Contributors


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Ashe


Dunnaville


Farashahi


Flax


Hapgood


Johnston


Parks


Patrick


Shelley


Weckstein


Wharton

David L. Arnold is a partner with the Hampton Roads-based law firm Pender & Coward PC. His professional experience includes civil, commercial, and tort litigation in Southeastern Virginia. He has a bachelor's degree from the University of Virginia and the College of William and Mary. [page 34]

David B. Ashe is general counsel for Providence Dane LLC in Virginia Beach. He was a judge advocate in the U.S. Marine Corps who served in Kuwait and Iraq. On his return, he entered the Marine Corps Reserve and served as deputy director of the Virginia Department of Professional and Occupational Regulation — a gubernatorial appointment. He has a bachelor's degree from Virginia Tech and a law degree from the University of the District of Columbia. [page 38]

Clarence M. Dunnaville Jr. of Richmond has worked in civil rights matters throughout his career, most recently was a member of the Virginia State Bar Diversity Task Force and head of the foundation that preserves the boyhood home of Oliver W. Hill Sr. in Roanoke. He is the recipient of the 2009 Lewis F. Powell Jr. Pro Bono Award from the VSB Special Committee on Access to Legal Services. Dunnaville has a bachelor's degree from Morgan State University and a law degree from St. John's University. [page 23]

Afshin Farashahi is a solo criminal law practitioner in Virginia Beach, where he formerly was a deputy commonwealth's attorney. He has a bachelor's degree from James Madison University and a law degree from the University of Virginia. [page 34]

Robert L. Flax has a general practice in Richmond. He is a former chair of the Virginia State Bar General Practice Section. He is a graduate of Antioch College and the University of Richmond School of Law. [page 43]

Erin W. Hapgood is an associate attorney at Guynn, Memmer & Dillon PC in Salem. Her practice focuses on defense work for local governments and insurance companies and other corporate defendants. She is a member of the Virginia Women Attorneys Association, and she co-chairs the Pro Bono Commission for the Young Lawyers Conference of the Virginia State Bar. [page 44]

Janean S. Johnston is an attorney licensed in Minnesota, and she has conducted legal risk-management and ethics audits and reviews nationwide since 1987. She assists Virginia lawyers with overall risk management efforts. [page 55]

Kellam T. Parks has a general civil practice with Wolcott Rivers Gates in Virginia Beach. He holds degrees from St. Andrews Presbyterian College and the College of William and Mary School of Law. He is a member of the Virginia Trial Lawyers Association. [page 40]

Renae Reed Patrick is past chair of the Virginia State Bar's Special Committee on Access to Legal Services. She is supervising attorney at Blue Ridge Legal Services in Harrisonburg, and she also has worked for legal aid societies in Lynchburg, Lexington, Manassas, Roanoke, and Christiansburg. She was named the Virginia State Bar's Legal Aid Attorney of the Year in 2003. She holds bachelor's degrees from the University of Colorado and a law degree from the College of William and Mary. [page 20]

Blackwell N. Shelley Jr. has a civil litigation practice with Shelley & Schulte PC in Richmond. He has a bachelor's degree from the University of Virginia and a law degree from Washington and Lee University. He is a member of the VSB sections on Trusts and Estates and Bankruptcy, the Richmond Bar Association's Bankruptcy Section, the Virginia Trial Lawyers Association, and the Judicial Conference of the Fourth Circuit Court of Appeals. [page 57]

Clifford R. Weckstein has been a judge since 1987 in the Twenty-third Judicial Circuit of Virginia, which serves Roanoke County and the cities of Roanoke and Salem. He is a graduate of the University of Virginia and the College of William and Mary School of Law. [page 48]

Amy W. Wharton is research and emerging technologies librarian at the Arthur J. Morris Law Library at the University of Virginia School of Law. Previously, she was a law firm librarian in Washington, D.C. She received a law degree from George Mason University and a library and information studies degree from the University of Oklahoma. She is a member of the Virginia Association of Law Libraries and wikimaster for VALL Wiki (vall.pbworks.com). [page 56]

Letters

Yes, Our Client Was Overpaying BPOL Tax

I want to thank Craig D. Bell and J. Christian Tennant of McGuireWoods for their excellent article, "Is Your Client Overpaying BPOL Tax?" in the October 2009 issue of *Virginia Lawyer*. Their review of our firm's victories in the Lynchburg Circuit Court and the Supreme Court of Virginia in *City of Lynchburg v. English Construction Company Inc., et al.* was thorough and provided an appropriate warning to the state tax bar to monitor if and how local revenue officers implement the Supreme Court's decision. If the testimony of the commissioners of revenue during my cross-examination is any indication, the *English Construction* decision will not stop localities from overassessing our business clients.

Neil V. Birkhoff
Woods Rogers PLC
Roanoke

Law Should Protect Rights of All Humans

Thank you for Robert T. Adams's book review, "Virginia Forced Sterilization Case is Still Law, Eighty Years Later" (*Virginia Lawyer*, February 2009), which I found quite thought-provoking. It is indeed astonishing and embarrassing that, as author Paul A. Lombardo explains in his book, *Three Generations, No Imbeciles: Eugenics, the Supreme Court and* Buck v. Bell, the Supreme Court decision of *Buck v. Bell* (1927) upholding the compulsory sterilization of the mentally disabled has never been overruled.

According to Lombardo (Adams tells us), the Supreme Court's later decision in *Roe v. Wade* (1973), erodes *Buck v. Bell*. I disagree. *Roe* in fact cites *Buck v. Bell* in support of its privacy analysis (*see Roe*, 410 U.S. at 154). And more fundamentally, by embracing the idea that some human lives (namely, unborn children) can be profoundly discounted in assessing the comparative rights at stake, *Roe* in fact provides a precedent to cement *Buck*'s discounting of the "feeble-minded."

Until we pledge ourselves to the bedrock notion of *human* rights — that membership in the species *Homo sapiens* alone suffices to entitle one to basic human respect and protection, regardless of one's mental or physical capacities, appearance, age, or lifespan — the temptation will always be there to subjugate some particular (and powerless) category of human beings for the perceived advantage of others.

Walter M. Weber
Senior Litigation Counsel
American Center for Law & Justice
Washington, D.C.

President's Message

by Jon D. Huddleston

Diamonds Are Forever

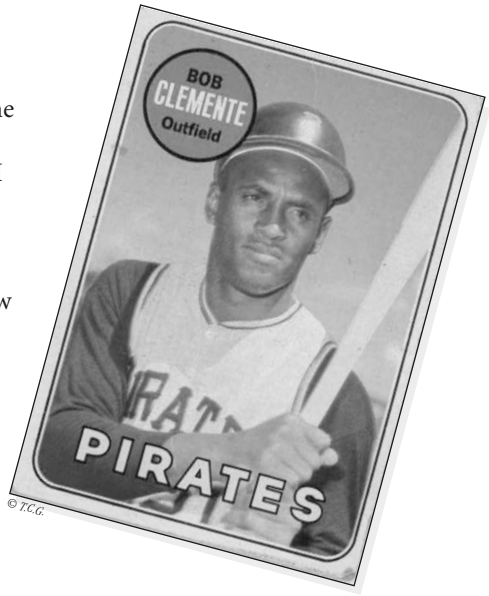
THE HOLIDAYS ARE UPON US. The winter chill has shown up in my area too often — but I suppose, for me, any time that it arrives it is unwelcome. The holidays are about friendships and family, about reflecting on the year gone by and the promise of the year ahead. In our house, the Christmas decorations are up; well, some of them are, anyway. Perhaps, we will complete the task before Christmas day. Perhaps, we will pledge to do better next year. Inexplicably, two pumpkins remain on our doorstep, survivors of both Halloween and Thanksgiving. No one has questioned their existence or demanded their removal. The Christmas pumpkin concept has apparently caught on in our neighborhood, as no fewer than five neighboring homes also have holiday pumpkins on their doorsteps.

Where did the year go? It seems like yesterday that the Yankees had defeated the Phillies in the World Series — the real sign that summer has ended until life begins anew with spring training in March. It is December and my mind is on friendship and baseball.

It is funny. Baseball is no longer my favorite sport to watch. It is not the sport of my children, but it is the sport of my youth. I loved the St. Louis Cardinals. I studied box scores. I owned way cool Lou Brock tennis shoes, which really were so much faster than anything Keds or Converse had to offer. I still have all of my baseball cards. Well, all but one.

I have thought about that card a lot recently — a 1969 Topps Roberto Clemente card. It was my only Clemente card. I had Mays's cards, Gibson's, Aarons's, and Robinsons's. But only one Clemente. As a child, I wasn't a fan of Clemente. He was a Pirate. The Pittsburgh Pirates were the enemy, perpetually standing in the way of the Cardinals' rightful place atop the National League East Division. But, I did appreciate his greatness as a player. It was impossible not to. He was that good.

I knew of his tragic death on New Year's Eve in 1972, as he was trying to get humanitarian supplies to earthquake victims in Nicaragua. But it was not until years later that I learned of the depth of his commitment to humanity and his extensive charity work in his native Puerto Rico and other Latin American countries.



Anytime you have a chance to make a difference in this world and you don't, then you are wasting your time on this earth.

I chose this wonderful quote by Clemente to use in my first President's Message and it has set the tone for our programs recognizing Virginia's good lawyers for their contributions to community service.

So what happened to the card? Well, that is where the friendship part comes in. Since the advent of baseball cards, there have been kids who have collected them. As long as kids have collected them, they have traded them with their friends. As long as there have been trades, there have been one-sided trades.

This particular bit of treachery occurred when we were fourteen or fifteen give or take a year. He was one of my best friends. We played countless hours of basketball. We attended the same school and church. We went to summer camps together and conducted our share of fairly innocent mischief. And we both had lots of baseball cards, but only one of us had a Clemente.

This particular afternoon, we sorted a bunch of cards that might be subject to trade discussion, pulling out about 100 or more cards in two stacks. These were the cards that were to be considered. About twice as many cards were in his stack of cards as were in mine. Then, he made the offer — his stack for mine. There were some really good cards in his stack. I accepted. The deal was done. I was really thankful I had pulled the Clemente from the stack.

Except I hadn't. A deal was a deal. There it was, the first lesson in contracts. *Bargain, consideration, delivery*. It was also a lesson in honor. There was no reneging. I could have checked the stack — another lesson that has served

me well over the years. It was not my finest moment, but it never affected our friendship. We continued to enjoy our summers. We got our driver's licenses and we continued to shoot a lot of hoops — we were a formidable duo on our home court, at least in our own minds.

Of course, college and adulthood changed things. We attended different colleges. Although we went to the same law school, he finished before I arrived. He did manage to leave specific instructions for his favorite law school professor to mercilessly torment a certain incoming first-year student, which were carried out with aplomb.

Weddings, children, jobs and job changes, life in different cities. All of the circle of life variables that pull us further from our childhood and away from our childhood friends pulled us apart. Months turned into years. If we had an address, perhaps a Christmas card was sent. Perhaps, a lunch would occur if we were in the area. The friendship never died, only the contact. We both enjoyed sports. We coached our kids and hugged our families and practiced law. But he did it in his world and I in mine.

I last saw him after my mother's funeral several years ago. He stayed for hours. We talked about school and camp and our kids — and my mom. We hugged. For a moment, we returned to our childhood lives. Despite the years, we hadn't lost a beat.

It was a couple of years before we next spoke, when he phoned to tell me of an unspeakable tragedy that had hit his family, an accident that will forever mar his holidays. I was far less comfort to him and his family than he had been to me. Life has a vicious side. Maybe through time we find comfort.

I had hoped he would be able to come see me installed as bar president last June but he was unable to make it. I did receive a note of regret a couple months later. It included a new address and a small gift: the 1969 Topps Roberto Clemente baseball card that he had held for me for the last thirty-five years. Another circle complete, but not ended.

Perhaps that is the lesson — that holidays mean family, that good friendships don't end no matter how interrupted, that spring will still bring baseball and that we must remember to make a difference in this world when we are given the chance.

MERRY CHRISTMAS to my old friend, and to each of you a joyous holiday season.

by Karen A. Gould

Three Organizations That Enhance the Bar's Mission

QUESTION: What do Lawyers Helping Lawyers, the Legal Services Corporation of Virginia, and the Virginia Law Foundation have in common?

Answer: Virginia lawyers. These three organizations help Virginia lawyers and our communities in unique ways. They are an important part of our statewide legal community.

Lawyers Helping Lawyers
Lawyers Helping Lawyers (LHL) was organized in 1985 to provide confidential assistance to members of the legal profession with substance abuse and mental health problems. LHL is not a part of the Virginia State Bar, and lawyers who go to it for help are assured of confidentiality by Rule 8.5, Comment 5, of the Rules of Professional Conduct. In addition to a statewide network of volunteers, LHL has a professional staff. Assistance can include assessment, professional consultation, information about or referral to treatment resources, informal or formal intervention, and monitoring. A major objective of the program is to help impaired lawyers and prevent disciplinary problems. In addition, LHL receives referrals from the VSB Professional Regulation Department and monitors the lawyers' progress. In return, the VSB provides $100,000 in support for LHL's programs. The VSB also makes three appointments to the LHL Board of Directors. Mary Yancey Spencer, deputy executive director of the VSB, is one of the VSB's appointees to the LHL board. Contact LHL at 600 E. Main Street, Suite 2035, Richmond, VA 23219; (877) 545-4682 (toll-free); info@valhl.org.; http://www.valhl.org.

Legal Services Corporation of Virginia
Legal Services Corporation of Virginia (LSCV) was created in 1975 by the Virginia State Bar, the Virginia Department of Social Services, and the Virginia Legal Aid Association. It promotes the development and coordination of legal aid programs that help the poorest and most vulnerable people obtain help with legal problems that affect their most basic needs: food, shelter, job, and health care. LSCV is a bridge to the local, community-based legal aid organizations that serve disadvantaged Virginians. LSCV provides those organizations with funding from the state and Interest on Lawyer Trust Accounts (IOLTA), program oversight, and coordination. The VSB acts as a conduit for state funding to LSCV. In addition to state and IOLTA funding, LSCV relies on donations to support legal services to the indigent. Because of the decrease in interest rates, decline in IOLTA revenue over the fiscal years ending 2009 and 2010 is projected to be close to $4 million for LSCV. The VSB Council appoints sixteen members of the LSCV Board of Directors, the VSB Young Lawyers Conference appoints one director, and the chair of the VSB's Special Committee on Access to Legal Services is an automatic appointment. The VSB's executive director currently serves on the LSCV Board. Mark D. Braley has been LSCV's executive director for eighteen years. Contact LSCV at 700 E. Main Street, Suite 1504, Richmond, VA 23219; (804) 782-9438.

Virginia Law Foundation
The Virginia Law Foundation was established in 1974 by the Virginia State Bar to serve as the nonprofit for Virginia lawyers seeking to improve the administration of justice and promote the rule of law throughout Virginia. Its mission is to promote through philanthropy the rule of law, access to justice, and law-related education. To that end, Virginia Law Foundation provides grants to help to:

- provide civil legal services to the poor;
- educate the public about law and about the legal profession;
- offer not-for-profit continuing legal education of Virginia lawyers;
- support public service internships for Virginia law students; and
- recognize and encourage excellence in the practice of law.

The Virginia Law Foundation has provided more than $23 million in grants to support law-related projects in Virginia. The foundation selects fellows each year to encourage and recognize excellence in the practice of law and public service. No more than 1 per cent of Virginia's lawyers are selected to be fellows; they are chosen for their distinction in the profession and contributions to the community. Supported by IOLTA revenue until 1996, the Virginia Law Foundation now relies on investment income and donations to

Organizations *continued on page 59*

Highlights of the Virginia State Bar Council Meeting

October 16, 2009

At its meeting on October 16, 2009, in Williamsburg, the Virginia State Bar Council heard the following significant reports and took the following actions:

Permanent Bar Cards
The Membership Task Force is discussing replacing the annual VSB membership card with a permanent card, at the request of President-elect Irving M. Blank.

UPL Felony Legislation
Sharon D. Nelson, chair of the Standing Committee on the Unauthorized Practice of Law, reported that the committee has decided on the advice of a legislator not to pursue legislation in 2010 that would make certain types of UPL a felony.

Proposals Approved by Council
The council approved the following proposals, which have been sent to the Supreme Court for approval:

- **Payee Notification** — This legislation would require insurers that pay liability claims to notify claimants when they disburse settlement proceeds of $5,000 or more to claimants' attorneys. Approved 39 to 25. http://www.vsb.org/site/public/payee-notification-proposal

- **New Rule 1.18** — This would define a prospective client to whom the duty of confidentiality is owed, and distinguish that prospective client from someone who unilaterally communicates with a lawyer with no reasonable expectation of forming an attorney-client relationship. The proposed amendment also would allow 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. Approved 67 to 1. http://www.vsb.org/site/regulation/prop-rule-118

- **Rule 4.2 amendment** — This would clarify that a commonwealth's attorney may advise a law enforcement officer regarding the legality of an interrogation or other investigative conduct when a defendant in custody, formerly charged, and represented by counsel waives his *Miranda* rights and wants to give a statement without his or her counsel present. Approved unanimously. http://www.vsb.org/site/regulation/rule-4-2

- **Paragraph 10 amendments** — These amendments would update Rules of the Supreme Court Part Six, § IV, ¶ 10. The amendments would eliminate redundancy in procedures for providing notice and soliciting public comment. They also would require the VSB to submit proposals that declare conduct to be UPL to the Attorney General's Office for analysis of any restraint of competition that might result. Approved 56-13. http://www.vsb.org/site/regulation/part-six-sect-iv-par-10/

- **Paragraph 13 amendments** — These amendments to Rules of the Supreme Court Part Six, § IV, ¶ 13 would clarify the term "charge of misconduct." Approved unanimously. http://www.vsb.org/site/regulation/part-6-sect-iv-par-13-charge-misconduct

Professional Guidelines To Be Published Online in Searchable Format

The Virginia State Bar *Professional Guidelines* for the first time are being published online in a searchable HTML format that will allow users to quickly access the sections they are looking for without flipping through pages or waiting for PDFs to download.

Because the format will meet most VSB members' needs, print copies of the *Professional Guidelines* were not mailed with the October 2009 issue of *Virginia Lawyer*. A limited number of copies will be printed and provided to members on request.

The print version is published each fall and contains the rules and regulations of the bar, including the Rules of Professional Conduct, attorney trust account regulations, mandatory continuing legal education regulations and forms, Virginia Consumer Real Estate Settlement Protection Act regulations, and portions of the Rules of the Supreme Court that outline VSB governance and the procedure for disciplining attorneys.

The online HTML version will allow members to browse the Rules of Professional Conduct by using a table of contents with hot links. Previously, the *Professional Guidelines* were available on the VSB website only as PDF files.

The HTML version will be updated throughout the year to provide a current version at all times. The print version is updated once a year. Changes approved by the VSB Council and the Supreme Court of Virginia are published online as a supplement.

Watch your first-of-the-month VSB E-News for further details.

MCLE Board Tentatively Approves Live Programming Requirement

by Michael L. Davis
Chair, Virginia MCLE Board

On October 19, 2009, the Mandatory Continuing Legal Education Board voted to tentatively approve amendments to the MCLE Regulations, pending public comment. The amendments affect course approval standards, responsibility of CLE course sponsors, and procedures pertaining to attorney compliance reporting.

The most significant recommended amendment would require that a portion of each attorney's MCLE credits derive from live interactive programs, as opposed to videotaped or archived seminars.

The board is unanimously committed and fully supports the proposition that all CLE programs be of high quality, convenient, and cost effective. Accordingly, Virginia was one of the first states to embrace distance course-delivery technology. The board recognizes the benefits of this technology for providing courses on very specialized or narrowly focused topics, as well as for making available nationally renowned speakers from outside Virginia.

Historically, the board has consistently emphasized the value of interactivity in course offerings and has opposed self-study to meet the minimum MCLE requirements. Under the current regulations, all distance-learning programs are required to have interactivity in order to be approved. However, research has found that the interactive component incorporated into archived online programs is minimal and rarely used by participants, to the extent that that these programs could reasonably be considered self-study.

During the last several years, the board also has become increasingly concerned that attorneys are being bombarded with solicitations from national and regional aggregators offering "blanket programs" or "Virginia bundles" of archived programs in order to satisfy a member's entire annual MCLE credit requirement. Although many of these offerings are substantial, useful, educational, and in compliance with the current regulations, some programs contain topics, law, and discussions that do not focus on Virginia or federal law, or contain materials that lack practical application to a Virginia lawyer.

In connection with addressing these issues, during the past year the board has discussed the pros and cons of a "live and interactive" amendment. Some members believe that all MCLE credits should emanate from truly live, "in-person" programs. Others believe that there should be no requirement that a program be live or interactive. Still others are of the opinion that a portion of the annual MCLE requirement should derive from some type of live and interactive programs.

Those in favor of the proposed amendment point out that, with advancement in technology, human interaction among bar members has been in decline. This is not to say that those advocating this position are opposed to using modern technology. Many of these same people voted in favor of approving podcasts. However, at the time of that vote, some members expressed concern that the MCLE Board also needed to preserve aspects of human interaction in order to maintain and enhance the high standards of civility to which Virginia lawyers have always aspired and which are specifically espoused by the Supreme Court of Virginia. It has also been suggested that attorneys learn more in an interactive group setting — in person or otherwise — rather than in a one-way stream of programming. Interactive discourse not only allows a dialogue with the instructor, but also promotes discourse and the exchange of ideas among attending bar members. Under the proposed amendment, any member of the bar may still obtain all of his or her annual MCLE credits through distance learning methods. All twelve hours may be completed at one's desk or computer, so long as at least four hours emanate from live interactive programs or seminars.

Those who oppose this amendment argue that there is no empirical evidence that a live interactive program delivers a better product or is more beneficial than a program that is pre-recorded and has no interaction component. Opponents assert that bar members, not the MCLE Board, should decide how they receive credit. In addition, the use of pre-recorded programs for credit allows a member to participate in CLEs at a convenient time and place and is not dependent on when the live class takes place.

After long and spirited discussions, the MCLE Board has recommended that not more than eight credit hours come

MCLE *continued on page 19*

Huddleston's Virginia Is for Good Lawyers Project in National Spotlight

Virginia State Bar President Jon D. Huddleston will unveil his Virginia Is for the Good Lawyers project to national audiences next year.

His first presentation will be at the National Conference of Bar Presidents (NCBP) Midyear Meeting in February in Orlando, Florida. In March, he will describe the project in Chicago at the NCBP's Bar Leadership Institute.

He will present the project's video component, *The Big Picture*, which can be viewed on YouTube at http://www.youtube.com/virginiastatebar and on the VSB website at http://www.vsb.org/site/about/va-good-lawyers/. The videos were produced in-house by VSB staff.

The videos and other components of Virginia Is for Good Lawyers tell the stories of Virginia citizen lawyers, who exemplify service to and leadership in their communities. Huddleston led the VSB to tell lawyers' stories through new social media partly to convey a positive image of lawyers and partly to encourage all VSB members to aspire to become citizen lawyers.

Other elements of the project include the use of Twitter (http://twitter.com/VA4GoodLawyers/), a president's blog (http://www.vsb.org/site/blog/), and an essay project, *Reflections* (http://www.vsb.org/site/about/va-good-lawyers/#reflections).

At NCBP meetings, bar leaders present workshops about projects they have undertaken to promote their bars' missions. For more information about NCBP and the meeting, see http://www.ncbp.org/.

Capsalis Wins Arlington's Winston Award

Manuel A. Capsalis (right), immediate past president of the Virginia State Bar, is presented with the Arlington County Bar Foundation's 2009 William L. Winston award from foundation Chair Charles E.K. Vasaly. The award, named for a retired Arlington circuit judge, honors promotion of democratic ideals and advancement of the rule of law. Capsalis was recognized in part for his advancement of diversity among the statewide bar during his presidency. His work led to the VSB Council recommending establishment of a diversity conference — a proposal now pending before the Supreme Court of Virginia.

"It would not have happened if it weren't for Manny Capsalis," said Arlington Circuit Judge Joanne F. Alper at the ceremony on November 17 at the Army Navy Country Club in Arlington. Capsalis is a former president of the Arlington County Bar Association, which lays claim to having Virginia's first female bar association president (Betty A. Thompson) and first African American president (Clarence F. Stanback Jr.).

In Memoriam

John Widman Appleford
Staunton
June 1938–October 2009

Delbert J. Barnard
Seattle, Washington
October 1934–January 2009

Alfred Z. Bernstein
University Park, Florida
July 1919–July 2009

George E. Cranwell
Arlington
December 1931–September 2009

Andrew Edward Crapol
New York, New York
July 1978–March 2009

James W. Fleet
Mobile, Alabama
April 1914–April 2009

Paul M. Hopkins
New York, New York
July 1944–September 2008

Michael Woodrow Hubbard
Minneapolis, Minnesota
April 1959–June 2009

Christopher Lee Keefer
Kingsport, Tennessee
July 1951–August 2009

Phillip Edwin Keith
Christiansburg
December 1950–August 2009

Christopher John Klicka
Purcellville
April 1961–October 2009

Hon. Henry W. MacKenzie Jr.
Portsmouth
January 1910–October 2009

Patrick Edward Martin
Fairfax
October 1942–August 2008

Ronald McGuire Maupin
Spotsylvania
February 1953–August 2009

Ruth November Murphy
Midlothian
September 1950–October 2009

Sterling Hale Moore
Glen Allen
August 1948–August 2009

Thomas Richard Nedrich
Falls Church
April 1941–January 2009

Michael George Neville
Goffstown, New Hampshire
August 1953–June 2009

Charles Hill Ryland
Warsaw
October 1913–October 2009

Robert B. Spencer Jr.
Dillwyn
July 1922–October 2009

Randy Allen Stratt
North Hollywood, California
May 1956–October 2009

Gregory Max Van Doren
Manassas
October 1947–October 2009

Pat Sliger Retires after 23 Years with VSB

Patricia A. Sliger, well known to Virginia State Bar volunteers as the staff liaison to many bar groups, will retire at the end of 2009, after twenty-three years of service.

Sliger is executive assistant to VSB Deputy Executive Director Mary Yancey Spencer, who calls her "the heart of the bar."

Sliger's relationships with VSB members most recently grew through her work with the Senior Lawyers Conference and sections on Family Law, General Practice, and Litigation.

"Pat Sliger exemplifies the ultimate in a section liaison: professional and caring," said VSB Executive Director Karen A. Gould. "She gently leads the groups where they need to go and keeps them focused. She has set an example for the other section liaisons at the bar to follow. She will be sorely missed."

Bar leaders appreciate her professionalism. Samuel W. Meekins Jr., former chair of the Litigation Section board, said that Sliger "managed to get things done without ruffling any feathers. That is such a tremendous skill set. She kept us on track, always with a smile. You never felt the pressure of it."

Cheshire I'Anson Eveleigh, a former chair of the Family Law Section Board of governors, said, "She always made sure that everything was organized, that all the attachments you had to the agenda were put into a lovely notebook and made available to everybody. She was organized, we were organized, and she made us look really good."

To many members of the VSB staff, Sliger serves as a sounding board, a mentor, and a friend. She quietly steps forward to help in times of need.

Deputy Clerk Vivian R. Byrd recalls the time several years ago when she was leading a Girl Scout troop of more than twenty girls in the Gilpin Court public housing project in Richmond. The troop had no money for projects, and the girls had no uniforms.

Byrd described the troop's plight to Sliger, who started making phone calls. She reached the ear of Oliver White Hill Sr., who made his own calls, and money started rolling in. "The girls were able to get brand-new uniforms, and they were so proud," Byrd said. The troop was able to enjoy many traditional scouting projects — including camping.

Frank O. Brown Jr., a past chair of the Senior Lawyers Conference, said, "In her friendly, modest, and unassuming way, she has contributed mightily to the success of our many projects. We have been part of her extended family, and she has taken great pride in our successes and accomplishments.

Robert H. Spicknall, president of the Virginia State Bar Members' Insurance Center, surprised Pat Sliger with flowers last month in honor of her retirement.

"We, in turn, are very proud of Pat. … We will miss her smile, her encouraging words, and her support."

"One of the things I have missed since retiring from the bar staff myself is the cheerful daily greeting I always got from Pat as I walked by her office, said Thomas A. Edmonds, retired executive director of the VSB.

He called Sliger "one of the bar's most loyal and dedicated staff members. She was unfailingly resourceful and helpful, and her pleasant demeanor and quiet, effective assistance endeared her to all with whom she worked — both other staff and volunteers."

New Policy Set for Court Vouchers and Payment Requests

Vouchers and payment requests for services provided to Virginia courts now must be submitted within thirty days after the service is completed, under a new policy by the Supreme Court of Virginia's Office of the Executive Secretary (OES).

For court-appointed counsel, the thirty-day period begins when all proceedings have been completed in the court for which the request is submitted.

For requests submitted after the thirty days, the OES may require a written explanation of the delay and other documentation. Requests older than two years after the service is completed will be denied.

Questions about the policy should be directed to John Rickman, director of fiscal services for the OES, at (804) 786-6455. The policy is posted at http://www.courts.state.va.us/courtadmin/aoc/fiscal/scv_pol_voucher_pymt_requ.pdf.

2010 High School Essay Contest Questions School Control Over Students' Online Communications

Does a student who criticizes his or her school on Facebook lose First Amendment protection of free speech? Should a school be able to discipline the student by barring sports, candidacy for student government, performance in a play, or another school activity? Does the fact that Facebook publishes the comments to an audience outside the school make a difference?

Virginia high school students are invited to submit essays that address those issues, for a chance of winning prize money and a trip to Virginia Beach, paid for by the Virginia State Bar and its Litigation Section. The deadline for submissions is February 8, 2010.

All Virginia students aged 19 or younger and enrolled in grades 9-12 or a home-school equivalent are eligible to submit an essay that addresses the contest hypothetical: "Free Speech: Can a School Limit Students' Online Communications?" The hypothetical is posted at http://www.vsb.org/site/public/law-in-society-hypothetical.

Essays are limited to 1,000 words, and are judged on how well they demonstrate the student's understanding of the role and value of the legal system in everyday life. Entries will be judged by attorneys, judges, and educators. The purpose of the contest is to awaken an interest in law and appreciation of the U.S. Constitution.

The first place winner will receive $1,750 cash and an expense-paid trip for the winner and his or her family to the Virginia State Bar Annual Meeting in Virginia Beach in June 2010 for presentation of the award. The winning essay will be published on the VSB website. Other awards include $1,500 cash (second place), $1,250 cash (third place), and honorable mentions of $100 cash. All winners receive a plaque and copy of Strunk and White's *Elements of Style*. Awards will be presented in May at the winners' schools.

More information, including contest rules and last year's winning essay, is posted at http://www.vsb.org/site/public/law-in-society/.

MCLE *continued from page 15*

from an archived source. Stated another way, at least four of the annual requirement of twelve credit hours should come from live interactive programming. Live and interactive programs include traditional classroom seminars, telephone seminars, and Webcasts with interactive components. The emphasis under the proposed amendment is that at least four credit hours of the annual MCLE requirement should come from programs that allow for contemporaneous discussion, questions, and discourse between the instructor and the attendees. Archived videotaped programs do not meet the definition of live interactive. The purpose of the change is to enhance the educational experience by providing that all members reap the benefits of both live and prerecorded programs.

Whatever one's viewpoint on the proposed amendment to the MCLE Regulations, one must keep in mind that it is the purpose of the MCLE program to enhance the professional skills of practicing lawyers, afford them periodic opportunities for professional self-evaluation, and improve the quality of legal services rendered to the public.

The full MCLE Board proposal can be found at http://www.vsb.org/site/regulation/prop-amendments-mcle-regs.

Comments on the proposal should be sent in writing to Gale Cartwright, MCLE Board, Virginia State Bar, 707 E. Main Street, Suite 1500, Richmond, VA 23219, no later than end of business on December 30, 2009.

(Note: The views expressed in this article are those of the author and do not necessarily represent a consensus of the members of the MCLE Board.)

Virginia Law Schools Offer Clinical Placement Programs

by Renae Reed Patrick

A GREAT RECESSION can be a catalyst for change. Spheres that previously seemed immune to seismic shifts and influences that seemed to be merely gestating are suddenly transforming.

The legal profession is one sector that faces extraordinary challenges. Changes are kaleidoscopic, they come so fast, deep, and broad.

At the national level, we are witnessing large across-the-board increases in demand for services from legal aid societies. Due to the unsettled times, there are like increases in the numbers of pro se litigants clamoring for access to the justice system. At least one state's court system, coping with sizeable budget deficits and staffing cuts, has replaced law clerk hires with subsidized associates who were deferred from major firms. Professional notices indicate increases in lawyers moving into solo practice. Interest on Lawyer Trust Accounts revenues, which previously provided a funding floor for legal services for the poor, deflated precipitously as the housing balloon burst.

Even before the downturn, educators called for more clinical training of law students. They wish to see teaching of legal knowledge, skills, and values that point toward professionalism. See, for example, the Carnegie Foundation's 2007 report, *Educating Lawyers: Preparation for the Profession of Law,* and *Best Practices for Legal Education: A Vision and a Road Map* (Stuckey et al., with a forward by Robert MacCrate, 2007).

Now, for many reasons — including fallout from the international financial crisis — the legal profession appears to be heeding these calls. News stories tout the practical value of clinical legal education, externships, and other moves to ensure that newly minted lawyers are better prepared to engage competently in a dynamic world and compete better for placements or self-generated business.

Cold statistics mesh functionally with a heartfelt message delivered by Clarence M. Dunnaville Jr. to the Virginia State Bar's Special Committee on Access to Legal Services. Hopefully, his remarks to the committee in spring 2009 have set a precedent, making it easier for others to engage in similar future conversations. The night before he talked to the committee, Mr. Dunnaville was presented with the bar's prestigious Lewis F. Powell Jr. Pro Bono Award. His remarks that night paid homage to the late U.S. associate justice's vision and courage in opposing massive resistance to court-ordered desegregation before Powell was ever appointed to the bench, while he served as a citizen lawyer leading the Richmond School Board.

As the 2009 Powell Award recipient, Dunnaville was commended for his more recent contributions as appointed counsel working on civil *Gideon* issues and for his lifetime of advocacy in the arena of civil rights. The latter included an ongoing commitment as a private citizen to perpetuate the legacy of the late civil rights lawyer Oliver White Hill Sr.

Fully engaged professionally in his seventies, and using the Hill House project in Roanoke as a model, Dunnaville urged the committee to be more proactive in fostering structured opportunities for intergenerational collaboration. With access to justice the goal, he feels that faculty-supervised interactions between law students and seasoned members of the bar have the potential to benefit many low-income clients across Virginia. In the style of a visionary and advocate, he challenges us to involve the law schools directly in our efforts to promote access to justice. His article in this issue of *Virginia Lawyer* is a product of that summons.

Hill House — the example selected by Dunnaville — is an affiliate of the Washington and Lee University School of Law. Among other stakeholders, the program's partners include Blue Ridge Legal Services, where I am employed as supervising attorney.

To inform you about existing clinical programs in Virginia, we provide the following information. We hope you will consider these law school initiatives or those evolving at your own alma mater for personal philanthropic contributions or your volunteer time. Consider how the programs also might function as opportunities for networking or consultation, as we all cope with the challenges ahead.

These are summaries of the many clinical opportunities offered to students in Virginia's law schools. These clinical programs eliminate the gap between the classroom and the courtroom and offer students the opportunity to integrate legal theory with practical experience, to assume the role of lawyer and work directly with clients, to enhance substantive knowledge of specialized areas of the law, to explore professional responsibility issues, to gain a better understanding of legal institutions, and to gain public service experience. All of the work performed by the students is supervised by a professor and, in many situations, another practicing attorney.

UNIVERSITY OF RICHMOND SCHOOL OF LAW

The Children's Law Center comprises the Delinquency Clinic, the Disability Law Clinic, the Juvenile Law and Policy Clinic, and the Family Law Clinic.

The **Delinquency Clinic** is litigation-oriented. It focuses on the needs of at-risk children and adolescents. Clinic students advocate on behalf of children appearing before area juvenile courts, often as defense counsel for youth accused of delinquency offenses and

occasionally as guardians ad litem in cases involving abuse and neglect or custody issues.

The **Disability Law Clinic** represents youth with mental or cognitive disabilities, children and parents seeking special education and community-based services, and youth with mental disabilities who are incarcerated or institutionalized. Clinic students may be appointed guardians ad litem for children with mental health needs in the justice system.

In the **Juvenile Law and Policy Clinic**, students work on legislative, research, and advocacy projects to effect systemic change in current legal and policy issues that affect children in the delinquency, educational, or child welfare systems in Virginia and the Mid-Atlantic region.

Through the **Jeanette Lippman Family Law Clinic**, students provide legal assistance to families and children in the city of Richmond in areas of abuse and neglect, divorce, custody, child in need of supervision or services, public benefits, housing, and domestic violence. The Family Law Clinic is also a multidisciplinary collaboration with Virginia Commonwealth University. Graduate students and faculty from VCU'S School of Social Work and Department of Psychology help the legal team provide holistic service and referrals to clients.

The **Clinical Placement Program** is divided into five sections:

- Civil — places students with government and public interest agencies.
- Criminal — defense and prosecutorial placements.
- Judicial — placements with state and federal judges at trial and appellate levels.
- Litigation — includes civil, criminal, and judicial placements.
- In-house counsel — places students with counsel for both national and international corporations.

UR's new **Intellectual Property and Transactional Law Clinic** offers students opportunities to represent for-profit and nonprofit organizations, artists, authors, and inventors from a variety of backgrounds in business formation and rights acquisitions.

The **Institute for Actual Innocence** selects and redresses Virginia cases in which there is credible evidence that a convicted person may be innocent.

UNIVERSITY OF VIRGINIA SCHOOL OF LAW

The Law School's Pro Bono Program encourages all students to provide at least twenty-five hours of free legal work annually. The following projects offer them an array of experiences:

The **Mortimer Caplin Public Service Center** — The law school's chief program for public service programming and outreach. Students work with prosecutors, public defenders, legal service organizations, and nationally known public interest organizations.

Child Health Advocacy Project — Student volunteers are trained to do legal intake and case follow-up with families of patients seen at the U.Va. Children's Hospital or its affiliated clinics.

Hunton & Williams Pro Bono Partnership — Students volunteer under the supervision of attorneys from the firm's Richmond office to represent indigent clients in the areas of domestic violence, family, immigration, and asylum law.

Immigrant Jail Outreach Project — Students volunteer under the supervision of attorneys from the Capital Area Immigrants' Rights Coalition in Washington, D.C., to conduct know-your-rights presentations and other work at the regional jail in Hampton Roads, which has a large population of immigrant detainees.

Legal Outreach Project — Students volunteer weekly to do client intake for the Legal Aid Justice Center at area soup kitchens, homeless shelters, and low-income housing projects.

Piedmont Court Appointed Special Advocates — Student volunteers are trained and supervised to serve as advocates for children who have been abused or neglected.

Pro Bono No-Fault Divorce Project — Students volunteer to assist with the filing of no-fault divorces for indigent clients under the supervision of attorneys from the Central Virginia Legal Aid Society.

U.Va. Law Veterans Medical Disability Appeals Pro Bono Program — Student pro bono volunteers are teamed with supervising attorneys to represent veterans before the U.S. Court of Appeals for Veterans Claims. The program emphasizes veterans whose disability claims have been rejected by the U.S. Department of Veterans Affairs.

Advocacy for the Elderly Clinic — Students represent elderly clients in negotiations, administrative hearings, and court proceedings on basic wills and powers of attorney, guardianships, consumer issues, Medicaid and Medicare benefits, nursing home regulation and quality of long-term care, elder abuse and neglect, and advance medical directives.

Capital Post-Conviction Clinic — The Virginia Capital Representation Resource Center conducts a clinic centered on the representation of those sentenced to death in Virginia and issues relevant to such cases.

Employment Law Clinic — Students work on employment cases in cooperation with the Legal Aid Justice Center and local attorneys. Cases include wrongful discharge actions, unemployment compensation claims, employment discrimination charges, and other employment-related claims.

Housing Law Clinic — Offered in conjunction with the Legal Aid Justice Center, this represents clients in housing-related cases involving eviction, rent escrow, grievance hearings, avoidance of illegal or unfair lease provisions, and abatement of substandard building conditions.

Mental Health Law Clinic — Students represent mentally ill or mentally disabled clients in negotiations, administrative hearings, and court proceedings on matters such as Social Security; Medicaid and disability bene-

fits claims; disability discrimination claims; access to housing; advance directives for medical care; and access to mental health or rehabilitative services.

Prosecution Clinic — Students work with prosecutors and are exposed to all aspects of prosecution.

WASHINGTON AND LEE UNIVERSITY SCHOOL OF LAW

Every third-year student is required to take one clinic, externship, or other similar course. A year-long professionalism course taught by W&L School of Law Dean Rodney A. Smolla requires students to accumulate at least sixty hours of law-related service during their final year of law school.

Programs include:

- Through the **W&L Community Law Center** at the Oliver Hill House in the City of Roanoke, students handle estate planning for elderly Virginians, visas for immigrant victims of family violence and violent crimes, restoring civil rights to ex-felons, and other types of legal problems considered on a case-by-case basis.
- **Low-Income Taxpayer Clinic** students provide free legal representation in controversies with the Internal Revenue Service, including audit representation, appeals, nonfilers, collection issues, innocent spouse relief, and representation before the U.S. Tax Court.
- **VC3.org** is a comprehensive capital defense resource guide maintained by Clinical Professor David I. Bruck and the Virginia Capital Case Clearinghouse at W&L, where students assist with legal research, drafting motions and legal memoranda, interviewing potential witnesses, reviewing, and summarizing records.
- **Public Prosecutors Program** students are placed with the U.S. Attorney's Office for the Western District of Virginia on projects that include legal research and writing assignments, participation in witness interviews, meetings with law enforcement personnel, trial preparation, and participation in a trial.
- **General Externship Program** students may pursue placements that serve the public interest and are not covered by the clinical course offerings. Examples include clerking for a general district or juvenile and domestic relations judge and working with general counsel for a not-for-profit organization.
- The **Criminal Justice Clinic** focuses on defense in general district and circuit court of indigent clients facing criminal charges of assault, driving while intoxicated, shoplifting, and marijuana possession.
- The **Community Legal Practice Center** provides free legal services to qualified residents of the Rockbridge County area. It serves victims of domestic violence and community residents older than sixty who have limited financial resources.
- The **Black Lung Clinic** assists coal miners and their survivors who are pursuing federal black lung benefits for the years the miners worked for the coal companies. W&L's clinic has a success rate roughly five times the national average in cases in which its students appear.

Other programs include transnational practicum programs in Serbia, Liberia, Iraq, and Cambodia.

COLLEGE OF WILLIAM AND MARY SCHOOL OF LAW

Students in the **Legal Aid Clinic** work in the Williamsburg office of the Legal Aid Society of Eastern Virginia to provide legal services to indigent people.

In the **Federal Tax Practice Clinic**, students assist in the representation of low-income Virginia taxpayers before the IRS, U.S. Tax Court, and U.S. District Court.

Domestic Violence Clinic students help victims obtain protective orders and with legal issues accompany such violence.

The **Appellate Litigation Clinic** focuses on legal research and writing in preparation of petitions and briefs on behalf of pro se, court-appointed, and public defender clients.

Special Education Advocacy Clinic students assist children with special needs and their families in special education matters.

The **Veterans' Benefits Clinic** offers students the opportunity to aid military veterans in the filing, adjudication, and appeal of disability claims with the Veterans Administration. Students work with psychology students at Virginia Commonwealth University in Richmond to refer clients for assessment, counseling, and therapy.

Students also participate in externships with public defenders and prosecutors, federal and state executive and legislative agencies, judges and courts, nonprofit organizations, law firms and in-house counsel, local government attorneys, and the General Assembly.

GEORGE MASON UNIVERSITY SCHOOL OF LAW

The **Clinic for Legal Assistance for Servicemembers** provides student representation in civil litigation, adjudication, and negotiation of cases that involve consumer protection, administrative law, bankruptcy, family law, landlord-tenant, contract, military law, and entitlement matters.

The **Domestic Relations Legal Clinic** offers students the opportunity to assist pro se litigants in obtaining uncontested divorces and all manner of domestic relations issues and cases.

Immigration Legal Clinic students work on a variety of projects, including legal research and drafting orders to appeals pertaining to immigration law issues.

The **Law and Mental Illness Clinic** allows students to gain experience in the judicial, legislative, academic, and advocacy aspects of laws that address the treatment of individuals with severe mental illness.

Clinical Programs continued on page 59

A New Role For Law Schools and the Bar

by Clarence M. Dunnaville Jr.

THE NEED TO MAKE LEGAL SERVICES available to all citizens regardless of economic status is one of the greatest challenges facing the nation. In *Documenting the Justice Gap in America*, the national Legal Services Corporation reports that one million cases a year must be rejected by LSC grantees because of insufficient program resources, and those cases represent "only a fraction of the level of unmet need."[1] To help close this massive gap, law schools need to change the way lawyers are trained. The mission of law schools should include responsibility for establishing clinical programs that provide direct legal assistance to needy clients and that produce graduates who are inculcated with zeal to make equal justice under the law a reality for all, regardless of economic status.

The Clinical Legal Education Association, in its 2007 publication *Best Practices for Legal Education*[2], states that "the legal profession, due in part to the shortcomings of legal education, is failing to meet its obligation to provide access to justice."[3] Many legal scholars agree.[4]

The inability of poverty-stricken persons, who now exceed 13 percent of the United States population, to obtain legal counsel has a huge impact on the lives of many citizens who lose fundamental rights and even their children. They are unable to navigate the legal system without legal representation.

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Recent Virginia Supreme Court Cases

In *Mitchell v. O'Brien*[5] which came before the Supreme Court of Virginia in early 2009, the appeal arose from an adoption proceeding instituted by the O'Briens. The child whom the O'Briens sought to adopt was the daughter of Mitchell, aged twenty-one. The mother of the child had placed the child for adoption without notifying Mitchell. Mitchell desired to parent the child. Although he was not properly served, he appeared in the proceedings and opposed the adoption. He asserted that he was indigent and repeatedly requested the appointment of counsel. The Fairfax County Juvenile and Domestic Relations and Circuit courts refused the appointment of counsel. After trial, the circuit court terminated his parental rights and granted the petition for adoption. The Virginia Court of Appeals affirmed, and Mitchell appealed to the Supreme Court of Virginia.

For the Supreme Court appeal, Mitchell was represented by court-appointed counsel. The Virginia Trial Lawyers Association appeared as amicus curiae. It was argued that the Constitution of Virginia requires the appointment of counsel. Some states have provided for the appointment of counsel in civil cases involving fundamental rights of indigent persons, and the Virginia Supreme Court was urged to follow those states' examples.[6]

The Supreme Court, by order entered February 13, 2009, affirmed the decision of the Court of Appeals. The Supreme Court ruled that the Court of Appeals did not err in denying court-appointed counsel and was not authorized by statute or constitutionally required to appoint counsel.

Brazell v. Fairfax County Department of Social Services[7] was another 2009 case before the Virginia Supreme Court in which appointment of counsel was requested and denied in the trial court. *Brazell* involved the termination of a mother's parental rights. The mother was a victim of domestic violence. A psychologist for the Social Services Department determined her IQ score was in the borderline to low-average range and she had cognitive and emotional disorganization and a superficial and disorganized pattern of taking in information and responding, Her children had been taken by the department, which was seeking to terminate all parental rights and place the children for adoption. The trial court denied the mother's request for counsel and refused to grant a continuance to allow her to seek counsel. She was forced to proceed to trial without an attorney. Because of her lack of skills, she was unable to subpoena favorable witnesses, adequately present evidence that was helpful to her, or properly cross-examine the department's witnesses. The mother, unaware of trial procedural requirements, did not object to introduction of improper evidence introduced against her, or make a motion to strike at the end of the department's case.

The department, which was required by law to prevail by clear and convincing evidence, argued that the defendant's parental rights should be terminated because she had not complied with its requirements that she obtain stable housing and employment and that she improve her parental skills, which the

The federal and state constitutional requirements for legal counsel to be provided to indigent persons has been the subject of litigation for half a century.

department claimed were inhibited by her mental condition. The department further urged that the children should not be returned to the mother because of the likelihood that her companion would again inflict violence on her, which would be harmful to the children. At the end of the trial, the judge appeared to have doubts that the department had sustained its substantial burden, as the following colloquy suggests:

> The Court: You just told me that a few minutes ago, and that stable housing has been acquired within a period of twelve months. If that were the stand-alone condition, should her children be taken away?
>
> Ms. Townes: It's not the stand-alone condition.
>
> The Court: OK, let's go to the next one.
>
> Ms. Townes: The other one is employment. She was instructed and court-ordered, and one of the major goals was to obtain stable employment.
>
> The Court: Does she not have stable employment at this time?
>
> Ms. Townes: Again according to her, yes.[8]

The mother appeared to have substantially met the department's requirement that she obtain housing and employment. Moreover, the department's own expert witness testified that she had made substantial improvements towards improving her parental skills, and stated in his trial testimony that she should be given more time to address her cognitive issues so that he could thoroughly assess her progress Significantly, there was evidence available in the files that the companion who had previously inflicted the domestic violence was barred by court order from having any contact with the mother, and had no contact with her for more than a year prior to the trial. This evidence was not presented, and the department argued strenuously in its closing argument that domestic violence was likely to occur. The Fairfax County Circuit Court terminated the mother's parental rights and approved the adoption of her children.

The Court of Appeals affirmed the trial court[9], holding that the respondent was required to be held to the same trial procedural requirements as if she had been represented by counsel, and because she had not objected at trial to the introduction of improper evidence, or made a motion to strike, she was precluded by Virginia Supreme Court Rule 5A:18 from challenging the insufficiency of the evidence on appeal.

In the petition for appeal to the Supreme Court, it was argued that the mother should have been appointed trial counsel or, in view of the grave, drastic, and irreversible efforts of a judgment terminating her parental rights, been granted a continuance to seek counsel. The Virginia Supreme Court denied the petition for appeal, holding that there were no constitutional or procedural issues that warranted the appeal.[10]

Both the *Mitchell* and *Brazell* cases involved termination of parental rights, which are fundamental rights under Virginia and federal law. In both cases, the parties sought legal representation but were denied counsel at the trial level and forced by the trial courts to proceed without counsel.

The record reflected that Mitchell was never properly served, although he learned of the proceedings and actively participated. The Virginia Supreme Court has held that a court acquires no jurisdiction until process is served in the manner provided by statute and that a judgment entered by a court that lacks jurisdiction is void.[11] Therefore, judgment terminating Mitchell's parental rights could very well have been determined void if counsel had represented Mitchell and had raised the lack of proper service in a timely manner.

In *Brazell*, as stated above, hearsay and improper evidence were introduced. Also, the respondent was unable to subpoena her witnesses or present her case and effectively cross-examine. Counsel would have made the proper objections and a motion to strike so that, even if the respondent were unsuccessful at the trial level, she would not have been precluded from raising the insufficiency of the evidence on appeal.

The above cases are examples of how the fundamental rights of poor people are lost because of the inability to retain legal counsel.

Neither the indigent twenty-one-year-old Mitchell nor Brazell, with her impairments, had the skills to defend themselves and preclude termination of their parental rights. The likelihood of receiving justice in both cases was simply theoretical and illusory. Trial counsel was absolutely necessary to obtain a just result.

Termination of parental rights is only one type of case involving important legal rights wherein it should be required as a matter of right that attorneys be appointed for indigent persons.

Other types include, but are not limited to, child custody, immigration, and cases involving shelter, basic human needs, and life necessities.

Constitutional Standards

In 1963, the U.S. Supreme Court ruled that any person hauled into court who is too poor to pay a lawyer cannot be assured a fair trial unless legal counsel is provided. *Gideon v. Wainwright*[12]

However, in *Lassiter v. DSS*[13], decided nearly twenty years after *Gideon*, the Court held that a constitutional right to counsel is presumed only when, if the party loses, he may be deprived of his physical liberty. If the case does not involve this possibility, due process requires the appointment of counsel only if a three-part balancing test dictates such an appointment. Thus, indigent defendants in civil cases have no automatic federal constitutional right to counsel unless their physical liberty is at stake if they lose. There is no "civil *Gideon*."

Need for a "Civil *Gideon*"

In the *Mitchell* case, the Virginia Supreme Court cited *Lassiter* in its ruling that the trial court was not constitutionally required to appoint counsel to represent Mitchell.

The federal and state constitutional requirements for legal counsel to be provided to indigent persons has been the subject of litigation for half a century. Today there is a significant move nationally within the organized bar to require legal counsel at no cost to the indigent in matters of basic human needs, including cases seeking termination of legal rights. As stated above, several states have held that trial courts are required by state constitutions to appoint counsel in civil cases involving fundamental rights. However, as shown above, Virginia has not followed this position.

Justice Earl Johnson Jr. of the California Supreme Court has written in the American Bar Association's *Judges' Journal* that justice for the indigent, if based on mere charity or good luck is just "theoretical and illusory," and without counsel it is difficult for judges to fulfill their essential purpose — to make correct and just rulings.[14] This was the case in both *Mitchell* and *Brazell*.

Justice Lewis F. Powell Jr. stated:

> Equal justice under law is not merely a caption on the façade of the Supreme Court building. It is perhaps the most inspiring ideal of our society. … [I]t is fundamental that justice should be the same in substance and availability without regard to economic status.[15]

Unfortunately, justice is not the same for the rich and the poor. In the *Mitchell* and *Brazell* cases it is doubtful that the defendants' parental rights would have been terminated if they had been able to afford competent legal counsel to represent them in the proceedings in the lower courts. Trial counsel makes a huge difference and should be available to all, regardless of economic status.

In 2005, the ABA formed an access to justice task force to study and recommend whether a resolution should be introduced to support the concept that counsel be required as a matter of right at public expense to low-income persons in certain adversarial proceedings where basic human needs are at stake. In August 2006, the ABA House of Delegates unanimously passed a resolution urging that counsel be required for indigents in civil proceedings that involve shelter, sustenance, safety, health, and child custody, based upon the recommendation of the task force.[16]

The *Judges' Journal* has devoted two recent editions to the need for access to justice for the poor. In its Summer 2008 and Fall 2008 editions the journal provides a comprehensive look at current access-to-justice trends. The articles conclude that programs across the nation have brought new energy, vision, coordination, and focus to maximizing the limited resources that are available for legal services for the indigent. In April 2009, the Philadelphia Bar Association adopted a resolution providing for counsel to be appointed in cases involving shelter, basic human needs, child custody, and termination of parental rights. Other bar associations have adopted similar resolutions.

It is my view that the Virginia State Bar Special Committee on Access to Justice should consider recommending that Virginia adopt a "civil *Gideon*" resolution that requires counsel to be appointed as a matter of right in cases involving important rights where basic human needs, parental rights, child custody, and other important fundamental rights are at stake.

Legal Services Corporation

More than three decades ago, Congress established the Legal Services Corporation, a private nonprofit corporation funded by Congress to financially support legal representation for poor people in civil cases. This representation usually is limited to persons whose family income is less than 125 percent of the poverty line, or about $27,500 for a family of four. Legal services organizations help many indigent persons, but they clearly are unable to meet all the need because of poor funding and the limited type of cases they can handle. Studies by the ABA, state and local bar associations, universities, government agencies, and others estimate that, at most, 20 percent of indigent persons who require legal services in areas of basic human needs are able to obtain such services. One million cases a year must be rejected by legal services organizations because of inadequate resources.

The majority of poor and near-poor people have no meaningful access to legal services

The majority of poor and near-poor people have no meaningful access to legal services, and it appears unlikely that Congress and private donors will provide adequate resources to solve this great challenge to deliver quality cost-effective legal services to the poor. A new approach is required. In addition to the current legal services programs and pro

bono commitments, there is a need for substantial additional resources to be tapped and for creative solutions to be explored.

Use of Law Students to Help the Indigent

Virginia's law schools are a significant and untapped resource available to help meet the need for legal representation of Virginia's indigent. In Virginia, it is estimated that there are in excess of three thousand persons attending law school, approximately one thousand of whom are third-year students. Students could be marshaled to assist poor people who need legal representation if law school clinical programs were in place. Use of law students would not solve the access to justice problem, but it could make a huge difference.

Law students are available in every part of Virginia. They are energetic and creative, and most are dedicated to the rule of law and social justice. Use of law students to serve a fundamental need of our society — to provide access to justice by the poor — would greatly benefit the students by providing training and would help fill the void in resources to provide legal services.

A New Way to Prepare Students

If poor people in need of legal services are to realize the benefit of the untapped resource of law students, law schools must change the way they educate students. The schools and the bar must institute programs that support and assist the implementation of such changes.

For at least two decades, the training of law students has been debated within the profession.[17] The transformation of students into lawyers is a substantial undertaking. In earlier times this was accomplished by the apprentice method. Under the practice of training apprentices through service to established lawyers, aspiring lawyers developed fundamental knowledge and skills through on- the-job tutelage by senior practitioners.

Over the past century, the education of lawyers has moved almost exclusively to law schools. Academic instruction in classrooms is the method by which virtually all lawyers are now taught. It has been a concern for years that classroom teaching does not train aspiring lawyers to become lawyers. Law schools neither train students to become lawyers nor supply them with the information and rules they will need to apply to the practice of law. The primary goal of law school is to teach students to "think like lawyers"; that is, to analyze problems and issues and formulate solutions.[18] Law faculties generally adhere to the view that the point of good professional training is to develop analytical and critical skills.[19] They are not concerned with training in the practical skills.

If poor people in need of legal services are to realize the benefit of the untapped resource of law students, law schools must change the way they educate students.

This academic training comes at considerable expense to law firms and legal organizations that hire law school graduates. Practitioners usually must dedicate several years to develop practical skills not taught in school.

Professor Graham C. Lilly of the University of Virginia School of Law wrote fifteen years ago that "law schools are not well suited, by either their university setting or through their faculties of academic lawyers, to impart professional skills."[20] This has been the view of many legal scholars for decades. Practical experience working with clients would be good for law students and good for the profession. By changing how lawyers are trained and directing students to provide services to the poor, law schools could help fulfill the need for legal services for the poor, and at the same time provide far better training for aspiring lawyers.

Carnegie Foundation Study

In 2007, the Carnegie Foundation for the Advancement of Teaching published a study on the preparation for the profession of law.[21] The study involved extensive field research that included observations and interviews with faculty, students, and administrators at a variety of law schools.

As the Carnegie Foundation study relates, the challenge of professional preparation for the law is to link the teaching of legal educators with the needs of practitioners and members of the public. The basic requirement of the profession is to serve the public.

The Carnegie Foundation study dissects the preparation of lawyers into three components: legal analysis, training for practice, and development of professional identity, including ethics and relationships with clients. Legal analysis developed at law schools is a prior condition for practice. Practice training, in contrast to legal analysis, is the development of skills required to practice the profession. Practical skills are "developed through modeling, habituation, experiment, and reflection," the study relates.

The study recognizes that legal analysis can be taught in classroom settings to many students at once, but that development of practical skills requires individual attention. It suggests that the third element of the framework, professionalism that includes social responsibility and ethics, also should be developed by individual attention.[22] The authors conclude that professionalism needs to become more explicit and better diffused throughout legal preparation, and they urge that movement in this direction be strengthened.[23] The study laments that courses on lawyering skills are typically elective, optional for

the students,[24] and that law school curriculums generally require no training beyond classroom legal analysis courses.

Currently, preparation for practice is left entirely to student initiative and future employers. Further, as the Carnegie study points out, most law school faculty are academicians drawn from a small number of leading institutions, and this limited pool has ensured substantial uniformity in career paths and outlook — especially in matters of faculty promotion and curriculum.[25] The uniformity results in little diversity of experience in faculty prospective among law schools that have advanced their status by copying the gold standard academic approach set for legal education.[26] In the schools visited by the foundation team, faculty consistently said that clinical programs were not a good use of resources, and faculty members were resistant to the importance of clinical pedagogical practices.[27] The study emphasizes that law schools today provide only the beginning stage of students' professional competence.

As every lawyer knows, the first-year law school curriculum is mostly standardized. Law schools impart a distinctive habit of thinking that forms the basis for their students' development as legal professionals. Soon after their arrival at school, law students begin to think like lawyers, sift through cases, and understand the application of legal rules. This process takes place through the "case-dialogue" teaching method. The Carnegie Foundation study discerned that connecting this training with actual practice situations generally remains outside the method.

The study finds that, unlike other professional education — most notably medicine — legal education pays relatively little attention to direct training and professional practices. This is so even though the ABA Section on Legal Education and Admission to the Bar Standard 302 provides that each student receive substantial instruction on "professional skills generally regarded as necessary for effective and responsible participation in the legal profession."

Another limitation found by the study is the failure generally to tie in the legal analysis focus with effectively developing the ethical and social dimensions of the profession. It was concluded by the Carnegie Foundation study that the shortcomings of limited focus on practice and lack of attention to professional responsibility are unintended consequences of the case dialogue method.[28]

The Carnegie Foundation study group endorsed a new and different proposal for legal education: to link the three aspects of legal training – learning to think like a lawyer and legal doctrine and analysis, with the practical and the ethical-social and client relations element. Each aspect would contribute to the strengths of the other, "crossing boundaries to infuse each other."[29] Under the Carnegie Foundation proposal, the third year of law school would be devoted primarily to the practical and client-relations aspects of legal training.

If all eight law schools in Virginia[30] adopt the Carnegie Foundation's recommendation and all third-year students are required to participate in clinical programs to develop practical skills, approximately one thousand students distributed throughout the state will be engaged in clinical programs each year. Third-year students can obtain practice certificates and actually represent parties in court proceedings under the supervision of a licensed attorney. Between eight hundred and one thousand certificates are granted in Virginia each year.

The Carnegie Foundation does not address the types of clinical programs law schools should establish, the types of practical training law students should receive, or what the focus of training should be. I recommend that each law school require that all students complete a minimum of one full semester of clinical work devoted to the indigent, as a requirement for a law degree. This should not be a twelve- or fifteen-hour-per-week program. Full work week attendance should be required, as if employed full-time.

As shown above, meeting the needs of the economically disadvantaged for legal services is a compelling challenge. Law schools generally have not adopted the mission of promoting social justice. My suggested approach to involve law students would shift to those responsible for educating lawyers an important role: making equal justice under law the same for all, regardless of economic status.

Law schools, as the primary source of legal training, should have a duty to inculcate in their students an obligation to provide legal services to the poor and to establish programs to foster this goal. This is consistent with ABA Section on Legal Education and Admission to the Bar Standard 302 (b), which mandates that "a law school shall offer substantial opportunities for: (2) student participation in pro-bono activities." Professor Stephen Wizner of Yale Law School observed in an article published more than ten years ago that law schools must seek to attract and admit applicants who are idealistic and committed to social justice, and law school faculty must teach and nurture the professional obligation of promoting legal assistance for the poor.[31]

The study finds that, unlike other professional education — most notably medicine — legal education pays relatively little attention to direct training and professional practices.

The argument that law schools should lead the quest for equal access to justice has been made by a number of legal scholars. Professor Robert Hornstein,

in a 2008 article[32] in the *William Mitchell Law Review*, cites articles by legal scholars who lament that law schools are educating students for technical proficiency but failing to inculcate in them a proper sense of their social and public responsibilities as members of the legal profession. The scholars urged that law schools, and particularly law professors, have a moral responsibility to instill in their students the professional responsibility of providing legal services for the poor.[33] Professors Jeanne Charn of Harvard Law School and Jeffrey Selbin of the University of California at Berkeley wrote recently that law school clinics are in a unique position to contribute to the unfinished agendas of legal services through clinical education.[34]

I believe that law students should be instructed early that lawyers are responsible for providing legal services to the indigent. The lesson should continue throughout law school, and third-year students should be required to complete a minimum of one semester of clinical programs devoted to social justice.

If law schools required their students to complete a semester of clinical programs, many more energetic young individuals would be providing legal services to the poor. This would benefit both the legal profession and society. The legal profession would benefit through faster and improved training of lawyers, and society would benefit because there would be an influx of prospective lawyers to work on pro bono and legal services projects. With third-year practice certificates, laws students could be appointed to represent indigent defendants. In *Mitchell*, law students could have represented Mitchell in the juvenile and domestic relations court and perhaps enabled Mitchell to retain his parental rights. In *Brazell,* law students could have assisted and advised Brazell early in her encounter with the Department of Social Services. If they were unable to resolve her problems on an administrative level, they could have assisted her in preparing her case for trial and they could have participated in the trial. With proper supervision, law students in many cases can be more effective than practitioners.

With proper supervision, law students in many cases can be more effective than practitioners.

It is recognized that bread-and-butter clinical programs with future employers — such as internships with law firms, prosecutors, and government agencies — are important. They should also be continued and perhaps expanded if law schools adopt the Carnegie Foundation's recommended approach to training prospective lawyers.

A requirement that all law students be compelled to complete one semester of providing legal services for the indigent would be a monumental step toward access to justice for all, irrespective of economic status. The clinical programs should include both civil and criminal clinics.

If all law schools moved to the Carnegie Foundation's model and adopted clinical programs that focus on social justice problems, there would in all likelihood be a shortage of clinical faculty available to provide leadership and supervision of the many students who would be participating. ABA Standard 304-3 requires that clinical courses be under the direct supervision of a member of the law school faculty. To hire enough faculty members to supervise the students would be expensive.

Law schools can economically meet the increased need for clinical program leadership in several ways: Although the courses must be supervised by a clinical faculty member, law school alumni can supervise and lead individual students. Alumni can advise students in practical aspects of law practice. Many law firms require their lawyers to discontinue their active case loads when they reach retirement age. Those lawyers, who include some of the most distinguished in the nation, may be utilized by law schools for clinical training. Virginia has an Emeritus Rule that allows attorneys to retire from active practice and continue to serve as lawyers for legal services organizations. The Virginia State Bar's Access to Justice Committee has requested the Supreme Court of Virginia to modify the rule to explicitly allow emeritus-status attorneys to work with law school clinical programs that provide pro bono services. This would add experienced lawyers to serve the needs of the indigent for legal services. Local bar associations should play a key role by helping to design the programs and staffing them through their committees. In addition, the Virginia Bar Association and specialty bars such as the Virginia Trial Lawyers Association can provide support.

Even with the use of alumni, retired lawyers, emeritus-status lawyers, and bar associations, additional clinical faculty will be needed to supervise the programs. Law schools will have to raise funds to support the added faculty.

Proposed Federal Legislation

U.S. Senator Thomas R. Harkin of Iowa has introduced the Civil Access to Justice Act of 2009. That proposed legislation provides for the federal commitment of additional resources to legal services organizations to fund civil legal services. It would increase the authorized funding level for the Legal Services Corporation from $390 million to $750 million. It would lift many restrictions currently placed on LSC-funded attorneys and would lift all restrictions on nonfederal funds except those related to abortion. Most importantly for law schools, the bill includes a provision that would authorize a grant program from the U.S. Department of Education to expand law school clinical programs.

If enacted, the Civil Access to Justice Act would provide up to $250,000 to each law school. It would permit the funds to be used for planning, training of faculty, salary for additional faculty members, travel and per diem for faculty and students, student stipends, equip-

ment, and library resources. The bill specifically provides that the funds may be used for programs that involve practicing lawyers in the process of training law students to perform as lawyers.

The Harkin bill provides that the cases and situations handled may encompass judicial, administrative, executive, or legislative proceedings, including the full range of preparation for such proceedings, factual investigation, empirical research or legal analysis, and transactional matters.

The bill's provisions for federal commitment to law school clinical programs are significant. They recognize the importance of clinical programs in training lawyers, and they provide financial support for the initiation or expansion of such programs. The bill has wide support in the profession. It is supported by the ABA, the Brennan Center for Justice, the National Legal Aid and Defender Association, and the National Organization of Legal Service Workers.

Virginia Should Take the Lead

The need to change how lawyers are trained is established in the Carnegie Foundation study and supported by a number of legal scholars. The challenge is to train lawyers to fulfill a need for society to provide equal justice under law. As stated above, this very significant undertaking can be accomplished by requiring that all law students participate in clinical programs that provide legal services for the indigent.

Changing the law school curriculas as recommended by the Carnegie Foundation study and using law students to provide access to justice for the indigent as suggested in this article would put Virginia in a position of national leadership in the quest for social justice. Virginia's law students at the same time would be able to develop legal skills and improve their marketability by participating in the clinical programs. They could gain an understanding of the justice system, the meaning of professionalism, and how to interact with clients, and they would graduate with a social consciousness to do their part during their careers to make equal justice under law a reality in our society.

To reach this goal, law schools will need to develop the mechanisms to implement the changes. This is a substantial undertaking that requires thinking outside the box.

A cadre of volunteer attorneys must be trained to work with the students. It is suggested that the Virginia State Bar approve continuing legal education courses specifically designed for attorneys working with law schools in clinical programs. These courses could be developed by the law schools with input from the VSB Mandatory CLE Board and local bar associations. Such courses will need to focus on the intake and processing of cases; the resources that will be provided by law schools; respective roles of the attorneys, the students, and the clinical professors in charge of the programs; and a profile of anticipated clients and unique substantive areas of law.

There will also be a need for each law school to determine the practice areas that it will focus on. Legal services for the poor are needed in many areas: domestic relations, including custody, termination of parental rights, and domestic violence; shelter, such as evictions, foreclosures, and homelessness; problems with governmental agencies; immigration issues; problems faced by the disabled, members of the military, and their families; transactional matters; and many, many others. In the field of criminal law, clinical programs relating to juvenile offenders, capital offense programs, and innocence projects can make a significant contribution to the quest for social justice.

Law schools will be required to develop and staff their clinical programs. The Virginia State Bar should provide guidance and support. Legal services organizations, local bar associations, law firms, and individual practitioners will need to be involved. Nonprofit organizations, community organizations, the courts, prosecutors, and some government entities should also provide support. The entire legal community should join in programs that will greatly improve legal services for the poor. The suggestions herein are not a panacea, but would help develop, sustain, and instill in the next generation of lawyers a zeal to make equal justice under law a reality for all, regardless of economic status.

There would still be a need for all lawyers to provide pro bono services for the poor. The legal services organizations are unable to handle the huge number of cases and the addition of law students would help, but would not in my opinion close the massive gap.

Existing Clinical Programs in Virginia

Clinical programs have existed in different forms in Virginia law schools for years. For a comprehensive list of links to the programs see Virginia Law Schools Offer Clinical Placement Programs by Renae Reed Patrick on page 20. This article describes two.

The Washington and Lee University School of Law is following the recommendation of the Carnegie study to inculcate in students the professional responsibility to provide pro bono services for the poor. The class that entered this fall will be required in their third

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year to devote substantial time to clinical work involving pro bono services.

In fall 2008, Washington and Lee established a pro bono program for indigent persons and senior citizens in Roanoke. The program is housed in the boyhood home of the late civil rights lawyer Oliver W. Hill Sr., in cooperation with the Roanoke Bar Association and the Oliver White Hill Foundation. The law students, with the help of the Roanoke bar, handled pro bono cases involving child custody, immigration, child abuse, victims of crimes, and habeas corpus, as well as other matters that affect the poor.

The Roanoke program has been very favorably received in the community. It is headed by Howard Highland, a Washington and Lee law graduate. A second W&L law graduate was added to the program recently to work with a growing number of students in the 2009–10 academic year.

The University of Richmond School of Law recently established a downtown Richmond clinical law center, which offers students the opportunity to serve the poor. The university's Jeanette Lipman Family Law Clinic represents indigent families in matters that include abuse and neglect, divorce, custody, public benefits, housing, and domestic violence. This clinic is a multidisciplinary collaboration with Virginia Commonwealth University. An Intellectual Property and Transactional Law Clinic offers University of Richmond law students opportunities to represent nonprofit organizations, artists, authors, and investors from a variety of backgrounds. The University of Richmond's Disability Law Clinic represents special-needs children and their families who seek appropriate special education and community based services mandated by federal and state law. The Juvenile Law and Policy Clinic works with state legislators and other state officials, attorneys, and juvenile justice advocates to effect positive change in the laws and policies that impact children in the Virginia juvenile justice system. The University of Richmond also established a Delinquency Law Clinic, which represents youth charged with delinquency offenses that range from petit larceny and trespassing to burglary and possession of illegal drugs. Finally, the Institute for Actual Innocence works on selected Virginia cases in which there is credible evidence that a convicted person may in fact be innocent.

These are two examples that show Virginia law schools' commitment to training students in clinical settings. All eight Virginia schools have dedicated substantial resources to programs involving social justice, and many are closely involved with local bar associations.

Conclusion

Virginia should require that counsel be provided to the indigent in civil proceedings involving basic human needs or fundamental rights, including shelter, sustenance, safety, health, child care, and termination of parental rights. This may require that all members of the bar be compelled to provide pro bono services.

Most states have established specific annual pro bono service goals, but a number have not. Virginia recommends that attorneys devote 2 percent of their professional time to pro bono services. This may not be enough. It is recognized that the profession may be divided on the belief that pro bono work is something that all lawyers should do. Some members of the profession are not fully sympathetic to the cause.

I believe that all members of the legal community agree that it is highly desirable to provide better training for lawyers. My suggestion that law students aid in the cause is an economical approach that will train lawyers better and will benefit the profession and society.

Endnotes:

1 Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low Income Americans* 8 (2007).
2 Roy Stucky and others, *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Association, 2007).
3 *Id.* at 24.
4 Stephen Wizner, *Is Learning to Think Like a Lawyer Enough?* 17 Yale L. & Pol'y Rev. 583, 591 (1998).
5 *Mitchell v. O'Brien*, Supreme Court of Virginia unpublished decision, February 13, 2009.
6 Alaska (In Re K. L.J.B 14 P. 2d 276 (1991). Connecticut) *Lavertine v. Nivaan*, 196 Conn; 403, 493 A. 2d 213 (1985); Florida (O.A.H. v. R.L.A., 712 So 2d 4 (Fla. App. 1988).
7 *Brazell v. Fairfax County Department of Social Services*, Supreme Court of Virginia unpublished decision, August 7, 2009.
8 *Brazell v. Fairfax County Department of Social Services*, Court of Appeals of Virginia, Record No. 1347-06-4 (Joint Appendix, vol. I, p. 530).
9 *Brazell v. Fairfax County Department of Social Services*, Court of Appeals of Virginia, Memorandum Opinion Per Curium, August 12, 2008, unpublished.
10 *Brazell v. Fairfax County Department of Social Services*, Supreme Court of Virginia, unpublished decision, Id.
11 *Slaughter v. Commonwealth*, 222 Va 787, 791, 284 S.E. 2d 824, 826 (1981).
12 *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).
13 *Lassiter v. DSS*, 452 U.S. 18 (1981).
14 Justice Earl Johnson, Jr., California Supreme Court -ABA Judges' Journal, Summer 2008.
15 Often quoted statement of Justice Powell.

16 American Bar Association resolution, August 8, 2006.
17 *See*: Graham C. Lilly, *Law Schools without Lawyers? Winds of Change in the Legal Profession*, 81 Virginia Law Review 1421 (1995); Harry T. Edwards, *The Growing Distinction Between Legal Education and the Legal Profession*. 91 Mich L. R. 34 (1992); Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 Cal L. Rev. 1231 (1991).
18 Moliterno and Lederer, *An Introduction to Law: Law Study and the Lawyer's Role*, Carolina Academic Press 1991, p. 153.
19 Lilly, *id.* at p. 1422.
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21 William M. Sullivan, Anna Colby, Judith Welch Wagner, Lloyd and Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law*, John Wiley and Sons (2007)
22 *Id.* at 14.
23 *Id.* at 87.
24 *Id.* at 87-88
25 *Id*. at 89-90.
26 *Id*. at 101.
27 *Id*. at 101.
28 *Id*. at 185-186.
29 *Id*. at 191.
30 Appalachian, George Mason, Liberty, Regent, University of Richmond, University of Virginia, Washington and Lee and William and Mary.
31 Wizner, *id.* at 585.
32 Robert Hornstein, *Teaching Law Students to Comfort the Troubled and Trouble the Comfortable: An Essay on the Place of Poverty Law in the Law School Curriculum.*
33 *Id*. *See* footnote 18.
34 Jeanne Charn and Jeff Selbin, *Legal Aid, Law School Clinics and the Opportunity for Joint Gain*, New York Law School Clinical Research Institute, Research Paper Series No. 08/09 #3, http://ssrn.com/abstract=1126444.

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The Fifth Amendment Privilege Against Self-Incrimination in Civil Cases

by David L. Arnold and Afshin Farashahi

The privilege against self-incrimination is primarily invoked in the context of criminal prosecutions. As criminal practitioners most frequently encounter Fifth Amendment issues, they tend to be more familiar with the scope and availability of the privilege. Moreover, the Fifth Amendment affords criminal suspects and defendants a blanket protection against self-incrimination. Since there is rarely ever any question as to whether an individual is either a suspect or a target in an investigation, the Fifth Amendment in a criminal context is relatively easy to identify and invoke.

A witness need not give testimony that could lead to criminal prosecution.

Fifth Amendment issues arise in civil cases often with little warning, however, and practitioners who may have never represented a criminal defendant are suddenly confronted with a constitutional right primarily associated with criminal law. Unlike criminal cases, in which a defendant is readily identifiable and may simply refuse to take the stand, civil litigants, witnesses, and their counsel are sometimes afforded less warning — and less time to prepare — for these issues. Accordingly, it is beneficial for all trial lawyers to have a basic knowledge of a Fifth Amendment application in the civil context.

Availability of the Fifth Amendment Privilege

Despite the U.S. Constitution's apparent limitation of Fifth Amendment rights to "any criminal case" (as well as an identical limitation in the Virginia Constitution[1]), the Fifth Amendment privilege is available to an individual in any court proceeding, whether criminal or civil.[2] The rule protects civil litigants and witnesses because incriminating testimony solicited in a civil proceeding could be used against the person in a future criminal case, which directly violates state and federal constitutional prohibitions on compelling a witness from giving "evidence against himself."[3] The privilege, however, is available only to an individual and cannot be invoked on behalf of a company.[4] Moreover, it is a "personal" privilege, and a witness cannot refuse to answer to protect another.[5]

In order to protect an unwitting client against self-incrimination, a practitioner must be able to identify the instance when invocation of the privilege is appropriate and analyze the applicability of the privilege. The privilege applies to testimony that may create a reasonable apprehension of prosecution by the witness. But the Fifth Amendment "does not provide a blanket right to refuse to answer questions."[6] It is up to the judge to determine whether the privilege is properly invoked, and that means that "some investigative questioning must be allowed."[7]

A witness need not give testimony that could lead to criminal prosecution. In other words, there must be some identifiable criminal charge to which the questionable testimony would support or provide a link to evidence to support the charge.[8] To sustain the privilege, "it need only be evident from the implication of the question, in the setting in which it is asked, the responsive answer to the question or an explanation of why it cannot be answered might be dangerous. …"[9] To sustain the privilege, counsel or the witness must demonstrate to the trial court how a prosecutor, "building the most unseemingly harmless answer, might proceed step by step to link the witness to some crime" and that such linkage not seem incredible or remote in the circumstances of the particular case.[10]

Although the privilege is restricted to evidence that is testimonial in nature, it has been applied

in other circumstances. The Supreme Court of Virginia has held that it may be applied to discovery responses.[11] The Virginia Court of Appeals has extended the privilege to "private papers."[12] Practitioners should carefully distinguish, however, testimony that could result in criminal prosecution from that which might result in civil, administrative, or other punitive penalties. No protection is afforded a client who may suffer a penalty as opposed to criminal liability. For example, attorney disciplinary proceedings are civil in nature, and the Fifth Amendment privilege is not available in a Virginia State Bar disciplinary proceeding simply because testimony could result in disciplinary action.[13]

Special analysis is required in situations in which the information sought is not verbal in nature, particularly when the evidence is the target of a subpoena. Private papers that contain incriminating information and are "testimonial or communicative" appear to be privileged.[14] Business records, or other records that are required to be kept by statute, are not protected.[15] Also, documents that might otherwise enjoy protection but which have been transferred to a third party are not protected.[16] When analyzing incriminating documents, the most compelling factor to be considered is possession, rather than ownership of those documents.[17]

In order to uphold criminal statutes, courts have been careful to distinguish between communications and other evidence that could be used in a criminal prosecution. For example, nontestimonial evidence such as breath and blood samples, lineups, and mug shots are not protected. Photographs or electronic computer data are not "testimonial," but they certainly could be incriminating. For instance, a compromising photograph suggesting adultery in the possession of a party to a divorce proceeding or the computer hard drive in a business conspiracy case where embezzlement has occurred is not likely to be protected by the Fifth Amendment. A carefully crafted subpoena could circumvent the privilege. In similar instances, practitioners should not assume that the privilege is available, or that it is definitely enforceable if an adversary invokes it.

Methods of Invoking the Privilege Against Self-Incrimination

Whereas a criminal defendant enjoys a blanket protection and may simply invoke Fifth Amendment privilege and refuse to take the stand, offer any testimony, or answer any questions, the Fifth Amendment privilege enjoyed by civil litigants and witnesses is more narrowly applied. A criminal defendant may simply refuse to take the stand; a civil litigant or witness, however, may not refuse to take the stand and may not refuse to offer testimony. To the contrary, in the civil context, the Fifth Amendment privilege extends only to specific questions. The privilege will not be automatically sustained upon a declaration by the witness or the witness's counsel that the response could be incriminating. For obvious reasons, the witness need not explain in minute detail why the response may be incriminating. To do so may jeopardize the very protection that the privilege seeks to establish. However, the privilege must be invoked for each question. At trial or in a deposition, the witness must take the stand and invoke the privilege for each and every applicable question posed. Only the witness, and not his or her attorney, can invoke the privilege.[18] In the context of a civil discovery process, such as interrogatories and requests for admissions, the privilege must be invoked in the responses.

Most Common Pitfall: Waiver of the Privilege

The privilege is most commonly waived when a client simply answers the question posed. The response will be considered a waiver not just to that specific question, but also to the matter and events relating to the question.[19] Moreover, the affirmative denial of an allegation in a pleading may result in waiver of the privilege with regard to specific questions posed in discovery further along in litigation.

It is much more burdensome to invoke the Fifth Amendment privilege as opposed to waive it. To invoke, a witness has to invoke for each question. But by answering one question, waiver attaches not just to the question, but also to related inquiries.

When analyzing incriminating documents, the most compelling factor to be considered is possession, rather than ownership of those documents.

Limitations On and Consequences In a Civil Proceeding

Counsel should be aware that, although the Fifth Amendment privilege is a right that always accompanies a person to any legal proceeding, there are some limitations to invoking it. The concern usually involves the person who uses the

privilege not to shield himself from criminal liability but as a sword to hinder the other party's attempts to obtain information. As explained below, the General Assembly has diminished the ability to abuse the privilege.

Another limitation of availability is that the privilege cannot be invoked when the risk of criminal prosecution has dissipated, such as when the statute of limitations has expired. And the privilege does not apply to embarrassing or degrading responses, nor to testimony that may lead to civil liability. Finally, as discussed above, it does not protect against producing nontestimonial, incriminating evidence.

Sword and Shield Doctrine and Virginia Code § 8.01-223.1

The Virginia Supreme Court in *Davis v. Davis*[20] set out the common law doctrine of "sword and shield," explaining that the privilege against self-incrimination was intended solely as a shield. The rule thus provides that a moving party cannot use it as a sword to sabotage any attempt by the other party, either during pretrial discovery or at trial, to obtain information relevant to the cause of action alleged and to possible defenses of the claim.[21]

This doctrine's applicability in Virginia is questionable in light of Virginia Code § 8.01-223.1, which states, "In any civil action the exercise by a party of any constitutional protection shall not be used against him." The court of appeals has interpreted this latter provision as superceding, at least in some instances, the sword and shield doctrine.[22] In effect, the invocation of the Fifth Amendment privilege is a weapon available to both parties that can prevent disclosure of relevant information.

On the other hand, the impact of this protection may be minimized in the context of divorce cases where adultery is alleged. In divorce proceedings, allegations of adultery must be proven by clear and convincing evidence. In a case in which the alleged adulterer's conduct is suspicious, one factor the courts consider is whether an explanation has been provided for the conduct. If no explanation has been provided, then an adverse inference may be drawn. Even when the privilege against self-incrimination has been invoked, it appears that, despite the protection afforded by § 8.01-223.1, it is still possible for an adverse inference to be drawn.[23] In *Watts v. Watts*[24], this is precisely what the Court of Appeals did. The husband had invoked the privilege during deposition when asked about whether he had engaged in extramarital intercourse. In a footnote, the court stated that it was "mak[ing] no negative inference based" on this exercise of the Fifth Amendment right.[25] But the court, having found sufficient evidence of adultery, then made the following statement: "In [invoking the Fifth Amendment], however, husband failed to provide a reasonable explanation for his conduct, a matter about which we do take cognizance."[26]

On this issue, counsel should also review *Romero v. Colbow*,[27] a divorce case in which the wife invoked the privilege in connection with questions about adultery. The Court of Appeals upheld the commissioner in chancery's finding that evidence was not sufficient to prove the wife had committed adultery despite very strong suspicious circumstances. The commissioner, relying on Code § 8.01-223.1, had said that the wife's invocation could not be used against her.[28] The Court of Appeals issued its ruling without commenting on this statement of the commissioner.[29]

Virginia Code §§ 8.01-401(B) and 8.01-223.1

Under Virginia Code 8.01-401(B), when one party calls another party to testify and the latter party refuses to do so, the court may punish the refusing party for contempt of court. In addition, the court may punish the refusing party by dismissing the action (if the refusing party is the plaintiff) and strike or disregard the plea, answer, or other defense of the party.

Just as with the sword and shield doctrine, the effectiveness of this provision has been diminished by Virginia Code § 8.01-223.1. One circuit court has ruled that Code § 8.01-223.1 is a more specific statute because it addresses a refusal to testify based on a constitutionally protected right as opposed to a general refusal.[30] Therefore, under this reasoning, a party cannot be punished for refusing to testify based on the privilege against self-incrimination. But note that § 8.01-223.1 applies to "a party" in a civil action; this could suggest that if a party's witness invokes the privilege against self-incrimination, then the trial court is permitted to draw an adverse inference against that party.

Virginia Code § 19.2-270

Counsel who is attempting to counter an invocation of the privilege by the opponent should also become familiar with Virginia Code § 19.2-270, which provides

> In a criminal prosecution, other than for perjury, or in an action on a penal statute,

> evidence shall not be given against the accused of any statement made by him as a witness upon a legal examination, in a criminal or civil action, unless such statement was made when examined as a witness in his own behalf.

On a quick reading, the statute appears to provide immunity from future prosecution, thereby preventing the invocation of the privilege against self-incrimination. As discussed above, in order to validly invoke the privilege, there must be a danger that the statement will support some part of a criminal case against the witness. However, the statute does not provide the type of blanket immunity (such as derivative use or transactional immunity) that would prevent an invocation of the privilege. First, notice that the statute only prevents the statement being used in a subsequent prosecution. It does not prohibit using that statement to lead to other evidence; the statute only provides use immunity and not derivative use or transactional immunity. This is significant because a witness can base an invocation on the premise that the statement, even though not directly admissible, may lead to other evidence.

Also, the statute provides the immunity only if the person is testifying on his own behalf. If an attorney's client is a witness in a litigation in which the client has no interest, then the statute does not apply to that witness.

Finally, the statute does not encompass perjury prosecutions. A client cannot invoke the privilege because she wants to commit perjury at a later hearing. But if the client has already given testimony under oath in another matter and that testimony is arguably inconsistent with what the client intends to testify, then a valid basis likely remains to invoke the privilege.

Conclusion

In criminal cases, the privilege against self-incrimination frequently arises, and counsel is typically prepared to address the issue well in advance of the moment. In the civil arena, however, the privilege can come up unexpectedly. If the issue is missed — or misunderstood — then the consequences can be severe. An inadvertent waiver of the issue will mean that the client will be deprived of invoking a powerful constitutional protection. ⚖

Endnotes:

1 Va. Const., art. I, § 8.
2 *Husske v. Commonwealth,* 252 Va. 203, 214, 476 S.E.2d 920, 927 (1996).
3 Va. Const., art. I, § 8.
4 *North American Mortgage Investors v. Pomponio*, 219 Va. 914, 918, 252 S.E.2d 345, 348 (1979).
5 *Id. at* 920, 252 S.E.2d at 349 (citing *Rogers v. United States*, 340 U.S. 367, 371 (1951).
6 *Cunningham v. Commonwealth*, 2 Va. App. 358, 361, 344 S.E.2d. 389, 391 (1986).
7 *Id.* at 361-62, 344 S.E.2d at 391.
8 *Pomponio*, 219 Va. at 919, 252 S.E.2d at 348 (citations omitted).
9 *Id.* at 919, 252 S.E.2d at 348 (quoting *Hoffman v. United States*, 341 U.S. 479, 486-487 (1951)).
10 *Id.* at 919, 252 S.E.2d at 348-349 (quoting *United States v. Coffey*, 198 F.2d 438, 440 (3d Cir. 1952)).
11 *Dunlaney v. Smith*, 97 Va. 130, 33 S.E. 533 (1899).
12 *Moyer v. Commonwealth*, 30 Va. App. 744, 751, 520 S.E.2d 371, 375 (1999).
13 *Tucker v. Virginia State Bar*, 233 Va. 526, 357 S.E.2d 525 (1987).
14 *Moyer*, 30 Va. App. at 751, 520 S.E.2d at 375.
15 *United States v. Doe*, 465 U.S. 605, 606 (1984); *Shapiro v. United States*, 335 U.S. 1, 16-18 (1948).
16 *United States v. Taylor*, 399 F.Supp. 681 (E.D. Va. 1975).
17 *Id.*
18 *Powell v. Commonwealth*, 167 Va. 558, 577, 189 S.E. 433, 441 (1937).
19 *Rogers v. United States*, 340 U.S. 367, 373-74 (1951); *Woody v. Commonwealth*, 214 Va. 296, 199 S.E.2d 529, 531 (1973).
20 233 Va. 452, 357 S.E.2d 495 (1987).
21 *Id.* at 456-457, 357 S.E.2d at 498.
22 Virginia Code § 8.01-223.1 went into effect before the *Davis* opinion was published. But *Davis* did not address this code section because the relevant facts in *Davis* arose before the statute went into effect.
23 In Virginia, adultery is Class 1 misdemeanor, which carries a maximum penalty of twelve months in jail and a fine of $2,500. Virginia Code §§ 18.2-366, 18.2-11.
24 *Watts v. Watts*, 40 Va. App. 685, 581 S.E.2d 224 (2003).
25 *Id.* at 702 n.2, 581 S.E.2d at 233 n.2.
26 *Id.*
27 27 Va. 88, 497 S.E.2d 516 (1998).
28 *Id.* at 93 , 497 S.E.2d at 518-519.
29 Despite the omission of any discussion of the Fifth Amendment in *Romero*, the Court of Appeals in the *Watts* case cited *Romero* in a footnote as holding specifically that the wife's invocation could not be used against her. *Watts*, 40 Va. App. At 702 n.2, 581 S.E.2d at 233 n.2.
30 *Murphy v. Murphy*, 19 Va. Cir. 96 (Fairfax County 1995).

Debt Collection
Serving and Supporting the U.S. Economy

by David B. Ashe

Our have-now society does not exist in a pay-now economy. As a result, debt collection is not only essential to the U.S. economy, it is understandable. The fundamentals of the U.S. market are easy: services are provided, goods are delivered, and then payments are owed. However, things happen that disrupt the market. Bad timing, bad luck, and hard luck lead to debt. The debt collectors engage.

Creditor clients are incredulous when collection attorneys explain that there is nothing simple or casual about a communication to collect a debt.

John Smith obtained a credit card. He asked for it, he needed it, and he used it. But life got in the way and the card was closed for nonpayment with an unpaid balance. His credit score is now blemished, default penalties are likely, and so is the embarrassment of being behind on bills. Does the arrival of the debt collector portend additional pain or needed relief for the debtor? The collector will likely settle for a reduced amount, so Mr. Smith will obtain a discount he never expected. Plus, considering the time between default and collection activity, Mr. Smith obtained an unexpected extension on his payment schedule. With additional time to pay on a now reduced total, Mr. Smith has his best chance ever to clear this blemish from his credit history. Lastly, the bank that once faced a total loss for this account now has obtained a partial recovery.

The key element in the above scenario was communication. Unfortunately, pitfalls prevent something as simple as a phone call or a letter from a debt collector. Creditor clients are incredulous when collection attorneys explain that there is nothing simple or casual about a communication to collect a debt. A New Jersey case has attempted to discourage any collector from even leaving a voice mail message. What about written communications? The Fair Debt Collection Practices Act (FDCPA) requires that if a debtor asks for verification of the debt, the collector must provide it in writing. What if the debtor uses one of the many downloadable collection response forms on the Internet to request no further contact, but still requests verification? This, too, has been the source of litigation against the collector.

From the perspective of collectors, the FDCPA is a good law. As written and intended, it's easy to navigate. When Congressman Frank Annunzio of Illinois championed this legislation in 1977, he sought to end the midnight phone calls, the false threats that debts have criminal liability, the attempts to reveal a consumer's debt to third parties. Even if the FDCPA did not exist, most people in this country would not use such dishonorable tactics. Fortunately, Congressman Annunzio's goals were achieved. Unfortunately, there was just enough space in the mortar of this law to stick a crowbar in there and wiggle out a few bricks.

The Federal Trade Commission and vigilant consumer attorneys have stopped many violations of the FDCPA. However, creatively construed claims can still allege an FDCPA violation. As an example, a federal case in Alabama has attempted to convert a statute of limitations in that court from an affirmative defense to a provision of the FDCPA. By statute in Virginia, as in most states, a statute of limitations is affirmative and must be raised by the defendant. In collection cases only, that Alabama case attempts to replace legislative

statute and require a collector to assess whether a debtor could possibly raise this defense in a collection suit. Nowhere else in civil litigation must a plaintiff abandon his claim due to the possible existence of a defense the defendant might raise and upon which the defendant might prevail.

Despite any disagreements about the FDCPA, no business can ignore outstanding accounts receivable or the critical need for available credit. In its 2009 *Roundtable Report*, the FTC stated:

> Consumer credit is a critical component of today's economy. Credit allows consumers to purchase goods and services for which they are unable or unwilling to pay the entire cost at the time of purchase. By extending credit, however, creditors take the risk that consumers will not repay all or part of the amount they owe. If consumers do not pay their debts, creditors may become less willing to lend money to consumers, or may increase the cost of borrowing money. Creditors typically use collectors to try to recover on debts to decrease the amount of their lost revenues. Debt collection thus helps keep credit available and its cost as low as possible.

Regarding purchased debt, most Virginia judges have avoided a temptation to address purchased debt action different from a third-party contingency collection effort. As the FTC statement above suggests, there is no difference. Needed service in the form of a credit card was extended and a balance is owed. To suggest that a simple assignment of a debt dilutes the substance of the debt questions the solid case law in Virginia regarding assignments and the fact that the assignee "stands in the shoes" of the assignor. *Nat. Bank & Trust Co. v. Castle*, 196 Va. 686, 85 S.E.2d 228 (1955)

There is also no dilution of the reliability of documentation that an assignee might produce from the assignor. A dozen federal agencies and federal laws and regulations are based on the information contained in the final or "charge off" statement of a credit card account. While the final balance reflected on the defaulted account will undoubtedly contain late fees and interest, these are service charges accepted by the cardholder and a fee for the credit service provided. As is noted in numerous cases across the country, credit card statements were not produced in preparation for litigation, they were generated in the normal course of business to reflect the routine transactions required to operate a business and as such, have an inherent trustworthiness.

In a previous scenario, it was easy to determine that with good communication enabled, the arrival of a debt collector brings relief to the debtor. Has the arrival of these interpretations of the FDCPA brought added relief to the debtor? There are not very many moving parts to the job of a debt collector: Make contact with the debtor and discuss payment arrangements. FDCPA litigation has narrowed or eliminated safe harbor conduct for many commonsense routes of communication with the debtor. Cautious collectors are being forced to avoid attempts to simply discuss the debt with the consumer. What is left for the collector except a lawsuit? And the collector had best not wait too long for that, either. ⚖

Author's note: A tip of the hat to a debt collection company operating in Virginia, Asset Acceptance LLC. Its mission statement is strong endorsement of any action taken on an account receivable: Returning value to our credit driven economy.®

A dozen federal agencies and federal laws and regulations are based on the information contained in the final or "charge off" statement of a credit card account.

Identity Theft and the Fair Credit Reporting Act: A Primer for Attorneys[1]

by Kellam T. Parks

It is estimated that more than nine million Americans had their identities stolen in 2008.[2] This occurs by companies "losing" clients' confidential data; "phishing," (seemingly authentic e-mails requesting verification information for accounts, but instead coming from scammers seeking personal information); computer hacking; and lost or stolen wallets, purses, or mail.

More people know of the problem due to the increased frequency of identity theft and public awareness campaigns, but few know how to rectify the problem. Victims are often overwhelmed and do not know their rights or what to do. Many attorneys have clients or potential clients calling them seeking assistance.

This article is a primer for the steps to follow in the event of identity theft and a brief overview of the Fair Credit Reporting Act (FCRA). I recommend that a victim of identity theft take these steps in order, if not simultaneously:

Contact a credit reporting agency.
The victim should contact any of the three major credit reporting agencies (CRAs): Equifax, TransUnion, and Experian, and ask that a fraud alert be placed on his or her file.[3] This can be done by phone. Any CRA contacted must alert the other two once a request has been made. The alert prohibits creditors from extending credit to the victim without verifying his or her identity. This alert will remain active for not less than ninety days. This alert also entitles the victim to one free report[4] from each agency (every consumer in America has access to one free credit report every twelve months[5]). Be aware that a fraud alert will slow down approval of any authentic credit checks, as the creditor will need to verify the victim's identity. However, a telephone number may be provided in the fraud alert that the creditor may use to contact the victim for verification purposes.

The victim can also request that an extended fraud alert, active for seven years, be placed on his or her file. This requires the victim to fill out an identify theft report with the CRA, which can vary in substance, but usually requires the agency form such as affidavits, proof of identity, relevant documents, and a filing with a law enforcement agency. The extended alert entitles the victim to two free credit reports within twelve months and the CRA will automatically remove the victim from the marketing prescreened list for five years, unless he or she asks to be placed back on the list before that time.

In addition to the fraud alerts with the CRAs, a Virginia law went into effect on July 1, 2008, that also allows its citizens to place a security freeze on their credit by contacting each of the CRAs.[6] This security freeze prevents the victim's credit file from being shared with potential creditors. After July 1, 2009, the CRAs have to comply within one business day.[7] The law is detailed and it is important that the victim follow the procedures carefully.[8]

Beyond the initial ninety-day fraud alert call, all steps should be documented in writing and anything sent to a third party during the process of addressing the identity theft should be sent by certified mail, with return receipt requested and copies kept for the victim's records. In addition, all documents given to third parties should be copies. Originals should be stored safely for future use.

Close accounts.
The victim should close any accounts that were created or were abused, due to the identity theft. He or she should obtain the contact information for the creditor's fraud department and then send all relevant information with an explanatory letter to that department. The victim should also ask if

the creditor accepts the Federal Trade Commission's ID Theft Affidavit, which can be downloaded at the FTC's website.[9] If not, the victim should request each creditor's specific fraud dispute form to fill out and return. Once the accounts have been closed and any fraudulent charges reversed, the victim should request a letter confirming the actions and status for his or her records. Unfortunately, often the old information reappears on the victim's credit, and the letters will speed up the process of correcting the information in the future.

When new accounts are opened to replace those that have been closed, the victim should be sure to place passwords on them. The passwords should not be easy to guess or readily available from personal information that has already been compromised.

Cancel government-issued documents and licenses.
The victim should contact any government agency that has issued a license or document, and follow its procedures for canceling and requesting a re-issuance. The victim should also request that his or her file or account be flagged to prevent further access to the account from anyone other than the victim and any authorized agent.

File a report with the police.[10]
The victim should file a report with the police and obtain a copy of the report. Sometimes the local police will be reluctant to take an identity theft report, so the victim may need to try a different jurisdiction such as the jurisdiction where the identity theft took place or where the card or information was used.[11] An in-person meeting should be attempted to make the report rather than any automated process that may be offered. This will allow the victim to present all of the evidence at the outset. It also will allow for better verification by third parties, should the need arise.

File a complaint with the FTC.
The victim should file a complaint with the FTC.[12] This will be useful personally to corroborate to third parties that the theft occurred and also for the government to keep track of such crimes and assist in combating them.

Clean up the victim's credit.
Once the steps in reporting the identity theft and setting up measures to prevent any future damage have been taken, it is important to address the victim's credit itself. The first step is understanding the law protecting consumers' credit. The FCRA, 15 U.S.C. § 1681 *et seq.,* as amended by the Fair and Accurate Credit Transactions Act of 2003, governs credit reporting and provides for redress for correcting identify theft. The FCRA allows the recovery of both statutory and actual damages suffered by the victim, as well as attorney's fees and costs against the offending party. This fee-shifting scheme aids those victims who normally could not afford counsel to assist them in their efforts to clear their credit. As to identity theft, the FCRA usually applies by addressing unauthorized access to a victim's consumer report and by inaccurate information not being removed from the victim's report.

Once the consumer disclosure has been obtained from the CRA, or a copy of the consumer report given by the CRA to a third party, the victim should review them carefully and note any incorrect information. Each CRA disclosure or report will contain different information, as each creditor or "furnisher," as they are defined under the FCRA, may report to a different CRA. A dispute should be sent to each CRA detailing the inaccurate information. It is especially important that this dispute be in writing (even though the victim may be able to report same online or over the phone) and sent certified return receipt requested. Should litigation be necessary to resolve the situation, the timing of the disputes and the information provided in them become necessary and important evidence.[13]

Once a CRA receives the dispute, it must forward it, including "all relevant information provided by the consumer," to the furnishers against whom the dispute pertains. The CRA must update its information, correct any inaccuracies generally within thirty days of receiving the consumer's dispute, and notify the consumer of the outcome. The CRA can be liable for failing to comply with the various duties and accuracy requirement in the FCRA. The furnishers must conduct an investigation, review the information provided by the agencies, and report the results back to the CRA. If the furnishers fail to perform any of these steps, they too can be liable under the FCRA. These procedures protect the victim of

The victim should close any accounts that were created or were abused, due to the identity theft.

identify theft, as many furnishers fail to adequately investigate disputes.[14] Without the protections of the FCRA, creditors could routinely ignore consumers, and victims would never get out from under the false claims for monies owed and their credit would remain damaged.

Identity theft can be the financial ruin of an individual and often causes tremendous stress and emotional turmoil. It is important for victims to know their rights and the steps that can be taken to enforce them. An excellent source for information for both attorneys and victims of identity theft is the FTC's official ID theft website.[15] Either as a victim or an attorney contacted by a victim, the steps detailed here and the resources provided in this article will help in taking back the life stolen by identity theft.

Endnotes:

1 Adapted and updated from the author's 2006 article, "How to Take Back Your Life After Identity Theft." *The Journal Vol 18, #4 (VTLA, 2006)*

2 Federal Trade Commission estimate (www.ftc.com); *see also* the Federal Trade Commission's 2006 ID Theft Survey, which estimated 8.3 million victims in 2005 (www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf); Javelin Strategy & Research 2009 Identity Fraud Survey Report, which estimated almost 10 million victims in 2008 (www.javelinstrategy.com)

3 Equifax: (800) 525-6285; P.O. Box 740241-0241, Atlanta, GA 30374
Experian: (888) 397-3742; P.O. Box 9532, Allen, TX 75013
TransUnion: (800) 680-7289; Fraud Victim Assistance Division, P.O. Box 6790, Fullerton, CA 92834-6790

4 Technically, the information you receive from a CRA is a "consumer disclosure," not a "credit report." In fact, a "credit report" does not exist under the Fair Credit Reporting Act. A third party receives a "consumer report," which is the document that triggers many of the act's protections. For purposes of this article, however, I use the popular term "credit report" until the section dealing with the FCRA for simplicity.

5 www.annualcreditreport.com; (877) 322-8228. I would recommend getting a copy of the Annual Credit Report Request Form and mailing it rather than obtaining the online information for better record-keeping and a cleaner result. You can obtain the form at the website and it should then be mailed to: Annual Credit Report Request Service, P.O. Box 105281, Atlanta, GA 30348-5281.

6 Va. Code § 59.1-444.2.

7 *Id.*

8 The Federal Trade Commission provides a link to a summary sheet with instructions, www.consumersunion.org/pdf/security/securityVA.pdf.

9 www.ftc.gov/bcp/edu/resources/forms/affidavit.pdf

10 Identity theft is both a federal crime (18 U.S.C. § 1028) and a Virginia crime (Va. Code § 18.2-186.3).

11 With the increased frequency of this crime and the growing importance of credit and digital data, more attention is being paid to these crimes and greater resources are being allocated to pursuing such criminals. As an example, President George W. Bush formed a task force in May 2006 to combat identity theft, with recommendations from that task force being issued in April 2007 (www.idtheft.gov/reports/StrategicPlan.pdf), and a report on the steps taken to implement the recommendations being issued in October 2008 (www.idtheft.gov/reports/IDTReport2008.pdf).

12 (877) ID-THEFT (438-4338); Identity Theft Clearinghouse, Federal Trade Commission, 600 Pennsylvania Ave. NW, Washington, DC 20580; www.ftccomplaintassistant.gov.

13 If at all possible, copies of any consumer reports provided to third parties by a CRA should be obtained. Usually they exist because there has been a denial of credit or contact from a creditor that alerts an individual that he or she has been the victim of identity theft. The purpose of using the consumer reports as a basis for disputing inaccurate information rather than consumer disclosures is twofold. First, the information on a consumer report is often different than the consumer disclosure, as the CRA uses a more stringent set of controls for the disclosures than the reports. Second, the CRA's liability under the FCRA is only triggered when referring to a consumer report, not a consumer disclosure.

14 On July 1, 2009, the federal banking agencies, the National Credit Union Administration, and the FTC issued joint rules to implement FACT Act requirements for furnishers to, in part, investigate disputes reported directly to them (as opposed through the CRA verification process). 16 CFR Part 660.4; 74 Fed. Reg. 31484 (7/1/09). The joint rules become effective July 1, 2010. *Id.* Unfortunately, the FCRA does not allow private enforcement against furnishers for failing to keep adequate records, accurate reporting to the CRAs, or handling a direct dispute, unless a dispute has been made with the CRAs and the furnisher then fails to properly verify the information. 15 U.S.C. §§ 1681s-2(c)&(d).

15 www.ftc.gov/bcp/edu/microsites/idtheft

Sharon's Story
The Advantages of a General Practitioner

by Robert L. Flax

My friend Sharon had multiple legal needs, and her story shows the advantages of a general practitioner. Because she turned for help to a small-firm practitioner, she had the flexibility and economy to pursue her rights through many courts over several years. Her attorney could draw on past work and training to represent her in each venue.

Her legal journey began with a show cause. After winning it in circuit court, Sharon defended it in the Virginia Court of Appeals and Supreme Court of Virginia. Her lawyer's experience with workers' compensation appeals helped write the brief, give oral argument, and successfully move to dismiss the Supreme Court appeal.

After remand to the circuit court, Sharon's ex-husband filed bankruptcy to get out of jail. The bankruptcy court referred Sharon to mediation of her objection to discharge. Her attorney's earlier workers' compensation mediations and lectures from the Virginia Trial Lawyers Association and the Virginia Bar Association aided preparation and conduct of the mediation. When mediation failed, the objection was tried in bankruptcy court. Her lawyer's skills, developed in previous objections to student loans and consumer debt, came to bear in Sharon's representation.

After bankruptcy court set the amount owed by the ex-husband, Sharon sued the guarantor of his circuit court appeal bond. Experience with posting appeal bonds in criminal and civil cases helped her general practitioner defend the validity of the appeal bond in the circuit court.

The guarantor filed bankruptcy after being sued. The objection to discharge was settled days before the trial. That settlement proved to be the only substantial payment Sharon received.

Sharon survived on disability benefits. She could not have pursued her cases unless her attorney belonged to a small firm and did not have to answer to anyone but his wife.

Months after her settlement, Sharon was diagnosed with cancer. The last services her lawyer provided to her were a will, medical power of attorney and living will, and helping her niece administer her estate.

Sharon gave her consent to this article before she passed away.

Her legal journey required her lawyer to be familiar with domestic relations, appellate practice, mediation, and bankruptcy. Practice in unrelated fields like workers' compensation and membership in professional organizations such as the Virginia Trial Lawyers Association provided skills to effectively help Sharon.

Sharon's story shows that general practice gave her lawyer the opportunity to learn from dissimilar experiences. Those experiences and the flexibility of a small firm helped her to receive uninterrupted assistance during the abrupt changes in direction of her cases and her life. ⚖

Sharon's story shows that general practice gave her lawyer the opportunity to learn from dissimilar experiences.

You Think You Know Statutes of Limitations?

by Erin W. Hapgood

Most attorneys know that the statute of limitations for personal injuries is two years, but what about defamation or a guardian's claim for a child's medical expenses? When does the cause of action accrue and what may toll it? As the bar exam fades into history, the bells that ring on limitations issues get fainter and fainter. Recently a partner in our firm reviewed the Virginia Code sections related to limitations. The results were surprising. This article cannot address all matters relating to limitations, but will refresh memories and provide a starting point, should you ever have a limitations problem.

There are few substantive or procedural areas of the law that can lead to malpractice as fast as missing a statute of limitations.

Even attorneys who do not file a complaint or an answer are presented with statute of limitations issues. A friend may ask casually for legal advice or a client for whom you prepared limited liability company papers now wants an accounting. Maybe a court-appointed client tells you that the last time he was in jail they did not respect his dietary restrictions and he wants to sue. Any response provided by an attorney can lead to a belief by the recipient that there is an attorney-client relationship with respect to that claim, which can present problems for attorneys. There are few substantive or procedural areas of the law that can lead to malpractice as fast as missing a statute of limitations. All attorneys should have a passing familiarity with them.

So, how well do you know your statutes of limitations? Before you continue reading, test yourself by taking the quiz on page 45.

So when does the cause of action accrue? Knowing the period is necessary, but so is knowing when the clock started ticking. As with all of the statutes involved, there are exceptions, but there are some basic rules which can be relied on in many cases. For injury to the person or damage to property the right of action accrues on the date the injury is sustained. Va. Code § 8.01-230. For contracts, when the breach occurred (not when the damage is discovered except when only equitable relief is sought or as otherwise provided). Va. Code § 8.01-230. For a medical malpractice claim based on a foreign object being left in the body the cause of action does not accrue until discovery of the object. Va. Code § 8.01-243 (C) (1). If fraud concealed the medical malpractice, a plaintiff will have one year from when the fraud was or should have been discovered. Va. Code § 8.01-243 (C) (2). For failure to diagnose a cancer tumor a patient has one year from when the diagnosis is communicated to the patient. Va. Code § 8.01-243 (C) (3) (prior to July 1, 2008).

Even if a limitation period has passed, certain events can toll the statutes of limitations. § 8.01-229. These include infancy and incapacity, which toll the limitations period until that disability is removed. § 8.01-229 (A)(1). The death of one party or another also affects the limitations (§ 8.01-229 (B)) as does an injunction (§ 8.01-229 (C)), obstruction by the defendant (§ 8.01-229 (D)), and other factors (§ 8.01-229 (E) – (K)). A suit filed in which the plaintiff has no standing does not toll the limitations period because such a suit is a legal nullity. *E.g., Johnston Memorial Hosp. v. Bazemore*, 277 Va. 308, 312 – 13, 672 S.E.2d 858, 860 (2009).

Limitations issues present in amendment to pleadings as well. *See,* Va. Code §§ 8.01-6, 8.01-6.1, 8.01-6.2, 8.01-18. On the defense side, the bar of the statute of limitations is raised as an affirmative defense in a responsive pleading, but not a demurrer. Va. Code § 8.01-235.

The failure to comply with the statute of limitations is an absolute bar to a claim and often leads to malpractice claims.[1] The lesson is, if an attorney in any way enters into representation of a claimant — even if the intent is to advise rather

How well do you know your statutes of limitations?

			Virginia Code Section
1.	Personal injury	____	8.01-243 (A)
2.	Property damage	____	8.01-243 (B)
3.	Fraud	____	8.01-243 (A)
4.	Parent's claim for children's medical expenses	____	8.01-243 (B)
5.	Medical malpractice (minor plaintiff)	____	8.01-243.1
6.	Wrongful death	____	8.01-244
7.	Written contract	____	8.01-246 (2)
8.	Unwritten contract	____	8.01-246 (4)
9.	Partner suits against each other for accounting	____	8.01-246 (3)
10.	Defamation	____	8.01-247.1
11.	Others not specifically listed	____	8.01-248
12.	Repose (damages from improvements to real property)	____	8.01-250
13.	Enforcement of judgments	____	8.01-251
14.	Money claim against the Commonwealth	____	8.01-255
15.	Notice for money claim against the Commonwealth	____	8.01-255
16.	Claims by the Commonwealth	____	8.01-231
17.	Claims by convicts related to the conditions of confinement[2]	____	8.01-243.2
18.	Notice for negligence claims against local governments	____	15.2-209
19.	Monetary claims against counties	____	15.2-1248
20.	Notice for tort claims against the Commonwealth	____	8.01-195.6
21.	Breach of condition subsequent or termination of fee simple determinable interest	____	8.01-255.1
22.	Workers' compensation injuries	____	65.2-601
23.	Legal malpractice	____	8.01-246

than represent — she must be sure to make the limitation on filing and her scope of representation perfectly clear to the client. The Virginia Supreme Court recently addressed a legal malpractice case where the issue of whether the failure to timely file a Virginia personal injury action. *Williams v. Joynes,* 278 Va. 57, 677 S.E.2d 261 (2009). The Court did not even discuss whether missing the deadline for filing the action was a breach of the attorney's duty. The negligence seemed to be presumed and the case turned on whether the negligence was the proximate cause of the plaintiff's injury.

Many jurisdictions adhere to the rule that fraudulently concealing the mistake will toll the statute of limitations.

Missing the statute of limitations is clearly a violation of an attorney's ethical obligations to his client, including the Rules of Professional Conduct 1.1 (competence), 1.3 (diligence), and potentially 1.4 (communication) if the attorney does not promptly inform the client of his mistake. Negligent failure to timely file an action, particularly in the personal injury context, "is one of the more common grounds of liability in legal malpractice actions." *See* authorities and discussion in, James Lockhart, *Cause of Action Against Attorney for Malpractice in Handling Personal Injury Claim,* 10 Causes of Action 87 (Originally published in 1986, updated 2009).

The attorneys in *Williams v. Joynes,* 278 Va. 57, 62, 677 S.E.2d 261, 264 (2009) missed the statute of limitations on a personal injury action, but assisted their client once the mistake was discovered. They informed the client "that the lawsuit had not been timely filed within the two-year statute of limitations governing personal injury actions in Virginia" and that the client "may have a malpractice claim" against them so should "consider hiring other counsel to explore this possibility." Given the situation, this was the best action the attorneys could have taken.

Many jurisdictions adhere to the rule that fraudulently concealing the mistake will toll the statute of limitations. George L. Blum, *Attorney Malpractice — Tolling or Other Exceptions to Running of Statute of Limitations*, 87 A.L.R.5th 473, Sec. II, § 3(a) (Originally published in 2001). Concealing a mistake would not only toll the statute, but would place the attorney in an even more tenuous position regarding her license. Disciplinary committees would likely be more lenient when faced with a mistake which the attorney addressed head on and attempted to mitigate the damage done to her client, as it appears the *Joynes* attorneys did. Concealing such a mistake would not benefit anyone involved — particularly the attorney.

Missing a statute of limitations is a discreet and identifiable event that constitutes a breach of the contract for services entered into by an attorney and his client, but it is not always so clear. The Virginia Supreme Court ruled that a cause of action for legal malpractice arising from "an undertaking or agency which requires a continuation of services, the statute of limitations does not begin to run ... until the termination of the undertaking or agency." *Keller v. Denny,* 232 Va. 512, 516, 352 S.E.2d 327, 329 (1987) (citing *Riverview Land Co. v. Dance,* 98 Va. 239, 244, 35 S.E. 720, 722 (1900)). The Court then held that "when malpractice is claimed to have occurred during the representation of a client by an attorney with respect to a particular undertaking or transaction, the breach of contract or duty occurs and the statute of limitations begins to run when the attorney's services rendered in connection with that particular undertaking or transaction have terminated, notwithstanding the continuation of a general attorney-client relationship, and irrespective of the attorney's work on other undertakings or transactions for the same client." *Keller v. Denny*, 232 Va. 512, 517-18, 352 S.E.2d 327, 330 (1987) (relying on reasoning from *Wilson v. Miller,* 104 Va. 446, 51 S.E. 837 (1905) (attorney-in-fact appointed to sell real estate, collect proceeds, and collect accounts receivable); *Beale v. Moore,* 183 Va. 519, 32 S.E.2d 696 (1945) (attorney employed to collect debts owed to bank in receivership); *McCormick v. Romans and Gunn*, 214 Va. 144, 198 S.E.2d 651 (1973) (attorney employed to develop subdivision, sell lots and collect proceeds); *Wood v. Carwile,* 231 Va. 320, 343 S.E.2d 346 (1986) (attorneys employed to handle many interrelated real estate financing transactions).

Attorneys may take statutes of limitations a bit too casually. We tend to view them as so basic and straightforward that it is easy to rely on that law school/bar review knowledge that stays with you. A review of the statutes and case law associated with limitations issues reveals that there are many issues that attorneys must address that are not so obvious. Accrual of actions and tolling

provisions can be complicated; the annotations to some of the statutes comprise many pages.

Even providing off-the-cuff advice on a limitation period can lead to potential problems if the recipient thinks more of it than the attorney. Before providing an information regarding limitations of actions, pick up the code book and refresh your memory. You will be glad you did. ⚖

The author thanks Jim Guynn for the refresher course and initial research.

Endnotes:

1 A cause of action for legal malpractice has three separate elements: 1) the existence of an attorney-client relationship creating a duty; 2) a breach of that duty by the attorney; and 3) damages that were proximately caused by the attorney's breach of duty. *E.g., Shipman v. Kruck*, 267 Va. 495, 501, 593 S.E.2d 319, 322 (2004) (cited in *Williams v. Joynes*, 278 Va. 57, 62, 677 S.E.2d 261, 264 (2009).

2 *See* also, the Virginia Prisoner Litigation Reform Act, Va. Code § 8.01 – 689 *et seq.*

Ad-*dress*-ing Counsel

Roanoke City Circuit Judge Describes Sartorial Standard

Editor's Note: When Roanoke City Circuit Judge Clifford R. Weckstein responded to a query from a fellow judge about dress codes for attorneys, he wrote more on the subject than he ever imagined he could. Through the General Practice Section, Judge Weckstein shares his research with the bar at large.

He made minor edits to update the original. He encourages readers to peruse the endnotes. And a disclaimer appears after the text, so the letter can be taken with the proper spirit — advancement of good advocacy, dignity, and decorum in the courtroom.

March 8, 2006

The Honorable Jacqueline F. Ward Talevi, Judge
Twenty-third Judicial District of Virginia
Roanoke City Courthouse
315 Church Avenue SW, Second Floor
Roanoke, VA 24016

The Court: Mr. Gambini, didn't I tell you that the next time you appear in my court that you dress appropriately?

Counsel: You were serious about that?[1]

Dear Judge Talevi:

"Recent events lead me to inquire," you e-mailed me, "does this circuit have a written dress code for attorneys? [The answer is "no."] If not, is there an informal unspoken dress code for attorneys? [The answer is "yes," though, as you will see, I would not choose the words "informal" or "unspoken."] If not, do any other circuits have a written dress code for attorneys?"

Our subsequent discussions led me to conclude that you would probably like more than "yes" and "no" answers to the questions you posed — though I hasten to admit that I had no idea that I could write so much on this subject. I have consulted the other judges of the Twenty-third Circuit. They have confirmed that we are all on the same wavelength:

- While the judges of our circuit have not adopted a written dress code for attorneys, we do, indeed, have clear expectations about how lawyers will be dressed when they are in the courtrooms, judges' chambers and "judicial corridors" of each of the courthouses.

- We expect lawyers to be attired *professionally* when they are in a courtroom, judge's office, or judicial corridor, without regard to whether they are planning to see a judge, or whether they were "not planning to come to the courthouse today."

- Our expectations are based upon well-established standards of professional attire that apply not only to "a lawyer appearing in a court of record in Virginia,"[2] but to lawyers appearing in state and federal courts throughout the United States. (And you can be sure that these standards, and our expectations, are not "unspoken" when, for example, a lawyer shows up in a circuit judge's office wearing a polo shirt.)

As far as I know, no Virginia circuit has adopted a written dress code for lawyers. Code § 8.01-4 permits any Virginia district or circuit court to adopt rules "necessary to promote proper order and decorum and the efficient and safe use of courthouse facilities and clerks' offices …," which could include adoption of rules for the attire of lawyers, litigants, jurors, and witnesses.[3] A number of Virginia jurisdictions (including Fairfax, Arlington, Alexandria, Virginia Beach, and Rappahannock County) have posted on their websites instructions or guidelines about proper courthouse attire for parties, witnesses, spectators, and jurors. As discussed below, the Virginia Board of Bar Examiners has a "mandatory dress code," and attorney attire is addressed in the *Virginia Bar Association Creed*.

What does it mean to be dressed "professionally"? To begin with, it means business attire[4] – not "business casual"[5] — but something closer to "business formal."[6]

For a man, this means a suit or sport coat (one that he actually is wearing),[7] a tie (actually tied around his neck),[8] and remaining attire of comparable level of business formality.

For a woman, the expectation is comparable — for example, a suit (skirt or pants and a jacket, either with a top/shirt/blouse or buttoned jacket), or an appropriately businesslike dress, with or without a jacket. I know that I have seen women attorneys in the courtroom wearing a formal-looking blouse or tunic with a skirt or pants, and have thought that they looked entirely appropriate — completely professional.[9]

An attorney's clothing must be neither too short, nor too tight, nor too sheer. "All attorneys and all officers of the court must be dressed in a dignified manner at all times in court. No attire or dress so flamboyant, disheveled or revealing as to create a distraction to the orderly conduct of court proceedings will be permitted."[10] Lawyers appearing in court should, in the wonderfully archaic language of a Texas federal district court's rule, "[r]efrain from assuming an undignified posture."[11] That

is, "[t]hey should always be attired in a proper and dignified manner, and should abstain from any apparel or ornament calculated to attract attention to themselves."[12]

Fashion excesses of the '60s and '70s — like miniskirts and leisure suits — led to confrontations between lawyers and judges.[13] In an oft-cited 1969 New York case, a 27-year-old female attorney appeared for trial wearing a miniskirt. "Prior to the commencement of any proceedings on behalf of the client, [the judge] made an order prohibiting petitioner from appearing as an attorney in his court until petitioner's mode of dress was 'suitable, conventional and appropriate.'"[14] The appellate court acknowledged that trial judges have the power to regulate attorneys' attire in judicial proceedings,[15] but found "that the record fails to show that [the attorney's] appearance in any way created distraction or in any manner disrupted the ordinary proceedings of the court. There is no suggestion that [her] dress was so immodest or revealing as to shock one's sense of propriety."[16] That, coupled with the fact that the judge's order gave "no indication as to what mode or type of dress would meet the requirement of 'suitable, conventional and appropriate,'" caused the appellate court to conclude that the judge's "discretion in this matter was improvidently exercised," notwithstanding his "sincerity in his desire to conduct his court with propriety."[17]

"Professional" connotes something more than coat and tie or suit and blouse. It has nothing to do with personal style, or with being in or out of style. Professional clothing conveys respect for the forum, for the cause or client who the lawyer represents, and for the rule of law; professional attire is appropriately decorous and dignified — that is, what the lawyer is wearing must not detract from the decorum or dignity of the courtroom, hearing room, or judge's office.[18]

"As a professional," the *Virginia Bar Association Creed*, says, "I should always: … Speak or write courteously and respectfully in all communications with a court or tribunal and show my respect by my attire and demeanor."[19]

"Respect for the Court requires … appropriate dress in all Court proceedings."[20] A lawyer must not be dressed in a way that "diminishes the dignity or decorum of the courtroom."[21]

Anyone who contemplates sitting for the Virginia Bar Examination receives a letter from the Virginia Board of Bar Examiners — an arm of the Supreme Court — communicating the fact that there is a statewide standard for lawyers who appear in Virginia courts:

> Dress for all applicants MUST conform to the standards suitable for a lawyer appearing in a court of record in Virginia, i.e., a suit or jacket and tie for males, and a suitable dress or suit (pantsuits are acceptable) for females. Violation of the mandatory dress code may result in your dismissal from the exam site and the disqualification of your exam.
>
> MANDATORY DRESS CODE
> NOTICE TO ALL APPLICANTS
>
> The Board is aware that many law firms and other professional offices have "dress down" policies of varying descriptions. *There is no "dress down" or "casual dress" policy at the Virginia Bar Exam.* Applicants who come to the Virginia Bar Exam are expected to dress in proper attire. For men, proper attire is coat and tie. For women, proper attire is traditional business attire. Recognizing the high calibre of professionalism that has traditionally characterized the bar, the Board is confident that no further discussion of this topic will be necessary.[22]

In other words: Yes, we have expectations for lawyers who come to court in the Roanoke Valley. We expect the same thing that is expected throughout Virginia, and what is expected in Virginia is what is expected the nation wide.

In 2005, the (Tucson) *Arizona Daily Star* profiled Robert Hooker, "a former Superior Court judge, longtime criminal defense lawyer and a famously well-dressed guy," who left a lucrative private law practice to become Tucson's public defender.[23]

"Robert Hooker was hired to lead the Public Defender's Office, not dress it up," the reporter wrote, "but the sartorially elegant Hooker believes in the power of appearances… as a symbol of the professionalism he wants the office to project. …His fashion reputation preceded him, prompting a question at his first staff meeting: 'Will there be a dress code?'"

"Hooker said, 'There already is a dress code. It's called professional. It's an issue of respect.'"[24]

I send best personal regards and wishes.

Very sincerely yours,
Clifford R. Weckstein

Disclaimer: The views expressed in this article are intended to be commentary concerning the legal system and the administration of justice, and to explain court procedures for public information, as authorized by Canon 4B and Canon 3B(9) of the Virginia Canons of Judicial Conduct. They are not, needless to say, the official view of the Judicial Conference of Virginia nor a "judicial opinion" of any court. ⚖

Endnotes:

1 *My Cousin Vinny*, Twentieth Century-Fox Film Corporation (1992).
2 Virginia Board of Bar Examiners.
3 *See*, Thomas M. Trenker, J.D., *Power of Court to Impose Standards of Personal Appearance or Attire,* 73 ALR 3d 353 (1976, updated December 2003); *Friedman v. District Court*, 611 P.2d 77 (Alaska 1980)("a court may impose minimum standards of dress for the attorneys who appear before it.… Attorneys occupy a different

position in relation to the courts than do ordinary citizens. Attorneys are officers of the court. The privilege of practicing law is subject to certain conditions, among which is that an attorney must observe reasonable rules of courtroom behavior and decorum. Courts have long controlled the manner in which attorneys may appear before them. Very few reported cases bear upon the question of proper dress. The paucity of litigation on this point probably indicates the cooperation of most attorneys and the restraint of most courts in the matter of appropriate dress." *Id.* at 78.); *c.f. Commonwealth v. Jones & Robbins, Inc*., 186 Va. 30, 33, 41 S.E.2d 720 (1947) ("[I]nasmuch as an attorney is an officer of the court in the administration of justice, the court has inherent power to supervise his conduct….")

4 "Business attire shall be appropriate dress for counsel while in the courtroom." North Carolina General Rules for the Superior and District Courts, Rule 12; "All attorneys appearing before the court or in chambers shall be attired in a manner that is consistent with the current generally prevailing and accepted business attire for professional men and women in the local community." Wash. Clark Super. Ct. Rule 0.4 (2005).

5 "[A]ll attorneys shall wear business, not business casual, attire while appearing before the Court." Local Rules, USBC Dist. Mont., Rule 5072-1 (Courtroom Decorum); "Lawyers must dress for court. No ripped jeans, but no top hat, tails, and spats, either. A well-dressed lawyer is formal but not inflated. Clothes do not make the lawyer. But they get the lawyer into court." Gerald Lebovitz, *Dress for Success: Be Formal But Not Inflated*, New York State Bar Assn. J., July–August 2001, at 8. (In truth, Mr. Lebovitz's column is about legal writing, not legal dressing.) A retired school principal, recently writing in *The Columbus* (Ohio) *Dispatch*, saliently observed that "[l]awyers and doctors show their professionalism by the way they dress. Judges do not permit lawyers in the courtroom if they are not dressed appropriately." http://www.dispatch.com/editorials-story. php?story=dispatch/2006/01/17/20060117-A8-07.html January 17, 2006

6 "Attire. Counsel will dress at the level of formality appropriate for appearing in a federal court." Local Rule (Civil) 39.5(c), USDC Dist. Alaska; "Male counsel will wear a conservative coat and tie with appropriate shirt, slacks, and shoes. Female counsel will wear appropriate conservative business clothing. Clothing for counsel should be such as they would wear to an important business meeting." SLR 3.0111, Umatilla and Morrow Counties, Oregon Circuit Courts (Decorum in Proceedings; Proper Apparel).

7 *See Friedman*, 611 P.2d at 78 ("While a court cannot adopt a dress code which is unduly rigid or which attempts to dictate matters of taste and esthetic preference, the requirement of merely wearing a coat and tie is a reasonable one." Attorney Friedman unsuccessfully argued "that the imposition of a dress code violates his rights to personal liberty and privacy under the Alaska Constitution," relying in part on a case in which the Alaska Supreme Court "held that the hair length of a public school student could not be prescribed by school officials." Without success, he "assert[ed] that an attorney's style of dress, so long as it is not disruptive of judicial proceedings, is beyond the power of the courts to control.")

8 String ties, bolo ties or hanging gold medallions don't count. *See Sandstrom v. State,* 309 So.2d 17, 23 (Fla. App. 1975). Neither does a bandana. *See Purpura v. Purpura*, 847 P.2d 314 (N.M. App. 1993), *cert. denied*, 847 P.2d 313 (N.M.1993); *State v. Cherryhomes*, 840 P.2d 1261 (N.M. App. 1992), *cert. denied*, 841 P.2d 549 (N.M. 1992). (Both cases involved attorney Cherryhomes. A court rule required lawyers to wear a coat and tie. In the earlier case, the lawyer was held in contempt for wearing a bandana around his neck instead of a conventional necktie. The conviction was affirmed. In the later case, "[w]hile the trial judge was speaking, appellant proceeded to loosen his tie and unbutton his top collar button. During the proceeding, appellant was wearing a conventional tie, knotted and closed around his neck, as well as a multicolored bandanna above that tie and around his neck. The trial judge told appellant that the court proceedings were not yet concluded and to 'please put his tie on.' Appellant responded that he had two ties on and that he had loosened only the conventional tie from around his neck. After further discussion between the trial judge and appellant regarding the tie, the trial judge held appellant in contempt for failure to abide by the proper decorum of the court." *Purpura,* 847 P. 2d at 315. "A review of the record indicates that appellant wore his conventional tie in a customary manner throughout most of the proceedings, however, appellant subsequently undid his collar and loosened his tie during court proceedings. The trial judge directed appellant to fix his tie because the hearing was not yet over. Appellant refused to adhere to the court's direct order and the trial judge found appellant in direct criminal contempt. …We hold that the evidence was sufficient to sustain a finding of criminal contempt beyond a reasonable doubt." *Id*., at 318

9 "Courtroom Appearance. — All attorneys shall dress appropriately when appearing in court. Male attorneys shall wear coats and ties; Female attorneys shall wear business attire, a dress or a business suit consisting of either pants or a skirt." Uniform Rules for the United States District Courts for the State of Louisiana, Local Rule 83.2.15W; "Attorneys, as officers of the court, must help to maintain the dignity of the court. Male attorneys and clerks of court must wear coats and ties in the courtroom. Female attorneys and clerks of court must wear a comparable level of attire." Rule 6.1(b) of the Uniform Rules For Louisiana [State] District Courts. *See* Kathleen J. Wu, *Look the Part: What to Wear from Head to Toe*, originally published in *The Texas Lawyer*, September 22, 2003, found online at www.andrewskurth.com/pressroom.html?_realtag=pressroom-publications&item_id=LookthePartWhattoWearfromHeadtoToe&_realtable=article.

10 N.M. L.D.R. Dist 1 LR1-204 (2005).

11 U.S.D.C. W.D. TX R. AT-5 (2005) ("The purpose of this rule is to emphasize, not to supplant, certain portions of those ethical principles applicable to the lawyer's conduct in the courtroom.")

12 *Id*. To the extent that this is relevant: A consultant to professional speakers counsels, "Use the trial lawyer's rule: 'Dress so appropriately for the circumstance and your role in it, that no one especially notices your clothing. They focus on you and your message.'" Alan Parisse, SpeakerNet News, 7/28/2000, http://www.speakernetnews.com/post/businesscasual.html. *See also*, Kathleen J. Wu, *Fake It Till You Make It—It's Important to Dress for Success, Even During the Age of "Business Casual,"* originally published in *The Texas Lawyer,* June 5, 2000, found online at http://www.andrewskurth.com/pressroom-publications-FakeItTillYouMakeItItsImportanttoDress.html.

13 *See Peck v. Stone*, 32 A.D.2d 506, 304 N.Y.S.2d 881 (1969) (miniskirt); S*andstrom v. State*, 309 So. 2d 17, 21 (Fla. Dist. Ct. App. 1975), *cert. dismissed*, 336 So. 2d 572 (Fla. 1976) (Attorney Sandstrom "wore a white suit, a sport shirt open at the neck, and a necklace with a round gold pendant the size of a silver dollar

with the hair on his chest showing through the open shirt." Considering that the year was 1974, and that the state was Florida, can anyone who was an adult in that year doubt that the "white suit" was a leisure suit?)

14 *Peck v. Stone.* According to the dissenting judge, the "27-year-old female attorney, was admitted to practice in December, 1967. In the spring of 1968 she appeared before a City Court Judge and a Justice of the Supreme Court, each of whom admonished her for wearing a miniskirt as inappropriate for courtroom appearance. On July 17, 1968 she appeared before respondent, another City Court Judge, who also questioned her propriety in wearing a miniskirt in his court. She admitted to him that she had not complied with the request of the Justice of the Supreme Court to lower the hemline to above the knee. On October 3 she again appeared before respondent wearing the same type of miniskirt in defiance of this Judge's request and displaying complete disrespect for the other Judges' admonitions. At that time respondent said that her dress 'is not suitable for courtroom appearance, which detracts from the dignity of the court and impairs authority.' He also directed her not to appear before him as an attorney in court 'until her dress is suitable, conventional and appropriate in keeping with her position as an officer of the court.'" *Id.*, 32 A.D.2d at 509; *compare Sandstrom*, 309 So. 2d 17.

15 *Id.* at 509.

16 *Id.* at 508.

17 *Id.* at 507.

18 "The wearing of a coat and necktie in open court has been a long honored tradition. It has always been considered a contribution to the seriousness and solemnity of the occasion and the proceedings. It is a sign of respect." *Friedman*, 611 P2d. at 78 (quoting *Sandstrom*, 309 So.2d at 23); "Your personal appearance and conduct in the courtroom is visible evidence of your respect for the rule of law and the administration of justice.… All attorneys shall wear appropriate attire. Men shall wear coats and ties. Women shall wear professional attire, i.e.: conservative dresses, suits and pantsuits. Appropriate attire for attorneys does not include jeans, warm-ups, jogging suits, sweats, shorts or other casual or athletic clothing, including athletic shoes." Okl. R. 7 Dist. Ct. R. 40; "The dignity of the Court is to be respected and maintained at all times. Attire for counsel and spectators should be restrained and appropriate to the dignity of a Court of Appeals of the United States." United States Court of Appeals for the Federal Circuit, Appendices, Courtroom Decorum; "The conduct, demeanor and dress of attorneys when present during any court proceeding shall reflect respect for the dignity and authority of the court, and the proceedings shall be maintained as an objective search for the applicable facts and the correct principles of law." Rule 801, Uniform Rules for District Courts of the State of Wyoming (courtroom decorum); "Attorneys, their employees, law clerks, runners, law students and court employees appearing in court or in a judge's office or chambers shall dress in a manner befitting the dignity of the court." N.M. L.D.R. Dist 2 LR2-109. A site for laypersons advises: "If you are attending a criminal Court in Virginia you should dress in good quality clothing, what you would wear to a job interview in an office, or what you would wear to a wedding or church. This is important to show respect for the Court. Whether you like to show respect or not, you will not get prosecutors and Judges to exercise discretion in your favor if you dress with disrespect." http://www.lawyers.ca/international/Default.asp?AD=3.

19 Available online at http://www.vba.org/aboutus.htm#creed; "Counsel, witnesses under their control, and parties should exercise good taste and common sense in matters concerning dress, personal appearance, and behavior when appearing in court or when interacting with court personnel."

20 *Principles of Professionalism for Delaware Lawyers*, A(4) (http://courts. delaware.gov/Rules/? prinproflawyers.pdf.) The Delaware Supreme Court has incorporated these principles of professionalism into its Rules of Court. The Pennsylvania Supreme Court also has adopted a *Code of Civility* as a part of its Rules of Court. That Code provides, *inter alia*, that "[a] lawyer should not engage in any conduct that diminishes the dignity or decorum of the courtroom," and "[a] lawyer should advise clients and witnesses of the proper dress and conduct expected of them when appearing in court and should, to the best of his or her ability, prevent clients and witnesses from creating disorder and disruption in the courtroom." Adoption of Code of Civility, No. 258, Supreme Court Rules Doc. No. 1, 30 Pa.B. 6541 (http://www.pabulletin.com/secure/data/vol30/30-52/2203.html.) The assumption, implicit in the injunction that a lawyer should advise clients and witnesses about proper dress, is that the lawyer understands and follows the rules for proper courtroom attire.

21 *See, e.g.,* Code of Civility, U.S. District Court, Eastern District of Pennsylvania, II, "The Lawyer's Duties to the Court," subparts 3 and 4 (http://www.paed.uscourts.gov/documents/procedures/shapoli.pdf); Topeka Bar Association Standards of Professional Courtesy (Proceedings shall be conducted with an appropriate air of formal decorum in court, including: … Wearing appropriate dress. Judges should wear a robe when conducting evidentiary hearings, oral arguments, and dockets at which parties or witnesses are in attendance. Attorneys should dress in business attire — *Committee comment*: Appropriate business attire for men requires wearing a jacket and tie. Proper dress for women must be appropriate attire for court. Attorneys should not appear in court wearing sports, leisure or casual wear. Stirrup pants, culottes, men's shirts with banded collars, casual sandals or shoes will not be considered proper court attire." This document is available online at http://www. shawneecourt.org/misc/tba_standards.htm.

22 Virginia Board of Bar Examiners. (Capitalization and other emphasis in original; in the original, the "notice" and the last sentence of the preceding paragraph are boldfaced).

23 Tom Beal, *Flashy Lawyers Leave Private Practice For Public Defender Jobs*, (Tucson) ARIZONA DAILY STAR, April 24, 2005 (http://www.azstarnet.com/dailystar/dailystar/71934.php).

24 *Id.* Robert Hooker died in 2008. Alexis Huicochea and Kim Smith, "Police: Street racer kills public defender," ARIZONA DAILY STAR, April 2, 2008 (http://www.azstarnet.com/sn/ byauthor/232506; Eric Swedlund and Kim Smith, "Bill of Rights was always Hooker's client, too," ARIZONA DAILY STAR

by Gifford Ray Hampshire, Chair

Local Bars Reduce Stress And Promote Dignity

IN THE OCTOBER 2009 *Virginia Lawyer*, I wrote about how local bar programs satisfy the idealism that inspired many of us to choose our profession. I also wrote about how local bar programs reduce stress by balancing the demands of practice with public service. Local bar associations also help reduce the stress of practice through social interaction outside the adversarial context of a particular case. And social interaction promotes dignity and civility.

During my term as president of the Prince William County Bar Association in 2001, I reviewed the bar association's organizational documents. The minutes of the organizational meeting on July 25, 1941, showed that seven lawyers met to adopt a "constitution" of the new association. Article II of the constitution reflected that the mission of the association was to "maintain the honor and dignity of the practice of law, and increase its usefulness in promoting the due administration of justice, and the mutual improvement and social intercourse of its members."

It is as true today as it was in 1941 that the stress of practice is reduced and the profession bettered when lawyers meet at bar-sponsored continuing legal education (CLE) programs, lunches or even at informal gatherings at the end of the day. At these events lawyers relax and younger lawyers learn from elders about the professionalism and the practice of law in the community. The relationships that are made and strengthened in these get-togethers help resolve subsequent legal matters — rather than though counterproductive, blistering letters or unnecessary motions. In this low-key way, local bar associations promote the honor and dignity of the practice of law and encourage civility in the administration of justice, while also reducing stress associated with the practice of law.

The Conference of Local Bar Associations (CLBA) assists local bars in planning programs. The CLBA Executive Committee is planning its next Solo and Small-Firm Practitioner Forum on March 8, 2010, at the University of Richmond School of Law. Topics will include ethics, law office management, and technology. The CLBA also is currently planning its next Bar Leaders Institute (BLI), designed to prepare future or aspiring bar leaders to plan local programs. More information will be published at VSB.org and a future edition of *Virginia Lawyer*.

The CLBA also encourages local bar association social programs through its Awards of Merit. The twenty-fifth annual Awards of Merit will be presented at the VSB Annual Meeting in June 2010. Past projects that received Awards of Merit have included volunteering at local shelters, participation in "no bills" nights, various CLE programs, mentoring programs, law camps, essay contests, blood and food drives, and many others. The CLBA website, http://www.vsb.org/site/conferences/clba/, has details about CLBA awards, programming, and resources. Look on the website for ideas for programs that will both provide a public service opportunity and promote professionalism and civility. Once you have designed and executed your program, be sure to submit it for consideration for an Award of Merit. Nomination information for Awards of Merit will be available in the spring of 2010.

The CLBA Executive Committee is planning its next Solo and Small-Firm Practitioner Forum on March 8, 2010, at the University of Richmond School of Law.

by Lesley Pate Marlin, President

Lessons from the Bumblebee

YOU MAY HAVE HEARD that the bumblebee should not be able to fly — that according to the laws of aerodynamics, a bumblebee's wings are too small in proportion to the size of its body, and they cannot beat fast enough to support flight. Yet …

In these tough times, the legend of the bumblebee reminds us of the value of determination and perseverance. We are in the worst economic downturn since the Great Depression. A *Wall Street Journal* article noted that this recession has been marked by the loss of professional jobs, including lawyers'. In 2008, according to the U.S. Department of Labor, the number of unemployed lawyers increased 66 percent to a ten-year high of twenty thousand. In 2009, according to LawShucks.com, more than four thousand lawyers have been laid off from law firms.

The economic crisis has disproportionately impacted young lawyers. Associates have been laid off in record numbers. Recent law school graduates have found it difficult to get jobs. Starting dates for incoming associates at many large law firms have been deferred for months.

The Young Lawyers Conference (YLC) is committed to serving the nine thousand lawyers in Virginia who are in their first three years of legal practice or under the age of thirty-six, especially during these difficult economic conditions and unprecedented changes in the legal industry. As a new member service initiative, the YLC recently offered hardship scholarships and discounts to its Professional Development Conference, so that young lawyers who had been affected by the economic crisis could attend.

Young lawyers facing challenging circumstances are not without resources. For example, the American Bar Association, under the leadership of President Carolyn B. Lamm, has a website to help lawyers during the economic downturn. It contains a job board and serves as a clearinghouse of information on topics such as job searching, networking, and professional development. The ABA's Economic Recovery Resources portal is http://new.abanet.org/economicrecovery/default.aspx.

In addition, the American Law Institute-American Bar Association and the Association for Legal Career Professionals offer a Web-based presentation, "Managing a Legal Career Transition in Tough Times," at http://www.ali-aba.org/career/.

Young lawyers facing challenging circumstances are not without resources.

Uncertainty and other challenges arising out of the economic crisis may cause increased stress, which can create or exacerbate mental health problems. For lawyers struggling with increased stress, anxiety, depression, and other mental health problems triggered by the economic crisis, Lawyers Helping Lawyers (http://www.valhl.org/) provides confidential twenty-four-hour assistance.

Now, more than ever, young lawyers must develop their legal expertise, acquire practice management techniques, learn business development skills, and network. These opportunities are available to young lawyers through the YLC, now as always. Young lawyers defy the odds, even in changing and uncertain times.

by John G. Mizell Jr., Chair

Lawyers Should Practice Civility; Society Needs the Example

OVER THE PAST SEVERAL MONTHS, we have seen glaring examples of the need for greater civility in our society.

Intemperate remarks at town hall meetings across the country during the health care reform debates, a congressman lashing out during a presidential address, and shocking behavior by well-known and well-liked athletes on the tennis court are examples of the explosion of incivility around us.

We have an important responsibility to express our opinions in a manner that respects the views of others. Lawyers have a particular role to help maintain a sense of balance and civility in our society.

The collegiality that develops among attorneys who are active in bar associations fosters civility in the legal system and society in general.

Senior lawyers have a special responsibility and opportunity to promote civility in the court system and society. We need only to look at a core component of the mission of the Senior Lawyers Conference: "to encourage cordial discourse and interaction among the members of the Virginia State Bar."

Zealous representation of our clients and civility in our law practices are not mutually exclusive. To the contrary, there are many situations where "winning at all costs" is actually shortsighted. For example, in the family law setting with which I am most familiar, it may be counterproductive for one spouse to try to portray the other spouse in the most negative terms possible when these estranged spouses will need to try to work together and coparent their children for many years. I have seen situations where parties have tunnel vision and seek certain short-term custody or financial goals while losing sight of how their actions or the actions of their attorneys may negatively affect the attitude of the other spouse permanently. As attorneys, we must help our clients consider the long-term effects in the midst of seeking short-term victories.

I enjoy working on bar association projects with attorneys who practice in areas of law I usually don't come in contact with. Projects may include mentoring an elementary school student with behavioral problem, helping a middle school student learn about the legal system as part of a docent program at the courthouse, or answering basic legal questions as part of a no-bills program in the community. A bond is developed as we share common goals in resolving disputes through the legal system. Bar associations also afford us an opportunity to interact with judges socially and in workshops and panel discussions such as at bench-bar conferences. Through these events, we have a dialogue about ways attorneys and judges can improve the efficiency and effectiveness of the court system.

Senior lawyers in particular must continue to foster a culture that supports active involvement in bar associations.

Attorneys also can regularly use our skills and training to promote civility beyond the courthouse. We might find opportunities coaching young people on the soccer field or in a board meeting of a homeowners association.

In this season when we exchange special greetings of joy, peace, and goodwill, emphasizing civility is especially appropriate. Moreover, I hope each of us will make civility a goal that is not just seasonal. It should be an integral part of our daily practice with our legal colleagues and others in society.

Senior lawyers have a special responsibility and opportunity to promote civility in the court system and society.

Finding Help When You Don't Know Where To Turn

by Janean Johnston, Practice Management/Risk Manager

IF YOU ARE a recent law school graduate or a "suddenly solo" who has left a large practice, its host of support staff, and unlimited resources, you might find daunting the prospect of setting up an office on your own for the first time. Sometimes the beginning of wisdom is to admit what you do not know. Poor planning causes problems such as malpractice claims and ethics complaints.

After twenty-two years of advising lawyers I have concluded that not paying attention to careful law office management procedures and practices has caused more problems for the public than the few malfeasant attorneys who skirt ethics rules for their own benefit. Becoming an ethical and competent attorney involves applying the ethics rules to the daily practice of law and implementing sound management principles.

Review the Virginia Rules of Professional Conduct on diligence, competence, and maintaining client confidences. How you handle client funds and manage trust account recordkeeping duties, avoid conflicts of interest, communicate with clients, and develop fee agreements are all guided by the ethics rules.

Where do you turn to find resources to help you become an efficient and ethical solo practitioner? Getting an overview of what you need to do in setting up a new office is a good place to begin. One of the American Bar Association's best-selling books is *How to Start and Build a Law Practice,* by Jay G. Foonberg, available by calling (800) 285-2221. This basic guide has been used by many small firms in setting up their practices. The ABA Law Practice Management section is an excellent place to look for resources, including *Flying Solo: A Survival Guide for the Solo and Small Firm Lawyer* and *Law Office Procedures Manual for Solos and Small Law Firms*.

Also helpful in setting up your new practice are *Solo by Choice: How to Be the Lawyer You Always Wanted to Be,* by Carolyn Elefant; *The Ultimate Guide to Solo and Small Firm Success,* by Renee Caggiano Berman; *The Organized Lawyer,* by Kelly Lynn Anders; and *The Busy Lawyer's Guide to Success,* by Dan Pinnington and Reid Trautz. Since you are just beginning your practice, it is likely that you will have time to learn tips and techniques from these resources.

Every solo needs a smartphone (such as PalmPre, iPhone, or Blackberry), a laptop (and knowing where the nearest Internet café is, since you could go stir-crazy just staring at your walls while waiting for a client to walk through the door), a good backup (whether flash drives or an online service), and a scanner.

Decide what computer software will best serve your needs. Case management systems for small firms include Abacus, Amicus Attorney, TimeMatters, PCLaw, or Practice Master. A book that may help you select the appropriate technology for your office is *The 2009 Solo and Small Firm Legal Technology Guide,* by Sharon D. Nelson, John W. Simek, and Michael C. Maschke. Case management software helps you manage your calendar and files. Valuable file management resources can be found through the American Records Management Association guide *Records Management in the Legal Environment: A Handbook of Practice and Procedure.* These resources can help you manage your calendar, detect conflicts of interest, and assist with accounting. Programs vary in their sophistication, so choose carefully. Consider combining programs for fuller capabilities, such as using TimeMatters with PC Law for better accounting. Allow sufficient funds for adequate training on the software.

For offices that have already purchased software for their general needs but want specific software to help manage client trust accounts and keep records as Virginia requires, you may find helpful QuickBooks Pro or the ALPS Trust Manager, developed for Virginia lawyers. There are also other programs that handle time and billing issues as well as trust accounting matters. Don't forget the excellent trust accounting booklet *Lawyers and Other People's Money*, by Frank A. Thomas III and Kathleen Uston, online at http://www.vsb.org/docs/Lawyers_OPM_electronic.pdf. The Virginia State Bar has developed a continuing legal education program, "The Devil Wears Green," that highlights trust accounting issues and ethical dilemmas. I encourage every Virginia lawyer to attend this worthwhile seminar.

Although there is a host of valuable information on the Web, it is wise to have good reference library that includes *Restatement of the Law Third, The Law Governing Lawyers,* Volumes 1 and 2, from The American Law Institute. Don't forget the Virginia State Bar's ethics hotline — (804) 775-0564 — when a grey issue arises, or the Fee Dispute Resolution Committee — (804) 775-9423 — when problems occur in this area. An equally important resource is Lawyers Helping Lawyers — (800) 838-8358 — for those times when we or a fellow lawyer needs help with mental health or chemical dependence problems.

I hope I have been helpful in giving you a place to begin. My purpose is to overwhelm you, but if you are feeling that way, please know that help is avail-

Practice Management
continued on page 59

Web 2.0: What's in It for Lawyer 1.0?

by Amy Wharton

IF YOU TWINGE at the mention of Twitter and hide your face from Facebook, you may feel a bit like Lawyer 1.0 caught in a 2.0 world. If so, help has arrived.

What's Web 2.0, and whatever happened to the first Web?

Web 2.0 is a name that artfully, if somewhat misleadingly, expresses how the Web's capabilities have advanced since its origin twenty years ago. As it was introduced, the Web (Web 1.0) was a collection of read-only pages. Information flowed only one way — from publisher to reader. When software applications were developed to allow pages to include read-write features, readers became copublishers. Web 2.0 was born.

Web 2.0 does not mean that Web 1.0 is obsolete. Not all information on the Web is read-write, nor should it be. Look for a way to edit most government Web pages and you'll see that the read-only Web still thrives. Yet Web 2.0 has definitely changed the world we live in. The change is not about new software, but about facilitating human interaction across space and time. The extent to which interaction is unfettered varies widely across sites. Web 2.0 sites such as Wikipedia (http://en.wikipedia.org), Facebook (http://www.facebook.com), Twitter (http://www.twitter.com), and YouTube (http://www.youtube.com) thrive on content posted by strangers; their owners impose few barriers to authorship. Site owners who need close control over content limit authorship to people they trust.

The legal profession has barriers to entry, and many law-oriented sites likewise impose barriers to authorship. Authors usually need to establish their legal credentials with managers of those sites before submissions are accepted. For law firms, the most popular use for Web 2.0 technologies may be behind the firewall, with access granted only to the firms' lawyers, clients, and outside counsel. Microsoft's SharePoint, which has been adopted as the information sharing platform of choice for many law firms, employs Web 2.0 wiki (basically, a document-editing tool for groups) and blogging applications. *The Lawyer's Guide to Collaboration Tools and Technologies: Smart Ways to Work Together*, by Dennis Kennedy and Tom Mighell (American Bar Association, 2008), discusses how Web 2.0 technologies are boosting collaboration in law practice.

Only half of Web 2.0's success is owed to read-write capability. Readers' willingness to contribute is the essential other half. You can gain expertise, current awareness. and competitive intelligence by being an avid reader of blogs and wikis. By becoming a contributor as well, you can share your own expertise with a large audience.

What does it take to become Lawyer 2.0?

Becoming Lawyer 2.0 first requires awareness of practical considerations about online publishing, many of which are unique to the legal profession. Virginia Continuing Legal Education recently addressed these issues in its seminar, "Entering the Fray: Online Social Media's Benefits, Pitfalls, Risk Management, and Ethical Concerns." (Audio is available at http://www.vacle.org.) Full awareness of these issues before you begin is critical. Once you're ready to move forward, starting as a "read-only" user is a good strategy. You can use your browser's RSS feed subscription feature (a little orange button that lets you feed updates to your browser or e-mail client) to track blawgs and Twitter feeds of interest. Monitor the traffic. When you see an interesting blawg post, jump in with a comment. Before long, you may be tweeting alongside your kids. Get out your video camera and you may soon have your own YouTube channel.

Useful Web 2.0

Google Docs (http://docs.google.com) and **Google Calendar** (calendar.google.com) — Share documents and calendars among open or closed communities. Google Docs is essentially a wiki.

LinkedIn (http://www.linkedin.com) — Targeted toward business connections. Post your business profile, connect and share professional activities.

***ABA Journal*'s Blawg Directory** (http://www.abajournal.com/blawgs/) — The ABA's listing of Law Blogs, or blawgs. Add your comments to others' postings, or start your own.

Martindale-Hubbell Connected (http://www.martindale.com/connected), **LegallyMinded** (http://www.LegallyMinded.com), and **LegalOnramp** (http://legalonramp.com) Legal social networking and information-sharing sites.

Lextweet (http://lextweet.com) and **Justia's Legal Birds page** (http://legalbirds.justia.com) — Legal tweets ranked by popularity and category respectively. (Tweets are short Twitter posts of up to 140 characters, often used to distribute links to Web pages or blog postings.) A mix of personal and professional postings is common.

Wex (http://topics.law.cornell.edu/wex) Cornell University Law School's legal dictionary and encyclopedia wiki.

Can RECAP Turn PACER Around?

by Blackwell N. Shelley Jr.

PACER is the acronym for Public Access to Court Electronic Records, a Web-based service run by the Administrative Office of the United States Courts (AO). PACER began in 1989 as a pilot program serving a few U.S. district and bankruptcy courts. Beginning in 1990, the federal Judicial Conference, under the direction of Congress, prescribed fees for the use of PACER. In those dark days before the Internet, PACER was a bulletin board service with dial-up access and it cost a dollar a minute to use. The per minute fee decreased during the 1990s, until 1998, when the federal judiciary implemented the new Case Management/Electronic Case Files (CM/ECF) system. CM/ECF, which was Web-based, dropped the per minute charge entirely and substituted a seven cents per page user fee to download or view documents in case files. Currently, the fee is eight cents per page, with some exceptions.

The PACER fees trace their origin to 1988, when the judiciary sought congressional funding to establish electronic public access services. Rather than appropriating funds for this purpose, Congress directed the judiciary to fund that initiative through the collection of user fees. (*See* 28 U.S.C. § 612.) As a result, PACER has always relied on fee revenue. These revenues, however, have far outstripped expectations. According to the 2006 annual report of the Judicial Information Technology Fund, the federal judiciary collected $62.3 million in electronic public access fees in 2006, resulting in a budget surplus (for PACER alone) of $32.2 million.[1] By 2008, the director of the Administrative Office of the U.S. Courts reported that revenues from the PACER user fees would be "used to finance other expenses related to electronic public access to the courts in areas such as courtroom technology and the Bankruptcy Noticing Center."[2] According to the *New Jersey Law Journal*, PACER's unspent revenues were $76.8 million for the 2008 fiscal year.[3] Clearly, PACER's user fees are a significant source of revenue for the third branch, but do PACER's users get what they pay for?

Law librarians have criticized PACER, saying that documents downloaded from PACER cannot be authenticated. They have been circulating a petition asking the AO to digitally sign each document filed on the system using readily available technology. And law librarians have criticized the cost and poor design of PACER and have requested that depository libraries get free access.[4]

Librarians are not alone in criticizing PACER.

Enter Carl Malamud. Malamud, depending on your perspective, is either a hero or villain of the Internet. He is partially responsible for creating the first Internet radio station, for putting the U.S. Securities and Exchange Commission's EDGAR database online and, recently, for persuading the Government Printing Office (GPO) to create a standard for publishing the *Federal Register* online, for free, in XML format. Malamud operates the nonprofit Public.Resource.Org, which, among other things, advocates that public records should be freely available on the Web.

Not surprisingly, PACER's per page charge irks Malamud, who believes that public access to court records should be open and free. (Malamud has also complained publicly about PACER's hit-or-miss record related to the publication of personal identifying information, such as addresses and Social Security numbers.) Malamud's organization has been amassing case law, codes, and treatises from public domain sources and, in some instances, by purchasing the rights and making the collection available online for free in the Internet Archive.[5] Malamud's efforts have been controversial.

In the fall of 2008, the GPO experimented with giving PACER away for free at seventeen select libraries around the country. Twenty-two year old programmer Aaron Swartz seized the opportunity to make a contribution to Public.Resource.Org. On one of the computers at the Seventh Circuit U.S. Court of Appeals library, Swartz installed a small Perl (dynamic programming language) script that, every three seconds, downloaded a new PACER document. Over the course of several weeks, Swartz moved 780 gigabytes of data — 19,856,160 pages of text — from PACER to an Amazon cloud server. Swartz then donated the documents to Public.Resource.Org.

The GPO and the AO were not pleased. The free access experiment was abruptly discontinued. Amazon identified Swartz to the FBI. According to a Freedom of Information Act request made by Swartz, the FBI checked Swartz's Facebook page, his work history with the U.S. Department of Labor, any outstanding warrants and prior convictions, and his mobile phone number against its federal wiretap or pen register records. They checked him against the records in a private data broker's database and considered a stakeout of his house. On the advice of his counsel, Swartz declined invitations to discuss his exploit and, ultimately, the FBI dropped the investigation.[6]

Swartz's Perl script, referenced above, originated with Stephen Schultze, a fellow at the Berkman Center for Internet and Society at Harvard University. Schultze has also been a critic of PACER's user fees, and suggests that they violate Section 205 (e) of the E-Government Act of 2002, which amended then-existing law to state that "the Judicial Conference may, *only to the extent necessary,* prescribe reasonable fees [for PACER]." In August 2009, Schultze became the associate director of Princeton University's Center for Information Technology Policy (CITP).

RECAP continued on page 58

RECAP continued from page 57

Also in August, the CITP started the RECAP project.[7] RECAP (motto: "Turning PACER around") is a free plug-in for the Firefox Web browser. RECAP works like this: If you run a PACER search, RECAP checks your query against the free database at Internet Archive (www.archive.org). If the document is already there, RECAP will show an on-screen icon, you can get the document from the public source, and you can skip the user fee. If the document is not in the public database and you choose to download it, RECAP automatically posts the new document to the free database.

The AO's response to RECAP was terse, but the office did not summon the FBI.[8] The position of the U.S. Courts is that if a PACER user is exempt from the user fees, then the user may not redistribute a downloaded document; otherwise, any PACER user who pays the user fee may save a copy of the document on the public database. So, officially, RECAP is legitimate and legal.

The documents in the RECAP database at Internet Archive are, however, heirs to the flaws of the documents in the PACER database. There is no way to know whether documents in the RECAP database are genuine copies of the documents in the PACER system. Likewise, if a document in the PACER system contains unredacted personal identifying information, then the RECAP document will also contain unredacted information. (For now, the RECAP creators have requested that the RECAP database not be indexed by search engines, in order to keep the information relatively unknowable.) Finally, while documents created by a court are not subject to copyright protection, there is no clear answer to the question of whether copyright protection can be extended to pleadings drafted by counsel or pro se parties.

Although there is no apparent connection to RECAP, the federal judiciary's Electronic Public Access Program is conducting a self-assessment of PACER to end in 2010.[9] The survey asks interested PACER users the participant to rate his or her satisfaction, explain the rating, and pick one thing to change about the system. According to the AO, the survey results will help define the next generation of PACER. Meanwhile, PACER will cost eight cents per page for the foreseeable future.

Endnotes:

1 *See* Judiciary Information Technology Fund Annual Report for Fiscal Year 2006, at http://www.scribd.com/doc/2436289/, last visited November 12, 2009.

2 *See* Annual Report of the Director, Activities of the Administrative Office of the U.S. Courts, James C. Duff, Director, at http://www.uscourts.gov/library/annualreports/2008/index.cfm, last visited November 12, 2009.

3 See *New Jersey Law Journal*, September 2, 2009, "Free Web Access to Judicial Records Gladdens Public but Worries Some Courts," available at http://www.law.com/jsp/law/sfb/lawArticleSFB.jsp?id=1202433517232&Free_Web_Access_to_Judicial_Records_Gladdens_Public_but_Worries_Some_Courts, last visited November 12, 2009.

4 The petition is available at http://www.thepetitionsite.com/1/improve-PACER, last visited November 12, 2009.

5 The current collection is at: http://bulk.resource.org/courts.gov/, last visited November 12, 2009.

6 *See* "FBI Investigated Coder for Liberating Paywalled Court Records," available at http://www.wired.com/threatlevel/tag/aaron-swartz/, last visited November 12, 2009. See, The New York Times News Blog, "The Lede: Steal These Federal Records — Okay, Not Literally," Schwartz, J. and Mackey, R., available at http://thelede.blogs.nytimes.com/2009/02/13/steal-these-federal-records-okay-not-literally/?ref=us, last visited November 12, 2009. See New York Times, "An Effort to Upgrade a Court Archive System to Free and Easy," Schwartz, J., at http://www.nytimes.com/2009/02/13/us/13records.html?_r=1, last visited November 12, 2009.

7 *See* https://www.recapthelaw.org/, last visited November 12, 2009.

8 *See* http://pacer.psc.uscourts.gov/announcements/general/exemptnotice.html, last visited November 12, 2009.

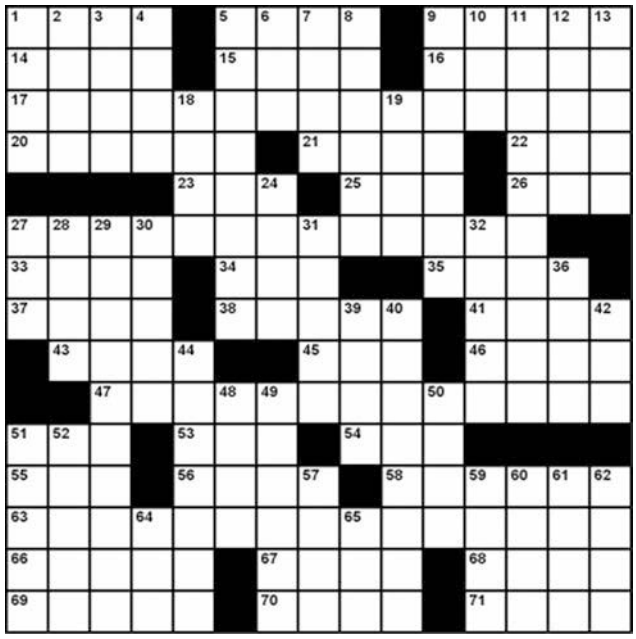
9 Electronic Public Access Program/PACER Assessment Begun, The Third Branch, available at http://www.uscourts.gov/ttb/2009-09/article05.cfm?WT.cg_n=TTB&WT.cg_s=Sep09_article05_tableOfContents, last visited November 12, 2009.

Practice Management continued from page 55

able. There may be value in talking with an experienced practitioner or finding an individual who can meet with you and provide assistance and encouragement in setting up your new office. If you have any questions about this article or wish to learn more, please call me at (703) 508-6630. Good luck and welcome to the brave new world of practicing as a solo in Virginia.

The Audience is Listening

by Brett A. Spain



Crossword answers on next page

Across

1. Frolic
5. Credit rating factor
9. Nigerian port
14. Inkling
15. Actress Fisher
16. "____ of the State" (Blink-182 album)
17. Music for a closing?
20. Trial
21. Pornography, colloquially
22. Definite article
23. Doggie doc
25. Exist
26. Edible tuber
27. Music available under the Freedom of Information Act?
33. Geometry calculation
34. Container
35. Captures
37. Portuguese explorer
38. Tennis shot
41. Ancient character
43. Took to court
45. Little pig?
46. Angers
47. Music to a plaintiff's ears?
51. Whichever
53. Imitate a pigeon
54. Fuss
55. Jones or Petty
56. Piece for 18D
58. Single afterthoughts
63. Music for a courtroom?
66. Spooky
67. The Delta house, e.g.
68. Cosmetic peddling lady
69. Queried
70. Monroe or Knox
71. Come down

Down

1. 18 U.S.C. Section 1961, et seq.
2. Smell
3. Fix
4. Common hors d'oeuvre
5. Language variations
6. Comp. key
7. Basic sandwiches (abbr.)
8. Airport feature
9. Desk
10. Black cuckoo
11. Civil War battlefield
12. College World Series locale
13. Oregon capital
18. Sitarist Shankar
19. Continental currency
24. Fit
27. Steno need
28. "Mila 18" author
29. Mole, kindly
30. Sci-fi weapon
31. Related maternally
32. MTV cartoon series
36. Dagger
39. Common mixer
40. Pro wrestling move
42. Snaky curve
44. Mandated
48. Stoles
49. Exit a server
50. Receiver Randy
51. Not in port
52. "Les _____" (Stravinsky ballet)
57. 70's hairdo
59. Id., e.g.
60. Prima donna
61. Coll. course for studying macro and micro trends
62. Transmit
64. Prevaricate
65. Jostle

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

Crossword answers.

Organizations continued from page 12

generate funds for grants. The foundation's board of directors is appointed by the VSB and the Virginia Bar Association, with ex officio members consisting of the VSB's executive director, the VBA's executive director, the Virginia CLE chair, the foundation's Fellows Council chair, and the foundation's executive director. Contact the Virginia Law Foundation at 600 E. Main Street, Suite 2040, Richmond, VA 23219; (804) 648-0112; vlf.info @virginialawfoundation.org; http://www.virginialawfoundation.org.

I HOPE YOU WILL SUPPORT these organization in whatever way you can. They do good work for Virginia lawyers. They need our help and support as much as we need them. ⚖

Clinical Programs continued from page 22

Through enrollment in the **Legal Clinic**, students have the opportunity to work in the Fairfax County Circuit Court judges' chambers, the Office of the Public Defender, the Office of the Commonwealth's Attorney, or a private attorney's office.

In a legal clinic for **Practical Preparation of GMU Patents Applications**, students write applications that will be filed for inventors affiliated with George Mason University.

The **Regulatory Clinic** allows students to engage in the federal regulatory process, analyze an active regulation, and file public comments from a public-interest perspective with a federal agency.

Externships have been undertaken in the executive office of the U.S. President, the U.S. Court of Federal Claims, the National Center for Missing and Exploited Children, the Alexandria Commonwealth Attorney's Office, the U.S. Patent and Trademark Office, and the U.S. Department of Justice.

REGENT UNIVERSITY SCHOOL OF LAW

Legal Clinic students serve low-income clients and handle landlord-tenant, consumer, selected domestic relations, and administrative matters.

Judicial and governmental externships students engage in legal research and writing under the immediate supervision of an on-site attorney or judge.

LIBERTY UNIVERSITY SCHOOL OF LAW

Students take **lawyering skills** courses in all six semesters of law school.

Work with the **Liberty University counsel** provides students an opportunity to participate in constitutional cases of significant national importance.

The Liberty Center for Law and Policy, a partnership between Liberty counsel and Liberty University School of Law, provides students the opportunity to work with legislators and policy organizations on the state and national level.

The law school's clinical and externship programs include working with one of the nation's top Internet child pornography task forces, which prosecutes child pornographers and pedophiles.

Externships include working for state and federal courts and prosecutors, state and national legislators and policymakers, government agencies, and business and public interest law firms.

APPALACHIAN SCHOOL OF LAW

The **Externship Program** gives all students an opportunity to learn about the legal system firsthand by shadowing a practicing attorney in a public interest setting for six weeks.

The externship, which is mandatory for all students, is placed between students' first and second years of law school.