

Virginia Lawyer

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The Official Publication of the Virginia State Bar

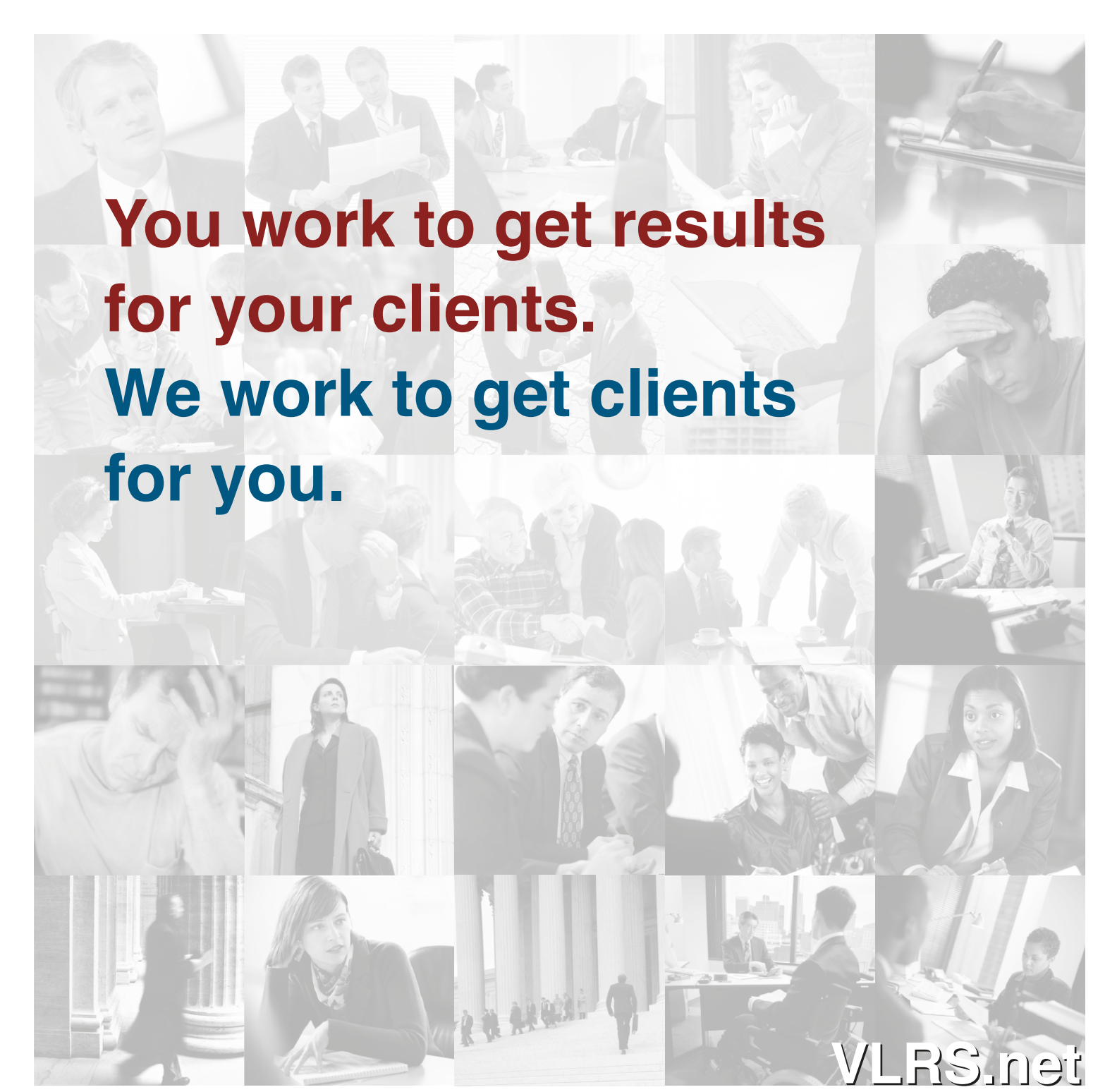


**2011–12 VSB President
George Warren Shanks**

feature articles by the
Environmental Law Section

Highlights of the June Council Meeting
and the 73rd Annual Meeting

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Virginia State Bar President George Warren Shanks and his wife, Janice Butler Shanks, at the Mimslyn Inn in Luray. Photo by Sharon Morris of Morris Photography.

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Correction

In the article "From Law School to Practice to the Bench, Chesterfield Judges Travel the Path Together" in the April 2011 issue of *Virginia Lawyer*, the name of the product Segway was misspelled.

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Editor:

Rodney A. Coggin
(coggin@vsb.org)

Assistant Editor:

Dawn Chase
(chase@vsb.org)

Advertising:

Nancy Brizendine
(brizendine@vsb.org)

Graphic Design and Production:

Caryn B. Persinger
(persinger@vsb.org)

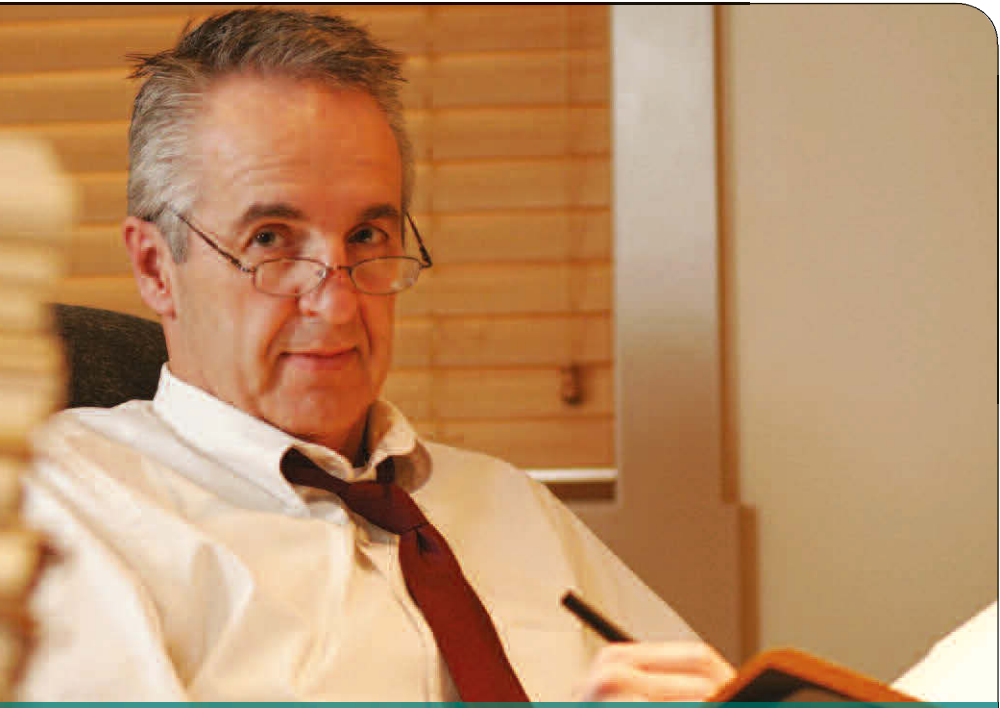
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Richmond PM	Oct. 4	The Virginia Historical Society
Charlottesville AM	Oct. 5	The Boar's Head Inn - The Pavillion
Fairfax AM	Oct. 6	Waterford at Fair Oaks
Fairfax PM	Oct. 6	Waterford at Fair Oaks
Manassas AM	Oct. 25	GMU Prince William Campus

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1-1:30 pm Check-In
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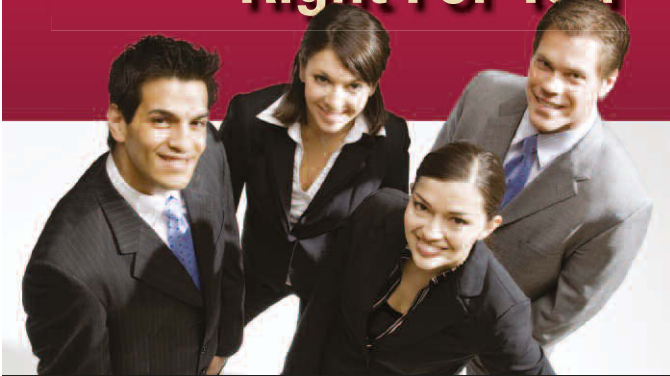
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- advancing the availability and quality of legal services
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* American Bar Association Standing Committee on Lawyers' Professional Liability. (2008). *Profile of Legal Malpractice Claims, 2004-2007*. Chicago, IL: Haskins, Paul and Ewins, Kathleen Marie.

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Monticello Article Deserves Wider Audience

I want to convey my appreciation to Frank O. Brown Jr. for his fascinating story in the April 2011 *Virginia Lawyer* about the long, winding saga of the ownership of Monticello. It is a marvelous story, wonderfully told. In my seven years at the University of Virginia and throughout my life since, I have visited Monticello more times than I can remember, but Mr. Brown's account of the stewardship of the Levy family and the tangled legal proceedings added a colorful dimension to its history.

Indeed, it is a story that deserves a much broader publication. I recommend that Mr. Brown submit it to something like the *New York Times Magazine*, the *Atlantic*, or a history review. I could also imagine someone building a terrific law school seminar on estates and real property around this story—or, better yet, an engaging historical novel or film.

Thank you, Mr. Brown, for sharing the fruits of your family visit and research. I wish my history-loving father and grandfather had lived to read your account.

Walter W. Bardenwerper
Arlington

Exceptional Article

I just returned from my forty-fifth law school reunion at the University of Virginia. Having graduated from the University of Richmond in 1963, I have a passion for the commonwealth that it is always rekindled when I read *Virginia Lawyer*.

The April 2011 edition was exceptional in that regard. The article by Frank Overton Brown Jr. on Monticello was an education on the history of this special place. I hope all who have the honor of living and working in this great state appreciate what they have and will strive to keep it so. God bless the Commonwealth of Virginia.

Roy Young
Tallahassee, Florida

Monticello Should Distribute Brown's Essay

Frank Overton Brown Jr.'s article in the April 2011 issue is the best and most coherent history of Monticello that I've seen in my many years as a Jefferson nut and supporter of the Thomas Jefferson Foundation. Unless something very similar already exists as a resource at the Foundation, I propose that the article be reprinted, with permission of the author and VSB, and be offered as a handout in pamphlet form to visitors at Monticello.

Mr. Brown's research and scholarship are impressive, and he has expressed himself with the clarity of style and organization that are earmarks of a good lawyer.

Robert C. "Bob" Nusbaum
Norfolk

Monticello — "Multifaceted Symbol"

I read with great interest and enjoyed Mr. Frank Brown's carefully researched and thorough article on Thomas Jefferson in the April 2011 issue of *Virginia Lawyer*. I would like to note, however, that the freed slaves mentioned in the article were Jefferson's own children who were freed by the codicil written only a few months before his death.

Letters continued on page 10

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Letters continued from page 9

At the time of his death, Jefferson had hundreds of other slaves. They were merely given his “solemn and dutiful thanks” and then sold like cattle at auction.

I find it sad that the man who wrote “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness” personally owned hundreds of slaves, including his own children, and did not ever free those slaves who were not his children.

I agree with Mr. Brown’s thinking that Jefferson could not have lived the life he lived and there would not have been a Monticello at all if it were not for “the human chattels.” I also agree with his statement that Monticello “is also a multifaceted symbol that represents many things to different people.” To me and I believe most people of color, it represents slavery, the shame of the nation that caused the deaths in the Civil War of 630,000 young men and maimed thousands more.

Clarence M. Dunnville Jr.
Richmond

Monticello’s Response

We at Monticello have a deep appreciation for the contributions of the Levy family in preserving Thomas Jefferson’s “three-dimensional autobiography,” and Mr. Brown’s focus on the legal aspects is fascinating. Anyone who wishes to read more about post-Jefferson Monticello will find lots of information on our website, www.Monticello.org (a search on “Levy” brings up fifty-three results). You’ll find books on the subject at www.MonticelloCatalog.org.

As for the issue of slavery at Monticello: this has been a focus of our foundation for years, but we have

recently embarked on several major initiatives involving interpretation of and education about the lives of the hundreds of enslaved men and women who lived and worked here. In the coming months, the results of these efforts will be more visible to the public, both at Monticello and online.

*Mark Lee
Director of Marketing and
Communication
The Thomas Jefferson Foundation Inc.*

Letters

Send your letter to the editor to:

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Telephone Ethics Seminar: "Ethics for the Trial Lawyer" — September 12, NOON–2 PM. Sponsored by the Virginia Trial Lawyers Association. Questions: Allison Love at (804) 343-1143, ext. 310, or alove@vtla.com

VTLA September Criminal Law — Six-hour seminar at four locations September 13–27. Questions: Allison Love at (804) 343-1143, ext. 310, or alove@vtla.com

Introduction to Sentencing Guidelines — Six-hour seminar, 9:30 AM–5 PM from August 16 through December 13 at several locations. Sponsored by the Virginia Criminal Sentencing Commission. Details:

<http://www.vcsc.virginia.gov/training/2011%20Seminars.pdf>

Advanced Sentencing Guidelines Topics & Ethical Hypotheticals — Six-hour seminar, 9:30 AM–5 PM from August 17 through October 26 at several locations. Sponsored by the Virginia Criminal Sentencing Commission. Details: <http://www.vcsc.virginia.gov/training/2011%20Seminars.pdf>

Virginia State Bar Harry L. Carrico Professionalism Course

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

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 October 15 through December 16, 2011. Send information by August 11 to chase@vsb.org. For other CLE opportunities, see Virginia CLE offerings on page 14 and "Current Virginia Approved Courses" at <http://www.vsb.org/site/members/mcle-courses/> or the websites of commercial providers.

Spahn and McCammon: Together Again The Ethics of Negotiating in Mediation

an interactive two-hour CLE program presented by the Virginia Alternative Dispute Resolution Joint Committee

- September 14, 2011, 3 PM, Troutman Sanders, Richmond
- September 21, 2011, 3 PM, Waterford Center at Fair Oaks, Fairfax

Thomas E. Spahn of McGuireWoods and John B. McCammon of The McCammon Group will focus on the lawyer's challenge to negotiate — both ethically and effectively in mediation — what lawyers can reasonably ask and expect of mediators, and what line mediators should not cross.

2 hours CLE Ethics – 2 hours CME (expected)

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Virginia CLE

Virginia CLE will sponsor the following continuing legal education courses. For details, see <http://www.vacle.org/seminars.htm>.

July 22

The Top 10 Employment Law Cases That Every Practitioner Should Know

Telephone
10–11:30 AM

July 26

Drafting Basic Employment Agreements in Virginia

Telephone
NOON–2 PM

July 27

Obtaining and Using Medical Records

Telephone
NOON–2 PM

July 28

The Social Networking Revolution: Practical Advice for Employers, Employees, and Their Counsel

Telephone
NOON–1:30 PM

Recent Developments in the Law: News from the Courts and General Assembly

Video — Charlottesville
9 AM–4:55 PM

August 4

Construction Critical Plan Method Scheduling

Live — Fairfax
8:55 AM–4:30 PM

Piercing the Corporate Veil

Telephone
NOON–2 PM

August 5

Drafting Basic Employment Agreements in Virginia

Telephone
NOON–2 PM

August 9

Obtaining and Using Medical Records

Telephone
3–5 PM

August 10

The Social Networking Revolution: Practical Advice for Employers, Employees, and Their Counsel

Telephone
3–4:30 PM

The Life of an Estate: Fundamentals of Probate Practice 2011

Video — Abingdon, Charlottesville, Norfolk, Tysons Corner, Warrenton
9 AM–1:15 PM

August 11

Get It Together: Document Management and Document Automation

Live — Richmond
9 AM–4:30 PM

The Life of an Estate: Fundamentals of Probate Practice 2011

Video — Alexandria, Hampton, Richmond, Roanoke, Winchester
9 AM–1:15 PM

August 16

2011 Bankruptcy Case Law Review: Update on Bankruptcy Cases That Every Practitioner Should Know

Telephone
NOON–1:30 PM

August 17

Preventing Nightmares: Preserving Issues and Avoiding Waiver

Webcast
NOON–2 PM

August 23

The Rise of Social Media: Risks and Rewards for Attorneys and Their Clients (Cospponsored by Women on Course)

Live — Leesburg
1–2 PM

August 24

Representing Juveniles: The Disposition Hearing and Beyond

Webcast
NOON–2 PM

August 25

The Cyber Sleuth's Guide to the Internet

Live — Fairfax
9 AM–4:15 PM

Extreme Depositions: Making the Leap to the Next Level

Telephone
NOON–2 PM

August 30

How-To: Intellectual Property

Telephone
NOON–2 PM

August 31

Piercing the Corporate Veil

Telephone
3–5 PM

September 7

Construction Critical Planning Method Scheduling

Video — Charlottesville, Richmond, Roanoke, Tysons Corner, Virginia Beach
8:55 AM–4:30 PM

How to Win Your Trial

Live — Richmond
TIME TBD

2011 Bankruptcy Case Law Review: Update on Bankruptcy Cases That Every Practitioner Should Know

Telephone
2–3:30 PM

Estate Planning for Nontraditional Assets

Telephone
3–5 PM

September 8

Ethics Safari: Surviving the Legal Practice Jungle

Live — Fairfax
9 AM–12:15 PM

Representation of Incapacitated Persons as a Guardian ad Litem: 2010 Qualifying Course

Video — Abingdon, Alexandria, Charlottesville, Richmond, Roanoke, Tysons Corner, Virginia Beach
9 AM–4:05 PM

Extreme Depositions: Making the Leap to the Next Level

Telephone
3–5 PM

September 9

Ethics Safari: Surviving the Legal Practice Jungle

Live — Richmond
9 AM–12:15 PM

How to Win Your Trial

Live — Fairfax
TIME TBD

How-To: Intellectual Property

Telephone
NOON–2 PM

September 12–13

Third National Family Law Symposium: State of the Family 2011

Live — Richmond

September 13

How-To: Criminal Law

Telephone
NOON–2 PM

September 14

20th Annual Advanced Elder Law Seminar

Live — Richmond
9 AM–4:15 PM

Representation of Children as a Guardian ad Litem 2009

Video — Alexandria, Charlottesville, Richmond, Roanoke, Tysons Corner, Virginia Beach
8:30 AM–5:15 PM

September 15

Legal Writing

Live — Richmond
9 AM–4:15 PM

September 15–16

4th Annual Advanced Business Litigation Institute

Live — Charlottesville

September 16

Business Succession Planning

Live — Richmond
9 AM–4:15 PM

Representing Juveniles: The Disposition Hearing and Beyond

Webcast
10 AM–NOON

September 20

The Cyber Sleuth's Guide to the Internet

Video — Abingdon, Tysons Corner, Virginia Beach, Warrenton, Winchester
9 AM–4:15 PM

September 21

An Overview of the Division of Child Support Enforcement from Administrative and Judicial Perspectives

Telephone
NOON–2 PM

The Cyber Sleuth's Guide to the Internet

Video — Alexandria, Charlottesville, Fredericksburg, Hampton, Richmond, Roanoke
9 AM–4:15 PM

Estate Planning for Nontraditional Assets

Telephone
3–5 PM

September 22

Time Management for Lawyers

Live — Fairfax
9 AM–4:15 PM

11th Annual Advanced Seminar for Guardians ad Litem for Children — 2010

Video — Abingdon, Alexandria, Charlottesville, Richmond, Roanoke, Tysons Corner, Virginia Beach
9 AM–4:15 PM

10 Sources of Labor and Employment Law Liability Every Business Attorney Should Recognize

(Cosponsored by Women on Course)
Live — Haymarket
1:30–2:30 PM

September 23

2011 Virginia Information Technology Legal Institute

Live — Fairfax
8 AM–5 PM

September 23–24

26th Annual Mid-Atlantic Institute on Bankruptcy and Reorganization Practice

Live — Charlottesville

September 27

Get It Together: Document Management and Document Automation

Video — Charlottesville, Richmond, Roanoke, Virginia Beach
9 AM–4:30 PM

How-To: Civil Litigation

Telephone
NOON–2 PM

September 28

Neighbor Law

Webcast
NOON–2 PM

28

Preventing Nightmares: Preserving Issues and Avoiding Waiver

Telephone
NOON–2 PM

Get It Together: Document Management and Document Automation

Video — Dulles, Harrisonburg, Tysons Corner, Winchester
9 AM–4:30 PM

September 30

How-To: Criminal Law

Telephone
NOON–2 PM

September 30

An Overview of the Division of Child Support Enforcement from Administrative and Judicial Perspectives

Telephone
2–4 PM

October 3

Business Succession Planning

Video — Alexandria, Charlottesville, Richmond, Roanoke, Tysons Corner, Virginia Beach
9 AM–4:15 PM

October 4

Recent Developments in the Law: News from the Courts and General Assembly

Video — Alexandria, Charlottesville
9 AM–4:55 PM

October 5

Recent Developments in the Law: News from the Courts and General Assembly

Video — Richmond, Roanoke, Tysons Corner, Virginia Beach
9 AM–4:55 PM

October 6

The Ailing Small Business: Alternatives to Declaring Bankruptcy

Telephone
NOON–2 PM

20th Annual Advanced Elder Law Seminar

Video — Alexandria, Charlottesville, Richmond, Roanoke, Tysons Corner, Virginia Beach
9 AM–4:15 PM

October 7

How-To: Civil Litigation

Telephone
NOON–2 PM

29th Annual Real Estate Practice Seminar: Mastering Fundamentals and Meeting Challenges in Difficult Times

Video — Alexandria, Charlottesville, Richmond, Roanoke, Tysons Corner, Virginia Beach
9 AM–4:05 PM

October 11

2011 Ethics Update for All Attorneys Who Use Email

Telephone
NOON–2 PM

Attacking the Expert's Opinion

Live — Fairfax
TIME TBD

20th Annual Employment Law Update Seminar

Video — Charlottesville
8 AM–4:30 PM

October 12

Attacking the Expert's Opinion

Live — Richmond
TIME TBD

20th Annual Employment Law Update Seminar

Video — Richmond, Tysons Corner, Virginia Beach
8 AM–4:30 PM

Ethics Update for Virginia Lawyers 2011

Telephone/Webcast
NOON–2 PM

Tax Consequences of Legal Liability Corporation and Limited Partnership Agreements

Telephone/Webcast
10:00 AM–NOON

October 13

Contempt of Court: A Lesson in Legal History

Live — Fairfax
9 AM–12:15 PM

Ethics Safari: Surviving the Legal Practice Jungle

Video — Alexandria, Charlottesville, Hampton, Richmond, Roanoke, Tysons Corner, Warrenton
9 AM–12:15 PM

What's New at the Virginia Supreme Court?: An Overview of Recent Civil Decisions 2011

Telephone
NOON–1:30 PM

October 14

Military Divorce: Representing Military Personnel and Their Families

Telephone/Webcast
NOON–2 PM

Ethics Safari: Surviving the Legal Practice Jungle

Video — Virginia Beach, Williamsburg
9 AM–12:15 PM

VSB President Shanks Urges Experienced Lawyers to Guide Those Who Follow

by Dawn Chase

“The frontier” is what George Shanks calls Luray and Page County, where he has practiced law for thirty-five years.

The county, which rolls along the Blue Ridge Mountains, isn’t that rough-hewn. The magnificent Luray Caverns draw tourists from around the world, and a gracious southern hotel, circa 1930, houses them. There’s a Walmart in Luray, and several fast-food establishments.

But Shanks has had a frontier experience in Page County. He knows the lay of the land as if he cleared it himself. He knows the downed trees, renovated bridges, and flood plains; the problems traveling east-west where the major thoroughfare goes north-south; the fits and starts of three decades of local development efforts; and the hard-knock lessons, such as, “It’s easy to buy Main Street property in any small town. It’s extremely hard to sell it.” Also, “Every lawyer in a small town ought to have a back door.”

For more of Shanks’s wry observations, see “Practice on the Frontier: Vignettes of Small-Town Life,” an essay he wrote for the VSB’s *Virginia Is for Good Lawyers* collection. <http://www.vsb.org/site/about/reflections-3>

This year, as the president of the Virginia State Bar for 2011–12, Shanks is taking that wisdom on the road. He wants seasoned members of the bar to provide more systematic mentoring to help new attorneys find their way through their individual practice frontiers.

George Warren Shanks, sixty-six, was reared in Wilmington, Delaware, and Buffalo, New York. “I had an idyllic childhood,” he said. His father was an organic chemist for DuPont. The senior Shanks couldn’t understand his son’s lack of adeptness with molecular com-

pounds. Shanks’s mother was interested in art and religion. Dinner-table “interrogations” — Shanks’s word — focused on “what you were up to, what you were about, and what you believed,” he said.

“My personality lends itself to the law. I’m a *My Cousin Vinny* kind of guy.”

After graduating from Indiana University and law school at Temple University, Shanks came to Virginia and practiced for three years in Winchester.

In 1972, he took a job as a legislative assistant to U.S. Senator Harry F. Byrd Jr., a Virginia Democrat-turned-Independent. Shanks commuted from Reston to the District of Columbia. He cut his teeth on big issues of the time — the creation of the Trans-Alaska Pipeline System, which made it through the Senate only because Vice President Spiro T. Agnew broke a tie; the resignation of Agnew after his conviction on tax-evasion charges; and, above all, the Senate Watergate hearings and impeachment proceedings that led to the resignation in 1974 of President Richard M. Nixon.

“I got to have a front-row seat for all of those things,” Shanks said.

For Watergate, “the senator knew that he was going to sit on the jury,” Shanks said. “He took it very seriously.” To prepare, Byrd tasked two staff members to prepare a prosecution and defense of Nixon. Shanks got the defense — a job that grew increasingly difficult as the proceedings went on.

To stay informed, Shanks followed the all-news radio station WTOP and newsprint editions of the *Washington Post*, *Washington Star*, *Richmond Times-Dispatch*, and *Congressional Record*. There was no Internet then. With no search engines at his fingertips, he relied on scuttlebutt and a network of well-informed contacts for background.

“It was incredible stuff,” Shanks said. The United States had come through a decade of assassinations and rioting, was bailing out of a long and unpopular war, and endured a period of shocking corruption at the highest levels, and yet “the republic survived. It was a good time to be a lawyer.”

Framed mementoes of the time hang in his conference room. A signed photo of Byrd and a lanky and boyish Shanks, with Byrd’s inscription thanking him for his work, and a vertical map of the Shenandoah Wilderness Area, which Shanks helped the senator get designated. Shanks jokes that he may have the map put in his coffin with him — it’s about the right size.

After seeing Byrd through his 1976 reelection, Shanks left Washington, at age thirty-two. His children had been growing up without him, and he wanted more for his life.

“One of the things I wanted to do is get out of the office, experience the cases that came to me. If a client had a boundary line dispute, I wanted to get out and walk the boundary line,” he said. He wanted to smell the honeysuckle and hear the children playing in the yard while he was working. He didn’t mind that there would be “a lot more Plymouths in your life than Porsches.”

He returned to private practice — this time in Page County, where the family had a vacation cabin. Thirteen lawyers practiced in the area then; now there are fourteen, who serve Page County’s 10,200 households.

Shanks began his frontier experience, in more ways than one.

On the legal front, he learned how to work with other lawyers, judges, and the courthouse staff, and how to attract clients, protect the privacy of their visits

to his office, and meet their legal needs. He has a general practice with some exceptions—he doesn't do bankruptcies or tax work, and he gave up contested domestic cases in 1988, when a divorcing couple depleted their few resources in an equitable distribution battle over a Shop-Vac.

On the community front, he learned the pace of local tradesmen and contractors, the patterns of daily life, the ins and outs of the school system.

At home, he was engaged in another pioneering experience. To his family of two biological children he added four adopted children with special needs. The children had serious medical problems, sometimes life-threatening.

The Page County school system had not previously educated students with the physical and learning challenges faced by Shanks's children. He had to wage regular battle to get them the services they needed. Because of his advocacy, Luray High School built the school system's first elevator, known as "Shanks's Shaft." As he learned, he shared: he never turned away pro bono assistance to other parents of children in special education.

From the outside, Shanks's commitment seems breathtaking. But he describes the challenges as gradual. "Those children were adopted one at a time." The challenges increased incrementally, and the family adjusted. That's the way big families work, "whether they have developmental disabilities or not." All six children are grown and out of the home.

Looking back on it, "There was once a time, when I was young and dumb, I thought I could do anything," he said.

Shanks is the first small-town bar president since Robert B. Altizer of Tazewell in 1996–97.

Shanks said that managing his practice from the road will be easier than it was for Altizer, because Shanks has access to email, a laptop, and a smartphone with a statewide network. Like Altizer, Shanks said, "I'm very fortunate

that my partners have been fully supportive of this effort."

He will be accompanied on his travels by wife Janice Butler Shanks, a former restaurateur and now a court reporter with Commonwealth Court Reporting LLC in Front Royal. "She's excited about traveling and about meeting people," he said. The two have between them nine children and eleven grandchildren.

Shanks now practices with Nathan H. Miller, who served in the Virginia House of Delegates and Senate, and J. Burns Earle III, in the firm Miller, Earle & Shanks PLLC.

He found mentors and role models throughout his career—starting with Senator Byrd. While serving on a VSB panel on mentoring in the 1980s, Shanks sat next to civil rights advocate Oliver W. Hill. Shanks thought, "This man is a giant of the law. What am I doing here?"

In Shanks's first days, a member of the bar would introduce him whenever he appeared before a judge for the first time.

He had other lawyers he could vent to, and ask questions.

"I learned that if I was going to dictate a harsh letter, to let it sit around for awhile, then read it again and decide whether it should be sent," he said.

Lawyers can turn to mentors to be reassured about a judge or opposing counsel—"She treats everybody that way." They can get ethical advice to questions such as, "I'm expecting a settlement. Can I go ahead and pay myself?" Mentors can coach a young lawyer on the economics of law—"how to make ends meet without going bankrupt."

"I was the recipient of that kind of courtesy when I started practicing law," Shanks said.

New lawyers have an advantage their predecessors didn't have: affordable communication and research tools that level the playing field. When Shanks started, he had to invest in a library. For



Biography

George Warren Shanks
Miller, Earle & Shanks PLLC
Luray

Education:
Indiana University, bachelor's degree in psychology, 1966
Temple University, law degree, 1969

Military Service:
Virginia Army National Guard, 2nd Lieutenant, 1969–74
U.S. Army Reserve, Captain, 1974–75

Virginia State Bar past work:
Chair, Conference of Local Bar Associations
Chair, Senior Lawyers Conference
Member, 7th District Committee
Member, General Practice Section
VSB Council and Executive Committee
Named Local Bar Leader of the Year, 2000

Other affiliations:
Page County Commissioner of Accounts
Commissioner in Chancery,
26th Judicial Circuit
Page County Bar Association
Virginia Trial Lawyers Association
Virginia Bar Association
American Bar Association
Virginia Association of Commissioners of Accounts
Blue Ridge Legal Services Board of Directors
Lawyers Helping Lawyers Board of Directors
Virginia Law Foundation Fellow, Class of 2005
Virginia Law Foundation Fellows Committee
Page Public Library Board of Directors

Family:
Wife Janice Butler Shanks and he have between them nine children and eleven grandchildren.

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Mentoring — A Shared Responsibility

I BEGIN MY BRIEF JOURNEY as your president with much more hope than concern, with much more anticipation than angst, and with a certainty that I am the incredibly fortunate successor and beneficiary of my friend and mentor, Irving M. Blank. There are times in history when momentous events are arrayed against a person of uncommon ability, when the struggle could go either way, and the presence and fortitude of one courageous soul garners the victory. If ever there was a time for the Virginia State Bar to need Irv Blank it was in the just-ended fiscal year. We owe him all the plaudits the bar can muster, for without him surely we would be twenty-one judges and \$5 million poorer.

I propose to write these columns in three sections: about messages, about people, and about programs. Irv Blank gives me more than enough copy to write about people. He is an engaging speaker, a delightful storyteller, and a brilliant lawyer. As the face of the Virginia legal profession last year, our mandatory bar was immediately recognized and respected as he travelled around the commonwealth and across the country carrying our message of excellence and fiscal responsibility. But Irv also provides me with a segue into programs for, as I said, Irv is my mentor. By observing Irv, listening to his message, and analyzing his delivery, I began to appreciate how to carry off the significant responsibility as state bar president with style, grace and good humor. Which proves you're never too old to learn.

Mentoring should be among the highest priorities of the bar. For us to

perpetuate our profession in the image we wish to be perceived, we must start with our newest members and inculcate in them the values we most admire. Ours is one of the ancient "learned professions." Law, medicine, and theology were recognized as the professions requiring both specialized training and a corresponding fiduciary obligation of service to the community. If popular media truly reflects the prevailing public attitude towards our profession, it appears we may have lost our way. Whether art imitates life or life imitates art, the portrayal of lawyers on television and in cinema should make us cringe. Certainly, our annually poor Gallup polling numbers for ethics and honesty should give us pause.¹

I do not for a moment suggest we abandon our role as zealous advocates for our clients' causes. And ours is an adversarial profession, no matter how much we may sponsor alternative dispute resolution as a kinder, gentler way to address grievances, real and imagined. After all, the Virginia Bill of Rights, a document not known for its lyric prose, instructs "That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred."²

But we must not allow popular notions of what a lawyer is, how she behaves, what she says, to cloud or confuse our own definitions of civility and collegiality, best expressed by the Virginia Bar Association's *Principles of Professionalism*.³ It should be, first and foremost, on our agenda for the initiation of young lawyers into the

profession. The VSB's Mandatory Professionalism Course is a worthy starting point. But after a day of inspirational presentations, the cold reality of clients, courts, and colleagues confronts every graduate of that mandatory continuing legal education.

The large and medium-sized firms have the institutional size and wisdom to mentor their new associates in-house. These young women and men are, after all, a valuable and expensive resource, to be guided and molded into the image the firm wishes to present. But the fact is that more than half of Virginia's practicing lawyers are solos or in small firms, where mentoring is much less assured as a process and the results are often left to chance.

To be sure, some excellent mentoring programs are already in place: The American Inns of Court, of which Virginia Supreme Court Justice Donald W. Lemons is president, has seven inns throughout Virginia,⁴ the Harrisonburg-Rockingham Bar Association has sustained an award-winning mentoring program for more than two decades, the Virginia Law Foundation sponsored a Fellows Mentor Program for years, the Metropolitan Richmond Women's Bar Association attributes its thirty-five years of growth and success to mentoring,⁵ and the Virginia Beach Bar Association sponsors a program, to mention but a few.

All these programs have in common the design to bring together "an individual with potential and an individual with expertise."⁶ As the *Virginia*

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Law Foundation Fellows Mentor Program Handbook states: "A mentor is an advisor, trainer, and teacher. A good mentor is both a good person and a good lawyer. In the legal arena, the mentor is someone who is able to guide a young attorney in the practice of law, give the young attorney instructional advice about local laws and customs, and help the mentee to grow personally, as well as professionally."⁷

This is not a subject taught in law schools. It is certainly not a subject heralded by the producers of popular entertainment. I propose that it become a shared responsibility of every local, regional and specialty bar. To that end during this coming year, I will attempt to draw together the programs and projects which appear to be working, to analyze those that have been attempted without success, and, finally,

to bring together practitioners, clerks, and judges from around the state to create a blueprint for mentoring, much as Bill Wilson of Covington has done with great success to promote his Senior Citizens Law Day Program.⁸ We owe it to the public, to ourselves, and to the legacy we share as protectors of the system of self-governance and democracy that Lincoln described as "the last best hope of earth."⁹

Endnotes:

- 1 Gallup Poll 11/19/2010, <http://www.pollingreport.com/values.htm>; 12/9/2009 <http://www.gallup.com/poll/124628/clergy-bankers-new-lows-honesty-ethics-ratings.aspx>; 12/14/2006 <http://www.gallup.com/poll/25888/nurses-top-list-most-honest-ethical-professions.aspx>
- 2 Constitution of Virginia, Article I, Section 11

- 3 Virginia Bar Association's *Principles of Professionalism*, <http://www.vsb.org/pro-guidelines/index.php/principles/>.
- 4 American Inns of Court, <http://www.innsofcourt.org/>.
- 5 Metropolitan Richmond Women's Bar Association, <http://www.mrwba.org/>.
- 6 University of Minnesota, Teaching Ethics for Research, Scholarship and Practice, Mentoring Subcommittee, February 9, 2009.
- 7 Virginia Law Foundation, <http://www.virginialawfoundation.org/forms/handbook.pdf>
- 8 *Senior Citizens Law Day Program Blueprint*, <http://www.vsb.org/docs/conferences/seniorlawyers/SCLDBlueprint.pdf>.
- 9 *Collected Works of Abraham Lincoln*, Message to Congress, December 1, 1862, <http://quod.lib.umich.edu/l/lincoln/>.

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more extensive research, he drove to the University of Virginia's law library.

But new lawyers are practicing in an environment that has deteriorated considerably, in Shanks's opinion. "We've lost civility and we've lost collegiality, and we've got to get those back."

Shanks offered some reasons. "Our whole society has developed a lack of tolerance. We have a sharp edge," he said.

The anonymity in cities shields lawyers from what he calls the "collegial opprobrium" that small-town lawyers experience immediately when they misbehave. Partially because of impressions left by lawyer advertising and television shows, "You have clients who don't want you to be a good advocate. They want you to be a gladiator."

And with many more lawyers competing for clients with fewer resources in a bad economy, a lawyer can be tempted to bend the rules.

"Every young lawyer needs a mentor," he said. Attorneys graduate with a good education, but they need help developing their counseling skills—"the art of the possible—not just what can happen, but what is likely to happen"—and their practice management—finishing each month with money for the staff, the light bulbs, and toilet paper.

Shanks is very familiar with the white-knuckle stresses of practice management. Except for the rare silver-spoon law school graduate, "We do all start out poor," he said. He paraphrased Wilkins Micawber, a character in Dickens's *David Copperfield*: "One penny in the black and life is good. One penny in the red and life is misery."

"I really hope I can go around and meet with the bar associations, to endorse and support current mentoring projects and initiate it where it doesn't exist."

He plans to promote the Virginia Bar Association's *Principles of Professionalism*, <http://www.vsb.org/pro-guidelines/index.php/principles/>, as a guide for appropriate behavior.

At his stage in life, Shanks has a good client base, many strong relationships in the legal community, and wisdom from coming through tough years and the desire to share it.

In his essay, he wrote, "My young associate constantly remarks that I seem to know 'everything.' I have to smile benignly, recalling that when I was his age, I too knew very little and understood almost everything. I find now that the more I learn, the less I understand."

Executive Director's Message

by Karen A. Gould



Things You Need to Know

Online Dues Renewal

We have instituted an online dues renewal process, which is effective for the first time with the 2011 dues renewal season. We are hopeful that lawyers will incur fewer penalties with the process. Because members will still need to individually certify their affirmation of whether they are in private practice, whether they carry malpractice insurance, and whether they have any outstanding judgments, firms will not be able to pay online for all their lawyers.

Participation by members is much higher than we expected. By July 7, 5,160 members have renewed online, and paid \$1,076,795.

Trust Accounting Rule Simplified by Supreme Court

The Supreme Court of Virginia has adopted the changes proposed by the Virginia State Bar Council to the trust accounting rules in Rule of Professional Conduct 1.15 and Rules of the Virginia Supreme Court Part 6, § IV, ¶ 20. The amendments do not create any new or additional obligations or duties in regard to trust accounts or handling funds or property. The amendments restructure and simplify Rule 1.15 to combine the requirements as they apply to lawyers and fiduciaries; eliminate the terms used to refer to certain records and replace them with specific descriptions of the type of records that need to be maintained; eliminate the rule's redundant definitions; eliminate detailed requirements from the rule that were specifically applicable to financial institutions, because that information is included in the VSB

Approved Financial Institution Agreement; add a specific requirement to the rule that a lawyer cannot disburse funds or use property of a client or third party without the client's consent, or convert or misappropriate funds or property of a client or third party, except as directed by a tribunal; add language to Comment [6] that gives additional guidance to lawyers using electronic banking transactions; add specific language requiring a lawyer to hold funds in escrow when a third party has made a claim against those funds; and add titles to subparagraphs for simplicity and clarity.

The amendments to Paragraph 20 define a financial institution approved by the Virginia State Bar, clarify the different types of trust accounts that can be opened with the current opt-out provision, and outline the specific requirements that financial institutions must follow as Virginia State Bar "approved financial institutions." This new Paragraph 20 incorporates a new "Virginia State Bar Approved Financial Agreement" that all financial institutions must execute in order to be approved by the Virginia State Bar. You can view the approved rule at http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/rule-115-of-rules-of-professional-conduct-and-paragraph-20-of-part-6-iv/.

New Rule of Professional Conduct 1.18, Effective Immediately

The Supreme Court of Virginia also adopted Rule of Professional Conduct 1.18 on June 21, 2011, recommended by the Standing Committee on Legal Ethics and endorsed by the council.

New Rule 1.18 defines a prospective client to whom the duty of confidentiality is owed, and distinguishes that prospective client from someone who unilaterally communicates with a lawyer with no reasonable expectation of forming an attorney-client relationship. The proposed amendment allows a law firm to screen the lawyer who discussed the possibility of employment by a prospective client to avoid imputation of a conflict to other lawyers in the firm. You can view the approved rule at http://www.vsb.org/pro-guidelines/index.php/rule_changes/item/new-rule-118-defining-a-prospective-client/.

Payee Notification

In October 2009, the council voted 39-25 to seek legislation that would require insureds that pay liability claims to notify claimants when they disburse settlement proceeds of \$5,000 or more to claimants' attorneys. The Virginia Trial Lawyers Association (VTLA) at the same time also requested similar legislation that was targeted to any type of payouts, rather than just settlement proceeds. In February 2010, Chief Justice Leroy R. Hassell Sr. asked the VSB and the VTLA to withdraw the proposed legislation until the statewide bar groups were consulted. The Supreme Court has authorized the VSB to consult with the statewide bar groups and to convene a Payee Notification Task Force of interested parties to discuss the issues. The outcome of those discussions will determine whether any proposed legis-

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Highlights of the June 16, 2011, Virginia State Bar Council Meeting

At its meeting on June 16, 2011, in Virginia Beach, the Virginia State Bar Council heard the following significant reports and took the following actions:

Budget

The council approved a \$12.7 million budget for 2011–12. Projected revenues reflect a dues decrease of \$25 for active Virginia State Bar members and \$12.50 for associate members.

Online Dues Renewal

VSB Executive Director Karen A. Gould reported that the new online dues renewal feature at VSB.org was used by more than three thousand attorneys, who paid approximately \$680,000 between the May 24 launch date and the council meeting. The VSB anticipates that the feature will decrease the number of attorneys who incur late fees.

YLC Bylaws Amendment

The council voted to extend the age at which Young Lawyers Conference members can serve on the board of governors. Before the extension, board members had to leave at age thirty-six unless they were on the YLC executive committee. Under the bylaw change, board members may serve until their terms are over.

Rule 1A:3 Study Committee

At the request of the Supreme Court, President Irving M. Blank appointed a committee to study changes that would be needed to Court Rule 1A:3 for the VSB to revoke certificates issued to foreign attorneys admitted to practice here pursuant to Rule 1A:1, the reciprocity rule.

Legal Ethics Bylaws Amendment

The council voted to reduce the number of Standing Committee on Legal Ethics members who are also members of the council from three to two. The change is found in the VSB and Council Bylaws Part II, Article VIII, Standing Committees.

Marni E. Byrum Recognized

The council commended Marni E. Byrum of Alexandria for twenty years of bar service. Among her many contributions is steering the development of ethical rules that govern multijurisdictional practice.

Bar Staff Changes

The council welcomed Kathryn Ramey Montgomery to the post of deputy bar counsel, succeeding Harry M. Hirsch, who retired after twenty-seven years with the VSB. The council also bid farewell to Valerie L. Breeden, who served as executive assistant to Executive Director Gould and Gould's predecessor, Thomas A. Edmonds. Breeden will be working for the Supreme Court as assistant to Justice LeRoy F. Millette Jr.

Thanks Expressed to Voluntary Bars

The council thanked the Virginia Bar Association and Virginia Trial Lawyers Associations, their presidents, and their executives for helping the Virginia State Bar prevent a proposed transfer of \$5 million from the VSB budget to the state General Fund during the 2011 session of the General Assembly.

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lation will be published for comment and brought before the council for a vote before being submitted to the Supreme Court for its consideration.

Rule 1A:3 Study Committee

The Supreme Court has asked the Virginia State Bar to study what rule changes would be necessary for the VSB to revoke the certificates issued to foreign attorneys who are admitted to practice in the commonwealth pursuant to Rule 1A:1, the reciprocity rule. The study committee's work is under way. The committee anticipates publishing a proposed rule change for comment in the near future and bringing the matter before the council at its October 2011 meeting.

The VSB E-News

Have you been receiving the Virginia State Bar E-News? The E-News is a brief monthly summary of deadlines, programs, rule changes, and news about your regulatory bar. The E-News is e-mailed to all VSB members except those who opt out. If your Virginia State Bar E-News is being blocked by your spam filter, contact your e-mail administrator and ask to have the VSB.org domain added to your permissions list.

W. David Harless of Richmond Is President-elect of Virginia State Bar

Warren David Harless of the Richmond firm Christian & Barton LLP is the Virginia State Bar's new president-elect. He will serve for a year, then succeed George Warren Shanks for the 2012–13 term as president.

Harless, fifty-five, took the office June 17 during the VSB's annual meeting in Virginia Beach.

A native of Jonesville in Lee County in the westernmost region of Virginia, Harless earned an undergraduate degree from the University of Kentucky and a law degree from the University of Virginia. He served a clerkship for U.S. District Judge Glen M. Williams, now retired, of the Western District of Virginia before joining Christian & Barton.

He is a partner in the firm's litigation department, is head of the firm's employment practice group, and serves on the firm's executive committee. He has authored or co-written numerous publications and continuing legal education materials within his practice areas, and serves frequently as a speaker at continuing education seminars within the profession. He has been a faculty member of the VSB's Mandatory

Professionalism Course and the panel that trains the faculty. He also has taught in the National Trial Advocacy College at the University of Virginia.

Harless currently is on the Virginia State Bar Council and Executive Committee. He has also chaired the Bench-Bar Relations Committee, serves as a member of the Budget and Finance Committee, and served on the task force that established the Diversity Conference.

He is a fellow of the American College of Trial Lawyers and the Virginia Law Foundation and a member of the Lewis F. Powell Jr. American Inn of Court, the Virginia Bar Association and its Boyd-Graves Conference, the Virginia Trial Lawyers Association, and the Bar Association of the City of Richmond, for which he served as its president in 1999–2000.

Harless's father, Warren Yokely Harless, was a Virginia state trooper who was killed in the line of duty in 1968. From 1992 until 2006, David Harless was a director of the Virginia Public Safety Foundation, which provides financial assistance and scholarships to families of



Virginia public safety officers killed in the line of duty. He was president of the foundation in 1997–98, and the foundation recognized him for distinguished service in 2001. He is a former member and chair of the Commonwealth Public Safety Medal of Valor Review Board, and he has served on the Executive Board of the Boy Scouts of America Heart of Virginia Council.

Harless is married to the former Deborah Ann Young of Richmond. Between them they have five children ranging in age from thirteen to twenty-six.

Nominations Sought for Board and Committee Vacancies

Volunteers are needed to serve the Virginia State Bar's special boards and committees. The Nominating Committee will refer nominees to the VSB Council for consideration at its October meeting.

Vacancies in 2012 are listed below. All appointments or elections will be for the terms specified, beginning on July 1, 2012.

Council Members at Large: 3 vacancies (of which 2 incumbents are eligible for reappointment to a second term). May serve 2 consecutive 3-year terms.

Disciplinary Board: 5 lawyer vacancies and 1 lay member vacancy (of which 3 lawyer members are eligible for reappointment to a second 3-year term, 2 lawyer members are not eligible for reappointment, and 1 lay member is not eligible for reappointment to a second 3-year term). District committee service is preferred. May serve 2 consecutive 3-year terms.

Mandatory Continuing Legal Education Board: 4 lawyer vacancies (of which 4 current members are eligible for reappointment to a second term). May serve 2 consecutive 3-year terms.

Nominations, along with a brief résumé, should be sent by **September 7, 2011**, to Irving M. Blank, Chair, VSB Nominating Committee, Virginia State Bar, 707 E. Main St., Suite 1500, Richmond, VA 23219, or e-mailed to nominations@vsb.org.

VSBS Dues Can Be Paid Online

Lawyers can now renew their Virginia State Bar memberships and pay their dues online.

Online Membership Renewal is available to members in good standing with active, active/Virginia corporate counsel, and associate memberships. Members also still have the option of renewing by postal mail. Dues statements were mailed May 26.

The online service accepts individual attorney renewals only.

Access is provided through the secure "Member Login" area of VSBS.org. As with the paper statements, members who choose "Online Membership

Renewal" certify whether they are covered by a professional liability insurance policy, select what voluntary sections they wish to join, and pay their mandatory annual dues (including the mandatory \$25 Clients' Protection Fund fee), plus any section dues, by credit card.

The site accepts MasterCard and Visa, which can be applied to dues-related payments only. These include late fees that accrue after the membership compliance deadline of July 31. The membership renewal, insurance certification, and dues payment are processed immediately, and a receipt is issued.

Access to the Online Membership Renewal option is available until early October, when attorneys are administratively suspended for membership non-compliance.

Online Membership Renewal is the first of several planned improvements to give members more flexibility and convenience through the VSBS website.

Eventually, the service will be expanded to include online renewals by groups of attorneys and charging of MCLE noncompliance fees and disciplinary costs.

Kathryn Montgomery Succeeds Harry Hirsch As Deputy Bar Counsel

Kathryn R. Montgomery is the new deputy bar counsel for the Virginia State Bar. She will assist Bar Counsel Edward L. Davis in overseeing professional regulation, and she will continue to prosecute ethics cases.

Montgomery has been an assistant bar counsel for the VSBS since 2003. She is a native of Danville and holds bachelor's and law degrees from the University of Virginia. She practiced in Arizona, then returned to Virginia, where she had a litigation practice with McGuireWoods LLP in Richmond for five years.

She succeeds Harry M. Hirsch in the deputy counsel position. Hirsch—shown here with his wife, Lois—retired in May after twenty-seven years prosecuting professional misconduct cases for the bar.



Virginia Lawyers Weekly photo

NOTICE: Check Your MCLE Hours Online Now

The Mandatory Continuing Legal Education compliance deadline is October 31, 2011. Go to <https://member.vsb.org/vsbportal/> to review your MCLE record.

An Interim Report and information on new MCLE requirements will be mailed to all active members in July. The new requirements will be effective with the 2012 MCLE compliance year, which begins November 1. If you have any questions, please contact the MCLE Department at (804) 775-0577 or mcle@vsb.org.

Got an Ethics Question?

The VSBS 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/>).

Law in Society Winner Honored at Beach

Thomas Park Beaver, a senior at Western Branch High School in Chesapeake, was recognized for his first-place essay in the 2011 Law in Society essay competition, sponsored by the Virginia State Bar's Litigation Section and Communications Committee. He attended the VSB Annual Meeting at Virginia Beach to receive his award, with two representatives of the Chesapeake Bar Association — Vice President Kimberly Phillips (left) and Secretary Corrynn Peters.

The award was presented by Robert L. Garnier, chair of the Litigation Section, and Elizabeth M. Allen, chair of the Communications Committee.

Beaver's was among 175 entries written by students from forty-seven Virginia high schools and homeschools. He won a \$2,300 cash prize, a copy of Strunk and White's *The Elements of Style*, and a certificate. He will attend the University of Virginia in the fall, and hopes to practice corporate law.



His winning essay, "Liberty and Sensitivity: The First Amendment in the Post-9/11 World," can be read at

<http://www.vsb.org/site/public/2011-winning-essay>.

Legal Services Corporation Needs Support for Civil Representation of the Poor

To Virginia State Bar Members:

Your dues statements, which were mailed on May 26, 2011, include a request for a voluntary contribution to the Legal Services Corporation of Virginia (LSCV), which supports ten legal aid programs that help low-income persons in all pockets of the state.

The economy has taken a heavy toll on civil legal services funding from governments, the private sector, and Interest on Lawyer Trust Accounts.

IOLTA funding in particular "is still at rock bottom," said Mark D. Braley, executive director of LSCV. The interest will contribute only a projected \$700,000 to the corporation's budget this year, compared to \$4.6 million in 2007.

The federal government recently cut 5 percent from legal services budgets nationally, and more cuts are being discussed. Also, LSCV's general revenue appropriation was reduced by 5 percent as part of across-the-board cuts implemented by the General Assembly in the 2010 budget, Braley said.

Meanwhile, more people are in need of legal services they can't afford to pay for. In the recent past, legal aid programs had enough resources to serve half of eligible applicants.

Now, "for every one we accept, we turn away two," Braley said.

Checks should be made out to LSCV and sent to 700 East Main Street, Suite 1504, Richmond, VA 23219.

Please consider a donation.

YLC Professional Development Conference

September 23, 2011

10:00 a.m.–5:00 p.m.

Hunton & Williams, LLP, Richmond

Practical Tips for an Evolving Job Market

6.0 CLE Credit Hours (pending)
(including 1.0 Ethics)

This daylong seminar will include discussions on growing your practice, practice essentials for both litigators and transactional attorneys, and avoiding the pitfalls that face every young attorney.

More information to come at
www.vayounglawyers.com

In Memoriam

C. Douglas Adams

Winchester
December 1925–January 2011

Curtis Darwin Blanc III

Kansas City, Missouri
July 1974–February 2011

Herbert E. Brodsky

Richmond
November 1919–January 2011

Michael Charles Buseck

Richmond
April 1957–May 2011

Erika Lynne Byrd

Vienna
June 1968–April 2011

J. Gilliam Conrad

Lynchburg
September 1915–August 2010

Philip Louis Chabot

Washington, D.C.
March 1951–December 2010

Dorothy Louise Dillon

Ferrum
April 1940–December 2001

Luther C. Edmonds

Norfolk
September 1942–June 2011

James Harvey Falk Jr.

Great Falls
December 1960–November 2010

Lawrence Williams Fary

Norfolk
September 1946–April 2011

Benjamin C. Flannagan IV

Richmond
September 1927–March 2011

James B. Fray

Rustburg
September 1915–December 2010

Gerald J. Gervino

Chevy Chase, Maryland
December 1942–July 2010

Ruth Ann Gibson

Lanexa
February 1953–April 2011

William John Glore

St. Thomas, Virgin Islands
April 1958–October 2010

Lewis E. Goodman Jr.

Danville
January 1936–April 2011

Rutherford C. Lake Jr.

Newport News
December 1928–January 2010

Joseph S. Livesay Jr.

Portsmouth
June 1927–March 2011

Frank Louis Neuhauser

Silver Spring, Maryland
September 1913–March 2011

C. Willard Norwood

Mechanicsville
May 1923–March 2011

Russell Vaughan Palmore Jr.

Richmond
August 1946–April 2011

Thomas Nelson Parker Jr.

Hot Springs
March 1927–April 2011

W. Newton Phillips

Richmond
July 1927–March 2011

Richard Harding Poff

Tullahoma, Tennessee
October 1923–June 2011

Russell H. Quynn Jr.

Richmond
July 1925–November 2003

Hon. Arthur W. Sinclair

Haymarket
October 1914–February 2011

Hon. Rayner V. Snead

Washington
September 1918–May 2011

Hon. Roscoe B. Stephenson Jr.

Covington
February 1922–May 2011

Wallace B. Stockdon

Bowlers Wharf
November 1924–December 2010

Lewis P. Summers III

Arlington
March 1916–March 2010

Harold O. Telstad

Newport News
August 1932–December 2010

Hon. W. Carrington Thompson

Chatham
November 1915–June 2011

Charles E. Williams

Huntsville, Alabama
April 1940–February 2011

James T. Youngblood

Springfield
January 1919–November 2010

VSB Honors Attorneys

The Virginia State Bar presented awards to the following lawyers during its annual meeting:

LOCAL BAR LEADER OF THE YEAR AWARD (Two Winners)

Presented by the Conference of Local Bar Associations

Andrea L. Bridgeman,
Freddie Mac,
McLean



Andrea Bridgeman is chair of the VSB's Committee on Access to Legal Services and a pro bono volunteer on many fronts. She helped develop the Virginia Supreme Court's rule that now allows lawyers with corporate counsel certificates to provide pro bono representation to individual clients. Because of that work, almost nine hundred Virginia corporate counsel can join the ranks of lawyers who provide legal services to persons who cannot afford legal fees.

For more information, see
<http://www.vsb.org/site/news/item/local-bar-leader-2011-2/>.

Tracy Ann Houck,
Parrish, Houck &
Snead PLC,
Fredericksburg



Tracy Ann Houck reenergized the Fredericksburg Area Bar Association when she was its president in 2006. That's one of many bar projects she has taken on statewide during her legal career. Others include the Virginia Trial Lawyers Association's Solo and Small Firm Conference, which she cochairs; the Virginia Joint Alternative Dispute Resolution Committee; and Phi

Delta Phi, a fraternity that promotes legal ethics. "Tracy strives for professionalism and is a motivating influence to those around her," according to the nomination letter.

For more information, see
<http://www.vsb.org/site/news/item/local-bar-leader-2011-1/>.

TRADITION OF EXCELLENCE AWARD *Presented by the General Practice Section*

James J. Knicely,
Knicely &
Associates PC,
Williamsburg



Jim Knicely views his general practice as an extension of his work for his church and community. He is modest about his many achievements, which include a degree from Harvard Law and clerking for U.S. Supreme Court Justice Harry A. Blackmun. "Mr. Knicely views the general practice of law as a ministry, and he recognizes the intrinsic value in helping to resolve the diverse legal issues encountered by people in his community," his associate wrote in the nomination letter.

For more information, see
<http://www.vsb.org/site/news/item/knicely-TOE-2011/>.

VIRGINIA LEGAL AID AWARD *Presented by the Special Committee on Access to Legal Services*

Larry T. Harley,
Executive Director,
Southwest Virginia
Legal Aid Society,
Abingdon



Keeping children out of foster care, warding off home foreclosures, insisting that emergency

rooms treat patients with emergencies regardless of ability to pay — Larry Harley has worked on all these projects in eighteen years as head of the legal aid program that has offices in Castlewood, Christiansburg, and Marion. He supervises thirty-five employees, including thirteen attorneys. VSB President Irving M. Blank praised Harley's "extraordinary dedication and expertise."

For more information, see
<http://www.vsb.org/site/news/item/southwest-virginia-legal-aid-society-director-selected-for-legal-aid-award/>

R. EDWIN BURNETTE JR. YOUNG LAWYER OF THE YEAR

Presented by the Young Lawyers Conference

Joanna L. Faust,
Cameron/McEvoy
PLLC, Fairfax



When you enjoy the new "Bankruptcy Bullets" and "Day in the Life Of" features in *Docket Call*, the newsletter of the VSB Young Lawyers Conference, you can thank Joanna L. Faust, who served two years as chair of committee in charge of the publication. In addition to introducing those features, she led the publication from print-only issues to a combination of print and electronic editions — a greener and less expensive choice.

For more information, see
<http://www.vsb.org/site/news/item/young-lawyer-year-2011/>

VSBA Honors Local Bar Associations

The following bar associations received awards from the Conference of Local Bar Associations during the Virginia State Bar Annual Meeting. The awards recognize projects that serve the bench, the bar, and the people of Virginia.

This year for the first time, the CLBA recognized projects sustained by bars for several years, as well as new projects. The CLBA makes information on winning projects available to other groups that want to consider similar programs. For information, contact Paulette J. Davidson at Davidson@vsb.org or (804) 775-0521.

AWARDS OF MERIT

For excellence in bar projects

First-time awardees:

Virginia Women Attorneys Association, Loudoun Chapter

Senior Symposium: An educational program for seniors, their families, and concerned citizens

Loudoun County Bar Association

Operation Turkey Dinner, to provide Thanksgiving meals to families of school children who qualify for the Free/Reduced Lunch Program

The Prince William County Bar Association Inc.

Introduction to Practicing Law in the

Prince William County Courthouse, for newly licensed attorneys

Norfolk & Portsmouth Bar Association

Legal Legacy Tree Grove, planted in Lafayette Park as part of Norfolk's Celebrate Trees! Initiative

Washington Metropolitan Area Corporate Counsel Association

Corporate Counsel Scholars Program, to create a diversity pipeline between law schools and in-house counsel jobs

Roanoke Bar Association and Salem/Roanoke County Bar Association

Rule of Law Project, established by the Virginia Bar Association to bring citizen lawyers into middle schools

Sustained Projects:

The Alexandria Bar Association

Beat the Odds Scholarship Program for students aged 13 to 21 — started in 2004

Loudoun County Bar Association and Fauquier County Bar Association

Leadership in the Law Summer Camps, to teach high school students about the justice system and encourage them to consider a legal career — started in 1999

Roanoke Bar Association

Barrister Book Buddies, to help children

in Roanoke City Public Schools learn to read — started in 1999

Virginia Women Attorneys Association, Loudoun Chapter

Adoption Day Programs, to celebrate and encourage adoptions — started in 2006

CERTIFICATES OF ACHIEVEMENT

For high achievement in bar projects

Fredericksburg Area Bar Association

Law Day project to present programs on legal topics in public schools

Metropolitan Richmond Women's Bar Association

"Understanding Your Domestic Relations Rights in Virginia" pamphlet translated into Spanish

The Alexandria Bar Association

Gridiron Musical Show & Dinner, featuring entertainment that satirizes current events and courthouse personalities

Norfolk & Portsmouth Bar Association

Breakfasts with the Bench to promote bench-bar relations

Virginia Law Foundation Accepting Nominations for Fellows Class of 2012

Nominations for the 2012 class of Virginia Law Foundation fellows will be accepted through August 29, 2011. The 2012 class will be inducted in Williamsburg on January 19, 2012, during the Virginia Bar Association's annual meeting.

Candidates must be an active or associate member of the Virginia State Bar for at least ten years; be a resident

of Virginia; be a person of integrity and character; maintain the highest standards of the profession; be outstanding in the community; and be distinguished in the practice of law. Sitting judges and constitutional officeholders are not eligible during their tenure, but retired and senior-status judges are eligible.

To obtain a nomination form, please contact the Virginia Law

Foundation at 600 East Main Street, Suite 2040, Richmond, VA 23219; phone (804) 648-0112; or by email at vlf.info@virginialawfoundation.org. To obtain a form online, go to www.virginialawfoundation.org/fellownoms.htm.

For a complete listing of current fellows, visit the foundation's website at www.virginialawfoundation.org/currentfellows.htm.

Local Bar Elections

The Alexandria Bar Association

Heather Nicole Jenquine, President
Kathleen Maureen Uston, President-elect
Sean Peter Schmergel, Secretary
Sarah Elizabeth McElveen, Treasurer
Stephen Christopher Swift, Director
David Andrew Lord, Director
Shelly Renee Collette, Director
Nicholas John Gehrig, Director

American Academy of Matrimonial Lawyers – Virginia Chapter

Edward Dean Barnes, President
Dennis Michael Hottell, President-elect
Ronald Stephen Evans, Vice President
Peter William Buchbauer, Secretary-Treasurer

Metro Richmond Family Law Bar Association

Vanessa Laverne Jones, President
Christopher Hunt Macturk, Vice President
Carrie Willis Witter, Secretary
Mark Bruce Michelsen, Treasurer
Melissa Suzanne VanZile, Chesterfield Representative
Robert C. Elliott II, Colonial Heights Representative
Jennifer Marie Fox, Hanover Representative
Edward Seayers Whitlock III, Henrico Representative
Craig Weston Sampson, Richmond Representative

Metropolitan Richmond Women's Bar Association

Alexandra Silva Fannon, President
Miss Sakina Karima Paige, President-elect
Colleen Marea Quinn, Vice President
Karen Michelle Welch, Secretary
Sharon Choi Stuart, Treasurer

Norfolk & Portsmouth Bar Association

Nathaniel Beaman IV, President
Gary Alvin Bryant, President-elect
Thomas Wayne Williams Jr., Secretary
Virginia Lynn Van Valkenburg, Treasurer
Joshua Ellis Baker, YLS Chair

Powhatan Bar Association

Eric Anthony Gregory, President
Tara Dowdy Hatcher, Vice President
Richard Kenneth Cox, Secretary
Philip Leroy McDaniel, Treasurer

The Bar Association of the City of Richmond

Tyler Perry Brown, President
Craig Thomas Merritt, President-elect
Anne Gaines Scher, Vice President
The Honorable Kevin Robert Huennekens, Hon. Vice President
John Kirkland Burke Jr., Secretary-Treasurer

Roanoke Bar Association

Lori Dawn Thompson, President
Thomas Harlan Miller, President-elect
Stephen Weldon Lemon, Secretary-Treasurer

Virginia Trial Lawyers Association

Edward Lefebvre Allen, President
Lisa Palmer O'Donnell, President-elect
Thomas Joseph Curcio, Vice President
John Eric Lichtenstein, Vice President
Barbara S. Williams, Vice President
Stephanie Elaine Grana, Vice President
Ronald Lee Livingston, Treasurer

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Fairfax's Yvonne McGhee New Head of Virginia Bar Association

Yvonne C. McGhee, executive director of the Fairfax Bar Association and Fairfax Law Foundation since 2000, will become executive director of the Virginia Bar Association. She will succeed Guy K. Tower, who is retiring after six years in the post. McGhee holds degrees from King College in Bristol, Tennessee, and the University of Richmond School of Law. She also holds a certified association executive designation from the American Society of Association Executives.

Wendy F. Inge Named ALPS Risk Manager for Virginia

Attorneys Liability Protection Society (ALPS) has named Virginia attorney Wendy F. Inge as ALPS risk manager for Virginia. Inge will educate Virginia lawyers on claims risks, strengthen law practice management resources online, and help the legal community develop techniques to avoid claims. For ten years, ALPS has been the endorsed professional liability insurance provider endorsed by the Virginia State Bar.

Inge formerly worked at Minnesota Lawyers Mutual, where she served as the director of risk management programs for eight years. She is based in Richmond. She has over twenty years of experience in the professional liability market. She currently serves on the VSB's Standing Committee on Legal Ethics and the Virginia Bar Association's Law Practice Management Section, and she is a member of the American Bar Association's General Practice, Solo and Small Firm Division. She has a law degree from the University of Richmond.

"Wendy is a wonderful addition to the ALPS team. No one has more Virginia-based experience in the risk

management field. She clearly understands lawyers and claims risk, and will be able to effectively produce, deliver, and facilitate educational courses whether live, online, or on-demand," said Chris Newbold, executive vice president of ALPS. Newbold works directly as ALPS's liaison with the Virginia Lawyers Malpractice Insurance Committee, which oversees the Virginia lawyers' professional liability market and the bar endorsement.

"I'm certain Wendy will do great things for Virginia lawyers and our legal community," said Richmond attorney R. Paul Childress Jr. of DuretteCrump PLC, and chair of the VSB's Committee on Lawyer Malpractice Insurance. "I've known Wendy for years, and with her experience and roots as a Virginia lawyer, she will hit the ground running and produce immediate results. We are extremely fortunate to have her on board."

In partnership with the Virginia State Bar, ALPS is committed to serving the state's law practitioners with unsurpassed professionalism and expert advice. From October 3 through 7, ALPS



will offer continuing legal education programs, with three ethics CLE credit hours. Registration details will be posted on the ALPS website at www.alpsnet.com.

Inge is available without charge to address risk management questions from VSB members, regardless of their insurer, at winge@alpsnet.com or (800) 367-2577.

Across Generations, Oliver Hill Sr. Will Come to Life Again in Theatre IV Play

Theatre IV, an award-winning performing arts program for young audiences, is producing a play about Oliver W. Hill Sr. that will be performed in schools statewide.

Producers hope that the story of a Virginian who overcame obstacles and became a legal leader in the civil rights movement will inspire youngsters in grades four through eight who face economic and social challenges today.

The theater has raised two-thirds of the \$95,000 cost of researching, producing, and staging the work, which is tentatively slated to debut in 2012 in February — Black History Month — at the Empire Theatre in Richmond.

Among the play's supporters are the Williams Mullen and McGuireWoods law firms, and Theatre IV's development staff are hoping that more lawyers and law firms will join in.

Playwright and artistic director Bruce Miller has begun his research. He is interviewing people who knew Hill. There are a lot of them. Hill lived to age one hundred and remained vital to the end. Those who worked with him and benefitted from his mentorship are eager to share their memories and the lessons learned.

Miller said for each interview "I'm going to come in with a clean canvas, with a fresh ear and eye," and absorb the images his interview subjects present him.

When the information reaches "critical mass," he will begin the creative task of bringing the stories to life in a script. A white man not too many years from retirement, with grown children of his own, Miller will try to transfer what he's learned into characters that help young audiences see themselves onstage, that speak to their ears, and that keep their attention.

He will send his draft to historians to ensure its accuracy. Casting, costuming, set design, and rehearsals will begin this fall. Fine-tuning of the script will come in the production process and performances, as Miller watches the audience respond.



Bruce Miller (right), artistic director of Theatre IV, interviews Virginia Senator Henry L. Marsh III about his memories of Oliver W. Hill Sr., beneath a portrait of the civil rights leader in Marsh's conference room. Marsh was mentored by Hill and carries on the Richmond practice of Hill, Tucker & Marsh, started by Hill and Samuel W. Tucker. The firm represented Virginia plaintiffs in *Brown v. Board of Education*.

Miller has had considerable experience with this sort of project since he and Phil Whiteway founded Theatre IV in 1975. Miller co-wrote *Hugs and Kisses*, about prevention of child sexual abuse. Now entering its twenty-ninth year, the play has been presented to more than 1.36 million children in every school district in Virginia and has won numerous state and national awards.

Historical subjects tackled by Theatre IV include the Jamestown story, James Madison, memories of former slaves interviewed through the Federal Writers Project, Vietnam prisoners of war and their wives, Martin Luther King Jr., and Arthur Ashe. Theatre IV's performance of Miller's play *Buffalo Soldier* — about Jones Morgan, the longest-surviving veteran of the Spanish-American

War — was invited to the Pentagon as a morale booster after the September 11, 2001, attacks.

Miller and Whiteway received the prestigious Theresa Pollak Lifetime Achievement Award for Excellence in the Arts in 2006.

"I think that students often look at a historical character as someone who lived in another time and another place," Miller said. "In reality, history is often made in our own backyard." With the Oliver Hill story, Miller wants Virginia children to understand that "this is something that happened *right here*." That lesson is particularly important today's students, who are two genera-

Theatre continued on page 62

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

Newly Elected

CIRCUIT COURTS (8-year terms)

5th Circuit — W. Richard Savage III of Suffolk General District Court succeeds Westbrook J. Parker, who retired in June 2010.

11th Circuit — Paul W. Cella of Powhatan General District Court succeeds Thomas V. Warren, who retired in January 2010.

14th Circuit — James S. Yoffy of Henrico General District Court succeeds Burnett Miller III, who retired in January 2011.

15th Circuit — Sarah L. Deneke of Stafford General District Court succeeds Horace A. Revercomb III, who retired in February 2010.

18th Circuit — James C. Clark of Alexandria, a partner of Land, Clark, Carroll, Mendelson & Blair PC, succeeds Donald M. Haddock, who will retire in December.

24th Circuit — F. Patrick Yeatts of Campbell General District Court succeeds J. Leyburn Mosby Jr., who retired in January 2010.

30th Circuit — Chadwick S. Dotson of Wise General District Court succeeds Joseph R. Carico, who resigned in September 2010.

GENERAL DISTRICT COURTS (6-year terms)

5th District — Alfred W. Bates III, a deputy city attorney in Portsmouth, succeeds W. Richard Savage III, now a circuit judge.

12th District — James J. O'Connell III, a deputy commonwealth's attorney in Chesterfield County, succeeds Thomas L. Murphey, who retired in March.

14th District — Mary Bennett Malveaux of Richmond, an attorney in the law firm Brenner, Evans & Millman PC, succeeds James S. Yoffy, now a circuit judge.

15th District — Ricardo Rigual, an attorney with Wills, Ashby & Rigual in

Fredericksburg, succeeds Sarah L. Deneke, now a circuit judge.

20th District — J. Gregory Ashwell, a Fauquier juvenile and domestic relations judge, succeeds Charles B. Foley, who retired in February 2010.

JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS (6-year terms)

15th District — Shannon O. Hoehl, an assistant Hanover County commonwealth's attorney, succeeds Larry E. Gilman, who retired in March 2010.

20th District — Jonathan S. Lynn of Warrenton, commonwealth's attorney for Fauquier County, succeeds J. Gregory Ashwell, now a general district judge.

Reelected

COURT OF APPEALS (8-year terms)

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. Cavado 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

6th District — Calvin R. Depew Jr. of Virginia Beach

13th District — Phillip L. Hairston of Richmond

14th District — John Marshall of Henrico

15th District — Frank L. Benser of Bowling Green, Peter L. Tribble of Hanover, and Gordon A. Wilkins of Montross

16th District — Roger L. Morton of Culpeper

19th District — Michael J. 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

J&DR 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

continued on page 32

Benchmarks

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

Unfilled Seats

The General Assembly's 2011 special session had not adjourned as of July 1. Many judgeships remain unfilled — some because they were not funded in the 2011–12 budget, and others because agreement could not be reached on a candidate. If the assembly adjourns without filling the funded judgeships, Governor Robert F. McDonnell will have the option of making temporary appointments of appellate and circuit judges, subject to election by the 2012 General Assembly. Unfilled district court seats that are funded can be filled pro tem by circuit judges.

The judicial seats that are currently or soon will be unfilled are vacated by:

SUPREME COURT OF VIRGINIA

Lawrence L. Koontz Jr. (retired in January) and Leroy Rountree Hassell Sr. (died in February)

CIRCUIT COURTS

2nd Circuit — A. Joseph Canada Jr. (retired in December 2009) and Glen A. Tyler of Accomack (retired in December)

7th Circuit — Aundria D. Foster of Newport News (retired in March) — unfunded seat

9th Circuit — N. Prentis Smiley Jr. of York County and Poquoson (died December 2008)

10th Circuit — Richard S. Blanton of Charlotte Court House (retired in March)

13th Circuit — Richmond Judges Theodore J. Markow (retired December 2009) — unfunded seat

17th Circuit — Benjamin N.A. Kendrick of Arlington (retired in January) — unfunded seat

26th Circuit — John R. Prosser of Winchester (retired in February)

27th Circuit — Ray W. Grubbs of Christiansburg (retired February 2010)

GENERAL DISTRICT COURTS

2nd District — Virginia L. Cochran (retired November 2009)

4th District — James S. Mathews of Norfolk (retired in January) — unfunded seat

6th District — Hopewell Judges Kenneth W. Nye (retired January 2010) and J. Larry Palmer (retired in January) — Nye's seat was funded, but Palmer's was not

11th District — Paul W. Cella of Powhatan (elected to circuit court in 2011)

13th District — Thomas O. Jones of Richmond (retired December 2009) — unfunded seat

17th District — Dorothy H. Clark of Arlington (retired in April) — unfunded seat

19th District — Lorraine Nordlund of Fairfax (elected to circuit court in February 2010) — unfunded seat

24th District — F. Patrick Yeatts of Rustburg (elected to circuit court in 2011)

25th District — A. Lee McGratty of Staunton (retired December 2008) — unfunded seat

27th District — Edward M. Turner III of Hillsville (retired December 2010) — unfunded seat

30th District — Chadwick S. Dotson of Wise (elected to circuit court in 2011)

J&DR District Courts

11th District — James E. Hume of Petersburg (retired December 2009)

14th District — Sharon B. Will of Henrico (retired April 2010) — unfunded seat

27th District — M. Keith Blankenship of Wytheville resigned in December 2008; Harriet D. Dorsey of Blacksburg temporarily filled the seat, but she did not seek election to a term and her appointment expired in February.

2012 Retirements

The following judges have announced retirements or are subject to mandatory retirements in 2012:

Circuit Judge Frederick B. Lowe of Virginia Beach (2nd Circuit) will retire in January.

Circuit Judge Samuel E. Campbell of Prince George (6th Circuit) must retire by February.

Circuit Judge Walter W. Stout III of Richmond (13th Circuit) must retire by January.

Circuit Judge Daniel T. Balfour of Henrico (14th Circuit) must retire by January.

Circuit Judge Larry B. Kirksey of Abingdon (28th Circuit) will retire in March.

General District Judge Robert L. Simpson of Virginia Beach (2nd District) must retire by January.

Pro Bono Lawyer Wins Payday Loan Case for Legal Aid Client

A pro bono lawyer in Harrisonburg prevailed in a challenge to a payday loan practice that left borrowers in what the Supreme Court of Virginia called “a vicious cycle of debt.”

The Court unanimously ruled on April 21, 2011, that the practice of having a borrower repay a loan and immediately take out a new loan for the same amount is a violation of Virginia law that prohibits payday lenders from refinancing, renewing, or extending loans, according to a press release from Blue Ridge Legal Services (BLRS).

The case, *Ruby v. Cashnet Inc.*, was brought by an elderly Shenandoah County resident against a payday lending company that operated a store in Woodstock. Grant D. Penrod of the Harrisonburg law firm HooverPenrod PLC represented the borrower without charge after she sought help from Blue Ridge Legal Services, her local legal aid agency.

The client took out thirty-three monthly loans between March 2005 and

November 2007. The amounts ranged from \$200 to \$500. From her fixed monthly Social Security survivor benefit of \$624, she would pay off her loan and finance charges each month, then take out another loan for the same amount.

“By calling each of these transactions a new loan instead of a refinancing or renewal of an existing loan, the payday lender sought to evade the interest rate ceilings set by state law, and instead imposed interest charges of approximately 190 percent,” BLRS reported.

The decision reversed a ruling by a Shenandoah County Circuit Court judge.

Penrod became familiar with this payday lending practice when he was an attorney for BLRS from 2005 until 2008. Dozens of low-income clients who had come to the legal services agency in search of debt relief were entrapped by the re-lending scheme. Freeing the clients from payday re-lending cycles often was an alternative to bankruptcy, Penrod said. When he joined his father and



Penrod

brother in private practice, he took his payday loan cases with him, and he has continued to serve as pro bono co-counsel with BLRS attorneys on such cases.

The Supreme Court’s decision in *Ruby v. Cashnet* can be downloaded at <http://www.courts.state.va.us/opinions/opnscvwp/1100287.pdf>.



Harrisonburg-Rockingham Bar Honored for Pro Bono Work

The Harrisonburg-Rockingham Bar Association has been honored by the national Legal Services Corporation board of directors for the association’s pro bono referral program, which it has operated since 1982 in collaboration with Blue Ridge Legal Services.

The importance of support by the private bar for civil legal assistance cannot be overstated at a time when LSC-funded legal aid programs are stretched thin and the national’s poverty population is growing, board Chair John G. Levi said at the presentation on April 14 in Richmond.

Shown (left–right) are Levi; Dana J. Cornett of the Harrisonburg-Rockingham Bar Association; John E. Whitefield, executive director of Blue Ridge Legal Services; LSC President James J. Sandman; and LSC board member Robert J. Grey Jr.

Access Work Celebrated

Members of Virginia's legal services community gathered at the Hanover Courthouse on April 12 to honor Gail Starling Marshall with the Virginia State Bar's Lewis F. Powell Jr. Pro Bono Award. Marshall's daughter, Starling Marshall (center), accepted the award on behalf of her mother. Virginia State Bar President Irving M. Blank presented a reproduction of *Patrick Henry Arguing the Parson's Cause*, in the courthouse where Henry argued his case. Abigail Turner, litigation director for the Legal Aid Justice Center in Charlottesville, presented remarks about the importance and challenges of legal access work. Turner nominated Gail Marshall for the award.

Also during the ceremony, Crystal Y. Twitty (shown here in front of a portrait of Henry) shared her memories of the

late Chief Justice Leroy Rountree Hassell Sr., who championed many access initiatives during his leadership of the Supreme Court of Virginia. Twitty formerly worked at the Court; now she is counsel to the Virginia Community College System.

The event was sponsored by the VSB's Special Committee on Access to Legal Services.



Indigent Defense Seminar Continues Hassell's Legacy

The annual seminar "Indigent Criminal Defense: Advanced Skills for the Experienced Practitioner" observed its seventh year on April 29 with a live program in Richmond and webcasts in Weyers Cave and Wytheville. The program drew its largest attendance ever, with 850 court-appointed lawyers and public defenders at the three locations.

Steven D. Benjamin (left) was program chair, and Justice William C. Mims represented the Supreme Court, whose justices cosponsor the event with the Chief Justice's Indigent Defense Training Initiative and the Virginia State Bar.

Seminar topics addressed cross examination in driving-under-the-influence cases, trial skills and strategies, immigration consequences of criminal convictions in Virginia, and ethics for the criminal defense attorney.

Bryan A. Stevenson (left), a lawyer from Montgomery, Alabama, (shown talking to a conference attendee) received a standing ovation for his presentation on "Eliminating Discrimination in Jury Selection." An article based on his lecture will appear in a future issue of *Virginia Lawyer*.

The seminar's sponsors, in the conference materials, paid tribute to the late Leroy Rountree Hassell Sr., who founded the conference when he was chief justice:

Hassell, they wrote, "believed that fundamental fairness and equal protection of the law required the state to provide the poor among us no less quality of representation than those who could afford the best representation possible. ... Where he found unfairness, he found a means for relief. Where resources were inadequate, he lobbied for more. When he learned that the quality of the training provided to Virginia's prosecutors was not being provided to Virginia's indigent defense bar, he created this program," which is provided annually at no charge.

Environmental Issues Linked to Virginia's Growth and Development

by Andrea W. Wortzel, chair

In recent years, we have become more aware of links between the global economy and the global environment. The BP oil spill in the Gulf of Mexico and the nuclear disaster in Japan demonstrate that the environment is linked to the economy and to the world. As the economy continues to rebound, there is more emphasis on sustainability and growing in a smarter way. Environmental programs offer the opportunity to explore new jobs, new resources, and new approaches to development.

The articles in this edition of *Virginia Lawyer* highlight the effects of environmental issues on Virginia's economy and future growth and development. Channing J. Martin writes about the Uniform Environmental Covenants Act and its impact on projects that involve the redevelopment and reuse of contaminated property. Margaret L. Sanner, John A. Mueller, Lisa M. Ochsenhirt, and Carla S. Pool describe efforts to restore the Chesapeake Bay. As these efforts continue, environmental and economic impacts will be significant. Miranda R. Yost and Thomas J. Mascia explore opportunities to develop a restorative economy through the use of environmental credits. Robert G. Burnley writes about renewed interest in uranium mining in Virginia.

While environmental law was once a niche field, it now is related to almost any transaction or business decision. The linkage between the global economy and the global environment will continue to influence how we do business in Virginia.

The Environmental Law Section of the Virginia State Bar offers helpful information to its members through continuing legal education programs, regulatory updates, and the section website, <http://www.vsb.org/site/sections/environmentallaw/>. We hope that you find these articles useful and interesting.



Andrea W. Wortzel practices environmental law in Hunton & Williams LLP's Richmond office. She focuses on water quality and water quantity issues, including compliance with law and regulations that govern water use.



Miranda R. Yost is an associate attorney and a member of the environmental team at Hunton & Williams LLP in Richmond. Her practice focuses on environmental and administrative law issues, with emphasis on regulatory counseling, enforcement defense, litigation, and permitting matters under the Clean Water Act, Clean Air Act, and other federal laws that govern recovery from environmental damage.



Thomas J. "TJ" Mascia is an associate attorney and a member of the environmental team at Hunton & Williams LLP in Richmond. He helps clients comply with environmental laws and regulations. He also advises on legal matters related to wetlands and species mitigation banking and conservation easements.

Environmental Credits

The Building Blocks of a Restorative Economy

by Miranda R. Yost and Thomas J. Mascia

In *The Ecology of Commerce*, Peter Hawkins states that society has the capacity and ability to create a remarkably different economy—one that can restore ecosystems and protect the environment while bringing forth innovation, prosperity, meaningful work, and true security.¹ Hawkins argues for a shift from an industrial economy, in which producers compete for lowest costs by externalizing costs onto the environment and society, to a “restorative economy.”² His vision of a restorative economy is one in which success and viability would be determined by the ability to integrate with or replicate cyclical ecological systems in its means of production and distribution. In such an economy, restoring the environment and making money would be one and the same.³

Environmental markets that integrate various environmental services present an opportunity for advancing a restorative economy in Virginia. With successful environmental credit programs already in place, the commonwealth is uniquely poised to move toward a more integrated and complementary environmental services marketplace that is truly restorative. This article briefly explores the potential benefits of this enhanced environmental market, while providing key considerations for its development.

Current Trading Programs in Virginia

Virginia has two established environmental credit markets offering real and liquid trading opportunities: the wetlands and stream mitigation banking program and the nutrient credit exchange program.

Stream and Wetlands Mitigation Banking

For all permitted impacts to wetlands, the Virginia State Water Control Law requires compensatory mitigation “sufficient to achieve no net loss of wetlands acreage and functions.”⁴ Compensatory mitigation is defined in the Virginia Water Protection Program regulation as “actions taken that provide some form of substitute aquatic resource for the impacted aquatic resource.”⁵ Among the acceptable forms of compensatory mitigation specified under Virginia regulations is the purchase or use of wetland or stream mitigation bank credits at a mitigation bank approved by the Virginia Department of Environmental Quality (DEQ) and the U.S. Army Corps of Engineers (Corps).⁶

In a typical wetland or stream mitigation banking transaction, the seller (an environmental resource firm specializing in wetlands restoration) generates or “banks” credits by undertaking a restoration project under the supervision of DEQ and the Corps to restore and then protect degraded resources on a particular site into perpetuity. If the project meets all applicable requirements, DEQ and the Corps will issue the seller or bank a number of tradable credits based on the acreage and type of restored resources (forest or tidal wetlands). The seller or bank can then sell these credits, generally for a profit. The buyer in these instances would be any land disturbance projects by a private developer or state agency seeking to satisfy compensatory mitigation requirements for a proposed project impacting wetlands in the same watershed as the banked project.

Virginia’s wetland and stream mitigation banking program has evolved into a robust, well-established environmental market platform that brings substantial environmental and economic benefits to the state. Between 2001 and 2009, unavoidable impacts to 1,992 acres of Virginia wetlands and open water were compensated with 7,156 acres of similar resources, and 1,400,104 linear feet of unavoidable stream impacts were compensated with 2,658,861 linear feet of stream.⁷ Drawing on accumulated experience administering the program, DEQ and the Corps

have developed thorough permitting procedures, compliance initiatives, and well-established compensatory mitigation standards and methods, while making continued efforts to monitor and assess state aquatic resources. These efforts have fostered significant market participation by ensuring a high level of confidence among potential sellers and buyers. By May 2011, Virginia had 74 operational mitigation banks, 11 mitigation banks that were completely sold out, and an additional 43 mitigation banks proposed, accounting for approximately 10 percent of the mitigation banking activity nationwide.⁸ This growing market will undoubtedly continue to provide economic and ecological benefits to the state.

See figure, right, from DEQ *Virginia Water Protection Permit Program Overview August 2010*.

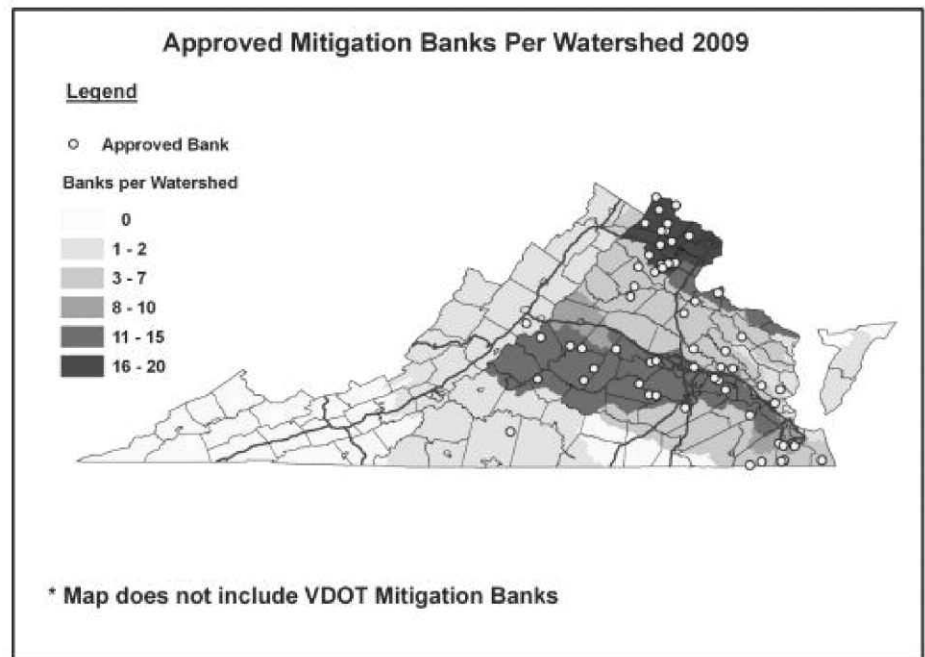
Nutrient Credit Exchange Program

Virginia is implementing one of the largest-scale nutrient trading programs in the United States. Like the state's wetland and stream mitigation banking market, nutrient trading in Virginia was prompted within the General Assembly. Virginia's nutrient trading program is the first in the country to be explicitly authorized and described in detail by state statute.⁹

The Virginia General Assembly enacted the Chesapeake Bay Watershed Nutrient Credit Exchange Program in 2005 to provide a mechanism for achieving the commonwealth's obligations under the Chesapeake Bay Program.¹⁰ Virginia committed to the Bay Program in 2000, entering into a cooperative agreement with several other bay states and the Environmental Protection Agency to improve water quality conditions in the Chesapeake Bay. Principal under the Chesapeake Bay Agreement is the shared commitment to achieve a 40 percent reduction in total nitrogen and phosphorus loads entering the bay (from a 1985 baseline).¹¹

The Virginia nutrient credit exchange program establishes strict, source-specific annual mass load limits (called wasteload allocation, or WLA) on nitrogen and phosphorus discharge for all municipally owned wastewater treatment plants and industrial point source dischargers. Sources are required to remain in compliance with their WLAs starting in 2011.¹²

Different requirements are specified under



the program for existing and new or modified sources. Existing sources (defined as a source that has received a WLA by 2005)¹³ are expected to achieve their wasteload allocation primarily through additional nutrient control investments.¹⁴ Any new or modified sources, on the other hand, must acquire WLA from either an existing point source, by funding offsets from nutrient-reducing best management practices (BMPs) from non-point sources, or by other means approved by the DEQ.¹⁵ Nonpoint source offsets are thus key transferrable environmental credits under Virginia's nutrient exchange program.

The preferred method of securing these offsets thus far appears to be through agricultural nonpoint source offsets. In January of 2008, DEQ published its *Agricultural BMP Trading Manual*, which presents best management practices eligible to generate nutrient credits from agricultural nonpoint offsets. DEQ approved the first nonpoint source nutrient bank under Virginia's exchange program in August of 2008, a project implementing a number of these best management practices on private farmland. Several more of these nutrient banks are being proposed. While these agricultural offsets may be the most heavily utilized under the program, by allowing for other offsetting options approved by DEQ, the program provides for alternate approaches. For example, an offsetting alternative would be urban nonpoint-source offsets secured through the use of treatment practices and strategies to reduce nutrient loads in urban stormwater runoff such as wet

ponds, constructed storm water wetlands, bioretention areas, and sand filters.¹⁶ Active and successful trading of nonpoint-source offsets under the nutrient exchange program seems likely, as any new growth in the regulated sector will necessarily generate demand for these environmental credits.

Benefits of an Integrated Market: Bundling and Incentives

Integrating environmental credit markets allows for bundling or stacking of multiple credits from a single project. For example, consider a wetlands mitigation project seeking credits for restoration of a forest wetlands community within the Chesapeake Bay watershed: Tree planting would be a significant component of such a project, pursuant to DEQ's mitigation banking criteria for this wetland type. At the same time, some components of this project may also be providing nonpoint source offsets to nutrient loading in the bay, as well as carbon offsets attributable to sequestration. The restored wetland might also be critical plant or animal habitat eligible for conservation banking credits. Thus, a single project can have multiple benefits serving multiple markets. This represents a considerable financial incentive for increased investment in restoration of Virginia's critical resources by participation in environmental markets. In addition, because a finite amount of land remains available for restoration, stacking could provide the economic spur to preserve and better use land, thereby encouraging investors to identify and restore the most ecologically valuable parcels.¹⁷ Maximizing these potential incentives and benefits requires an integrated and complementary fair market environmental trading regime — one that can successfully link multiple types of credits, buyers, and sellers.

It bears noting that the topic of bundling often raises concerns over double counting. Obviously, awarding the same specific ecosystem service multiple credits for multiple markets is not of optimum benefit to Virginia's environment. But bundling, at least as the term is used in this article, does not mean double counting. Rather, where a single project can clearly delineate the individual restoration components, with each serving specific environmental needs, these individual project components should be credited in the markets they best serve. An integrated market platform can allow this to happen while tracking projects to ensure that double counting is not allowed.

Another significant advantage of a complementary market approach is that it minimizes investor confusion. Ideally, an integrated marketplace, while seeking contribution from numerous stakeholders, would ultimately be administered by a single agency, pursuant to a single set of guidelines. This allows for consistent, seamless administration and encourages investors to consider new types of projects outside of their traditional niche market. Providing a one-stop shop for all markets provides an easily accessible forum for trade; potential buyers and sellers can communicate better.

Finally, bundling credits in this manner provides options for projects with multiple impacts in major metropolitan areas such as Northern Virginia. When a developer has options for addressing air and water impacts through one mitigation bank, uncertainty and inconsistency are removed. Plus, the performance risk and long-term monitoring for these environmental credits is transferred to the seller.

Obstacles

While market integration has advantages, such an approach does present challenges. One hurdle will be how to integrate fragmented expertise and authority. Scientific expertise, like regulatory authority, is typically service- and agency-specific. Coordinating this expertise and disjointed control to serve a more integrated market will be a challenge.¹⁸ Split motivation among stakeholders is also an obstacle.¹⁹ Since market participants and supporters are often interested in the protection of services most important to their bottom line, impetus for action often involves an ecosystem service.²⁰ Virginia must recognize these challenges as it advances toward a more centralized system of environmental trade.

Necessary Market Infrastructure

Environmental Services Market Creation and Valuation

Determining a reliable, widely recognized means of valuing environmental services in an integrated market is key to reducing project risks, managing transactional costs, and enabling basic deals.²¹

Virginia's existing environmental services markets rely, at least in part, on one particularly attractive and relatively flexible valuation option — the use of “broadly tailored assessments.”²² This approach requires analysis of standardized aspects relevant to valuation of the environmental service. For example, Virginia's wetland mitiga-

tion program determines credit value in part based on the type of restored wetland involved.²³ Similarly, Virginia's nutrient trading program relies on evaluation of a standard set of best management practices to determine nutrient credit value.²⁴ Another example of this valuation approach is the Wetlands Evaluation Technique developed by the Corps, the Federal Highway Administration, and the federal Environmental Protection Agency. The technique relies on analysis of eleven wetland functions, including ground-water recharge and discharge. Development of a similar standardized approach to assessment of multiple environmental services could be an effective starting point for addressing integrated market valuation in Virginia.

Alternative valuation approaches include reliance on simple indicators (acreage — also a factor in Virginia wetlands credits valuation assessments), function-specific assessments (comparing a single environmental function to advanced modeling environmental impacts frameworks), best professional judgment, and economic evaluations (evaluating willingness to pay for the environmental service, costs of damage if service is lost, or cost of technological substitutes).²⁵

Environmental Credits Bank Oversight

Privately sponsored, market-based banks would provide an attractive means of oversight for an integrated environmental credits market in Virginia. This approach allows for greater flexibility and efficiency than strict regulatory approaches. There are two apparent benefits of this approach: fair market forces ensure that mitigation credits are provided at the least cost, and the incentivizing of high-quality environmental services projects are developed in response to the transfer of risk of mitigation failure to the credit provider.²⁶

At the same time, DEQ, the Corps, and other resource agencies could also provide market oversight. DEQ's experience overseeing the existing wetlands mitigation and nutrient credit programs would make it a promising entity for playing a lead role in a more centralized and integrated market platform in Virginia.

Market Motivators — Carrots or Sticks

The promise of incentives and the threat of enforcement are key to motivating trading within any environmental credits market. Tax deductions and tax credits encourage environmental trade. For example, since 1964 the federal government

has offered a tax deduction for conservation easement documentation, and since 1983 states have enacted tax credits for conservation. Similar incentives could be used to boost interest in environmental markets in Virginia, particularly among private landowners.

Enforcement is another effective regulatory motivator of trades of environmental services credits. Without agency enforcement of the regulatory scheme creating an environmental credits market, the credits would lose value and the market would likely fail.²⁷ Both of Virginia's existing markets provide regulatory caps ("no net loss" for wetlands mitigation and mass load limits for the nutrient exchange program) that drive trade through enforcement. Emission caps such as those seen in nonattainment areas or the Chesapeake Bay total maximum daily loads will also motivate environmental trade.²⁸

Virginia can use incentive-based and regulatory-based tools to develop and enhance its environmental trading regime. Finding the right mix of these tools to advance a centralized trading platform will be key.

Examples of Successful Multicredit Exchange Efforts from Other States

Two successful credit exchange efforts demonstrate that integrating complementary environmental markets is both possible and beneficial.

The first example is a restoration project conducted by the Pennsylvania Environmental Council (PEC) in a Chesapeake Bay watershed located in Pennsylvania. Seeking to demonstrate how a single conservation project can receive credits for multiple environmental services, PEC reforested a riparian buffer on agricultural land in the Susquehanna subbasin on the Chesapeake Bay watershed. The project successfully resulted in tradable credits for reduction of nutrients, sediment, and carbon.²⁹

The Ecosystem Credit Accounting System developed by the Willamette Partnership offers a second example of integrated environmental trading. In addition to leading multicredit projects similar to PEC's, the Willamette Partnership has developed an ecosystem credit calculator. Instead of requiring land managers to use completely separate methodologies and indicators to assess the value of a variety of environmental services (wetland, water quality, and species condition) from a project, this method uses site indicators to calculate both the ecological functions provided by the site and the contextual value of the surrounding ecosystem. The calcula-

tor can be used to determine the value of riparian habitat, upland prairie, wetlands, and salmonid habitat credits generated from a single project.³⁰

Moving Toward a Restorative Environmental Market in Virginia

Virginia is primed to build upon its existing environmental credit markets and recent related legislative developments through integration and expansion of those markets.

The 2011 General Assembly expanded Virginia's nutrient trading program. This legislation shows that Virginia is grappling with environmental market issues, but no market integration program is yet under development.³¹

As this legislation and new laws are implemented by Virginia agencies, and as stakeholders study the expansion of nutrient trading opportunities, the possibility of further expansion and the integration of existing and emerging environmental services markets should be considered.

Building on Banking Successes through Integration in Virginia

Virginia's environmental marketplace has come a long way in the last decade. The state's fully functional stream and wetlands and nutrient credit markets are a testament to this progress. But if Virginia hopes to make the same strides going forward, a paradigm shift in market design is critical. Integration is key. This must become the overriding design principle as Virginia seeks to refine and develop environmental markets.

Integration will allow stakeholders in Virginia to seize upon opportunities for market enhancement presented by the obvious overlap among individual markets. With a fully integrated environmental marketplace, the maximum economic and ecological benefits can be extracted from each market transaction. Without it, Virginia's environmental marketplace may not reach its full restorative potential.

Conclusion

Building a robust, restorative environmental marketplace is an ambitious goal. In Virginia, much of the groundwork has already been laid. The state has overseen the development of two distinct environmental credit markets, from inception to implementation to successful administration. In the process, a proven infrastructure has emerged. While significant challenges lie ahead, Virginia's environmental marketplace is well poised to expand to a restorative economy.

Endnotes:

- 1 Peter Hawkins, *The Ecology of Commerce: A Declaration of Sustainability*, 1993, p. 2.
- 2 Hawkins, pp. 11, 83.
- 3 Hawkins, pp. 12-13.
- 4 Virginia Code § 62.1-44.15:21 B.
- 5 9 VAC 25-210-10.
- 6 Virginia Code § 62.1-44.15:23.
- 7 VA DEQ, Office of Wetlands and Water Protection, *Virginia Water Protection Permit Program Overview August 2010*, at http://www.deq.state.va.us/export/sites/default/wetlands/pdf/2009Status_and_Trends_August2010.pdf.
- 8 See <http://geo.usace.army.mil/ribits/index.html>.
- 9 Stephenson, Kurt, *An Evaluation of Nutrient Trading Options in Virginia: A Role for Agriculture?*, Selected Paper prepared for presentation at the Southern Agricultural Economics Association Annual Meeting, Atlanta, Georgia, January 31-February 3, 2009, p. 1, available at http://ageconsearch.umn.edu/bitstream/46779/2/ReviewVAPointSourceOffsets_Stephenson%20et%20al.pdf.
- 10 Virginia Code § 62.1-44.19:12-19.
- 11 *Chesapeake Bay Agreement*, 2000.
- 12 9 VAC 25-820-70C.
- 13 9 VAC 25-720.
- 14 Stephensen, et al., p.3.
- 15 Virginia Code § 62.1- 44.19:15.B.1.
- 16 Stephensen, et al., p.5.
- 17 <http://www.moore.org/files/The%20State%20of%20Ecosystem%20Services.pdf>.
- 18 <http://www.moore.org/files/The%20State%20of%20Ecosystem%20Services.pdf>.
- 19 *Id.*
- 20 *Id.*
- 21 Ray Hartwell, et. al., *Ecosystem Service Market Development: The Role and Opportunity for Finance*, The Institute of Natural Resources, January 2010, p. vii (available at http://www.ecosystemmarketplace.com/pages/dynamic/resources.library.page.php?page_id=7533§ion=library&eod=1).
- 22 Lisa M. Schenck, *Wetlands Protection: Regulators Need to Give Credit to Mitigation Banking*, 9 Dick. J. Env. Pol. 103, 116 (2000).
- 23 9 VAC 25-120-115
- 24 9 VAC 25-820-70 (Part II, B of the General Permit contained therein); see also *Agricultural BMP Trading Manual*, DEQ (2008).
- 25 Schenck, p. 116-120.
- 26 Jonathan Silverstein, *Comment: Taking Wetlands to the Bank: The Role of Wetland Mitigation Banking in a Comprehensive Approach to Wetlands Protection*, 22 B.C. Env'tl. Aff. L. Rev. 129, 145 (1994).
- 27 See Silverstein, p. 161.
- 28 See e.g., 9 VAC, Chapter 140; Section 9 of the Chesapeake Bay TMDL.
- 29 Burke, p. 195.
- 30 <http://willamettepartnership.org/ecosystem-credit-accounting/willamette-ecosystem-marketplace-documents/COE%20handout%206.23.09.pdf>
- 31 S.B. 1100, 2011 Gen. Assem., Reg. Sess. (Va.); S.B. 1099, 2011 Gen. Assem., Reg. Sess. (Va.); S.B. 1102, 2011 Gen. Assem., Reg. Sess. (Va.).

How Will Virginia Regulate Uranium Mining?

by Robert G. Burnley



Robert G. “Bob” Burnley is president of Robert G. Burnley LLC, a firm that advises clients on environmental issues. He served for thirty-two years in Virginia state government, including the State Water Control Board, the Virginia Economic Development Partnership, and the Department of Environmental Quality, where he was director from 2002 until 2006.

The Environmental Law Section invited Robert G. Burnley, former director of the Virginia Department of Environmental Quality and currently an environmental consultant, to share his thoughts on the background of uranium mining in Virginia and current interest in reviving uranium mining. Mr. Burnley is uniquely suited to offer his opinions on this subject, given his participation in the development of the original moratorium on uranium mining and his involvement in current discussions on the issue. Any views or opinions expressed in this article are solely those of Mr. Burnley and do not necessarily represent those of the Environmental Law Section or the Virginia State Bar. We appreciate Mr. Burnley’s willingness to share his insights on this interesting subject.

—Andrea W. Wortzel, chair

Uranium mining interests are lobbying legislators to lift the current ban on uranium mining in Virginia. Lifting the ban should not be done without considering effects on the health of the environment and the economy.

Background

During the late 1970s and early 1980s, uranium deposits potentially worth billions of dollars were discovered in Pittsylvania County, extending into the Piedmont region of Virginia.

In 1981, the Virginia General Assembly asked the Virginia Coal and Energy Commission to evaluate the impacts of uranium production.¹ In 1982, following that assessment, the Virginia General Assembly established a moratorium on uranium mining that remains in effect today.² The legislature is currently reevaluating the moratorium and is considering lifting it. Virginia Uranium Inc. is poised to mine and mill uranium in Pittsylvania County, at a site known as Coles Hill, when the moratorium is lifted.

There is also the probability of mining in other regions of the state. A Virginia Tech professor reports that there is “a very high probability that there are other deposits of the same size, same grade, as Coles Hill located in the eastern United States.”³ Officials with the mining company have stated that the lead geologist who discovered Coles Hill is “insistent to this day that it is the first of more, major discoveries in Virginia.”⁴

Part of the legislative reevaluation process includes a study being conducted by a committee of the National Academy of Sciences and sched-

uled for completion in 2011. The study will help inform the legislature’s decision and will examine a number of environmental considerations. The study also will provide independent, expert advice and information regarding the future of uranium mining in Virginia.

The study will not recommend lifting or continuing the moratorium. The study committee says that whether uranium can be mined safely in Virginia is a public policy question for the General Assembly. The legislature will decide based on this study and three others being conducted concurrently, which are evaluating socioeconomic effects and water-quality impacts. The final decision will presumably be made in 2013, after the public reviews the studies, considers the impacts, and contacts their elected representatives. Some interests want the moratorium lifted in 2012, which would preclude any meaningful review and assessment of the reports.

Environmental Protection and Industrial Interests

Virginia has been a leader in environmental protection. When the Clean Water Act was passed in 1972, the State Water Control Board expanded its staff, regionalized operations and, in 1975, assumed the federal national pollutant elimination discharge system (wastewater discharge permitting) program. The State Water Control Board was established in 1946; through the Department of Environmental Quality, it administers the State Water Control Law and associated regulations. Virginia is, and has been for decades, an approved

state for Clean Air Act purposes. Virginia operates an independent solid waste program that regulates solid waste landfills and the state administers its own wetlands permitting program.

Despite this early history of leadership, in recent years Virginia has a checkered record of protecting our natural resources. In my four decades as an environmental professional in Virginia, I have sometimes seen shortsighted and weak leadership for the environment in the executive and legislative branches. Natural resource regulation has often been motivated by politics and economics rather than science and the long-term benefits of a healthy environment. Only a few of Virginia's decision makers appreciate the direct link between a healthy environment and a vibrant economy. The latter simply does not exist without the former. Yet the general fund budget for environmental protection and conservation programs comprises less than 1 percent of the state's total general fund budget. The 2010 the general fund appropriation for the commerce and trade secretariat was nearly \$1.2 billion, while the seven agencies of the natural resources secretariat responsible for protecting the commonwealth's environmental and cultural resources had to split \$425 million.⁵

During the past few years, there have been a number of proposed changes to Virginia's environmental statutes and regulations. Some, notably Chesapeake Bay-related legislation, have or would have strengthened environmental protections, but most have weakened environmental protections for the sake of various special interests. The majority of those efforts to weaken the law have been successful, and Virginia's environment is more vulnerable as a result.

In 2005, the State Air Pollution Control Board offered a few very reasonable changes to Virginia's mercury pollution control strategy. Mercury contamination of surface waters is a growing problem and these new regulations, while quite modest in nature, could have slowed the growth of the mercury problems. These regulations were never promulgated, due to opposition by potentially affected industry.

In 2007 and 2008 there was a concentrated effort to eliminate Virginia's three citizen environmental regulatory boards and vest nearly all of their authority in the executive branch. That plan, which was not successful, would have reduced the public's involvement in permitting and other environmental protection activities and given even greater control to some special interests.

In 2010, the General Assembly passed Senate Bill 128 that allowed major sources of air pollution in nonattainment areas to buy compliance through a trading scheme rather than actually reducing

emissions and improving air quality. This legislation again benefitted special interests at the expense of the health of those living in nonattainment areas, and at the expense of future economic growth in those communities. This legislation was later repealed in deference to changes in anticipated federal Environmental Protection Agency regulations, but the special-interest protection purpose of the original bill remains unchanged by that action.

In 2011, Senate Bill 1025 and its companion bill in the House of Delegates exempted the coal industry from the basic effluent toxicity testing requirements that apply to other industrial discharges. This change in the law precludes environmental protection; it transferred authority from the State Water Control Board and the environmental professionals in state agencies to the Virginia General Assembly.

Virginia has many miles of rivers that are chronically polluted by industrial chemicals.⁶ If dischargers are exempted from routine testing that could lead to pollution reductions, because it costs too much or the dischargers are afraid of what they might find, then we are destined to repeat the mistakes of the past — except this time we will have no excuses. This waiver from such a fundamental environmental regulatory tool is problematic. Can a uranium mining industry in Virginia be similarly accommodated?

The legislature appears to be on a course to further weaken struggling environmental regulators and regulations to assist industrial growth. This flawed strategy overlooks the fact that environmental health is critical to economic health, and the weakening of the regulatory system inhibits industrial development. For example, new industry cannot be recruited to nonattainment areas or to states without a high quality of life, which for most persons includes clean air and water. An industrial development strategy that benefits business and industrial interests at the cost of environmental quality is shortsighted, counterintuitive, and harmful to the commonwealth's economic interest.

Regulating the Uranium Industry

While Areva — a global nuclear energy company active in uranium mining, milling and enrichment — has operations in Lynchburg, there are no mines or milling operations in Virginia because of the 1982 moratorium. Consequently, there are no environmental programs to regulate uranium mining, milling, or uranium tailings waste disposal in Virginia.

State regulations for uranium mining and processing would be required. Depending on final requirements in such regulations, various permitting, monitoring, inspection, and enforcement programs would be developed and necessarily funded.

The regulatory landscape for uranium mining and milling operations is complex and invokes both federal and state authority across the entire matrix of legal constructs for environmental protection. Mining operations would fall under Virginia regulatory authority. The regulation of the milling process — whereby uranium ore is milled into yellowcake — is regulated largely under federal authority. The Nuclear Regulatory Commission is charged with enforcing milling regulations. However, states can apply to become “agreement states,” whereby the commission delegates day-to-day enforcement, management, and monitoring of milling sites to state regulators. In Virginia’s case, the delegation would be to the Department of Mines, Minerals, and Energy. Should the moratorium be lifted, evidence is strong that Virginia will become an agreement state, taking over all aspects of uranium mining, milling, and hazardous waste disposal from the federal government. Virginia is already a “partial agreement state” in regard to source material and all by-product materials except uranium mill tailings.

The Environmental Protection Agency also plays a role in setting standards. Applicable legal frameworks include the Clean Water Act; Clean Air Act; Safe Drinking Water Act; Resource Conservation and Recovery Act; Comprehensive Environmental Response, Compensation, and Liability Act (Superfund); National Environmental Policy Act; and Uranium Mill Tailings Radiation Control Act.

A thorough review of the regulatory landscape for uranium mining and milling exceeds the space limitations for this article. See Katherine E. Slaughter’s 2010 article in the *Virginia Environmental Law Journal*, Volume 28, at http://www.southernenvironment.org/uploads/publications/will_uranium_get_a_glowing_welcome_in_va.pdf for an in-depth analysis of the regulatory framework.

The commonwealth — presumably through the Department of Mines, Minerals, and Energy and Department of Environmental Quality — would be responsible for the safety of miners and all those who may be exposed to the hazards of uranium mining by contact with contaminated water, air, and land, and for the short- and long-term impacts to businesses and industry.

Who Pays?

Funding is essential. The Virginia Department of Environmental Quality (DEQ) in 2011 will receive about 21 percent of its budget from state general fund appropriation.⁷ That means 79 percent of DEQ’s budget must come from federal

support, various grants, permit fees, and other sources. This is a precarious budgeting position.

During the administration of Virginia Governor Mark R. Warner (2002–06), permit fees were increased twice, the DEQ budget was cut, and it was necessary for the agency to occasionally borrow money from the state treasury to meet payroll. This was not a formula for stable operations.

Budget restrictions force the DEQ to operate on a risk-based priority basis. The threats that present the greatest risk to human health or the environment get the most attention and consume the greatest percentage of resources. Programs not mandated by law, not funded by the federal government, or not supported by permit or other fees are low priorities. Staffing and operational budget cuts often come at the expense of data collection, inspection frequency, or travel and training restrictions, further hampering basic environmental protection practices.

On February 7, 2011, a DEQ representative advised the National Academy of Sciences committee that new environmental regulatory programs for uranium mining and milling will be a high priority for the agency and that high-priority programs are properly staffed and funded. While that is the only politically correct assurance that could be given, it was offered without knowledge of the type of mining that would be employed, the number of mines that will be active, the location of the mines, the extent of milling activities, or the requirements of the regulations yet to be promulgated. Without any of this information, it is difficult to estimate the number and type of staff that might be required, the travel and training costs, laboratory costs, equipment costs, and contingency requirements.

If the commonwealth is funding the DEQ at about the 20 percent level, what programs will be cut to fund the regulation of uranium mining and milling? Chesapeake Bay restoration? Air quality protection? Water quality protection? Or will these new programs be funded by permit fees that are set by the General Assembly and are subject to increase or decrease by the General Assembly?

Permit fees that fund a single industry are inherently problematic. Virginia is the nation’s second largest importer of municipal solid waste and “land protection” programs will receive about \$2.25 million in general fund money to regulate millions of tons of garbage that are landfilled in 2011.⁸ Permit fees fund most programs, raising another \$11 million a year.⁹ Should the imported solid waste stream be reduced, permit fees may not pay for regulatory activities associated with the long-term management of those facilities.

Only one company has well-developed plans to mine and mill uranium in Virginia. If permit fees support the regulation of uranium mining and milling and at the onset only one company is paying those fees, how large must the fees be? While that may not be a burden to the mine owners while mining and milling is profitable, is it a conflict of interest for one regulated entity to be totally funding the regulators? What happens if uranium prices fall and the company decides the fees are too high? Will the General Assembly lower them? Eliminate them? Then what happens to the regulatory efforts?

How Well Will Virginia Regulate Uranium Mining?

A marginal effort to control an extremely serious threat to the health of Virginians and Virginia’s environment will benefit no one. The decision makers and political leaders want economic success, and that often translates into fewer regulations, a less burdensome regulatory climate, and low environmental protection costs. Unhealthy tension and competition between business and environmental protection does not promote either.

Without a serious commitment to human health and environmental protection, the mining and processing of uranium is potentially disastrous. It remains to be seen whether environmental protection funding, historical weather patterns that are inconsistent with safe mining, risks to existing business interests, the size of the potentially effected population, and the numerous local, regional, and statewide environmental issues will get the same consideration as the promised economic benefits. If they do not, and the mining moratorium is lifted, Virginia and Virginians will continue to lose, because the relationship between the environment and the economy is misunderstood and prejudiced.

Endnotes:

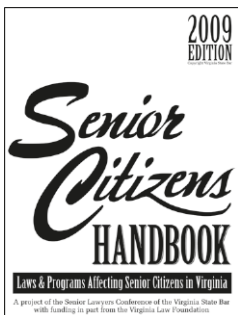
- 1 Report of the Coal and Energy Commission to the Governor and General Assembly of Virginia (1986)
- 2 Va. Code Ann. § 45.1-273, *et seq.*
- 3 A. Rice, “Nuclear Standoff: What Happens When You Discover Uranium In Your Backyard,” *The New Republic* (Mar. 3, 2010) (quoting Professor Robert Bodnar).
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- 6 2010 305(b) 303(d) Integrated Report
- 7 DEQ Director David K. Paylor, Annual Budget Briefing for Virginia Forever, Dec. 20, 2010
- 8 Id
- 9 Id

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Restoration of the Chesapeake Bay

The Chesapeake Bay Total Maximum Daily Load and the Virginia Watershed Implementation Plan

by Lisa M. Ochsenhirt, Carla S. Pool, Jon A. Mueller, and Margaret L. Sanner



Ochsenhirt



Pool



Mueller



Sanner

Excessive amounts of nitrogen, phosphorous, and sediment impair water quality in the Chesapeake Bay. For more than three decades, Virginia, Maryland, Pennsylvania, New York, Delaware, West Virginia, and the District of Columbia and the federal government have worked to reduce the amounts of these pollutants entering rivers and streams throughout the 64,000-square-mile bay watershed. Bay impairment remains, despite significant measures designed to reduce nutrients, multiple interstate agreements, years of litigation, and the passage of laws and regulations aimed at stemming these pollutants.

In December 2010, the U.S. Environmental Protection Agency (EPA) issued a total maximum daily load (TMDL) finding for the bay to cap the amounts of nutrients and sediment that may enter the watershed,¹ and each of the bay jurisdictions developed initial watershed implementation plans (WIPs) defining how the caps will be met.²

This article briefly describes TMDL history, provides a snapshot of Virginia's Phase I WIP, suggests important challenges the commonwealth will face during the next phase of cleanup planning, and sounds a note of measured optimism regarding bay restoration.

History of the Bay Program and Overview of EPA TMDL and Virginia WIP

Previous Agreements and Restoration Efforts

Based upon a congressionally mandated study of the bay, the first Chesapeake Bay Agreement was signed in 1983 by the governors of Maryland, Pennsylvania, and Virginia; the mayor of the

District of Columbia; and the administrator of the EPA.³ The agreement created the Chesapeake Bay Program, led by the EPA and included officials from each bay jurisdiction.

In 1987, a second Chesapeake Bay Agreement was signed, with a goal of reducing bay nutrient pollution by 40 percent by 2000. Amendments to the agreement in 1992 capped the 40 percent reduction goal after 2000, recognized the need to reduce nutrients in the tributaries, and called for the states to develop tributary-specific strategies to meet the nutrient reduction goal.

In the late 1990s, several lawsuits were filed against the EPA alleging a failure to develop TMDLs for states that ignore their specific statutory obligations to develop those load allocations. These cases were settled either through judicially approved consent decrees or memoranda of understanding; collectively, they required the EPA to develop TMDLs for the bay and its tidal tributaries by May 2011 if the bay jurisdictions did not.⁴

In 2000, Congress amended Section 117 of the Clean Water Act⁵ to "achieve the goals established in the Chesapeake Bay Agreement."⁶ The amendment clarified the EPA's authority related to restoring the bay and tidal tributaries by providing that the administrator of the EPA should work with an executive council to ensure that management plans were developed and implementation begun to achieve the Bay Agreement's nutrient goals and the water quality requirements necessary to restore living resources. Also in 2000, acknowledging that the 1987 Agreement goal of 40 percent nutrient reduction goal had not been met, the Chesapeake Executive Council signed the *Chesapeake 2000* agreement. The agreement prompted the states to issue and the EPA to approve revised water quality criteria⁷ in 2003 and the states to issue associated point source caps that set the standard for point source permitting in the bay region. Using bay-specific modeling in coordination with a multistate workgroup, the EPA led an effort to develop nutrient

load allocations for all states and major river basins in the bay watershed.⁸ These allocations guided the development of revised state-specific tributary strategies.

The states worked to implement these tributary strategies, but as the decade drew to a close, cleanup was not complete. In 2007, the Chesapeake Executive Council announced that the Chesapeake Bay Program would not meet its water quality goals by 2010, and in June 2008 the program's principals' staff committee requested that the EPA develop a bay TMDL effective no later than December 31, 2010. This deadline was also included in the settlement of a lawsuit, *Fowler v. EPA*,⁹ asserting that the EPA had failed to comply with Section 117(g) and the bay agreements.

Executive Order

In May 2009, President Barack Obama issued Executive Order 13508, which required seven federal agencies, led by the EPA administrator, to develop a strategy for addressing bay pollution and preserving bay natural resources.¹⁰ The final strategy was issued on May 12, 2010. It required the EPA to develop a bay TMDL with full implementation by 2025. The strategy also defined goals for improving bay water quality and habitat, sustaining fish and wildlife populations, increasing public access, and conserving land.¹¹

Development of Bay TMDL Allocations

Developing the TMDL allocations was a lengthy process.¹² In 2003, bay watershed model simulations and other data suggested a nitrogen allocation of 175 million pounds annually. Federal and state decision makers preliminarily allocated 183 million pounds of nitrogen to the seven bay watershed jurisdictions for incorporation into the state tributary strategies.¹³ Updated information, including a newer bay computer model, led to a 2010 allocation of 185.9 million pounds per year of nitrogen, 12.5 mpy of phosphorus, and 6.45 billion pounds per year of sediment among the seven jurisdictions.¹⁴

Phase I Implementation in Virginia

The Accountability Framework

The foundation for the bay TMDL is an "accountability framework" that includes requirements that each state's watershed implementation plan provide "reasonable assurances" that the allocations will be met, and that two-year milestones, tracking and progress assessments, and federal contingency actions be established. These mea-

asures are meant to ensure that bay restoration proceeds on schedule to full completion by 2025.

Phase I WIPs are the pollutant-reduction plans each bay jurisdiction developed to implement the TMDL's nutrient and sediment allocations.¹⁵ The EPA expected each state's WIP to provide a road map to meet 60 percent of required pollutant reductions by 2017 and the balance by 2025,¹⁶ including an account of existing legal, regulatory, and programmatic tools (and plans to enhance them); strategies for allowing growth without exceeding the TMDL's pollutants caps; protocols for tracking and reporting reductions and for addressing anticipated implementation delays; and detailed schedules.¹⁷ The EPA reviewed the draft WIPs and required that they provide "reasonable assurance" that the state would be able to ensure pollutant reductions from nonpoint and point sources to achieve state and basin-level caps.¹⁸

The EPA has promised to hold bay jurisdictions accountable if they fail to attain two-year milestones based upon the pollutant caps set in the TMDL. States are expected to monitor and report on their activities and set goals for each succeeding two-year milestone of the TMDL's fifteen-year implementation period. Before the start of each milestone period, the EPA will assess the jurisdiction's progress in meeting its previous two-year program goals, evaluate its commitments for the next period's, and work with states to revise implementation plans to ensure adequate progress.

An essential part of the TMDL's accountability framework is the promise of federal "consequences" if a bay jurisdiction does not make adequate progress in preparing a WIP, developing and achieving milestones goals, issuing appropriate discharge permits to point sources, or crafting effective mechanisms to reduce pollutant discharges from nonpoint sources. Consequences include expanding discharge permit coverage to currently unregulated sources, deepening federal review of state-issued discharge permits, requiring pollutant offsets and additional point source reductions, increasing federal enforcement in the watershed, and conditioning or redirecting federal grants.¹⁹

Virginia's Phase I Plan

Virginia's history of bay restoration includes notable achievements, such as significant reductions already made from point sources (with efforts dating back to the 1980s and '90s), the successful 2005 program to assign nutrient discharge

caps for significant point sources, an innovative nutrient trading exchange program intended to give wastewater treatment plants a cost-effective way to improve the bay's water quality, and progress made by the agricultural community. Despite the progress represented by such measures, achieving the TMDL allocations will require new and creative strategies.

Virginia's Phase I WIP represents the commonwealth's commitment to meet this challenge.²⁰ Important ways it proposed to achieve the pollutant allocations include requiring additional reductions from sectors such as agriculture, urban stormwater, and wastewater, and widespread reliance on an expanded nutrient credit exchange program. In an early display of the functioning of the TMDL's accountability framework, however, the EPA found the draft WIP "seriously deficient" and proposed sector-wide backstops to meet the problems. The commonwealth responded with a final WIP that made significant, and in some ways innovative, plans to address intractable pollutant problems.

In agriculture, Virginia's WIP defines new expectations. Continuing its emphasis on voluntary efforts for this sector, Virginia proposed a novel "resource management plan" program to encourage adoption of best management practices — a program that the General Assembly enacted in the 2011 session with a "safe harbor" incentive.²¹ Virginia's WIP also evaluated small animal operations to determine whether any of them should be required to obtain discharge permits, and to fully implement the barnyard runoff control, waste management, and mortality composting practices that would be required under a confined animal-feeding operation permit. Notably, Virginia will develop mandatory programs if, at the conclusion of the initial milestone period, insufficient progress is made.²²

To reduce pollutant discharges from urban and suburban stormwater, Virginia confirmed that it would complete a statewide stormwater rule to improve new development and redevelopment performance standards. Virginia also proposed a voluntary program to limit fertilizer application on nonagricultural urban lands — an idea that the General Assembly has since modified and enacted as a ban on the registration and sale of phosphorus-containing lawn maintenance fertilizer to consumers.²³

Virginia also included important terms for the wastewater sector. In addition to establishing wasteload allocations for wastewater treatment facilities, it also agreed to a several-staged effort to

review the state's existing chlorophyll-a standard. The WIP states that it will require an upgrade of wastewater treatment plants in the James River basin to meet the river's dissolved oxygen standard by 2017 and its chlorophyll-a standard thereafter (subject to a reexamination of the standard).

To ensure that Virginia is successful in implementing its Phase I WIP, the EPA has promised ongoing oversight of Virginia's overall implementation and enhanced oversight of the agricultural and urban stormwater sectors.²⁴

Phase II Implementation in Virginia

The next step in implementation planning is the development of Phase II WIPs. This process will bring with it a host of challenges and likely will engender public debate over a number of emerging policy issues, particularly at the local level, as this stage will establish local reduction goals for nutrients and sediment by county and city. Planning and implementing these local projects will require pragmatic considerations of time and costs.

The Phase I WIP establishes requirements for various source sectors. Of particular interest to localities, the Phase I WIP aggressively seeks to reduce urban stormwater discharges. Management measures for areas developed before stormwater management was required will present significant challenges due to the potentially high cost of installing or upgrading best management practices in these older areas (one of the measures suggested for making reductions). The WIP also includes urban nutrient management plans on additional properties, including locally owned properties, fertilizer restrictions, and phosphorus reductions for redevelopment.

One way to manage these new expectations for urban stormwater (and other sectors as well) may be by expanding the existing nutrient trading program. Trading allows one party to sell pollutant reduction credits to a source that needs to meet reduction goals. Allowing municipal stormwater systems to trade would introduce cost-effectiveness considerations into management decisions,²⁵ increase flexibility in implementation, and allow "local decision-makers to consider nutrient and sediment generating potential as they face development, land use, and capital planning challenges."²⁶

Another significant Phase I WIP issue involves James River Basin nutrient allocations. Over the next several years, the state will review and potentially revise its existing chlorophyll-a standard, which is the first of its kind in the bay watershed.²⁷ The Phase I WIP acknowledges that

“the draft nutrient allocations for the James River are *significantly more stringent* than the levels that formed the basis for the state regulatory actions taken in 2005 for the chlorophyll criteria and the wastewater treatment plant allocations.”²⁸ The stakes are high — achieving the TMDL allocations is estimated to cost an additional \$0.5 to 1.0 billion for the James River Basin.²⁹

The EPA expects that all management measures needed to comply with the TMDL will be taken on a condensed schedule and during one of the most challenging economic periods for local government in decades.³⁰ The bay TMDL does not take into account affordability or cost-effectiveness; however, local governments have a responsibility to their citizens and customers to seek cost-effective solutions. Balancing this responsibility with the drive to improve bay water quality will be the biggest challenge of the Phase II WIP development process. Localities may seek additional implementation flexibility as the Phase II process moves forward.

Conclusion: Achieving Water Quality Goals

The Clean Water Act’s goal is that all waters of the United States be “fishable” and “swimmable.” States and the District of Columbia have established specific uses for their waters and water quality standards protective of those uses. Much progress has been made by many of the states and the source sectors discussed above to reduce the amount of nutrients that flow into the bay. Unfortunately, bay cleanup goals have not been fully met. The TMDL and the state WIPs lay out the next set of measures to be taken to achieve those goals.

The TMDL, implemented by each of the seven bay jurisdictions and supported by the EPA’s future oversight, is the next step in working to achieve those goals for the waters of the bay and its tidal tributaries. The commitments made in Virginia’s Phase I WIP, the early steps taken by the General Assembly to implement those commitments through the lawn fertilizer and resource management plan legislation, and the work being done to begin the Phase II implementation planning process are all steps towards meeting Clean Water Act goals and restoring the bay for the benefit of Virginia’s citizens and the nation.

Endnotes:

1 <http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html>
 2 The TMDL has recently been challenged in federal court by the American Farm Bureau, Pennsylvania Farm Bureau, and six agricultural trade associa-

tions. *American Farm Bureau Federation v. EPA*, No. 1:11-cv-00067-SHR (M.D. Pa.).
 3 This group of signatories is also known as the Chesapeake Executive Council.
 4 *American Littoral Society v. EPA*, No. 96-330 (D. Del. 1997); *American Littoral Society v. EPA*, No. 96-489 (E.D. Pa. 1997); *Ohio Valley Environmental Coalition, Inc. v. Carol Browner*, No. 2:95-0529 (S.D. W.Va. 1997); *Kingman Park Civic Association v. EPA*, 84 F. Supp. 2d 1 (D. DC 1999); *American Canoe Ass’n v. EPA*, 54 F. Supp. 2d 621 (E.D. Va. 1999).
 5 33 U.S.C. § 1267(g).
 6 Pub.L. 106-457, Title II, Sec. 202(b)(2), Nov. 7, 2000, 114 Stat. 1967.
 7 EPA, *Ambient Water Quality Criteria for Dissolved Oxygen, Water Clarity and Chlorophyll-a for the Chesapeake Bay and Its Tidal Tributaries (2003)*.
 8 See http://www.chesapeakebay.net/wq_git_info.aspx?menuitem=47174
 9 Case No. 09-cv-00005-CKK, D. D.C., January 5, 2009.
 10 <http://executiveorder.chesapeakebay.net/page/About-the-Executive-Order.aspx>
 11 <http://executiveorder.chesapeakebay.net/post/New-Federal-Strategy-for-Chesapeake-Launches-Major-Initiatives-and-Holds-Government-Accountable-for-Progress.aspx>
 12 <http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html>
 13 EPA 2003, *Setting and Allocating the Chesapeake Bay Basin Nutrient and Sediment Loads*, EPA 903-R-03-007.
 14 TMDL, ES-1.
 15 Under the CWA, a TMDL must be “established at a level necessary to implement the applicable water quality standard,” taking into account pollutants from point and nonpoint sources as well as from natural background. 33 U.S.C. § 1313(d)(1)(C).
 16 See EPA letter to Principals’ Staff Committee, September 11, 2008. Overall, the TMDL requires reductions of nitrogen by 25 percent, phosphorus by 24 percent, and sediment by 20 percent.
 17 See TMDL, 8-3 to 8-9.
 18 The EPA emphasized that its approval of the TMDL and state implementation plans would be dependent, in part, on whether the specific elements of the “reasonable assurances” to reduce pollution loadings from nonpoint sources are clear and transparent, specific in their manner of effectuation, and enforceable through legislation, regulation, enforceable agreements, appropriate and/or verifiable incentive programs. See TMDL, 7-1 to 7-2.
 19 See TMDL, 7-11 to 7-12; see also Letter from Shawn M. Garvin, regional administrator, U. Environmental Protection Agency, Region III, to L. Preston Bryant, Virginia secretary of natural resources (Dec. 29, 2009) available at http://www.epa.gov/region3/chesapeake/bay_letter_1209.pdf.
 20 Incorporated into the state’s watershed general permit at 9 VA. ADMIN. CODE § 25-820-10, *et seq.*
 21 VA. CODE ANN § 62.1-44.19:12, *et seq.*
 22 Virginia’s allocations are nitrogen 53.42 mpy, phosphorus 5.36 mpy and sediment 2578.90 mpy. TMDL, 8-28.
 23 Commonwealth of Virginia, *Chesapeake Bay TMDL Phase I Watershed Implementation Plan*:

Virginia's Uniform Environmental Covenants Act

A Solution in Search of a Problem

by Channing J. Martin



Channing J. Martin of Richmond is chair of the environmental practice group at Williams Mullen. He serves on the council of the American Bar Association's Section of Environment, Energy and Resources, and is a past chair of the VSB Environmental Law Section. He co-wrote *Brownfields Law and Practice* (2010) and an upcoming ABA book on implementing institutional controls at contaminated sites.

The 2010 Virginia General Assembly enacted legislation creating the Virginia Uniform Environmental Covenants Act.¹ The act was effective on July 1, 2010, and the Virginia Department of Environmental Quality (DEQ) is drafting regulations and guidance to implement it.

In most respects, the act is identical to the Uniform Environmental Covenants Act (UECA) drafted by the National Conference of Commissioners on Uniform State Laws. As with UECA, the Virginia act establishes how an environmental covenant — often a restrictive covenant governing use of contaminated property after cleanup — is drafted, reviewed, and recorded under governmental oversight. The Virginia act also sets notice requirements, rules regarding the priority and subordination of prior interests, and procedures to enforce, amend, or terminate environmental covenants.

This article is not a primer on the act. Instead, it describes and analyzes legal and practical problems that practitioners, regulators, and courts will face as the act is implemented. Many of the act's provisions will not work and may trap the unwary. So, considering that Virginia's existing procedures for recording and enforcing restrictive covenants appear to work just fine, one might ask, "If it ain't broke, why fix it?"

Background

Restrictive covenants have long been used to implement federal and state environmental programs throughout Virginia. They are often required as a condition of wetland permits and are used in connection with hazardous waste and hazardous substance laws. Perhaps the most frequent use of environmental restrictive covenants has been in connection with Virginia's Voluntary Remediation Program (VRP).²

Enacted in 1995, the VRP allows persons to voluntarily clean up contaminated property if

cleanup is not clearly mandated by the U.S. Environmental Protection Agency (EPA), the DEQ, or a court pursuant to certain enumerated laws.³ The person performing the cleanup is often given a choice by DEQ: Clean up the site to stringent residential standards or impose restrictive covenants on the property and use more lenient nonresidential standards. The most common restrictive covenants required by DEQ prohibit use of the property for residential purposes and use of groundwater for potable purposes. These restrictions are found in a Certificate of Satisfactory Completion issued by DEQ at the end of the remediation.

Similar procedures have been employed by other state and federal environmental agencies in Virginia when restrictive covenants are required. Essentially, the regulated party and the agency negotiate the language, and a declaration of restrictive covenants is then drafted and recorded. This system has worked well for years. There are no cases challenging the validity or enforceability of environmental restrictive covenants in Virginia.

Legislative History of the Act

In 2006, a resident of Virginia who is a former president of the National Council of Commissioners on Uniform State Laws, sought to have UECA enacted by the Virginia General Assembly. The bill never cleared committee. Another effort was made in 2007, but again the bill was tabled. In 2010, the proponent of the bill gathered other supporters and argued the legislation was necessary to facilitate brownfields redevelopment. The bill was enacted. The DEQ is now

drafting regulations and guidance to implement the act. The regulations will include fees to be paid for each environmental covenant recorded and will provide a model template. Most of the program will be implemented by guidance for the time, being so that DEQ can gain experience before issuing additional regulations.

Is Use of the Act Mandatory?

The act can be used only if the environmental covenant is imposed in an “environmental response project” overseen by a federal or state agency that determines or approves the response action under which the covenant is created. Covenants imposed in connection with cleanups not conducted under agency oversight are not subject to the act. The overwhelming majority of covenants will be imposed in connection with an environmental response project overseen by an agency. Is use of the act mandatory in those circumstances?

This question arose when the bill was debated in the General Assembly. Supporters insisted use of the act was not mandatory. They cite Va. Code § 10.1-1241.D. that states, “This chapter does not invalidate or render unenforceable any interest, whether designated as an environmental covenant or other interest, that is otherwise enforceable under the law of the Commonwealth.” They said this meant that environmental covenants need not comply with the act, and that use of the act was voluntary. It’s debatable whether this interpretation is correct — one could argue that if use of the act is not mandatory, it would have been easy enough for the General Assembly to say just that.

But even if the act is voluntary, it may be difficult for persons to avoid using it. The DEQ is required to collect fees to administer the act, and if the program is little used, then fees will dwindle and the uniformity that the act is intended to promote will not occur. Thus, DEQ personnel are likely to promote the act’s use in their administration of the Voluntary Remediation Plan and other environmental programs. EPA personnel overseeing environmental response projects in Virginia are likely to conclude that since the act is Virginia law, it should be used even if it is voluntary.

All of this illustrates why it may be difficult for lawyers to convince clients and regulators that recording a restrictive covenant outside of the act may be a better alternative than recording an environmental covenant under the act. Nevertheless, there are compelling legal and practical reasons why use of the act should be avoided

Contents of an Environmental Covenant

The act requires that an environmental covenant include a number of elements, including a description of the property, activity and use restrictions, the name and location of any administrative record concerning the environmental response project, and the identity of every “holder” (a person entitled to enforce the environmental covenant⁴). In addition, an environmental covenant may contain other information, restrictions, and requirements agreed to by the persons who signed it.⁵

The environmental covenant must be signed by the agency, every holder, and — unless waived by the agency — every owner of the fee simple title to the real property subject to the covenant. The agency may require anyone who has an interest in the real property to sign the covenant as a condition for approval of the covenant.⁶ This means, for example, that the agency could insist that a lender with a prior deed of trust on the property subordinate its interest as a condition for approval of the covenant.

The signature requirements for an environmental covenant raise a number of troubling issues. First, each environmental covenant must be signed by an agency. An agency is defined to mean the DEQ “or any other state *or federal* agency that determines or approves the environmental response project pursuant to which the environmental covenant is created.”⁷ If a federal agency is overseeing the project, it’s usually the EPA. Traditionally, the EPA has not signed or been a party to environmental covenants. Instead, the property owner signs and records the covenant at the EPA’s direction, while giving the EPA or state agency the right to enforce it. That being the case, what happens if the EPA or other applicable federal agency refuses to sign the environmental covenant on the ground that no federal environmental law authorizes or compels it to do so? What happens if the EPA says it doesn’t have the personnel or resources to review the covenant for compliance under the act and, accordingly, won’t sign it? If the EPA does sign, the reviews and delay inherent in the EPA’s consideration of the covenant could result in significant delays in completing the project. Time is often critical in brownfield redevelopment projects⁸ and in sales of industrial or commercial property. Requiring a federal agency to sign the covenant could hinder brownfield redevelopment.

Second, the act requires every fee simple owner of the real property subject to the covenant to sign the covenant “unless waived by the

Agency.”⁹ If property is jointly owned and one of the owners refuses to sign or can't be found, the agency can waive the requirement and allow the covenant to become effective without that owner's signature and consent. Is this provision constitutional? Imposing use restrictions on property without consent is a taking under the Fifth Amendment, particularly when a more stringent cleanup could be accomplished — although at greater cost — that would not require an environmental covenant. Note that the act says that an amendment of an environmental covenant is not effective against an owner unless the owner consents to it or has waived the right to consent.¹⁰ However, no such protection is provided by the act when the covenant is first imposed.

Third, there is a concern that banks and other lenders with recorded deeds of trust could insist on their right not to subordinate their lien. The act does not allow the agency to trump a previously recorded lien, but it gives the agency authority to refuse to approve an environmental covenant if it is not signed by the lender. This means the party remediating the property may have to use stricter and more costly cleanup standards than would have been the case if a risk-based cleanup combined with an environmental covenant had been approved by the agency. This person would then be caught in the middle, with the agency refusing to agree to a more lenient cleanup unless the lender subordinates and the lender taking the position that it has no obligation to subordinate and will not do so.

Notice of an Environmental Covenant

A copy of the environmental covenant is to be provided “in the manner required by the Agency” to certain persons enumerated in the act and to each locality where the property is located.¹¹ Despite this requirement, the act states that “[t]he validity of a covenant is not affected by failure to provide a copy of the covenant as required under this section.”¹²

That's helpful, because otherwise there could be a problem for any person remediating property under the auspices of the EPA or another federal agency. The reason is that notice is to be provided “in the manner required by the Agency,” meaning — in the context of a federal environmental response project — the EPA or some other federal agency. The difficulty is that while the DEQ's regulations and guidance will describe how notice must be provided for *state* environmental response projects, there are no such regulations or guidance for *federal* environmental response pro-

jects overseen by the EPA or other federal agencies. So, how do persons provide notice when they are conducting federal environmental response projects? That question is left unanswered by the act.

Amendment or Termination by Court Order

An environmental covenant is perpetual unless it is:

- by its terms, limited to a specific duration or is terminated by the occurrence of a specified event;
- terminated by consent in the manner described in the act;
- terminated or modified by court order under the doctrine of changed circumstances in the manner described in the act;
- terminated by foreclosure of an interest that has priority over the environmental covenant; or
- terminated or modified in an eminent domain proceeding in the manner described in the act.¹³

The procedures for termination or modification by court order should not pose any complications when the agency overseeing the cleanup is a state agency, but they will not work when the agency overseeing the cleanup is a federal agency. Here's why: The act sets an administrative procedure that must be followed prior to filing an action in court. The agency that signed the covenant must be petitioned to make a determination “that the intended benefits of the covenant can no longer be realized.”¹⁴ If the agency makes that determination, then the act authorizes a court, under the doctrine of changed circumstances, to terminate the covenant or reduce its burdens. The agency's determination, or its failure to make a determination, is subject to review by a court pursuant to the Virginia Administrative Process Act.

The problem is that this procedure will not work with federal agencies. The actions of federal agencies in administering federal environmental laws are not subject to review under state law. An example illustrates the problem: A property owner one hundred years from now petitions the EPA to determine that an environmental covenant on her property is no longer needed because the contaminants have degraded below levels of concern. The EPA delays for months, declines outright, or says it just doesn't have the time or resources to do it. The owner will have no ability under the act to ask a Virginia court to terminate the covenant, because the EPA's actions are

not reviewable under the Virginia Administrative Process Act. The act provides no remedy when federal agencies decline or don't act on a petition to terminate or modify a covenant. The property owner will then be stuck with a "Hotel California" environmental covenant — one that no longer makes sense, but never leaves.

Amendment or Termination by Consent

An environmental covenant may be amended or terminated by consent, but only if the amendment or termination is signed by the agency; the holder; unless waived by the agency, the current owner of the fee simple title; and each person that originally signed the covenant, unless the person waived in a writing the right to consent or a court finds that the person no longer exists or cannot be located or identified with the exercise of reasonable diligence.¹⁵ This means persons have the ability to veto the termination or amendment of an environmental covenant for any reason or no reason, even if the environmental condition of the property no longer presents a threat to human health or the environment. All they have to do is refuse to sign. Moreover, if each person that originally signed the covenant cannot be found, filing an action in court will be necessary to have the court declare that those persons no longer exist or cannot be located or identified with the exercise of reasonable diligence. Considering our shifting population and the limited human lifespan, filing an action in court is sure to become the norm for amending or terminating covenants ten to twenty years from the date they were recorded.

Buyers of property whose sellers have imposed an environmental covenant can avoid having to find the seller and obtain its signature by requiring the seller to waive its right to consent in the real estate contract. On the other hand, the seller may insist the covenant be kept in place under all circumstances and, accordingly, will not waive. Buyers will be well served to address the issue of waiver with their seller before the transaction closes.

Removal of Holders

The act allows a holder to be removed and replaced by agreement of the other parties to the environmental covenant.¹⁶ This provision is arguably unconstitutional, because the act states that "[t]he interest of a holder is an interest in real property."¹⁷ The act appears to allow a property interest to be invalidated and "taken" merely by agreement of the other parties to the covenant.

Enforcement

The act provides ammunition to those that wish to stop redevelopment projects. A civil action for injunctive or other equitable relief for violation of an environmental covenant may be maintained by a party to the covenant, if applicable; the federal agency overseeing the cleanup; the DEQ; any person to whom the covenant expressly grants power to enforce it; any person whose interest in the real property or whose collateral or liability may be affected by the alleged violation of the covenant; and any locality in which the real property subject to the covenant is located.¹⁸ Moreover, the act grants standing to persons that did not previously have it under state law. Such persons include, for example, adjacent property owners who contend their liability has been affected by the alleged violation. Localities can also enforce the covenant. In short, the number of persons who can sue to enforce environmental covenants has been greatly expanded under the act.

Policy Challenges in Implementation

The act presents a number of policy challenges in its implementation. First, the act gives localities the right to review, oversee, and enforce environmental covenants that are subject to the act. Few local jurisdictions appear to have the expertise or funding available to participate in this process, but the act now gives them authority to do so. Most localities will probably defer to the DEQ and EPA, but some localities — particularly larger localities with environmental staff — may exercise their rights. Because localities must now be notified of environmental covenants under the act, many of them are likely to contact the DEQ for support and to answer technical questions. DEQ will need to anticipate the expectations of these localities and budget for the assistance they will require.

Second, the DEQ will need to ensure the program is implemented uniformly among its programs with oversight from the DEQ's legal staff or the Virginia attorney general's office. Without legal oversight, significant errors affecting property rights could be made.

Third, the in-perpetuity aspect of environmental covenants makes administering the program a challenge. Few environmental covenants will be written to terminate of their own accord or on the happening of specified events. That means covenants recorded in 2011 will still be effective a thousand years from now unless action has been taken to amend or terminate them. The timeless nature of these instruments points out

the need for the long-term management of information resources using a reliable archive system. As with any government agency, record retention is a challenge, and a reliable system must be put in place to ensure records are retained and available in the distant future to respond to questions about site conditions, exposures, and restrictions. Perhaps an even bigger challenge will be to ensure that the EPA and other federal agencies also maintain these records. There is no mechanism under state law to make them do so.

Finally, the act could lead to redevelopment projects being slowed or derailed because a landowner or other party given rights under the act refuses to agree to or amend an environmental covenant, even if the DEQ, the EPA, or another federal agency agrees with the proposed action. Thus, rather than facilitating the redevelopment of brownfield properties, the act has the potential to hinder it through misuse of the act's provisions by parties opposed to a project.

Why was a legislative fix necessary when the existing system was not broken? How is the redevelopment and reuse of contaminated property facilitated by more bureaucracy, fees, and the uncertainty inherent in the act? Why are procedures specified and fees charged for environmental covenants, but not for other types of restrictive covenants recorded under Virginia law?

The act is a minefield. Smart practitioners will tread warily or, better yet, take another path.

Endnotes:

- 1 Va. Code §§ 10.1-1238, et seq.
- 2 Va. Code § 10.1-1232.
- 3 Va. Code § 10.1-1232.A.
- 4 Va. Code § 10.1-1240.A.
- 5 Va. Code § 10.1-1240.B.
- 6 Va. Code § 10.1-1240.A. and C.
- 7 Va. Code § 10.1-1238 (emphasis added).
- 8 A "brownfield" is any "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." Va. Code § 10.1-1230.
- 9 Va. Code § 10.1-1240.A.5.
- 10 Va. Code § 10.1-1246.B.
- 11 Va. Code § 10.1-1243.A.
- 12 Va. Code § 10.1-1243.B.
- 13 Va. Code § 10.1-1245.A.
- 14 Va. Code § 10.1-1245.B.
- 15 Va. Code § 10.1-1246.A.
- 16 Va. Code § 10.1-1246.D.1.
- 17 Va. Code § 10.1-1239.A.
- 18 Va. Code § 10.1-1247.A.

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- Revision of the Chesapeake Bay Nutrient and Sediment Reduction Tributary Strategy, at 4-5 (Nov. 29, 2010).
- 24 Virginia's WIP, 58-59; *see also* HB1830, Acts, c. 781 (2011).
 - 25 Virginia WIP 59; TMDL, 8-27.
 - 26 SB1055, Acts, c. 353 (2011).
 - 27 TMDL, 8-27 to 8-29.
 - 28 The Phase I WIP "recommends the Commonwealth expand the nutrient credit exchange program to better ensure that future nutrient and sediment reduction actions are as equitable and as cost-effective as possible among all of the source sectors." VA WIP, *supra* note 23 at 11-12.
 - 29 *Id.* at 12.
 - 30 9VAC25-260-310.
 - 31 VA WIP at 8 (emphasis in original).
 - 32 *Id.*
 - 33 Although there has been a slight upswing in the state and national economies over the last year, localities have been forced to increasingly tighten their budgets due to decreasing revenues. *See*, Christopher W. Hoene & Michael A. Pagano, National League of Cities, *Research Brief on America's Cities*, at 7 (Oct. 2010).

Author Bios:

Lisa M. Ochsenhirt is an attorney with AquaLaw PLC in Richmond. Her practice includes stormwater and wastewater permitting, stormwater utility development, and policy matters such as Chesapeake Bay requirements and biosolids management. She has a bachelor's degree from the University of Virginia and a law degree from the College of William and Mary.

Carla S. Pool's practice with AquaLaw PLC involves water, wastewater, stormwater, and utility law issues. She received a degree in environmental sciences and history at the University of Virginia in 2006 and a law degree from the University of Richmond in 2010. During law school, she worked as a summer intern with the Chesapeake Bay Foundation and the Southern Environmental Law Center.

Jon A. Mueller is vice president for litigation at the Chesapeake Bay Foundation in Annapolis, Maryland, where he litigates to force compliance with environmental laws and regulations. He previously was a litigator with McGuireWoods LLP in Richmond, and, as U.S. Department of Justice attorney, he enforced federal law on behalf of the Environmental Protection Agency and other federal agencies.

Margaret L. "Peggy" Sanner is Virginia senior attorney for the Chesapeake Bay Foundation in Richmond. She advises and litigates for the foundation on environmental issues and represents it before the General Assembly. She has practiced in environmental and other law for more than twenty-five years. Most recently, she was counsel with Reed Smith LLP in Richmond.

Join the VSB Environmental Law Section

Visit our website at
<http://www.vsb.org/site/sections/environmentallaw/>
 for information on joining and to view past issues
 of our newsletter.

Conference of Local Bar Associations

by Nancy M. Reed, Chair



Conference Honors Bar Leaders

AT THE ANNUAL MEETING of the Conference of Local Bar Associations on June 17, 2011, the CLBA presented two local bar leaders, Andrea L. Bridgeman and Tracy Ann Houck, with the Local Bar Leader of the Year Award.

Andrea L. Bridgeman is a corporate lawyer whose active pro bono service has included making opportunities for other corporate counsel to represent low-income clients in Virginia without charge. Bridgeman is associate general counsel at Freddie Mac in McLean. She has worked within her company, with the Fairfax Bar Association and other local bars and legal aid societies, in continuing legal education classes, and through the Virginia State Bar to provide direct legal assistance to low-income clients and to make it possible for other corporate counsel to provide limited pro bono representations. She has served on the VSB Committee on Access to Legal Services since 2006 and is currently its chair.

In nominating her for the award, the Washington Metropolitan Area Corporate Counsel Association wrote, "Andrea has been involved in local bars at all levels, making sure that corporate counsel have a voice before these groups and play a visible role in bar activities."

In Virginia, lawyers who hold bar-issued certificates as corporate counsel normally can represent only one client — the companies for whom they work. Bridgeman helped the Virginia State Bar and Supreme Court of Virginia develop rule changes that now allow these corporate counsel to provide uncompensated pro bono legal representations of other clients. Her work helped lift restrictions for supervision so that corporate counsel can have more flexibility in their pro bono service. Her efforts opened the possibility that the 882 corporate counsel certifi-

cate holders in Virginia can join the ranks of lawyers who provide legal services to persons who do not have the means to pay legal fees.

In endorsing Bridgeman's nomination, James A. Ferguson, executive director of Legal Services of Northern Virginia, wrote, "Despite holding a prominent position in the legal department of a busy company, she has devoted an amazing amount of volunteer time to legal aid and pro bono work. ... I believe that a real leader is somebody who 'walks the walk' — somebody who, rather than just paying lip service to the importance of concepts like access to justice, devotes their time and talents to making sure that our low-income neighbors have meaningful access to high-quality legal assistance. Andrea Bridgeman has done just that."

Bridgeman holds an undergraduate degree from Bryn Mawr College and a law degree from the University of Virginia.

Tracy Ann Houck is a lifelong Fredericksburg resident who reenergized the Fredericksburg Bar Association for the benefit of local attorneys and the community. Houck has a civil litigation practice with Parrish, Houck & Snead PLC in Fredericksburg. "In 2006, while President of the Fredericksburg Area Bar Association, she was the instrumental force in regaining the vitality, interest and membership of the Bar Association, and continues to be actively involved," according to her nomination from the association.

Houck also is involved with the legal community statewide, through many groups. She cochairs the annual Solo and Small Firm Conference for the Virginia Trial Lawyers Association and served a three-year term on the faculty of the Virginia State Bar's Mandatory Professionalism Course. She is a member of the Fifteenth Judicial Circuit Bar Association (for

which she was president in 2000), the Virginia Association of Defense Attorneys, the Virginia Joint Alternative Dispute Resolution Committee, and Phi Delta Phi, a fraternity that promotes a high standard of legal ethics. She also is on the executive committee of Friends of the Rappahannock, which maintains and preserves the Rappahannock River and its tributaries.

Houck holds a bachelor's degree from the College of William and Mary, a Publishing Institute degree from the University of Denver, and a law degree from the University of Richmond. She taught English in Tokyo for two years and was a copy editor, editor, and technical writer in New York for several years. After law school, she worked as a law editor for the Michie Company in Charlottesville.

"Throughout Tracy's career, she has promoted the legal profession with total dedication, full commitment, integrity, and complete devotion. She continues to be a role model for women attorneys," according to the nomination letter. "Tracy strives for professionalism and is a motivating influence to those around her."

The CLBA Executive Committee is proud of Andrea and Tracy for their dedication to their local bars, the VSB, and their communities.

It has been a pleasure and a great privilege to serve as chair of the Conference of Local Bar Associations this year. My local bar, the Page County Bar Association, is very proud to have one of our members and a past Local Bar Leader of the Year and chair of the CLBA, George Warren Shanks, installed as president of the Virginia State Bar. As with many bar leaders, George began serving locally many years ago. It is amazing where service to your local bar can lead.

YLC Program Spotlight – Emergency Legal Services, and a Thank You



IN MY COLUMNS THIS PAST YEAR, I have highlighted the many accomplishments of the Young Lawyers Conference. Our Oliver Hill-Samuel Tucker Prelaw Institute last July, Students Day at the Capitol program in October, three Minority Prelaw Conferences (held in Lexington, Williamsburg, and Arlington), and new Mental Health Law continuing legal education program that has helped educate attorneys on the many ways mental health issues can impact clients are just a few examples. Young lawyers across the commonwealth have been doing so much for the bar and their communities—I could not be more proud of our volunteers.

Absent from my summaries was a program we call Emergency Legal Services. Cosponsored with the Virginia Bar Association Young Lawyers Division, the program provides pro bono legal assistance to Virginians affected by natural disasters and other mass emergencies. The program maintains a network of volunteers trained in disaster-related legal needs. Once the governor of Virginia declares a state of emergency, volunteers are mobilized quickly to provide advice about insurance issues, landlord-tenant problems, home repair contracts, home solicitation, lost legal documents, and other legal issues resulting from the disaster or emergency. Over the years our volunteers have responded to hurricanes, flooding, and tornadoes. We train volunteers twice a year, but we always hope that the training will not be needed.

In April 2011, we were needed. Over a very short time, a series of devastating tornadoes touched down in three areas of the commonwealth. Hundreds of our fellow Virginians saw their homes destroyed or damaged. This has become the second deadliest year for tornadoes in Virginia since the National Weather Service began tracking such data in 1950.

Immediately after the first tornadoes, the YLC and the VBA YLD Emergency Legal Services committee jumped into gear, planning and implementing a telephone CLE (generously hosted by Virginia CLE) to train new volunteers to provide free legal services and comprehensive reference materials to the tornado victims. More than one hundred attorneys answered the call for volunteers and attended the CLE! Tornado victims are now being referred to our volunteer attorneys through the Virginia Lawyer Referral Service. I have always said that there is something special about being a Virginia lawyer, and the fact that more than one hundred Virginia lawyers have volunteered to provide these services lends credence to my belief. I want to thank all of these volunteers, as well as YLC Emergency Legal Services program Chairs Ronald A. Page Jr. and Jessica L. Hacker Trivizas. While I would have preferred that the program was not needed again this year, I am very grateful for their hard work conducting the training CLE and implementing the program.

I am also very grateful that I have had the opportunity to serve as YLC president this year. It is a humbling

experience to lead such a dynamic and energetic group of individuals. I could not have done it without the invaluable assistance of the Virginia State Bar staff, especially Maureen D. Stengel and Catherine D. Huband, and the support of the terrific group of lawyers sitting on the YLC board of governors: Kenneth L. Alger II, Mollie C. Barton, Megan Bradshaw, Brian R. Charville, Maureen E. Danker, Andrew G. Geyer, Macel H. Janoschka, Christy E. Kiely, Gerald E. Mabe II, Demian J. McGarry, Trevor A. Moe, Nathan J. Olson, Brooke C. Rosen, Rachael A. Sanford, Jennifer B. Shupert, Glen H. Sturtevant Jr., Nathan J. D. Veldhuis, and our immediate past president, Lesley Pate Marlin. Board members oversee the committees that have put on all the great programs I have enjoyed telling you about this year, and I hope they know how much I have enjoyed working with them.

Last, I want to say a special word about my successor, Christy E. Kiely: her dedication to the YLC is unparalleled, and I could not be leaving the YLC in better hands. I am looking forward to the upcoming bar year under Christy's leadership, and again, thanks to everyone who helped make 2010–11 another great year for the YLC!

Senior Lawyers Conference

by John H. Tate Jr., Chair



Final Report: Tree-Planting Project Advances, Fifty-year Members Honored

THIS IS THE FINAL MAGAZINE COLUMN in my term as chair of the Senior Lawyers Conference. This year has passed quickly. I just returned from the Virginia Annual Meeting in Virginia Beach, and except for the tunnel and traffic problems, the meeting seemed to me to be a complete success.

I want to thank Warren Haynie and the members of his committee for the excellent continuing legal education program on attorney trust accounts and the explanation by the accounting firm of Protiviti on how to analyze the financial reports of a business. These were timely topics for the operation of a law office. Most of us did not have financial training as we prepared for law school, and analysis of financial reports is a valuable skill for an attorney in business and for equitable distribution issues in a divorce.

The final action by the conference was at a brunch for the members receiving fifty-year awards. The recipients and their families and guests were very appreciative of the delicious brunch, the presentations, and the number of officials from the State Bar who attended the ceremony to honor our members.

Outgoing President Irv Blank made the presentations. Photographs of each presentation will be sent to the honorees. All of the leaders of the State Bar, the new president, George Warren Shanks and the president-elect, Dave Harless, were present along with Ed Weiner, incoming chair of the Conference of Local Bars, and Michael Hu Young, the incoming chair of the Diversity Conference, as well as officers and other members of our conference.

In the April issue of *Virginia Lawyer*, I reported on the tree planting project that was initiated this year by the

Senior Lawyers Conference. That project was successful beyond our original hopes. More than 2,600 seedlings were delivered for planting across Virginia.

The members of the conference, the VSB Council and Executive Committee were very supportive of this project, and everyone who participated was pleased with the effort and the results of our plan to plant more trees across Virginia. The public was very receptive to the green initiative everywhere and thought it should be continued.

The general tree planting by the Senior Lawyers Conference may become an annual event.

But there is a need for funds for both of the tree planting projects to succeed. The Senior Lawyers must secure private funding to buy the seedlings and for a tree on the Virginia Capitol grounds to honor the late Chief Justice Leroy Roundtree Hassell Sr. The latter is a \$10,000 project.

Both of these efforts will officially start at our initial meeting of the conference in September under the leadership of Chair Bob Calhoun. Bob Vaughan of Danville and I have volunteered to be cochairs of these fundraising efforts and to work as members of the 2011–12 tree planting committee. If you are willing to donate to this project, please contact any member of the Senior Lawyers Conference, or SLC liaison Stephanie Blanton at (804) 775-0576.

Finally, the tree planting project will need the help of the members of the bar. If you will be responsible for seeing that trees are planted in your home area, contact us and we will have a selection of trees that are recommended for planting in each area of

Virginia. Sign up for trees and they will be delivered to you in your home area in February 2012.

There were well-attended conference programs in Charlottesville, Leesburg, Harrisonburg, Covington, Smyth County, and the Northern Neck.

As the chair of the Senior Lawyers Conference, I was a member for this past year of the council and executive committee of the State Bar. Serving again on the executive committee reminded me of how much work is being done every day by the staff to protect the public and to support the members of the Virginia State Bar. This work is not only by the State Bar staff, but by the member volunteers of the bar. This was a particularly challenging year because of budget issues in the General Assembly and the ongoing issue of judicial vacancies. Our bar is in good hands and the full-time employees, the many lawyer volunteers, and the council have the best interests of the State Bar at the top of their agendas.

Our former chair, George Warren Shanks of Luray, became the president of the bar at the annual meeting, and we congratulate him on this great honor. We wish him a successful year without the distractions of 2010-11.

My thanks to all the members of our conference for their dedication and hard work for the past year, and to Paulette J. Davidson for her steady hand as liaison. I could not have blended the responsibilities chairmanship into my own solo practice without the help of the members of the conference and the State Bar staff. As the song goes, "It was a very good year."

Saving Some Green: Free Resources on Environmental Law

by Suzanne B. Corriell

Environmental legal research often requires examining federal, state, and local laws, in addition to understanding science and technology. While there are many print and subscription-based resources available for a fee, websites also that can help you navigate the laws and stay current with environmental news, and legal and scientific developments.

Environmental Protection Agency (EPA)

<http://www.epa.gov>

The Environmental Protection Agency's National Library Network was recently named Federal Library/Information Center of the Year for its innovative and sustained achievements. The EPA provides access to more than forty-five thousand digital documents, many of which are available through the agency's website. In addition to providing background information on science, technology, and environmental issues, the site provides a full library of laws and regulations. These libraries can be accessed by topic or by industry/business sector. They include federal statutes and regulations, as well as policy, guidance, compliance, and enforcement documents. The EPA provides access to regional newsrooms on its site (<http://www.epa.gov/region3/newsevents/index.html>), including information on Virginia at "EPA in Virginia" (<http://www.epa.gov/aboutepa/states/va.html>).

National Council on Science and the Environment (NCSE)

<http://ncseonline.org/NLE/CRS/>

The National Council on Science and the Environment provides access to more than 2,000 Congressional Research Service reports on environmental and related topics. These reports, originally prepared for the U.S. Congress, are objective, accurate, and easily interpreted by nonscientists. The NCSE also provides access to the *Encyclopedia of Earth*,

policy papers, conference reports, and news summaries.

Virginia Department of Environmental Quality (DEQ)

<http://www.deq.virginia.gov/>

The Virginia DEQ site is the preeminent site for Virginia's environmental laws, regulations, and policies. In addition to linking to current and proposed regulations, the site posts public notices, environmental reports, studies, data, press releases, and news releases. Content areas are also provided for hot-topic areas, such as the Chesapeake Bay and air quality. Forms and applications are also readily available online.

Environmental News Network

<http://www.enn.com/>

The Environmental News Network intends to "create a platform for global environmental action," partnering with environmental experts and editorial affiliates to provide news, information, and resources. The national and international environmental topics include environmental policy, climate, energy, water, green building, pollution, ecosystems, agriculture, and health. Archives go back to 2002.

Environmental News Service (ENS)

<http://www.ens-newswire.com/>

The Environmental News Service is a daily international wire service for environmental news topics. Worldwide contributors cover issues and events with environmental impact. Topics include legislation, politics, lawsuits, international agreements, public health, air quality, drinking water, oceans and marine life, land use, wildlife, forests, natural disasters, hazardous materials, nuclear issues, renewable energy, recycling, transportation, and environmental economics. A searchable archive extends to 2001, and readers may subscribe to free email newsletters.

Earthjustice

<http://earthjustice.org>

Earthjustice is the nation's leading, non-profit law firm for the environment. Their attorneys are involved in environmental protection cases, as well as policy development and strategic media campaigns. The Earthjustice website summarizes federal legislation and regulations and links to Earthjustice's current cases. The Washington, D.C., office focuses on Virginia regional issues, including sustainable fisheries, energy efficiency, and toxic mercury emission reductions. The website includes a blog, press releases, and a monthly newsletter.

Virginia Institute of Marine Science (VIMS)

<http://www.vims.edu/index.php>

For specialized research on marine science and the Chesapeake Bay, turn to the Virginia Institute of Marine Science. VIMS provides access to the institute's comprehensive research on coastal ocean and estuarine science. VIMS gives full-text access or citations for news and journal articles, advisory and special

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Suzanne B. Corriell is head of reference and research services at the University of Richmond's Muse Law Library, and she is Vice President/President-Elect of the Virginia Association of Law Libraries. She received an undergraduate degree from Mount Holyoke College and law and master of library science degrees from the University of Iowa.

The Perils of Employer-Provided Technology: Employer Inaction and the Attorney-Client Privilege

by Lauren E. Fisher

Employers regularly provide employees with computers, cell phones, and wireless networks, presumably—and sometimes explicitly—for business use. Employees occasionally use that technology to email their personal attorneys. Of course, for an email between attorney and client to be privileged, it must have been made in confidence.¹ Though many attorneys assume that emails sent using employer-provided technology could not have been made in confidence, and thus cannot be privileged, this oversimplified view is often incorrect.

Courts consider a combination of factors in deciding whether such emails are privileged. These include whether the employer established a policy banning personal use of company computers and email, monitored the use of its computers and email, had a right to access its computers and emails, notified employees of its policy regarding computer and email use, and implemented its computer and email use policy consistently.² If the employee can show that the employer failed in even one of these areas, the attorney-client privilege may attach to emails sent using employer technology.

First, emails between an employee and an attorney may be privileged if the employer's email policy is imprecise. For example, in *Stengart v. Loving Care Agency*,³ the employer had a policy and practice of saving a snapshot of every web page an employee viewed.⁴ As a result, the employer could examine every email sent by the employee, regardless of the email system used.⁵ Pursuant to that policy, the employer examined a past employee's hard drive and uncovered emails between the employee and her personal attorney that had been sent through a web-based email account.⁶ The employer's policy allowed for the personal use of email⁷ but did not put the employee on notice that her web-based emails were subject to monitoring.⁸ Largely because of these considerations, the court decided that

the employee's expectation of privacy in those web-based emails was reasonable.⁹

An employer's failure to enforce its email policy may also enable its employee to assert the attorney-client privilege. In *Curto v. Medical World Communications Inc.*,¹⁰ the employer acted pursuant to its email policy, as set forth clearly in its employee handbook, when it recovered Web-based emails from the laptop of a terminated employee.¹¹ However, the employer had enforced its email policy on only four prior occasions.¹² Moreover, the employer could not monitor the employee's laptop during her employment, as the policy stated it would, because the employee worked from home and used a private server that could not be accessed by the employer.¹³ Under those circumstances, the court found that the employee had a reasonable expectation of privacy in her emails to an attorney.¹⁴

An employee may also assert the privilege if his or her employer fails to effectively communicate an email policy. In *Mason v. ILS Technologies LLC*,¹⁵ the employee never agreed to abide by the employer's email policy, and whether he had even been notified of the policy's existence was hotly contested.¹⁶ Consequently, the court found that emails between the employee and his attorney and sent from through the company email system were sufficiently private to be privileged.¹⁷

Finally, if an employer interprets its email or computer use policy in a way that is inconsistent with a strict reading of the policy, that inconsistency may lead to a leak of privileged emails. In *DeGeer v. Gillis*,¹⁸ for example, the employer conducted a review of a former employee's work laptop to determine whether any privileged information existed on the computer.¹⁹ The court viewed this privilege review as material, as it contradicted the employer's position that no information stored on the

computer could be privileged. The court deemed emails from the employee to his attorney to be privileged.²⁰

Email is now a recognized part of all discovery and litigation and invariably employees will communicate with their personal attorneys using employer-provided technology. Attorneys who represent employers should advise their clients to implement policies banning the personal use of any technology the employer provides. Employers must also know that merely having a policy is not enough; rather, employers should consistently enforce their policies—especially policies that call for the regular monitoring of emails.

On the other hand, attorneys with employee clients must discourage their clients from using employer-provided technology to communicate with counsel. Employee clients should know that if their employers consistently apply email and computer-use policies, then any communications through employer-provided channels may not be private enough to be privileged.²¹

Endnotes:

- 1 See *Banks v. Mario Industries*, 274 Va. 438, 454, 650 S.E.2d 687, 695–696 (“[T]he [attorney-client] privilege is waived where the communication takes place under circumstances such that persons outside the privilege can overhear what is said.”) (citations omitted).

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Lauren E. Fisher is an associate with the Richmond firm Shelley & Schulte PC and practices in civil litigation with an emphasis on employment law.

Life Experiences in the Law

by Robert W. Wooldridge Jr.

When I went on the bench, I thought (at least hoped) I had spent enough time as a lawyer to prepare me to become a judge. The first jury trial I presided over was a seemingly routine personal injury case. It was complicated, however, by the fireman's rule, a doctrine with which I was then unfamiliar and have not confronted since. By lunchtime on the first day of trial, both plaintiff's and defendant's counsel had made motions for mistrial as a result of my rulings. Looking on the bright side, I surmised that at least I was impartial in my incompetence. So I strove for the rest of my years as a judge to keep the impartiality in place while working on the competency.

The experience could have been worse. For one of my colleagues who left a sophisticated business and real estate litigation practice, his first day on the bench found him presiding over a criminal case involving a man charged with having intimate relations with a golden retriever. We made sure my colleague understood that the chief judge assigned all new judges for their first trial a subject with which the new judge was likely already familiar.

Relationships in the courtroom are built on the actions and reputations of those involved. We all know that lawyers try to get a book on judges—what a particular judge does and doesn't like; what to do and not to do in her courtroom; even whether he is reputed to favor plaintiffs or defendants, the prosecution or the defense, a husband or a wife. However inaccurate and unscientific that exercise may be, to some extent it is part of good lawyering: know your audience and prepare your case accordingly.

Judges, of course, often do the same. Sometimes consciously, sometime not, they try to get a book on lawyers—if this attorney says that a case stands for a certain proposition, you can bet that it does; this attorney has to be watched closely; if I'm knocking heads with an

attorney, is he the problem, or am I? And judges share their views with other judges. That's why we hope that young lawyers understand (and experienced lawyers remember) that every motion they file and every argument they make may affect not only how that judge views them in that trial and in the future, but also their reputation with the entire bench.

My favorite cases had little or nothing to do with the area of the law they addressed. Rather, they were those in which really good, well-prepared lawyers were involved on both sides. Those were the cases that challenged me in the best ways and made my job most satisfying, and those were the cases in which justice had the best chance of being achieved.

Since retiring from the bench I have been serving as a mediator. I knew that most cases settled before trial, but thought that even more should and wanted to contribute to that process. I had seen far too many litigants come to court "out of principle" or with unrealistic expectations, only to leave from court dismayed. The financial and emotional cost to parties of litigation, coupled with great uncertainty of the outcome at trial, should prompt pretrial resolution of all but the rare civil case. Most lawyers are able to settle most matters on their own, but sometimes a neutral voice (especially one belonging to someone who once sat on the bench) helps them help their client. Parties increasingly look to courts to fix problems that courts are not statutorily or practically able to resolve. Even when courts have the authority and ability, their resources are increasingly limited (unlike the appetites of litigants).

I am familiar, from my experience in private practice as well as from the bench, with most of the areas in which I mediate. I understand how lawyers in those fields work and think, having been one in an earlier life. Other areas of practice, such as family law, I know only from my time on the bench. Judges on my former court spent more time on

family law than on any other area of law. Working with family law attorneys in mediation has affirmed the view I developed on the bench: family law disputes are difficult for all concerned (parties, counsel, and the court). Regardless of the substantive area, better that parties end their matters in a way that neither side may find ideal but which both sides can accept.

When I retired from the bench, law school offered and I accepted the opportunity to teach what we both thought would be a good fit: evidence, and Virginia practice and procedure. After thirty years of litigation from both sides of the bench, a presumption of expertise didn't seem unreasonable. I soon found we were both mistaken. (Likely many attorneys who appeared before me already realized that, but were kind enough not to say so to my face.) I fear I learned nearly as much as my students about the rules of evidence and the vagaries of Virginia practice the first time I taught those courses. While that learning curve has diminished with each succeeding year of teaching, it will never disappear entirely.

In law, we age as we learn and learn as we age. When that learning stops, I suspect it's time to go.



Robert W. Wooldridge Jr. retired from a Fairfax County Circuit judgeship in 2008. He is a mediator with the McCammon Group, senior lecturer in Law at the George Mason University School of Law, and senior counsel to the firm of Rees Broome PC.

Fee Disputes: Resolve Them, Don't Litigate Them

by Anthony F. Troy and Robert A. Pustilnik

View from the Bar

In 1992, a special committee of the Virginia State Bar studied the issue of fee disputes between clients and their attorneys. As a result of the committee's recommendations, the State Bar in June 1993 implemented a Fee Dispute Resolution Program throughout the commonwealth.¹ Though not yet available in all circuits, the program is operating in much of the state, is readily accessible, and is, at \$20, still the best deal in town.

After almost two decades, the program is more important today, in our litigious society. Surveys and research from other states demonstrate that use of the judicial system by attorneys against clients, many times in the same courtroom where they represented them, lead to public disdain toward the legal profession. Litigating fees aggravates those attitudes. Measured against the aspirations set forth in the Preamble to the *Rules of Professional Conduct*, it follows that litigation should be the last resort to a fee dispute. As the preamble reminds us, as licensed professionals we are viewed as public citizens, and our conduct should always conform to the requirements of law — not only in our professional service to clients, but also in our own business and personal affairs. It is our duty to always seek respect for and improvement of the law. Conflicts are best resolved through the exercise of not only professional but also moral judgments.

If these aspirational concepts and strengthening the public's respect for the legal system and the rule of law are not motivational, then an attorney, prior to filing a lawsuit to recover fees, should consider the American Bar Association's conclusion: for every law suit brought, the probability of a malpractice counterclaim exceeds 90 percent.² One major legal malpractice carrier says that "suing clients or former clients for unpaid fees

is usually unproductive and frequently dangerous."³ The same organization, Attorneys Liability Assurance Society, reports that many legal malpractice claims arise from disputes over legal fees. These concerns are why the Fee Dispute Resolution Program was formed almost two decades ago and should be considered by an attorney to recover fees.

Despite these warnings, the fee dispute system is not being fully used. Thus, in 2002 a task force examined how participation in the program could be increased. A mediation component was added to the program and more than fifty attorney and nonattorney mediators agreed to provide free services in fee disputes.⁴ Other changes simplified the program. Frequently asked questions were added to the Fee Dispute Resolution Program Web page at VSB.org.⁵ These improvements and other changes, including providing mediation as well as arbitration services, promote greater use and an expansion of the program.

The program is simple. Volunteer attorneys chair local fee dispute committees made up of attorneys⁶ and laypersons.

The State Bar receives at least one call per day from a client or attorney involved in a fee dispute. The bar refers the caller, or "petitioner," to the chair of the fee dispute committee in the jurisdiction of the attorney involved in the dispute. The cost is \$20, paid by the petitioner at the time the hearing is requested, and is nonrefundable. The chair then contacts the other party to participate in a resolution session. Participation is voluntary and is not tied to the VSB disciplinary system. Fewer than 20 percent of callers to the program follow up on the referrals.

Surveys show that in most instances clients are willing to participate in the programs but attorneys are less willing to do so. Attorneys prefer to litigate, and they know that their clients do not.

Members of the bar choose the setting where they think they have the advantage — a concept inconsistent with the duty to instill respect for the judicial system. They are concerned that a mediation or arbitration process may lead to a reduction in their fee.

Pearl Insurance, a liability carrier, set out a six-step analysis that should be undertaken by any member of the bar who is contemplating suing a client for fees.

Recognizing that, almost always, a motivated client can develop an argument that at least some portion of services fell below some reasonable expectation and standard of care, the six-step analysis is as follows:

- Assess your odds of winning a lawsuit and adjust the amount you are seeking to recover accordingly. If your odds are 80 percent, reduce by 20 percent and re-evaluate whether it is worth pursuing.
- If you believe it is still worth pursuing, re-evaluate your fees. You cannot recover excessive fees, including in contingency situations. Reduce amount accordingly.
- Still think it is worth it? Deduct legal fees and the value of your time and that of others that will be spent pursuing the action and — most likely — defending a counterclaim. Remember that your professional liability insurance may cover some of the costs of a counterclaim defense, but likely will not address expenses related to prosecution of the fee suit.
- Still want to sue? If you want to recover fees and not expenses, deduct an appropriate percentage for taxes.
- Still want to sue? Deduct damage to public relations and good will.

- Still want to sue? Remember that clients often do not pay because they cannot pay. Deduct any amount likely to be uncollectable.

The Fee Dispute Resolution Program has the best deal. It benefits all, eliminates unseemly litigation, and instills confidence in the public about our system of justice. Let's use it.

Anthony F. Troy is an attorney with Troutman Sanders LLP, former attorney general of Virginia, and chair of the Virginia State Bar Special Committee on the Resolution of Fee Disputes.

View from the Bench

Why would any attorney ever want to bring a fee dispute into the courtroom when the fee Dispute Resolution Program is available? Even if the program were not available, I cannot think of a good reason for asking a court to decide whether a fee is appropriate, or in having the court decide whether the attorney handled a case competently and professionally. If there is a dispute about a fee, there is an unhappy client or former client. If the client is unhappy, there must be some basis for the client's discontent. The client is going to get to tell the judge why the client did not think the attorney earned that fee, or all of it. The judge is going to determine if the client's dissatisfaction is genuine or if it is fabricated. Frankly, that is the only issue before the court in cases involving fee disputes.

Let me digress. In my thirty-five years in practice, I never sued a client for a disputed fee. I was a collection attorney. My firm was in court every week, with dozens of cases. One more case—a fee dispute—would not inconvenience us. It would not take time away from our practice, since we could make the case (and the trial) returnable on days that we were in court. But if the client was unhappy with our services, the result, or the bill, I would not want to have the client tell a judge before whom I practice regularly that my work was insufficient, or that my bill for services was not in line with my client's expectations. The reasons for taking this approach are obvious. If the court ruled that the client

was correct, that would have been the court's way of telling me that I was not all that I should have been, or that I had not done all that I should have done, in that case. How could I ever appear before that judge again, knowing that the judge felt that way about my services in a case that I brought on my own behalf?

How did I deal with disputed fees? I settled the cases for what the client felt my services were worth, even if that was zero, and walked away from the case and the client. There is no amount of money that I might recover that would justify an unfavorable result before the court in a fee dispute. And, that was before the days of social media, before the era when a client could post his dissatisfaction on my Facebook page, or his; and tell the world how he devastated me in court.

That is not to say that I never sued a client for a fee, or that an attorney should use the judicial process when a client refuses to pay an undisputed fee. In fact, in our practice we represented several firms and handled "fee collection" litigation. Attorney clients never sent us matters that they knew were contested. They apparently used the program for those cases. And, if a debtor who owed money to our client contacted us to contest the fee before suit was filed, we always gave the client the debtor's version of the dispute and let the client determine whether to go forward with litigation. In almost all cases, the attorney client chose not to do so, and we would settle the cases, or return them to the clients to write off, or to go through the Fee Dispute Resolution Program.

In my nine years on the bench, I have had heard fewer than a dozen fee dispute cases. I always offer an alternative of continuing the case and proceeding with the fee dispute program. I give them the brochure for the program and explain how it works. Almost every attorney has expressed a willingness to proceed. Any reluctance was almost always expressed by the client. Ultimately, most of the cases wound up being resolved by the program, and I have only tried a handful of cases involving disputed fees.

In those cases, the attorney almost never wins the entire amount for which he or she sues, unless I determine that the client's dissatisfaction was fabricated. The attorney, however, still must demon-

strate that he had proceeded professionally and diligently, that he had not billed by the hour for unnecessary services, and that the result of the case was not unexpected. This is a difficult burden of proof.

From the bench, these cases present other problems, as well.

A judge—often one who has not been in private practice for many years, if ever—is asked to evaluate the performance of the attorney and the reasonableness of the attorney's hourly rate. What standard can the judge use to determine the quality of service, unless the attorney plaintiff is going to bring expert witnesses into the courtroom in order to set the standard and to show that the attorney plaintiff complied with those standards? After all, the attorney has the burden of proof on each of these issues. This is a substantial burden. In a typical case, the client will claim that the attorney acted without consulting with the client, did things that the client did not want done, or refused to do things that the client suggested—all of which led to the poor result or to the excess billing. How does the attorney overcome this direct testimony? The program's panel of attorney and lay members is in a much better position than the court is to evaluate such claims.

Human nature poses the worst problem. When the attorney and client mediate, when neither is fully satisfied by the result, both think that they have won or substantially prevailed. But, when the attorney wins, in whole or in a large part, in court, the lay party thinks that the system is against him or her, that judges always side with attorneys, and that he has now been wronged twice. A bar complaint is likely, a Facebook posting is inevitable.

Which takes me back to my original question:

Why would any attorney want to bring a fee dispute into the courtroom?

Robert A. Pustilnik is chief judge of Richmond General District Court.

Endnotes:

- 1 The committee also studied the issues of mandatory written fee agreements and requiring, as a condition of licensure, that attorneys commit to arbitrate all fee

disputes. Neither of these mandatory requirements was recommended, though it was strongly suggested that, as a matter of professional practice, all fee arrangements should be in writing.

- 2 Executive Summary, Committee Proposal for Fee Dispute Resolution Program (1993).
- 3 General information provided to law firms in the ALAS risk retention organization.
- 4 Task Force Report, Attorney-Client Fee Dispute Mediation Program (2002).
- 5 See www.vsb.org/site/public/fee-dispute-resolution-program.
- 6 Attorneys who serve must have been members of the bar for at least five years. Committee members volunteer for three-year terms.

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reports, dissertations, and recommended websites. Much of the site is geared to the scientific community. It also links to state and federal agencies, government reports, and studies. Interactive maps show the institute's national and international research.

ECOLEX

<http://www.ecolex.org/>

ECOLEX is an environmental law information service. It posts information on treaties, international policy and technical guidance documents, legislation, judicial decisions, and law and policy literature. Users can access abstracts and indexing about each document, as well as full texts. The treaty database is effective when seeking treaties that address environmental problems.

For additional environmental law resources, please see articles by the College of William and Mary's Jennifer Sekula, "Nothing Dismal About It: Researching Environmental Law Without Getting Swamped," (*Virginia Lawyer*, December 2005, at 41) (http://www.vsb.org/docs/vvalwyer_magazine/dec05sekula.pdf) and Hunton & Williams's Michele M. Gernhardt, "Bite-sized Environmental Law: Resources for the Jack of All Trades," (*Virginia Lawyer*, December 2008, at 53) (http://www.vsb.org/docs/vvalwyermagazine/vl1208_library.pdf).

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tions or more removed from the civil rights movement.

The play's current budget will fund sixty free performances for at-risk schools in the Richmond area, as well as free matinee performances at the Empire. "At an average of 350 students per performance, the Oliver Hill play will be seen by approximately 21,000 students in 2011-12," according to the theater's executive summary.

The play also will be marketed to other Virginia school systems. The play will comply with Virginia's Standards of Learning requirements, which this year added questions about Hill for the first time.

Eventually, "My dream would be that somehow we would be able to raise national awareness" of Hill's story, Miller said. He hopes 2011-12 will be "just the beginning of the life of this program."

The Oliver Hill Foundation, which supports preservation of Hill's boyhood home in Roanoke and other projects to preserve Hill's legacy, does not benefit from donations to the Theatre IV production. The foundation issued a statement that it "supports thoughtful, thorough, and creative initiatives to further Mr. Hill's life's work—especially Mr. Hill's focus upon protecting and enhancing the exercise of civil rights."

Elizabeth M. Horsely, a partner of Williams Mullen, said, "Williams Mullen is excited to support the Oliver Hill project, which will introduce students to Virginia's civil rights leader and serve as a cornerstone to the Empire Theatre's centennial celebration."

To donate to Theatre IV's Oliver Hill project, contact Liz Musselman, director of development, at (804) 783-1688, ext. 1123, or lmusselman@theatreivrichmond.org. —Dawn Chase

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- 2 See, e.g., *In re Asia Global Crossing Ltd.*, 322 B.R. 247, 257 (S.D.N.Y. 2005); *United States v. Hatfield*, No. 06-CR-0550, 2009 U.S. Dist. LEXIS 106269, at 28 (E.D.N.Y. Nov. 13, 2009); *Geer v. Gilman Corp.*, No. 3:06 CV 889, 2007 U.S. Dist. LEXIS 38852, at 3 (D. Conn. Feb. 12, 2007), cases *infra*.
- 3 201 N.J. 300, 990 A.2d 650 (2010).
- 4 See *id.* at 307, 990 A.2d at 655-656 (recounting the process through which webpages were saved on the employee's hard drive).
- 5 See *id.* at 307, 990 A.2d at 656.
- 6 See *id.* at 309, 990 A.2d at 656 (describing how the employer could view the emails sent through the personal, password-protected Yahoo account of the employee).
- 7 See *id.* at 311, 990 A.2d at 657 ("The principal purpose of electronic mail (*email*) is for company business communications. Occasional personal use is permitted").
- 8 See *id.* at 314, 990 A.2d at 659.
- 9 See *id.* at 322, 990 A.2d at 663 (noting that the policy does not address web-based emails and that occasional personal use of email was permitted, and deciding that the employee could reasonably expect her emails to remain private).
- 10 No. 03-CV-6327, 2006 U.S. Dist. LEXIS 29387 (E.D.N.Y. May 15, 2006)
- 11 See *id.* at 4.
- 12 See *id.* at 8 ("[L]ack of enforcement by MWC of its computer usage policy created a 'false sense of security' which 'lull[ed]' employees into believing that the policy would not be enforced.") (citations omitted), see also *Leventhal v. Knapek*, 266 F.3d 64, 73 (2d Cir. 2001) (stating that whether

an expectation of privacy is reasonable can vary depending on whether the employer monitors its computers).

- 13 See *id.* at 17 (describing the difference between the case at hand and cases in which the employer "retained the key" to the employee's computer through remote access technology).
- 14 See *id.* at 26.
- 15 No. 3:04-CV-139, 2008 U.S. Dist. LEXIS 28905 (W.D.N.C. Feb. 29, 2008).
- 16 See *id.* at 11-12 (emphasizing the importance of effectively conveying an email policy to employees).
- 17 See *id.* at 10 ("If Plaintiff lacked knowledge of the email policy, and Defendant cannot show that Plaintiff was notified of the policy, then Plaintiff had a reasonable expectation of privacy and confidentiality in his email communications with his personal attorney.").
- 18 No. 09 C 6974, 2010 U.S. Dist. LEXIS 97457 (N.D. Ill. Sept. 17, 2010)
- 19 See *id.* at 27.
- 20 See *id.* at 28 ("If Huron interpreted its computer usage policy as meaning that employees waive the attorney-client privilege by using their work email addresses and Huron computers to communicate with counsel, such a review would have been unnecessary.").
- 21 See e.g., *Holmes v. Petrovich*, 191 Cal. App. 4th 1047, 1068 (finding that an employee's method of emailing her attorney was "akin to consulting her attorney in one of defendants' conference rooms, in a loud voice, with the door open.").

John W. Bates III of Richmond is the recipient of the 2011 William H. Ruffner Medal, Virginia Tech's highest honor, in recognition of his support of the university. He is a former managing partner of McGuireWoods LLP and now serves as counsel to the firm. He is now an associate member of the VSB.

Garry R. Boehlert has joined Saul Ewing as a partner in the litigation department. He will work in the Washington, D.C., office and co-lead the firm's construction practice. He formerly was with Winston & Strawn LLP. His practice focuses on public and private procurement and matters involving infrastructure projects.

Manuel A. Capsalis, Carole H. Capsalis, and E. Kate Fitzgerald have opened a law firm, **Capsalis Fitzgerald PLC**, with offices in Leesburg and Arlington. Serving as counsel to the firm are **Debra Fitzgerald-O'Connell** and **Edward L. Weiner**. Leesburg office: 1 West Market Street, Second Floor, Leesburg, VA 20176. Arlington office: 2200 Clarendon Boulevard, Suite 1201, Arlington, VA 22201. Phone for both: (703) 525-2260; fax (571) 209-5123. <http://www.capfitzlaw.com/index.html>

David A. Clark has opened the **Clark Law Firm PLC**, a general law practice that emphasizes employment law counseling and litigation. 4391 Ridgewood Center Drive, Suite G, Woodbridge, VA 22192; phone (703) 986-0451; fax (703) 986-0342; www.TheClarkLawFirmPLC.com

Dannel C. Duddy and **David J. Esposito** have joined the Glen Allen firm of Harman, Claytor, Corrigan and Wellman PC associates. Both will concentrate their practices in general civil litigation, including motor vehicle, premises, and products liability.

Doris W. Gelbman has opened **The Law Offices of Doris W. Gelbman** in Charlottesville. Her practice focuses on family law with an emphasis on elder law matters in Charlottesville, Waynesboro, and the neighboring counties. Gelbman moved to Charlottesville from Boston, where she practiced litigation at Bernkopf Goodman LLP. Phone (434) 906-7022; dwgelbman@gelbmanlaw.com; <http://gelbmanlaw.com/>

Mitchell P. Goldstein has opened the **Goldstein Law Group Inc.**, with two offices in the Richmond area. The practice focuses on the protection of assets for consumers and small businesses. 9962 Brook Road, #647, Glen Allen, VA 23059; 102 E. Cary Street, Richmond, VA 23219; (804) 592-1674; mitch@mittchellpgoldstein.com; www.morethanbankruptcy.com

R. Lee Grant Jr., a former deputy general counsel for Cavalier Telephone Company, has opened **Lee Grant Law PLC** at 2317 Westwood Avenue, Suite 103-B, Richmond, VA 23230; phone (804) 464-8545; LeeGrant@LeeGrantLaw.com; www.LeeGrantLaw.com.

Seth M. Guggenheim is an adjunct associate professor of law at American University's Washington College of Law. Guggenheim, senior assistant bar counsel for the Virginia State Bar, is co-teaching a course on ethics for trial lawyers.

Locke Partin DeBoer & Quinn PLC, a family law and personal injury firm in Richmond, has opened a second office at 6101 Harbourside Centre Loop, Midlothian, VA 23112. **Robert W. Partin** is the managing partner at the new location. Phone (804) 285-6253; info@lockepartin.com

Joseph B. Mullaney has joined Reese Law Office in Fairfax as an associate. He previously worked at Vorys, Sater, Seymour and Pease LLP in Washington, D.C. **Catherine M. Reese**, also of the Reeses firm, has been certified as a family mediator by the Supreme Court of Virginia.

Julie C. Parks and **Mary Ann Schaffer** have opened **Parks & Schaffer PLLC** in Alexandria. Parks previously was a clerk for the Alexandria Circuit Court, and Schaffer was in-house counsel for a government contractor. The new practice focuses on estate planning and offers in-home consultations. 303 North Washington Street Alexandria, VA 22314; mailing address: PO Box 320242 Alexandria, VA 22320; phone (703) 229-0191; www.parksandschaffer.com

David W. Pugh has opened **David Pugh PLLC** at 530 Main Street, Suite 305, Post Office 1119, Danville, VA 24543; phone (434) 799-7844. He formerly was an attorney for the Virginia Legal Aid Society and later practiced in the Republic of Palau.

Jason Douglas Reed has opened the **Law Firm of Jason Reed PLC**, which focuses on the defense of criminal, driving-under-the-influence, and traffic cases in the Richmond area. 10301 Memory Lane, Suite 201, Chesterfield, VA 23832; phone (804) 748-8080; www.jasonreedlawfirm.com

James C. "Jim" Roberts will retire from practice at the end of 2011, his law firm, Troutman Sanders LLP, has announced. Roberts, of Richmond, practiced for more than five decades and earned a reputation as a standout attorney, a mentor, and a philanthropist who provided pro bono assistance throughout his career. He has been awarded the Virginia State Bar's Tradition of Excellence Award by the General Practice Section and the Harry L. Carrico Professionalism Award by the Criminal Law Section.

Margaret "Meg" Sander has joined the Richmond office of Reed Smith LLP. She is in the firm's education practice.

Lori L. Smith has joined Marks & Harrison PC, and will practice out of the firm's Hopewell office at P.O. Box 170, Hopewell, VA 23860; phone (804) 458-2766; fax (804) 458-9856; lsmith@marksandharrison.com; www.marksandharrison.com.

Jennifer J. "Jen" West has been elected a shareholder and director at Spotts Fain PC in Richmond. She is a member of the firm's creditors' rights, bankruptcy, and insolvency section.

John S. West is the new managing partner of Troutman Sanders LLP's Richmond office. He has been a partner of the firm since 2001 and was deputy group leader of its white collar and government investigations practice. As managing partner, he succeeds **Thomas E. duB. "Ted" Fauls**, who will continue his legal practice as a partner in the firm's lending and structured finance group.

E-mail your news to chase@vsb.org for publication in *Virginia Lawyer*. All professional notices are free to VSB members and will be edited for length and clarity.

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Tribute to the Chief

by Hon. B. Waugh Crigler

On June 17, 2011, the chief justice of the Supreme Court of Virginia, Cynthia D. Kinser, did something that few, if any, chief justices of any jurisdiction would dare to do. She took her place as a “square” in a mock-up of the television show *Hollywood Squares*. She donned a farmer-styled brimmed cap and prefaced her participation in a standing-room-only showcase program at the Virginia State Bar Annual Meeting by reminding the audience she was nothing more than a farm girl from Lee County. Then she proceeded to give an answer to an evidentiary question posed to her as one of the squares. The audience burst into laughter and applause.

What had just happened? Maybe nothing else like this has occurred before in the seventy-two-year history of the VSB. It was fitting that the question posed to the chief justice related to non-verbal hearsay. Virginia’s highest justice and titular head of the integrated bar, had just nonverbally made herself vulnerable to those who practice before her, even at the great risk that the position she was taking on a point of evidence may come before her Court one day. What a demonstration to assure all lawyers licensed in Virginia that she was, is, and will continue to be a lawyer from Lee County, and “one of us.” Implicit, of course, in both her verbal and nonverbal communications was a message that all Virginia lawyers should hear and heed. People matter, and relationships among lawyers and with the courts of the commonwealth are at the core of our service to our clients and the society at large.

If, as former VSB president Jon D. Huddleston championed during his tenure, “Virginia is for good lawyers,” then Chief Justice Kinser sounded a clarion call that in order to be good lawyers and judges we must be people who are willing to sacrifice the trappings of posi-



Chief Justice Kinser, left, with Judge Angela E. Roberts

tion and title in order to be good people for the sake of good relationships. Just as the chief justice was willing to potentially expose herself to the risks of transparency, we must know that good relationships come at a great price. If not at any other time in the bar’s history, today’s culture is caught in a vortex between image and reality. The image is that of high professional and ethical standards. The reality of practice, however, all too often shows us something quite different.

If that were not so, why is it then that when judges and lawyers get together they don’t exchange stories of how professionally or ethically lawyers have dealt with the courts or one another? Instead, don’t we most often hear stories of how sharp, unprofessional, or unethical someone has been before or outside the presence of a tribunal, all in the name of advocacy? Are we not then living up to an accusation of hypocrisy?

Aligning image and reality starts at the top, but it must have a bottom—up following to become effective. Leaders must conduct their lives, professional and private, according to the principles that honor the profession. If they do not, their message cannot be trusted. Those who follow must be committed enough

to the principles of the leaders that they are willing and ready to join in the practice of those principles. There is no question that former chief justice Harry L. Carrico, took giant steps in the right direction to lead in the development and implementation of the VSB’s Professionalism Course. Yet, many who teach and train as faculty in this program today know that the former pedagogical methods of communicating ethical and professional principles may not be as appealing to this current generation as they were to former generations of newly admitted lawyers. We have heard that relationships and community are the forums in which today’s students best learn those principles.

So what is so important about June 17, 2011, when Chief Justice Kinser donned her tractor-driving, cattle-herding, hay-baling, farmer-style cap? Could it be that she was telling all those in the audience that practicing law is about a community of judges, lawyers, and clients held together by the law, which is the glue of society that can be effectually mediated only through relationships? Yeah! And she did not even use words.

B. Waugh Crigler has been a U.S. magistrate judge since 1981 and was Chief Justice Kinser’s colleague in the federal Western District of Virginia.

photo courtesy of Virginia Beach Convention and Visitors Bureau



73rd Annual Meeting Virginia Beach, Virginia June 16–19, 2011

At the Virginia State Bar’s Seventy-third Annual Meeting, George Warren Shanks of Luray was sworn in as president of the VSB, succeeding Irving M. Blank of Richmond. W. David Harless of Richmond became president-elect.

The program included a showcase continuing legal education program, “Judiciary Squares — An Interactive Review of Evidentiary Matters,” sponsored by the Young Lawyers Conference.

Other programs included “Through the Rabbit Hole: When Your Law Partner Is the Mad Hatter — Alzheimer’s and the Practicing Lawyer.” A panel of judges, lawyers, doctors, and support staff discussed the symptoms of Alzheimer’s, and offered insights and suggestions on how to determine if there is a dementia issue and how to effectively, kindly, and thoughtfully help a colleague.

Special events at this year’s Lawyers Expo included family bingo and book sales by Fountain Books.

And VSB groups honored Virginia lawyers, including attorneys who are in their fiftieth year of practice (see page 67).



Virginia Lawyers Weekly photo

1: George Warren Shanks (center) assumed the role of VSB president, succeeding Irving M. Blank (left), who led during the 2010–11 bar year. W. David Harless (right) is now president-elect and will become president in 2012.

2: James J. Knicely (left) of Williamsburg is the recipient of the General Practice Section’s Tradition of Excellence Award, presented by section Chair Jeffrey C. Flax. For more about Mr. Knicely, see page 26.

3: In keeping with an eighteen-year VSB tradition, Executive Director Karen A. Gould presents outgoing President Irving M. Blank with a caricature by Michael L. Goodman, a Glen Allen lawyer and cartoonist. Blank, who played varsity tennis at Virginia Tech, is shown volleying several balls imprinted with VSB issues.

4: At the Young Lawyers Conference luncheon were (left–right) YLC President Carson H. Sullivan, YLC Young Lawyer of the Year Joanna L. Faust, and YLC President-elect Christy E. Kiely. For more about Faust’s accomplishments, see page 26.



1: The Senior Lawyers Conference recognized fifty-year members of the VSB: (left-right) Myron C. Smith of Fairfax; John Harvey Quinn Jr. of Washington, D.C.; R. Arthur Jett Jr. of Norfolk; John Latane Melnick of Falls Church; Senior U.S. District Court Judge Henry Coke Morgan Jr. of Norfolk; Charles H. Osterhoudt of Roanoke; Daniel J. Dinan of Arlington, formerly a special trial judge for the U.S. Tax Court; James Pendleton Baber of Cumberland; R. Dennis McArver of McLean; and Barry Kantor of Virginia Beach.

2 and 3: Ten active and retired judges participated in “Judiciary Squares: An Interactive Review of Evidentiary Matters,” the showcase continuing legal education program sponsored by the Young Lawyers Conference. Stanley P. Klein, retired from the Fairfax Circuit, moderated. The other participants were (left–right, front) Beverly W. Snukals of the Richmond Circuit; Joel C. Cunningham of Halifax in the 10th Circuit; B. Waugh Crigler, a U.S. magistrate judge for the Western District of Virginia in Charlottesville; (middle) Deborah S. Roe of the Hampton Juvenile and Domestic Relations District; Robert W. Wooldridge Jr., retired from the Fairfax Circuit; Barry G. Logsdon of the Newport News J&DR District; (back) Virginia Supreme Court Chief Justice Cynthia D. Kinser; Angela E. Roberts of the Richmond J&DR District; and Cleo E. Powell of the Virginia Court of Appeals.

4: President Blank and Nancy M. Reed, chair of the Conference of Local Bar Associations, present the 2011 Local Bar Leader of the Year Award to (left–right, with plaques) Tracy Ann Houck and Andrea L. Bridgeman. For more about the award winners, see page 26.

73rd Annual Meeting



1: Larry T. Harley (left) of Abingdon, who is in his eighteenth year as executive director of the Southwest Virginia Legal Aid Society, receives the Virginia Legal Aid Award from President Blank. See page 26 for more details.



2: Paul Galanti (at podium), Virginia commissioner of veterans services and a seven-year Vietnam prisoner of war, moderated a panel on veterans in the court system. Participants were (left–right) Lt. Col. Anthony Caruso, active-duty deputy chief of staff for the Virginia Army National Guard at Fort Pickett; David P. Morgan, a Navy veteran who practices with Cravens & Noll PC in Richmond; F. Don Nidiffer, Ph.D., of Charlottesville, executive director and co-principal investigator at Virginia NeuroCare for military service members with brain injuries and post-traumatic stress disorder; and Julia E. Keller, formerly of the Navy Judge Advocate General Corps, who practices with Gilbert, Albiston & Keller PLC in Norfolk. Sponsored by the VSB Criminal and Family Law Sections.



3: Among the special events at the annual meeting was an education program, “Through the Rabbit Hole: When Your Law Partner Is the Mad Hatter — Alzheimer’s and the Practicing Lawyer.” Participants were (left to right) moderator and former VSB president Jeannie P. Dahnk, VBS Ethics Counsel James M. McCauley, Norfolk Circuit Court Judge Charles E. Poston, executive director of Lawyers Helping Lawyers James Leffler, Dr. James F. Corcoran, and Frank O. Brown Jr. Panelist L. Lionel Hancock is not in picture.

4: Magician Rob Westcott’s antics caused a young assistant to get the giggles during the children’s dinner as he prepares to pull a rabbit out of a box.



Mark your calendar for the VSB 74th Annual Meeting
June 13–17, 2012

For more Annual Meeting photos, see our Flickr page, <http://bit.ly/73rd-VSB>.



1: The Lawyers Expo, sponsored by the VSB General Practice Section, featured the latest in law office technology and related products and services.

2: (Left–right) Andrea L. Bridgeman, a winner of the 2011 Local Bar Leader of the Year Award; Judge James W. Benton, retired of the Virginia Court of Appeals; and Maureen K. Petrini, director of access to legal services for the VSB, reunite at the Lawyers Expo.

3: Ruth Kirui and Thomas K. Kirui took first place for a third year in the 5K Run in the Sun event sponsored by Virginia Lawyers Media and the VSB Young Lawyers Conference. Thomas practices with Kirui Law Firm in Arlington and is a judge advocate with the U.S. Army Reserves. Ruth, Thomas’s fiancée, is a software engineer whose running is coached by Thomas.

4: Participants in the Ninth Annual Tennis Tournament sponsored by MichieHamlett.

5: Participants in the Twenty-seventh Annual David T. Stitt Memorial Volleyball Tournament sponsored by Fidelity National Title Group and the VSB Young Lawyers Conference

6: Jeannie P. Dahnk, a Fredericksburg lawyer and former Virginia State Bar president, led the Family Bingo sponsored by her law firm, Glover & Dahnk.

Playing with the Great Ones

by Michael J. Holleran

One of the joys of practicing law for a long time is the number of fine people you meet. I remember walking into a meeting of the Fairfax Bar Association's Law Related Education Committee as a relatively young lawyer in the late 1980s. The senior partner at my law firm had strongly recommended that new attorneys get involved in the Fairfax Bar Association. What great advice. By virtue of following that recommendation I made many good friends. One of those was the late Edward Joseph Walinsky of Fairfax.

In those days Ed had his own practice in Falls Church. He handled domestic and criminal matters, as well as civil litigation. Ed and I became friends as we realized we had a lot in common, including William and Mary, a love of sports, strong faith in God, and a preference for early lunches. However, Ed was a fervent Redskins fan and I was a rabid Cowboys supporter. Thus, we had a twice-yearly lunch bet on the games and we would always try and arrange lunch for the day after those contests.

Ed and I had lunch together two or three times a month for more than twenty years. Many of those were at Anthony's in Falls Church before the lunch crowd arrived. Those lunches were spent commiserating over cases, discussing the latest sports news, and talking about the events of our growing families. Ed and his wife, Fran, lived in Annandale with their three children. Ed's love of Fran and pride in his children was evident.

Fairfax Bar Association activities with Ed were always enjoyable. We went to local elementary schools to put on a play of the case of *Curly Pig v. B.B. Wolf*. I took one of my sons with me one year when he was a preschooler. (How time flies! He is now in college.) When Ed put on the wolf mask my son crawled under my chair in fright. We also worked on various Law Day activities. Getting students educated about the legal process was important to Ed, and he took on bar activities with gusto. He served on many Fairfax Bar Association committees as

well as its board of directors. Service beyond self was a way of life for Ed.

In the 1990s I worked with Ed on an annual live call-in television program on Channel 56 in Falls Church. The show featured a judge, two attorneys versed in the particular subject at issue, and a host. Volunteers worked the phone banks and would write out the callers' questions on a card and hand them to the host to read. We did the program together for five or six years.

One year I was serving as host. Ed was a panelist. The topic was domestic relations—Ed's specialty—and a subject that generated many calls. I decided to have a little fun with Ed and, after reading a particularly vitriolic message from a scorned spouse, changed the name of the caller "Fran in Annandale." I then said, "Ed, what do you think Fran should do?" Without missing a beat, Ed looked into the camera and with a twinkle in his eye said, "Well Fran, here is what you should do . . .," and proceeded to answer the question flawlessly.

As our lunches continued into the 2000s, I witnessed Ed's pride as his three children accomplished many things, including all gaining admission into the College of William and Mary. Ed moved to practice with Robert E. Shoun, Beverly J. Bach, and Dennis J. Smith in Fairfax, where he focused on domestic relations work. Ed became recognized as an outstanding lawyer and continued to serve the Fairfax Bar Association and the community in a variety of public service ventures.

As my firm does not handle domestic relations work, Ed became a referral source. He was known not only as an exceptionally bright attorney but one who was also devoid of ego and who never forgot he was dealing with families in crisis. I got to work with Ed on a few matters and his strong legal skills were evident. Like one of his favorite Redskins players, Art Monk, Ed was not flashy, but like Monk he became a star in his field. Each year after the Hall of Fame results, Ed would complain when Art Monk was bypassed, and he could recite all the sta-

tistics and reasons why Monk should be enshrined. When Monk finally received the long-overdue election, Ed was pleased.

About four years ago Ed told me at lunch that he had been diagnosed with stage four lung cancer. (Ed was never a smoker.) Ed remarked that he "had been dealt high cards" his whole life and that he would not complain but simply fight and go on. And for most of the next four years that is exactly what Ed did, as he beat the statistical odds against him. He did not dwell on his illness. Instead, he continued to excel as a practicing attorney, traveled with Fran and his children, continued his volunteer activities with the bar association and his church, and lived to the fullest. Our lunches remained the fun occasions where we discussed our families, the latest happenings at the courthouse, and of course sports. We wondered if either of our teams would ever make it back to the Super Bowl as the glory days of both franchises seemed distant. Ed's faith and strength were inspirational to many and he continued to live to the fullest until his death and entrance to another Hall of Fame on February 28, 2010.

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



Michael J. Holleran is president and managing partner of Walton & Adams PC in Reston. He represents clients in business litigation and commercial transactions.

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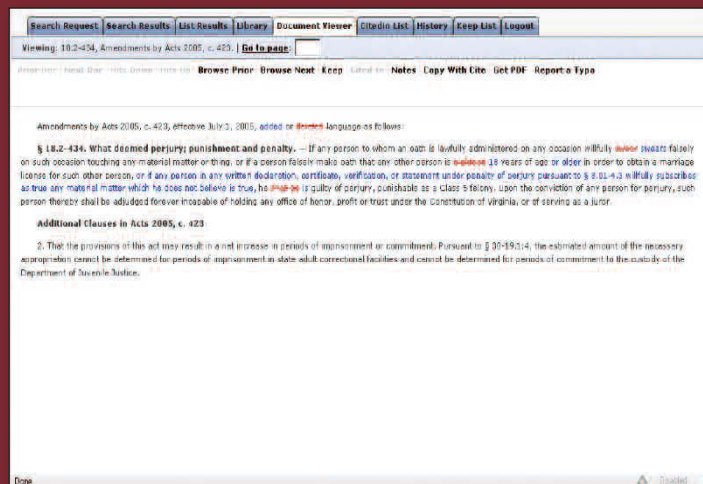
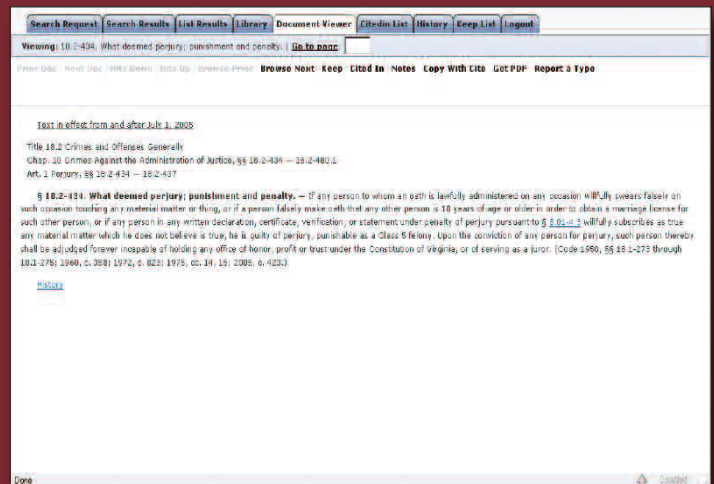
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