Authorization for Targeted Killings Should Be Rescinded

I have just read Robert H. Wagstaff's informative and insightful article, "In the Wake of Boumediene: The International Rule of Law Remains in Jeopardy," in the December 2010 *Virginia Lawyer*.

I have worked in support of the rule of law in some dozen countries, including recently in Iraq, to which I expect to return early in 2011. (Of course, I am now expressing my own views and not necessarily those of the U.S. government or its agencies or officials.)

I was particularly concerned to read the account of President Obama's authorization of targeted killing(s). I can only hope that such a policy will not be implemented and will be rescinded forthwith.

Thank you for your notable contribution to my understanding of the jeopardy that would further undermine the rule of law in the world today.

Brian C. Murphy
Chevy Chase, Maryland

Letters

Send your letter to the editor to:
coggin@vsb.org; fax: (804) 775-0582; or mail to:
Virginia State Bar, *Virginia Lawyer* Magazine
707 E. Main Street, Suite 1500, Richmond, VA 23219-2800

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/**.

CLE Announcements

Virginia Lawyer publishes at no charge notices of continuing legal education programs sponsored by nonprofit bar associations and government agencies. The next issue will cover April 13–July 20, 2011. Send information by March 13, 2011, to chase@vsb.org. For other CLE opportunities, see "Current Virginia Approved Courses" at http://www.vsb.org/site/members/mcle-courses/ or the websites of commercial providers.

"Not in Good Standing" Search Available at VSB.org

The Virginia State Bar has added a new feature to its Attorney Records Search at http://www.vsb.org/attorney/attSearch.asp: the ability to search active Virginia lawyers' names to see if they are not eligible to practice because their licenses are suspended or revoked.

The "Attorneys Not in Good Standing" search function was designed in conjunction with the VSB's new permanent bar cards.

Lawyers are put on not-in-good-standing (NGS) status for administrative reasons — such as not paying dues or fulfilling continuing legal education requirements — and when their licenses are suspended or revoked for violating professional rules.

The NGS search can be used by the public with other attorney records searches — "Disciplined Attorneys" and "Attorneys without Malpractice Insurance" — to check on the status and disciplinary history of a lawyer.

by Irving M. Blank

From the Frontline of a Budget Crisis

AT THIS WRITING, I can report to you that the Virginia State Bar's Executive Committee, officers, and staff are responding to a threat to our budget. In this time of crisis we are working together to provide documentation that supports our need for appropriate funding to protect the public and advance the practice of law in Virginia.

On December 17, 2010, Governor Robert F. McDonnell presented his budget to the money committees of the Virginia General Assembly. He asked that $5 million be transferred from the dedicated special revenue fund balances at the Virginia State Bar to the General Fund of the commonwealth.

The VSB office was notified of the governor's proposal less than twenty hours before the governor's public announcement, and the communication was in no way a conversation about the transfer of funds.

This money was raised entirely from the dues and fees paid into the VSB special fund by the lawyers of Virginia. No tax money, no assessments on the citizens of Virginia, no part of criminal fines or court fees goes into this special fund.

Lawyers are contributors to the General Fund, not beneficiaries. The VSB is charged by the Attorney General's Office for services, and the State Treasurer keeps the interest on our accounts.

It is true that a substantial amount of money passes through our special fund from the General Fund to Legal Services of Virginia, the Capital Representation Resource Center, and the Community Tax Law Project. None of this money is used by the VSB. The General Assembly simply uses our account to distribute these funds.

We also informed legislators that:

- The VSB transfer would be an unprecedented appropriation of dues and fees paid by Virginia's lawyers for the protection of Virginia's citizens and the regulation of the legal profession.

- Longstanding language in the Appropriation Act and Va. Code § 54.1-3913 evidence an intent to protect the State Bar Fund from being used for purposes other than administration of the Virginia State Bar.

- The VSB has streamlined operations, cut expenses by approximately $600,000 per year, and shared in the salary freeze imposed on state agencies since 2007.

- Mandatory bar dues in Virginia are among the lowest in the United States. Among the thirty-three states with mandatory bars, Virginia ties for thirtieth place. Because of the dedication of our members, we are the beneficiaries of thousands of hours of volunteer time and services.

Without adequate financial support, the VSB would be impaired in its mission to protect the public from unethical and dishonest behavior by attorneys. We face unanticipated expenses each year. For example, our receivership fees have varied in recent years from less than $100,000 to more than $500,000 in a single year. The VSB has no place other than its dues to raise the funds necessary to operate.

The taking of these funds would no doubt impair the VSB's ability to protect the public, as well as impair the VSB in meeting its other obligations to the public, the legal community, and the judiciary.

The funds the governor proposed to take were openly collected and maintained through a budget and audit process conducted by the state every year. They represent less than six months of operating capital.

At this writing, our attempts to educate legislators about the impact of the fund transfer have had some success: the House Appropriations Committee has recommended restoring the $5 million to our budget. However, Senate Finance proposes restoring only half of it. If the budget conferees allow any lawyers' dues money to be transferred to the General Fund, they will set a disturbing precedent that will hamper our operations in years to come.

by Karen A. Gould

Welcome to Chief Justice Kinser

THE SUPREME COURT OF VIRGINIA is now being led by Cynthia D. Kinser, the first woman Chief Justice in the Court's history.

Before she began the job on February 1, Justice Kinser already had a challenging schedule. Trips to Richmond and elsewhere from the westernmost tip of Virginia for Court sessions and hours focused on writing briefs in her Pennington Gap chambers will continue to be part of that life. She tends her Lee County cattle farm, which once belonged to her grandparents. And she is dedicated to her family, church, and community.

Now she adds to that challenging mix a four-year term of administrative duties — leading the Court in its oversight of the state's judicial system. If she approaches it as her predecessors — including, most recently, Justice Leroy R. Hassell Sr. — did, she will be the face of the Supreme Court to the General Assembly and the citizens of Virginia.

(For a delightful article about Chief Justice Kinser, see "Next chief justice finds strength in her rural roots" in the December 12, 2010, issue of the Richmond Times-Dispatch, at http://www2.timesdispatch.com/lifestyles/2010/dec/12/tdflair01-blazing-a-trail-ar-703830/.)

The Virginia State Bar — an agency of the Court — looks forward to working with Chief Justice Kinser.

Last fall, the VSB Council passed the following resolution:

WHEREAS, the Virginia State Bar, on behalf of the 45,000 members of the Virginia State Bar and the statewide bar organizations in the Commonwealth, expresses the esteem, pride, and warm wishes of the lawyers of Virginia to the Honorable Cynthia Dinah Fannon Kinser on her election as Chief Justice of the Supreme Court of Virginia effective February 1, 2011; and

WHEREAS, her election to that esteemed position makes her the first woman to become Chief Justice of the Supreme Court of Virginia, a historical event of great significance in the Commonwealth of Virginia; and

WHEREAS, Chief Justice Kinser's demonstrated legal skills, her professional accomplishments, her service to the legal profession, the Court, the judiciary and the public, and her high moral character offer great promise of success as a distinguished Chief Justice of Virginia; and

WHEREAS, Chief Justice Kinser earned her undergraduate degree from the University of Tennessee and her law degree from the University of Virginia School of Law; and

WHEREAS, she has served the profession, the judiciary and the public with distinction as a law clerk for the Honorable Glen M. Williams of the U.S. District Court for the Western District of Virginia; as a lawyer in private practice; as Commonwealth's Attorney for Lee County; as a United States Magistrate Judge; and as a Justice of the Supreme Court of Virginia upon her appointment to the Court by Governor George Allen in 1997, and being elected a Justice twice by the General Assembly; and

WHEREAS, in each of these roles she has exhibited the highest degree of competence, integrity, dedication, and professionalism; and

WHEREAS, she has dedicated herself to her profession and her community as a member of the National Association of Bankruptcy Trustees, the Appalachian School of Law Board of Trustees, the Virginia 4-H Foundation Initial Board of Directors, the Holston

Conference of the United Methodist Church Foundation, Inc., Board of Directors, and the Lee County Arts Association Board of Directors, and through commitment to her church as organist at the First United Methodist Church and to her family by her participation in the operation of the family cattle farm while maintaining her responsibilities as a Justice of the Supreme Court of Virginia; now, therefore, be it

RESOLVED, that the Virginia State Bar and the statewide bar organizations of the Commonwealth record their high regard and appreciation for the work and commitment of Cynthia Dinah Fannon Kinser, and their confident expectations of the further significant contributions Chief Justice Kinser will make to jurisprudence in the Commonwealth as Chief Justice of the Supreme Court of Virginia.

Adopted this 15th day of October 2010, effective the 1st day of February 2011.

Irving M. Blank
President, Virginia State Bar

***

THANK YOU, Chief Justice Kinser, for taking on the additional duties of the Chief Justice of the Supreme Court of Virginia. The lawyers of Virginia salute you for your dedication to public service and stand ready to assist you.

Chief Justice Kinser

In Memoriam

R.H. Abbott
Farnham, Virginia
December 1915–October 2010

John F. Batte Jr.
Richmond, Virginia
May 1925–October 2010

Philip Clark Baxa
Richmond, Virginia
October 1955–November 2010

William Louis Chambers
Vienna, Virginia
June 1949–October 2010

Martin Fillmore Clark
Stuart, Virginia
August 1920–December 2010

John M. Cloud
Chesapeake, Virginia
July 1933–June 2010

Arethea Angela Coles
Alexandria, Virginia
July 1967–January 2011

Lewis A. Curling
Richmond, Virginia
July 1925–August 2010

L. Mitchell Dick
McLean, Virginia
January 1926–October 2010

Mary Margaret Burnett Hatch
Roanoke, Virginia
March 1923–November 2010

John Martin Hemenway
Bedford, Virginia
April 1963–April 2010

James Rutledge Henderson IV
Tazewell, Virginia
March 1949–October 2010

Dan S. Hollon
Vienna, Virginia
June 1924–August 2010

Thomas D. Jordan
Midlothian, Virginia
October 1916–April 2010

Philip Michael Keating
Arlington, Virginia
October 1959–January 2011

Claudia Anne Luecke
Westfield, New Jersey
January 1967–October 2010

Calvin F. Major
Richmond, Virginia
July 1926–November 2010

Prof. Robert Gerald Lauck
Reston, Virginia
August 1925–October 2010

Lewis B. McNeace Jr.
Richlands, Virginia
July 1942–November 2010

G. Kenneth Miller
Venice, Florida
February 1921–November 2010

Bryan Keith Morris
Chesapeake, Virginia
July 1961–December 2010

Owen B. Pickett
Virginia Beach, Virginia
August 1930–October 2010

Michaux Raine III
Penhook, Virginia
April 1936–July 2010

Willard M. Robinson Jr.
Newport News, Virginia
June 1935–October 2010

Harry P. Rowlett
Jonesville, Virginia
July 1927–September 2010

Jennifer Rebekah Santa Barbara
Delaware Water Gap, Pennsylvania
April 1968–August 2010

Eugene O.S. Stevenson
Arlington, Virginia
October 1932–December 2010

James K. Stewart
Reston, Virginia
December 1943–November 2010

Clayton B. Tasker
St. Simons Island, Georgia
August 1918–January 2010

Albert Teich Jr.
Norfolk, Virginia
February 1929–October 2010

James Melton Verner
Arlington, Virginia
September 1915–October 2009

Paul Hamilton Wilson
Newport News, Virginia
August 1950–October 2010

Local and Specialty Bar Elections

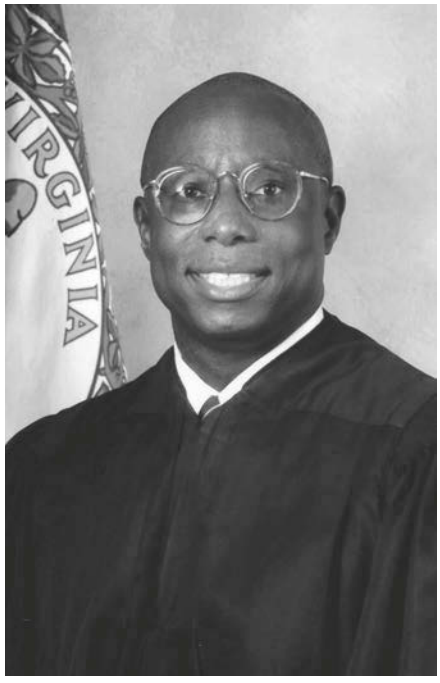
Virginia Association of Defense Attorneys

Dennis John Quinn, President

Lisa Frisina Clement, President-elect

Elizabeth Guilbert Perrow, Secretary

Glen Alton Huff, Treasurer



Leroy Rountree Hassell Sr.

August 17, 1955–February 9, 2011

Chief Justice Leroy Rountree Hassell Sr. was a person of great energy and determination, with a passion for the judicial system as an equal branch of government. He demonstrated enormous care and diligence to advance the cause of justice for all Virginians. He was a distinguished jurist. The high standard he set for professionalism will be remembered and admired by the lawyers of Virginia.

The following sitting judges have been reelected by the 2011 General Assembly:

Court of Appeals

D. Arthur Kelsey

Elizabeth A. McClanahan

Circuit Courts

1st Circuit: **V. Thomas Forehand Jr.** of Chesapeake

4th Circuit: **Everett A. Martin Jr.** of Norfolk

5th Circuit: **Carl Edward Eason Jr.** of Suffolk

6th Circuit: **Samuel E. Campbell** of Prince George

7th Circuit: **David F. Pugh** and **C. Peter Tench,** both of Newport News

8th Circuit: **Christopher W. Hutton** and **Wilford Taylor Jr.**, both of Hampton

12th Circuit: **Herbert Cogbill Gill Jr.** of Chesterfield

13th Circuit: **Bradley B. Cavedo** and **Richard D. Taylor Jr.**, both of Richmond

16th Circuit: **Timothy K. Sanner** of Louisa

19th Circuit: **Randy I. Bellows** and **Dennis J. Smith**, both of Fairfax

20th Circuit: **James H. Chamblin** of Leesburg

21st Circuit: **Martin F. Clark Jr.** of Stuart

23rd Circuit: **Robert P. Doherty Jr.** of Salem and **Clifford R. Weckstein** of Roanoke

27th Circuit: **Brett L. Geisler** of Hillsville

30th Circuit: **John C. Kilgore** of Gate City

General District Courts

2nd District: **Calvin R. Depew Jr.** of Virginia Beach

13th District: **Phillip L. Hairston** of Richmond

14th District: **John Marshall** and **James Stephen Yoffy**, both of Henrico

15th District: **Frank L. Benser** of Bowling Green, **Peter L. Trible** of Hanover, and **Gordon A. Wilkins** of Montross

16th District: **Roger L. Morton** of Culpeper

19th District: **Michael Joseph Cassidy** of Fairfax

21st District: **Edwin A. Gendron Jr.** of Martinsville

23rd District: **M. Frederick King** of Roanoke

25th District: **William D. Heatwole** of Waynesboro

29th District: **Jack S. Hurley Jr.** of Tazewell

31st District: **Charles F. Sievers** and **Peter W. Steketee**, both of Manassas

Juvenile and Domestic Relations District Courts

1st District: **Rufus A. Banks Jr.** and **Larry D. Willis Sr.**, both of Chesapeake

2nd District: **Gerrit W. Benson** of Virginia Beach

4th District: **M. Randolph Carlson II** of Norfolk

7th District: **Thomas W. Carpenter** of Newport News

12th District: **Bonnie C. Davis** of Chesterfield

15th District: **Gerald F. Daltan** and **Julian W. Johnson**, both of Stafford, and **David F. Peterson** of Fredericksburg

16th District: **Susan L. Whitlock** of Louisa

17th District: **Esther L. Wiggins** of Arlington

18th District: **Constance H. Frogale** of Alexandria

20th District: **Pamela L. Brooks** of Leesburg

24th District: **Kenneth W. Farrar** of Lynchburg and **Michael T. Garrett** of Amherst

25th District: **Paul A. Tucker** of Fincastle

26th District: **William H. Logan Jr.** of Woodstock

27th District: **Marcus H. Long Jr.** of Christiansburg

29th District: **Henry A. Barringer** of Tazewell

31st District: **William Alan Becker** and **Paul F. Gluchowski**, both of Manassas

Pro Bono Ceremony Blends History with Celebration

The Hanover County Courthouse Historic District — the location of a renowned Colonial court case — will be the site of the Virginia State Bar's Pro Bono Awards Ceremony and Reception and an educational program on April 12, 2011.

The program will begin at 3 PM at the original Hanover Courthouse, where Patrick Henry argued the Parson's Cause in 1763. A reenactment of his argument will open the program, and an hour-long continuing legal education program based on the performance will follow. The reenactment is paid for by an anonymous donor.

Supporters of access to legal services hold out the Parson's Cause as an example of a lawyer's responsibility to represent unpopular or unappealing cases. Henry — who was relatively unknown at the time — represented vestrymen who had paid Anglican clergymen less than the clergymen felt they were entitled to.

After the educational panel, the courthouse will be the site of a 7 PM ceremony to present the 2011 Lewis F. Powell Jr. Pro Bono Award. Any recipient of the Oliver W. Hill Law Student Pro Bono Award also will be honored at that time. VSB President Irving M. Blank will preside.

A reception will follow the award ceremony at the historic Hanover Tavern across the road from the courthouse.

The program is open without charge to lawyers, judges, and affiliated professionals who are interested in access to justice issues. For registration and other details, see http://www.vsb.org/site/pro_bono/powell-ceremony.

Hanover County Courthouse, built in 1733. Photo by Bill Dickinson

CALL FOR NOMINATIONS

Virginia Legal Aid Award

Sponsored by the VSB Special Committee on Access to Legal Services.

Nomination Deadline:
March 25, 2011

For more information, see http://www.vsb.org/site/pro_bono/virginia-legal-aid-award.

Virginia Lawyer Referral Service

For information, see http://www.vsb.org/site/public/lawyer-referral-service/.

Free and Low-Cost Pro Bono Training

Visit the Pro Bono page on the VSB website for free and low-cost pro bono training and volunteer opportunities: **http://www.vsb.org/site/pro_bono/resources-for-attorneys**

Lawyers Helping Lawyers

Confidential help for substance abuse problems and mental health issues.

For more information, call our toll free number:

(877) LHL-INVA

or visit http://www.valhl.org.

Section Sponsors, Promotes Programs for All VSB Members

by Robert L. Garnier, chair

THE LITIGATION SECTION OF THE VIRGINIA STATE BAR is pleased to offer in this issue of *Virginia Lawyer* four articles that we hope will interest lawyers throughout the commonwealth.

In "Five Myths about Immunity of Governmental Employees," Roger T. Creager and Thomas J. Curcio explore misunderstandings regarding the protection of immunity for governmental employees. They cite controlling law from the Supreme Court of Virginia.

J. Michael Martinez de Andino and M. Thomas Andersen analyze in "Common Interest Doctrine in the Fourth Circuit" the availability in the U.S. Court of Appeals for the Fourth Circuit of an attorney-client work product privilege to two or more parties sharing a common interest. They provide a checklist to weigh the application of the common interest doctrine.

In "A Review of the American Arbitration Association's Rules for Construction Disputes: Knowledge Is Power," Kristan B. Burch instructs practitioners who draft construction contracts or handle construction claims before the American Arbitration Association.

Travis J. Graham, in "Your Answer, Please," questions the merit of filing reactionary motions, in lieu of straightforward answers, in response to complaints and discusses the value of filing answers alone and saving motions for later argument and adjudication.

I hope you enjoy these articles and find them useful. Consider joining our section. As the largest section within the Virginia State Bar, the Litigation Section sponsors or participates in many efforts to fulfill our purpose: to provide a forum for discussing matters that affect the way litigation is conducted in Virginia, to sponsor projects and programs for the members of the section, and to promote improvement of the efficient, affordable, ethical, and just resolution of societal disputes.

The section sponsors and supports continuing legal education seminars, including workshops at the VSB Annual Meeting in June and, often, a program at the bar's Midyear Legal Seminar. This year, the Litigation Section will present at the annual meeting a workshop on choosing, preparing, and using litigation experts. I encourage you to attend. The section also publishes a quarterly newsletter that includes updates on court decisions of interest to litigators. Our section's appellate practice subcommittee also presents CLE programs and provides other resources, including a forthcoming handbook to incorporate new appellate rules approved by the Supreme Court of Virginia. The section also supports the efforts of the Young Lawyers and Senior Lawyers Conferences.

The Litigation Section cosponsors and funds the VSB Law in Society Scholarship competition. This annual essay contest for high school students increases awareness and appreciation of our legal system among students throughout the state.

For more information about the Litigation Section, including our past newsletters and how to join, please visit http://www.vsb.org/site/sections/litigation.

Robert L. Garnier practices with the litigation firm Garnier & Garnier PC in Falls Church. He represents individuals and corporation in defense and prosecution of personal injury claims. He holds degrees from the College of William and Mary and its Marshall-Wythe School of Law. He is chair of the Virginia State Bar Litigation Section. He has written and spoken on topics of interest to litigators.

Roger T. Creager is the principal of the Creager Law Firm PLLC (www.creagerlawfirm.com) in Richmond. He serves on the board of governors of the Virginia Trial Lawyers Association, which awarded him its Courageous Advocate Award in 2001. He also serves on the Virginia Bar Association's Boyd-Graves Conference and is a past chair of the Virginia State Bar Standing Committee on Legal Ethics. He can be reached at (804) 405-1450 and rcreager@creagerlawfirm.com

Thomas J. Curcio is the principal of Curcio Law in Alexandria. A graduate of the State University of New York at Stony Brook and the George Washington School of Law, he serves on the executive council of the Virginia Trial Lawyers Association and is on the faculty of the Virginia State Bar Professionalism Course and the Virginia College of Trial Advocacy. Mr. Curcio is coauthor of *Evidence for the Trial Lawyer*, a LexisNexis publication now in its sixth edition. He is a member of the Virginia Bar Association's Boyd-Graves Conference.

Five Myths about Immunity of Governmental Employees

by Roger T. Creager and Thomas J. Curcio[1]

America's great writer Mark Twain said, "The report of my death has been greatly exaggerated."[2] America's great general Ulysses S. Grant said, "The distant rear of an army engaged in battle is not the best place from which to judge correctly what is going on in front."[3] Two related principles emerge: First, rumors and misunderstandings have a tendency to arise. Second, the best way to dispel misunderstandings is by close examination of the facts at the source. Both these principles apply to the determination of the immunity of governmental employees. Misunderstandings of the controlling legal principles tend to develop, but those misunderstandings are readily dispelled by a careful examination of the actual decisions of the Supreme Court of Virginia.

Myth Number 1: There is an easily applied all-purpose pass-or-fail test for the immunity of governmental employees.

Attorneys litigating immunity issues frequently ask a court to apply the "*James v. Jane* four-part test" to determine whether a governmental employee is protected by immunity. They argue that the test is met or not met, as though immunity analysis merely involves checking off boxes on a four-item list to produce a "yes" or "no" answer. This erroneous notion is perhaps somewhat understandable, since the case law does refer at times to the "four-part test enunciated in *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980)."[4] Closer examination of the full text of the decisions of the Court clearly shows, however, that *James v. Jane* did not establish an easily applied litmus test or list of check-off boxes. *James v. Jane* set forth four nonexclusive factors that courts should consider in evaluating whether immunity should apply.[5]

There is no simple litmus test for immunity.[6] An overly broad application of immunity would unsoundly protect and encourage irresponsible, reckless, and even unlawful actions by public employees. An unduly narrow application of immunity would have an unwarranted chilling effect on public service. What is required in all cases is a close consideration of all the facts and circumstances, the pertinent factors, and the competing public policies involved.

Myth Number 2: The actions of governmental employees usually are entitled to the special protection of governmental-employee immunity.

Only the immunity of the sovereign itself is automatic and absolute (unless waived).[7] There is no automatic or absolute immunity for governmental employees.[8] Whether they are entitled to the special protection of immunity depends upon the particular facts of each case,[9] and the employee has the burden of proving that his or her actions are entitled to immunity.[10] Even when a governmental employee's actions are entitled to immunity, the employee is still not protected from liability for breach of a ministerial duty or for gross negligence.[11] Determination of governmental-employee immunity issues necessarily "requires line-drawing" and the courts "must engage in this difficult task."[12] "Yet, by keeping the policies that underlie the rule firmly fixed in our analysis, by distilling general principles . . . , and by examining the facts and circumstances of each case this task can be simplified."[13]

Myth Number 3: If an activity involves "judgment and discretion," then the governmental employee is always protected by immunity.

The governmental employee will, of course, usually insist that the conduct in question required her to use "judgment and discretion" and thus she is protected by governmental-employee immu-

nity. This assertion is, quite simply, the legal equivalent of an exaggeration. The true rule of law is set forth in the *James v. Jane* decision, where the Virginia Supreme Court made very clear: "Whether the act performed involves the use of judgment and discretion is a consideration, but it is not always determinative. Virtually every act performed by a person involves the exercise of some discretion."[14]

Moreover, it is evident from the case law that the fact that a governmental actor used "discretion" may in some cases support immunity, but in other cases will oppose immunity. Thus, the argument for extending immunity to a governmental employee is strongest at the "highest levels of the three branches of government," where the exercise of judgment and discretion is an inherent and assigned part of the responsibilities involved but becomes weaker "the farther one moves away from the highest levels of government."[15] This is because in the case of governmental employees at the highest levels, the exercise of "judgment and discretion" (in the fullest, immunity-protected sense) is centrally and quintessentially important to the job and the responsibilities assigned to them. The exercise of judgment and discretion by high-level governmental employees is fundamentally necessary in the public interest and warrants granting them immunity. By contrast, in the case of a lower-level employee, the fact that the employee used little or no discretion would usually support granting immunity (since the employee had little or no discretion and essentially did what he was ordered to do), while the exercise of judgment and discretion might well favor denying immunity (since the exercise of judgment and discretion do not lie at the heart of the low-level employee's assigned role). Thus, the Supreme Court of Virginia has held that the argument for extending immunity to a low-level employee is strongest when there is "no evidence that they did anything other than exactly what they were required to do by the sovereign" and "were simply carrying out instructions given them."[16] On the other hand, there is little or no public interest in protecting a low-level governmental employee from liability for conduct that involved the exercise of a judgment and discretion that was not actually entrusted to or required of her.

The governmental employee's own descriptions of the nature of his conduct are not controlling. As previously noted, the governmental employee facing liability will almost always say that he had to use judgment and discretion in the activity in question. In many cases, the governmental employee will say that he was confronted with an emergency or at least with a situation that was unusual and required urgent actions. These self-serving labels assigned by the employee to his own actions may perhaps be relevant in some cases, but they surely cannot be controlling or determinative. If they were, the immunity decision would, in effect, be made by the employee himself by virtue of self-serving assertions rather than by the courts to which the decision is properly entrusted. The mere fact that the employee claims he used his judgment and discretion to determine and implement a particular course of action does not automatically mean immunity applies to any and all conduct involved.[17] Moreover, as noted above, virtually every action involves the use of some kind of judgment and discretion. The critically important issue is whether the action in question involved an exercise of the "special kind of judgment and discretion" which, under the circumstances presented, merit the special protection of governmental-employee immunity.

Myth Number 4: Policy manuals and instructions are irrelevant and inadmissible with respect to the immunity issue.

Governmental employees asserting immunity sometimes contend that violations of the employer's guidelines or orders or the employee's training and instructions are inadmissible "private rules" and cannot have any bearing on the issues raised by a plea in bar. This assertion is illogical and contrary to Virginia law. The Supreme Court of Virginia has held that private rules are not admissible to establish the standard of care in a negligence action, but they can be introduced into evidence for other purposes.[18] Moreover, it is obvious that the public interest is not well served by granting immunity protection to conduct that is contrary to the limitations the governmental entity has deliberately and specifically imposed upon the employee's activities and conduct. As noted above, the Supreme Court of Virginia has

…virtually every action involves the use of some kind of judgment and discretion.

long held that an employee who exceeds his authority does not deserve immunity protection. In a 2004 decision that rejected immunity, the Supreme Court relied repeatedly on the written procedures of the Fairfax County Fire Department.[19]

Myth Number 5: The fact that an employee exceeded his authority, violated the law, or violated his employer's instructions and requirements is of no consequence in the immunity analysis.

Governmental employees seeking the protection of immunity often argue that the fact that they exceeded their authority, violated the law, or violated their employer's instructions and requirements is of no consequence in the immunity analysis. Once again, this argument is contrary to the decisions of the Supreme Court of Virginia. When an individual governmental employee fails to act in accordance with duties imposed upon him by law or by his governmental employer, then he is not entitled to immunity. "There is no statute which authorizes the officers or agents of the state to commit wrongful acts. On the contrary, they are under the legal obligation and duty to confine their acts to those that they are authorized by law to perform. If they exceed their authority, or violate their duty, they act at their own risk[.]"[20]

When an individual governmental employee fails to act in accordance with duties imposed upon him by law or by his governmental employer, then he is not entitled to immunity.

Defendants arguing that immunity applies even though their conduct violated applicable laws, duties, orders, training, or instructions frequently rely upon a misinterpretation of the Supreme Court's decision in *Colby v. Boyden*.[21] In *Colby*, the issue was whether a police officer engaged in a vehicular pursuit was entitled to governmental-employee immunity. A statute enacted by the General Assembly sets forth[22] conditions that must be present in order for a police officer to be exempt from complying with the usual motor vehicle laws and thus be allowed to speed, run red lights, and engage in other conduct that would usually be unlawful.[23] In the course of holding that under the circumstances presented (which the Court assumed did comply with the requirements of the emergency-response statute), the Court said that the emergency-response statute "neither establishes nor speaks to the degree of negligence necessary to impose civil liability on one to whom the section applies. The degree of negligence required to impose civil liability will depend on the circumstances of each case."[24] Police defendants sometimes incorrectly interpret this statement as meaning that whether or not their conduct violated the law (including the emergency-driving statute) makes no difference and is irrelevant and inadmissible on the issue of whether their conduct is protected by immunity. The *Colby* decision cannot, however, fairly be understood to establish such an illogical conclusion. After all, decades of Supreme Court decisions (previously cited) establish that whether an employee has violated the law or exceeded his authority and instructions does matter.[25] It would be illogical to think that the public interest requires granting the special protection of immunity to a governmental employee who violates the law or exceeds his authority

Defendants also sometimes cite *Colby* in support of an argument that whether they violated guidelines or requirements governing their conduct is irrelevant with respect to the immunity determination. It is important to understand the arguments and issues that the Court ruled upon in *Colby*. In *Colby*, the injured plaintiff argued that because the police department had guidelines addressing emergency-response driving any and all emergency driving was ministerial in nature and a police officer engaged in emergency driving (even emergency driving that complied with all applicable laws, orders, guidelines, training, and instructions) would never be protected by immunity. It is not surprising that the Supreme Court of Virginia rejected this absurd argument. The Court held:

> The City exercised administrative control and supervision over Officer Boyden's activities through the promulgation of guidelines governing actions taken in response to emergency situations. However, those guidelines do not, and cannot, eliminate the requirement that a police officer, engaged in the delicate, dangerous, and potentially deadly job of vehicular pursuit, must make prompt, original, and crucial decisions in a highly stressful situation. Unlike the driver in rou-

> tine traffic, the officer must make difficult judgments about the best means of effectuating the governmental purpose by embracing special risks in an emergency situation. Such situations involve necessarily discretionary, split-second decisions balancing grave personal risks, public safety concerns, and the need to achieve the governmental objective.[26]

It would be a mistake, however, to conclude that this language means that any time a police officer or other public official claims he was confronted with an emergency, he is always automatically entitled to immunity, and that he should be granted immunity regardless of whether he violated applicable rules, guidelines, or statutes. Any such conclusion would be contrary to the explicit holding of the Court in *Colby* that was tied to the facts and circumstances presented.[27]

In *Colby*, the Supreme Court also rejected an illogical argument that where all the requirements of the emergency-response statute were met the statutory reference to "civil liability for failure to use reasonable care" in effect eliminated the immunity that would otherwise apply.[28] Once again, the Supreme Court of Virginia soundly rejected this absurd argument which would have stood logic and immunity law on its head.[29]

Nothing in the *Colby* opinion, however, stands for the proposition that whether the police officer complied with the emergency-response statute or other applicable guidelines or duties should be completely disregarded for purposes of the immunity analysis. To the contrary, the *Colby* decision itself recognized that in enacting the emergency-response statute the legislature struck a critically important balance between competing policy considerations and decided how the proper balance should be achieved. The Supreme Court of Virginia held:

> In enacting the statute, the legislature balanced the need for prompt, effective action by law enforcement officers and other emergency vehicle operators with the safety of the motoring public. A similar concern for balance underlies the Virginia sovereign immunity doctrine. Both concerns are satisfied here without conflict.[30]

The public interest in the safety of the motoring public that underlies both the statutory emergency-response requirements and the immunity analysis is a profound and important public interest indeed. Studies show that when a high-speed police chase ends in a fatality, an innocent bystander is likely to be the one killed a third of the time.[31] The governmental-employee immunity analysis must include consideration of the statutory requirements, because "a similar concern for balance underlies" both the immunity analysis and the statutory provisions. It would be an anomalous result to conclude that a police officer who runs a red light in direct violation of statutory mandates and in direct violation of her orders, guidelines, training, and instruction should be granted the special protection of governmental-employee immunity. The public interest is not served by actions by governmental employees who exceed their authority or violate the law. If a governmental employee expects his conduct to be accorded the special protection of immunity, it is reasonable and just, and serves the public interest, to insist that the employee must comply with the law and with orders, requirements, and guidelines that govern his conduct. If they fail to do so, they "act at their own risk." This is the balance struck by the law of Virginia and this balance properly promotes and serves the competing public interests involved. ⚖

Endnotes:

1 The authors were recently co-counsel in a major police-response case in Fairfax County. A Fairfax County police officer responding to a report of a fight at a grocery store ran a red light, struck a car in the intersection, and killed the driver of that car. Fairfax County was protected by absolute sovereign immunity. The authors sued the police officer, who then asserted she was entitled to governmental-employee immunity. The immunity plea was tried to the court. Judge R. Terrence Ney of the Fairfax Circuit Court overruled the plea and held the police officer would be liable for simple negligence. Judge Ney stated that the police officer's "belief that it was an emergency, simply put, does not make it an emergency." Volume II, Transcript of August 12, 2009, Trial at page 337 lines 21-22. *See McIntosh v. Perry*, Case No. 2009-00354, Order entered August 12, 2009 (Fairfax Cir. Court). Shortly before the subsequent jury trial on the tort claims, Fairfax County agreed to pay $1.5 million to settle the case. The *Washington Post* reported that Supervisor Gerald W. Hyland, who represents the district where the accident occurred, said the settlement was the first time during his time on the board (since 1988) that the county had agreed to pay any amount to settle a lawsuit involving a vehicular collision. *See http://www.washingtonpost.com/wp-dyn/content/article/2010/01/26/AR2010012603513.html.*

2 Clemens, Clara, *My Father, Mark Twain* 184 (New York: 1931).

3 Ulysses S. Grant, *Personal Memoirs* 182 (Modern Library Paperback Ed. 1999).

4 *Heider v. Clemons*, 241 Va. 143, 145, 400 S.E.2d 190, 191 (1991).

5 The Supreme Court of Virginia has explained:

> In *James* [*v. Jane*] we developed a test to determine entitlement to immunity. Among the factors to be considered are the following:
>
> 1. the nature of the function performed by the employee;
> 2. the extent of the state's interest and involvement in the function;
> 3. the degree of control and direction exercised by the state over the employee; and
> 4. whether the act complained of involved the use of judgment and discretion.

Messina v. Burden, 228 Va. 301, 313, 321 S.E.2d 657, 663 (1984) (citing *James v. Jane*, 221 Va. at 53, 267 S.E.2d at 113). All emphasis in this article is added to the original quoted material unless otherwise indicated.

6 "Admittedly, no single all-inclusive rule can be enunciated or applied in determining entitlement" to immunity. *James*, 221 Va. at 53, 282 S.E.2d 864, 869.

7 *See*, *e.g.*, *Messina v. Burden*, *supra*.

8 *Id.*

9 "The degree of negligence required to impose civil liability will depend on the circumstances of each case" and "[e]ach case must be evaluated on its own facts[.]" *Colby v. Boyden,* 241 Va. 125, 130, 132, 400 S.E.2d 184, 187 (1991). Immunity has been extended to lower-level governmental employees only on a "*case-by-case* basis." *Messina*, 228 Va. at 309, 321 S.E.2d at 661.

10 *See Tomlin v. McKenzie,* 251 Va. 478, 480, 468 S.E.2d 882, 884 (1996).

11 *Colby v. Boyden*, 241 Va. at 128-29, 400 S.E.2d at 186-87.

12 *Messina v. Burden*, 228 Va. at 310, 321 S.E.2d at 662.

13 *Id.*

14 *James v. Jane*, 221 Va. at 53, 282 S.E.2d at 869.

15 *Messina*, 228 Va. at 309, 321 S.E.2d at 661.

16 *Id.*

17 *See, e.g., Friday-Spivey v. Collier*, 268 Va. 384, 387 n.3, 390, 601 S.E.2d 591, 592 n.3, 594 (2004) (where the evidence showed that the fire truck driver was "driving in a nonemergency manner without lights and sirens" and that department procedures for emergencies required lights and siren, and the trial court erred in applying immunity). In *Friday-Spivey*, the Supreme Court held that immunity did not apply despite the fire truck driver's testimony he felt an urgent response was necessary since an infant was locked in a car and "we just [did not] know what to expect when we [got] there" and "despite a natural inclination to classify the report of a child in a locked car as an 'emergency.'" *Id.* Even though the fire truck driver thought that an urgent response was necessary, the evidence showed that the fire truck driver "knew nothing about the infant's condition at that time." 268 Va. at 387, 601 S.E.2d at 594. As *Friday-Spivey* shows, what matters is not the governmental employee's after-the-fact, self-serving, subjective claim of urgency but rather what all of the evidence shows regarding whether the officer was actually required to use and did use the kind of "judgment and discretion" that warrants the application of governmental immunity. *See McIntosh v. Perry*, *supra*; *Lake v. Mitchell*, 77 Va. Cir. 14, *; 2008 Va. Cir. LEXIS 118 (Prince George Cir. Ct. 2008) (police officer's subjective claim of "emergency" was rejected as a matter of law since the actual evidence showed he did not respond in an emergency manner and violated his departmental orders). In *Lake*, the Court held:

> Defendant fails all four prongs of the test first set forth in *James v. Jane*, 221 Va. 43, 53, 282 S.E.2d 864 (1980). (1) Mitchell [the police officer] was not performing an emergency function at the time he was driving to the homicide scene; (2) the Commonwealth had no interest in Mitchell's use of excessive speeds; (3) there was not a sufficient degree of control and direction exercised by the Commonwealth over Mitchell; and (4) nor was Mitchell using discretion to act in a manner, which is integral to the Commonwealth's interest of public safety.

Lake v. Mitchell, 77 Va. Cir. at 15.

18 The evidentiary rule in Virginia is that private rules are not admissible to establish the standard of care in a negligence action. *See Virginia Ry. & Power Co. v. Godsey*, 117 Va. 167, 83 S.E. 1072 (1915); *Pullen v. Nickens*, 226 Va. 342, 310 S.E.2d 452 (1983). The Supreme Court of Virginia has recognized that evidence regarding "private rules" is admissible when offered for other purposes. Thus, for example, the Court has held that a defendant's safety policies may be relevant and admissible in a negligence action on the issue of defendant's knowledge of a potential danger and as evidence of the foreseeability of the occurrence that caused injury. *See New Bay Shore v. Lewis*, 193 Va. 400, 408-409, 69 S.E.2d 320, 325-326 (1952) ("The safety rules adopted by defendant, and its instructions to its employees, clearly indicate that defendant was aware of the potential dangers involved"). Similarly, the Court has held that training and instruction that a defendant has received is relevant and admissible evidence on the issue of whether his conduct constituted willful and wanton negligence. *See Alfonso v. Robinson*, 257 Va. 540, 546, 514 S.E.2d 615, 619 (1999). Rules may also be relevant and admissible evidence with respect to issues such as vicarious liability and sovereign immunity. *See Houchens v. Univ. of Va.*, 23 Va. Cir. 202 (Charlottesville Cir. Ct. 1991). In 2006, the Supreme Court of Virginia held that no error had been committed when the trial court admitted evidence of private rules where the evidence was admitted for a purpose other than proving the standard of care required in a negligence action. *See Riverside Hospital, Inc. v. Johnson*, 272 Va. 518, 636 S.E.2d 416 (2006).

19 In *Friday-Spivey*, the Supreme Court of Virginia, in rejecting an immunity plea, observed that under the Fairfax County Fire and Rescue Department Standard Operating Procedures a "'Priority 1' call means that there is a 'great potential for loss of life or serious injury" and a "[r]esponse to a Priority 1 [emergency] call requires the use of warning equipment," and stressed that at the time of the collision he was "driving in a nonemergency manner without lights and sirens" and under such circumstances he "was required [by department procedures] to obey all traffic regulations." 268 Va. 387 n.1, 390, 601 S.E.2d 591, 592 n.3, 594.

20 *James v. Jane*, 221 Va. at 55, 282 S.E.2d at 870 (quoting *Eriksen v. Anderson*, 195 Va. 655, 660-61, 79 S.E.2d 597, 600 (1954)). *See Bowers v. Commonwealth, Dep't of Highways & Transp.*, 225 Va. 245, 248-249, 302 S.E.2d 511, 513 (1983) ("Our conclusion is that the immunity of the State from actions for tort extends to State agents and employees where they are acting legally and within the scope of their employment, but if they exceed their authority and go beyond the sphere of their employment, or if they step aside from it, they do not enjoy such immunity when they are sued by

a party who has suffered injury by their negligence") (quoting *Sayers v. Bullar*, 180 Va. 222, 230, 22 S.E.2d 9, 13 (1942).

21 241 Va. 125, 400 S.E.2d 184 (1991).

22 The emergency-response statute is currently set forth at Virginia Code 46.2-920. At the time of the *Colby* decision, the emergency-response statute was set forth at former Virginia Code § 46.1-226.

23 Under Virginia law, a police officer must abide by all traffic laws unless his conduct is within some express statutory exception. *See Virginia Transit Co. v. Tidd*, 194 Va. 418, 425 (1952) (even police officer responding to an emergency has a duty to comply with all motor vehicle laws unless some statutory exemption applies); *White v. John Doe*, 207 Va. 276 (1966) (all statutory duties imposed by motor vehicle statutes applied to the police officer unless some statutory provision specifically exempted him); *Yates v. Potts*, 210 Va. 636, 640 (1970) (police officer who brought personal injury action against speeder he was pursuing was not guilty of negligence per se "if the exemption [established by a predecessor to current Virginia Code § 46.2-920] is applicable"). The General Assembly has expressly provided that the statutory duties governing motor vehicle operation are applicable to all drivers, including police officers, unless some specific exception is proved to apply. *See* Virginia Code § 46.2-801 ("The provisions of this chapter applicable to the drivers of vehicles on the highways shall apply to the drivers of all vehicles . . . subject to such exceptions as are set forth in this chapter").

24 241 Va. at 132, 400 S.E.2d at 188.

25 *See* footnote 20 *supra*.

26 241 Va. at 129-130, 400 S.E.2d at 187.

27 "While each case must be evaluated on its own facts, to hold that Officer Boyden's acts here were merely ministerial, thereby denying him the protection of the sovereign immunity defense for the actions complained of in this case, not only ignores the realities of the circumstances under which he performed his **job**, but also would inhibit law enforcement officers faced with similar decisions regarding vehicular pursuit in the future. Applying the four-part test of James, we concur with the trial court that the defense of sovereign immunity was applicable to Officer Boyden's actions in this case." 241 Va. at 130, 400 S.E.2d at 187.

28 241 Va. at 132, 400 S.E.2d at 188 (quoting statutory language).

29 "Adopting Colby's position would create the anomalous result of requiring a showing of simple negligence in order to impose civil liability on a policeman who complies with Code § 46.1-226 [now § 46.2-920] during a vehicular pursuit, while requiring gross negligence as a prerequisite for imposing liability upon an officer who fails to comply with the statute. If, for example, an officer in hot pursuit failed to have the requisite insurance in force, the statute would be inapplicable and he would be civilly liable only on a showing of gross negligence. Yet, if his colleague had the requisite insurance, simple negligence would be sufficient to impose liability upon him. Such a result is illogical and is not required by the statute or by the cases decided thereunder." *Colby v. Boyden*, 241 Va. at 132, 400 S.E.2d at188.

30 *Colby v. Boyden*, 241 Va. at 132, 400 S.E.2d at 188.

31 See editorial, April 21, 2010, "Law Enforcement; Deadly Pursuits," Richmond Times-Dispatch reprinted at http://www2.timesdispatch.com/news/2010/apr/21/ed-chas21_20100420-175804-ar-156137.

Common Interest Doctrine in the Fourth Circuit

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This article analyzes the current status of the common interest doctrine within the U.S. Court of Appeals for the Fourth Circuit. Generally, courts within the Fourth Circuit hold that for the common interest doctrine to apply, the parties must have a nearly identical interest that is legal in nature, though the interest may also have a commercial component. However, there is an implication that an adverse party is required, which means that at least contemplated litigation is a prerequisite. Clients having a common legal interest with another party would be well advised not to share information with that party outside the presence of counsel, and preferably should only do so after executing a written common interest agreement. We provide at the end of this paper a common interest doctrine checklist to aid in determining whether a contemplated situation would meet the requirements for application of the common interest doctrine.

Definition and Requirements

The common interest doctrine is "an extension of the attorney-client privilege"[1] or the work-product doctrine,[2] and "applies when two or more parties consult or retain an attorney concerning a legal matter in which they share a common interest."[3]

Accordingly, the common interest doctrine requires an underlying privilege — either the attorney-client privilege or the work product doctrine. "The common interest doctrine … is not a privilege in its own right. Merely satisfying the requirements of the common interest doctrine without also satisfying the requirements of a discovery privilege do not protect documents from disclosure."[4]

In the Fourth Circuit, the requirements of the underlying privileges are similar to those in other circuits. First, the attorney-client privilege applies only if the asserted holder of the privilege is or sought to become a client; the person to whom the communication was made is a member of the bar of a court or his subordinate and is acting as a lawyer in connection with this communication; the communication relates to a fact of which the attorney was informed by his client without the presence of strangers, for the primary purpose of securing either an opinion on law or legal services or assistance in some legal proceeding, and not for the purpose of committing a crime or tort; and the privilege has been claimed and not waived by the client.[5] In short, the attorney-client privilege applies "only to confidential disclosures by a client to an attorney made in order to obtain legal assistance."[6]

Second, the work product doctrine "protects an attorney's work done in preparation for litigation" and therefore requires pending or anticipated litigation.[7] A party asserting work product privilege must show "as to each document, that the work product in question was prepared by, or under the direction of, an attorney and, was prepared in anticipation of litigation."[8] The purpose of the work product doctrine is to prevent a party from benefitting unfairly from the opposing party's counsel's time in gathering facts relevant to litigation when those facts were ascertainable by both parties. The doctrine also safeguards the mental impressions and opinions of an attorney to ensure that the lawyer is "free to advise clients and prepare their cases for trial without undue interference."[9]

Courts generally require that the parties show the existence of an underlying privilege for

the common interest doctrine and disclose the communication at a time when they shared a common interest,[10] shared the communication in furtherance of that common interest,[11] and have not waived the privilege.[12] The burden of showing compliance with these requirements is on the party seeking to apply the common interest doctrine.[13]

These requirements are generally required by all courts that apply the common interest doctrine. What follows are certain particularities of the common interest doctrine within the Fourth Circuit.

"Common Interest" within the Fourth Circuit

The seminal case *DuPlan Corp. v. Deering Milliken Inc.* dealt at length with the common interest doctrine and is widely cited within and outside of the Fourth Circuit. *DuPlan* required that the "common interest" between the parties be identical and pertain to a legal interest.[14] Since *DuPlan*, courts have not consistently required that the interest be identical, but often merely state that the interest be common, consistent with the current name of the doctrine. For example, in 2005 in *In re Grand Jury Subpoena*, the Fourth Circuit did not require that the interest be identical, but stated that "[f]or the privilege to apply, the proponent must establish that the parties had some common interest about a legal matter" and that "some form of joint strategy is necessary."[15] Similarly, in 1990 the Fourth Circuit stated "persons who share a *common* interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims."[16]

Although courts have not consistently required an identical interest, courts have required that the interest be legal in nature: "the common interest doctrine applies when two or more parties consult or retain an attorney concerning a *legal* matter in which they share a common interest"[17]; "[t]o be entitled to the protection of this privilege the parties must first share a common interest about a *legal* matter"[18]; "[t]he common interest doctrine permits parties whose *legal* interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims."[19]

The doctrine's requirement that the parties' interest be legal in nature is understandable given that the attorney-client privilege — the very privilege from which the doctrine extends — requires the privileged communication to involve legal subject matter.[20]

Nevertheless, despite the explicit requirement that the common interest be legal in nature, the Fourth Circuit recognizes that the parties' common interest may be both legal and commercial, and the commercial nature of the interest does not negate application of the doctrine. "The fact that there may be an overlap of a commercial and legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest."[21]

Who Can Have a Common Interest?

Previously, only criminal codefendants in pending litigation could have a common interest under what was termed the "joint defense privilege." In fact, the Supreme Court of Virginia was the first court to recognize the joint defense privilege, and it did so by extending the attorney-client privilege to communications between criminal codefendants made in the presence of counsel.[22] The rationale was that the codefendants could have hired the same attorney, so to encourage the free flow of information to produce the most effective legal advice, communications between the codefendants and their corresponding counsel should also be protected by the attorney-client privilege.[23] Thus, it is clear that although courts frequently state that the common interest doctrine applies only "when two or more parties consult or retain *an* attorney,"[24] each party may retain its own attorney, because "the counsel of each [is] in effect the counsel of all."[25] Therefore, the privilege extends to multiple parties, each having its own counsel, rather than just multiple parties having joint counsel.

…the Supreme Court of Virginia was the first court to recognize the joint defense privilege, and it did so by extending the attorney-client privilege to communications between criminal codefendants made in the presence of counsel.

The "joint defense privilege" was not extended to civil codefendants until 1942, when

the Supreme Court of Minnesota in *Schmitt v. Emery*[26] extended the privilege. The name "joint defense privilege" was eventually changed to the "common interest doctrine" because the privilege was extended to coplaintiffs as well as parties not in pending litigation. The Fourth Circuit explicitly recognized the expansion of the joint defense privilege to the common interest doctrine in 1990:

> Whether an action is *ongoing or contemplated*, whether the jointly interested persons are *defendants or plaintiffs*, and whether the litigation or potential litigation is *civil or criminal*, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.[27]

Thus, a common interest may be found among defendants or plaintiffs regardless of whether they are in civil or criminal litigation.

With regard to the requisite type of interest the parties must have, the *DuPlan* court explained that the key consideration in determining whether a sufficient common interest exists between two or more parties is "the nature of the common interest as it relates to the action of the attorney."[28] In *DuPlan*, although the patent holder and the exclusive licensee engaged in a transaction "which necessitate[d] the services of an attorney who represent[ed] the interests of both parties to the transaction," the common interest of the patent holder who was a party to the pending litigation and a nonparty exclusive licensee was not sufficiently legal in nature.[29] The court reasoned that the exclusive licensee would only benefit financially from the patent holder's legal success and, therefore, there was no common legal interest between the patent holder and the exclusive licensee. Therefore, the communications that occurred during the licensing transaction were not entitled to the exception of waiver under the common interest doctrine.[30] As explained below, if the parties had an identifiable adverse party, the court would have been more likely to find a common legal interest.

The Fourth Circuit has declined to address whether an adverse party is a prerequisite for invoking the common interest doctrine.

Is an Adverse Party Required?

Until 1996, the implication was that litigation needed to be pending for a common interest to exist. However, in *Aramony* the Fourth Circuit adopted the Second Circuit's reasoning in *United States v. Schwimmer*,[31] and stated "it is unnecessary that there be actual litigation in progress for this privilege to apply."[32] Since *Aramony*, courts in the Fourth Circuit have not required litigation to be in progress.[33] The District Court for the District of Maryland explained this principle by stating that the litigation "may be actual, pending *or contemplated* against a common adversary."[34] Thus, while actual litigation need not be in progress, there is an implication that litigation must at least be contemplated against (or threatened by) an adverse party for there to be a sufficient common interest among the parties.

The Fourth Circuit has declined to address whether an adverse party is a prerequisite for invoking the common interest doctrine. In *Hunton & Williams v. United States Dept. of Justice*, Hunton & Williams relied on a Third Circuit case (*Haines v. Liggett Group Inc.*[35]) to argue that the common interest doctrine only applies when there is an adverse party.[36] The Fourth Circuit stated, "[w]e need not address the issue here" because there was "ample evidence to support the district court's conclusion" that there was an adverse party.[37] While *Haines* from the Third Circuit involved the joint defense privilege and therefore required an adverse party (that is, a plaintiff adverse to multiple defendants), the fact that the Fourth Circuit skirted the issue in *Hunton & Williams* leaves a faint implication that at least a potential identifiable adverse party is required for the common interest doctrine to apply. Courts within the Fourth Circuit have yet to apply the common interest doctrine in the absence of contemplated, threatened, or pending litigation.

Requiring litigation (contemplated or otherwise) for the common interest doctrine to apply,

however, is unfounded. The common interest doctrine "applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine."[38] While the work-product doctrine requires litigation (because it protects an attorney's work done in preparation for litigation), the attorney-client privilege does not require litigation, or even contemplated litigation.[39] Therefore, it does not follow that litigation (pending or contemplated) is required for a court to find that a common legal interest between two parties exists. Nevertheless, because of this unpredictability, one would be well advised not to share information with a third party in the absence of at least contemplated or threatened litigation against an identifiable adverse party.

Waiver of Attorney-Client Privilege

The common interest doctrine does not apply if the parties have waived the underlying privilege,[40] and the underlying privilege may be waived if at least one attorney is not present. As recognized by the U.S. District Court for the Eastern District of Virginia, "the Fourth Circuit has implied that an attorney must be on either end of the communication."[41] But who may be on the other side of the communication without waiving the privilege? If one of the parties is a corporation, for example, to whom may an attorney communicate? When determining who the attorney-client privilege extends to, courts often apply, first, the control group test and, second, the subject matter test.[42] Under the control group test, "the main consideration is whether the particular representative of the client, to whom or from whom the communication is made, is involved in rendering information necessary to the decision-making process concerning a problem on which legal advice is sought."[43] Therefore, in the corporate setting the control group test should not be viewed as limiting communications between the attorney and the group that controls the corporation, but merely as limiting communications between the attorney and the individuals that control the information necessary for the attorney to render legal advice. For example, in a patent case a patent attorney may need to speak to "the corporate technical personnel down in the ranks" rather than the chair of the board who "probably could not explain the problem well enough" for the attorney to be able to render legal patent advice.[44]

After satisfying the control group test, the subject matter test is simply satisfied if the communication is "incident to a request for, or the rendition of, legal advice."[45] Accordingly, the attorney-client privilege and the common interest doctrine protect communications that are between an attorney and people that control the information necessary for the attorney to render legal advice if those communications are for the purpose of requesting or giving legal advice. In sum, clients (joint or otherwise) that have a common interest would be well advised to avoid direct client-to-client communications made outside the presence of counsel because those communications will not be protected under the attorney-client privilege, and the common interest doctrine, therefore, would not apply to those communications.

Does the Doctrine Require a Written Agreement?

The Fourth Circuit does not require a written confidentiality or common interest agreement.[46] However, "[w]hile [the] agreement need not assume a particular form, an agreement there must be."[47] Agreements are best manifested by a writing, and a written agreement helps the parties meet their burden of proof that the shared information was made in confidence and that they do indeed have a common interest.[48] Accordingly, it is best to have a written agreement, whether it be named a confidentiality agreement, a joint defense agreement, a joint prosecution agreement, or a common interest agreement, and should preferably include a statement that the purpose of the information exchange is to further a common legal interest between the parties.[49]

Who Can Waive the Common Interest Doctrine?

As recognized in the seminal *Chahoon* case, which established the joint defense privilege, "the privilege belongs to each and all of the clients, and cannot be released without the consent of all of them."[50] Courts within the Fourth Circuit uphold the principle that the privilege must be waived by each party unless the original parties are now opposed in litigation.[51]

Common Interest Doctrine Checklist

The following checklist may be used to determine whether courts within the Fourth Circuit would apply the common interest doctrine to a communication:

- Does the communication, before being shared with a third party, satisfy either the attorney-client privilege or the work product doctrine?
- Do the parties seeking to enter a common interest agreement share a common interest?
- Is the common interest legal in nature with respect to the actions of the attorney(s)? In other words, is the purpose of the communication that is to be shared with a third party to secure primarily either an opinion on law or legal services or assistance in a legal proceeding?
- Is litigation at least contemplated against a potential identifiable adverse party?
- Is an attorney on at least one side of the communication?
- Is there an express agreement between the parties that a common interest exists between them?
- Is the communication made after there is an express agreement between the parties and in furtherance of the common interest?
- Is the communication made in confidence?
- Have the parties collectively waived the privilege?

The common interest doctrine has evolved over the years and will continue to evolve. What remains true, however, is that the more identical and the more legal the common interest is between the parties, the more likely courts are to find that the common interest doctrine applies and, therefore, find nonwaiver of communications shared between those parties. Nevertheless, because courts within the Fourth Circuit have yet to hold that litigation — pending or contemplated — is not required, clients would be well advised not to share information with a third party in the absence of at least contemplated litigation against an identifiable adverse party. ⚖

Endnotes:

1 *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996).
2 *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990).
3 *Sheet Metal Workers Int'l Ass'n v. Sweeney*, 29 F.3d 120, 124 (4th Cir. 1994).
4 *Hunton & Williams v. United States Dept. of Justice*, 590 F.3d 272, 280 (4th Cir. 2010).
5 *In re Grand Jury Subpoena*, 415 F.3d 333, FN3 (4th Cir. 2005) (citing *United States v. Jones*, 696 F.3d 1069, 1072 (4th Cir. 1982).
6 *In re Outsidewall Tire Litigation*, No. 1:09cv1217, 2010 U.S. Dist. LEXIS, *5 (E.D. Va. July 6, 2010) (quoting *In re Grand Jury Subpoena*, 415 F.3d at 338).
7 *In re Grand Jury Proceedings # 5 Empanelled Jan. 28, 2004*, 401 F.3d 247, 250 (4th Cir. 2005).
8 *Rambus Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 272 (E.D. Va. 2004).
9 *See In re Doe*, 662 F.2d 1073, 1077-78 (4th Cir. 1981).
10 *Hunton & Williams*, 590 F.3d at 285 ("Documents exchanged before a common interest agreement is established are not protected from disclosure.").
11 *In re Grand Jury Subpoenas*, 415 F.3d at 341 ("purpose of the privilege is to allow persons with a common interest to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims") (quotations omitted).
12 *Id.* at 339.
13 *Id*.
14 *See DuPlan Corp. v. Deering Milliken Inc.*, 397 F. Supp. 1146, 1165 (D.S.C. 1974) ("The key consideration is that the nature of the interest be identical, not similar, and be legal, not commercial.").
15 *In re Grand Jury Subpoena*, 415 F.3d at 341 (employee's cooperation in an internal investigation alone not deemed sufficient to establish a common interest) (citing *United States v. Weissman*, 195 F.3d 96, 100 (2d Cir. 1999).
16 *In re Grand Jury Subpoena*, 902 F.2d 244, 249 (4th Cir. 1990).
17 *Sheet Metal Workers Int'l Ass'n*, 29 F.3d at 124.
18 *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996).
19 *Hunton & Williams*, 590 F.3d at 277.
20 *In re Grand Jury Subpoena*, 415 F.3d at FN3 (to be privileged, communication must be for the purpose of securing primarily either an opinion on law, or legal services, or assistance in some legal proceeding).
21 *DuPlan Corp.*, 397 F.Supp. at 1172. *Cf. Bank Brussels Lambert v. Credit Lyonnais (Suisse) SA*, 160 F.R.D. 437, 448 (S.D.N.Y. 1995) ("the common interest doctrine does not encompass a joint

business strategy which happens to include . . . a concern about litigation").

22 *See Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822 (1871).

23 The Supreme Court of Virginia stated: "The parties … might have employed the same counsel, or they might have employed different counsel as they did. But whether they did the one thing or the other, the effect is the same, as to their right of communication to each and all of the counsel, and as to the privilege of such communications. They had the same defense to make, the act of one in furtherance of the conspiracy, being the act of all, and the counsel of each was in effect the counsel of all…. They had a right, all the accused and their counsel, to consult together about the case and the defense, and it follows as a necessary consequence, that all the information, derived by any and all of the counsel from such consultation, is privileged, and the privilege belongs to each and all of the clients, and cannot be released without the consent of all of them." *Chahoon*, 62 Va. (21 Gratt.) at 841-42.

24 *Sheet Metal Workers Int'l Ass'n*, 29 F.3d at 124.

25 *Chahoon*, 62 Va. at 841. *See also In re Grand Jury Subpoena*, 415 F.3d at 341 ("The purpose of the privilege is to allow persons with a common interest to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.").

26 2 N.W.2d 413 (Minn. 1942).

27 *In re Grand Jury Subpoenas*, 902 F.2d at 249 (reversing the district court's ruling which was based on the notion that the joint defense privilege is limited to codefendants).

28 *DuPlan Corp.*, 397 F.Supp. at 1174.

29 *DuPlan Corp.*, 397 F.Supp. at 1175.

30 *Id.*

31 892 F.2d 237, 243 (2d Cir. 1989).

32 *Aramony*, 88 F.3d at 1392.

33 *See*, *e.g.*, *Hanson v. United States Agency for Int'l Development*, 372 F.3d 286, 292 (4th Cir. 2004) ("communications between each of the clients and the attorney are privileged against third parties, and it is unnecessary that there be actual litigation in progress for this privilege to apply") (citing *Aramony*, 88 F.3d at 1392).

34 *Beyond Systems Inc. v. Kraft Foods Inc.*, No. PJM-08-409, 2010 U.S. Dist. LEXIS 40423, at *5 (D. Md. April 23, 2010).

35 975 F.2d 81, 90 (3d Cir. 1992).

36 *Hunton & Williams*, 590 F.3d at 283.

37 *Id.*

38 *In re Grand Jury Subpoenas*, 902 F.2d at 249 (citing *Transmirra Products Corp. v. Monsanto Chemical Co.*, 26 F.R.D. 572, 578 (S.D.N.Y. 1960).

39 *See In re The Regents of the University of California*, 101 F.3d 1386, 1390 (Fed. Cir. 1996) ("It is well established that the attorney client privilege is not limited to actions taken and advice obtained in the shadow of litigation."); *see also* Paul R. Rice, Attorney-Client Privilege in the United States § 1:13 (1993) (the attorney-client privilege in the United States is free of the "pending or in anticipation of litigation" limitation).

40 *In re Grand Jury Subpoenas*, 415 F.3d at 339.

41 *In re Outsidewall Tire Litigation*, 2010 U.S. Dist. LEXIS 67578, at *8 (E.D.Va. July 6, 2010) (noting that the Second and Third Circuits have stated that the common interest doctrine applies to communications between an attorney for one party and the common interest party).

42 *See, e.g., DuPlan Corp.*, 397 F. Supp. at 1165; *see also Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491-492 (7th Cir. 1970) (applying "control group" and "subject matter" tests).

43 *DuPlan Corp.*, 397 F.Supp. at 1165.

44 *Id.*

45 *Id.*

46 *See Beyond Systems Inc.*, No. PJM—08-409, 2010 U.S. Dist. LEXIS 40423, at *4 (noting that "[w]hile not required, there has never been a written record of a common interest agreement over the eight years of intense litigation").

47 *Hunton & Williams*, 590 F.3d at 287.

48 *See id.* at 286 (noting that the parties failed to create a written common interest agreement until November 2005, and that neither party made any kind of "common interest" notation on their written communications until October 2005).

49 *See* Martin F. Murphy, *Sharing Secrets: Thinking About Joint Defense Agreements*, 46 F. B.J. 31 (Sept. - Oct. 2002).

50 *Chahoon*, 62 Va. (21 Gratt.) at 841.

51 *In re Grand Jury Subpoenas*, 902 F.2d at 248 ("An exception to the general rule that disclosure to a third party of privileged information thereby waives the privilege, a joint defense privilege cannot be waived without the consent of all parties who share the privilege."); *see also Beyond Systems, Inc.*, No. PJM-08-409, at *8, 2010 U.S. Dist. LEXIS 40423 ("As the privilege is shared by more than one entity, each entity sharing in the common interest must waive its protection.").

Knowledge Is Power

A Review of the American Arbitration Association's Rules for Construction Disputes

by Kristan B. Burch

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Many commercial construction disputes continue to be resolved through arbitration before the American Arbitration Association (AAA), based on contractual provisions in prime contracts, subcontracts, and architect contracts. Parties can adhere to the AAA rules or can modify the rules. It is important to be familiar with the AAA rules when filing and handling an arbitration before the AAA. It is also important to understand the rules when drafting construction contracts that contain AAA arbitration clauses, as your client may want to modify by contract some of the rules to better accomplish its objectives.

Most commercial construction disputes resolved through AAA arbitration apply the Construction Industry Arbitration Rules and Mediation Procedures (AAA Construction Rules), last amended on October 1, 2009.[1] The AAA Construction Rules, along with other resources, are available at www.adr.org.[2]

Unless the parties or the AAA determines otherwise, disputes involving no more than two parties in which the claim or counterclaim does not exceed $75,000 (exclusive of interest, attorneys fees, and arbitration fees and costs) shall be decided under the Fast Track Procedures.[3] Unless the parties agree otherwise, disputes in which the disclosed claim or counterclaim of any party is $1 million or more (exclusive of interest, attorney's fees, and arbitration fees and costs) shall be decided under the Procedures for Large, Complex Construction Disputes.[4] All other disputes shall be decided under the Regular Track Procedures.[5]

The AAA permits filings to be completed online through AAA Webfile, including the filing of a demand for arbitration and a request for mediation.[6] The forms can be completed and viewed online by the filing party, with any required filing fees paid by credit card.[7]

Initiating the AAA Arbitration Proceeding

After a demand for arbitration is filed by a claimant, the respondent has fourteen calendar days after notice of filing of the demand is sent by the AAA to file an answering statement and a counterclaim, if applicable.[8] To the extent that no answering statement is filed within fourteen days, the respondent will be deemed to have denied the claim filed by claimant.[9]

The AAA Construction Rules permit a claimant or respondent at any time prior to the close of the hearing or the date established by the arbitrator to increase or decrease the amount of a claim or counterclaim.[10] To the extent that a party seeks to add a new or different claim or counterclaim, that party must make a request in writing to the AAA, with a copy sent to the other party.[11] After the arbitrator is appointed for a case, no new or different claims can be submitted unless the arbitrator consents.[12]

Deciding the Location of the AAA Arbitration

Many construction contracts establish the location for AAA arbitration proceedings. When such location is established in the relevant contract, the AAA will not alter the location unless the parties agree to a different location.[13] When a dispute exists regarding location, the parties must notify the AAA within fourteen calendar days from when the AAA initiated the case or the date established by the AAA.[14] This means that respondent should include in its answering statement any dispute regarding the location specified by claimant in the demand for arbitration.[15]

When an agreement is silent on location and the parties cannot agree, the arbitration shall be conducted in the city nearest the site of the project in dispute subject to the power of the arbitrator to determine the location for the arbitration

within fourteen days after the date of the preliminary hearing.[16]

Selecting the AAA Arbitrator

Unless otherwise agreed by contract, a dispute shall be resolved by one arbitrator, except when the AAA decides that three arbitrators should be appointed.[17] To the extent that a party would prefer three arbitrators, a party can request that three arbitrators be appointed when filing the demand for arbitration or the answering statement.[18] Such a request shall be considered by the AAA in deciding how many arbitrators to appoint.[19] To the extent that the amount of a claim is increased or decreased during an arbitration, a party can request a change in the number of arbitrators as long as the request is made no later than seven calendar days after receipt of the R-6 required notice of change of claim amount.[20]

When an arbitrator is chosen or a method decided for appointing an arbitrator, the AAA will follow that agreement.[21] The contract also may say when an arbitrator should be appointed. If the contract does not specify, the AAA shall notify the parties to make the appointment, and if no appointment has been made within fourteen calendar days, the AAA appoints the arbitrator.[22]

If no provisions are made by contract for selecting an arbitrator, the AAA Construction Rules outline the selection process. The AAA sends to the parties the names of possible arbitrators chosen from the National Construction Panel, along with background information on each potential arbitrator.[23] The AAA prefers that the parties choose an arbitrator from the names provided. If an agreement cannot be reached, each party has fourteen calendar days from receipt of the names to strike names objected to and number the remaining names in order of preference.[24] A party does not have to provide its list to the opposition. From the lists returned to the AAA, the AAA appoints an arbitrator.[25] Such lists can be filed by the parties online through AAA Webfile or can be submitted in paper form.

To the extent that review of the lists does not result in the appointment of an arbitrator, the AAA Construction Rules grant the AAA authority to make the appointment from the other members of the National Construction Panel without seeking further input from the parties.[26]

After being appointed, the arbitrator shall provide a disclosure to the AAA that lists any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence.[27] Such disclosure shall be provided by the AAA to the parties.[28] If either party finds something in the disclosures that causes concern about the impartial and independent nature of the arbitrator, the party can file an objection to service of the arbitrator, and the AAA shall decide whether the arbitrator should be disqualified.[29] An arbitrator may be subject to disqualification for partiality or lack of independence, inability or refusal to perform duties with diligence and in good faith, and any grounds for disqualification provided by applicable law.[30] The AAA's decision on disqualification is conclusive.[31]

If an arbitrator cannot perform duties for a particular case, the AAA may declare the position vacant and fill the vacancy.[32] For vacancies that arise after a hearing has started, the remaining arbitrators can continue with the hearing and decide the case, unless the parties agree otherwise.[33] When a substitute arbitrator is appointed, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat any part of any prior hearings.[34]

Conducting the AAA Preliminary Management Hearing and Discovery

Following selection of an arbitrator, a preliminary management hearing is conducted by telephone. The issues to be discussed at the hearing include, but are not limited to, the issues to be arbitrated, the schedule for the arbitration — including any pretrial submissions — and the form of the arbitration award.[35] The parties may request a standard award, a reasoned opinion, an abbreviated opinion, findings of fact, or conclusions of law.[36] An arbitrator shall determine the form of an award if the parties cannot agree.[37]

Parties' intent to engage in discovery can be discussed during a preliminary management hearing. The parties can request that an arbitrator sign subpoenas for witnesses or documents, and any proposed subpoena must be submitted to the other parties at the same time that the request is made to an arbitrator to issue the subpoena.[38]

If no provisions are made by contract for selecting an arbitrator, the AAA Construction Rules outline the selection process.

Unless otherwise agreed to by the parties, the AAA Construction Rules permit an arbitrator to direct the production of documents, the identification of witnesses, and the exchange of exhibits to be used at an arbitration hearing.[39] No other discovery is permitted under the AAA Construction Rules unless the parties agree or an arbitrator orders it in exceptional cases.[40]

Unless the parties agree otherwise, an arbitrator has thirty calendar days from the closing of the hearing to issue an award.

An arbitrator may order interim measures, including injunctive relief and measures of protection or conservation of property or disposition of perishable goods.[41] An arbitrator may order interim measures through an interim award and may require security for the costs of the measures.[42]

Navigating the AAA Arbitration Hearing

Pursuant to the AAA Construction Rules, an arbitrator and the AAA shall maintain the privacy of hearings unless the law provides to the contrary.[43] The AAA Construction Rules permit a stenographer to be present for the hearing if any party desires, and the requesting party shall be responsible for the costs unless the parties agree otherwise.[44]

A site inspection or other investigation can be made by an arbitrator.[45] A party has the right to be present at the inspection unless another agreement is reached by the parties or proper notice is given in advance of the inspection.[46]

At the hearing, a claimant presents evidence to support its claim, and a respondent presents evidence regarding its defenses to the claim.[47] Questions can be asked of witnesses by the parties and the arbitrator.[48] An arbitrator may permit evidence to be presented by live testimony, videoconferencing, Internet communication, telephone, and other remote means.[49] An arbitrator may receive and consider evidence of witnesses by declaration or affidavit.[50]

Evidence offered by parties at a hearing should be relevant and material to the dispute, but an arbitrator is not required to conform to the legal rules of evidence.[51] The AAA Construction Rules direct an arbitrator to take into account applicable principles of legal privilege, such as those involving confidential communications between lawyers and clients.[52]

Unless the parties agree otherwise, an arbitrator has thirty calendar days from the closing of the hearing to issue an award.[53] The hearing may be reopened by an arbitrator at any time before an award is issued.[54] If the hearing is reopened, an arbitrator has thirty calendar days from the close of the reopened hearing within which to issue an award unless the parties agree otherwise.[55]

An arbitrator's award shall be issued in writing and shall provide a concise written financial breakdown of any monetary awards or a line-item disposition of each nonmonetary claim or counterclaim.[56] An award may contain equitable relief and specific performance of a contract.[57] In addition, an arbitrator may assess and apportion fees, expenses, and compensation among the parties, and an award may include interest and attorneys fees.[58]

Within twenty calendar days after transmission of an award, an arbitrator or a party may request that the arbitrator correct any clerical, typographical, technical or computational errors in the award, but the arbitrator cannot redetermine the merits of any claims already decided.[59] After such a request is made, the other party shall have ten calendar days to respond to the request, and the arbitrator shall dispose of the request within twenty calendar days after transmittal of the request and any response.[60] ⚖

Endnotes:

1 The AAA also has a set of rules specific to home construction called Home Construction Arbitration Rules and Mediation Procedures. While this article does not focus on the home construction rules, they are available at http://www.adr.org/sp.asp?id=32399.
2 The AAA Construction Rules are available at http://www.adr.org/sp.asp?id=22004#large.
3 AAA Construction Rule R-1(b). These rules are available at http://www.adr.org/sp.asp?id=22004#ftpr.
4 AAA Construction Rule R-1(c). These rules are available at http://www.adr.org/sp.asp?id=22004#ftpr.
5 AAA Construction Rule R-1(e).
6 The AAA Webfile portal is available at https://apps.adr.org/webfile/.
7 Filing demands for arbitration through AAA Webfile is not mandatory. Parties still can initiate an arbitration by a paper filing with the AAA office.
8 AAA Construction Rule R-4(c).

9 *Id.*
10 AAA Construction Rule R-6.
11 *Id.*
12 *Id.*
13 AAA Construction Rule R-12.
14 *Id.*
15 *Id.*
16 *Id.*
17 AAA Construction Rule R-18.
18 *Id.*
19 *Id.*
20 *Id.*
21 AAA Construction Rule R-15.
22 *Id.*
23 AAA Construction Rule R-14.
24 *Id.*
25 *Id.*
26 *Id.*
27 AAA Construction Rule R-19. The AAA Construction Rules state that in order "to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-19 is not to be construed as an indication that the arbitrator
> considers that the disclosed circumstances is likely to affect impartiality or independence." *Id.*

28 *Id.*
29 AAA Construction Rule R-20.
30 *Id.*
31 *Id.*
32 AAA Construction Rule R-22.
33 *Id.*
34 *Id.*
35 AAA Construction Rule R-23.
36 AAA Construction Rule R-44.
37 *Id.*
38 AAA Construction Rule R-33.
39 AAA Construction Rule R-24.
40 *Id.*
41 AAA Construction Rule R-36.
42 *Id.*
43 AAA Construction Rule R-25.
44 AAA Construction Rule R-28.
45 AAA Construction Rule R-35.
46 *Id.*
47 AAA Construction Rule R-32.
48 *Id.*
49 *Id.*
50 AAA Construction Rule R-34.
51 AAA Construction Rule R-33.
52 *Id.*
53 AAA Construction Rule R-43.
54 AAA Construction Rule R-38.
55 *Id.*
56 AAA Construction Rule R-44.
57 AAA Construction Rule R-45.
58 *Id. See also* AAA Construction Rules R-52 (Administrative Fees), R-53 (Expenses), and R-54 (Neutral Arbitrator's Compensation).
59 AAA Construction Rule R-48.
60 *Id.*

Your Answer, Please

by Travis J. Graham

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A client comes to you with a freshly served complaint, or a counterclaim arrives in the mail. This is common enough. If you are doing your job, this should happen a couple of times a month. It is odd, then, that there usually follows a period of great indecision, during which meetings are held, associates are roped in, elder statesmen or stateswomen of the firm are consulted, and teeth are gnashed, all over the burning question of what to do next. Should we file an answer or something else, and if the latter, what?

There is no need for all of this stress. In all but a very few circumstances, the answer is: file an answer.

I can almost hear the blustering. There is something about just answering a claim that makes people uneasy. I believe there are two reasons: First, some folks think that simply answering is a sign of weakness, and that it is important to strike back at a claimant with great vengeance and fury. Second, there is the lurking fear that by answering, you are waiving something, and no one wants to take the time to read the rules to see if this is true. Neither of these is necessarily a good reason not to file an answer.

"What motions are you talking about, anyway?"

There are all kinds of motions, and you can seek just about any form of relief through a motion.[1] Here, however, we are concerned with those motions that can be filed in lieu of an answer. In federal court, these are the motions listed under Rule 12 of the Federal Rules of Civil Procedure. There are basically seven grounds for such a motion: lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, insufficient process, insufficient service of process, failure to state a claim upon which relief can be granted, and failure to join a party under Rule 19.[2] There are also two Rule 12 motions, which are of limited utility: the motion for more definite statement under Rule 12(e) and the motion to strike under Rule 12(f). These last two have their place, but will not be discussed further here.

Under Virginia law, one may file a demurrer, a special plea, a motion to dismiss, or a bill of particulars in lieu of an answer.[3] The demurrer is the equivalent of a motion to dismiss for failure to state a claim,[4] while other legal defenses — such as those related to jurisdiction, venue, and service — are raised through a motion to dismiss. We will not focus on the bill of particulars and the special plea here.

Any of these can be filed in lieu of an answer. Because they can, however, doesn't mean they should.

"But if we just answer, that's like admitting something, and plus we need to show them we mean business!"

There are several types of lawyers who refuse to answer a claim on moral grounds and feel that to do so is a sign of weakness. One is the crusty ex-military type who runs triathlons and displays pictures of himself at the top of mountains. Another is partner in a giant firm with legions of associates at his or her command. A third is the the lawyer who was trained by, or wants to impress, one of the first two. Some of these are the same lawyers who set hearings by notice and call you "disingenuous" in their pleadings.

The thought process appears to be that if a lawyer fires back with a sheaf of motions, the plaintiff or counterplaintiff will be shocked, stunned, and demoralized, and will see the error of his ways. This is likely not so, and the attempt to elicit "shock and awe" may actually backfire, for several reasons.

First, your opponent may actually find it helpful to see all the legal arguments nicely researched and packaged at such an early point in the case. It gives him plenty of time to strategize, plan discovery, do research, and otherwise prepare. Contained in your pile of motions there will often be facts and legal positions that hadn't

occurred to your opponents, and which they will thank you for bringing to their attention. Your motions provide a great road map for the claimant's attorney in planning his case, identifying issues and witnesses and evidence, and prioritizing discovery. In fact, your thunderous blast of defense might even lead a claimant's attorney to locate evidence and witnesses who, given six or eight months, might vanish into the ether.

Second, you are less likely to win motions filed very early. Most judges are reticent to throw out claims when the claimant has had time to fully investigate them. It's easy to see why this is so in the case of motions that require evidence—such as motions for summary judgment or special pleas. But, apparently by some sort of transitive power, this type of reasoning applies even to motions that technically shouldn't involve discovery, such as demurrers or motions to dismiss. A motion to dispose of a case, no matter what it's called, made six days after the case is filed and set for a quick hearing is not going to succeed as often as would the same motion filed a few months later.

Further, as everyone knows, once you pull a knife and don't use it, you are unlikely to get a second chance. It is harder to get the attention of the typical court with regard to a supplemental motion to dismiss or a renewed demurrer after the first one fails.

Third, the earlier you file your motion, the easier it is for your opponent to wiggle out of the jam you put him in. In state court, the overwhelming practice of judges who grant early demurrers is to allow leave to amend. When this happens, your opponent goes back to his office and sits down with your demurrer, the complaint, and the hearing transcript, and carefully pleads around all of your arguments. This is very easy to do early in the case when there has been little discovery, and much harder later when the claimant has been boxed in on some things and can't plead differently.

In federal court, a claimant does not need leave to amend in response to your motion, unless you answer first. Rule 15 allows one amendment to a claim as a matter of right within twenty-one days after a responsive pleading is filed or after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.[5] This means that while you can trigger the start of a twenty-one-day period to amend by filing certain motions, you still cannot block a party from amending as of right in response to a motion—unless of course you answer, wait twenty-one days, and then file your motion.

Another good reason to answer quickly is so that you can do so with, as they say, "pure heart and empty head." There may be inconvenient allegations in the claim to which you can truthfully respond by saying that your client is without knowledge of their truth or falsity. But if you research and file motions and prosecute them over the next few months along with depositions, interrogatories, and requests for production, then when you finally must answer, your client may have that knowledge—and wish it weren't so. Remember, there is no requirement under the federal or state rules to update an answer. Remember also that in Virginia state court, you can base a motion for summary judgment on an answer, but not a deposition.

Finally, contrary to popular belief, a simple answer may do more good than a wheelbarrow full of motions. I recently received such an answer from a defense attorney not known for conserving paper, and the silence was sort of eerie—like in a movie where the hero says, "It's quiet. Too quiet. …" We just settled that case relatively painlessly. A mere answer allows the parties to keep talking if they were talking before suit was filed. It reduces your stress level and that of your colleagues, especially since the responsive pleading deadline is one of the few that is set by the rules and is truly important.

To conclude, answering a claim is not a sign of weakness, nor is a barrage of motions a sign of strength, nor is early-motion practice always a good tactical decision. An early barrage of motions is probably the equivalent of firing at the enemy while he is still out of range: it won't work, it tells the enemy where you are, and it wastes ammo. Wait until you see the whites of their eyes, and you will have a better chance.

Most judges are reticent to throw out claims when the claimant has had time to fully investigate them.

"But don't we waive a bunch of stuff if we answer?"

I hesitate to even say this, but, yes, it is possible to waive by filing an answer. The possibility of waiv-

ing something (even something completely useless) is enough to scare some lawyers, and they will not read further. "Why chance it?" they think. "If I file every possible motion, there is no way I can make a mistake. Plus, I don't have to read the rule."

To them I say, loosen the belt and the suspenders, work through the rules, and maybe save some effort.

Differentiate waiving a defense and waiving the right to make a defense by pretrial motion. Waiving a defense means that the defense is unavailable for the rest of the case. It can't be raised by motion, or at trial, and probably not on appeal. By contrast, when one waives the right to raise a defense by pretrial motion, the substantive defense is not lost and may be raised at trial and, if properly preserved, on appeal.

This distinction is important, but not obvious, under the federal rules. In sympathy with lawyers who hate procedural rules and always fear that they are missing something, I think that Federal Rule 12 is an abomination. Not only is the distinction between waiving a defense and waiving the right to make a motion not clear, the subject of waiver is difficult to decide from the text of the rule. It is a collection of principles, exceptions, and exceptions to exceptions.

This is what you need to know:

First, unless defenses based on personal jurisdiction, venue, sufficiency of process, and sufficiency of service of process are found in your first responsive filing — whether an answer or a motion — those defenses are substantively waived. You can't argue about them anymore, pretrial, at trial, or posttrial.[6]

Second, there are three defenses left: lack of subject matter jurisdiction, failure to state a claim, and failure to join a party under Rule 19. Of these, lack of subject matter jurisdiction is easy; you can always raise this, even on appeal.[7]

This leaves failure to state a claim and failure to join a party under Rule 19. A motion to dismiss for failure to state a claim may be made before answering, in lieu of an answer.[8] (Interestingly, almost all federal courts agree that a motion to dismiss any portion of a claim tolls the response deadline for the entire claim.[9] This is not true in Virginia practice.) You can also raise the defense in your answer,[10] but this isn't equivalent to a motion; you have to do more if you want a pretrial hearing on the issue. Most importantly for purposes of this discussion, you may also raise this defense after answering, except that the motion will be called a "motion for judgment on the pleadings" instead of a "motion to dismiss."[11] The standard is the same. In fact, most people still call it a "motion to dismiss."

The defense of failure to join a party under Rule 19 is a little more complicated, because there are two kinds of Rule 19 motions. A motion under Rule 19(a) asserts that a necessary party is not before the court, and asks the court to remedy the situation. If the court agrees, the court merely orders that the necessary party be added. A motion under Rule 19(b) not only asserts that a necessary party is not before the court, but that the party cannot be added, because to do so would oust the court of jurisdiction. The remedy here, should the court agree, is dismissal of the action.

The defense under Rule 12(b)(7) based on Rule 19(a) can be made by motion before answering, or it may be made in the answer — although, as with failure to state a claim, this merely preserves the defense and does not entitle you to a pretrial hearing on the issue.[12] This defense may not be made by a post-answer motion. A defense based on Rule 19(b), however, may be made by motion before answering, may be preserved in the answer, and may be raised by motion after answering in a motion for judgment on the pleadings.[13]

There is only one final catch, and that is when you make any motion under Rule 12(b), you cannot later make another Rule 12(b) motion based on any ground that was available and was not included in the first motion.[14] This does not apply to motions concerning subject-matter jurisdiction, or motions for judgment on the pleadings under 12(c).

In applying all this, I recommend a step-by-step approach. First, to state the obvious, decide whether you have any of these defenses, or care about them. Waiving defenses is inconsequential if you don't have defenses. If you have a valid defense based on venue, personal jurisdiction, or process, the motion probably depends on clear facts — your client's address and the way process was served, for example. Make the motion. Be sure it is worthwhile, however. Do you really care about how the summons was served, given that it can be re-served correctly? To argue failure to state a claim, do so in a motion for judgment on the pleadings after you have corralled your opponent. The best argument about the absence of a necessary party is in Rule 19(b), and you can delay that motion, too. Finally, if you believe there is a subject matter jurisdiction problem, you have ample time to raise it.

In Virginia state court, the rules are different. If you file an answer alone, or a motion that does not assert these grounds, you waive objections to venue,[15] objections to personal jurisdiction,[16] and objections to defects in service.[17]

Further, the filing of an answer alone waives the right to demur, unless new grounds appear.[18] This is not only a waiver of the procedural right to demur; in theory one substantively waives all demurable defects by failing to demur. This sounds horrendous, but is it? Although many defense lawyers would never admit it, sometimes the complaint really does state a claim, and you are waiving nothing by foregoing the demurrer. If you demur, you theoretically waive objections to all other existing defects reachable by demurrer which were not included in your motion — you cannot make serial demurrers. You should examine whether you are losing anything. Remember that you may be able to assert certain defenses by other types of motions. Finally, you do not waive objections to subject matter jurisdiction or failure to join an indispensable party by answering.[19]

It is possible to waive defenses, and to waive the procedural right to raise defenses at certain times. It is also possible to understand the rules, and to plan accordingly instead of filing everything out of fear.

"But in my case . . ."

There are a few cases in which a quick motion is better than an answer. If you have an absolutely rock-solid, unassailable, unavoidable, 100 percent– certain defense, and one that can be made by motion (meaning it typically doesn't involve disputed facts), file it quickly. These would include defenses such as lack of subject matter jurisdiction in a particular court, a clear lack of personal jurisdiction, misnomer, the existence of an agreement to arbitrate, or some other defense that is certain to do away with the entire case quickly. I do not mean "certain" to you and your two colleagues and your client at a restaurant after an all-day meeting about the case. I mean "certain" to an objective judge who follows the rules and the law and who doesn't have time to evaluate Byzantine legal arguments. There aren't many of these motions.

Your opponent or the opposing party may respond insufficiently or not at all to a quick dispositive motion. Few judges are going to dismiss a claim early if the opposing party or lawyer appears and grovels appropriately. If you have an opponent who is not good at responding to motions, consider waiting a few months so that you can argue about "the protracted history of this matter" to the judge.

Conclusion

An attempt to devastate the other side with a battery of motions in lieu of an answer probably won't work, and may be counterproductive. The claimant's attorney is likely not scared of your motions; he may just appreciate your hard work in researching all the legal issues. Nor does he think that you have practically surrendered if you file an answer. There are good reasons to file an answer, not the least of which is your own mental wellbeing as the response deadline approaches. And no, you do not waive all your defenses by filing an answer instead of a motion, or two or three. There are rules to consult without resorting to voodoo or second sight, and there is no need for the "abundance of caution" we hear so much about.

So consider foregoing the lengthy meetings and strategy sessions the next time a complaint or counterclaim arrives. Instead, file an answer and move on to something else. It is likely a more productive use of your time. ⚖

Endnotes:

1 For a discussion of perhaps the funniest motion ever filed, see *Washington v. Alaimo,* 934 F.Supp. 1395 (S.D. Ga. 1996).
2 Fed. R. Civ. P. 12(b).
3 Rule 3:8 of the Rules of the Sup. Ct. of Va.
4 Va. Code § 8.01-273.
5 Fed. R. Civ. P. 15(a)(1).
6 Fed. R. Civ. P. 12(h)(1).
7 Fed. R. Civ. P. 12(h)(3).
8 Fed. R. Civ. P. 12(b)(6).
9 *See, e.g., Ideal Instruments Inc. v. Rivard Instruments,* 434 F.Supp. 2d 598, 637-40 (N.D. Iowa 2006).
10 Fed. R. Civ. P. 12(b).
11 Fed R. Civ. P. 12(c).
12 Fed. R. Civ. P. 12(b)(7); Fed. R. Civ. P. 12(h)(2).
13 Fed. R. Civ. P. 12(h)(2)(B).
14 Fed. R. Civ. P. 12(g).
15 Va. Code § 8.01-276.
16 Va. Code § 8.01-277.
17 *Id.*
18 *O'Neill v. Cole*, 194 Va. 50, 55, 72 S.E2d 382, 385 (1952).
19 Va. Code § 8.01-276.

by Nancy M. Reed, Chair

What's Your Interest? There's a Bar Association for You

IN ADDITION TO LOCAL BAR ASSOCIATIONS, there are twenty-seven specialty and statewide bar associations in Virginia. These range in size from the Virginia Bar Association and the Virginia Trial Lawyers Association to the smaller Virginia Creditor's Bar Association and Local Government Attorneys of Virginia. A complete list of Virginia's bar associations is available through the Conference of Local Bar Associations at http://www.vsb.org/site/conferences/clba/view/local-statewide-bar-associations/, with links to those that have websites.

Here is some information on Virginia's statewide and specialty bars:

Virginia Bar Association—Formed in 1888, the VBA serves it members by "cultivating and advancing the science of jurisprudence, promoting reform in the law and in judicial procedure, facilitating the administration of justice in this state, and upholding and elevating the standard of honor, integrity and courtesy." A commitment to professionalism in its many expressions pervades all of the activities of the VBA.

The VBA accomplishes this through its legislative advocacy. During the year, the association's committees and sections analyze statutes and bring their recommendations before the VBA Executive Committee for endorsement. The VBA then actively pursues its program in the General Assembly.

The VBA also sponsors a Rule of Law Project to inspire middle-school students to become active citizens by helping them appreciate and protect the rights we enjoy under our laws and the responsibilities we share.

Virginia Trial Lawyers Association—The VTLA was formed in 1959 to enhance the knowledge, skills, and professionalism of trial lawyers. Most members practice in small- or mid-sized firms and spend a substantial portion of their time in the courtroom. The VTLA provides continuing legal education for attorneys and paralegals. It sponsors a "Road to Virginia Justice" educational program about civil and criminal justice, a bike safety and helmet project, an Excellence in Journalism Award, and law student trial competitions.

The VLTA also represents members' and their clients' interests in the Virginia General Assembly.

Local Government Attorneys of Virginia Inc. provides continuing education of local government attorneys and a forum for exchange of ideas between their offices across the state. They publish *Bill of Particulars* and hold two conferences and local seminars every year.

The **Virginia Creditor's Bar Association** was founded in 1990 and promotes the professional interests of attorneys engaged in debt collection; promotes standards and understanding among persons involved in debt collection; and encourages honor and integrity to client, the courts, and the community.

The **American Academy of Elder Law Attorneys'** Virginia chapter maintains an e-mail discussion group and sponsors an annual CLE program. This year the program will focus on the role guardians ad litem play in contested guardianships. In addition, the VAELA has worked with the Virginia Bar Association's Elder Law Section on the Uniform Guardianship Statute, and they previously worked on the recently enacted Uniform Power of Attorney Act.

The **Virginia Association of Defense Attorneys** was formed in 1968. It is a valuable source of educational opportunities, information sharing, and networking for Virginia attorneys who are dedicated to the defense of civil actions and the promotion of fairness and integrity in civil justice. Through its *Journal of Civil Litigation* and its CLE programs, the VADA tracks trends in litigation procedure and the law involving insurance policy coverage, medical malpractice, professional liability, workers' compensation, product and toxic torts, auto and transportation liability, and corporate and commercial litigation. The VADA's philosophy is to provide active support for legislation, primarily but not exclusively procedural in nature, that creates a level playing field for its members in the defense of their clients.

The **Virginia Association of Commonwealth's Attorneys** and **the Virginia Association of Criminal Defense Lawyers** serve attorneys on both sides of criminal litigation. The VACA provides training and advocacy for Virginia's 120 elected commonwealth's attorneys and their approximately 645 assistants. The VACDL's members include lawyers who provide criminal defense, one-third of whom

CLBA continued on page 54

by Carson H. Sullivan, President

We Want to Hear from You

THE YOUNG LAWYERS CONFERENCE needs your help. This one is easy — all you need to do is put on your thinking cap and take a few minutes to reach out to us.

What Are We Seeking?

The YLC is currently seeking nominations for our R. Edwin Burnette Jr. Young Lawyer of the Year Award. We present this award at the Virginia State Bar Annual Meeting to an outstanding young lawyer who has demonstrated exemplary service to the YLC, the legal profession, and the community. The award is named in honor of Judge R. Edwin Burnette Jr. of Lynchburg, who served as president of the YLC for the 1985–86 bar year and as president of the Virginia State Bar in 1993–94. Judge Burnette exemplifies all of the qualities and attributes the YLC seeks to promote. He chaired and was a member of several committees dedicated to serving the legal profession and the public, and was the recipient of the first Virginia Legal Aid Society's Pro Bono Award.

Award recipients are individuals who go above and beyond. They give much of their time to helping others through pro bono and community service, they act at all times with integrity and honor, and they have distinguished themselves in their law practices and in their communities through their leadership activities. Nominees must be YLC members, which means simply that they are licensed to practice in Virginia and are age thirty-six or younger.

Past Award Winners

The most recent Young Lawyer of the Year award recipient was Robert E. Byrne Jr. of Charlottesville. Bob was honored at the 2010 Annual Meeting for his exceptional service during the past bar year, including his service to the YLC as cochair of the Professional Development Conference and chair of the Children and the Law Commission, his contributions to the YLC's *Docket Call* newsletter, his service as chair of the community relations committee of the Charlottesville Albemarle Bar Association, and his organization of Senior Law Day and Rule of Law Day in his district.

Bob joined a distinguished list of past recipients dating back to 1994 — the year the YLC first introduced the award. Please visit http://www.vsb.org/site/conferences/ylc/view/awards/ on the YLC's website for a complete listing of our R. Edwin Burnette Jr. Young Lawyer of the Year winners.

What Should You Do?

The chances are high that many of you reading this article already know someone who should be nominated for this year's award. Do not miss the chance to recognize exemplary young lawyers in your community. Please send your nominations with a brief written summary of the nominee's activities to Lesley Pate Marlin, the YLC's immediate past president, at lpmarlin@venable.com. Nominations must be received by April 1, 2011.

If you have any questions about the nominations process, please do not hesitate to contact me at (202) 551-1809 or carsonsullivan@paulhastings.com. As always, if you would like to get involved with the YLC, please let me know, or contact our membership chair, Nathan J. Olson, at (703) 934-1480 or nolson@cgglawyers.com.

VSB Young Lawyers Conference Seeking Nominations for Board of Governors

At its Annual Meeting on June 17, 2011, the Virginia State Bar Young Lawyers Conference will be electing member to the Board of Governors. Any active member of the bar in good standing under the age of thirty-six or in their first three years of practice may serve on the YLC Board.

All nominations are due on April 1, 2011, and any letter of interest or nomination should be sent to:

Lesley Pate Marlin
Venable LLP
575 7th Street, NW
Washington, DC 20004
Fax: 202-344-8300
lpmarlin@venable.com

Seeking Nominations

The Virginia State Bar Young Lawyers Conference is seeking nominations for the R. Edwin Burnette Jr. Young Lawyer of the Year Award.

This award honors an outstanding young Virginia lawyer who has demonstrated dedicated service to the YLC, the legal profession and the community.

The nomination deadline is April 1, 2011. Nominations should be sent to:

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lpmarlin@venable.com

CALL FOR NOMINATIONS

Award of Merit Competition
Sponsored by the VSB Conference of Local Bar Associations.

Tradition of Excellence Award
Sponsored by the VSB General Practice Section.

Virginia Legal Aid Award
Sponsored by the VSB Special Committee on Access to Legal Services.

For more information, see http://www.vsb.org/site/members/awards-and-contests.

Virginia State Bar Harry L. Carrico Professionalism Course

See dates and registration information at **http://www.vsb.org.**

Join a VSB Section

Section membership is open to all members in good standing of the Virginia State Bar. Many sections also have law student and associate memberships. The sections are supported by dues which range from $10 to $35.

- Administrative Law
- Antitrust, Franchise & Trade Regulation
- Bankruptcy Law
- Business Law
- Construction Law & Public Contracts
- Corporate Counsel
- Criminal Law
- Education of Lawyers
- Environmental Law
- Family Law
- General Practice
- Health Law
- Intellectual Property Law
- International Practice
- Litigation
- Local Government Law
- Military Law
- Real Property
- Taxation
- Trusts and Estates

Find more information online at **http://www.vsb.org/site/members/sections/.**

by John H. Tate Jr., Chair

On Seedlings and Professionalism

AS I WRITE THIS, there are still remnants of an icy, snowy December and early January in Marion. But the leaders of the Senior Lawyers Conference are thinking ahead to spring and how we might improve the lives of all Virginians. We have worked for years to enhance the legal profession — to create an environment of civil behavior, mentorship, and stewardship of our clients and the judicial system.

At our meeting in Charlottesville in November we adopted the concept of sponsoring a program to encourage lawyers across Virginia to begin planting trees as a community service project of the Senior Lawyers Conference. We are now working on the details of the program, and there will be further updates this year.

After the November meeting, Frank O. Brown Jr., a former SLC president, used an issue of the *Senior Lawyer News* to compare our role to that of the tree planter whom William Cullen Bryant — a lawyer — described in his poem "The Planting of the Apple Tree." (See http://www.bartleby.com/102/28.html.)

Now, the SLC would like to make that metaphor more tangible. We are designing a program in which the SLC will invite you to join with the conference in planting trees throughout the commonwealth, to provide shade, shelter, beauty, and even some fruit for your enjoyment. We hope that those who follow us, whether or not they are lawyers, will join in making this tree planting initiative a goal to improve the communities in Virginia.

We plan to design our project so that it may be adopted by individual lawyers, by bar associations or other groups. You may do it alone, or engage your communities to join in this effort. Tree planting is a project that seems to appeal to everyone, and our goal will be to emphasize planting hardwood trees, or those which have a longer life span, even though they may have a slower growth.

We were treated in November to a presentation by Dean Cumbia, the director of forest resource management for the Virginia Department of Forestry. The department offers online catalogs (http://www.BuyVirginiaTrees.com and http://www.dof.virginia.gov/nursery/resources/catalog-2010-2011.pdf) listing many varieties of trees — hardwoods, pines, willows, shrubs, dogwoods, and, yes, apple — that are suited to Virginia's climates and habitats. The prices are very reasonable. Ten seedlings of most varieties cost $20, plus a shipping charge for those who can't pick up their order from the Augusta Forestry Center in the Staunton-Waynesboro area. As the quantity purchased increases, so do the savings, and if groups are interested in a more comprehensive program of planting, fifty northern red oaks only cost $75.

Members of the conference are personally paying for the trees we plant, and we are willing to make a reasonable personal donation toward the purchase of trees for other bar groups.

Just scrolling through the Forestry Department catalogs will feed your optimism. You might picture your grandchildren thinking of you when they look at the trees you've planted. They'll provide shade, they'll provide a windbreak. They'll beautify your property. Good tall hardwoods can even — and I can testify to this about my own home — reduce your air conditioning bills.

In your own yard, you may observe the "orphan" trees that reseed from existing trees or natural events. Sometimes they are real cultivators of new growth. Squirrels hide walnuts, which in our case sprouted a tree that is now about twenty feet high. The "helicopters" from an existing silver maple self-seeded a tree that is now twenty five tall.

Some of our trees had died, and we started a replanting on our lot of some of the lost trees — planting pink and white dogwoods, oaks, maples, cherry and apple trees, and some red oaks that I received from Dean Cumbia.

Many communities have property that cries out for tree-planting. Schools and parks, for example, might appreciate a donation and provide volunteers to help dig the holes for planting, and then water the trees in dry times. To find out what's available that you might wish to plant in your community, contact your local town or city manager, and use the resources of the Virginia Department of Forestry local offices.

I encourage you to get involved in the project now. We are coming to the best time of the year to plant trees. The Forestry Department sale extends only into April, and some trees may already be sold out. Check on availability by calling (540) 363-7000.

You may let us know if you are interested in a tree-planting project by e-mailing Paulette J. Davidson, the VSB's Senior Lawyers Conference liaison, at Davidson@vsb.org. We'd love to

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The Jury Is Out: Considerations for Using an Online Jury Research Service

by Greg Stoner

For many litigators, mock trials and jury research studies are essential components of thorough case preparation. However, despite the well-recognized value of these tools, burdensome costs and protracted timelines prohibited many attorneys from using them in all but a few cases. Today, with enhanced technological capabilities, online jury research and focus groups provide attorneys with an affordable means of obtaining the valuable information previously only available via traditional mock trials and research.

What Is Online Jury Research?

While the traditional jury research so many are familiar with dates back to the 1970s, online jury research studies first came into the marketplace only about ten years ago. Recognizing the drawbacks of traditional jury research and mock trial studies, vendors of online services sought to develop a meaningful, efficient, and cost-effective tool that leveraged the features of the Internet to the benefit of their clients. During the first decade of the 2000s, with the proliferation of the Internet and the development of tools that allow for real-time interaction and video transmission, online jury research services became viable and credible to an increasing number of attorneys. Furthermore, with study costs a fraction of what one might pay for a traditional face-to-face focus group or mock trial, these services have become increasingly useful in a legal marketplace focused on efficiency.

How Does It Work?

While there are numerous consultants and firms from which to choose, there are common elements in nearly all online jury research. "Jurors," selected and qualified by the provider, review files, questions, or whatever information you choose to provide. The information submitted can include text and audio files, images, video, or real-time presentations. Study participants provide feedback and answer the client's questions either in real time or at their own convenience through a secure website. In some instances, jury participants have the capability to interact with one another by text or video chat. Following completion of the study, you will be presented with a type of report or summary of the findings of the study.

Points to Consider

When selecting a trial consultant or online jury research service, one should ask:

How are "jurors" recruited, selected, and qualified?

Methods for identifying and screening prospective participants can vary greatly from one service to another. Be sure that the techniques used to locate and approve individuals to participate are disclosed and appropriate for your study. Studies that provide respondents who are representative of your client's jury pool, are free of conflicts, and reside in the proper venue will retrieve more beneficial and accurate information.

How is case information presented to the participants?

Depending on the vendor and your needs, case summary information may be provided in text, audio, or video formats. More extensive services will allow for the submission of exhibits and other elements. You may also wish to know about how the information you provide to the vendor is disseminated to the subjects and what instructions, if any, are given.

How long will the study take?

Depending on the scope, a complete project could take a few days or several weeks. Vendors with an established pool of participants in a particular venue may be able to begin the study immediately, while others may take several days to get everything in place.

How flexible is the provider in meeting my needs?

Some vendors offer few options, while others can create a unique study customized to your needs. Of course, more deviations from standard operations may result in higher costs, but the outcomes are likely to be of greater benefit to you in your case.

Research continued on page 54

Gregory Stoner, law librarian at Williams Mullen in Richmond since 2008, has bachelor's degrees in historic preservation and American studies from the Universeity of Mary Washington and a master's degree in history from Virginia Commonwealth University. He currently is earning a master's in information science from the University of Tennessee through an H.W. Wilson Fellowship. He is a member of the Virginia Law Libraries Association and other professional groups that advance the work of law librarians.

Cloud Computing — A Silver Lining or Ethical Thunderstorm for Lawyers?

by James M. McCauley, Ethics Counsel, Virginia State Bar

Because of the flagging economy, businesses and professionals are searching for increased efficiency and reduced costs and risks in their endeavors. This is especially true for the ever-increasing risks and costs associated with information technology (IT) management. Today, the business world is overrun with entreaties by IT firms offering "cloud computing services" who advertise that "the future is here and it is in the clouds."

What Is Cloud Computing?

There is no one agreed definition of "cloud computing."[1] Software as a Service (SaaS) is but one form of cloud computing referring to a category of software delivered via the Internet to a web browser (such as Internet Explorer) rather than installed directly onto the user's computer. The resulting data is held by the third-party service provider (or maybe by a data center provider by companies like Amazon, RackSpace or other host), not on a computer or server within the law firm. Cloud computing is not new, but it has become a hot topic in the IT and business world. Software has been employed over networks for decades, including through application service providers that rose to prominence in the 1990s and then fizzled out with other tech companies that went bust in the early 2000s. Some lawyers already use web-based applications in their practice, including online legal research (Westlaw, LexisNexis, CaseFinder or Fastcase), web-based e-mail (Gmail, Yahoo, or Hotmail), document creation or collaboration tools (Google Docs), and data backup services (Mozy, i365, IBackup, Steel Mountain, and Carbonite). These are all examples of cloud computing. Although the concept of cloud computing is not new, its rapid expansion and diversification in the IT and business world are recent.

Cloud computing might also be described as shifting information technology responsibility from the consumer to service providers who deliver IT services via the Internet — the "cloud." The consumer relinquishes control over IT functions compared with legacy systems. Responsibility shifts from the consumer to a third party for infrastructure, application software, development platforms, developer and programming staff, licensing and updates, security, and maintenance. Some might describe cloud computing as the virtualization of the computing process or as outsourcing IT.[2]

Many firms today are considering switching from obtaining and loading software on their own computers to SaaS platforms to facilitate their practices, particularly in the areas of case management and time and billing platforms. There are arguments for and against using SaaS. Examine those issues before you decide to switch over. Cloud computing liberates the consumer from many of the burdens of IT management issues, enabling the consumer to focus on core activity. Cloud computing also reduces costs and expenses associated with purchasing and maintaining the hardware and software necessary to run applications, security measures, backup, and disaster recovery.

Benefits of Cloud Computing

- **Save money:** Cloud computing applications greatly reduce the costs of electronic data management. These applications are less expensive than designing your own program or modifying an existing program. Focus your technology budget on competitive advantage rather than infrastructure.
- **Identified cost:** Your investment in hardware and software is minimized. Cost for the SaaS model can be based on the number of users or the amount of data storage volume; it is easy to identify and budget for monthly or annually. For the best pricing, the contract terms are often multiyear commitments — sometimes three to five years.
- **Save time:** There is no installation, and the SaaS provider takes care of updates, including security, and is responsible for data storage and retrieval.
- **Intuitive:** SaaS programs are more intuitive and easier to use than traditional software. However, because they

James M. McCauley is the ethics counsel for the Virginia State Bar. He and his staff write the draft advisory opinions for the Standing Committees on Legal Ethics and Unauthorized Practice of Law and provide informal advice to members of the bar, bench, and general public on lawyer regulatory matters, through the Legal Ethics Hotline (http://www.vsb.org/site/regulation/ethics/). McCauley teaches professional responsibility at the University of Richmond School of Law in Richmond and serves on the American Bar Association's Standing Committee on Legal Ethics and Professionalism.

are newer, they sometimes have more limited features than older software programs.

- **Staying current:** Gain immediate access to the latest innovations and updates at the provider's expense.

- **Mobility:** SaaS products allow lawyers to access their software and their data from many locations, without additional cost (with an Internet connection). Because most SaaS is accessed through a web browser, system requirements are minimal.

- **Service:** You may get better service from a vendor. If you are considering SaaS, ask a vendor about a service level agreement. A good agreement should guarantee both a certain level of uptime for the product and a response time for technical and support service requests.

Ethical Concerns for Lawyers Using Cloud Computing

Concerns about Security and Reliability. There are always concerns about a new technology's security and reliability. Comment 16 to American Bar Association Model Rule 1.6 states that "[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are under the lawyer's supervision." Comment 17 states that "the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."

There is no basis in the Virginia Rules of Professional Conduct for an unqualified prohibition of lawyers managing their office software applications and client data using cloud computing. Lawyers have always had an ethical duty to safeguard confidential client information. Rule 1.6. However, lawyers may share information protected under Rule 1.6 with third parties as needed to perform necessary office management functions, if the lawyer exercises reasonable care in the selection of the third-party vendor and secures an agreement that the vendor will safeguard the confidentiality of the information shared. Va. Rule 1.6(b)(6). In the past, lawyers have outsourced copying and document production to third-party vendors. Confidentiality of client information was protected by contractual arrangements between the law firm and the third-party vendor. In other advisory opinions, the VSB Standing Committee on Legal Ethics has emphasized that lawyers must act competently to protect the confidentiality of information relating to the representation of their clients, including protecting both open and closed client files.[3]

In ABA Formal Opinion 95-398 (1995) the American Bar Association's Standing Committee on Legal Ethics and Professionalism recognized that "in this era of rapidly developing technology, lawyers frequently use outside agencies for numerous functions such as accounting, data processing, photocopying, computer servicing, storage and paper disposal and that lawyers retaining such outside service providers are required to make reasonable efforts to prevent unauthorized disclosures of client information." The opinion states that outside service providers would be considered to be nonlawyer assistants under Model Rule 5.3, which states that lawyers have an obligation to ensure that the conduct of the nonlawyer employees they employ, retain, or become associated with is compatible with the professional obligations of the lawyer. But how does a lawyer exercise the supervision required of Rule 5.3 over a company such as Google or Yahoo that essentially offers cloud computing contracts on a take-it-or-leave-it basis?

In addressing attorney use of the Internet for client file storage, the State Bar of Arizona's Ethics Committee has stated:

> [A]n attorney or law firm is obligated to take reasonable and competent steps to assure that the client's electronic information is not lost or destroyed. In order to do that, an attorney must be competent to evaluate the nature of the potential threat to client electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish that end. An attorney who lacks or cannot reasonably obtain that competence is ethically required to retain an expert consultant who does have such competence. Arizona State Bar Op. 05-04.

The Massachusetts Bar Association Committee on Professional Ethics issued an ethics opinion that "A law firm may provide a third-party software vendor with access to confidential client information stored on the firm's computer system for the purpose of allowing the vendor to support and maintain a computer software application utilized by the law firm. … However, the law firm must 'make reasonable efforts to ensure' that the conduct of the software vendor (or any other independent service provider that the firm utilizes) 'is compatible with the professional obligations of the lawyer[s],' including the obligation to protect confidential client information reflected in Rule 1.6(a). The fact that the vendor will provide technical support and updates for its product remotely via the Internet does not alter the Committee's opinion." Massachusetts Bar Op. 2005-04 (March 3, 2005).

Attorneys are not required to guarantee that a breach of confidentiality cannot occur when using an outside service provider. Rule 1.6 only requires the lawyer to act with reasonable care to protect information relating to the representation of a client. Nevada's Ethics Committee addressed the question of whether an outside party could be used to store files in digital format or if this would be considered a breach of confidentiality. In reaching a decision, the Nevada committee analogized storing digital files on an off-site server to storing paper documents in an off-site storage facility operated by a third party. In reviewing prior ABA opinions, the committee concluded that as long as the lawyer exercises care in the selection of the vendor, has a reasonable expectation that the vendor will keep the data confidential and inaccessible by others, and

instructs the vendor to preserve the confidentiality of the information, the requirements of Rule 1.6 are met. Nevada Formal Op. 33 (2006).

A recent Alabama ethics opinion takes a similar approach consistent with the Nevada and Arizona opinions. Alabama lawyers may outsource the storage of client files using cloud computing if they keep abreast of appropriate security safeguards and take reasonable steps to make sure the off-premises provider uses sound methods to protect the data. Alabama State Bar Disciplinary Comm'n, Op. 2010-02.

Although Virginia has not issued an ethics advisory opinion on a lawyer's use of cloud computing, Virginia Rule 1.6(b)(6) appears similar to Alabama's. The rule allows lawyers to share confidential information with an outside agency if "necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential." This rule does not require the lawyer to obtain the client's consent before disclosing information to the outside agency. In LEO 1818 (2005) the Virginia State Bar's Standing Committee on Legal Ethics concluded that a lawyer or law firm may store a client's file or information in electronic or digital format. In so doing, the committee acknowledged in a footnote that it may be necessary for the lawyer to rely on outside technical support to develop a paperless office.[4]

If you are using a SaaS provider, protect your confidential data and information. Secure portals and secure transmission protect client confidentiality. Is the transmission of the data encrypted to preserve confidentiality? Are you using a safe password or even biometrics for access?

Laws Protecting Privacy of Data

Laws in the United States and overseas protect privacy of data or information. They include the Family Educational Rights and Privacy Act of 1974; the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996), 42 U.S.C. 1320d et seq., 45 C.F.R. Parts 160 & 164; and the Gramm-Leach-Bliley Act, 15 USC 6801et seq. Various states may have data protection or security laws, such as Massachusetts General Law Chapter 93H, Regulations 201 CMR 17.00; the New Jersey Identity Theft Protection Act, N.J.S.A. 56:11-44 to 50 and 56:8-161 to 166; and the Virginia Health Records Privacy Act, Va. Code § 32.1-127.1:03.

The Federal Trade Commission has posted enforcement actions for security breaches by cloud computing providers.[5] The European Union also has laws protecting the privacy of information that may affect users of cloud computing.[6]

There has been much discussion in the legal community over whether lawyers should convert to SaaS. Opponents argue that lawyers should not be the first to test the water. Rather, lawyers should consider letting problems be resolved by other businesses. Lawyers should protect of their data and their clients' data. Putting it in the hands of a third party is a loss of control that should not be risked. On the other hand, proponents of SaaS say that lawyers have shared client information with third-party vendors for decades and that data stored in the cloud is at least as safe and secure, if not more so, than data stored locally. They argue that most SaaS vendors use sophisticated data centers to house their customer's data. These data centers feature elaborate, redundant security and backup systems to ensure that data is protected from accidental loss and unauthorized access. The technology and the expertise employed by SaaS vendors are greater than at most law firms. Carefully consider the pros and cons before you decide what's right for your firm and your clients.

Because of the complexity of this ever-changing technology, lawyers have to be careful with cloud computing. The primary concern for most is control over the data. While the customer owns the data, the data is stored on a third-party server, the location of which may not be known to the customer. The cloud computing service provider may move the data for its own reasons to another server in another country.

Questions You Need Answered

Cloud computing is a global undertaking. Considerations should include:

- Where will users be located?
- Where will the data be processed?
- Where will the data be stored?
- Where is the disaster-recovery and backup site located?
- Where are the data subjects located?
- Where will support services be based, and will support have access to sensitive data?
- Will subcontractors or outsourcing be utilized for any functions having access to sensitive data?
- Does the customer have the right to approve in advance any transfer of data to another state or country?
- Who will have access to the data and will there be different levels of access?
- Who will supervise the project and will there be monitoring and auditing of policies and procedures?

To see how some of these questions are addressed by Google, you might check out Google's cloud computing contract. A Google Apps Premier Edition Online Agreement can be found at http://www.google.com/apps/intl/en/terms/education_terms.html.

Best Practices for Cloud Computing Vendors

- **Transparency**: Cloud computing platforms should explain their information handling practices and disclose the performance and reliability of their services on their public web sites.
- **Use limitation:** A cloud provider should claim no ownership rights in

customer data and should use customer data only as its customers instruct or to fulfill contractual or legal obligations.

- **Disclosure**: A cloud provider should disclose customer data only if required by law and should provide affected customers prior notice of any compelled disclosure.

- **Security management system:** A cloud provider should maintain a robust security management system that is based on an internationally accepted security framework (such as ISO 27001) to protect customer data.

- **Customer security features:** A cloud provider should provide customers with configurable security features to implement in their usage of the cloud computing services.
- **Data location:** A cloud provider should tell customers the countries in which customer data is hosted.

- **Breach notification:** A cloud provider should notify customers of known security breaches that affect the confidentiality or security of the customer data.

- **Audit:** A cloud provider should use third-party auditors to ensure compliance with its security management system.

- **Data portability:** A cloud provider should make available to customers their data in an industry-standard, downloadable format.

- **Accountability:** A cloud provider should work with customers to designate appropriate roles for privacy and security accountability.

Data May Be Subject to E-Discovery Rules

A client's data may be subject to discovery in pending or anticipated litigation; a lawyer may be ethically obligated to take measures reasonably necessary to preserve client data and avoid spoliation claims. Rule 3.4(a) provides that [a] lawyer shall not:

> (a) Obstruct another party's access to evidence or alter, destroy or conceal a document or other material having potential evidentiary value for the purpose of obstructing a party's access to evidence. A lawyer shall not counsel or assist another person to do any such act.

Rule 3.4(e) requires a lawyer "to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."

In dealing with cloud providers, lawyers must consider issues regarding access to data, contractual provisions for disclosure of confidential information including customer data to third parties, including via subpoena or other compelled disclosure, and litigation holds may require nondestruction of cloud provider records and backup media.

Conclusion

With any emerging technology, lawyers must confront ethical issues that arise when the lawyer considers using that new technology. Because data security is the lawyer's primary concern, lawyers need to approach the issue of cloud computing carefully. "When going to the cloud, you've got to do some due diligence," to ensure not only that the provider can do what you need it to do, but that it will be around long enough to do it when you need it.[7] Finally, lawyers should consider that there may be particular types of information too valuable or critical to store in the cloud. As David Cearley put it, "I wouldn't ever put the formula for Coca-Cola in the cloud."[8]

Endnotes:

1 For a very technical and detailed definition see the National Institute of Standards and Technology's "NIST Definition of Cloud Computing," authors: Peter Mell and Tim Grance, Version 15, 10-7-09, at http://csrc.nist.gov/groups/SNS/cloud-computing/, last updated Aug. 27, 2010.

2 Kevin F. Brady, "Cloud Computing: Panacea or Ethical 'Black Hole' for Lawyers," *The Bencher*, Nov.-Dec. 2010 at 17.

3 Virginia LEO 1305 (lawyers must destroy and cannot simply dump closed client files). Also, this obligation of confidentiality survives the death of the client. *See* Virginia LEO 1207 (1989). In addition, lawyers may convert paper files into electronically stored data. LEO 1818 (2005).

4 Va. Legal Ethics Op. 1818 (2005) at n.2.

5 ChoicePoint – settlement of data security breach charges in violation of Fair Credit Reporting Act and Federal Trade Commission Act. The settlement included $10million in civil penalties — the largest in FTC's history — and further required $5 million for consumer redress as well as implementation of new procedures. *See* http://www.ftc.gov/opa/2006/01/choicepoint.shtm; and recently filed complaint with the FTC: *IMO Google Inc. and Cloud Computing Services*, seeking injunctive relief and investigation into Google Inc. and its provision of cloud computing services alleging failure to adequately safeguard confidential information)(Complaint available at http://epic.org/privacy/cloudcomputing/google/ftc031709.pdf.)

6 (a) European Union Directive on Data Protection, effective October 1998 (Directive 95/46/EC), prohibits transfer of personal data to non-EU countries if they do not meet EU "adequacy standard" for protection of privacy.

(b) Swiss Federal Act on Data Protection regulates the processing of data about physical and legal persons

(c) Various EU member s may implement their own data protection laws, e.g., German data protection authorities issued April 29, 2010, resolution requiring additional diligence when transferring data to parties who are self-certified under the Safe Harbor program; data protection authority of the German federal state of Schleswig-Holstein issued a June 18, 2010, legal opinion concluding that clouds outside of the EU are unlawful, even if the EU commission has issued an adequacy decision in favor of that country.

7 John Tomaszewski, general counsel of TRUSTe, an Internet privacy services provider in San Francisco, who was a panelist speaking at a presentation titled

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The Better Part of Discretion: Judicial General Practice of Law

by Judge Norman A. Thomas
Fourth Judicial Circuit of Virginia

When I was a youngster, my pediatrician did it all. If I was ill, my mother took me to his office and he would examine me, decide what the matter was, and treat me, which usually meant that I got a "shot" from him (or his nurse, whose visage I learned to greatly fear!). When I fell on the playground and split my lip, or wrecked my bike and broke my collarbone, it was he who met us at the emergency room and did any and all needed work. The same was true of the dentist; until I had children of my own, I'd never met a "pediatric" dentist. The same fellow who molded and fitted my father's dentures and looked after my mother's dental needs also attended to my brother and me. He got the job done well enough; however, he did not possess a particularly warm personality and his office most certainly lacked any semblance of a kid-friendly atmosphere. Such was the general practice of pediatric medicine and family dentistry during my youth. Those practitioners could make referrals to specialists, no doubt, but except in the most extreme or unique circumstances, they took care of their own patients' needs. They knew enough about many things to competently practice their professions.

Many attorneys in the past similarly engaged in the general practice of law. The same attorney that would assist you in estate planning, real estate matters, small business administration or contractual relationships might also meet you in court to represent you in civil matters, traffic court or — when it came to that certain family member who always was in trouble — criminal proceedings. Of course, some attorneys — particularly those in more rural or suburban settings — still successfully engage in a widely varied general practice. But during my nearly thirty years of experience in the legal profession, their numbers have greatly declined. Our profession relies more on specialization, and few would argue against the societal value of that increasing trend.

Writing here as a circuit judge and, in a larger sense, as a trial court judge, I submit that we are general legal practitioners in the truest sense of our modern profession. We take an oath to steadfastly seek to make correct decisions in cases of every legal topic, and sometimes we do so without clear precedential authority to guide us. Moreover, due process depends not only on our achieving correct results from a substantive perspective, but also properly, according to Virginia's labyrinth of civil and criminal procedural and evidentiary rules.

Without question, we trial judges receive much helpful guidance and have access to many resources that assist us. We may review reports of decided cases from every level of Virginia's courts, our colleagues willingly discuss legal issues with us, many jurisdictions employ law clerks to assist us with research and legal writing, the Judicial Conference of Virginia annually provides us with continuing legal education, and many of us periodically attend courses at the National Judicial College. Still, on many occasions we must adjudicate issues of subject matters that we never practiced as attorneys, and in which we simply have no experience. The General Assembly does not fill our ranks only with general practitioners.

Thus trial judges have a responsibility to be ever-active students of the law and to stay abreast of its evolution through decided cases, legislative action, and regulatory and rule-making authorities. We must engage in research and the process of judicial reflection. You may rest assured — based on my observations as a practitioner and a jurist — Virginia's judges, taken as a whole, genuinely work hard to perform such tasks. I believe our judiciary, top to bottom and from every evaluative perspective, ranks among the best in the nation.

Notwithstanding the quality of our personnel, our resources, and the consistency of our strivings, the judicial general practice of law places a premium upon at least three additional qualities: attorney preparation, effective efforts at settlement and other forms of alternative dispute resolution, and the discretion afforded to trial judges.

The cold truth is that attorney preparation counts for much in ensuring correct judicial decisions. In this age of legal specialization, the presiding judge may not be familiar with the controlling legal principles of your case. Even if the judge possesses a background in them, her or his daily occupation now spans a broad range of topics. With good case preparation, counsel can serve as a reliable guide and a much-appreciated resource to the court in its decision-making role.

Normally, the involved attorneys know the strengths and weaknesses of their clients' respective positions. The best counsel representation will seek first a negotiated or other nonlitigated result to ensure a positive outcome and avoid the risk of a disappointing or perhaps

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"The Real Realities of Cloud Computing: Will the Cloud Produce Smooth Sailing or Stormy Weather?" on Aug. 7, 2010, offered by the American Bar Association Section of Science and Technology Law. Participants in the program looked at security risks to law firms that choose to move data application and storage into the cloud of the Internet.

8 David W. Cearley, a vice-president at the technology research company Gartner Inc., in Stamford, CT, who was a copanelist at the program cited in note 8, *supra*.

Attorneys May Submit Ethics Questions by E-mail

The Virginia State Bar now responds to lawyer's ethics questions submitted by e-mail, as well as telephone.

E-mail:
Go to http://www.vsb.org/site/regulation/ethics/ and click the blue box, "E-mail Your Ethics Questions."

Phone:
Call (804) 775-0564 and leave a voice mail. Your call will be returned.

The ethics staff tries to respond to questions on the same business day they are received.

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What expertise does the provider bring to the table?
A provider or trial consultant should be able to not only manage your study, but also provide you with a detailed report that interprets the study findings.

Conclusion
Online jury research clearly provides attorneys with a new tool for quickly and affordably gathering information about trial techniques and specific case issues. Many online jury research services do not replicate the comprehensive and dynamic perspective one typically expects with a traditional mock trial. In many ways, online studies are most often best characterized as focus groups rather than mock trials. Also, in instances in which face-to-face interaction among participants or observing jury reaction is critical, there may be no substitution for a traditional study. While online jury research may not be appropriate for all situations, the utility and viability of such a service is definitely on the rise. ⚖

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hear about commitments from individuals or groups.

Back to the metaphor: We like to think that, as actively involved senior lawyers, we are doing work we might never fully enjoy, as the hardwoods will last longer than most lawyers. Perhaps, generations from now, lawyers in the courtroom and the office will hear the message we want to send by this project: they will reach high for excellence, generously bestow the fruits of their training and experience, and uphold the dignity and beauty of our nation of laws. ⚖

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are public defenders and their assistants. They hold an annual CLE program and maintain an e-mail group where members can discuss issues, obtain sample pleadings, and ask procedural questions. The VCCDL also runs a mentor program through which new lawyers around the state are matched with experienced criminal defense lawyers who are familiar with the courts, prosecutors, and judges in their jurisdictions.

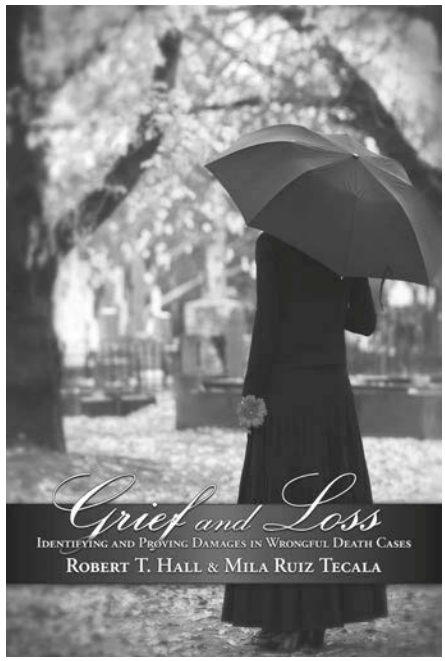
The **Hispanic Bar Association of Virginia** and the **Asian Pacific American Bar Association of Virginia Inc.** were both formed in the 1990s. The Asian Pacific Bar was formed to be a voice of the Asian Pacific American community and raise awareness of the changing faces of the legal community. The Hispanic Bar sponsors programs that enhance the professional development of their members and raise awareness of important issues facing the Hispanic and immigrant communities in Virginia. Its president, Juan E. Milanes, is a member of the CLBA Executive Committee.

COMMON THREADS run through all specialty bars: they are dedicated to improving the professional development of their members; they educate the community at large about law and the legal profession; they publish newsletters, bulletins, and magazines; they meet for education and fellowship; and many lobby the General Assembly. Each of our twenty-seven specialty bars — large and small — offers Virginia attorneys a place to find like-minded colleagues for education and camaraderie. Check them out and join one today. ⚖

Grief and Loss: Identifying and Proving Damages in Wrongful Death Cases

By Robert T. Hall and Mila Ruiz Tecala
Trial Guides LLC, http://www.trialguides.com/book/grief-and-loss/
Portland, Oregon 2009 (340 pages)

Reviewed by Jason W. Konvicka



In their exceptional new book, Robert T. Hall and Mila Ruiz Tecala prove that wrongful death cases involve much more than funeral expenses, medical bills, lost wages, and pain and suffering. Wrongful death cases stem from the loss of a human being, frequently under traumatic circumstance. Such a loss forever changes almost every aspect of the lives of those who are left behind to mourn. Truly understanding the depth of a client's emotional pain is one of the toughest challenges for trial attorneys. Communicating that loss to a jury is an even greater challenge. Hall and Tecala show us how.

The authors first met in the mid-1980s when Hall represented a family in a wrongful death claim and Tecala was the family's grief counselor. Over time, a relationship of trust formed and they have worked together on numerous wrongful death cases since. Relying on their vast experience, Hall and Tecala collaborated to write this book.

Robert Hall is one of Virginia's most experienced trial lawyers. His prodigious litigation skills, which span both civil and criminal matters and have resulted in numerous landmark verdicts and decisions, and he has received almost every professional award and distinction. In the civil realm, Hall is well known for his groundbreaking work on wrongful death cases. For more than forty years, he has represented the families of those killed as a result of medical negligence, defective products, and motor vehicle accidents. Representing families during their darkest hours has become one of Hall's true passions, and he has obtained a wealth of knowledge on the grief process as a result.

Mila Tecala, a nationally and internationally known grief counselor, has vast experience with the grieving process and has worked in many academic and clinical settings, including Georgetown University and the St. Francis Institute, now the Wendt Loss Counseling Center, in Washington, D.C., where she served as clinical director. As a clinician, she has developed an exceptional reputation helping people rebuild their lives after they experience the death of a loved one.

The book was written for trial attorneys. However, anyone interested in the grieving process or in how wrongful death cases are litigated will find the book both insightful and highly informative. The book is written in a style that is easy to read and understand. In addition, it is well organized and can serve as a quick reference.

In the preface, the authors state that "a death *in* a family is a death *of* that family as it was then constituted." This fundamental concept is reflected throughout the book as the authors delve deeply into the impact of losing a loved one as a result of less-than-natural causes. The myth that all people grieve in a similar manner is quickly dispelled. We learn that different family members grieve in different ways and on different timetables. Hall and Tecala also explain how a death changes the interrelationships between the surviving members of a family. For example, the death of one person can represent the loss of a spouse, parent, grandparent, and sibling. Each of the surviving family members — spouse, child, grandchild, and sibling — has suffered a unique loss. Each family member must be allowed to grieve on his or her own terms. In addition, the roles played by the surviving family members will necessarily change to accommodate the loss of the former role player. A stay-at-home spouse may be forced to return to employment outside the home. A child may become the leader of a family even if he is not fully prepared for the responsibility. An older sibling may be tasked with raising a younger sibling. Throughout the book, Hall and Tecala explore how death has different and sometimes far-reaching ramifications for every member of a surviving family.

A large portion of the book is broken into chapters dedicated to specific types of loss. For instance, the death of

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a spouse, the death of a parent, the death of a child, and the death of a sibling are all addressed in depth. Each of these chapters contains sections devoted to special circumstances that can further affect the grieving process. The chapter on death of a spouse, for example, includes a segment on troubled marriages. The chapter on the death of a parent discusses the grieving process in children of ages ranging from childhood to adulthood. The chapter on the death of a sibling contains information on the death of a twin. And the chapter on the death of a child discusses the death of an only child, as well as the death of an adopted child. Stigmatized deaths, including those from suicide and AIDS, are also addressed. It is hard to imagine a scenario involving death that is not touched on by the authors in some fashion.

The book extends beyond a thorough explanation of the grieving process. It was, after all, co-written by one of Virginia's foremost trial lawyers. The book explains how trial lawyers and mental health care professionals can work together to help their clients as they traverse the litigation process. It also provides strategies for overcoming juror bias and misperceptions, and it outlines defense arguments often presented in wrongful death cases.

The book is punctuated with Hall's recollections of past wrongful death cases. These are much more than "war stories." Instead, Hall's memories teach important lessons about the grieving process, how grief impacts a lawyer's relationship with his client, and how to best serve as an advocate for clients during extremely difficult times. Many of the accounts are touching, and the authors' sensitivity and compassion is evident.

Personally, it was impossible to read the book without considering how death has affected members of my own family, and how it, unfortunately, will touch each of us in the future. In that sense, and in that sense only, the book can be difficult to read at times.

The book is accompanied by a CD-ROM that contains the wrongful death laws in all fifty states, sample closing arguments by Hall and other notable trial lawyers, sample direct examinations of wrongful death beneficiaries and a grief counselor, several checklists, legal briefs, and other information on wrongful death related topics. The CD-ROM alone is worth much more than the relatively modest cost of the book ($125.00).

Grief and Loss is an invaluable educational resource and deserves a spot on the bookshelf of any lawyer who represents families in wrongful death cases. The book will help lawyers of all experience levels better understand their client's grief and emotional suffering and, in turn, enable them to better communicate that pain to a jury. ⚖

Members of the Virginia State Bar who have recently published books may request a review by contacting Dawn Chase at chase@vsb.org.

Reviewer **Jason W. Konvicka** is a founding member of the medical malpractice section of Allen Allen Allen & Allen in Richmond. He serves on the Board of Governors of the Virginia Trial Lawyers Association.

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even catastrophic result. Isn't it better to diligently pursue a result to which your client voluntarily submits, as opposed to a result litigated and imposed by a judge or jury that lacks expertise in the subject matter? An attorney well schooled in the subject matter can best shepherd a client to such a conclusion. Knowledge is power, and that advantage often can best be wielded by seeking a litigation end through nonadversarial means.

Finally, there is that wonderful safe harbor known as "judicial discretion." Courts utilize it to ensure due process and a maximization of correct outcomes. The judicial process is not designed or expected to produce outcomes with mathematical precision. The application of the law to varied fact patterns may, from judge to judge, yield somewhat results that properly may withstand appellate review. The legal profession is not science. As a circuit judge, one must not rely upon the appellate process to cover over legal or other errors in the name of an exercise of discretion. However, the credibility and vitality of Virginia's judicial system — staffed as it is with jurists of all legal backgrounds and former practice specialties and applying their individual professional acumen — greatly benefits from the flexibility afforded by proper application of judicial discretion.

The growing complexity of the law requires an increasing reliance on attorney specialization. Clients receive truly expert advice and guidance, and our society gains from it. Our trial judges now and in the future will ascend the bench from law practices limited to a subset of legal subject matters. When they do, they commence a new career within the profession: that of a judicial general practitioner. Recognition of this fact by the judicial branch and attorneys alike will help achieve the desired standard of due process for all. ⚖

Judge Norman A. Thomas sits in the Norfolk Circuit Court.

Editor's Note: This is one of a series of columns by judges and lawyers of the Virginia State Bar.

Got an Ethics Question?

The VSB Ethics Hotline is a confidential consultation service for members of the Virginia State Bar. Nonlawyers may submit only unauthorized practice of law questions. Questions can be submitted to the hotline by calling (804) 775-0564 or by clicking on the blue "E-mail Your Ethics Question" box on the Ethics Questions and Opinions web page (http://www.vsb.org/site/regulation/ethics/).

Have You Moved?

Keep in Touch with the VSB

To check or change your address of record with the Virginia State Bar, take the following steps:

Go to the VSB Member Login at https://member.vsb.org/vsbportal/. Go to "Membership Information," where your current address of record is listed. To change, go to "Edit Official Address of Record," click the appropriate box, then click "next." You can type your new address, phone numbers, and e-mail address on the form.

Contact the VSB Membership Department (membership@vsb.org or (804) 775-0530) with questions.

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clock, and no one could vouch for its accuracy.

I spellbindingly argued that Billy was being persecuted and prosecuted for his dweebininity. The jury deliberated. And ... Acquittal on all counts! Against all odds. There was up to maybe $160 at stake. Billy was ecstatic. The other waiters were chagrined. Animal continued his search for the secret of fire. I was a sudden celebrity.

And at age seventeen, my career path was pretty much set.

Then to top it all off, I read that summer in the *Washington Post* that the American Bar Association recommended that lawyers charge $50 per hour. I did some quick math. Or rather, I went to my younger brother, who was (and is) a math genius, and he did some quick math. Astounding. Mind-boggling. Forty hours a week. Fifty dollars an hour. Why, that's, that's — a *lot* of money. Of course, I had no idea at all about overhead. My father was a government lawyer. You mean you have to pay your secretary? You have to pay rent for your office?

So I made my career decision based in part on a false financial pretext.

But I did in fact join the second-best profession (after Ben & Jerry's taste tester) on the planet. I do charge more than $50 per hour, but both my secretary and my landlord get pretty cranky if they don't get paid.

I am still really enjoying myself, and I *think* I'm doing okay financially. I'll have to check with my brother.

This essay is part of Reflections*, a collection by and about Virginia lawyers that was solicited by Virginia State Bar Immediate Past President Jon D. Huddleston as part of his Virginia Is for Good Lawyers initiative. http://www.vsb.org/site/about/va-good-lawyers/#reflections*

Terry D. Adams has joined Midkiff, Muncie & Ross PC as an associate in the firm's Oakton office. He will represent insurers in workers' compensation, professional liability, and other defense matters. He is a former commissioner of the Fairfax County Consumer Protection Commission.

Dontaé L. Bugg has opened the **Law Office of Dontaé L. Bugg PLLC**, which focuses on family law and defense of driving under the influence, traffic, and criminal matters in Virginia and the District of Columbia. 1100 North Glebe Road, Suite 1010, Arlington, VA 22201; phone (703) 224-4432; www.bugglaw.com

Ellen Firsching Brown of Richmond, a member of the Virginia State Bar, has co-written a book, *Margaret Mitchell's Gone with the Wind: A Bestseller's Odyssey from Atlanta to Hollywood,* which presents a history of the novel's literary rights and their management by Mitchell and her lawyers. Included is a discussion of how Mitchell's estate, run by a group of Atlanta lawyers, continues to generate profits today through management of Mitchell's copyright. For more information, see www .margaretmitchellsgonewiththewind.com

Aaron J. Christoff and Gregory R. Nugent have opened Nugent **Christoff PLLC** at 1701 Pennsylvania Avenue NW, Suite 300, Washington, DC 20006. The firm focuses on family law in the District of Columbia, Maryland, and Virginia. Christoff is a member of the Virginia State Bar.

Paul S. Cohen has joined the Tax Complex LC in Richmond. He will concentrate his practice on individual, gift, trust, and estate tax compliance and planning. He was formerly with McGladrey & Pullen LLP in Richmond.

Hunter W. Jamerson has joined the law firm of Macaulay & Burtch PC as a lawyer-lobbyist. In addition to continuing his practice as a trial lawyer, Hunter will represent commercial and nonprofit corporations and trade associations before the Virginia General Assembly, state agencies, and local governments.

Eileen Morgan Johnson has been named a partner of Whiteford Taylor Preston LLP. She practices in the firm's Falls Church office, where she is cochair of the nonprofit organizations group.

Gregory Kaplan PLC has opened a new Alexandria office and named partners there and in Richmond. **Grady C. Frank Jr.** joined the firm as a partner and opened the Alexandria office, relocated from the District of Columbia. Frank's practice focuses on commercial real estate transactions. **Alyssa A. Haun** and **Burke S. Lewis** were elected partners in Richmond. Both are members of the firm's development and real estate practice team. Alexandria office: 439 North Lee Street, Lee Street Square, Alexandria, VA 22314; phone (202) 756-4570.

Luder F. Milton has joined the Richmond office of Eckert Seamons Cherin & Mellott LLC as an associate. He represents businesses and individuals in commercial and utilities litigation and regulatory matters. He previously practiced at Hirschler Fleischer PC.

Colleen M. Quinn of Locke Partin DeBoer & Quinn in Richmond has been selected by the Richmond YWCA to receive the 2011 Outstanding Woman Award for Law and Government. Ms. Quinn is director of the firm's Women's Injury Law Center and the Adoption & Surrogacy Law Center, and she has advocated for state laws that affect adoption and surrogacy. She also practices personal injury and employment law.

Lauren K. Keenan has been named an associate in the Arlington firm Bean, Kinney & Korman PC. She will practice trusts, estates, and land use law. She previously worked on land use policy and law for the Urban Land Use Institute in Washington, D.C.

Henry G. Pannell of Jones, Walker, Waechter, Poitevent, Carrere and Denegre LLP in Atlanta has been elected to a one-year term as an independent director of FHLBank Atlanta by the bank's member institutions.

LeClairRyan has moved its Blacksburg office to the Virginia Tech Corporate Research Center, Building 12, 1715 Pratt Drive, Suite 2700, Blacksburg, VA 24060; phone (540) 961-2600; fax (540) 961-2941.

Louis K. Rothberg of Arlington has joined Fox Rothschild LLP, as counsel in the Washington, D.C., office. His practice focuses on national security matters. He previously practiced with Dilworth Paxson LLP.

Christopher P. Saady has become a tort claims attorney for the U.S. Navy Office of the Judge Advocate General in Norfolk. He will adjudicate personal injury, medical malpractice, and other tort claims against the Navy and the U.S. Marine Corps. He previously was in private practice in Richmond, where he had a plaintiffs and defense practice in personal injury matters.

Travis A. Sabalewski has been named a partner in the Richmond office of Reed Smith LLP, where he practices commercial litigation and serves as the firm's Richmond pro bono coordinator.

Charles L. "Charlie" Shumate of Gainesville has been appointed county attorney for Stafford County. He previously had a practice in Northern Virginia that included land use and other cases involving local governments.

Justin M. Sizemore has been hired as an associate attorney in the Richmond office of ReedSmith LLP. He has undergraduate and law degrees from the University of Virginia.

Ashante Latanya Smith has been named a partner in the Richmond office of Troutman Sanders LLP. She practices

commercial real estate, including financing for multifamily and other affordable housing. She has practiced with Troutman Sanders since 2002.

Andrew R. Sommer and **Marc A. Cohn** have received promotions at Howrey LLP. Sommer was named a partner and Cohn is now of counsel. Both practice intellectual property law in the firm's Washington, D.C., office.

Phillip C. Stone, Phillip C. Stone Jr., Robert W. Stone, and **Elizabeth A. Stone** have formed the **Stone Law Group PLC**, a general civil practice firm located at P.O. Box 640, 250 East Market Street, Suite A, Harrisonburg, Virginia 22803. Phone (540) 432-0157

Julie M. Strandlie of Alexandria has been selected to attend the Political Leaders Program at the Sorensen Institute for Political Leadership at the University of Virginia.

Eileen Guerin Swicker has opened the **Law Office of Eileen Guerin Swicker**, a practice that focuses on estate planning, estate administration, and advising small businesses. 20 West Market Street, Suite E, Leesburg, VA 20176; phone (571) 918-0616; fax (703) 459-9620; eswicker@swickekrlaw.com; www.swickerlaw.com

Brian J. Teague has opened **Patent Law of Virginia PLLC** in Richmond. A member of the Virginia State Bar and a registered patent attorney, Teague prepares and prosecutes patents in many areas of intellectual property. He also provides counsel on trademarks and unfair competition. P.O. Box 9319, Richmond, VA 23227; phone (804) 248-8539; fax (804) 955-4180; http://www.patentlawva.com/

Keith M. Yacko has become a principal in the Reston firm Buonassissi, Henning & Lash PC.

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LEGAL SERVICES EXECUTIVE DIRECTOR

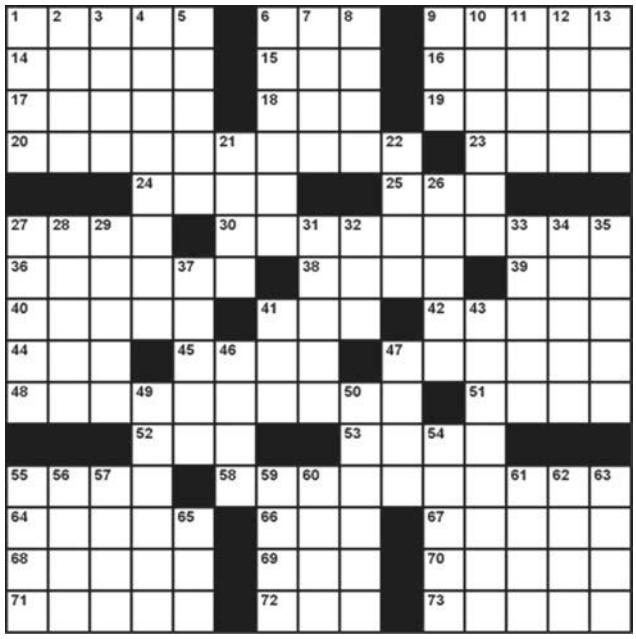
Rappahannock Legal Services, Inc. (RLS) seeks a new executive director to succeed William L. Botts III, who after 26 years is retiring from that position on March 15, 2011. RLS is an unrestricted Virginia legal services program established in 1973 with offices currently in Fredericksburg, Culpeper, and Tappahannock. RLS has been rated as an "exceptional" program by its funders. It provides community-based field services to 16 counties and the City of Fredericksburg in the Rappahannock River watershed stretching from the Blue Ridge Mountains to the Chesapeake Bay. Its staff of 17, including seven lawyers, with pro bono assistance, handles approximately 3,450 cases a year. The current RLS annual budget is $998,673, supported by revenue derived from 43 sources. RLS represents eligible clients in a variety of civil disputes, with a focus in the areas of family, domestic violence, housing, income maintenance, health, and immigration. RLS administers an innovative housing program utilizing CDBG, HPRP, HomeShare, and VISTA grants. Applicants must be licensed, or eligible to be licensed, to practice in Virginia, with courtroom experience, as well as demonstrated leadership and administrative experience. Salary is negotiable, depending on experience and qualifications. Health, disability, retirement, and other benefits are available. This position entails overall supervision of program policies and procedures and litigation activity; community outreach; liaison and education; employee recruiting and training; and grievance, budget and fundraising functions.

Please send cover letter, résumé, references, and writing sample, postmarked by Feb. 1, 2011 to: Search Committee, Rappahannock Legal Services, Inc., 618 Kenmore Avenue, Suite 1-A, Fredericksburg, Virginia 22401.

RLS is an EEO Affirmative Action employer.

Stranger Than Fiction

by Brett A. Spain



Across

1. Transcript option
6. Keyboard key
9. Peer
14. Farm houses
15. Shade
16. Fencing move
17. Put into law
18. ERISA issue
19. Doles (out)
20. What you might have if you combine elements of 30A, 48A, 58A, 4D, and 43D
23. 80's term for "rad"
24. Tsp., e.g.
25. Vane direction
27. Tennis pioneer
30. Section 1983 requirement
36. Help for a collar?
38. Repast
39. Tuna variety
40. Schemers
41. Rode the pine
42. Ferber and St. Vincent Millay
44. Drilling target
45. Kiln
47. Refugee
48. Rule 5:11 issue
51. Shots in a saloon
52. Authoritative dict.
53. Dies _____
55. Farm denizen
58. Police tape confines
64. Account
66. Sixth sense
67. Delta House rush chairman, to the brothers
68. Space Invaders game set
69. Totality
70. Nary a soul
71. Coral organism
72. Lie alternative?
73. Sea eagles

Down

1. East of Eden victim
2. Compos mentis
3. Ragged rock
4. Review from the bench
5. Strong fiber for rug-making
6. Desire
7. Air
8. Radiate
9. Shade tree
10. Canadian province
11. Golden Rule word
12. Copper and Bronze
13. Not as much
21. Elan
22. Sailing
26. Witch trial locale
27. Fancy neckwear
28. Step
29. Speak in Spanish
31. Famed violin makers
32. Vietnam offensive
33. Zesty
34. Midwest stopover
35. Goes up
37. Argue to the jury
41. Former Soviet terr.
43. Officer's companion
46. "Hell's Bells" group
47. Raison d' _____
49. A legal secretary, often
50. Like many teenagers
54. In unison
55. Audit std.
56. Aware of
57. Comparable (abbr.)
59. Authentic
60. Actress Fisher
61. English school
62. Hawaiian goose
63. You are in Mexico
65. Sass

This legal crossword was created by Brett A. Spain, a partner in the commercial litigation section of Willcox & Savage PC in Norfolk. He can be reached at (757) 628-5500 or at **bspain@wilsav.com**.

Crossword answers.

Why I Became a Lawyer

by James W. Korman

I was always good at arguing. And I enjoyed it. If I wanted to, even when I was a kid, I could switch sides and argue the other side of any dispute. Some of my masterpieces you may have heard about: Bill Russell is better than Wilt Chamberlain; Willie Mays is better than Mickey Mantle; my Mom is prettier than yours; and, of course, the never-to-be-forgotten: there is no way Stanley Bagan could tackle Jim Brown.

The truth is, I *could* argue the other side of these weighty issues, but I didn't want to. This proclivity for, not to mention sheer enjoyment of, polemic was a big part of it. But a lot of things contributed.

Oh, sure, my father was a lawyer. He was in the office of the Corporation Counsel, which is what they called the attorney for the city in Washington, D.C. He was my hero, but more because he played football and basketball than for any legal prowess. He never really tried to direct me into the law, and he never talked shop at home.

When I was nine years old, he actually argued the school segregation cases before the Supreme Court of the United States, and I attended. But the only recollection I have of the experience is that I had to wear a tie, and sit still for a really long time in incredibly boring circumstances. Oh, and my Dad was up front wearing a morning suit. (Or was it "mourning suit"?)

I have a book which has some of the transcripts of the historic arguments. In it, my father is having exchanges with Justice Felix Frankfurter, Justice Hugo Black, and Justice William O. Douglas. Anyway, if you had asked me when I was nine years old what I wanted to be when I grew up, fireman, football player, and cowboy were my top three. A profession where I had to wear a suit every day and drive a Buick was out of the question.

If we move the time machine ahead a few years, I had lost interest in cow-punching (Dale Evans was not in the same league as Sophia Loren), my ectomorphic body seemed to lend itself more to basketball than football, and Billy Heiman was the worst waiter in the history of Camp Saginaw. The last of these turned out to be the most significant. Camp Saginaw is located near Oxford, the "Garden Spot of Pennsylvania." They say "Garden Spot" because they grow a whole lot of mushrooms around Oxford. They grow mushrooms in cow poo, so Oxford didn't smell like any garden spot, and "Cow Poo Spot of Pennsylvania" lacked that *je ne sais quoi*.

Anyway, I had been a camper at Camp Saginaw from the time I was six years old. It was a two-month sleep-away camp. By the time you reached ages sixteen and seventeen, you became a waiter in the camp mess hall. This was supposed to be a privilege. You got to compete in the athletics, creep over and try to see the teenage girl campers in their bras and panties, and wait tables for six meals a day in an un-air-conditioned mess hall. But they paid you — sort of. There was a fairly large pool of cash tips that was divided up at the end of the summer.

But Billy Heiman was a little bit the dweeb. He had pretty thick glasses, actually yukked when he laughed, and had the athletic ability of an escargot. Billy repeatedly showed up late at the mess hall, and had broken sixty plates, including forty at one time in a massive kitchen cart tip-over maneuver.

The other waiters saw an opportunity — the kind of opportunity that tigers see when a guy walks in wearing pork chop underwear. If Billy Heiman lost his tips, there would be all the more cash for the other waiters to divide among themselves. Let's indict Billy and put him on trial.

So they did. And Billy asked me if I would defend him. The prosecutor was none other than the same Stanley Bagan whose high school football coach had taught him such an effective method of tackling that he could bring down Jim Brown (in his dreams). The judge was the headwaiter, who also shared in the tip pool. His physical bulk precluded any question of possible bias. The sergeant-at-arms was another waiter we called "Animal." So many years have passed that I cannot specifically recall if Animal had an opposable thumb.

The jury was three camp counselors. This could possibly work to my and Billy's advantage. There was at least a possibility of objectivity.

The big trial was very well attended. I brilliantly cross-examined the prosecution witnesses, including Animal and the judge/headwaiter. I was able to establish that other waiters had broken plates without penalty, and that Billy's tardiness was measured by the big mess hall

Reflections continued on page 56

James W. Korman has been practicing law for over forty years with Bean, Kinney & Korman PC in Arlington, where he focuses on family law and personal injury matters. He is a fellow of the American Academy of Matrimonial Lawyers and a past president of the Arlington Bar Association. He has never been employed by Ben and Jerry's.