

# Judicial Independence and the Rule of Law

by Phillip V. Anderson, 2005–2006 VSB President



“A courtroom is a quiet place, where it doesn’t matter how much money you have, whether you are popular or not, where the weak can take on the strong, where we park whatever political differences we have at the common door. The people want a judge who doesn’t look over their shoulder, who looks them in the eye, gives them a fair hearing and a fair day in court.”

Senator Lindsey O. Graham of South Carolina made these observations to the American Bar Association House of Delegates in August 2005 while he participated in a panel discussion on judicial independence. Senator Graham articulated his vision of what we as a freedom-loving people expect from our judiciary, and how independence is the lifeblood of that vision. He, along with other panelists — U.S. Supreme Court Justice Stephen G. Breyer and former U.S. Solicitor General Theodore B. Olson — voiced concerns about what appears to be a lack of appreciation for the fundamental concepts of separation of powers and an independent judiciary.

Judicial independence is what Americans expect, Senator Graham noted, and is absolutely crucial to our system of government. “Voting is not a democracy,” he said. “Saddam Hussein got 100 percent of the vote. A democracy is the rule of law supported by the participation of the public. The key to a democracy is if you lose the election, you don’t lose your life, your house, your business, your rights — because the law won’t let that happen.” The rule of law distinguishes our form of government from the rest of the world, and the guardians of this rule of law are an independent judiciary free from intimidation, undue influence and reprisal.

A natural tension between notions of judicial independence and judicial accountability has been with us since 1803, when Chief Justice John Marshall first established the right of the U.S. Supreme Court to pass on the constitutionality of an act of Congress. The tension has continued, with perhaps the most notable example being President Franklin D. Roosevelt’s proposal to enlarge the size of the Supreme Court to insure favorable treatment for his economic recovery legislation.

Recently, the tension has heightened, with unwarranted or uninformed criticism of judicial decisions, calls for impeachment of judges, and virulent personal attacks on judges for decisions that do not adhere to a particular political or philosophical agenda. Whether merely reflective of a culture in which all forms of discourse have become less urbane, the attacks show a declining appreciation for the importance of an independent judiciary.

## Dear Fellow Members of the Bar:

In November 2004, Legal Services of Northern Virginia (LSNV) initiated a fundraising phonathon. The event was a great success, resulting in the participation of over four hundred attorneys, thirty-five callers and seventy-six thousand dollars raised in support of LSNV. This year, LSNV will be conducting its second annual phonathon, “Calling for Justice,” in April, concluding on Law Day, May 1.

For the past four years the Greater Richmond Bar Foundation (GRBF) and the Central Virginia Legal Aid Society (CVLAS) sponsored a phonathon campaign. Some of the past volunteer telephone solicitors included the Governor, two former Governors, bar presidents and scores of attorneys. Last year during Law Week, over fifty lawyers made calls that raised more than thirty-nine thousand dollars. This year, the GRBF and CVLAS will conduct a 2006 phonathon during Law Week, May 1–5.

Please help make these worthy events a success.

Sincerely,

A handwritten signature in black ink, appearing to read "Phillip V. Anderson". The signature is written in a cursive style with a horizontal line extending to the right.

Phillip V. Anderson  
President

## P R E S I D E N T ' S M E S S A G E

Not all of the challenges are overt. They also come in subtle forms, such as inadequate funding of the judicial branch, partisanship in the selection and confirmation process, and threats of impeachment or failure to reappoint. These influences gradually erode the dignity of and respect for our republic's most honored and important institutions.

Judicial independence cannot flourish without nurture. The responsibility for that nurture, by necessity, rests with an informed and engaged bar. In a recent address to the American Academy of Appellate Lawyers, U.S. Justice Sandra Day O'Connor stated: "There is no natural constituency for judicial independence except for a vibrant responsible lawyer class. We can't trust the courts to protect themselves." No element of our society should have a better appreciation for the importance of an independent judiciary than lawyers. While we pay lip service to the importance of an independent judiciary, are we as vigilant as we should be? Do we recognize subtle and even well-intentioned efforts that undermine the independence of our judiciary? Are we engaged in responding to those challenges in a positive and reasoned way?

Traditionally, lawyers have been very involved in the political fabric of our nation; however, this is less the case now. Fewer lawyers serve in our state legislature. Lawyers have become so focused on the business of law that they have neglected the more time-consuming and less lucrative responsibilities of political and community involvement. Our complacency may be explainable, but nonetheless fatal.

Senator Graham concluded his remarks with an expression of a fear that should be foremost in all of our minds: "We are trying to spread the rule of law in faraway places with strange-sounding names, but my biggest fear is that we take it for granted here."

The fear is real. Without the protection of an independent judiciary, the rule of law is at risk. Support for judicial independence separate and apart from its importance to the rule of law risks being lost in a cry for "accountability." The question for each of us is what will carry the day — judicial independence, or accountability?

Unless we as lawyers heed the call to become more involved and be prepared to clearly articulate the connection between independence and the rule of law, accountability may indeed carry the day and call into question the legitimacy of and respect for these institutions. The time for our action is now.

Send your letter to the editor\* to:  
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Virginia State Bar,  
*Virginia Lawyer Magazine*  
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[www.vsb.org/publications/vlawyer/letters.html](http://www.vsb.org/publications/vlawyer/letters.html).

## David P. Baugh Is the 2006 Recipient of the Lewis F. Powell Jr. Pro Bono Award

David P. Baugh of Richmond is the recipient of the Virginia State Bar's sixteenth annual Lewis F. Powell Jr. Pro Bono Award.

Baugh was selected for his pro bono representation in numerous First Amendment cases, his zealous defense of indigent criminal defendants in complex court-appointed cases for nominal compensation, and his dedication to training other members of the defense bar through continuing legal education.

The award, named for a late U.S. Supreme Court justice from Richmond, is sponsored by the VSB's Special Committee on Access to Legal Services. It will be presented on April 26 at the Miller Center of Public Affairs at the University of Virginia, during the annual VSB Pro Bono Conference.

Baugh was named a "Human Rights Hero" by the American Bar Association for his representation of Ku Klux Klan member Barry Elton Black for burning a cross at a 1998 Klan rally in Virginia. Baugh, who is African American, took his defense of Black's free speech rights to the U.S. Supreme Court and prevailed.

He also served as a court-appointed lawyer to Mohamed Rashed Daoud Al-Owhali, an al-Qaeda member who participated in a 1998 bombing that killed 213 people and wounded thousands at the U.S. Embassy in Kenya. Al-Owhali faced the death penalty; he received life in prison without parole.

"I think every lawyer should take court-appointed cases," Baugh said in an interview. In many appearances before schools and community groups, he tries to convey the majesty of American law. His law firm in Richmond handles a steady stream of cases

with minimal compensation but with a "manifest injustice" that requires protection of constitutional rights. "Every time the government loses a case, the Constitution gets stronger," he said.

"I'm doing God's work—I'm a lawyer."

Charlottesville attorney Steven D. Rosenfield, who has worked with Baugh on pro bono civil litigation, nominated him for the award. "David has been a mentor and hero to countless criminal defense lawyers in Virginia since he moved here to practice criminal defense and civil rights law," Rosenfield wrote. As a board member of the American Civil Liberties Union of Virginia, Baugh "has represented for free students, prisoners, citizen speakers and a host of other individuals who have needed an advocate to protect them from the government," Rosenfield wrote.

Baugh is a graduate of Virginia State University and what is now the Thurgood Marshall School of Law at Texas Southern University in Houston. He is a former assistant United States Attorney for the Eastern District of Virginia and the Eastern District of Texas.



David P. Baugh

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## Troutman Attorneys Receive James C. Roberts Award

McLean attorneys Tameka M. Collier and Mary C. Zinsner have received the James C. Roberts Award from their law firm, Troutman Sanders LLP, for their contributions to pro bono service.

The two were recognized for developing a vital pro bono program in Troutman's Tysons Corner office, where they work. They matched clients who needed pro bono help with lawyers. As a result, total pro bono hours contributed by attorneys in the Tysons Corner office in 2005 increased almost fourfold over the previous year, according to a press release.

In addition, Collier and Zinsner personally contributed a combined total of 240 hours to pro bono service in 2005.

Both attorneys work in the firm's complex litigation practice group. Collier, an associate, received undergraduate and law degrees from the College of William & Mary. Zinsner is a partner. She received a bachelor's degree from the College of the Holy Cross and a law degree from George Washington University.

The award is named for a Richmond attorney who in 1959—within two years of graduating from law school—assembled a small group of attorneys to provide counsel to low-income and elderly individuals. He was instrumental in creating what is now Central Virginia Legal Aid Society. Roberts still is an active volunteer and regularly donates time to The Virginia Bar Association's Pro Bono Hotline.

## Fairfax Bar Recognizes Pro Bono Standouts

The Fairfax Bar Association recognized 2006 pro bono standouts during its February luncheon. The James Keith Public Service Award is bestowed by the bar association; the other awards are from the Fairfax Bar Pro Bono Program. Winners are:

**William L. Schmidt**, James Keith Public Service Award. Schmidt has chaired the Fairfax Law Foundation, cochaired the Community Outreach Committee and served on the Fairfax Bar Truancy Project Task Force. He has been a volunteer neutral case evaluator and motions day conciliator in Fairfax Circuit Court since 1997. His community outreach includes ringing the bell and chairing the board of advisors for the Salvation Army, repairing homes of needy people for the Fairfax Bar's Christmas program, Katrina Relief Fund work, and organizing the "Can-U-Care" Food Drive Program.

**Whiteford, Taylor and Preston**, Pro Bono Law Firm of the Year. In addition to accepting clients through the Pro Bono Program's Neighborhood Outreach Program, the firm has partnered since 2002 with Homestretch, a transitional housing program that helps homeless families achieve more productive lives.

**Charles A. Tievsky**, Pro Bono Lawyer of the Year. In 2004, he began single-handedly staffing a clinic that provides immigration law assistance at the Herndon Neighborhood Resource Center. He represents individuals, lobbies for immigration reform, provides resources to immigrants and educates the community to dispel myths about immigrant communities.

**Russ Reiff**, Pro Bono Paralegal of the Year. An independent paralegal, Reiff works on behalf of residents of Mondloch House, a shelter program for homeless people.



Fairfax Circuit Judge Jane Marum Roush presented William L. Schmidt with the Fairfax Bar Association's James Keith Public Service Award, which recognizes pro bono legal service and other volunteer contributions.

## U.Va. Law Student to Receive the Oliver White Hill Law Student Pro Bono Award

Ryan T. Almstead, who will graduate this year from the University of Virginia School of Law, will receive the 2006 Oliver White Hill Student Pro Bono Award, bestowed by the VSB Special Committee on Access to Legal Services.

Since he began law school, Almstead has immersed himself in volunteer work. He had logged more than five hundred hours of pro bono and community service work by the fall semester of his third year. One hundred uncompensated hours were spent with the Legal Aid Justice Center in Charlottesville, where he worked with the Mental Health Law Clinic and provided outreach to patients at Western State Hospital in Staunton.

Almstead, a graduate of Union College in Schenectady, New York, began pro bono and public service work before law school, when he volunteered at a Boston-area high school, working with English as a Second Language students, and at a

nursing home in San Carlos, Costa Rica. Last summer, he was a housing unit clerk at the Legal Aid Society of Hawaii.

He plans to work for legal aid in upstate New York after graduation. He is originally from Linlithgo, New York.

In nominating Almstead for the award, Kimberly Carpenter Emery, an assistant law school dean at U.Va. wrote, "Ryan came to law school with the explicit goal of helping low-income clients in need of legal assistance. ... It is hard to think of another student who has so consistently demonstrated a commitment to serving those members of our society who lack access to justice."

Two Legal Aid Justice Center attorneys endorsed the nomination. "Ryan's enthusiasm, patience and understanding breeds confidence in poor clients who often need a human boost to carry on in a difficult life," wrote Alex Gulotta, executive director, and John Conover.



Ryan T. Almstead

The award will be presented during the annual VSB Pro Bono Conference April 26 at the Miller Center of Public Affairs at U.Va.

The award is named for a Richmond civil rights attorney who led efforts to integrate public schools.

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## Northup Is Pro Bono Partner at Troutman Sanders

Stephen A. Northup has been appointed the first pro bono partner at Troutman Sanders LLP.

In the new job, he will work with pro bono committees in each of Troutman's offices in the United States, in hopes of expanding the number of hours donated by the firm's 630 lawyers. He will work with Dorothy Jackson, whom Troutman recently hired as a full-time pro bono coordinator.

Jackson is based at the firm's headquarters in Atlanta. Northup works in Richmond, where he will continue his practice that focuses on complex business disputes.

Under his guidance as chair of the firm's pro bono committee, Troutman reemphasized a policy that encourages its attorneys to donate at least fifty hours annually to pro bono legal work, for individuals or nonprofit organizations without ability to pay.

The firm began posting an intranet menu of volunteer opportunities, tracks pro bono hours of its attorneys, and publishes a report that gives credit for the work.

That work led the Virginia State Bar's Special Committee on Access to Legal Services to give Northup its Lewis F. Powell Jr. Pro Bono Award in 2004.

According to recent statistics, 60 percent of Troutman lawyers did some pro bono work, Northup said. Almost 30 percent donated twenty or more hours, and seventy-seven lawyers provided fifty or more hours. Some took on projects that required hundreds of hours.

Troutman Sanders has offices in Atlanta; New York; Raleigh, N.C.; Washington, D.C.; London; and Hong Kong. In Virginia, the firm has offices in Richmond, McLean, Virginia Beach and Norfolk.

"My goal is to get 100 percent participation" of lawyers donating at least twenty hours, Northup said. "Lawyers are often the butt of jokes, ... but most lawyers take seriously the obligation" to provide pro bono services.



Stephen A. Northup



# Highlights of Virginia State Bar Council Meeting

## March 3, 2006

**At its regular meeting on March 3, 2006, in Richmond, the Virginia State Bar Council heard the following significant reports and took the following actions:**

**FastCase**—the Virginia State Bar’s new online legal research service—was up and running earlier than the March 1, 2006, start-up date. Few problems have been reported. The service is provided as a membership benefit, without charge, to active, associate, judicial and emeritus members of the bar who are in good standing.

A search committee has begun its work to find a **new VSB counsel** to replace Barbara Ann Williams, who left in February to return to private practice at McGuireWoods. Virginia State Bar President-elect Karen A. Gould is chair of the committee, which began screening applicants in early March. The committee hopes to have a recommendation to present to the council at its June meeting.

In response to the General Assembly’s election of judicial candidates who bypassed statewide bar screening processes for state appellate vacancies, VSB President Phillip V. Anderson will appoint a task force to study **judicial nominations**. Members of the council expressed frustration at the 2006

Assembly’s rejection of two Court of Appeals candidates who were recommended by the VSB Judicial Nominations Committee, in favor of two who did not submit to the process in a timely fashion.

The council approved a **lawyer-lookup feature** on the VSB Web page, at the recommendation of the Committee on Publications and Public Information. Lawyers must sign up on the Web page to have their names, address of record and business telephone number listed in the database, which will be available to the public.

The VSB will use **mass e-mails** to members in extraordinary circumstances only, under a new policy adopted by the council. Mass e-mails must be approved by the executive director or a majority of the officers.

The VSB will develop a periodic **electronic newsletter** that will list continuing legal education programs, meeting notices and other brief items of interest to Virginia lawyers. The e-newsletter will go to members who do not unsubscribe when they receive an issue of the publication.

The council approved a change to the Rules of Professional Conduct that would give the VSB **disciplinary authority** over

lawyers who are licensed in other states or countries, and who are practicing in Virginia temporarily. The change, which will be sent to the Supreme Court of Virginia for its consideration, is one of a series designed to bring Virginia into the mainstream with other states in dealing with the increasing presence in their jurisdictions of foreign lawyers representing clients. The change was recommended by the Multijurisdictional Practice Task Force.

The council endorsed an amendment to the Rules of Professional Conduct that would prohibit an attorney from entering into an agreement that restricts the attorney’s **ability to practice law**. The current rule—Rule 5.6(b)—contains language that in some circumstances allows settlement agreements to include a provision that limits a lawyer’s future practice activities. The amendment was requested by the Boyd-Graves Conference and approved by the VSB Standing Committee on Legal Ethics. It will be sent to the Supreme Court for consideration.

The council unanimously adopted a resolution honoring and thanking **Barbara Ann Williams** for her exemplary service during the past eight years as Bar Counsel.

## Old Dominion Bar Association Meeting Focuses on Disaster Relief

The Hurricane Katrina experience on the Gulf Coast and local responses to natural disasters—including issues affecting the Virginia legal community—were discussed at a recent meeting of the Old Dominion Bar Association at Regent University School of Law in Virginia Beach.

Guests were Lieutenant General Russel L. Honoré—commander of the First United States Army in Fort Gillem, Georgia, and coordinator of military relief efforts after Katrina—and New Orleans Civil District Court Judge Michael G. Bagneris.

After their prepared remarks, Honoré met with representatives of municipalities in Hampton Roads to discuss local disaster preparations, and Bagneris met with members of the judiciary.

Bagneris described legal issues faced by the court system—missing evidence, inability to impanel juries, some insurance companies' call for all judges in New Orleans to recuse themselves because they were victims, and the possibility that residents of

New Orleans could be included in a class-action suit against the federal government because studies show that flooding was due to faulty levees.

Continuing legal education sessions focused on bankruptcy law and its effect on disaster victims, Virginia's pro bono ethics, and Federal Office of Emergency Management Agency training for volunteer attorneys sponsored by the young lawyers divisions of the Virginia State Bar and The Virginia Bar Association.

The meeting was sponsored by Regent University School of Law and an ODBA committee chaired by Suffolk Juvenile and Domestic Relations Judge Alfreda Talton-Harris and Suffolk General District Judge Gammeil G. Poindexter.

Others on the organizing committee were attorneys Helivi L. Holland of Suffolk, Regina H. Turner and Vivian F. Brown of Virginia Beach, Leonard L. Brown of Chesapeake and Vincent L. Robertson of Richmond.

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## Attorneys Contribute to Katrina Relief Programs

Virginia lawyers responded quickly and generously when Hurricane Katrina ravaged Gulf Coast infrastructures in August of 2005.

They contributed almost one hundred thousand dollars to a Hurricane Katrina Legal Assistance Fund established by the Virginia State Bar and The Virginia Bar Association. That money was split equally between Mississippi and Louisiana after Alabama, originally designated a recipient, decided the needs there were not as urgent.

Louisiana and Mississippi bar leaders reported they gave out the money in grants of five hundred to one thousand dollars to help lawyers reestablish their law practices.

VSB President Phillip V. Anderson said representatives of the bars in those states have expressed their thanks for the outpouring. "They were extremely grateful," he said. "The contribution of Virginia

lawyers exceeded anything they could ever have anticipated." Anderson said the response from Virginia was reported to be the largest of all the states'.

On other fronts, 235 Virginia lawyers stepped forward to volunteer should they be needed to help displaced persons who relocate to the commonwealth. They underwent training provided by the VSB/VBA Young Lawyers Emergency Legal Services. Calls for assistance are managed by the VSB Lawyer Referral Service.

Some legal aid programs in Virginia also took part in relief projects. The Legal Aid Society of Eastern Virginia attended regional gatherings of evacuees held at Norfolk State and Christopher Newport universities. There, staff lawyers joined other public service groups in providing assistance, such as advice on establishing identity and working with insurance companies.

With recovery efforts still underway, the justice systems in the affected areas still are in need of assistance.

A new opportunity is on the horizon. The Louisiana Supreme Court approved a pro bono rule that allows out-of-state lawyers to handle routine civil legal matters *pro hac vice* through court-approved programs. Details will be posted on the VSB Web site, [www.vsb.org/site/pro\\_bono](http://www.vsb.org/site/pro_bono).

Meanwhile, Emergency Legal Services training programs are continuing. The course will be offered during the Annual VSB Pro Bono & Access to Justice Conference, which will focus on "All-Hazards Preparedness through the Prism of Public Interest Law." That will take place Wednesday, April 26, at the Miller Center of Public Affairs at the University of Virginia in Charlottesville. Information is posted on the VSB Web site.

## Chief Justice Hassell Receives Hill-Tucker Award

Virginia Chief Justice Leroy R. Hassell Sr. has been presented with the Richmond Bar Association's Hill-Tucker Public Service Award.

The award, named for civil rights lawyers Oliver W. Hill and the late Samuel W. Tucker, is bestowed on lawyers and judges who "render conspicuous public service and otherwise distinguish themselves in service to society beyond the practice of law."

The Chief Justice, before he became a judge, served on the boards of directors of charitable organizations such as the Massey Cancer Center, Richmond Renaissance Inc., the Garfield Childs Memorial Fund, the Carpenter Center for



Chief Justice Leroy R. Hassell Sr.

the Performing Arts and Central Virginia Legal Aid. He also served as a member and chair of the Richmond School Board.

Since he went on the bench, Hassell volunteers with educational projects and he performs hospice work. He is a mentor and participates in programs at J.E.B. Stuart and J.L. Frances elementary schools. He helps people through the final difficulties of terminal illness through hospice. And during holidays he purchases and personally delivers food to needy families.

The Hill-Tucker Public Service Award was presented March 16 during a Richmond Bar luncheon.

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## Ebert Given Carrico Professionalism Award — Post-9/11 Issues Highlight Criminal Law Seminar

The Thirty-Sixth Annual Criminal Law Seminar, sponsored in Charlottesville and Williamsburg by the Virginia State Bar Criminal Law Section, drew more than six hundred attorneys.

Paul B. "Butch" Ebert was presented with the Harry L. Carrico Professionalism Award for dedication and unique contributions to criminal justice.

As Prince William County's commonwealth's attorney for thirty-eight years, Ebert has prosecuted many high-profile cases within and outside the county—including that of John Allen Muhammad, one of two snipers charged with killing and wounding people along the Interstate 95 corridor in 2002. A Virginia Beach jury sentenced Muhammad to death—one of twelve capital convictions Ebert has won in his career.

Robert F. Horan Jr., commonwealth's attorney for Fairfax County, wrote of *Muhammad*, "If ever there was a case that demanded the abilities of a topnotch

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Paul B. "Butch" Ebert (left) with Reno S. Harp III, who presented the Harry L. Carrico Professionalism Award. Harp is a longtime member of the Criminal Law Section Board of Governors and a previous recipient of the award.



# Bar News

(continued from page 19)

prosecutor, it was that case. ... The trial result was a tribute to [Ebert's] knowledge, planning and forceful performance in the courtroom."

At the Charlottesville seminar on February 3, Edward B. MacMahon Jr. described the challenges of defending Zacarias Moussaoui, the so-called "twentieth hijacker" in the terror attacks of September 11, 2001. Three days from the start of *void dire* of five hundred potential jurors in the sentencing phase of Moussaoui's trial, MacMahon talked about the difficulties of a case that involves ten languages; huge quantities of classified documents; witnesses whose identities are secret; and a client who is publicly hostile to his own counsel and the judge.

In Williamsburg on February 10, defense lawyer Bobby Lee Cook of Summerville, Georgia, was the keynote speaker. Cook—who is said to have been the model for "Matlock" on the television series of the same name—departed from his usual humorous style to warn of dangers to civil rights posed by post-9/11 surveillance and detentions. He called on lawyers to be vigilant and to challenge the threats where they can. The prosecutors and defense lawyers in the audience gave him a standing ovation.

The Criminal Law Section presented a resolution commending Frank W. Dunham Jr., who is ill and recently retired as the first federal public defender for the Eastern District of Virginia. Dunham was a federal prosecutor and defense lawyer during his thirty-five year career. He was part of Moussaoui's defense team, and he defended Yaser E. Hamdi, a United States citizen of Saudi Arabian descent who was detained indefinitely by the U.S. after being captured fighting with Taliban forces in Afghanistan.

Dunham won the Hamdi case when the U.S. Supreme Court in 2004 disallowed the U.S. government's unilateral assertion of executive authority to suspend constitutional protections of individual liberty. Justice Sandra Day O'Connor wrote, "We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens." Legal scholars called the case

one of the most important of the twentieth century.

Dunham, "in his representation of persons who were publicly despised for their views and their actions, lived up to the highest traditions of the Bar and exemplified the ideals of due process of law and fair play as articulated in the Constitution and Bill of Rights of the United States," the resolution states.



Edward B. MacMahon received a standing ovation from defense lawyers and prosecutors for his role defending Zacarias Moussaoui.

The Criminal Law Section also presented a resolution in memory of Roger D. Groot, who died in November. Groot was a law professor at Washington and Lee University and participated in the defense of many death-penalty cases. At the 2005 Criminal Defense Seminar, he forcefully urged lawyers to lobby for better compensation in court-appointed criminal cases.



Harvey L. Bryant III, commonwealth's attorney of Virginia Beach, is chair of the Criminal Law Section.



Paul B. Ebert (left) speaks with Bobby Lee Cook, a Georgia defense attorney who has practiced for fifty-seven years.

## Forum, Town Hall Meeting and BLI Held

The Virginia State Bar Conference of Local Bar Associations sponsored or cosponsored training in leadership and small-firm management that drew more than eight hundred participants in recent months. The Solo & Small-Firm Forum in Harrisonburg in September was the second in a series cosponsored with the Supreme Court of Virginia. Chief Justice Leroy R. Hassell Sr. was the luncheon speaker and conducted a town hall meeting in conclusion. In January, a combination Bar Leaders Institute and Solo & Small-Firm Forum was held at the College of William & Mary in Williamsburg with W&M President Gene R. Nichol as keynote speaker. Once again Chief Justice Hassell presided over a town hall meeting and question-and-answer session. On March 17 a stand-alone BLI was presented at the Southwest Virginia Higher Education Center in Abingdon. Robert J. Grey Jr., immediate past president of the American Bar Association, was the luncheon speaker.



David J. Johnson, executive director of the Virginia Indigent Defense Commission, spoke in Abingdon about the crisis in pay for court-appointed criminal defense attorneys.



M. Janet Palmer of Richmond, chair of the Conference of Local Bar Associations, introduced Robert J. Grey Jr., immediate past president of the American Bar Association, at the Abingdon BLI.



(L-R): In Abingdon, Manuel A. Capsalis of Arlington, immediate past chair of the Conference of Local Bar Associations, and George W. Shanks of Luray, chair-elect, described services that the VSB provides to lawyers.



Frank O. Brown Jr. of Richmond continued his circuit-riding crusade to encourage lawyers to plan for their practices' orderly conclusion after death or disability.



Mary Lynn Tate, a former president of the Virginia Trial Lawyers Association, moderated a panel of Southwest Virginia judges who expressed their concerns about lawyers' practices in depositions, motions and scheduling. Tate practices in Abingdon.

*(more photos on page 22)*



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Roscoe B. "Steve" Stephenson III (left), a former chair of the VSB Disciplinary Board, spoke in Williamsburg about the attorney disciplinary process. Here, he sits with VSB President Phillip V. Anderson of Roanoke. Stephenson practices in Covington.



John Y. Richardson Jr., secretary of the Conference of Local Bar Associations, with Portsmouth attorney William H. Oast III in Williamsburg. Richardson, who practices in the Norfolk City Attorney's office, also serves on the VSB Council.



The keynote speaker in Williamsburg was Gene R. Nichol, president of the College of William & Mary. Here, he sits at lunch with Chief Justice Leroy R. Hassell Sr. (center) and Justice Cynthia D. Kinser. Thomas A. Edmonds, executive director of the Virginia State Bar, is standing.

**You may register now for the next  
Solo & Small-Firm Practitioner's Forum  
in Danville on May 2, 2006.  
See page 10 for more information.**

## IN MEMORIAM

**Dorothea Allen**

Annapolis, Maryland  
March 1919–September 2005

**Donald R. Antonelli**

Arlington  
June 1935–November 2005

**William S. Banks**

Richmond  
December 1911–November 2005

**Newell Blair**

Falls Church  
April 1907–June 2004

**The Honorable John D. Butzner Jr.**

Richmond  
October 1917–January 2006

**The Honorable Marvin F. Cole**

Richmond  
January 1922–August 2005

**French H. Conway**

Danville  
June 1918–December 2005

**Roger J. Costello**

Manassas  
January 1918–December 2005

**Berkeley Cox Jr.**

Hartford, Connecticut  
March 1930–November 2004

**Jon Lee Duncan**

Abingdon  
November 1946–February 2006

**Vernon M. Geddy Jr.**

Williamsburg  
April 1926–June 2005

**Joseph B. Geyer**

Baltimore, Maryland  
February 1919–December 2005

**Ernest S. Heisley**

Fairfax  
November 1934–February 2006

**Pat B. Hale**

Grundy  
November 1927–November 2005

**Albert Henry Jacoby Jr.**

Stafford  
March 1949–February 2006

**Thomas B. Larkin Jr.**

San Diego, California  
August 1918–March 2004

**Edward A. Linden**

Tucson, Arizona  
February 1943–November 2005

**The Honorable D. Carleton Mayes**

Dinwiddie  
February 1915–November 2004

**William H. Parker Jr.**

Danville  
August 1910–September 2005

**Stanley Walter Preston Jr.**

Richmond  
July 1940–January 2006

**C. Fred Rosenbaum**

Lake Worth, Florida  
May 1936–November 2005

**James Francis Sharkey**

Sun City Center, Florida  
December 1916–December 2005

**G. Martin Shepherd Jr.**

Springfield  
October 1923–February 2004

**Rudolph Albin Shupik Jr.**

Chatham  
October 1946–February 2006

**Charles G. Snead**

King George  
September 1943–December 2005

**Bedford Brown Uhler Jr.**

Manassas  
November 1915–January 2004

**Felix J. Ward**

Roanoke  
January 1919–December 2005

**William F. Wetmore Jr.**

Arlington  
July 1921–March 2003

## Notes from the Conference Chair



### William T. Wilson, 2005–2006 Senior Lawyers Conference Chair

The featured articles in this edition of the *Virginia Lawyer* are either authored or sponsored by members of the Senior Lawyers Conference (SLC). The conference has more than 11,200 members. When members of the Virginia State Bar reach fifty-five years of age, they automatically become members, making the Senior Lawyers Conference the largest conference of the VSB—fast becoming even larger as baby boomers come on board.

As I have chaired the Senior Lawyer's Conference, and even before that, as a member of the conference's Board of Governors, I have been impressed by the energy, insight and productivity of the senior lawyers. Many of them give countless hours to our conference programs when they just as easily could be enjoying the rocking chair of retirement. We are also blessed with a Board of Governors that is as active as any group of young lawyers I know. I thank them all for their service. I also thank the very able Patricia A. Sliger, our liaison with the Virginia State Bar, for her help.

Although mentioned elsewhere in this magazine, it is worthwhile to list again some of the Senior Lawyer Conference programs:

- **Senior Law Day Program**—The conference has been encouraging all local bar associations to conduct Senior Law Day programs in their jurisdictions. This is a program patterned after one that was successfully executed in Covington by the Alleghany-Bath-Highland Bar. A panel of eight lawyers, including a general district court judge, divided the *Senior Citizens Handbook* and explained it to an audience of one hundred senior citizens. Because of the success of that program, the conference has not only enthusiastically sponsored the program but has also agreed to furnish *Senior Citizens Handbooks* to bar associations willing to put on similar programs. Both Chief Justice Leroy R. Hassell Sr. and VSB president Phillip V. Anderson have endorsed the program. If you are interested in putting on a Senior Law Day Program, please contact Pat Sliger at (804) 775-0576.
- **Senior Citizens Handbook**—This is the handbook that is jointly produced and distributed by the Senior Lawyers Conference and the Young Lawyers Conference. It is a great book for both senior citizens and younger citizens who are interested in senior law issues.

- **Frank O. Brown Jr.**, former Senior Lawyer Conference chair and now editor of the conference newsletter, is stumping the commonwealth explaining to local bar associations the value of lawyers' preparing for death and disability.
- **Emeritus Rule**—The conference was instrumental in getting the Supreme Court of Virginia to adopt a rule that permits retiring lawyers to provide free legal services to indigents without having to meet some of the requirements of active membership.
- **Program for VSB Annual Meeting**—Entitled "So You're Going to a Nursing Home/Assisted Living Facility," this program fits in well with our Senior Law Day program and is designed to educate senior citizens and their families about the technicalities, complications and pitfalls involved when one is considering becoming a resident of one of these institutions. The panel will include state Senator R. Creigh Deeds; Commissioner Anthony Conyers Jr. of the Virginia Department of Social Services; Linda L. Wilhelm, Director of Training and Education for the Virginia Department of Health Center for Quality Healthcare; T. Daniel Frith III, a plaintiff's litigator in nursing home and assisted living facility cases; and Andrew H. Hook, whose practice focuses on elder law estate issues. I will moderate the panel.
- **Web site**—The Senior Lawyers Conference has a Web site designed to provide helpful information to the profession and the public. Again, Frank Brown keeps that program going (and, in fact, set it up). [www.vsb.org/slc/index.html](http://www.vsb.org/slc/index.html).
- **Other programs**—Senior lawyers are also well represented on the committees and commissions set up through the initiatives of Chief Justice Hassell, i.e. "Involuntary Commitment," "Fees for Lawyers who Represent Indigent Defendants" and "Courts in the Twenty-First Century".

Senior lawyers give unselfishly back to the profession while they try to demonstrate to the younger lawyers, by example, the value of civility and professionalism. It's been "quite a trip so far" (as "Gus" said in *Lonesome Dove*). Thanks for having me serve.

# Civility IN SOCIETY AND THE LAW

## *Reasonable (and great) expectations*

by Frank Overton Brown Jr.

Among the purposes of the SLC are "...to uphold the honor of the profession of law, to apply the knowledge and experience of the profession to the promotion of the public good, and to encourage cordial discourse and interaction among the members of the Virginia State Bar." Encouragement and promotion of civility are ongoing efforts of the SLC in working toward our purposes.

Civility means courtesy or politeness. Civility derives from the Latin "civitas," which is the same word from which civilization comes. Professor P. M. Forni of The Johns Hopkins University, an expert in civility, says, "Although we can describe the civil [people] as courteous, polite, and well mannered, etymology reminds us that they are also supposed to be good citizens and good neighbors." This reminder brings us to the illuminating thought that providing pro bono legal services is an aspect of civility.

Civility does not stand alone. It is supported by humility—an acknowledgment that none of us possesses all knowledge and wisdom, that we all can benefit from listening to others, by being respectful and effective listeners. The complementary obverse of this is being respectful and effective speakers by not turning disagreeable in the face of disagreeable conduct. Many of us have been taught since our youth that "A soft answer turneth away wrath." There is merit in that proverb. Recently many of us have had our memories refreshed by a scene in the movie "Good Night, and Good Luck" (about Edward R. Murrow), regarding the nationally televised exchange in 1954 between two lawyers—Senator Joseph R. McCarthy and Joseph N. Welch, then a sixty-three-year-old senior lawyer with the Boston firm Hale and Dorr. McCarthy's conduct was decidedly uncivil, and, Welch's conduct in response was decidedly, memorably and effectively civil. We all know in what ways society remembers each of these men.

The Honorable Paul L. Friedman, a U.S. District judge states for the District of Columbia, in his article entitled, "Taking the High Road: Civility, Judicial Independence and the Rule Of Law", published in the *NYU Annual Survey Of The American Law*, Vol. 58:187, observed:

This civility issue is not just about etiquette and manners. Unfortunately, incivility is a trend that is becoming culturally institutionalized and accepted in some quarters, and it threatens the pursuit of justice in very real ways. The rise in incivility has resulted from a number of recent developments. First, society has changed. There is less civility in public discourse generally, in politics and government, on television, certainly in the sports world, and in the media. *Many lawyers have grown up in this environment, and they do and will practice what they see all around them unless they are told by the more experienced among us that it is unacceptable.* [emphasis added] This only works, however, if senior lawyers have not themselves abandoned traditional notions of civility and professionalism and if judges also accept responsibility for changing the tone. Lawyers need to remind themselves and teach their juniors new to the profession—and judges need to and should remind both—that personal attacks, name-calling and invective will not be tolerated as the means to the end. Second, many current lawyers see the legal profession as a money-making venture at least as much as it is a calling dedicated to high standards of professionalism and service. Lawyers feel pressured to get and keep clients



in an environment where clients now follow a “shopping around for lawyers” mentality. In this economically-driven, result-focused marketplace, clients are especially demanding and many expect hired guns to do their bidding—or they will find others who will.... In terms of the tone of our profession, lawyers must be reminded that they can be advocates for their clients without assuming their clients’ personalities, antipathies and tactics. Lawyers provide their skills, their seasoned judgment, and their advice. They provide their ability to reason, to engage in rational discourse, and to present analytically sound arguments. Perhaps most important, they offer to clients their own professional reputations....

Our professional reputations are built over a career, one day at a time, one interaction after another, in our families, in our communities and in our legal profession. Ours is an honorable profession. Roscoe Pound, Dean of the Harvard Law School from 1916 to 1936 wrote that “[t]here is much more in a profession than a traditionally dignified calling. The term refers to a group... pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood.” Of course, our honorable profession is a means of livelihood; otherwise most of us would not be able to be part of it, but someone once observed that the coin in which we as professionals are really paid is in the respect of those whom we respect. It is respect of the bench, respect of the bar, and respect of those whom we serve.

In addressing newly admitted attorneys on November 1, 2004, Justice Peter T. Zarella of the Connecticut Supreme Court said: “The practice of law has historically been referred to as a noble profession. The increase of incivility and unprofessional behavior, however, has tainted the public’s view of lawyers, and so we must join forces to restore nobility to our profession through our civil treatment of, and respect for, everyone who has a role in the legal process, whether we are on the same side—or the opposing side—of a dispute. We must be adversaries without being enemies. We must return to a practice of taking the high road with fairness, courtesy and simple good manners. We must mend fences rather than trample them.”

It is promising to note that law schools, with the encouragement of senior lawyers (see “The Roles of Law Schools and the Judiciary in Promoting and Maintaining Civility, Ethics and Professionalism,” by G. Marshall Mundy and Vicki L. Wiese, in *Virginia Lawyer*,

December 2003, Volume 52, Number 5) are incorporating the promotion of civility in their missions. Two good examples are the Duke University School of Law and The Marshall-Wythe School of Law at the College of William & Mary. Duke’s mission is: “to prepare students for responsible and productive lives in the legal profession. We train our students to be excellent lawyers, equipped for any number of different careers, and committed to the values of hard work, integrity, personal responsibility, *civility* [emphasis added], tolerance, respect, and service.” Marshall-Wythe states: “We are a school where powerful teaching and powerful scholarship are prized in practice as well as rhetoric, where collegiality and *civility* [emphasis added] flourish even while high standards of performance are defined and expected....”

Virginia Chief Justice Leroy R. Hassell Sr., in conjunction with the VSB Conference of Local Bar Associations, has sponsored Solo & Small-Firm conferences that drew hundreds of lawyers to Abingdon, Harrisonburg and Williamsburg. Chief Justice Hassell followed each conference with a Town Hall Meeting, at which any lawyer in the audience had the opportunity to stand and to raise with the Chief Justice and VSB leaders questions or concerns regarding the legal profession or the administration of justice in Virginia. These sessions have been remarkable examples of collegiality and civility. The lawyers have raised difficult issues in thoughtful and respectful ways. The Chief

Justice listened attentively, responded directly and clearly, and indicated what follow-up action he would take. Bar leaders have done the same. I have attended all three Town Hall meetings; they represent great examples of cordial discourse, civility and collegial interaction among members of the Virginia State Bar. We should be proud of them.

SLC Board members Edward R. Slaughter Jr. and Homer C. Eliades are currently studying issues related to civility (and incivility) in society and the legal profession. They are engaged in a dialogue with a noted academician in this regard, and we expect to hear insightful, constructive and useful things from them over the next year.

Civility means many things to many people. Civility is certainly an aspect of professionalism. It may have been instilled in us as we were growing up; it may have been encouraged in us by teachers, a code, a standard of professional conduct, or a civility oath. It may be in our very nature. It may have been developed in us by a mentor. I have come to realize that civility and incivility are really habits. Incivility is a bad habit. Civility is a good habit. It will manifest itself in very small ways that will build to very great results—one interaction at a time. The most effective form of discipline is self-discipline. Let us all follow the good habit of civility and, thereby improve our society and our profession.

## C·I·V·I·L·I·T·Y

### LET US REMEMBER THAT CIVILITY IS NOT A SIGN OF WEAKNESS.

— GOVERNOR TIMOTHY M. KAINE,  
INAUGURAL ADDRESS,  
WILLIAMSBURG, VIRGINIA  
JANUARY 14, 2006

# PLANNING AHEAD

## Protecting your and your clients' interests in the event of your disability, death or other disaster

by Frank Overton Brown Jr.

The Senior Lawyers Conference has worked since its inception to encourage and assist lawyers in protecting their own and their clients' interests by planning for the lawyer's own disability, incapacity, impairment, death, disappearance or other crisis.

Lawyers should be concerned with matters related to the protection of clients' interests, when a law practice ends. They should establish a written plan for the orderly concluding or other disposition of the practice (bearing in mind that Rule 1.17 permits the purchase and sale of a law firm); designate another lawyer to assist in that regard; and maintain easily understandable records to help the other lawyer to carry out his or her responsibilities. If a lawyer has not made such plans, the Virginia State Bar may have a receiver appointed to do this.

The costs of receiverships may be substantial, and they are costly to the bar. In the FY 2005-2006 VSB budget, two hundred thousand dollars is budgeted for receiverships. Receiverships involve attorneys who are deceased, disabled or have serious misconduct problems that will result in loss of property to clients or others. Considering human frailties, receiverships due to misconduct will probably never be eliminated. The VSB currently has twenty receiverships pending; of these twenty, eight involve deceased or disabled attorneys. Rather than a lawyer doing no planning and relying on the appointment of a receiver, a lawyer should meet his ethical duty (and his own best interests) by having a plan in place that allows the lawyer's practice to be dealt with properly.

The Senior Lawyers Conference Web Site at [www.vsb.org/slc](http://www.vsb.org/slc) links to planning documents, such as a special power of attorney and agreement regarding law practice and a last will and testament provision to appoint an executor for the practice.

To encourage Virginia lawyers to plan, on behalf of the SLC, I present a program to bar associations. The program has full CLE ethics credit, and is presented as a one-hour or two-hour program, depending on the needs of the bar association. This program is presented at no cost to the association.

If your local bar association wishes to schedule this program, please call Patricia A. Sliger at (804) 775-0576, and she will make the referral to me.

Considering that lawyer impairment may lead to disability, death or other problems, one of the areas of help which I mention in the program is Lawyers Helping Lawyers, which is a 501(c)(3) nonprofit corporation endorsed by the Virginia State Bar, The Virginia Bar Association, the Virginia Trial Lawyers Association and the Virginia Board of Bar Examiners. Lawyers Helping Lawyers provides confidential, nondisciplinary assistance to members of the legal profession who experience professional impairment as a result of substance abuse or mental health problems. This help comes from professional staff and a statewide network of volunteers. James E. Leffler, is the executive director. The toll free telephone number is (877) 545-4682. Judges and lawyers should be aware of this program, which can remedy situations, which might otherwise result in receiverships.

Although there is presently no specific requirement in the Virginia Rules of Professional Conduct, lawyers should arrange to protect clients' interests in the event of the attorney's own inability to do so. Consider Rules 1.1 and 1.3: Rule 1.1 Competence—"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.3 Diligence—"(a) A lawyer shall act with reasonable diligence and

promptness in representing a client. (b) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16. (c) A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3.”

Because client confidentiality has been a concern regarding this type of planning, it is encouraging to note that the Supreme Court of Virginia amended Rule 1.6, effective January 1, 2004, to add the following paragraph (4) to paragraph 1.6 (b): “(b) To the extent a lawyer reasonably believes necessary, the lawyer may reveal... (4) Such information reasonably necessary to protect a client’s interests in the event of the representing lawyer’s death, disability, incapacity or incompetence.”

In 2002, the comment to Rule 1.3 of the American Bar Association Model Rules of Professional Conduct was amended to state that “the duty of diligence may require that each sole practitioner prepare a plan” that “designates another competent lawyer to review client files, notify each client of the lawyer’s death or disability, and determine whether there is a need for immediate protective action.” The Supreme Court of Virginia has not adopted this comment; however, the Virginia State Bar Council has recommended to the Court an added Comment to Rule 1.3 (see description below).

If an attorney dies without a contingency plan in place, the VSB can petition the court to appoint a receiver to deal with the practice and take necessary actions to protect clients’ interests under *Virginia Code* Section 54.1-3900.01. Bar dues must cover the difference when there are not enough assets in the law firm to cover the cost of the receivership. Having a contingency plan in place will drastically reduce the problems and questions that arise if something should happen to the attorney, and may eliminate the need for a receiver. In November 2003, the VSB Receivership Task Force was established to study the costs and procedures involved when receivers are appointed to terminate the

law practices of deceased or impaired attorneys or of attorneys whose licenses to practice law have been suspended or revoked under circumstances that would preclude their further involvement in client matters or client funds. The task force has focused on the issues of costs of receiverships, qualifications and responsibilities of receivers, insurance for receivers, and the relevant *Virginia Code* Sections. The task force examined the Virginia statutes dealing with receivers for law practices and drafted amended *Code* Sections 54.1-3900.01 and 54.1-3936, and 2.2-1839, all of which were passed by the General Assembly and signed by the Governor in 2005. The task force is presently working on a *Handbook for Receivers* to assist receivers for law practices throughout the commonwealth in performing their duties, and to lend uniformity to procedures statewide. In support of the VSB’s and SLC’s efforts to encourage lawyers to plan for their own disability or death, and thereby to reduce

the need for the appointment of receivers, the Receivership Task Force, in conjunction with the Standing Committee on Legal Ethics, proposed a new Comment [4] to Rule 1.3 of the Rules of Professional Conduct, which was debated by VSB Council at its meeting on October 20-21, 2005, amended, and recommended to the Virginia Supreme Court as follows:

“[4] A lawyer should plan for client protection in the event of the lawyer’s death, impairment, incapacity or disappearance. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer’s death, impairment, incapacity or disappearance.”

It is hoped that the Supreme Court will act on this matter in the not-too-distant future.

The first step in developing a plan is to gather the facts that you will need to dis-

cuss with your potential “back-up” attorney. To assist you in this regard, we have provided a checklist on the SLC Web site ([www.vsb.org/slc](http://www.vsb.org/slc)) under “attorney resources.”

The next step is to be certain that your office procedures are current and in place. In collaboration with your office staff, you should draft written materials for the back-

up attorney and your office staff. These materials should include:

- Engagement letters with notice language to clients similar to this—“Confidentiality. You are my client and our communications are a matter of attorney-client privilege and are confidential. You agree that I shall have the right to designate a ‘back-up’ or ‘assist-

ing attorney’ to protect your interests in the event of my death, disability, incompetence, incapacity or inability to act on your behalf. You agree that I may reveal to this attorney such information that I believe reasonably necessary to protect your interests in such events”

- A letter to be sent to clients when your back-up attorney begins to act.
- An up-to-date office procedures manual.
- A description of your files maintenance and office systems.
- Locations of files and materials which are stored or safeguarded off-site.
- Instructions for producing a list of client names and addresses for open and closed files.
- Guidance on your system for monitoring all deadlines and follow-up dates and your calendaring system.
- Methods for keeping client files appropriately documented.
- Time and billing records.
- Bank account records, including trust and non-trust accounts.
- Passwords for computer access.
- A “telephone tree” or similar communication method for office personnel.
- Location and contact information regarding professional liability and other insurance policies.
- A current attorney checklist.

The next step is to select your potential back-up attorney. Above all, this person should be someone that you trust (this will be intuitive on your part), who is in good standing with the bar, who is experienced in handling the types of legal matters which you handle, who is reasonably likely to be available when needed, and who has professional liability insurance. It is important in discussing this matter with the potential back-up attorney that there be complete openness and honesty on both sides about what is expected, including a discussion of and provision for the source of compensation for the back-up attorney. The agreement which you enter

## THE SENIOR LAWYERS CONFERENCE

The Senior Lawyers Conference of the Virginia State Bar presently has more than 11,200 members. All members of the Virginia State Bar who are fifty-five years of age or older and in good standing are automatically members of the SLC. No application is necessary and no dues are required. Since the establishment of the SLC in 2001, the members of the SLC have been active in many programs and activities, including the following (as lawyers are inclined to say) by way of illustration, and not by way of limitation: production and distribution of the Senior Citizens Handbook (in conjunction with the Young Lawyers Conference); SLC sponsorship of a luncheon at the VSB annual meeting honoring senior lawyers for fifty years of service (a special effort of past Chair William B. Smith) development and promotion of Senior Law Days by local bar associations (a pioneering effort of our chair, William T. Wilson); encouragement of mentoring of young lawyers by senior lawyers (an especial interest of our chair-elect, Jack W. Burch Jr.); adoption of an emeritus rule which enables retiring attorneys, in association with an approved legal assistance organization and under the supervision of a supervising attorney, to provide pro bono legal services to the poor and working poor of Virginia (former SLC board member Clarence M. Dunnaville Jr. worked tirelessly on this); encouraging local bar associations to educate the public about health care decision making and advance medical directives (R. Hunter Manson III, a former SLC board member, began this effort); development of a greatly-used and greatly useful Web site for the benefit of attorneys and the public at [www.vsb.org/slc](http://www.vsb.org/slc); encouraging civility and professionalism (former SLC board members G. Marshall Mundy and C. Glasgow Butts laid the groundwork for this, and current board members Edward R. Slaughter Jr. and Homer C. Eliades continue the effort); working to reform the involuntary commitment processes in Virginia; publishing a mailed and online newsletter, the *Senior Lawyer News*, available on our Web site; improving the quality of care provided to senior citizens in and the standards of accountability for nursing homes and assisted living facilities; and educating attorneys to make plans to protect their and their clients’ interests in the event of the attorney’s disability, death or other disaster (past Chair Patricia A. Barton devoted countless hours of hands-on work in this effort).

Please contact any SLC officer or Board of Governors member to offer suggestions for programs and activities. If you are interested in volunteering to be more active in the SLC, please let us know.

into should be in writing and executed copies should be kept by both parties.

Inform your office staff about the identity of the back-up attorney and of their roles if something should happen to you. Make this a collaborative effort.

Be sure your client files are organized in a manner that will make it easy for anyone to see the history of the file and the steps that need to be taken next. Document issues discussed in meetings, telephone conversations, advice provided and client responses in writing and maintain these documents in the client file. Use checklists and other forms that will assist file management. Include contact information for all involved parties.

Another way to maintain order is to have a closed-file retention/disposition program in place. Whether your firm retains files for a set number of years after closing or forever, it is essential to have an organized file retention/disposition program. Closed files should be indexed and assigned a closed number. The file should indicate if and when it is to be destroyed on the

index and file. For guidance, *See Virginia Legal Ethics Opinion 1305.*

If you keep original client documents, such as wills, trust agreements or deeds, be sure that they are properly safeguarded and accounted for.

Ethics rules for trust accounting should be adhered to and followed at all times (*See Rule 1.15*). Two good resources to assist with trust accounting are the rule itself and *Lawyers and Other Peoples' Money*, by Virginia lawyer Frank E. Thomas III, and available from Virginia CLE.

Your contingency planning should also take into account actions to be taken in the event of natural and/or man-made disasters.

The written agreement with your back-up attorney and all supporting materials referenced above should be updated and reviewed with your back-up attorney and staff periodically, in order to protect your and your clients' interests.



**Frank Overton Brown Jr.** of Richmond is a member and past chair of the Senior Lawyers Conference Board of Governors, and he has served on the Virginia State Bar Council. He concentrates his practice in the areas of wills, trusts, estate planning, estate and trust administration and related tax matters. He is a fellow of the American College of Trust and Estate Counsel. Brown is a former commissioner in chancery for Richmond Circuit Court, and he is a regular continuing legal education program lecturer. He holds bachelor's, master's and law degrees from the University of Richmond, where he taught as an adjunct professor of law for eight years and has continued to participate in estate planning issues.



# JUMP START

## Your Career: Tips for New Lawyers

by Jack W. Burtch Jr.

I began my law practice as an associate with a large Richmond law firm in 1973. As a lawyer for over thirty years now, I have learned a few things I wish I had known when I started out. The following are my top ten tips for new attorneys—so you don't have to do it yourself the hard way.

### Know EXACTLY what is expected from your assignment.

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When you are given an assignment, do not leave the assigning lawyer's office without knowing exactly what you are supposed to do and what the final product is supposed to look like. For example, the lawyer may say, "I need some help in the Jones matter. I can't remember if Virginia is a seven-year or a twenty-one-year state for adverse possession. Can you take care of this?"

Sounds simple, doesn't it? Just go to Lexis and find out what the elements of adverse possession are in Virginia. But it's not that simple. Does she want a written memo? If so, will a short answer to the question suffice, or do you need to write a detailed analysis of adverse possession? Will an oral report do? Are you sup-

posed to figure out how the adverse possession issue fits in to the larger issue or is this simply a one-shot inquiry? In other words, have you just been assigned to the case or are you a research resource? The assigning lawyer may not know the answer right now, but you won't know either until you ask.

This leads to my next point: Finish the job. Your boss is neither your research assistant nor your editor. Turn in a completed piece of work—the best work you can do. The lawyer may improve it or change it, or she may not. However, if you make her finish it, she will resent you. Not a good way to keep a job.

Remember, if you give the assignment back in the form expected, you will have done your job well and efficiently. Kudos to you, even if the answer was not what your boss wanted to hear.

# 10 TIPS

- Know what is expected
  - Do the job yourself
  - Allow enough time
- Learn your office equipment and software
  - Read the file
- Stay focused on the desired outcome
  - Ask and answer questions carefully

## LISTEN

- Use all five senses
- It takes more than time

### Do the job YOURSELF.

Make sure the assignment is not reassigned to the assignor. This may not make sense right now. Here's how it works. I am the assigning attorney, and I ask an associate to research something like the question above. The associate assumes that my legal assistant knows the answer because she does a lot of real estate work, and of course her answer will be clearer and easier to obtain than something from a law book. So the associate asks the legal assistant about adverse possession and, wanting to demonstrate how smart a legal assistant can be, she will say she can find out. But she is busy or thinks this is too much trouble to go through for a new associate. So she immediately marches into my office and asks me.

The associate just reassigned the problem to me. The associate was not only useless, but also added to my workload rather than being an efficient part of the team. Guess how long that individual will stay around if this problem doesn't have an instant solution?

### It takes as long to get a BRIEF ready for court as it does to write it in the first place.

Most new lawyers think that once the draft is done, they are home free. A little bit of editing, have the secretary whip it into the final format, and it will be ready for filing. Wrong. After you finish the brief, your boss will want to look at it. He will have criticisms or different ideas.

These changes will need to be incorporated and reviewed again. Then you will need to figure out, if you don't already know, what the court's requirements are: page limits, tables of cases, etc. How many copies does the court need? Are you supposed to send a copy to the judge's chambers? While an experienced legal secretary can help you through all of this, today such experienced people are few

and far between. Allow enough time for this process and all its variables. Don't miss the deadline. And don't become the next firm legend by running up the hill to the Supreme Court with seconds to spare.

You don't yet know enough to take shortcuts. When you are thoroughly familiar with an area of the law, you may learn some. Until then, avoid them. They lead to dead ends, and usually you will just have to start all over.

**LEARN about every machine and software program in the office.**

The lawyer who can't run the equipment is a hostage to the staff. Staff aren't always available. There's nothing like having the copier or fax machine jam on Friday afternoon before a deadline, and you don't know what to do.

**READ the file.**

This may seem obvious, but it's a step that is often overlooked by new lawyers. Legal questions never arise in the abstract (except among former Law Review staffers who are counting the days until their application comes through for an assistant professorship). The file tells you what the case is about and what your boss knows, or may not know. It can answer most of your questions about the assignment. You can find out who the players are and what has happened so far. If you read the file, you will not only turn in a more complete and polished piece of work—you may actually become useful on the case. That's the whole point. If you become useful (read, *indispensable*) on enough cases, you will have the closest thing this profession offers to job security.

**"Keep your EYE on the rabbit."**

This adage comes from a talk U.S. District Judge Richard L. Williams gave to The Virginia Bar Association when he was a partner at McGuireWoods. Every case has a goal—a desired outcome. If your efforts aren't directed toward the desired outcome, you're wasting your time. A lot of new lawyers become unduly fascinated by the many issues even a simple case can raise. Only a few critical points help push the ball forward. Focus on those and ignore the rest. Keeping your eye on the rabbit shows your boss you know what's important. Don't confuse activity with achievement. Being busy isn't the goal. Your work must achieve an end; it is not an end in itself.


**Ask questions, and answer questions CAREFULLY.**

It's important to ask questions. But before you ask a question, be sure you have tried to find the answer. That is, after all, your job. If the answer to the question is in the file, why haven't you read the file? If the answer is in a book, why haven't you looked there first? When you ask a question, have it formulated before you speak. Ask the most important question first. Your boss has other things to do.

When answering a question, be honest. If you don't know, say so. Smart clients are good smoke detectors. No one likes to be fed a line—especially not clients who are paying for your help. There's nothing wrong with admitting that you aren't the Encyclopedia of All Legal Solutions. If you don't know, inform them that with time and research, you can find out. That's why they came to you in the first place.

Be sure to keep your client up-to-date on your progress by returning phone calls and sending information. If a squeaky wheel gets the most grease, save time and money by greasing it before it starts making unfriendly noises. Not returning your client's phone calls is the first step to creating an unhappy client.

## First Year as an Attorney?



If you weren't at the First Day in Practice Seminar, you still have an opportunity to buy the book used at the seminar. This valuable information contains the basics from the best... experienced judges and lawyers, with practical tips and real-life essentials. **Quantities are limited, so order your copy today!**

**FIRST DAY IN PRACTICE MATERIAL**

Enclosed is my check for \$55 for the 2005 First Day in Practice handbook.

NAME: \_\_\_\_\_

ADDRESS: \_\_\_\_\_

\_\_\_\_\_  
(City) (State) (Zip)

TELEPHONE: ( \_\_\_\_\_ ) \_\_\_\_\_

BAR I.D. NUMBER: \_\_\_\_\_

Please make your check payable to the Virginia State Bar and mail to:  
 Bar Services Department, Virginia State Bar, 707 East Main Street, Suite 1500,  
 Richmond, VA 23219-2800

## LISTEN.

Starting law practice is scary. The lingo of any specialty is confusing at first. Other lawyers talk to you as if you understand what they're saying. It takes some time to get it, but don't worry, you will. In the meantime, just be a "lingo sponge" and soak it in. If words or phrases that you don't yet know are part of an assignment, look them up or ask what they mean. Or just nod and listen for context. The lawyer who is talking to you has probably forgotten how clueless he was in his first month out of law school. After a few months, you'll be slinging the phrases just like everyone else.

## USE all five senses.

If I don't know an adversary or a client, I prefer to meet on his or her turf. You may have heard that you will have the upper hand if they come to you. Maybe that's what you want. More often, however, you want to learn what makes the other person tick. Go to them. What are they reading? How organized, or disorganized, are they? What mementos and pictures are on display? All these provide information about who they are.

If you don't know why you were invited to the meeting, it is probably because your boss needs another pair of eyes and ears. He may also need someone to take better notes than he can. He has a lot to think about in the meeting while you can take good, detailed notes (preferably using the participant's words and not your instant translation.) Two of the very best assistants I ever had, neither of whom had yet started law school, were great observers. After a meeting they could tell me who was nervous, who was confident, and what a client really wanted out of the case. They observed gestures, word fumbling, vocal tone and body language. You can catch important details that your boss will miss, and that makes you indispensable. Attorneys who simply attend a meeting are common. Insightful attorneys who take in the complete picture are much more effective.

## The firm will make you a PARTNER when it has to.

Just because your firm has a seven-year track to partner doesn't mean that you're on timed autopilot toward the big promotion. You will become a partner when the law firm has to make you one, and that will only happen if you become indispensable. Nothing is handed to you in law practice. If you want to become a partner, you have to put in more than just the time. 📌

## Now, all that being said, old dogs also can learn new tricks, especially from their younger counterparts in the firm. Here are the top three tips I have learned from law student assistants and new lawyers over the years;

### Technology, technology, TECHNOLOGY.

Recent generations have begun to infuse law firms not only with knowledge of multiple time-saving technologies, but with a seemingly inherent talent for multitasking. It isn't an age thing; multitasking is a learned behavior, and technology helps us do it. Employees are expensive. Technology is cheap. If we take the time to learn the system, we can cut out a lot of employee legwork we've been paying for.

Use the personal computer. It is a moneymaker. It can be our base of operations and best friend. Scanning correspondence and files into PDFs can save valuable space that cuts into over-

head. Print out documents as needed. Only keep paper copies of open and active files.

E-mail is fast and efficient. We can send documents, sound, even video with a click of the mouse. Using e-mail effectively can cut down on telephone time. It can give more control over the time spent communicating with clients and other lawyers.

Learn computer research. Lexis and Westlaw and the free legal research Web sites are gold mines. We can build sophisticated legal research files and save them in an electronic format. Every document we can create or capture digitally is a potential form.

### Make friends with YOUNGER lawyers.

The men who were legal giants when I came to the bar (and they were all men, then) have retired. The legal giants of the future are among our associates and their friends. Get to know them. Lawyering is fundamentally democratic. All our licenses are the same. If much of our business comes from referrals, widening our circle of friends expands our referral base. This not only secures our practices, but also enriches our lives.

### ATTITUDES are changing.

Gone are the days when the men had the offices and the women sat outside

their office doors. A lawyer recently told me he would “have his girl call my girl.” Well, I don’t have a “girl,” and many of my colleagues are women. As an older lawyer, one of my greatest challenges is to change my attitudes. I have programmed assumptions about how work should be done. I know how a successful legal career should progress. I assume that finishing a client’s project is more important than some-

thing else I may want to do. The generations now entering law practice do not share these assumptions. Certainly, they can learn a few things from me, but I can learn just as much from them. Being open to that possibility makes me optimistic.

OURS IS A LEARNED PROFESSION. WE HONOR THAT BY REFUSING TO STOP LEARNING. [↻](#)



**Jack W. Burtch Jr.** was admitted to the Virginia Bar in 1973. He received his undergraduate degree *cum laude* from Wesleyan University in Middletown, Connecticut in 1969 and his law degree from Vanderbilt University in 1972, where he served as a member of the board of editors of the *Vanderbilt Journal of Transnational Law*. After serving as an associate in the labor law section of Hunton & Williams from 1973 to 1980, Burtch became a principal of the firm that became McSweeney, Burtch & Crump. In January 2001, he joined the firm that became Macaulay & Burtch PC where he represents businesses, executives and professionals in employment law and labor relations. Burtch is an adjunct professor of law at the University of Richmond School of Law where he teaches negotiations and interviewing and counseling.

## CALL FOR YLC BOARD NOMINATIONS

THE NOMINATIONS COMMITTEE of the Virginia State Bar Young Lawyers Conference is now accepting nominations for seats on the Board of Governors which are up for election at this summer’s Annual Meeting. Elections will be held for positions representing the following Young Lawyers Districts:

### YLC District

- 2nd District
- 5th District
- 6th District
- 7th District
- 8th District
- 9th District
- 10th District
- and four At-Large positions

### consists of Judicial Circuits

- Circuits 2 & 4
- Circuits 19 & 31
- Circuits 9 & 15
- Circuits 16, 20 & 26
- Circuits 23 & 25
- Circuits 10, 21, 22 & 24
- Circuits 27, 28, 29 & 30

Anyone interested in serving on the Board of Governors for the Young Lawyers Conference or in nominating a young lawyer to the Board of Governors should forward a letter of interest or nomination to:

**Savalle C. Sims**  
 Arent Fox PLLC  
 1050 Connecticut Avenue, NW  
 Washington, DC 20036-5339  
 202.857.6395 fax • [sims.savalle@arentfox.com](mailto:sims.savalle@arentfox.com)

**The deadline for receipt of nominations is **MAY 1, 2006.****



# Reforming Virginia's MENTAL HEALTH Statutes & Processes

by Chief Justice Leroy R. Hassell Sr.

When I became the Chief Justice of the Supreme Court of Virginia, I met with the leadership of the Senior Lawyers Conference and expressed my great desire to work closely with the Conference. Gregory E. Lucyk, the Chief Staff Attorney for the Supreme Court of Virginia, has helped me pursue various initiatives with the Senior Lawyers Conference.

I can state without reservation that Virginia's lawyers are very blessed because we have many members of the Senior Lawyers Conference who have invaluable knowledge and experience and they are willing to use their talents and vast resources to mentor new lawyers and help Virginia's senior citizens. Recognizing the experience, ability, energy, and enthusiasm exhibited by members of the Senior Lawyers Conference, I asked the Conference to assist the Supreme Court as the Court embarked upon an effort to improve Virginia's mental health statutes and involuntary mental commitment processes.

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The provision of adequate mental health treatment and fair judicial processes that ensure due process for mental health patients are issues of national importance and are not unique to Virginia. According to the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, (DSM-IV), approximately 22.1 percent of Americans eighteen and older suffer from a diagnosable mental disorder in a given year. If this conclusion is correct, approximately 44.3 million Americans experience some type of diagnosable mental disorder each year. Common mental disorders include depressive disorders, schizophrenia, anxiety disorders, panic disorders, post-traumatic stress disorders, eating disorders, Alzheimer's disease, and autism spectrum disorders, just to mention a few.

Interestingly, as early as 1100 A.D., asylums existed for the treatment of persons who suffered from mental disorders. Both the English and the French established facilities for persons who suffered with mental illnesses, but I suspect that these facilities were more similar to jails than to hospitals.

In Great Britain, before the founding of Jamestown, persons who suffered from mental illnesses were either incarcerated or cared for by their families. Upon the establishment of British colonies in America, the new colonists also cared for mentally ill family members at home. Mentally ill individuals without family support often drifted from town to town. As local jails began to be constructed in colonial America, drifters suffering from mental illness were commonly confined for petty crimes and vagrancy.

The Pennsylvania Hospital, the first hospital in the United States, opened in 1751 in Philadelphia to care for the poor and the mentally ill. The first public facility dedicated solely to the treatment of the mentally ill was established in Williamsburg, Virginia, during the colonial era. This facility continues to operate today and is now known as Eastern State Hospital.

In November 1769, at the urging of Governor Francis Fauquier, the Virginia House of Burgesses passed "An Act to make provision for the support and maintenance of ideots, lunatics, and other persons of unsound minds." That statute stated in relevant part:

WHEREAS several persons of insane and disordered minds have been frequently found wandering in different parts of this colony, and no certain provision having been yet made either towards effecting a cure

of those whose cases are not become quite desperate, nor for restraining others who may be dangerous to society: Be it therefore enacted, by the Governor, Council, and Burgesses, of this present General Assembly, and it is hereby enacted, by the authority of the same, That the honourable John Blair, William Nelson, Thomas Nelson, Robert Carter, and Peyton Randolph, esquires, and Robert Carter Nicholas, John Randolph, Benjamin Waller, John Blair, jun. George Wythe, Dudley Diggs, jun. Lewis Burwell, Thomas Nelson, jun. Thomas Everard, and John Tazewell, esquires, be and they are hereby constituted trustees for founding and establishing a public hospital, for the reception of such persons as shall, from time to time, according to the rules and orders established by this act, be sent thereto.

Although the Legislature's choice of language would be extremely inappropriate and antiquated if it were used today, the Act was considered very progressive for the eighteenth century.

The 1769 Virginia Act not only provided funds for the construction of a public hospital for the mentally ill, but the Act also established Virginia's first legal procedures for involuntary commitment. Pursuant to the Act, a magistrate acting on his own knowledge or other information that a mentally ill individual was "going at large" was required to issue a warrant directing the sheriff to bring that person before the court. Three magistrates would examine the individual and receive evidence. If a majority of the magistrates deemed it "expedient and necessary," the individual would be transferred to the public hospital.

The president of the directors of the hospital would summon the hospital's court of directors, who would determine the proper course of action. Medical training was not a qualification for a seat on the court of directors, although many prestigious Virginians were members.

The 1769 Act, though in many ways innovative for that era, lacked the legal safeguards that commonly accompany modern commitment procedures, including a right to counsel, the right to trial by jury on appeal, and the right to a prompt preliminary determination of the necessity of detention. The 1769 Act and other subsequent legislation were consolidated in the 1819 Code of Virginia. In 1825, the General Assembly approved the construction of a second public asylum in Staunton.

The judicial branch of government is committed to improving the quality of mental health services provided to Virginians and the judicial processes attendant to civil commitments.

The first major revision of Virginia's mental health statutes was undertaken in 1841, when famed American mental health advocate Dorothea Dix was just beginning her national campaign for humane treatment of the mentally ill. The 1841 revisions required that a panel of three magistrates elicit the testimony of the mentally ill individual's doctor, if the person had been receiving medical treatment. If the magistrates recommended commitment, the new changes required the hospital's court of directors to convene "as soon as may be" in a meeting "which shall not unnecessarily be delayed" in order to determine whether the patient should be committed to the asylum.

Despite having made some improvements, the 1841 Act also specifically provided that mentally ill individuals were to be kept in jail until and unless one of Virginia's asylums gave notice of a vacancy. Notably, the Act distinguished between mental illness and mental retardation, requiring State asylums to refuse patients suffering from the latter condition. The new law ordered county "overseers of the poor" to care for mentally retarded citizens who were without financial resources.

The year 1841 represents another milestone in Virginia's treatment and care of its mentally ill citizens. That year, Dr. John Galt became the superintendent at the public hospital in Williamsburg. Although conditions in nineteenth century mental hospitals were often deplorable, Dr. Galt rarely restrained his patients and employed a philosophy of compassionate treatment known as moral management. He also advocated deinstitutionalization and medication as alternatives to confinement.

By 1950, more than 500,000 individuals resided in mental institutions across the United States. By this time, Virginia's commitment statutes had undergone significant reforms, but concerns about civil rights abuses and dismal living conditions in mental institutions captured the public's attention. Over the next three decades, as public confidence in the effectiveness of medication and community-based treatment options grew, widespread deinstitutionalization of mental health patients was

The solutions to the problems that confront Virginia's mental health system and legal processes are complex and subject to great debate.

implemented. Virginia's experiences reflected the national trend. According to a paper issued by the Treatment Advocacy Center, Virginia experienced a deinstitutionalization rate of over 90 percent between 1955 and 1996.

In the year 2004, the last year for which complete statistics are available, there were 45,369 involuntary mental commitment hearings in the general district courts in Virginia and 2,024 proceedings in the juvenile and domestic relations district courts. Legal protections now include, among others, the right to counsel during the involuntary commitment process, the right to a commitment hearing within 48 hours of the execution of a temporary detention order, and periodic reviews of the necessity of detention.

According to the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services, 5.4 percent of Virginia's adult residents between the ages of 18 and 69 suffer from a serious mental illness. By comparison, the Virginia Department of Corrections estimates that

15 percent of Virginia's prisoners have some form of mental illness or mental disorder. This unintended consequence of deinstitutionalization has left jail superintendents and sheriffs lamenting their newfound responsibility of housing the mentally ill because sheriffs and jail superintendents lack the expertise and resources to do so effectively.

There are numerous issues that affect the provision of mental health services in Virginia and the administration of justice. When I began my tenure as Chief Justice, one of my most important priorities was to contribute to the discussion of reform of Virginia's mental health statutes and processes. The judicial branch of government is committed to improving the quality of mental health services provided to Virginians and the judicial processes attendant to civil commitments. All persons and institutions that are involved in Virginia's mental health system and processes—mental health practitioners; law enforcement personnel, including sheriffs; judges and court personnel; attorneys; magistrates; special justices; patients; patients' families and friends—have a stake in improving this area of law.

The solutions to the problems that confront Virginia's mental health system and legal processes are complex and subject to great debate. The Supreme Court of Virginia and the Senior Lawyers Conference of the Virginia State Bar recently sponsored a conference on mental health issues, and over three hundred people attended. We discussed a variety of important topics: the desirability of a comprehensive evaluation of the Commonwealth's mental health statutes, Title 37.2 of the Code of Virginia; improvement of the civil commitment process; better community capacity to provide intensive crisis intervention services for people who suffer from mental illnesses; ending unnecessary criminalization of people with mental illnesses; alternative methods of transportation for mentally ill persons in protective custody for evaluation or treatment; new processes that encourage and facilitate voluntary treatment of mental health patients who are in crisis or experiencing deteriorating



conditions; intensive stabilization services for mentally ill patients in the absence of dangerous behavior or threats; and greater respect and protection of patients' rights, dignity, and due processes.

Many complex issues must be discussed and resolved in an effort to improve Virginia's mental health statutes and the involuntary commitment process. Now that we have the benefit of more than 200 years of hindsight, we must heed the lessons of Virginia's past to be sure that our reforms adequately balance the provision of care with respect for patients' rights and public safety considerations. One crucial part of that mission will be to divert persons with mental health disabilities away from the criminal justice system

by providing forums where they can receive appropriate treatment. The Supreme Court—with the assistance of the Senior Lawyers Conference, Professor Richard J. Bonnie of the University of Virginia's Institute of Law, Psychiatry and

Public Policy and others—has embarked upon a journey that we hope will culminate in the resolution of these multifaceted problems and hence, better care and treatment for Virginia's citizens and families who must confront mental health issues.

Leroy Rountree Hassell Sr. has been Chief Justice of the Supreme Court of Virginia since February 2003. He has led the Court and the Virginia State Bar to undertake several initiatives, including special training of defense lawyers for indigent criminal defendants, a Solo & Small-Firm Forum and Town Hall Meeting held in different areas of the state, and the project referred to in this article—a multidisciplinary effort to improve the process for involuntary civil commitment of people with mental illnesses.



Chief Justice Hassell is a native of Norfolk. He received a bachelor's degree in government and foreign affairs from the University of Virginia in 1977 and a law degree from Harvard Law School in 1980. He was a partner at McGuireWoods before he was appointed to the Supreme Court in 1989 by then-Governor Gerald L. Baliles.

*I am very pleased to have an opportunity to share with the members of the Virginia State Bar concerns regarding Virginia's mental health statutes and commitment processes. I am indebted to my law clerk Regina J. Elbert, for her assistance with this article. I would be remiss, however, if I did not first thank the members of the Senior Lawyers Conference of the Virginia State Bar, which comprises all members of the Virginia State Bar who are 55 years of age or older and are in good standing with the Bar. The Senior Lawyers Conference was established in 2001. Even though the Conference focuses upon issues of interest to senior lawyers and senior citizens, the Conference is intimately involved in improving the legal profession and the law and in pursuing the public good. I am happy to report that even though I have not yet attained the minimum age requirement, William Brice Smith made me an honorary member of the Conference.*

*Every member of the Senior Lawyers Conference, as well as every member of the State Bar, is indebted to Patricia A. Sliger, the Virginia State Bar staff liaison with the Senior Lawyers Conference. Simply stated, her commitment to issues that affect Virginia's senior citizens is unparalleled, and I thank her very much.—Chief Justice Leroy R. Hassell Sr.*

## CALL FOR NOMINATIONS

### Award of Merit Competition

Established by the VSB Conference of Local Bar Associations, this competition is designed to recognize outstanding projects and programs of local and specialty bar associations; share successful programming ideas and resources with all bar associations; encourage greater service to the bench, bar and public; and inform the public about some of the excellent work of local and specialty bars and the legal profession in general. The deadline for the receipt of nominations is May 1, 2006.

### Local Bar Leader of the Year

Established by the VSB Conference of Local Bar Associations, this award recognizes past and presently active leaders in their local bar associations who have continued to offer important service to the bench, bar and public. The award serves as a continuing monument to the dedication of local bar leaders. It also serves to emphasize the importance of close cooperation between the Virginia State Bar and local bar leaders. The conference does not necessarily present this award every year, but only as often as the caliber of nominations deems appropriate. The deadline for the receipt of nominations is May 1, 2006.

### R. Edwin Burnette Jr. Young Lawyer of the Year Award

This award was established by the VSB Young Lawyers Conference to honor an outstanding young Virginia lawyer who has demonstrated dedicated service to the Young Lawyers Conference, the legal profession and the community. The deadline for the receipt of nominations is May 1, 2006.

**For more information on these awards, see [www.vsb.org/awards.html](http://www.vsb.org/awards.html).**

# When Seasons Change

*I expect to pass through this world but once; any good thing therefore that I can do, or any kindness that I can show to any fellow creature, let me do it now; let me not defer nor neglect it, for I shall not pass this way again."*

—Stephen Grellet 1773-1855

**Jimmy F. Robinson Jr., 2005–2006 Young Lawyers Conference President**



Earlier this year, my family suffered a tremendous loss. The matriarch of my family, my great grandmother, Mae Ola English (“Aunt Mae”) passed away. Her generosity, love and leadership served as the foundation on which five living generations stood and the glue that connected our many parts. Always conscientious, Aunt Mae, seeing the moon on the horizon, prepared for the inevitable in painstaking detail. As was typical in almost all dealings with Aunt Mae, there was little left for us to do, but much that we would learn. She was prepared for seasons to change, and her example served as a lesson for all of us.

The seasons of our lives serve as chapters of change. Each season takes us on a journey where we are constantly growing, evolving, transforming ourselves; gaining more insight, wisdom and courage; and challenging ourselves to go further, be better, do more, take less and give from the heart. The reality of life is that we are only here for a few seasons. While most members of the Young Lawyers Conference are changing from the spring to summer of their lives, there are plenty in our ranks who are moving into their fall or winter. As young lawyers we are acutely aware of the many issues facing today’s senior citizen.

Some of us are fortunate to still be able to call or visit our aging parents. Life for them can change at any given moment. As our parents and family members move into the season of life where age-related illnesses such as heart attack, stroke, arthritis or dementia trigger concerns about the future and how to plan for it, the Young Lawyers Conference becomes a resource for them.

The Young Lawyers Conference recognizes that the constantly changing laws of our commonwealth can become confusing to most people. Therefore, partnering with the Senior Lawyers Conference, we publish the *Senior Citizens Handbook*.

The *Senior Citizens Handbook*, first published in 1979, is a joint project of the Senior and Young Lawyers conferences. Over the years, we have jointly distributed tens of thousands of copies. The current handbook addresses a broad range of laws, issues and programs affecting Virginia’s elder citizens. It provides practical guidance for dealing with many of the problems faced by older Virginians and includes comprehensive resource and con-

tact information to aid readers in locating organizations that serve seniors.

Among the many topics covered are health care (Medicare, Medicaid, Medigap, managed care, long-term care insurance, Alzheimer’s disease), long-term care (nursing homes, assisted living, adult day care, home care), housing (landlord-tenant issues, reverse mortgages), real estate transfers, probate and estate administration, advance directives, guardianship, funeral services, consumer issues, age discrimination, elder abuse, grandparent rights to visitation and custody, and financial assistance (Social Security, Supplemental Security Income, pensions, veterans benefits, federal tax relief).

This handbook is an invaluable tool for many seniors who otherwise would not have access to this information. This useful guide has been designed, updated and even translated into Spanish to remind seniors and their family members of their many rights and privileges as citizens, and to prepare, as Aunt Mae did, for the seasons to change. Each year that the handbook is updated, we hope that it will help answer questions or locate services that may be beneficial.

Participating in this project allows the Young Lawyers Conference to pay tribute to our valued senior Americans who protected our freedom, preserved our legal heritage, marched and sat down so that we could enjoy equality under the law. We salute these valued citizens. Many of our senior Americans fought world wars to carry our democracy forward into the twenty-first century. Just as important, many continue to fight the domestic wars of drugs, child abuse, spousal abuse, discrimination and poverty. Our contribution to this handbook allows the Young Lawyers Conference, in our own way, to honor our seniors and extend our appreciation by helping them with their legal rights.

William T. Wilson and the Senior Lawyers Conference are doing a tremendous job distributing these handbooks and educating our seniors across the state about their rights and how to plan for the future. If you want to help, please do not hesitate to contact me. If you need handbooks for your “Aunt Mae” or any other family member, please give me a call at (804) 783-7540.



# Local Bars Offer Disaster Preparedness Resources



**M. Janet Palmer, 2005–2006 Conference of Local Bar Associations Chair**

The 2006 hurricane season will soon be here, while haunting images remain of destruction from last year's storms. We continue to hear stories of families separated, businesses destroyed and homes not rebuilt.

Persons have lost material possessions, and many suffer continuing psychological and emotional trauma. I cannot imagine losing my neighborhood and never again worshipping with my friends at church, or my children never again seeing their classmates.

The law firm Morrison & Foerster LLP has produced a handbook with legal information that individuals, families and small businesses need after flooding and other devastation caused by hurricanes. This project was completed in conjunction with the Center for Pro Bono, a project of the American Bar Association Standing Committee on Pro Bono and Public Service.

The Center for Pro Bono has a helpful Web site of free Hurricane Katrina Disaster resources at [www.abanet.org/katrina/](http://www.abanet.org/katrina/).

The Virginia State Bar's Special Committee on Access to Legal Services is cosponsoring a continuing legal education program entitled "Preparedness Through the Prism of Public Interest Law" with the University of Virginia's Miller Center of Public Affairs on April 26, 2006. Martha Bergmark, founding president of the Mississippi Center for Justice, will speak about her participation in regional relief operations for the recent Gulf Coast Storms.

More information about this event is available at [www.vsb.org/probono/pbc06.pdf](http://www.vsb.org/probono/pbc06.pdf).

Other disaster-related volunteer opportunities for law firms, voluntary bars and individual lawyers are available through Virginia Corps at [www.virginiacorps.org](http://www.virginiacorps.org). The site offers homeland security and preparedness service options for professionals and citizen volunteers.

The VSB Pro Bono Conference includes a one-hour emergency legal services training session by the young lawyers of the VSB and The Virginia Bar Association. This is offered under an ongoing standby initiative cosponsored by the ABA and the Federal Emergency Management Agency. The Pro Bono Conference will also discuss opportunities for lawyers to volunteer in New Orleans and elsewhere as temporary *pro hac vice* cocounsel with any of six eligible legal nonprofits under the Louisiana Supreme Court's supplemental emergency legal services pro bono rule.

During its midyear meeting in Virginia Beach, the Old Dominion Bar Association discussed local responses to natural disasters.

Other members of the Conference of Local Bar Associations may find that local government officials and members of the judiciary are willing to discuss these topics and lend assistance to those in need.

## RISK MANAGEMENT CORNER

## To Refer or Not to Refer

by John J. Brandt

It is a challenge for both attorney and client whether to refer a client to another lawyer or to represent the client, even if the attorney may not be experienced in the field of law in question.

The Virginia Rules of Professional Conduct (2005-06) set forth in the first rule, Rule 1.1 Competence, the basis for our discussion:

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

The comments under Rule 1 offer some assistance as we ask ourselves these questions:

- How complex or specialized is the case?
- What is your general legal experience?
- What is your training and experience in the field of law represented by this case?
- Can you give the case adequate preparation and study?

It is important that “A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.”

A newly admitted attorney may be as competent as an experienced practitioner. Of course, an attorney may always associate with another more experienced lawyer—or he or she may decide that the best practice is to refer the client to another lawyer. Indeed, as discussed in the article “Lawyer-to-Lawyer Fee Splitting Arrangements,”

(*Virginia Lawyer*, Vol. 54, No. 3, p. 51 (Oct. 2005)), it may be remunerative for the referring lawyer to send his client to a more competent attorney; and it may be comforting to know that the referring lawyer is probably relieved of any legal responsibility for the case.

Attorneys just beginning law practice do not have to refer all cases, or else they would never practice law. Those lawyers, and even older lawyers encountering a new area of the law, are usually armed with analytical skills honed in law school, in studying for and passing the bar and being licensed in Virginia.

Good judgment, common sense and pure old-fashioned elbow grease are predicates for a successful representation. Attorneys should not shy away from seeking assistance from more experienced members of the bar. Virginia has a well-earned reputation for producing lawyers always ready to give a helping hand to less experienced attorneys.

Location in the commonwealth may also influence an attorney’s judgment. An attorney should be more willing to refer a client to more experienced representation when the resources are readily available. For example, if a large-city client of substantial means requests a detailed estate plan from an attorney with limited experience in trusts and estates, the attorney should be more willing to refer than if the client comes from a more rural part of our state and is reluctant to travel to a large city for assistance. To some extent, the attorneys in our more rural areas may be the single source of legal representation for myriad legal issues. They are the true “general practitioners” and we are all indebted to them for



the wonderful work they do for their fellow Virginians.

However, a lawyer should not foolishly go forward alone into an area of the law beyond his or her competence. Thus, where a wealthy client in a rural area needs a good estate planner and refuses a referral to an attorney in a large city, the rural attorney may be able to associate experienced counsel, and by e-mail forward important documents to better assist his client.

There may not be an easy answer to all questions involving the propriety of referring clients. Here are a few practical-guideline questions:

- Do you have the time to devote to a case which concerns an area of the law in which you do not presently feel comfortably competent?
- Does the client have the money to be able to afford the extra time that may be necessary to increase your competence?
- Is the client a longtime client who looks to you frequently for legal advice and assistance?

(continued page 44)

## CLE Attendance: A Big Deal ... or Not?\*

by Mark Bassingthwaight, mbass@alpsnet.com

I would like to describe a disciplinary matter that was resolved a few years back in another jurisdiction, because the issue addressed remains a risk management concern.

The trouble began when Attorney A submitted a continuing legal education compliance report in December claiming credit for two programs that were scheduled for the following January. The CLE commission asked for and received a resubmitted report, as credit could not be granted for future programs. The resubmitted report listed the same two January programs due to the time that had elapsed.

Later, a random report verification review revealed that Attorney A had failed to register at one of the January seminars. He stated that he had paid and registered but arrived shortly after the program had ended because he mistakenly believed that the program was an all-day event instead of two hours and because he drove to the wrong location. It was his belief that the late arrival would not nullify the hours. Once again, the commission asked for a new report. This time Attorney A dropped the disputed January seminar and substituted a different seminar. All of the reports were notarized.

In response to disciplinary charges that were filed, Attorney A admitted misconduct as to his CLE requirements but argued that, since no clients were harmed, the behavior did not constitute attorney misconduct. He also argued that he reasonably believed that making the effort to attend a seminar entitled him to receive credit for the program since "it is common practice for attorneys to receive full CLE credit for seminars when they leave early."

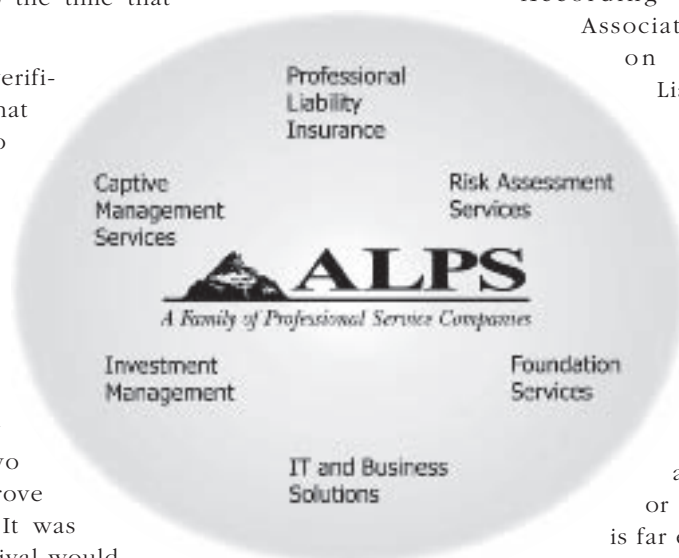
In the end, the attorney was found to have violated rules that prohibit an attorney from knowingly making

a false statement of material fact to a tribunal and from engaging in conduct involving dishonesty. The court suspended him from practice for ninety days after finding that his false statements on the notarized report constituted perjury. The court also noted that eventual compliance with the requirements did not constitute mitigation because compliance is a requirement. The court further noted that an attorney who is practicing law while not in compliance with the CLE requirement is engaging in the unauthorized practice of law.

According to the American Bar Association's Standing Committee on Lawyers' Professional Liability, 56 percent of malpractice claims are a result of a substantive error, such as failure to know or properly apply the law and failure to know or ascertain a deadline. Risk management tips that address substantive law are rare, because these issues are not as easily addressed as administrative or client relations matters. It is far easier to focus on returning client phone calls in a more timely

fashion or incorporating an improved calendaring program into the practice then trying to determine an attorney's level of competency. No one would ever have a risk manager visit if the visit process included an attempt to determine a basic level of attorney competency. In spite of this, one tip that we do share that helps address the prevention of substantive errors is to take full advantage of CLE programs in your practice area.

I think that we would all agree that the attorney's actions were wrong. Yet his statement that it is common practice for attorneys to leave early and report being there for the full time struck a nerve. Over the years, I have witnessed a great deal of late arrivals and early departures at CLE events. I have watched attorneys arrive on time, sign in, pick up the



(continued from page 42)

- Conversely, is the client a new client who is not likely to return after a one-time engagement?
- Do you have a good friend-attorney who practices in an area of law in which you may feel inadequate?
- Does the case involve a considerable amount of money?
- Have you reached a personal decision, either immediately upon meeting the client or shortly thereafter, that you feel inadequate in representing the client?

Honest answers to these questions may hold the key to your reasonable decisions. The standard of care for a Virginia attorney is whether he addresses a case entrusted to him “with a reasonable degree of care, skill, and dispatch...” *Glenn v. Haynes*, 192 Va. 574, 581, 66 S.E.2d 509, 512 (1951). For example, if you cannot develop the necessary skills to represent a client, refer him to a good lawyer. If the prospective client cannot pay you to

develop the expertise needed to successfully represent the client, refer him.

If the client is a longtime client who will not be referred easily, explain the challenges to the representation and give the client options: stay with you and associate a more experienced lawyer; pay a bit more to you as you develop the expertise to reasonably represent the client; or pursue a complete referral.

If the client is a new client and is not likely to bring further legal business to you in the future, refer the case.

Where you have a good friend who practices in the area of law in question, you will probably feel more comfortable with a straight referral because your friend is not likely to enter into a long-term relationship with your client.

If the case involves a considerable amount of money and concomitantly a potentially large fee, you understandably may wish to keep the case. However, if you are honestly con-

cerned about your level of expertise, you must inform the potential client that you may need to formally associate another, more experienced lawyer, and the client must approve of the association. Alternatively, you may refer the case entirely and investigate a referral fee.

When all is said and done, you will probably know instinctively whether or not you should try to keep the case or refer it. Read the Rules of Professional Conduct; consult an attorney friend with experience; make a free, confidential call to the risk manager (1-800-215-7854) or to the Ethics Hotline (1-804-775-0564); and use good judgment.

The challenge for an attorney who lacks the specific expertise required for a given legal representation is significant, but it can be solved with a careful and reasoned evaluation of the problem.

## THE ALPS CONNECTION

materials and promptly exit, only to return for the last part of the program in order to pick up a certificate of attendance. In addition, how many of us have witnessed attorneys sleeping, reading a paper or even working on a client matter during a presentation? Although I cannot speak from firsthand knowledge, having never reviewed CLE reports for accuracy, I suspect that Attorney A's perspective has some basis in reality. I become even more concerned as we incorporate video programs, online seminars and teleconferences into the mix. It is so easy to start the clock ticking and let the opportunity to learn pass us by.

Substantive mistakes are a significant malpractice problem and CLE programs offer an opportunity to

help each of us decrease the risk of a claim by keeping us current, informed and connected. I encourage each of you to choose wisely when selecting a CLE program and focus on quality and subject matter when making the decision. Then go participate and take advantage of the educational opportunity. Further, attending a program two weeks before the CLE deadline on a subject that is completely irrelevant to your practice truly is a waste of time and money. Plan ahead. Finally, when completing the affidavit of compliance remember this case. It serves as a reminder that the CLE process is not something to be taken lightly. Attorney A got caught; how many others don't? In the end, we all pay for it.

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