Error and Omission

The December 2006 *Virginia Lawyer* contains an important error and omission. In the article by Arun K. Sood entitled "National Security, Foreign Ownership and Defense Contractors," the author incorrectly refers on page 42 under the heading "Export and Import Rules" to the "International Trading in Armaments Requirements."

The correct name of the pertinent regulations is International Traffic in Arms Regulations codified at 22 CFR Parts 120-130. This is known as ITAR to export control practitioners. These regulations implement the Arms Export Control Act, 22 USC 2751 et. seq.

Although the author does not mention it, your readers must also be aware of a parallel export control regime, the Export Administration Regulations (EAR) codified at 15 CFR Parts 730-774.

A thorough knowledge of both these parallel export control regimes is extremely critical in the context of "National Security, Foreign Ownership and Defense Contractors."

LOUIS K. ROTHBERG
Associate Counsel for International Cooperative Programs, Office of the Deputy Assistant Secretary of the Army for Defense Exports and Cooperation
Arlington

Continuing Legal Education Reform

The facts Virginia State Bar President Karen A. Gould presented in her October Message ("Should the MCLE requirement be abolished?") made a good, if unintended, case for continuing legal education reform. I do not criticize the good work of the many volunteers who unselfishly devote their time and talent to the mandatory continuing legal education program. I thank them for their service. I've been an instructor and moderator, so I know how much work it is. But let's take a more critical look at the facts between the lines with a benefit-versus-cost analysis.

On October 1, ten thousand out of twenty-five thousand licensed active attorneys had not finished their mandatory CLE requirements. This 40 percent waited until the last thirty days to squeeze in their hours. Ms. Gould "hoped" they would fulfill the requirements in a "way that enhances their practice." This presumes (probably correctly) many would take irrelevant courses just to punch their ticket. If Virginia attorneys thought MCLE was of benefit, they would jump in at the first opportunity and clamor for more. That is hardly the case. Four out of ten lawyers can't be bothered.

Mandatory CLE makes you attend. Offering nineteen thousand courses through a variety of media makes it easy, but for four out of ten lawyers, it isn't perceived as having value. I will not accept the premise that 40 percent of Virginia attorneys are "procrastinators" who need to "change their lifestyles." They are simply choosing to spend their time in ways they deem more worthy. In addition, 10 percent saw so little value they were willing to pay penalties totaling $230,000 to miss the Oct. 31 deadline.

What is the cost of MCLE? If twenty-five thousand lawyers spend an average of five hundred dollars a year for their twelve hours, they are paying $12.5 million. That's big business, and a large part of it goes to profit-making enterprises, not altruistic state bar programs. Forget the myth that we should overlook the cost because the money goes to a good cause.

Take a step further: if twenty-five thousand lawyers charging $150 an hour spend twelve hours a year in MCLE classes, the lost income is $45 million. Adding tuition and late fees, the true cost of MCLE is nearly $58 million every year. That's a lot of money—enough to endow a law school.

Are we getting $58 million of benefit from MCLE? If the mandatory hours were cut in half, at a savings of $29 million per year, I doubt the quality of legal services in Virginia would suffer.

Alternatives? First, limit MCLE to an annual one-day "changes in the law" course. That will protect the public. Second, provide an incentive to do more. Offer optional CLE courses for those who wish to pursue and maintain bar certification in recognized specialties. CLE can stand on its own merit if Virginia attorneys have an opportunity to pursue a meaningful curriculum and official recognition of their expertise. Those who pursue specialty certification will be rewarded with more than the comfort of knowing they did what they had to.

CRAIG E. BUCK
Fredericksburg

(Editors note: The following is a reply from the chair of the MCLE Board to the letter above.)

In this edition of *Virginia Lawyer*, Craig Buck sets out an argument for reforming the Mandatory Continuing Legal Education (MCLE) system in Virginia. As the current chair of the Virginia MCLE Board, I have a unique perspective in responding to Mr. Buck. While a review of the MCLE system may indeed be in order, Mr. Buck's observations, his purported "cost/benefit analysis" and his proposed alternatives to the current system miss the mark.

Mr. Buck incorrectly concludes that ten thousand Virginia lawyers do not believe that attending CLE courses is worthwhile. On the contrary, since lawyers must average one credit hour per month in order to fulfill their MCLE requirements, it is a positive sign that 60 percent of Virginia lawyers had completed all of their hours prior to October. Perhaps many of those "procrastinating" lawyers simply needed one or two hours in order to complete the requirement, and the completion of MCLE credits in the last month is hardly indicative of a lack of interest in their professional development.

The more likely explanation for some lawyers waiting to complete their MCLE

Letters continued on page 4

requirements is that all of us must prioritize our obligations, both in our practices and in our personal lives. Certainly we do not believe that a brief that we complete at 4 p.m. on the due date has less value than a brief completed earlier than the due date. Likewise, if we are scheduled to attend an all-day CLE event in May and find that we must prepare witnesses for an early June trial, we are much more likely to postpone our attendance at a course that need not be completed until the end of October.

Mr. Buck's "cost/benefit analysis" is likewise flawed. Let us first look at the "cost" of MCLE, as Mr. Buck describes it. Virginia lawyers have many avenues to fulfill their twelve-hour MCLE requirement, and not all involve the fifty-dollar-or-so per credit hour that Mr. Buck assumes. In fact, Virginia lawyers near metropolitan areas can find numerous free courses, many of which include pro bono *publico* training, allowing them to satisfy additional professional obligations. Lawyers can teach CLE courses for which they pay no course fees and in fact receive credits for a portion of the time they spend preparing to teach the courses.

In finding that the "true cost" of MCLE is fifty-eight million dollars, Mr. Buck assumes that the time we spend in a CLE course is lost and will never be billed. While this may be true for the lawyer who only works eight hours per day, five days per week and fifty weeks per year, most of us do not have the luxury of working eight hours per day. If a client's needs must be met, we work however long it takes to get the job done. Spending twelve hours per year attending CLE presentations does not supplant the time we spend working for clients, it supplements that time.

Although neither the individual nor aggregate costs of MCLE participation are as enormous as Mr. Buck suggests, it is true that MCLE does impose financial and time costs on Virginia lawyers. It is, therefore, important that we carefully consider whether the "benefits" of an MCLE program make these expenditures worthwhile. Mr. Buck provides no analysis of the benefits of MCLE, other than to opine that he doubts that legal services in Virginia would suffer by cutting the requirement in half.

The most important benefit of requiring regular attendance at CLE courses is that it comes as close as we can to mandating that lawyers discharge their obligation to provide competent representation of clients, as required by Rule 1.1 of the Rules of Professional Conduct. In fact, the Supreme Court of Virginia determined that MCLE is so important that Comment 6 to Rule 1.1 provides that the MCLE requirements are "the minimum standard for continuing study and education which a lawyer licensed and practicing in Virginia must satisfy."

Besides improving knowledge of specific legal topics and enhancing practical and management skills, another benefit of MCLE is that it forces attorneys into an environment where important learning is likely to occur through informal contact with other lawyers as well as through the formal education process itself. The legal profession as a whole has an obligation to take steps to ensure that all lawyers recognize continuing legal education as a professional duty. Our ethical commitment to our clients and the public includes an obligation to always strive for the best performance we are capable of providing. The complexity of practicing law in today's world requires that lawyers maintain competence by supplementing the practical experience they gain from actual representations. The only way an attorney can make sure that he or she is maintaining competence is to make a lifelong commitment to continually enhance his or her competence. Thus, mandating that each Virginia lawyer engage in a minimum number of CLE hours is necessitated by our ethical obligations to our clients to provide competent representation.

Clients themselves expect that lawyers whom they retain will exert appropriate efforts to acquire state-of-the-art knowledge and professional skills. All lawyers benefit from that expectation, which certainly underlies the attorney-client relationship. The legal profession is afforded certain privileges in part because we maintain to the public that the responsible practice of law requires specialized education. For example, the Virginia General Assembly has made it a crime to practice law without a license. More importantly, the public has agreed that our profession is important to our society, and we are therefore afforded the privilege of regulating ourselves. To ensure that we fulfill our unique and challenging professional responsibilities, we have an obligation to do as much as we possibly can to maintain a high level of professional competency through CLE programs.

Mr. Buck's suggestion that a one-day course on "recent developments in the law" provides the requisite training to Virginia lawyers is inappropriate. Legal competency not only involves knowledge about the content of the law, but also involves the requisite professional skills necessary to act on the attorney's knowledge of the law. In other words, it is one thing for a lawyer to possess the specific knowledge necessary for that lawyer's field of practice, but it is just as essential that the competent lawyer have the sufficient skill to translate that knowledge into effective action. Mr. Buck's suggested one-day refresher course only addresses one component of lawyer competency.

In addition, Mr. Buck's suggestion fails to provide for training in legal ethics or professionalism, the need for which is even more important than ever, given the increasing attention to the issue of civility within the practice of law. Ethics and professionalism are areas of the law in which all members of the Virginia State Bar regularly need exposure to emerging problems and information.

While not a perfect system, Virginia's current MCLE apparatus is an excellent mechanism to help ensure the competency of Virginia's lawyers. MCLE is ultimately an expression of the bar's collective commitment to the shared goal of continuing legal education as a crucial element of a lawyer's practice. MCLE focuses that commitment by requiring that each lawyer periodically focus his or her attention on the broader question of the status of his or her knowledge and skills and the steps he

or she can take to enhance them. We should always be willing to improve the MCLE system and to implement changes that will benefit Virginia lawyers and, most importantly, their clients. The purported "reforms" that Mr. Buck identifies move us in the wrong direction and fail to improve the existing excellent system for continuing to ensure that Virginia's lawyers maintain a high degree of professional competency in serving clients.

ERIC M. PAGE
Glen Allen

Letters

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*Letters published in *Virginia Lawyer* may be edited for length and clarity and are subject to guidelines available at **http://www.vsb.org/site/publications/valawyer/**.

Amendment to Rule 1A:4. Out-of-State Lawyers—When Allowed to Participate in a Case *Pro Hac Vice*.

(Effective date changed to July 1, 2007.)

On November 28, 2006 this Court entered an order amending Rule 1A:4, effective February 1, 2007. It appearing proper to the Court to do so, the effective date of this rule amendment is hearby changed to July 1, 2007. —effective January 16, 2007

A Celebration of Virginia's Government

by Karen A. Gould, 2006–2007 VSB President

I had the great fortune to be asked by Chief Justice Leroy R. Hassell Sr. to participate in a celebration of the 230th anniversary of the Constitution of Virginia on November 2, 2006. It was truly a memorable occasion. Governor Timothy M. Kaine gave an excellent speech (see opposite page), as did Lieutenant Governor William T. Bolling, Attorney General Robert F. McDonnell, House Speaker William J. Howell, and state Senator Benjamin J. Lambert III.

Each speaker approached the subject of the importance of Virginia's constitution from the perspective of his role in Virginia's government. Many speakers emphasized the tripartite nature of our government and the need for each of the three bodies to operate independently.

With the help of several of my law partners,[1] I approached my speech from the perspective of the importance of lawyers in our society 230 years ago, as well as today. I hope that I succeeded:[2]

> Good afternoon, Mr. Chief Justice, honored and distinguished guests. It is indeed a privilege for me to appear before you today to represent the Virginia State Bar and the lawyers of Virginia.
>
> As you know, the Virginia State Bar is an arm of the Supreme Court of Virginia and licenses and regulates Virginia's lawyers.
>
> We are fortunate to have over twenty-five thousand active lawyers licensed by the Virginia State Bar to represent the citizens and businesses in our great state. I am proud to be one of Virginia's sixteen thousand lawyers in private practice.

In 1776, 230 years ago, lawyers were just as important to the frame and fabric of our society as they are today. Lawyers were instrumental in drafting the United States and Virginia constitutions. All told there were twenty-five lawyers among the fifty-six signers of the Declaration of Independence. Thomas Jefferson was a Virginia lawyer, as were James Madison and James Monroe. Thirteen of our first sixteen presidents were lawyers.

Lawyers conceived of our tripartite system of government—the chief executive, our governor; the legislature; and the courts—a system designed to keep each other honest. These built-in checks and balances keep freedom real.

As far back as Shakespeare, the role of lawyers as a bulwark of liberty has been recognized. In all of English literature, the most misunderstood quote is from Shakespeare's play *Henry VI*, where "Dick the Butcher," an anarchist, implores his coconspirators that "first thing we do, is kill all the lawyers." Many have taken this quote out of context as an attack on lawyers, when in reality it is a recognition that lawyers are vital to civilized society.

Both Shakespeare and "Dick the Butcher" recognized that a civilized and ordered society is dependent on the law, lawyers and the institutions created by lawyers.

Even a cursory review of the Virginia constitution will reveal the handiwork of Virginia lawyers throughout the generations. Lawyers were involved with the first constitution from 230 years ago and have been involved in each version since then.

Constitutions, like the lawyers who draft them, often contain imperfections and over time are changed in an attempt to correct those imperfections. In the Virginia and American experiences, the constitutions truly represent our statement of an idealized world of how things should be. As time goes on, changes will continue to be made to the Virginia constitution in response to societal changes.

Given the last 230 years, we can remain confident that, 230 years from now, the Virginia constitution, while different from the one we have today, will stand for the same idealized principles as it does now, including the rule of law, the equality of all persons before the law, and the concept of justice for all. I can think of no finer gift for the legal profession to have given the commonwealth of Virginia.

On behalf of the Virginia State Bar, thank you for your consideration of the important principles set forth in the Virginia constitution, drafted in large part by lawyers. We are fortunate to have a great system of justice. ⚖

Endnotes:

1 Many thanks to Patrick M. McSweeney, David R. Ruby and Wesley G. Russell Jr. for their assistance in the preparation of this speech.

2 Thanks also to the people who read this column and those who read it and are motivated to write a letter responding to my comments. I appreciate that people have different viewpoints and am glad that *Virginia Lawyer* can give these people a forum to express their views.

COMMONWEALTH OF VIRGINIA

The 230th Anniversary of the Enactment of Virginia's First Constitution

November 2, 2006
Held at
The Supreme Court of Virginia
Richmond, Virginia

Address to the Supreme Court of Virginia
by Governor Tim Kaine

Thank you, Mr. Chief Justice, and members of the Court. It is a treat to be here with nothing to ask and no anxieties about the outcome. I have a hard time coming to this podium without feeling the nerves in my stomach that I used to feel when I would be here arguing a case. I ended up with a batting average before this court that was somewhat less than Ty Cobb's lifetime batting average. Yet I always had not only a sense of appropriate anxiety when I was here, but also a sense of awe about this place that I still sense today. Awe because we would come as litigants with differences of opinion, dramatically different opinions in most instances, and yet we litigants would stand before you and talk about those differences, answer questions, and work toward a civil resolution of differences. That's what this body has always been about.

Today, we're here gathered with folks from all different walks of life, the three branches of state government, House and Senate, Democrats and Republicans, and the public and private sectors.

The history of the Virginia constitution is a fascinating one. The 230th anniversary that we celebrate today is worthy of celebration and a bit of reflection.

When the constitution was written, Thomas Jefferson was not part of the drafting party, because he was in Philadelphia working at the National Constitutional Convention. Jefferson, no man of complete humility, actually thought he could write two constitutions at once, and so he did write the Virginia preamble. And as George Mason was drafting the bill of rights and the constitution in Virginia, Jefferson was sending him from Philadelphia what he thought the Constitution of Virginia should contain. George Mason did not use anything except the preamble, claiming that the work that Jefferson sent had arrived too late. Mason became, therefore, probably the first American lawyer to assign blame to something getting lost in the mail. Our history may be different as a result.

I didn't realize until I looked at the constitution that it was in 1776 that Virginia began a tradition that is still somewhat unusual: that judges and justices be appointed by the legislature. Most governors I deal with are used to elected justices and judges or justices and judges that a governor may appoint with advice and consent of the legislature; but there it is as plain as day in the 1776 Constitution that it is the legislature that has responsibility for such appointments.

Though I am no constitutional scholar or historian, I do want to say something about constitutionalism. What does it mean to have a constitution? What are some principles that are worthy of celebration?

As the Attorney General mentioned, there are three proposed constitutional amendments that will be on the November 2006 ballot. As we Virginians consider those amendments to the constitution, it is not a bad thing to step back and ask about constitutions generally. What were the odds at the time this document was written in 1776 that we would be here 230 years later with a civilization as great as Virginia's or as great as our nation's? Clearly there had to be some powerful and timeless principles in this constitution. Otherwise, constitutional government in Virginia wouldn't have lasted for 230 years.

As I think about constitutions and constitutionalism, it strikes me that there are two basic, very fundamental principles in all constitutions that last—principles that are critically important and that the vast majority of people around the world don't have the ability to live under. These two principles are different, but they are related.

The first principle is the notion of the rule of law—that we arrange the affairs of society in a way that they are not subject to the whim of the

Constitution *continued on page 16*

Constitution *continued from page 15*

ruler to decide what happens. Instead, laws and regulations and policies are reached by democratically elected legislators.

I lived in a country that was a military dictatorship, where it was the whim of the ruler that governed and not the rule of law that counted. Most in the world still live under that or a similar form of government. We are fortunate that we do not.

What a powerful thing it is to think that a ruler, no matter how benevolent or how despotic, does not hold sway, but instead the people hold sway. That is the first principle of constitutionalism that is so very powerful.

There is a second principle that is equally powerful, because the rule of law in and of itself would not be enough. It has always been the case, because the conditions of the human heart are unchangeable, that majorities can do things that will harm minorities. Whether they be racial minorities, minority political parties, or minorities of any kind, they are always in jeopardy of being oppressed or marginalized in a system operated under a pure rule of law because they may be unpopular, because their numbers are few, because of so many reasons.

And so the second principle that is so beautiful in this constitution is reflected in the bill of rights put into the Virginia constitution in 1776, though not put into the national Constitution until the late 1780s. The bill of rights protects individuals against the government, and even against the will of the democratic majority, because of a belief that an individual has an inherent worth that should not be constrained or trampled upon, regardless of what a majority believes. That is a very fundamental principle of constitutionalism, and it represents a significant understanding of human nature by the drafters of constitutions. Thus, a bill of rights that protects individuals so that they won't be set upon by majorities is at the very heart of what we celebrate today.

The last element of constitutionalism that's important doesn't happen on its own. It happens because of you. Words on a page don't really mean that much, unless there are people of independence and backbone to enforce those words. It's amazing what we ask humble individuals to take on as judges.

All judges are humble before the robe goes on, and you only become omniscient thereafter. Now, I know that from my experience of being married to a judge. What we ask you judges to do is to resolve the most difficult and challenging social issues and issues in the lives of individuals—powerful, tough challenging issues—and to do it in accord with the principles, that it will be law, not whim, that will govern, and that, whether they be unpopular or marginalized for other reasons, individuals will be protected because they have a God-given right to be respected as individuals.

And so to you and to all of those whose pictures are arrayed here in the chamber and to all those who have served in the courts of the Commonwealth of Virginia at any level, who have taken on such a challenging, difficult and vitally important task—to make those two principles live and endure—the Commonwealth thanks you.

Frank W. Dunham Jr., Federal Public Defender, Dies at 64

by Dawn Chase

Frank W. Dunham Jr., the Virginia federal public defender whose advocacy on behalf of accused terrorists led to reaffirmation of basic constitutional rights in the post-9/11 United States, died November 3, 2006.

He suffered from brain cancer, diagnosed during the trial of Zacarias Moussaoui.

"It was devastating. It's still devastating to us," said Gerald T. Zerkin, senior assistant public defender in Dunham's office, who with Edward B. MacMahon Jr. took up Moussaoui's defense.

Dunham, 64, served as both defender and prosecutor during his colorful career. "Talk about a hard charger and just a dedicated soul," said U.S. Magistrate Judge Dennis W. Dohnal, who worked with Dunham as an assistant U.S. attorney in the 1970s.

"It didn't matter who his client was. He gave him his all. He was the best of our system."

While in private practice in Northern Virginia, Dunham took up the defense of W. Mark Felt, the FBI's second-in-command at the time of the Watergate break-in in 1972. Felt was charged with illegally authorizing government agents to break into homes without warrants during a search for Vietnam War protestors suspected of bombings. Dunham brought former President Richard M. Nixon into the trial to testify on behalf of his client. Felt was convicted, but President Ronald W. Reagan pardoned him before he served any portion of his sentence.

More than thirty years later, in spring 2005, Felt revealed himself to be "Deep Throat," the secret source who led journalists along the trail that linked Watergate to the president, resulting in Nixon's resignation.

In private practice, Dunham chalked up a record of successful cases representing people accused of white-collar crimes such as fraud and espionage.

Virginia State Bar President-elect Manuel A. Capsalis practiced with Dunham during those years. "He could be both brilliant and goofy at the same time," Capsalis said. As a young lawyer, Capsalis learned valuable life-quality lessons from Dunham: Take time for public service. Coach soccer. Attend your kids' baseball games.

"Despite how busy Frank was, he was very involved and dedicated to his family and two sons," Capsalis said.

Dunham, born in Philadelphia and raised in Arlington, had a family and was working full time as a naval architect while he attended law school at Catholic University of America. He was the first student to place first in a class while attending night school.

Colleagues explain his success as a lawyer by pointing to his top-notch mind and dogged tenacity.

"When his mind got around a problem, he just didn't let go," said Michael S. Nachmanoff, who started his career practicing with Dunham, followed him to the public defender's office and now has been named to succeed him as the public defender for the Eastern District of Virginia.

Dunham was the first to serve in that job. He had just started—he had hired key staff and arranged for offices in Alexandria, Richmond and Norfolk—when he brought his staff together for a newspaper portrait on the federal courthouse steps in Richmond.

That was August 2001.

A month later, American life changed forever. And Dunham took up two cases that cemented his legacy.

One was the defense of Moussaoui—a mentally ill French citizen of Moroccan descent, accused of being a hijacker who did not make it onto the targeted planes.

Moussaoui insisted on representing himself, which he did with unrelenting hostility to the judge, his own lawyers and the system in general. With the court's approval, Dunham, Zerkin and MacMahon conducted a shadow defense, ready to step in should their client be deemed unable to represent himself.

"Frank maintained a relationship with Moussaoui longer than the rest of us," Zerkin said. "He would go see him on Saturdays, even. He worked very hard, as if he had a real client."

In terms of volume of discovery, it was the biggest criminal case in United States history. Seven thousand FBI agents had investigated the 9/11 attacks and filed reports. The defense had to read every one. Ten languages were involved.

The defense insisted upon, and preserved, Moussaoui's right to review the testimony against him and interview government witnesses.

And the defense team convinced the jury that Moussaoui, while guilty of conspiracy, was a marginal participant in the attacks. By the narrowest of margins, it condemned him to life in prison, but spared him the death penalty.

But it was Dunham's representation in the case of *U.S. v. Hamdi* that won this tribute from MacMahon: "The *Hamdi* case was, in my judgment, one of the greatest accom-

plishments ever by an American attorney." Dunham learned from a newspaper that Yaser E. Hamdi, a United States citizen of Saudi Arabian descent, had been detained indefinitely by the U.S. military after being captured fighting with Taliban forces in Afghanistan. Dunham petitioned the U.S. District Court for the Eastern District of Virginia for an appointment to defend Hamdi. He asserted Hamdi's constitutional rights to judicial review and access to counsel.

And he won. The 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." The case was settled quickly. Hamdi was reunited with his family in Saudi Arabia.

Dunham was a dyed-in-the-wool conservative who arrived at a crucial point in history with a combination of intellect, ability in law, patriotism and a commitment to defend life, liberty and property through the Constitution, Capsalis said.

Nachmanoff put it this way: "In times of great crisis, in times of great fear, it is people like Frank who are the bulwark against the assault on our Constitution and our fundamental values. Frank vigorously, competently and creatively defended some of the most reviled and unpopular defendants, and in doing so protected all of us. Frank represented the absolute best of what this country has to offer."

Last year, in Dunham's final months, he was recognized with a resolution from the Virginia State Bar's Criminal Law Section.

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," it said.

Public Law Internship Established to Honor Civil Rights Icon on His 100th Birthday

Oliver White Hill, whose advocacy in *Brown v. Board of Education* made it possible for African-Americans to be educated in integrated schools, will celebrate his one-hundredth birthday on May 1, 2007.

In his honor, the Virginia Law Foundation has established an Oliver White Hill Internship Fund, which will support internship assistance in civil rights and civil liberties. That intern will be chosen annually by the Oliver White Hill Foundation, a nonprofit group that works to ensure Hill's legacy.

The VLF is seeking donations to the internship fund and will match the first $20,000 in contributions. It hopes to raise $100,000 by May 1, so that the first intern hired under the program can be announced at a May 4 birthday celebration.

Here, Hill (seated) appears with (left to right) VLF President John A.C. Keith, President-elect John L. Walker III, and Vice President Mary Ann Delano at a press conference to announce establishment of the fund.

The internship is one of several activities to recognize Hill's centennial. Others, all sponsored by the Hill Foundation, include purchase and restoration of his boyhood home in Roanoke, a series of seminars on civil rights overseen by federal Judge Roger Lee Gregory, production of a documentary film, and a one-hundredth birthday dinner to be held at the Richmond Marriott. (See page 23.)

For more information on the internship fund, call Sharon Tatum at (804) 648-0112.

Richmond Honors Late Judge's Professionalism

The late Judge Randall G. Johnson of Richmond Circuit court was posthumously honored with the Richmond Bar Association's Hunter W. Martin Professionalism Award during the group's November 2006 meeting.

Johnson's family accepted the award, which was established in 1993 to recognize adherence to the highest standards of professionalism.

Johnson died August 18, 2006.

Four Harrisonburg-area Attorneys Have Received Awards for Pro Bono Service

- M. Christopher Sigler of Sigler & Sellers, who handled a number of difficult domestic relations cases last year.
- Jill M. Lowell of Wharton, Aldhizer & Weaver, who negotiated a settlement for a client who had been misled into a predatory loan.
- Brian K. Brake of Lenhard Obenshain, who successfully sued a credit disability insurance company when it refused to pay payments on a loan held by a disabled client.
- Benjamin S. Barlow, formerly of Wharton, Aldhizer & Weaver, who closed out a difficult pro bono case on which he had spent 120 hours.

The awards were presented by Blue Ridge Legal Services at the October meeting of the Harrisonburg-Rockingham Bar Association.

In Memoriam

Gary L. Bengston
Danville
February 1938–December 2006

Charles Harley Booth
Williamsburg
September 1931–July 2006

Justin Hart Brandon
Alexandria
November 1978–October 2006

Sylvia Mary Brennan
Alexandria
May 1965–January 2006

Robert Lewis Clark
Dayton, Ohio
January 1948–October 2006

The Honorable A. Christian Compton
Richmond
October 1929–April 2006

The Honorable John E. Dehardit
Gloucester
September 1924–July 2006

The Honorable T. Ryland Dodson
Danville
March 1922–August 2006

The Honorable Robert W. Duling
Richmond
November 1928–August 2006

Neale Strong Foster
Miami, Florida
February 1925–June 2006

Carter Lee Gore
Fort Defiance
March 1935–September 2006

Jonathan Andrew Hack
McLean
March 1965–April 2006

John W. Jackson
San Rafael, California
December 1095–April 2006

James Gordon Kincheloe
Fairfax
September 1924–July 2006

William Peter Koczyk Jr.
Annandale
February 1953–September 2006

Peter J. Kostik
Arlington
June 1922–November 2006

Henry Kowalchick
Virginia Beach
February 1924–October 2006

Joseph Alexander McCann
Vienna
August 1928–October 2006

John W. Moore III
Richmond
September 1937–October 2006

Herbert Parker
Cambridge, Massachusetts
January 1935–June 2006

Mark Bennett Peterson
Charlottesville
December 1949–May 2006

The Honorable Philip L. Russo
Virginia Beach
May 1922–July 2006

Ann Sungmie Suh
Arlington
November 1941–November 2006

Theodore N. Irving Tondrowski
Richmond
June 1951–November 2006

Eldred C. Van Fossen
Frederick, Maryland
October 1925–September 2006

T. Eugene Worrell
Charlottesville
July 1919–April 2006

Fundraising Begins for Nuremberg Trials Courtroom at Virginia Holocaust Museum

The Virginia Holocaust Museum in Richmond has launched a project to build an exhibit to honor the importance of the Nuremberg Trials in working through the rule of law to obtain justice.

The exhibit includes a reproduction of the courtroom and continuous projections of footage from the trials of Nazi leaders whose actions led to mass murder and genocide.

"The significance of the Nuremberg Trials lay in the message they sent to both the vanquished and their victims: Those who commit crimes against humanity will be held accountable under international law," according to a museum press release. "It was this historic tribunal that defined a method for adjudicating acts of genocide and served as a crowning achievement for the American legal system."

The museum is asking members of Virginia's legal community to financially support the project, which has a fundraising goal of five hundred thousand dollars. The exhibit is projected to open in August 2007.

"Students and practitioners of law have a devoted interest in preserving democracy and seeking justice for crimes against humanity," said Jay M. Weinberg, a Richmond lawyer, trustee of the museum and chair of the Nuremberg project.

"The replica of the Nuremberg Trials Courtroom will offer everyone the chance to experience the actual footage of the court proceedings and serve as a constant reminder of the evils of intolerance."

For information on partnerships, contact museum President and Executive Director Jay M. Ipson at (804) 257-5400, ext. 250, or jipson@va-holocaust.com.

Foundation to Mark Oliver Hill's 100th Birthday

A dinner to honor civil rights icon Oliver White Hill's one hundredth birthday will take place Friday, May 4, at 7 pm at the Richmond Marriott. Proceeds will benefit the Oliver White Hill Foundation, which works to preserve his legacy as a key attorney in *Brown v. Board of Education.*

The foundation invites law firms to sponsor tables at the event. For more information and tickets, call Clarence M. Dunnaville Jr. at (804) 648-9200.

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Assessing "Manifest Injustice" in Spousal Support Cases:

Playing the Blame Game

by Brian M. Hirsch

Here's a familiar fact pattern: The parties have a miserable marriage of fifteen years. The husband makes one hundred thousand dollars per year. The wife is a stay-at-home mom. The husband is unhappy and has been difficult to live with. Maybe he suffers from depression. Maybe he is just "emotionally unavailable" due to a bad childhood, or maybe his career is burning him out.

The wife is equally unhappy. Maybe her spouse is not fulfilling her needs. Maybe being a stay-at-home mom is not as satisfying as her former career, or maybe she suffers from depression after being in a loveless marriage. The parties' sex life is long over. The wife has an affair with a neighbor. The husband suspects something is wrong. His suspicions are confirmed by a private investigator.

The wife walks into your office with a Complaint for Divorce alleging adultery. You explain that, according to Virginia Code § 20-107.1, she might be permanently barred from receiving spousal support. She tells you that she has not had a paying job in nine years, and her three children (ages ten, seven and five) still need her at home. She explains that the affair lasted only a few weeks, was the only act of infidelity during her marriage and it ended several months ago. She asks whether there isn't something in the law that would allow her to receive spousal support.

It depends. The exception to adultery as a permanent bar to spousal support was enacted in 1988. The statute allows an award of spousal support in the face of adultery "if the court determines from clear and convincing evidence, that a denial of support and maintenance would constitute a manifest injustice, based upon the respective degrees of fault during the marriage and the relative economic circumstances of the parties." Virginia Code § 20-107.1B, as amended.

There are a few notable features to the statute. First, it raises the standard of proof to "clear and convincing evidence." Clear and convincing evidence has been defined as "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Congdon v. Congdon,* 40 Va. App. 255, 263, 578 S.E.2d 833, ___ (2003) *citing Lanning v. Va. Dept. of Transp.*, 37 Va. App. 701, 707, 561 S.E.2d 33, 36 (2002) (citations omitted).[1]

The test for finding a manifest injustice is in the conjunctive. The court must consider the respective degrees of fault during the marriage and the relative economic circumstances of the parties. *Congdon v. Congdon,* 40 Va. App. 225, 264, 578 S.E.2d 833 (2003).

The best-known manifest injustice case is *Congdon v. Congdon,* 40 Va. App. 225, 578 S.E.2d 833 (2003), which is a classic example of the exception. Mrs. Congdon conceded that she engaged in an extramarital affair for at least five years during the marriage. However, the evidence also showed Mr. Congdon was a coarse individual. He would often engage in conversations in front of his children about "strip joints and topless bars," and talked crudely about sex over the parties' twenty-year marriage. *Id.* at 259. He complained about the wife's weight, appearance, housekeeping and spending habits. He called her a witch. He was a heavy drinker. He controlled family finances, and he once threatened to move out of town if Mrs. Congdon did not stop speaking with her parents. *Id.* at 260.

Mr. Congdon's financial ability was as great as his manners were poor. He had a college degree, a stable position in the family trucking business, an annual salary of $250,000 and income from corporate dividends and family gifts. He had more than six million dollars in assets. Mrs. Congdon earned $10 per hour at the time of the hearing.

There is no question of the enormous disparity in the Congdon's economic circumstances. Thus, all that was left for the trial court to decide was the "respective degrees of fault" provision of Virginia Code §20-107.1B. This would juxtapose Mrs. Congdon's affair with Mr. Congdon's relentless crude behavior. In doing so, the trial court found a manifest injustice and awarded Mrs. Congdon spousal support. The court of appeals, in affirming the trial court, stated:

> The law does not excuse, condone, or justify [Ms. Congdon's] infidelity. But neither does the law turn a blind eye to [Mr. Congdon's] behavior, which multiple witnesses described as both unrestrained and longstanding. *Id* at 266.

Courts have found a manifest injustice in situations where the respective degrees of fault were less disparate than in *Congdon.* In *Barnes v. Barnes,* 16 Va. App. 98, 428 S.E.2d 294 (1993), the wife admitted to a post-separation affair. However, the parties both conceded that their marriage had ended prior to their separation. The trial court granted the husband a divorce on the wife's adultery, but awarded her spousal support under a manifest injustice theory.

The husband appealed, claiming that there were no "respective degrees of fault" since there was no finding of marital fault on his part. The court of appeals disagreed, stating that respective degrees of fault were not limited to legal grounds for the divorce. It also included "all behavior that affected the marital relationship, including any acts or conditions which contributed to the marriage's failure, success, or well-being." *Id.* at 16 Va. 298. The court recalled the wife's testimony that the husband did not spend time alone with her and that he would sometimes make crude remarks toward her. This, coupled with the parties' joint concession that the marriage had essentially ended prior to their separation, satisfied the "relative degrees of fault" element of the test.

It appears inconsistent to find a manifest injustice in *Congdon* (where Mr. Congdon acted so reprehensibly toward his wife), and to also find it in *Barnes* (where the marriage seemed to merely die on the vine). The explanation lies in the differing weight often assigned to pre- and post-separation adultery.[2] *Congdon* involved preseparation adultery, and took some persuasive evidence of Mr. Congdon's fault to overcome this. In *Barnes*, the wife admitted to postseparation adultery, but the trial court concluded that the marriage was irretrievably lost prior to this. This same pre/postseparation adultery analysis was applied in finding a manifest injustice in *Zasler v. Zasler,* 2003 WL 22076354 (Va. App.) (wife committed preseparation adultery, but husband used cocaine, induced wife to use it, and was arrested for assaulting wife with a knife), and in *Porter v. Porter,* 2004 WL 1556000 (Va. App.) (wife awarded spousal support when her adultery occurred fourteen months after separation and husband announced his desire to separate while the parties were still living together).

An interesting aspect of the manifest injustice cases is the interplay between the two elements—disparity in economic circumstances and the respective degrees of fault. The statute does not state whether each prong must be independently satisfied, or if the two factors combined must rise to the level of a manifest injustice. The court of appeals has interpreted the statute so that "a party obtaining spousal support need not prevail independently on *each* prong by clear and convincing evidence." *Porter v. Porter*, 2004 WL 1556000 at 3 (Va.App.). Instead, it is the *totality* of the two factors which the court must weigh in determining the existence of a manifest injustice.[3] This can result in the weight of one element being far greater or less than the other. However, this does not matter so long as the two elements, when taken together, convince the trial court that barring spousal support to an adulterous spouse would constitute a manifest injustice.

Henke v. Henke, 2005 WL 2335378 at 1 (Va. Cir. Ct. 2005) demonstrates that the greater the disparity in economic circumstances the less proof is required of respective degrees of fault. Here, the wife had committed adultery on several occasions. However, the wife was disabled, and receiving only modest Social Security disability payments. The husband earned ninety-three thousand dollars annually. The court, in awarding spousal support to the wife, merely stated that the marriage did not end because of the adultery, but "was doomed soon after the parties' youngest child was born." *Henke v. Henke,* 2005 WL 2335378 at ___ (Va. Cir. Ct.). Had Ms. Henke been gainfully employed, it is less likely that the court would have found a manifest injustice.

Barnes seemed to agree with this when it stated that

> [e]ven though one party may have been the major force in creating the "fault during the marriage" which led to its dissolution and the other spouse may have been relatively blameless,

> those conditions constitute but one of the factors the court must weigh. The court must also weigh and consider the parties' relative economic positions in deciding whether it would be manifestly unjust to deny a spousal support award.

Barnes v. Barnes, 16 Va. App. 98, 102, 428 S.E.2d 294, ___ (1993)

This policy places a greater burden on higher wage earners than lower wage earners to behave better toward their spouses and permits spouses of these higher wage earners to commit adultery and still receive spousal support. Assume the wife earns fifty thousand dollars per year and commits adultery in a long-term marriage. Why should her husband who earns two hundred fifty thousand dollars per year be expected to behave better during the marriage than if he earned seventy-five thousand dollars? The converse is also true. Why should a lower wage earner get to behave worse to his or her adulterous spouse?

The manifest injustice exception states that once a court determines that there is no impediment to awarding spousal support, the adultery becomes irrelevant.[4] Spousal support is awarded as though the adultery did not occur. While fault (both actual grounds and factors and circumstances contributing to the dissolution of the marriage) is a statutory factor in making an equitable distribution award[5], it is not a factor under § 20-107.1 in awarding spousal support.

This makes § 20-107.1 an "all or nothing" statute. Either the court finds a manifest injustice and awards spousal support without giving any weight to the adultery when making the award, or it does not find a manifest injustice, which results in a permanent bar to spousal support. The law does not take this same approach when dividing property. Virginia's equitable distribution statute (*i.e.,* Virginia Code § 20-107.3) allows the court to consider adultery and other attendant bad acts when dividing marital property, and give whatever weight the court deems appropriate. Reconciling these two statutes (*e.g.,* all or nothing for spousal support versus a sliding scale of wrongdoing for property division) is difficult in light of the similarities of factors, which the two statutes require the court to consider.

Both Virginia Code §§ 20-107.1 and 20-107.3 require the court to consider all of the following:

- Duration of the marriage[6]
- Ages, and mental and physical conditions of the parties[7]
- The contributions, monetary and nonmonetary, of each party to the well-being of the family[8]
- Tax consequences to each party[9].

To the extent the two statutes differ, they do so along logical lines. Each party's income—and the extent to which each sacrificed a career—are considerations in the spousal support statute but not the equitable distribution statute. How and when marital property was acquired and the liquid and nonliquid nature of marital property are proper considerations when dividing property but are not when awarding spousal support. Why, then, is fault a consideration when dividing property but not when determining the amount and nature of spousal support (as opposed to deciding whether to award it at all)? It is naive to believe that no court has ever given a lower spousal support award after finding a manifest injustice. How much of a discount is applied by judges who choose to "hold their noses" and grant an adulterous spouse some spousal support instead of declaring a permanent bar to spousal support? Wouldn't courts approach the topic more honestly if they could discount an award of spousal support by some amount due to a party's fault instead of deciding whether to even make such an award? This would also solve the problem of the high wage earner married to the adulterous spouse being held to a higher standard of conduct during the marriage (or the lower wage earner being held to a lower standard).

In determining spousal support, it is more forthright to consider the marriage in terms of the parties' positive monetary and nonmonetary contributions, as well as their negative monetary and nonmonetary contributions. This concept was first applied to equitable division in *O'Loughlin v. O'Loughlin,* 20 Va. App. 522, 458 S.E.2d 323 (1995). In *O'Loughlin,* the court awarded Mr. O'Loughlin a smaller percentage of marital property due to his ongoing and open affair during the marriage, which the court considered a negative nonmonetary contribution. Why should this same rationale not be applied in spousal support cases? There is no compelling rationale to retain the "all or nothing" aspect to adultery as a bar to spousal support. It is more logical to permit a court to consider fault and factors and circumstances contributing to the dissolution of the marriage in determining the amount and nature of a spousal support award.

Until the General Assembly modifies the current spousal support statute, Virginia courts will be placed in the unenviable position of either completely overlooking the adultery or forever barring a spouse from receiving spousal support because of it. Our legislature should consider a middle ground between these two extremes. ⚖

Endnotes:

1 This is a level higher than "preponderance of the evidence" which has been described as something made to appear "more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal, notwithstanding any doubts that may still linger there." *See, Lamar Co. v. Board of Zoning*

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Appeals, 270 Va. 540, 549, fn, 5, 620 S.E.2d 753, ____ (2005), citing *Northern Virginia Power Co. v. Bailey,* 194 Va. 464, 471, 73 S.E.2d 425, ___ (1952).

2 Both preseparation and postseparation adultery create a ground for divorce. *See, eg., Robertson v. Robertson,* 215 Va. 425 (1975), *Surbey v. Surbey*, 5 Va.App. 119 (1987).

3 As the Court stated in *Congdon,* "it is whether clear and convincing evidence of [the parties'] respective degrees of marital fault—coupled with an examination of the economic disparities between them—supports a finding of manifest injustice." *Congdon,* 40 Va. App. At 266, 578 S.E.2d at 838.

4 Virginia Code § 20-107.1E first requires the court to consider *whether* to award spousal support. If there is no impediment to awarding support, then § 20-107.1 requires the court to consider various factors in "determining the nature, amount and duration of an award."

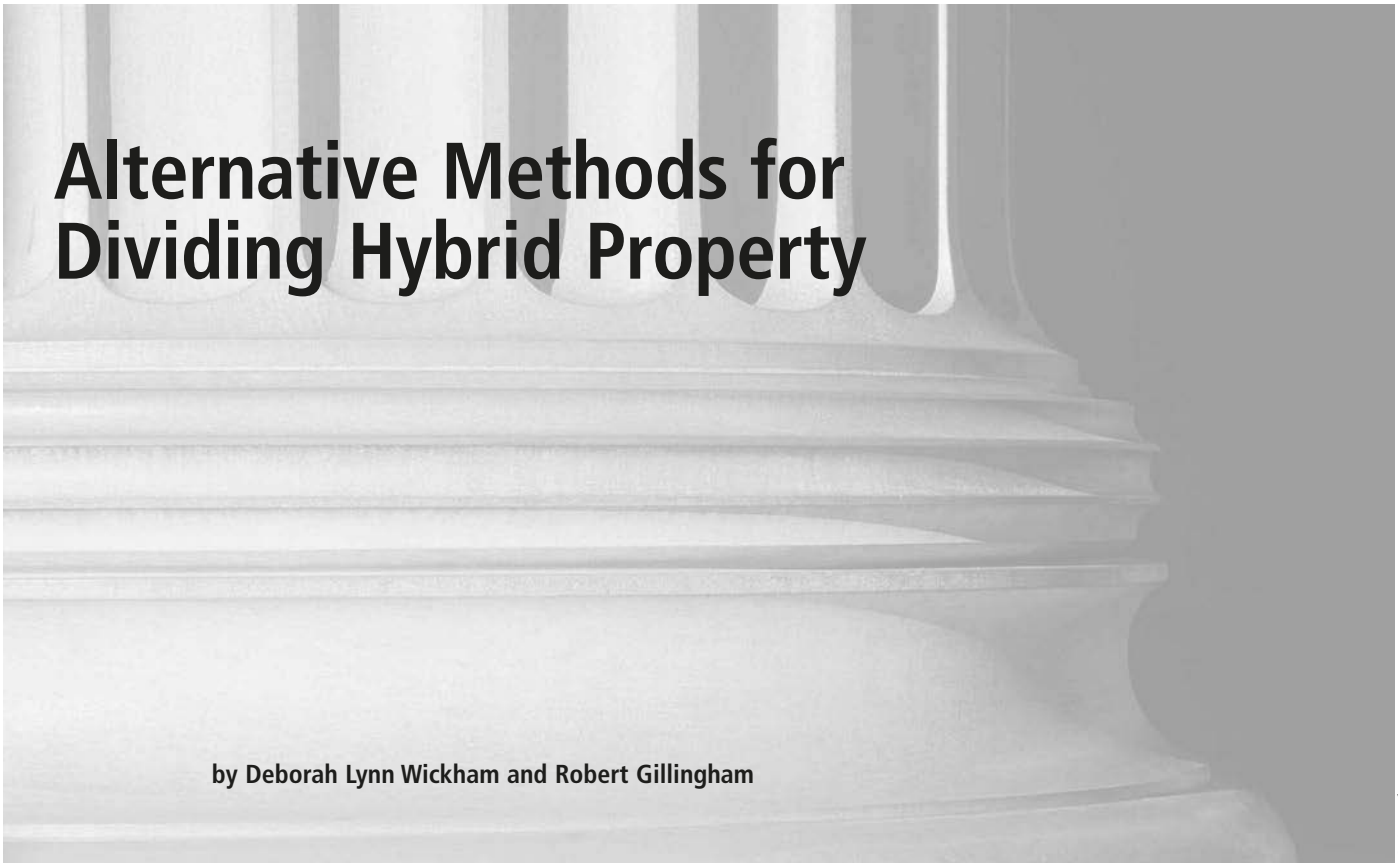
5 *See*, Virginia Code § 20-107.3E(5).

6 *See* Virginia Code § 20-107.1E(3) and 20-107.3E(3).

7 *See* Virginia Code § 20-107.1E(4) and 20-107.3E(4).

8 *See* Virginia Code § 20-107.1E(6) and 20-107.3E(1).

9 *See* Virginia Code § 20-107.1E(13) and 20-107.3E(9).



Alternative Methods for Dividing Hybrid Property

by Deborah Lynn Wickham and Robert Gillingham

The distribution of equity in a hybrid property—where hybrid denotes the use of both marital and separate funds to acquire the asset—is complex and often contentious. Two extant methods for dealing with hybrid property have serious conceptual and practical shortcomings. Since neither yields consistent results and both create incentives to manipulate the financing of hybrid property, we propose a new alternative that corrects these flaws.

Description of the Methods

Brandenburg v. Brandenburg[1]

Although it was never considered the only way to divide equity in a hybrid property, the *Brandenburg* formula has been the predominant choice. This approach calculates the sources of funds for the paid-in investments in the house. (Paid-in investments are the total of the investments—separate and marital—made by the parties in the house.) It uses the shares of these investments attributable to separate and marital sources to divide the equity in the house at the valuation date.

Brandenburg has at least two related flaws. First, it focuses on paid-in investments. It therefore ignores the fact and the amount of the mortgage—a potentially substantial and onerous obligation undertaken by both spouses—as a critical source of funds for the purchase of the property. Second, the division of funds under *Brandenburg* is sensitive to whether the house undergoes a cash-out refinancing or separate funds are used to pay down the mortgage. If either of these occurs, the level of paid-in investments changes and the separate and marital shares of the equity must be adjusted. *Brandenburg* provides little guidance on how this should be done, despite the fact that the implications can be drastic.

Keeling v. Keeling[2]

Instead of focusing only on paid-in investments, *Keeling* centers on the total sources of funds used in purchasing the house—including the mortgage—in calculating the separate share. This share is calculated by multiplying the equity in the house at the valuation date by the ratio of the separate contribution to the original purchase price. In other words, if a person contributed 10 percent of the purchase price from separate funds, that person would be allocated 10 percent of the equity as separate property when the asset is divided, regardless of how the remaining 90 percent of the purchase was financed. *Keeling* is flawed because it uses the share of the purchase price to determine the share of equity. This method may yield a reasonable result under certain facts, but unreasonable results for others.

A New Approach

A fix for *Keeling* allocates separate and marital shares of the total value of the house—rather than the equity in it—at the valuation dates and assigns liability for the mortgage independently. The mort-

gage would be treated as a marital source of funds for purchasing the house. The marital and separate sources of funds would add to the purchase price, and their shares would be used to distribute the value of the house at the valuation date between the parties.

Responsibility for the mortgage would be treated independently as a joint, marital liability. Payments to principal from marital funds or the proceeds from a cash-out refinancing invested in marital property would only affect the magnitude of this marital liability. On the other hand, separate shares in the responsibility for the mortgage would arise if either a pay down of the mortgage came from separate funds or the proceeds of a refinancing were used to augment separate property. However, these transactions would affect only the allocation of the mortgage liability between the parties, not the allocation of the value of the house.

This method is impervious to tactics that could shape the distribution of equity in the event of a divorce. Like *Keeling*, this approach recognizes that responsibility for a mortgage matters in assigning shares in the value of the house. The alternative presented here goes beyond *Keeling* by distributing the liability for the mortgage and the value of the house completely separately. A situation in which a house is financed with a mortgage or an alternative debt instrument will yield the same distribution of total net assets.

Application

The strengths and weaknesses of these three approaches are evident in four cases. The parameters for each of the examples are displayed in Table 1. To simplify exposition, the wife is assumed to be the sole source of separate funds in each of the examples—although the results carry over directly to a case where both spouses make separate contributions—and transaction costs are ignored. The implications for each of the methods under the four cases are summarized in Table 2.

The focus of Table 2 is on the distribution of the capital gain on the house—the profit that accrues during the marriage. This is $300,000 in all cases, because it is simply the 60 percent increase in price from $500,000 at purchase to $800,000 at the valuation date.

Table 1. Alternative Hybrid Property Scenarios

Item	Case 1: Separate down payment	Case 2: Interest only loan	Case 3: Cash-out refinance	Case 4: Post separation pay down
Purchase price	500,000	500,000	500,000	500,000
Down payment	100,000	100,000	100,000	100,000
Wife's separate funds	50,000	50,000	50,000	50,000
Marital funds	50,000	50,000	50,000	50,000
Mortgage loan (original)	400,000	400,000	400,000	400,000
Marital payments to equity	50,000	-	(50,000)	50,000
Post-separation pay down (wife)	-	-	-	50,000
Mortgage balance at valuation date	350,000	400,000	450,000	300,000
Paid-in investments	150,000	100,000	50,000	200,000
Wife	100,000	75,000	50,000	150,000
Husband	50,000	25,000	-	50,000
House price at valuation date	800,000	800,000	800,000	800,000
Equity at valuation date	450,000	400,000	350,000	500,000

Table 2. Outcomes Under Alternative Hybrid Property Scenarios

Item	Case 1: Separate down payment	Case 2: Interest only loan	Case 3: Cash-out refinance	Case 4: Post separation pay down
House price at valuation date	800,000	800,000	800,000	800,000
Mortgage balance at valuation date	350,000	400,000	450,000	300,000
Equity at valuation date	450,000	400,000	350,000	500,000
Wife's separate paid-in investments				
Pre-separation	50,000	50,000	50,000	50,000
Post-separation	-	-	-	50,000
Marital paid-in investments	100,000	50,000	-	100,000
Profit on house	300,000	300,000	300,000	300,000
Brandenburg				
Wife's separate share of equity	150,000	200,000	350,000	250,000
Marital share of equity	300,000	200,000	-	250,000
Wife's profit on house	200,000	225,000	300,000	225,000
Husband's profit on house	100,000	75,000	-	75,000
Keeling				
Wife's separate share of equity	45,000	40,000	35,000	100,000
Marital share of equity	405,000	360,000	315,000	400,000
Wife's profit on house	147,500	145,000	142,500	150,000
Husband's profit on house	152,500	155,000	157,500	150,000
New approach				
Wife's separate share of house value	80,000	80,000	80,000	80,000
Marital share of house value	720,000	720,000	720,000	720,000
Wife's separate share of mortgage	-	-	-	(50,000)
Marital share of mortgage	350,000	400,000	450,000	350,000
Wife's profit on house	165,000	165,000	165,000	165,000
Husband's profit on house	135,000	135,000	135,000	135,000

Case 1: Separate Down Payment by Wife and Normal Amortization

This case serves as the reference case, not only to compare the three methods, but also to gauge the effect of alternative sce-

narios on the distribution of equity. In this case, the couple purchases a $500,000 house. The wife contributes $50,000 from separate funds to the down payment to augment $50,000 of marital funds. Finally, the couple uses $50,000 of marital funds to amortize the mortgage during the marriage. In *Brandenburg*, the distribution is based solely on the shares of equity supplied. Consequently, the wife receives two-thirds of the equity in the house. *Keeling*, on the other hand, limits the wife's separate share to 10 percent (calculated as the ratio of her $50,000 down payment to the purchase price of $500,000) of the equity, thereby reducing her share of equity distribution to only 55 percent.

An alternative method distributes the sources of funds for the purchase of the house in the same manner as *Keeling*, but allows the value of the separate source of funds to grow with the value of the house. The 10 percent separate contribution to the purchase is allocated 10 percent of the value of the house ($800,000), rather than 10 percent of the equity ($450,000). At the same time, it assigns liability for the mortgage ($350,000) independently. The mortgage is entirely a marital debt, and each spouse is assigned 50 percent of this debt. Finally, the mortgage liabilities are subtracted from the shares of the value of the house to determine the distribution of equity. Allowing the value of the separate contribution to grow with the value of the house increases the share allocated to the separate contribution relative to *Keeling*. Under this approach, the wife receives 58.9 percent of the equity, rather than 55 percent.

Case 2: Interest-Only Loan

This case shows the effect on distribution when no marital funds are used to pay down the mortgage. With an interest-only loan, the marital contribution is only $50,000 (the down payment) and each spouse saves $25,000 in mortgage amortization relative to the previous example. Under *Brandenburg*, the wife's separate share would be increased—concentrated—relative to Case 1, since no marital funds were used to amortize the mortgage. She would receive three quarters of the equity rather than two thirds, as in Case 1. Consequently, even though the equity is only $400,000, rather than $450,000, she would still receive the same $300,000 as her share. Since her share of the marital contribution to equity would be reduced by $25,000, her profit on the house would be increased relative to Case 1 by $25,000. The husband would receive $50,000 less in distribution from the house, but would also save $25,000 in amortization costs, leaving him $25,000 worse off.

On the other hand, the situation relative to Case 1 is reversed under *Keeling*. The wife's separate share of the equity is based on the ratio of her separate down payment to the purchase price of the house, which has not changed. Consequently, she receives $27,500 less as her share of equity (55 percent of the $50,000 reduction in equity due to no amortization) and the husband receives only $22,500 less (45 percent of the $50,000 reduction in equity). After allowing for the benefits of no amortization, the wife is $2,500 worse off and the husband is $2,500 better off.

Only under the alternative method is the distribution of total assets unaffected by the choice of an interest-only loan. The only thing that changes in this method is the amount of mortgage debt distributed between the husband and wife. The increase of $25,000 in mortgage liability for each spouse exactly offsets the $25,000 in reduced amortization that each enjoyed. Opting for the interest only loan has no effect on the spouses, as it arguably should not. The new method eliminates incentives for choosing an interest-only loan.

Case 3: Cash-Out Refinance

The appropriate treatment of a cash-out refinancing is not obvious in either *Brandenburg* or *Keeling*. In *Keeling*, the husband argued that the cash obtained in the refinance should be deducted solely from the marital source of funds for the purchase of the house. Of course, the appropriate treatment would depend on how the cash obtained was used—for instance, whether it went into a joint savings account or was used to increase the separate holdings of one of the spouses. Moreover, the treatment of a cash-out refinancing under either *Brandenburg* or *Keeling* becomes especially problematic if the amount of cash obtained results in a negative marital share.

In the hypothetical case considered here, the mortgage is increased from $400,000 at the time of purchase to $450,000 at the time of the distribution of assets. Subtracting the increase in the mortgage from the original marital contribution to the down payment reduces the marital contribution to equity to zero. Under *Brandenburg*, the wife's separate contribution now represents 100 percent of the equity investment, so the wife receives 100 percent of the equity in the house in the division of assets. Her profit on the house increases by $100,000 relative to Case 1. The husband, on the other hand, is $100,000 worse off.

As with the interest-only loan, the cash-out refinancing has the opposite effect on the distribution under *Keeling*. Relative to Case 1, the wife's equity share is $55,000 less (55 percent of the $100,000 reduction in equity). She does save $50,000 on her share of the marital contribution to equity, but her profit on the house is reduced by $5,000 and the husband's profit is increased by $5,000. Again, only with the alternative distribution method is the distribution of total assets unaffected by the choice of a cash-out refinancing. The increase in each spouse's mortgage debt is exactly offset by the reduction in the marital contribution to equity—that is, both spouses obtain $50,000 less in equity from the house than they do in Case 1, but both also pay in $50,000 in equity.

Case 4: Post-Separation Paydown of the Mortgage

If separate funds are used, postseparation pay down of the mortgage can be a tactic for increasing the shares of the distribution for the spouse paying down the mortgage. Case 4 differs from Case 1 by adding a postseparation pay down of $50,000 from the wife's separate assets. This has a slightly different effect on the total distribution, in that the wife gains under both *Brandenburg* and *Keeling*. Under *Brandenburg*, the pay down increases the wife's separate contribution

to equity from $50,000 to $100,000, and her share of the distribution of equity from $300,000 (two thirds of $450,000) to $375,000 (75 percent of $500,000). This increase in her equity share is more than enough to offset the cost of paying down the mortgage, increasing her profit on the house by $25,000.

The wife's position is also improved under *Keeling* because, unlike in Cases 2 and 3, her separate contribution to the purchase of the house is increased (the $50,000 pay down of the mortgage is added to her $50,000 separate down payment). Consequently, she would now receive 20 percent of the equity as her separate share. Once more, the new approach eliminates the incentives to manipulate the financing of the house in anticipation of a property settlement. In this approach, the postseparation pay down reduces the wife's share of the mortgage liability, but does not increase her separate share of the equity. Relative to Case 1, her share of the mortgage liability would be reduced from $175,000 to $125,000, and this reduction is exactly offset by the cost of the pay down.

Additional Complications

At least three issues further complicate the distribution of equity from a hybrid property.

- **Negative marital contribution.** Under *Brandenburg*, the possibility exists for a negative marital contribution. This results from a cash-out refinancing that increases the mortgage to a level higher than the original purchase price. Only the new approach deals with this possibility without ad hoc adjustment.

- **Transactions costs.** The appropriate treatment of transactions costs is not clear. The judge in *Keeling* gave the husband credit for transactions costs in calculating the share of the purchase price financed with separate funds. A simpler approach would be to treat transactions costs as current outlays, rather than equity transactions, and ignore them in the division of the property.

- **One spouse on title or mortgage.** If only one of the spouses is listed on the title or mortgage, it would be necessary to examine the degree to which the other spouse still contributed to the purchase and was responsible for the mortgage. The same tracing of funds can establish who provided the equity financing for the house. To allocate the house value and the mortgage however, it would be necessary to assign responsibility for the mortgage. If only spouse is listed on the mortgage, but marital funds are used for the amortization and default on the mortgage would have significant implications for the finances of the unlisted spouse, an argument could be made that the mortgage is a marital liability. On the other hand, if only one spouse is on the mortgage and all payments to equity are made from that spouse's separate funds, an argument could be made that the house is separate property, even if both names are on the title.

Summary

The three approaches to dividing the equity of a house in the event of a divorce follow a logical progression, from the seriously flawed *Brandenburg* to a much-improved—at least conceptually—*Keeling* to a new approach that adopts the basic concept in *Keeling* but avoids its anomaly:

- *Brandenburg* focuses on two measures of equity. The sources of paid-in equity are used to allocate the shares of equity at the valuation date. The value of the house and mortgage financing or refinancing are all ignored as irrelevant, except as they affect the two measures of equity, but decisions on how to finance and refinance will have important and arbitrary effects on the *Brandenburg* shares.

- *Keeling* identifies the fatal flaw in this approach by drawing out the implications of ignoring the role of the mortgage as a source of financing and a marital debt. Although it uses the full purchase price of the house to identify separate and marital shares, avoiding the critical flaw in *Brandenburg*, it applies these shares to the equity at the valuation date in an arbitrary and unfair manner. The problem stems from the fact that—like *Brandenburg*—it operates directly on the equity at the valuation date in dividing the property.

- The new approach solves this problem by focusing entirely on the price of the house at the time of purchase and the price of the house at the valuation date to allocate separate and marital shares in the asset. The focus on the purchase price of the house recognizes the fact that the mortgage is a key source of financing for which the married couple accepts joint responsibility and for which they should receive credit in calculating separate and marital shares of the asset. The application of these shares to the price of the house at the valuation date recognizes that the mortgage at the time of valuation is best treated independently as a marital or hybrid debt. The equity at time of valuation is thus addressed implicitly, as a byproduct of separately allocating the asset—the value of the house—and debt—the mortgage. In so doing, it abstracts from any unintended consequences of the decision on how to finance the house or whether to refi-

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nance it. These decisions affect only the allocation of the debt, not the allocation of the marital asset.

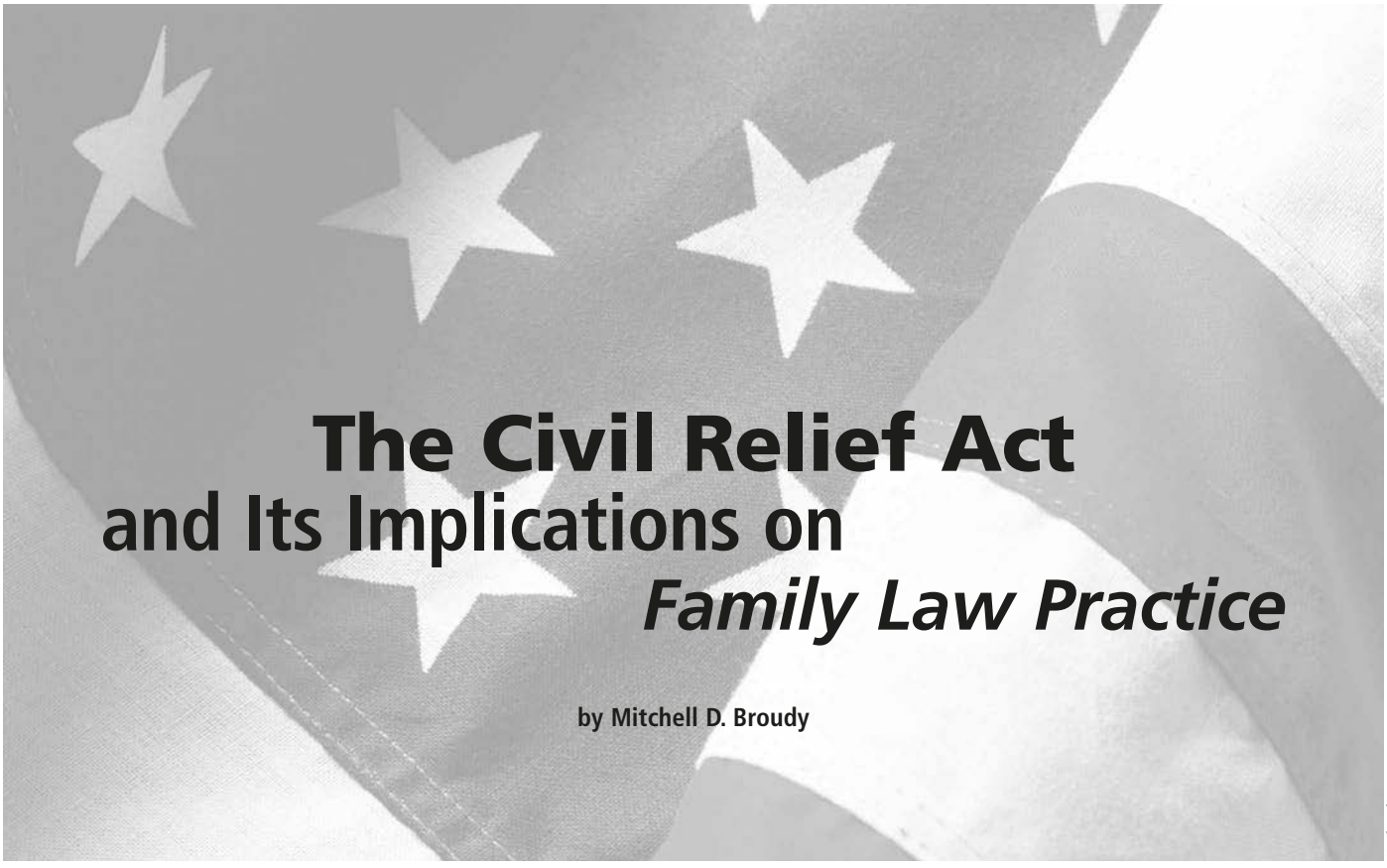
- The new approach distributes the capital gain on the house in the hybrid property in a manner that exactly offsets the effect of alternative financing choices, including an interest-only loan, a cash-out refinancing or a postseparation pay down of the mortgage from separate funds. The approach is incentive-compatible, since it eliminates any gain that one spouse can obtain at the cost of the other. The two parties receive the same profit under the new approach regardless of the financing arrangement. Because she invests $50,000 more at the time of purchase, in each case she receives $30,000 more in profit, the same 60 percent return that the house itself earns. It is interesting that the distribution the profits that have accrued in the house yielded by the new approach is bracketed by those under *Brandenburg* and *Keeling*, indicating that these two alternatives tilt too much toward one spouse or the other.[3] ⚖

Endnotes:

1 617 S.W.2d 871 (Ky. Ct. App. 1981).

2 47 Va. App. 484; 624 S.E.2d 687 (January 24, 2006).

3 The cases considered in this note are all examples of the commingling of marital and separate assets. The approach will also appropriately treat cases in which a separate interest is created when one spouse independently augments the value of the house (for instance, by using an inheritance to finance an addition to the house), in all cases properly adjusting the value of separate and marital interests for the time at which they were made. These issues, as well as suggestions for how Brandenburg might be modified to address them, are discussed in a longer version of this paper available on request from the authors.



The Civil Relief Act and Its Implications on *Family Law Practice*

by Mitchell D. Broudy

With the war on terror and the wars in Iraq and Afghanistan, family law practitioners likely will have a client or an opposing party called to military duty. Familiarity with the Servicemembers Civil Relief Act (SCRA) becomes a necessity, for the act significantly impacts civil procedure in juvenile and circuit courts. The SCRA affects litigation relating to divorce, child custody and visitation, and support where servicemembers[1] are involved. The breadth of the act expands beyond civil court procedures and now applies to administrative hearing procedures, such as a social services civil finding of abuse and neglect, or an administrative support order.[2] This article provides a brief overview of the SCRA from a family law perspective.

Among other remedial relief, the SCRA contains civil procedure statutes that relate to the entry of temporary[3] and final default judgments against servicemembers, continuance "stay" requests by servicemembers, the tolling of time periods against servicemembers[4], and the staying of the execution of judgments on behalf of servicemembers[5]. This article addresses procedures that relate to default judgments and continuance requests.

The SCRA, the predecessor of the Soldiers' and Sailors' Civil Relief Act (SSCRA), was enacted on December 19, 2003. The reason for the revision is stated in legislative history:

> With hundreds of thousands of servicemembers fighting in the war on terrorism and the war in Iraq, many of them mobilized from the reserve components, the [House Committee on Veterans Affairs] Committee believes the Soldiers' and Sailors' Civil Relief Act should be restated and strengthened to ensure that its protections meet their needs in the 21st century.[6]

The new SCRA is easier to comprehend than the SSCRA, many portions of which were drafted with the advent of World War I. Additionally, a considerable amount of SSCRA case law had developed and Congress wanted to clarify the SSCRA by incorporating and codifying many of these rulings. The act was strengthened in several respects: the SCRA now applies to the National Guard called for active duty, to administrative "civil" proceedings and to *pendente lite* relief.

Why should a juvenile court judge or an administrative hearing officer be bound to this federal act when these civil procedure concerns are typically delegated to the state? The answer is threefold. First, the SCRA expressly mandates that it applies to all state courts and agencies.[7] Second, the U.S. Supreme Court affirmed that the legislation was an exercise of "necessary and proper" supplementary power of the federal government that derives from the constitutional delegation of authority to maintain the national defense.[8] Third, Virginia law embraces the SCRA. Virginia Code § 44-102.1 (2003) extends the coverage of the act to apply to National Guard members who receive orders from the

governor for thirty or more consecutive days. Virginia Code § 8.01-428 (a) (2005) establishes a Virginia procedural mechanism to set aside default judgments that do not comport to SCRA standards. Virginia Code § 8.01-15.2 (2005) restates the requirement of 50 App. USC § 521 directing the petitioner to file a sworn affidavit as to respondent's military status prior to entry of a default judgment. Finally, Virginia Code § 44.97.1 (1990) expands the procedural safeguards for servicemembers and for litigants whose attorneys have been called to active duty. This statute authorizes, upon a proper request, a three-week continuance, and it authorizes an extended time to file pleadings.

Default Judgments—50 U.S.C. app. § 521 (2003):

This section applies to final judgments, interim orders and administrative orders. Before the entering of any default judgment, the plaintiff must file a sworn affidavit indicating that the defendant is or is not in the military or that the military status of the party cannot be determined. The Department of Defense has made this an easy process by providing a public Web site—**https://www.dmdc.osd.mil/scra/owa/home**—to determine a person's military status. The site provides the user with a printable certificate that indicates military status. Under 50 U.S.C. app. § 582 (2003), the certificate is prima facie evidence as to the military status and thus can be the underlying basis for the sworn affidavit.

If the defendant is in the military, the court is required to appoint an attorney to represent his interest prior to entering a judgment.[9] In addition, the court *sua sponte* or—upon request of the court-appointed counsel—is mandated to "stay" or continue the proceeding for a minimum of ninety days, if there may be a defense to the action which requires the defendant's appearance, or if, after due diligence, appointed counsel has been unable to contact the servicemember or otherwise determine if a meritorious defense exists.[10]

If a default judgment is entered in contravention to this statute, the servicemember[11] has recourse to set aside the judgment no later than ninety days from his or her termination date from the military.[12] To obtain the relief, the servicemember must show that she had at least a legal defense to the action (or some part of it) and that she was materially affected by reason of her military service in making such a defense. For example, if a default *pendente lite* order granted the nonservicemember with custody of the child, possession of the house and an obligation of support in contravention of the SCRA, the servicemember would have an opportunity under this provision as well as under Va. Code § 8.01-428 (a) (2005) to set aside the temporary order. To avoid needless expense of an appointed attorney in an uncontested matter, the family practitioner may include a written SCRA waiver in the parties' stipulation agreement.[13]

Continuances "stay of proceedings"—50 U.S.C. app. § 522 (2004).

Over the years, this section has been the most controversial. The concept that the SCRA should not be used as a sword but only as a shield was developed through litigating the former "stay" section under the SSCRA. The basic requirements of this section places two evidentiary burdens on the servicemember, whether plaintiff or defendant: He must communicate to the court the facts establishing why his current military duty requirements materially affect his ability to appear, and he must provide the court with alternate dates. He also must provide to the court a letter from his commanding officer that military duties prevent his appearance and that military leave is not authorized. The court then is obliged to continue the matter for no fewer than ninety days. If he fails to meet these two burdens, the court may proceed with the hearing.[14] The servicemember may request additional stays, but he must meet the same burdens as in his initial request. Also, the granting of second and subsequent requests for a continuance is discretionary with the court. The litmus test for determining second or subsequent stay is not expressly espoused. If the court denies the second stay, the court must appoint an attorney to represent the servicemember in the action before entering judgment.[15]

Understanding the legal theory of shield and sword is essential to litigating "stay" requests. Its origins began with a 1943 U.S. Supreme Court decision, *Boone v. Lightner*, in which the court upheld a North Carolina court's ruling that the servicemember was not entitled to a stay because he was deliberately and willfully attempting to evade an ultimate determination of issues involved by exercising his rights under the SSCRA.[16] In interpreting *Boone*, the Supreme Court of Virginia noted that military service should not be used as a mere excuse, but as the cause in fact for the servicemember's absence.[17] In *Lutes v. Alexander*, the Virginia Court of Appeals, in upholding the trial court's denial of a stay, held that the SSCRA is to be used as a "shield" and not as a "sword"—the servicemember cannot take "refuge" behind the act so as the act is "put to [an] unworthy use."[18] The line of cases that deal with this issue involve servicemembers not advising noncustodial parents of their "military family care plan," in which the servicemembers set forth a plan for the children to reside with someone other than the noncustodial parent while they are deployed. By the time noncustodial parents discover the physical change in custody, their efforts in court are thwarted by the servicemember's request for "stay" under the SCRA.[19] Although there is no case law on point, arguably the SCRA contains a statute that expressly prohibits such an inappropriate use of the act.[20]

When possible, counsel should anticipate and address issues that can arise from being called to active duty or being deployed. For example, in *Lackey v. Lackey*[21], the custodial parent obtained court approval prior to temporarily placing the parties' son with his parents while being deployed. Consider requiring the court or the parties to agree on the "military family care plan," or at least give notice of any significant changes in the plan, which may affect the parties' children. If a substantial financial change may occur as a result of military duty, create a self-executing support modification in accordance with Va. Code § 20-109.1 (2003). ⚖

Endnotes continued on following page.

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Endnotes:

1 "Servicemember" is an inclusive term referring to all members of the uniformed services, including the reserve components and National Guards called to active duty for more than thirty days, coast guard, commissioned officers of the Public Health Service or the National Oceanic and Atmospheric Administration. See 50 U.S.C. app. § 511 (2004)

2 50 U.S.C. app. § 512 (2003)

3 The SCRA now defines judgment as both temporary and final orders. 50 U.S.C. app. § 511(9) (2004)

4 50 U.S.C. app. § 526 (2003)

5 50 U.S.C. app. § 524 (2003)

6 108 H. Rpt. 81

7 50 U.S.C. app. § 511(5) (2004)

8 *Dameron v. Brodhead*, 345 U.S. 322, 325 (1953).

9 50 U.S.C. app. § 521(b) (2) (2003)—the court-appointed attorney is unable to waive any defenses of the servicemember if the attorney is unable to locate him.

10 50 U.S.C. app. § 521(d) (2003)

11 Civilians do not have any recourse under this statute against default judgments, even if the plaintiff failed to file an affidavit with the court.

12 50 U.S.C. app. § 521(g) (2003)

13 50 U.S.C. app. § 517 (2004)

14 The defendant is barred from seeking recourse under default judgment section of the SCRA. 50 U.S.C. app. § 522(e) (2004). See *King v. Irvin*, 614 S.E.2d 190 (Ga. App. 2005)

15 50 U.S.C. app. § 522(d) (2) (2004)

16 *Boone v. Lightner*, 319 U.S. 561, 571 (1943).

17 *Lackey v. Lackey*, 222 Va. 49, 278 S.E. 2d 811 (1981).

18 *Lutes v. Alexander*, 14 Va. App, 1075, 1085, 421 S.E. 2d 857 (1992)

19 See *Ex Parte K.N.L.*, 872 So. 2d 868, 872 (Ala. App. 2003), the Alabama appeals court upheld the juvenile court's denial of stay noting that "the juvenile court would have been well within its discretion in determining that the mother had intentionally delayed the custody proceedings and had used her active-duty orders in an eleventh-hour attempt to effect a long-term denial of the father's rights to visitation and custody."; *In re the Marriage of Grantham*, 698 N.W.2d 140 (Iowa 2005), the Supreme Court of Iowa upheld the denial of stay finding in part because of the fact they concealed from the mother the family service plan for the child to live with the paternal grandmother until it was too late for the mother to seek judicial relief before the father was called to active duty. The court noted that the purpose of the act is as a shield of a defense and not as sword for attack or as an instrument for the oppression of opposing parties. *Id* at 145.

20 50 U.S.C. app. § 581 (2003) entitled, *In Appropriate Use of Act.*

21 *Lackey v. Lackey*, 222 Va. 49, 278 S.E.2d 811 (1981).

Family Drug Treatment Courts:

A Place for Judicial Activism?

by the Honorable Angela Edwards Roberts

Socrates asserted four traits belonging to a judge: to hear courteously, to answer wisely, to consider soberly and to decide impartially.[1] The tug-of-war between judicial restraint and judicial activism was probably not part of Socrates's thinking, but has become a political concern over recent decades. In the midst of hot-button politics, however, family court judges nationwide have been responding to the nature and number of cases overwhelming their dockets. Chief Justice Judith S. Kaye of New York described in *Newsweek* exploding caseloads fueled by drug abuse, domestic violence and family dysfunction: "The flood of cases (into the courts) shows no sign of letting up. We can either bail faster or look for new ways to stem the tide."[2] Chief Justice Leah Ward Sears of Georgia wrote about it in the *Washington Post*: "Fragmented families are flooding our court dockets.... For judges they represent a difficult workload.... For children, they are a tragedy."[3]

This onslaught of family dysfunction has dramatically changed the role of the family court judge, and, more than ever, Socrates's observation must be heeded. Like our colleagues in other states, Virginia's Juvenile and Domestic Relations District Court (J&DR) judges are responding to this deluge by assuming judicial roles and trying approaches that may appear unorthodox, even activist, in nature. One of these is the family drug treatment court (FDTC).

The objective of this article is to inform lawyers and judges about these new courts and to encourage judges to be involved in this innovation. This article asserts that family drug treatment courts allow for collaborative intervention without breach of judicial ethics when a team of professionals, led by the J&DR court judge, works collaboratively to help families effectively deal with substance abuse.

Further Identifying the Problem

With the passage of the federal Adoption and Safe Families Act of 1997 (ASFA) (Public Law 105-89), Congress mandated that children in the foster care system have a permanent placement within twelve months of entering the system.[4] For parents who were substance abusers, this presented a particular challenge. Assuming they wanted addiction treatment, waiting lists were long, court dockets were crowded, and the likelihood of relapse could easily place them outside the twelve-month time frame. Could a law whose intent was to place children in loving, permanent homes rather than allowing them to languish in the foster care

system for years have the unintended effect of separating families that might reasonably be reunited?

Fearing this reality and searching for a solution to the problem, child welfare proponents borrowed principles from adult drug courts started in 1989, and applied the principles to create FDTCs.
These courts are a juvenile or family court docket of which selected abuse, neglect, and dependency cases are identified where parental substance abuse is a primary factor. Judges, attorneys, child protection services, and treatment and other social and public health personnel unite with the goal of providing safe, nurturing, and permanent homes for children while simultaneously providing parents the necessary support and services to become drug and alcohol abstinent.[5]

These courts are civil in nature and have a sense of urgency to rehabilitate participants within the mandated time frame. The ultimate sanction for failure is not incarceration as in adult drug court, but loss of parental rights. Because alcohol and drug abuse have been identified as the cause of seven out of ten child abuse and neglect cases, the need for these courts is critical.[6]

In 2004, the Conference of Chief Justices and the Conference of State Court Administrators adopted a national joint resolution committing all fifty state chief justices and state court administrators to "take steps, nationally and locally, to expand and better integrate the principles and methods of well-functioning drug courts into ongoing court operations."[7]

Family Drug Treatment Courts in Virginia

Virginia established its first drug treatment court in 1995 as a result of the judiciary's efforts to find more effective methods to handle the escalating number of drug offenders on Virginia's court dockets. This reflected the philosophy that more effective handling of drug treatment for addicts would result in higher recovery rates and reduced criminal behavior.[8] Initially starting with one adult drug treatment court, today the number of operational drug treatment court programs in the state has grown to twenty-nine. There are sixteen adult felony courts, one adult driving-under-the-influence drug treatment court, eight juvenile drug treatment courts and four family drug treatment courts. These four FDTCs are currently making a difference in Alexandria, Charlottesville/Albemarle County, Newport News and Richmond.

Virginia has strong judicial, legislative and executive support for the continuation and expansion of drug treatment courts. Because these programs represent the most successful and cost-effective approach to dealing with drug-addicted offenders. advocates continue to seek permanent and stable sources of funding.[9] Chief Justice Leroy R. Hassell Sr. commented in his address to the Virginia Drug Court Association, September 30, 2005:

> As I review the preliminary data, as I receive letters from graduates of drug courts, as I interact with participants in drug court programs and listen to their life stories, as I see families reunited, marriages restored, and jobless, unproductive people who were once, through their own fault albeit, existing in a cycle of despair, as I observe these people being transformed into productive, taxpaying citizens, I conclude that, yes, drug courts work. I conclude that, yes, drug courts are needed.[10]

Indeed, this thinking is consistent with that of Thomas Jefferson, who stated, "The care of human life and happiness, and not their destruction, is the first and only legitimate object of good government."[11] If alcoholism and drug addiction are accepted as treatable and preventable diseases, states should address them through a public health strategy with the goal of long-term recovery.[12]

How Family Drug Treatment Courts Operate

Common practices and key components adopted by the National Association of Drug Court Professionals are essential to every drug court.[13] (See sidebar.) These include requiring early case screening and assessment; prompt referral and access to a continuum of treatment and rehabilitation services; a coordinated strategy to govern responses to participants' compliance; partnerships with public agencies, treatment providers, attorneys, community-based organizations and others; and regular and active judicial supervision.[14]

FDTCs normally use a team approach to handle cases. Judge, attorney, social worker, substance abuse/mental health worker, court appointed special advocates and others are all a part of the team of professionals that provide support needed to deal with addiction. The court convenes on a weekly basis. The team of professionals keeps participants accountable by ordering various evaluations, urine screens, Alcoholics Anonymous or Narcotics Anonymous meetings, job searches or whatever else the court may

Defining Drug Courts:
The Key Components

1. Drug courts integrate alcohol and other drug treatment services with justice system case processing.
2. Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants' due process rights.
3. Eligible participants are identified early and promptly placed in the drug court program.
4. Drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services.
5. Abstinence is monitored by frequent alcohol and other drug testing.
6. A coordinated strategy governs drug court responses to participants' compliance.
7. Ongoing judicial interaction with each drug court participant is essential.
8. Monitoring and evaluation measure the achievement of program goals and gauge effectiveness.
9. Continuing interdisciplinary education promotes effective drug court planning, implementation, and operations.
10. Forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court program effectiveness.

(NADCP, 1997).

deem appropriate. Inpatient services and detoxification programs are often absolutely necessary.

In some cases, children of recovering parents are removed from their homes. In other cases, children are able to remain with a parent or guardian. As long as a participant is in the FDTC, he or she gets credit for working toward reunification, with the incentive being a desire to not lose custody of his or her children. Therefore, the time period may extend beyond the twelve-month ASFA-mandated period. The key is to provide community resources along with the accountability the law requires.

If a community determines that family drug treatment court would be a welcomed alternative to traditional procedures but the number of participants who would take advantage of such an opportunity is small, a regular J&DR docket could feasibly handle the cases with an intensive team approach. Clearly though, larger numbers of waiting participants who could encourage judges and family law practitioners to check into starting one in their community. For further information on Virginia drug treatment courts, please visit **www.courts.state.va.us/dtc/home.html**.

Judicial Ethics

The key to the success of any drug court rests on the professional role of the judge as leader in the drug court process. The role of the judge changes from the traditional passive one to a more active one. "No longer are courts and judges uniformly shying away from these issues because they may entail 'social work.' Instead many judges are becoming knowledgeable about substance abuse causes, symptoms, behaviors and treatments, as well as issues relating to recovery, relapse, and family dysfunctions."[15] As drug courts are becoming more accepted in the legal community, the issue of the proper ethical role of judges in the process continues to be debated. "In all judicial proceedings, the judge bears the ultimate responsibility for ensuring that the parties receive a fair hearing in a dignified forum."[16] Each of Judicial Canons 1 through 5 raises unique ethical concerns for the drug court judge. I will only focus on four of the most common.

As noted previously, a coordinated strategy governs court responses to compliance. This strategy used by all drug courts involves "staffing," in which members of the drug court team meet in advance of the participant's hearing to discuss the participant's progress in treatment and to reach consensus about rewards and sanctions. As a judge becomes part of this collaborative decision-making team that includes treatment providers, court personnel and attorneys, the judge's involvement may appear to undermine perceptions of judicial independence and impartiality. Canon 1(A) states:

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved.[17]

It is submitted that the collaborative decision-making process, however, does not violate the judge's duty of independent judgment so long as the final decisions remain with the judge. The judge may not delegate this final decision making to other members of the drug court team.[18]

All drug courts require the judge's personal engagement with each participant throughout the drug court experience. This dynamic is crucial to the successful completion of treatment and other program requirements. The ethical concern here is that of avoiding the appearance of impropriety. The judge's personal engagement must not conflict with the judge's position as a detached arbiter who is blind to the parties before the court.[19] Canon 2(A) states:

> A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.[20]

The Code requires impartiality, not disengagement. A judge can show concern about a participant's progress in recovery, yet can also extend the same quality of engagement and concern to all participants to avoid the appearance of impropriety.[21] If the judge maintains an active, supervising relationship throughout treatment, the likelihood increases that a participant will remain in treatment and improve the chances for reaching sobriety and family reunification.

All drug courts should forge partnerships among drug courts, public agencies and community-based organizations to generate local support and enhance drug court program effectiveness. Ethical concerns are raised when the independence or impartiality of the judiciary comes into question. As long as the focus of collaborative work in this area is to educate about drug court practices and procedures, there should be no ethical problems. Caution should be taken when partnering with law enforcement so as to not appear to be acting as an instrument of law enforcement. Where court-community partnerships cooperate in the exchange of information, ethical concerns should be minimal or nonexistent. Community organizations that educate the court about available resources merely serve to aid the court's disposition of cases. Partnerships should never include discussion of specific cases that are pending in the court, nor should they cast any doubt on the judge's capacity to act impartially.[22]

Finally, certain concerns about impartiality and dignity may arise from a judge's conduct both inside and outside of the courtroom in drug courts. Praising, hugging and clapping for participants are inconsistent with normal courtroom behavior, but quite common in drug courts. Likewise, judges attending social gatherings (like a picnic) with parties before the court is not customary, but is common in drug courts. Canon 3(B) states:

> A judge shall require order and decorum in proceedings before the judge.[23]

Realizing that a drug court's goal is to actively promote the successful treatment of participants rather than to mediate a dispute between two litigants, a judge may participate in these activities to promote the objectives of the drug court. The judge must, however, remain impartial and dignified and treat all participants equally; not discuss or transact business with participants outside of the courtroom; keep outside gatherings open to all participants; and never be alone with a single participant.[24]

The Benefits of Family Drug Treatment Courts

Family drug treatment courts have been shown to benefit families, courts and the community. They shorten a child's time in foster care by identifying substance abuse issues early and starting treatment. Also, because of the individualized case plan and the drug court team's close monitoring, the participant is more likely to succeed. If the participant fails the program, there is usually no question that reasonable efforts to rehabilitate have been provided and the case can move toward permanency. Because the time in foster care is shortened, communities save money. Family drug courts can serve as an effective preventive intervention for addicted parents by preventing babies from being born to a substance-abusing mother.[25]

Socrates's wisdom is alive in Virginia's FDTCs as the J&DR judge utilizes a team of community-based professionals to hear courteously, answer wisely, consider soberly, and decide impartially in an area of life and law where solutions are very difficult to harness. Rather than being a model of judicial restraint, family drug courts represent judicial activism to confront the onslaught of family dysfunction brought on by drug abuse. Virginia's J&DR judges are responding to the nature and number of cases overwhelming family court dockets, and the family drug treatment courts are making a difference in the lives of Virginia's children and their families. ⚖

Endnotes:

1 Quoted in Wright, *Courtroom Decorum and the Trial Process*, 51 JUDICATURE 378, 382 (1068).

2 Hon. Anthony J. Sciolino, *The Changing Role of the Family Court Judge: New Ways of Stemming the Tide,* 3 CARDOZO PUB. L. POL'Y & ETHICS J. 395 (2005), quoting Chief Justice Kaye from a NEWSWEEK 1999 article.

3 Hon. Leah Ward Sears, *A Case for Strengthening Marriage*, THE WASHINGTON POST, Oct. 30, 2006, at A17.

4 *Applying Drug Court Concepts in the Juvenile and Family Court Environments: A Primer for Judges* (June 1998) at 16 [hereinafter PRIMER].

5 *Painting the Current Picture: A National Report Card on Drug Courts and Other Problem Solving Court Programs in the US*, Bureau of Justice Assistance (BJA), National Drug Court Institute (NDCI)(May 2005), at 12 [hereinafter Report Card].

6 National Center on Addiction and Substance Abuse at Columbia University, New York, NY (1999). *No safe haven: Children of substance abusing parents.*

7 Report Card, *supra* note 5, at 9. See also *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America,* 74 NOTRE DAME L. REV. (Jan. 1999).

8 Virginia Drug Treatment Courts Program (VDTCP) Web site at **www.courts.state.va.us/dtc/home.html**

9 For further discussion of policies to improve the ways states organize and deliver alcohol and drug prevention and treatment see "Blueprint for the States: Findings and Recommendations of a National Policy Panel. Join Together." 2006 (hereinafter Blueprints) at **www.jointogether.org**.

10 VDTCP, *supra* note 8.

11 Quoted in *Therapeutic Jurisprudence*, supra note 7 at 439.

12 "Blueprint," *supra* note 9 at 8.

13 *Defining Drug Courts: The Key Components* (National Association of Drug Court Programs, 1997)

14 *See* Report Card, *supra* note 5 at 10. 10 Key Components.

15 Primer, *supra* note 4, at 6. *See also* Pamela M. Casey and David B. Rottman, Problem-solving Courts: Models and Trends, paper presented to the National Center for State Courts (NCSC) July 8, 2003.

16 *Ethical Considerations for Judges and Attorneys in Drug Court*, National Drug Court Institute (May 2001) at 1.

17 Rules of the Virginia Supreme Court of Virginia, Part Six, Section III, Canons of Judicial Conduct for the State of Virginia. Canon 1 (A) (hereinafter Canons)

18 Ethical Considerations, supra note 15 at 3.

19 Ethical Considerations, *supra* note 15 at 5.

20 Canon 2(A), supra note 16.

21 Ethical Considerations, supra note 15 at 5.

22 Ethical Considerations, supra note 15 at 5.

23 Canon 3, *supra* note 16.

24 Ethical Considerations, *supra* note 15, at 8.

25 The Honorable Leonard Edwards, *Judicial Perspectives on Family Drug Treatment Courts*, 56 JUVENILE & FAM. CT. J. 3 (Summer 2005).

Acknowledgement—

The author wishes to thank and acknowledge the assistance of Professor Lynne Marie Kohm, John Brown McCarty Professor of Family Law, Regent University and law school liaison for the Virginia State Bar Family Law Section Board of Governors.

The Honorable Angela Edwards Roberts is a judge on the Richmond Juvenile and Domestic Relations District Court. She is a member of the board of governors of the Virginia State Bar Family Law Section; the VSB Professionalism Course Faculty; the Chief Justice's Indigent Defense Training Commission; and the Governor's Commission on Sexual Violence. She holds a political science degree from Virginia Tech and she received her law degree from Emory University School of Law.

Let Us Now Praise Great Men[1] (And Women)[2]

by George W. Shanks, 2006–2007 Conference of Local Bar Associations Chair

Greatness is an elusive commodity, bestowed by acclamation, withdrawn by whim, leavened by time and ultimately reduced to the dust of memory for all but the merest few. Seldom can greatness be achieved in a single act or moment, for although timing may be "everything," good fortune is hardly synonymous with greatness. The rubric "even a blind hog may find a truffle" comes to mind.

So an integral component of greatness is endurance, dedication, staying power, if you will. The longevity of an exercise more or less rules out dumb luck as the key to its success. And, of course, to be great the success must be far above the ordinary.

Greatness has inherent in it the aspect of signal importance—to an idea, to a cause, to a profession or a community. I used to think of this with some fondness in terms of the aphorism, "Give a man a fish and feed him for a day; teach a man to fish and feed him for life." At least until the anti-male (or maybe the antifishing) lobby got hold of the last stanza and interjected observations about boats, bucks and beer. In any event, greatness does something of lasting benefit for far more than the principal actor.

Which brings me to our profession and those who display the uncommon will to give more than they take. All platitudes of law school aside, practicing law in our society can be a brutal experience for the professional who must balance ethics, responsibility and responsiveness to clients, colleagues and courts, continuing educational growth and the checkbook, and still have time for a personal life. We have all been there at one time or another. Most of us still are. You can't just "dabble" at the practice of law.

So when a lawyer does things in the community that raise her head and shoulders above her legal peers or when his dedication to the profession's image or its community relations endures not over months of busy practice but over decades of effort—to these individuals we can bestow the title of greatness.

The Conference of Local Bar Associations does this once a year and has done for the last decade or so: The Local Bar Leader of the Year Award is a recognition of those among us who serve with distinction, within their local bar association, to the bench, the bar and the public. It recognizes not popularity or intellectual brilliance or economic wealth or public power. It honors instead outstanding dedication and achievement. In an age of instant gratification, it is an award like no other.

You have one of these great women and men in your local bar. And while they do not seek this recognition, they deserve it, for their devotion to matters far beyond "the bottom line." They reflect our own aspirations as they honor our profession. An application form is posted at: **www.vsb.org/site/members/awards-and-contests#localbar**.

Nominate someone from your local bar today. Do it for them, for you, for your local bar, for us all. Recognize their greatness. ⚖

Endnotes:

1 *Sirach*, Ch. 44, v.1

2 Title excerpt: Byman, Daniel L. & Pollack, Kenneth M., *International Security* (Spring 2001)

YLC Programs Address Immigration Issues

by Maya M. Eckstein, 2006–2007 Young Lawyers Conference President

According to U.S. Census data, the percentage of foreign-born residents of Virginia increased by 82.9 percent between 1990 and 2000, while the average percentage increase in the United States was 57.4 percent. Virginia obviously is experiencing a significant increase in its immigrant population. Immigrants come to this country, and to Virginia, for a variety of reasons—to reunite with family, to fill skilled and unskilled employment positions, or to find protection from persecution. Whatever the reason, immigrants clearly are a significant and growing segment of Virginia's population.

The Immigrant Outreach Committee of the Young Lawyers Conference is seeking to address issues raised by the influx of immigrants. In fact, it is one of the most active of the YLC's committees. The committee is focused on helping judges, practitioners, and immigrants understand immigration laws and other laws that affect immigrants. This year, the committee has scheduled an array of programs.

For example, on October 19, 2006, the committee held a panel discussion at the Regional Judicial Conference for Juvenile and Domestic Relations Judges of Alexandria and Arlington, Fairfax, Prince William and Loudoun counties. The discussion focused on the Special Immigrant Juvenile ("SIJ") status afforded some minors under 8 U.S.C. § 1101(a)(27)(J). SIJ status is appropriate for some undocumented and unaccompanied minors who have been abused, abandoned or neglected and, if granted, allows them the possibility of permanent residency in the United States. Acknowledging that immigration officials typically lack expertise in dealing with children and family issues, Congress explicitly sought the help of the nation's juvenile and domestic relations courts in determining whether certain minors are entitled to such status. The October 19 panel discussion focused on SIJ status and the role of Virginia's Juvenile and Domestic Relations judges in determining whether such status is appropriate.

The committee has at least two other programs scheduled for this bar year. First, the Immigrant Outreach Committee is hosting a continuing legal education program on March 7, 2007, at Regent University School of Law in Virginia Beach, on the immigration consequences of criminal convictions. The program is scheduled for 1:30–4:30 PM, and speakers will include immigration attorneys, criminal attorneys and immigration officials. The primary goal of the CLE is to familiarize attorneys who represent non-U.S. citizens in criminal courts of the immigration consequences of various criminal convictions and to promote the effective assistance of counsel for noncitizens. For many noncitizens, deportation often is a worse punishment than imprisonment. Thus, the CLE will include an overview of immigration laws as they relate to criminal convictions, how to avoid adverse immigration consequences, and post-conviction measures that can be taken to resolve adverse immigration consequences. Those interested in registering for this CLE should contact Hugo Valverde at (757) 422-8472 or **hugo@valverderowell.com**.

The committee also is scheduling for spring 2007 in Northern Virginia a CLE program that will include a mock immigration trial. Like the panel discussion offered by the juvenile and domestic relations judges, this program, offered to attorneys and others, will focus on the Special Immigrant Juvenile status. It will feature a J&DR judge, as well as an immigration judge with the U.S. Bureau of Citizenship and Immigration Services ("CIS"). The CLE will be held in the morning and the mock trial in the afternoon. The mock trial will address both the J&DR and the CIS aspects of the process.

The YLC's Immigrant Outreach Committee is committed to helping Virginia's lawyers and judges address the myriad legal issues raised by the increasing number of immigrants in the commonwealth. It also is committed to helping immigrants understand their rights and responsibilities as residents of Virginia. Anyone interested in working with the committee should contact either of its cochairs, Sarah Louppe Petcher (**sarahlouppe@yahoo.com**) or Hugo Valverde (**hugo@valverderowell.com**). ⚖

Senior Lawyers Conference

by Jack W. Burtch Jr., 2006–2007 Senior Lawyers Conference President

One of the joys of being chair of the Senior Lawyers Conference is the privilege of working with so many energetic and committed lawyers who want to continue to make a difference in their communities and give back to this profession. With more than twelve thousand members, the Senior Lawyers Conference has the most members of any conference or section of the forty-thousand-member Virginia State Bar. We have a wealth of experience and expertise that we can share with our profession and our communities.

I am pleased to report that many more local bar associations are planning Senior Citizens Law Day programs. William T. Wilson, the conference's former chair, is working with members of our Board of Governors to see that all local bar associations have the materials necessary to put on a successful Senior Citizens Law Day Program. The program is one way we distribute the *Senior Citizens Handbook*. The handbook itself is currently undergoing revisions to ensure that it is as up-to-date and useful as possible. Many thanks to those who have been working on these revisions—the reactions to the handbook have been extremely positive. If you want to help your local bar association present a Law Day, contact Patricia A. Sliger at (804) 775-0576 or sliger@vsb.org.

I am also happy to tell you that retired Judge Joseph E. Spruill Jr. is now serving as our conference's liaison with the Lawyers Helping Lawyers program. Judge Spruill succeeds F. Mather Archer in this position. Lawyers Helping Lawyers provides confidential, nondisciplinary assistance to members of the legal profession, including judges and law students, with substance abuse or mental health problems. Lawyers Helping Lawyers provides services to individuals and coordinates educational programs about substance abuse and mental health. It is offered as a free service to the legal community through the support of the VSB, The Virginia Bar Association and other associations and individuals. Many members of our conference are active volunteers with Lawyers Helping Lawyers. If you are interested in volunteering your services or finding out more about the educational programs offered, please give them a call at (804) 644-3212.

In working toward fulfilling that part of the Senior Lawyers Conference's mission to "promote the welfare of seniors generally," our conference is collaborating with the VSB Joint Alternative Dispute Resolution Committee to develop programs to aid seniors through the use of ADR. As the proportion of seniors in the general population grows, so does the need to address individual seniors' and senior communities' often unique concerns. Use of alternative dispute resolution methods can be effective and efficient in helping seniors deal with disputes that involve senior living facilities, entitlement programs and family issues such as medical directives and guardianship.

If you have an idea for a program or project, or would like to get more involved with the Senior Lawyers Conference, please let me know. ⚖

RISK MANAGEMENT CORNER

Moving Forward . . .

by John J. Brandt

We live in a much more mobile society than we did twenty years ago. Employees frequently move from company to company and from coast to coast.

And so do lawyers. Twenty years ago, after a young lawyer graduated from law school and passed the Virginia Bar, he or she carefully interviewed at law firms and made what he or she believed would be a "lifetime" decision on employment. Midlevel partners in law firms twenty years ago rarely would consider leaving a firm, and it was virtually unheard of that senior partners would leave their own firm to begin a new legal adventure.

However, all of that is changing as young lawyers leave firms, frequently with another associate, to begin their own. Midlevel partners, who have developed a specialty niche conclude that they can do better by beginning their own firm. And even senior partners believe they may be happier in their later years by starting a small firm or becoming of counsel to another law firm.

These departures result in hurt feelings, contentious relationships and a fight for the right to continue representation of clients, some of whom represent an enormous amount of fee income. Important to all lawyers, these disputes invariably concern the Virginia State Bar and expose attorneys to violations of the Rules of Professional Conduct.

To evaluate the problems which arise, imagine that a thirty-person law firm in Norfolk has practice groups in criminal defense, plaintiff personal injury and estate planning. Bill and Kathy are young attorneys in the plaintiff personal injury section, which comprises ten lawyers: a senior partner, a midlevel partner and eight associates, of which Bill and Kathy are senior, each having been employed at the firm for six years. They are convinced that partnership has permanently eluded them and that they can do better professionally and economically if they leave the firm and begin their own firm. They have been planning their departure for four months and have been careful not to perform any planning (location of new firm, new legal entity, letterhead and staff) on their current firm's time or premises. The work is all done in the evenings and on weekends. Unfortunately—or fortunately (depending upon your viewpoint), the senior partner discovers the plan and, after discussion at a hastily-called partnership meeting, the firm terminates Bill and Kathy immediately, takes their keys and evicts them forthwith, all the while reminding them that they signed a "three-hundred-mile covenant not to compete" when they were hired. Furthermore, Bill and Kathy are warned that all client files belong to the law firm and that the firm will take over the representation of all personal injury files relating to the multiple cases then being pursued by Bill and Kathy.

Shaken by the confrontation, Bill and Kathy take consolation in the belief that many of their clients will continue representation with them, based upon confidential telephone calls they had with each one before the lawyers were terminated. In those conversations, Bill and Kathy encouraged the clients to stay with them in their new firm and said nothing about the option of remaining with their old firm.

What are the ethical implications? First of all, neither Bill and Kathy nor their old law firm, "own" any client. Clients own themselves and always retain the right to terminate their attorney "at any time, with or without cause." Virginia Rules of Professional Conduct, Rule 1.16—comment [4] (2006-07). Once this basic premise is understood, the civilized and ethical steps to follow when a lawyer leaves a firm can be reasonably developed.

The firm violated Rule 5.6 when it obtained an agreement from Bill and Kathy not to compete. Any such agreement signed by the two associates is unenforceable unless it deals with retirement benefits.

LEO 1403 instructs that a firm cannot direct its attorneys not to contact a client regarding their termination until the firm had first contacted the client. See also Rule 1:16(d). The corollary appears to be that Bill and Kathy had the ethical right, if not a duty, to contact clients they had been representing to give notice that they were leaving the firm. However, they should have been cautious to inform the clients that they had three choices: leave with Bill or Kathy; stay with the firm; or select another attorney. LEO 1506. A "neutral letter" from the firm and Bill and Kathy is the preferred route, but may not be realistic in light of the emotionally charged atmosphere which typically pervades these situations.

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Bill and Kathy's telephone conferences with clients were defective because, as described above, they did not enunciate that each client had the option of continuing with the law firm or selecting another attorney. They also should have informed the client that they would be approaching the firm about a joint neutral letter to each client. If the firm refuses (in our hypothetical, Bill and Kathy were promptly fired), then they should send a neutral letter—as should the firm—and request a quick decision by the client.

File Access

The firm may not hold a client's file hostage and must immediately give the file to Bill or Kathy upon a client's decision to retain them. Rule 1:16(e). Remember, the file is the property of the client. Original documents must be returned; copies of all other documents must be made available. A reasonable copy fee may be imposed, but nonpayment is not a basis to refuse to turn over the file. Internal memoranda and billing records need not be released. The law firm may not condition the production of the client's file upon the client signing a release of liability. LEO 1332. Nor may the firm refuse to give Bill and Kathy's contact information (address and telephone numbers) upon request. LEO 1506.

As to fees owed by the clients whose work was being done by Bill and Kathy, the firm is probably entitled to a *quantum merit* payment for the time spent by Bill and Kathy up to the time of their departure. If the client refuses to pay the firm its *quantum merit* fee, the firm can ethically garnish that client's funds held in Bill and Kathy's trust account, after obtaining a judgment against the client—although this disposition is not recommended. LEO 1807. Contrastingly, Bill and Kathy are probably entitled to a division of fees earned, but not yet billed, at the time of their withdrawal. LEO 1556.

Ideally, when lawyers decide to leave their firms, all attorneys involved will act professionally, keep in mind that the client's interests are supreme, and aspire to act as Virginia ladies and gentlemen. ⚖