judges who have been licensed in Virginia for fifty years.

1: Tom Spahn (l), ethics attorney for McGuireWoods law firm, moderated a panel on "Ethics Issues in Dealing with Governmental Entities." On the panel were (l–r) Sharon Pandak, former county attorney for Prince William County; VSB Ethics Counsel Jim McCauley; and Ann Marie Cushmac, a senior assistant attorney general in the Virginia Attorney General's office.

2: O'Kelly E. McWilliams III (l) received the R. Edwin Burnette Jr. Young Lawyer of the Year Award for his service to the Young Lawyers Conference, the legal profession and the community. McWilliams, who practices in Washington, D.C., is shown with YLC President Savalle Sims and Judge Burnette, for whom the award is named.

3: Portsmouth lawyer Theophlise "T." Twitty (seated), who volunteered in the VSB disciplinary system and served on the Executive Committee, was thanked for his years of service to the Virginia State Bar. President David Bobzien presented the certificate, held by Twitty's wife, Gloria.

4–5: Virginia attorney general candidates squared off in a debate sponsored by the Young Lawyers Conference. Delegate Bob McDonnell (l), R-Virginia Beach, and Senator Creigh Deeds, D-Bath County, differed on issues such as the state's role in end-of-life controversies and stem cell research.

1: Frank Morrison (l) of Lynchburg celebrates receiving the Gardener G. DeMallie Jr. Award with a man he calls a role model, Larry Hoover of Harrisonburg. Hoover, known as "the father of mediation in Virginia," received the Tradition of Excellence Award, bestowed by the VSB General Practice Section. Morrison's award, given by the Virginia Law Foundation's Continuing Education Committee, recognizes dedication to the legal profession, integrity and contributions to CLE.

2: Bill Botts (l), executive director of Rappahannock Legal Services, received the 2005 Legal Aid Award, presented by President David Bobzien.

3: Jill Wells Nunnally, president of the Metropolitan Richmond Women's Bar Association, accepted an Award of Merit from Manny Capsalis, chair of the Conference of Local Bar Associations. The award recognized the association's partnership with Richmond's Thomas Jefferson High School. The association also received Certificates of Achievement for a mentorship program and its annual Pro Bono Luncheon.

4: Savalle C. Sims of Washington, D.C., outgoing president of the VSB Young Lawyers Conference, passed the torch to Jimmie F. Robinson of Richmond, who is serving as president for the 2005–06 bar year.

5: Kathy Mays (l), who retired this year as director of judicial planning for the Supreme Court of Virginia, was recognized for her contributions to the development of alternative dispute resolution in the commonwealth. The award was presented by Karen Keyes, chair of the VSB/Virginia Bar Association Joint Committee on ADR.

6: The VSB thanked Carlos Wilson, who has greeted guests at the front door of the Cavalier Hotel since 1938 and has never missed a day of work. With Wilson are his daughter, Margie Coefield (standing), and wife, Adrienna Roundtree.

1: Circuit Judge Martin F. Clark Jr. (seated) of Patrick County autographed a copy of his second novel, *Plain Heathen Mischief*, for Bob Scully (l) of Vienna. Clark was the banquet speaker.

2: Outgoing President David Bobzien, an inveterate runner, was presented with a caricature drawn by Richmond lawyer Michael Goodman. Bobzien wore a coonskin cap in recognition of his log cabin at Jordan Hollow, where he entertained the VSB Executive Committee. VSB Executive Director Tom Edmonds made the presentation.

3: A child creates a world with sand during a Sand Castle Contest sponsored by Minnesota Lawyer Mutual Insurance Company.

4: Vendor Ed Carpenter (l) describes his services to Aubrey Rosser of Altavista, during the Lawyers Expo.

5: Participants in a tennis tournament included (l–r) Anthony Greene and Rhysa South—the tournament winners—along with Will Homiller, Beth Anderson, Doug Callaway, Katelyn Grahm and Esther McGuinn.