Humor in the Law

I am looking for a book written some time after 1940. I read it in the 'fifties or 'sixties. I think the title was *Humor in the Law*. It was written by a Richmond lawyer. I would love to get a copy. I loaned my copy out and never got it back. Please help.

Robert Richard Boyd
9100 Belvoir Woods Parkway, #310
Fort Belvoir, Virginia 22060

We want to hear from you.

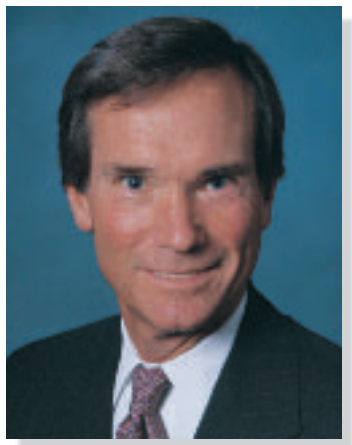
Send your letter to the editor* to:
E-mail: coggin@vsb.org
fax: (804) 775-0582
mail: Virginia State Bar,
Virginia Lawyer Magazine
707 E. Main Street, Suite 1500,
Richmond, VA 23219-2800

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

Appellate Program & Reception

The VSB Litigation Section's Appellate Subcommittee will sponsor a program and reception at 2:00 P.M. on Friday, June 17, 2005, at the VSB Annual Meeting. The program format is designed to promote interest in appellate practice and to give practitioners and speakers the benefit of dialogue. This event will be open to bar members attending the annual meeting.

Solo and Small-Firm Practitioner Forum



by David P. Bobzien, 2004–2005 VSB President

It's 351 miles from my home in Reston to Abingdon. And, as the students at George Mason basketball games chant when there is less that a minute to go and Mason has the lead over James Madison, it's "66 west, 81 south" and several hours of monotonous, truck-passing and being-passed driving. I spent my last Saint Patrick's Day making that trip to take part in March 18's Solo and Small-Firm Practitioner Forum. The idea for the forum sounded plausible enough. For over a year, Chief Justice Leroy R. Hassell Sr. had been saying that he believes that rural practitioners, who overwhelmingly practice as solos or in small-firm settings, saw the State Bar only from the standpoint of its regulatory function—when they or a colleague down the street received an envelope stamped in red "personal and confidential." If the Supreme Court could bring the Virginia State Bar to the Southwest and organize a forum that would help practitioners avoid disciplinary pitfalls, better manage their offices and trust accounts, learn about the benefits of their membership, and voice their concerns about the VSB and the judiciary, then perhaps the State Bar would be better recognized for the service and assistance it provides its members.

As we prepared to bring Mohammed to the mountain—or, in this case, a venue fourteen miles from the Tennessee border—we thought that the forum's success would hinge as much on the messengers as on the messages and that having messengers from the Southwest and other rural areas would be essential. As the forum unfolded on March 18, the benefit of having lawyers who had been there and done that became evident. Justice Cynthia Kinser of Pennington Gap led the forum, and her sensitivity to the circumstances and needs of rural practitioners was evident both in her planning and the tone she set during the meeting. Nancy Byerly Jones of Banner Elk, North Carolina, spoke on law office management, technology, and trust accounting from the perspective of a national consultant who is also a solo practitioner currently serving as an assistant prosecutor in her rural county. Frank O. Brown Jr., who has labored tirelessly on issues affecting senior lawyers, discussed the need for all lawyers to have plans in place that will help control the chaos that can arise if something happens to an attorney or to law practice. He emphasized the special need for a solo attorney to select a trusted "back-up attorney" who can step in and contact clients and manage open files, dates/deadlines, and trust accounts, when needed.

At no time during the forum was the understanding of the unique challenges facing solo and small-firm practitioners in rural settings more evident than in the session on ethical issues presented by VSB Disciplinary Board veteran Roscoe B. "Steve" Stevenson III of Covington. Steve talked about his world. Law office management for him includes changing his light bulbs and ensuring through thick and thin that office overhead costs will be met. The population is shrinking (except for newly minted attorneys), but not his travel time between courthouses or the short distance to the border of West Virginia, where he's not licensed and can't expand his practice. Clients he has had from the day he opened his practice will at times want him to handle cases in areas of law in which he has little experience, because they trust him and are reluctant to be referred out to unknown lawyers who might not be as generous in their billings. A client will inform him that he has a lawyer for his personal injury claim whom he chose because of an inspiring ad on the back cover of the phone book. Clients who used to come in every so often to replace second trusts, when new large expenses were facing them, no longer need his services because they can rely on credit cards or equity lines of credit to get them through. It was in this context that Steve nevertheless spoke passionately about the counterbalancing rewards of solo practice and the slippery slopes, failures, indiscretions, and traps that a solo practitioner must learn to avoid.

After a half-hour panel discussion of several services and benefits that the State Bar provides, the forum concluded with a Town Hall Meeting, during which the attendees had the unusual opportunity

Forum *continued on page 12*

Highlights of Virginia State Bar Council Meeting

February 18–19, 2005

At its regular winter meeting on February 18 and 19, 2005, in Richmond, the Council of the Virginia State Bar heard the following reports and took the following significant actions:

Online Legal Research Program for all VSB Members

Four vendors have submitted proposals to provide basic online legal research services to all Virginia lawyers—a project endorsed by Chief Justice Leroy R. Hassell Sr. as part of his initiative to improve services to solo and small-firm practitioners. The cost of the research package will be paid from lawyers' dues as a Virginia State Bar membership benefit, with no additional charge. The vendor selection process has been delayed by two legal challenges. In one case, a company that provides research on CD-ROM has, in a letter, accused the VSB of antitrust violations if it offers the planned program as a member benefit. Counsel in the attorney general's office has advised the bar that providing such a service would not violate antitrust laws. In the second challenge, one of the would-be vendors has been accused by competitors of offering to provide data that is not its own. The VSB is addressing that question with all the prospective vendors before it proceeds to negotiations over a contract. VSB Executive Director Thomas A. Edmonds told the Council that a vendor likely will be chosen in time for the June Council meeting. With only a few dissenting votes, the Council authorized VSB officers and staff to negotiate and enter into a contract once legal issues are resolved. Some voluntary bar associations continue to object to the VSB offering such a member benefit.

General Assembly

Bar-related legislation before the 2005 General Assembly included:

- **Increased funding and other relief to Virginia's system for defending indigent people accused of crimes.** Most of the proposals failed to progress, despite intense support from an unprecedentedly broad cross-section of the legal community and editorial support from several daily newspapers in Virginia. The assembly did, however, set aside money to provide Internet access to public defender offices. And it budgeted a small amount to more fully fund the account used to pay court-appointed criminal defense attorneys, while continuing the current cap on their fees.

- **Clarifying procedures for putting law practices into receivership when attorneys are unable or unwilling to tend to client matters.** Both houses unanimously approved the legislation, which was requested by the VSB after a task force studied the existing receivership statutes and made recommendations for improvements.

- **Authorizing nonlawyers to represent limited liability entities in general district court.** The VSB opposed this bill, which was withdrawn by the patron in committee.

- **Requiring lawyers who do not have legal malpractice insurance to pay $1,500 annually to the VSB Clients' Protection Fund.** The VSB took no position on the measure, which passed the House but died in the Senate Courts of Justice Committee.

- **Establishing a process to have a delayed criminal appeal heard when the client's attorney failed to file.** This measure, which passed both houses, addresses recent reports that many felons in Virginia lost their right to appeal because their lawyers missed filing deadlines or failed to take other required procedural steps.

Judicial Elections

The Council unanimously resolved that "selection of judges should be based on merit, and judges should be selected from among candidates who have submitted their credentials to the appropriate bar organizations for consideration and recommendation." The resolution, proposed by past VSB President Joseph A. Condo, was a response to the General Assembly's recent election of judicial candidates who had not submitted themselves to the evaluation processes of bar groups.

Malpractice Insurance Notification

Lawyers who certify on their annual dues statement that they have malpractice insurance would be required to notify the VSB within thirty days if their malpractice coverage ends, under a rule change recommended by the Lawyer Malpractice Insurance Committee and approved by the Council. The proposed change will go before the Supreme Court of Virginia for its consideration.

Foreign Legal Consultants

The Council approved new rules for certifying lawyers from other countries as "foreign legal consultants." If the rules are approved by the Supreme Court of Virginia, lawyers with that designation will not be able to practice in Virginia courts or render legal services based on application or interpretation of Virginia law or the law of another United States jurisdiction. They can, however, give advice based on the law of the country where they are admitted to practice or the laws of other foreign countries, and on public and private international law. The VSB's Multijurisdictional Practice Task Force developed the rules in response an increasing demand for uniform regulatory standards for foreign lawyers in the United States. The task force used as its model the American Bar Association's Model Rule for the Licensing of Foreign Legal Consultants.

Virginia Lawyer Register Changes

The Council approved changes to the Virginia Lawyer Register proposed by the VSB Publications and Public Information

Committee. Starting with the August-September 2005 issue, the publication will be given over entirely to official records of the VSB: disciplinary actions, legal ethics opinions, trust account depositories, Clients' Protection Fund payouts and proposed rule changes, for example. Advertising and feature articles will be limited to the glossy Virginia Lawyer magazine, which is published alternately with the Register. The loss in advertising revenue will be made up through an increase in ad rates and reduction in the cost of publishing the Register.

Circuit-Based Extraordinary Service Awards Pilot Project

The Council was told that the VSB's Special Committee on Access to Legal Services would like to launch an award program under which lawyers will be recognized by their circuits for extraordinary contributions to the justice system through pro bono work or by accepting nominally compensated court-appointed cases. The award program will start in three circuits on a pilot basis this year—the Fourth (Norfolk), Twenty-Fourth (Lynchburg and nearby counties) and Thirtieth (Lee, Scott and Wise counties). Nominations can come from members of the legal profession, bar associations and the general public in each circuit. The deadline for nominations is July 1. Winners will receive a certificate signed by the Chief Justice and the President of the VSB. The certificate will be presented at the opening term of circuit court in each locality. The Council unanimously approved the program.

Insurance News: Reduced Rates And Premium Holiday

Fortis Benefits Insurance Company, which writes the VSB group life insurance coverage sold by the Insurance Center for Virginia State Bar Members, has announced a rate reduction as of May 1, when nonsmokers will pay 10 percent less and smokers' rates will drop by 5 percent. Those already enrolled in the plan and those who applied for it by February 17 will enjoy a premium holiday for six months. Also, the Insurance Center has begun selling Health Savings Accounts that combine high-deductible health insurance with a savings account deducted from pretax income. The money in the account may accumulate, with no "use it or lose it" deadlines.

New Election Deadlines

The Council amended the VSB Bylaws to change the deadlines for electing the president-elect. Now, candidates must file their petitions by October 1, and, in contested elections, ballots must be returned by December 1. The task force determined that the old deadlines—March 1 and May 1, respectively—did not allow enough time for presidents-elect to train for the office.

to pose questions and make comments to a panel that was introduced by Justice Kinser and consisted of Chief Justice Hassell, VSB Executive Director Tom Edmonds, Bar Counsel Barbara Williams, and Conference of Local Bar Associations Chair Manny Capsalis. There was no lack of conversation. Chief Justice Hassell was able to assuage a concern about the expensive utilization of Commissioners in Chancery by telling attendees that House Bill 2583, passed by the 2005 General Assembly, will require the agreement of counsel before a commissioner can be appointed; assure several individuals that he agreed with, and would pass along to the judiciary, suggestions regarding ways to increase civility in the courtroom and the involvement of judges in local bar activities; and point out that, realistically, disparate sentencing among circuits, as troubling as that may be to some, will always be a part of the judicial system as long as human beings are judging.

Whether the day was a success has to be left to the judgment of the participants in the audience. But from my vantage point, it was well worth the long drive. ⚖

Clients' Protection Fund Board
Petitions Paid

On February 4, 2005, the Clients' Protection Fund Board approved payments to fourteen clients. The matters involved seven attorneys.

Attorney/Location	Amount Paid	Type of Case
Charles D. Chambliss, Jr., Richmond	$1,500.00	Unearned Retainer/Wrongful termination suit
Robert D. Eisen, Norfolk	$5,000.00	Unearned Retainer/Criminal representation
Robert D. Eisen, Norfolk	$2,100.00	Unearned Retainer/Post-conviction representation
Saad El-Amin, Richmond	$2,550.00	Unearned Retainer/Post-conviction representation
Kelly K. Latimer, Manassas	$635.00	Unearned Retainer/Traffic violation
Kelly K. Latimer, Manassas	$2,000.00	Unearned Retainer/Driving violation
Steven Y. Lee, Fairfax	$4,521.14	Unearned Retainer/Civil suit
Steven Y. Lee, Fairfax	$1,809.00	Unearned Retainer/International adoption & immigration matter
Steven Y. Lee, Fairfax	$1,002.39	Unearned Retainer/Immigration matter
Steven Y. Lee, Fairfax	$20,000.00	Unearned Retainer/Immigration matter
Steven Y. Lee, Fairfax	$18,089.96	Unearned Retainer/Immigration matter
Steven Y. Lee, Fairfax	$3,617.98	Unearned Retainer/Immigration matter
John H. Partridge, Herndon	$500.00	Unearned Retainer/Employment discrimination case
David Thomas Steckler, Fredericksburg	$20,000.00	Embezzlement/Escrow funds
Total	**$83,325.47**	

Virginia State Bar Council To Review Proposed Amendments To Rules 1.2 & 4.2 Of The Rules Of Professional Conduct And Rule 1:5 Of Rules Of Supreme Court Of Virginia

Pursuant to Part Six: Section IV, Paragraph 10(c) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on June 16-19, 2005, in Virginia Beach, Virginia, is expected to consider for approval, disapproval, or modification, proposed amendments to Rule 1.2 and 4.2 of the Rules of Professional Conduct and Rule 1:5 of the Rules of the Supreme Court of Virginia by the Special Committee on Access to Legal Services and Standing Committee on Legal Ethics.

In September 2002, the Supreme Court of Virginia requested that the Virginia State Bar form a committee to explore the issue of "unbundling," or limited representation in Virginia. This request was part of a larger report directed at increasing access to the courts for pro se and lower income litigants. The Virginia State Bar's Special Committee on Access to Legal Services accepted the charge and formed a subcommittee to consider amendments to the Rules of Professional Conduct that would allow the "unbundling" of legal services; in particular, allowing a lawyer to prepare pleadings for a pro se litigant to file in court. Through the course of its study, the subcommittee held public forums; conducted surveys of service models in Virginia and throughout the country; interviewed individuals who are opposed to as well as those engaged in unbundled representation; sought input from retired judges and prospective clients who could benefit from increased unbundled opportunities; reviewed literature and studies conducted throughout the country; and analyzed existing case law and ethics opinions from the Virginia state and federal systems.

The subcommittee found that self-representation in Virginia courts is rapidly increasing. Pro se litigants who cannot afford to pay a lawyer for full representation throughout all stages of litigation may nonetheless be able to pay for discrete, limited legal services that would assist them in handling their cases in court.

The purpose of the amendments to all three rules (Rules 1.2, 4.2 and Va. S. Ct. R. 1:5) is to permit an attorney to provide discrete task representation to a client when both the client and lawyer have agreed that the lawyer will only perform discrete tasks and the client will perform the remaining tasks. Often a client cannot afford a full representation by a lawyer but wants to have the lawyer provide limited legal assistance. A typical example is the lawyer who is asked to prepare pleadings for a pro se litigant.

The proposed amendments to Rule 1.2 (Scope of Representation) explicate and expand the current provision in the rule allowing the lawyer, with the client's informed consent, to limit the goals and objectives of the representation in the context of "unbundling" legal services.

The proposed amendments to Rule 4.2 (Communication with Persons Represented by Counsel) address when the lawyer may communicate directly with a pro se litigant who is receiving or has received limited representation by an attorney.

The proposed amendments to Va. S. Ct. R. 1:5 (Counsel) would permit an attorney to sign a pleading that the attorney prepared for a pro se litigant simply to inform the court that the litigant received substantial assistance from the lawyer. However, by signing the pleading to provide that disclosure to the court, the attorney is not deemed to have entered an appearance of record. The amendment is driven in part by ethics opinions and court cases that prohibit an attorney from "ghostwriting pleadings" for a pro se litigant and a countervailing concern that the assisting attorney may be forced to conduct a case in court when the person assisted wants to proceed pro se.

The cornerstone of each of the recommended changes is disclosure to opposing counsel, the court and the client. Attorneys providing these limited representation services will remain responsible for compliance with all existing ethical rules.

Inspection and Comment

The proposed amendments may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 A.M. and 4:30 P.M., Monday through Friday. Copies of the proposed amendments can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at **http://www.vsb.org**.

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed amendment by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **May 20, 2005**.

RULE 1.2 Scope of Representation

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), and (d), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer may limit the ~~objectives~~ scope of the representation if the client consents after consultation~~:~~, during which consultation the lawyer shall include disclosure of the risks and benefits of such limited representation. In any limited representation, the lawyer shall remain bound by all Rules of Professional Conduct.

(c) A lawyer may assist in the preparation of pleadings or other filings in a tribunal on behalf of a pro se litigant. If the lawyer substantially prepares a filing for a tribunal, the lawyer must take reasonable measures to assure that the lawyer's role is disclosed in writing to the tribunal and to the opposing counsel. If a lawyer substantially prepares a plead-

ing for *a pro se* litigant, the lawyer must identify him or herself in the pleading as having substantially prepared the pleading for the client to file pro se. All rules and regulations governing competence, due diligence and the requirement that pleadings be meritorious shall apply to the lawyer's conduct in preparing the pleading.

(e d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

(d e) A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

(e f) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

COMMENT

Scope of Representation

[1] Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute resolution processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. These Rules do not define the lawyer's scope of authority in litigation.

[2] In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[3] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Services Limited in Objectives or Means

[4] The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

[5] In nonlitigation matters, it is common for the scope of representation to be limited. In litigation matters, however, limitation of the scope of representation involves special concerns that transcend the interests of the client and the lawyer. Moreover, a limitation on the scope of representation in litigation matters has the potential to significantly prejudice the client unless the nature of the limitation and the risks to the client are carefully explained. When limitations on the scope of representation are being considered, the lawyer must fully advise the client of the difficulties the client may encounter in representing him or herself.

Whenever practical, an agreement to limit the scope of representation shall be memorialized in a written agreement signed by both the attorney and client that sets out the nature and limits on the scope of legal services to be provided. When it is impractical to secure a written agreement (e.g., volunteer hotlines, last-minute/emergency requests for legal assistance, etc.), the lawyer must fully advise the client of the limits on the scope of representation and the legal services to be provided. In either scenario, notice of the scope of the relationship shall be communicated to the client prior to the provision of legal services.

A lawyer may not limit representation to the point where the lawyer does not provide meaningful, competent advice. Such limitation shall not circumvent Rule 1.8(h).

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Nothing in this Rule is intended to affect or limit the laws and regulations governing professional conduct of lawyers.

Criminal, Fraudulent and Prohibited Transactions

[6] A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of question-

able conduct and recommending the means by which a crime or fraud might be committed with impunity.

[7] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted or required by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer shall not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. *See* Rule 1.16.

[8] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[9] Paragraph (c) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (c) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (c) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities. *See* also Rule 3.4(d).

VIRGINIA CODE COMPARISON

Paragraph (a) has no direct counterpart in the Disciplinary Rules of the *Virginia Code*. EC 7-7 stated: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client...." EC 7-8 stated that "[I]n the final analysis, however, the . . . decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client. . . . In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." DR 7-101(A)(1) provided that a lawyer "shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law . . . . A lawyer does not violate this Disciplinary Rule, however, by . . . avoiding offensive tactics...."

With regard to paragraph (b), DR 7-101(B)(1) provided that a lawyer may, "with the express or implied authority of his client, exercise his professional judgment to limit or vary his client's objectives and waive or fail to assert a right or position of his client."

With regard to paragraph (c), DR 7-102(A)(7) provided that a lawyer shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(6) provided that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-105(A) provided that a lawyer shall not "advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal ... but he may take appropriate steps in good faith to test the validity of such rule or ruling." EC 7-5 stated that a lawyer "should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."

Paragraph (d) had no counterpart in the *Virginia Code*.

With regard to paragraph (e), DR 2-108(A)(1) provided that a lawyer shall withdraw from representation if "continuing the representation will result in a course of conduct by the lawyer that is illegal or inconsistent with the Disciplinary Rules." DR 9-101(C) provided that "[a] lawyer shall not state or imply that he is able to influence improperly . . . any tribunal, legislative body or public official."

COMMITTEE COMMENTARY

The Committee adopted this Rule as a more succinct and useful statement regarding the scope of the relationship between a lawyer and the client. However, the Committee moved the language of paragraph (b) of the *ABA Model Rule* to the Comment section styled "Independence from Client's Views or Activities" since it appears more appropriate as a Comment than a Rule. Subsequent paragraphs were redesignated accordingly.

The Committee added the fourth sentence in Comment [1] requiring lawyers to advise clients of dispute resolution processes that might be "appropriate."

In Comment [7], the Committee used the verb "shall" to match the mandatory standard of the *Virginia Code* and these Rules.

Rule 4.2. Communication with Persons Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

COMMENT

[1] This Rule does not prohibit communication with a represented person, or an employee or agent of a represented person, concerning matters outside the representation. For example, the existence of a controversy between an organization and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having inde-

continued on page 22

pendent justification or legal authorization for communicating with the other party is permitted to do so.

[2] In circumstances where applicable judicial precedent has approved investigative contacts in pre-indictment, non-custodial circumstances, and they are not prohibited by any provision of the United States Constitution or the Virginia Constitution, they should be considered to be authorized by law within the meaning of the Rule. Similarly, communications in civil matters may be considered authorized by law if they have been approved by judicial precedent.

[3] *ABA Model Rule* Comment not adopted.

[4] When opposing counsel has filed a substantial assistance pleading pursuant to Rule 1:5, a lawyer must contact that opposing counsel and ascertain whether the opposing counsel continues to represent the person on whose behalf the pleading was filed. A lawyer who learns that a pro se litigant is being "coached" or receiving advice from another lawyer shall inquire of that lawyer whether the litigant is pro se or represented. If the lawyer is advised that the litigant is pro se, then there shall be no prohibition against communication with the litigant.

[45] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in *Upjohn v. United States,* 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits *ex parte* communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate *ex parte* with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

[56] This Rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question. Neither the need to protect uncounselled persons against being taken advantage of by opposing counsel nor the importance of preserving the client-attorney relationship is limited to those circumstances where the represented person is a party to an adjudicative or other formal proceeding. The interests sought to be protected by the Rule may equally well be involved when litigation is merely under consideration, even though it has not actually been instituted, and the persons who are potentially parties to the litigation have retained counsel with respect to the matter in dispute.

[56a] Concerns regarding the need to protect uncounselled persons against the wiles of opposing counsel and preserving the attorney-client relationship may also be involved where a person is a target of a criminal investigation, knows this, and has retained counsel to receive advice with respect to the investigation. The same concerns may be involved where a "third-party" witness furnishes testimony in an investigation or proceeding, and although not a formal party, has decided to retain counsel to receive advice with respect thereto. Such concerns are equally applicable in a non-adjudicatory context, such as a commercial transaction involving a sale, a lease or some other form of contract.

Virginia Code Comparison

This Rule is substantially the same as DR 7-103(A)(1), except for the change of "party" to "person" to emphasize that the prohibition on certain communications with a represented person applies outside the litigation context.

Committee Commentary

The Committee believed that substituting "person" for "party" more accurately reflected the intent of the Rule, as shown in the last sentence of the Comment, and was preferable to the apparent limitation of DR 7-103(A)(1) which referred to "[c]ommunicat[ion] on the subject of the representation with a party . . . ."

Rule 1:5 Counsel.

When used in these Rules, the word "counsel" includes a partnership, a professional corporation or an association of members of the Virginia State Bar practicing under a firm name.

When such firm name is signed to a pleading, notice or brief, the name of at least one individual member or associate of such firm must be signed to it. Signatures to briefs and petitions for rehearing may be printed or typed and need not be in handwriting.

Service on one member or associate of such firm shall constitute service on the firm. Service is not required to be made on foreign attorneys.

"Counsel of record" includes a counsel or party who has signed a pleading in the case or who has notified the other parties and the clerk in writing that he appears in the case. Counsel of record shall not withdraw from a case except by leave of court after notice to the client of the time and place of a motion for leave to withdraw.

Counsel of record does not include counsel whose representation of a party is limited to assisting in the preparation of pleadings or documents for the party to file *pro se.* A counsel may undertake to provide only limited representation to a *pro se* party in a court proceeding in compliance with Rule 1.2 of the Virginia Rules of Professional Conduct and other ethical requirements. Documents filed by a *pro se* party that were substantially prepared by counsel who does not appear in the proceeding shall carry the counsel's name, address, telephone number, bar number and the following statement: "(counsel's name) substantially prepared this pleading, but does not enter

an appearance in this case." Counsel shall advise the party that the documents must carry this information. Counsel who substantially prepares a pleading or other document makes the same certifications as if counsel were submitting the pleading, except that counsel may rely upon the *pro se* party's representation of the facts unless counsel has reason to believe that those representations are false or materially insufficient, in which instance counsel shall make an independent reasonable inquiry into the facts. ⚖

Virginia State Bar Council To Review A Proposed Amendment To Rules 7.4 Of The Rules Of Professional Conduct

Pursuant to Part Six: Section IV, Paragraph 10(c) of the Rules of the Supreme Court of Virginia, the Virginia State Bar Council, at its meeting on June 16-19, 2005, in Virginia Beach, Virginia, is expected to consider for approval, disapproval, or modification, a proposed amendment to Rule 7.4 of the Rules of Professional Conduct by the Standing Committee on Lawyer Advertising and Solicitation.

RULE 7.4

The Standing Committee on Lawyer Advertising and Solicitation is proposing an amendment to Rule 7.4(d) that concerns a lawyer's ability to advertise certain certifications or accreditations. This amendment incorporates the ABA's position in the current Model Rules that if an attorney has been certified by an ABA accredited organization, then the attorney can advertise that he is so certified without any disclaimer. This amendment would not apply to attorneys advertising they are strictly members of ABA accredited organizations. The amendment would simply add a further distinction to the current rule, which requires a disclaimer for all certifications that are not recognized by the Supreme Court of Virginia. The amendment comes as a committee response to requests from many of the practicing members who carry these ABA specialty certifications.

In making this recommendation the committee has confirmed that the ABA has a very stringent process of accrediting lawyer specialty certification programs to ensure that the certified lawyers have been evaluated, have demonstrated their substantial involvement in the subject area, received adequate peer review, passed a written examination and are currently in good standing within their state bar. The ABA administers the accreditation process under a set of rules and procedures. The applicant's organizational capabilities, operational methods and certification standards are reviewed by specially appointed evaluation panels. These panels are comprised of individuals with special knowledge of the substantive specialty and the certification process. The panel reports its findings to the Standing Committee which prepares a recommendation on accreditation for the ABA House of Delegates. The actual granting of accreditation is voted on by the House at its Annual and Midyear meetings. The accreditation period is five years, after which a program must be re-accredited if it is to retain its standing with the ABA.

Inspection and Comment

The proposed amendment may be inspected at the office of the Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219-2800, between the hours of 9:00 A.M. and 4:30 P.M., Monday through Friday. Copies of the proposed amendment can be obtained from the offices of the Virginia State Bar by contacting the Office of Ethics Counsel at (804) 775-0557, or can be found at the Virginia State Bar's Web site at **http://www.vsb.org**

Any individual, business or other entity may file or submit written comments in support of, or in opposition to, the proposed amendment by filing ten copies with Thomas A. Edmonds, the Executive Director of the Virginia State Bar, not later than **May 20, 2005.**

RULE 7.4 Communication Of Fields Of Practice And Certification

Lawyers may state, announce or hold themselves out as limiting their practice in a particular area or field of law so long as the communication of such limitation of practice is in accordance with the standards of this Rule, Rule 7.1, Rule 7.2, and Rule 7.3, as appropriate. A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as follows:

(a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(b) A lawyer engaged in Admiralty practice may use as a designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation;

(c) A lawyer who has been certified by the Supreme Court of Virginia as a specialist in some capacity may use the designation of being so certified, e.g., "certified mediator" or a substantially similar designation;

(d) A lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization, provided that: 1) the lawyer has been certified as a specialist by an organization that is currently accredited by the American Bar Association and the name of the certifying organization is clearly identified in the communication; or 2) that the communication clearly states that there is no procedure in the Commonwealth of Virginia for approving certifying organizations.

COMMENT

[1] This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "spe-

cialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 and 7.2 to public communications concerning a lawyer's services.

[2] However, a lawyer may not communicate that the lawyer has been recognized or certified as a specialist in a particular field of law, except as provided by this Rule. Recognition of specialization in patent matters is a matter of longestablished policy of the Patent and Trademark Office as reflected in paragraph (a). Paragraph (b) recognizes that designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Because Virginia has no procedure for approving organizations granting certifications of other specialties, lawyers communicating the fact that they have been certified as specialists in a field of law by a named organization (other than the Supreme Court of Virginia as provided in paragraph (c)) must clearly disclose that there is no procedure in Virginia for approving certifying organizations (paragraph (d)).

VIRGINIA CODE COMPARISON

Rule 7.4(a) and (b) are substantially the same as DR 2-104(A). Paragraph (c) is new, and paragraph (d) follows one of the two options in *ABA Model Rule* 7.4(c).

COMMITTEE COMMENTARY

The Committee maintained the current DR 2-104(A) approach in the first two paragraphs of this Rule.

Because national organizations are increasingly certifying specialists in different areas of the law, the Committee determined to permit Virginia lawyers to describe such certifications. However, Virginia has no procedure for state approval of such certifications. For this reason, the Committee adopted the alternative *ABA Model Rule* 7.4(c) that requires lawyers communicating certified specializations to make the additional clear disclosure that Virginia has no procedure for approving certifying organizations. This additional disclosure balances Virginia clients' interest in receiving additional information about lawyers and the need to avoid misleading clients by implying some government-approved certification. At the same time, it was deemed that any certification process implemented by the Supreme Court of Virginia (under (d)) would obviously be reliable, so as to eliminate the necessity for any disclaimer. ⚖

Respondent Bound by Submissions to Bar and Must Sign Responses

On March 2, 2005, COLD approved a proposed amendment providing that a Respondent is bound by written submissions to the bar made by Respondent or Respondent's counsel. The amendment further requires a Respondent to sign certain submissions.

Part 6, Section IV, Paragraph 13 of the Rules of the Virginia Supreme Court

13. PROCEDURE FOR DISCIPLINING, SUSPENDING, AND DISBARRING ATTORNEYS.

* * *

F. Participation and Disqualification of Counsel in Disciplinary Proceedings

1. Attorney for Respondent

~~A Respondent may be represented by an Attorney at any time with respect to a complaint.~~

a. In a Disciplinary Proceeding or Investigation, a Respondent shall be bound by any written submission by the Respondent or his or her Attorney to the Clerk of the Disciplinary System or Bar Counsel.

b. A Respondent must sign his or her written response to a Complaint, a Charge of Misconduct and a Certification.

* * * ⚖

The Remarks of The Honorable Gerald L. Baliles, Former Governor of Virginia

Reflections: The Honorable Robert R. Merhige Jr.

Wednesday, February 23, 2005—Cathedral of the Sacred Heart, Richmond, Virginia

Late last Friday, word began to seep through the community that our friend and colleague, the Honorable Robert R. Merhige Jr., had left us. It was a saddening realization that this man of civility and courage, this gentle but vibrant force of the legal realm, would no longer be available for a cup of coffee and a word of counsel to some young attorney, or to a former colleague still on the bench, or to me.

Since last weekend, published accounts of this remarkable man's life have reminded us of his many awards, accolades and accomplishments, of his personification of the American dream. You know the story—he worked his way through college and law school; flew bombing missions over Europe during World War II; built a highly successful law practice; was appointed a federal judge by the President; and presided over many complex and controversial decisions. His genius for creative consensus building among corporate litigants is legendary; his courtesies to one and all are well-known. His courage under fire is a lesson in grace, especially when his life—and the lives of his family—were under threat.

All those things we know—and admire—and respect.

But his humanity and sense of humor must be mentioned, for they, too, capture the essence of the man who was more than a judge.

Those who were close to him knew how much he loved his family, how he worshiped the ground that his wife, Shirl, walked on. He doted on his children and was smitten by his grandchildren. He considered his fifty-six law clerks, accumulated over 31 years on the bench, as members of his extended family.

The judge was a sociable man—he loved good conversation, especially over dinner with friends, usually at LaPetite France, Chez Max or the Commonwealth Club, and while he did not wear his religion on his sleeve, he rarely missed Mass at his church.

I knew the judge well. My first week in the practice of law was his first week on the bench, and we both were involved in an important case. Twenty years later, I, as Governor, presented him with a proclamation at a black-tie dinner, recognizing his twenty years on the bench. Many of you were in attendance.

For the last seven years, the judge was my next door neighbor at the law firm of Hunton and Williams. I almost never beat him to the office in the mornings. He took delight in asking why I was late at 6:45 a.m. He almost certainly invented the Puritan work ethic.

Not so long ago, after the judge had returned from a multidistrict litigation case in the cold weather of Maine, where he had been hospitalized, we had a meeting to tell him ever so gently that while we loved him and appreciated his hard work, we did not want him to endanger his health by traveling like that again.

Our chairman, Gordon Rainey, in that silver-tongue tone of his, could not have been nicer. But the judge bolted out of his chair, and said: "After forty-eight bombing missions over Germany, you've got to be kidding! I don't want to be babied. I want to earn my keep."

The judge was a master of wit and could puncture the pomposity of lawyers as well as engage in acts of self-deprecation. He was fond of his colleagues on the federal bench, and lunched with them occasionally after he had retired.

On one such occasion, the judge invited me to join them and asked me to drive my black Cadillac with a low license to pick up his friends. Imagine the pleasure he took as we pulled up in front of the federal courthouse, with lawyers and judges standing there on a summer-like day. The judge rolled down the window, invited his friends to get in the car and asked with a mischievous grin, "Have you met my chauffeur, the former Governor?"

There is another anecdote that captures the essence of the jurist whose life we celebrate today.

On his office wall hangs a 1967 photograph of the judge and several other nom-

continued on page 27

The Honorable Robert R. Merhige Jr., a United States district judge in the Eastern District of Virginia from 1967–1998, died February 18 in Richmond. He was 86.

Judge Merhige was best known for his 1972 decision to order school desegregation. The personal price he paid in the aftermath of that decision—he and his family were victims of threats and violence, and he was socially ostracized in some circles—made him an icon of judicial courage and independence.

A native of Brooklyn, New York, Judge Merhige received his undergraduate degree from High Point College in 1940 and his law degree from the University of Richmond in 1942. He served in the Army Air Force during World War II.

He was appointed to the bench by President Lyndon B. Johnson. After his retirement, he was of special counsel to the Richmond-based law firm Hunton & Williams.

VBA Executive Vice President to Retire

Charles Breckenridge "Breck" Arrington Jr., executive vice president of The Virginia Bar Association since 1991, will retire effective February 1, 2006.

The VBA, with 5,600 members, is the largest and oldest statewide voluntary bar organization in Virginia. It was founded in 1888.

Arrington, once chair of the VBA Young Lawyers Division, received his undergraduate and law degrees from the University of Virginia. Before becoming the VBA's executive, he was vice president of Newmyer Associates Inc., a Washington, D.C., public and governmental affairs management consulting firm. He also served in legal and management positions with Atlantic Richfield Company in Dallas, New York, Washington and Los Angeles.

He was counsel to the first state environmental protection agency—in New York—and was a partner in what is now the Vandeventer Black law firm in Norfolk.

He was an officer in the United States Navy and is a graduate of the U.S. School of Naval Justice.

VBA President James V. Meath said, "Breck's announcement is a 'passing of the guard' kind of event which we are sorry to see come to pass. However, his announcement will allow for a timely search for his replacement and an orderly transition for the affairs of the association. We have a knowledgeable and dedicated staff at the VBA built during Breck's tenure. We fully expect to maintain our high level of service to our members and continue our contributions to the public and the legal profession."

continued from page 26

inees at the White House with President Lyndon B. Johnson, a Democrat. I once asked him how it was that he was such good personal friends with other federal judges, some of whom were appointed by other presidents of another party. His reply was a lesson for us to ponder and keep:

He said, "My loyalty is to the law, not to the person who appointed me. My colleagues have taken the same oath. So, we are a fraternity, a co-equal branch of government. We take the same oath as members of the executive and legislative branches of government: 'to preserve, protect and defend the Constitution of the United States.'" And then he added, with a twinkle in his eye: "Don't you and your friends in both parties and the other two branches of government ever forget it!"

So, we gather today to salute—and say farewell to—a good man who lived life fully, who believed with every fiber of his being that "to do justice, one must ensure fairness." Who among us could have said it better? ⚖

J. Scott Kulp Joins VSB Disciplinary Staff

J. Scott Kulp has joined the Richmond office of the Virginia State Bar as an assistant bar counsel.

Kulp previously was an associate in the litigation section of Williams Mullen PC, where he handled general litigation matters. He also organized and participated in the firm's involvement in the Legal Aid Justice Center Pro Bono Housing Project.

He received a bachelor's degree in history from the University of Virginia in 1992 and his law degree from Washington and Lee University in 1996. He served as a law clerk in the chief staff attorney's office of the Supreme Court of Virginia before joining Williams Mullen in 1998.

Virginia State Bar Professionalism Course

Upcoming course dates:

MAY 5, 2005—CHESAPEAKE

JULY 21, 2005—MCLEAN

for additional dates and a registration form:

www.vsb.org/membership/professionalism.pdf

VBA Executive Vice President to Retire

Charles Breckenridge "Breck" Arrington Jr., executive vice president of The Virginia Bar Association since 1991, will retire effective February 1, 2006.

The VBA, with 5,600 members, is the largest and oldest statewide voluntary bar organization in Virginia. It was founded in 1888.

Arrington, once chair of the VBA Young Lawyers Division, received his undergraduate and law degrees from the University of Virginia. Before becoming the VBA's executive, he was vice president of Newmyer Associates Inc., a Washington, D.C., public and governmental affairs management consulting firm. He also served in legal and management positions with Atlantic Richfield Company in Dallas, New York, Washington and Los Angeles.

He was counsel to the first state environmental protection agency—in New York—and was a partner in what is now the Vandeventer Black law firm in Norfolk.

He was an officer in the United States Navy and is a graduate of the U.S. School of Naval Justice.

VBA President James V. Meath said, "Breck's announcement is a 'passing of the guard' kind of event which we are sorry to see come to pass. However, his announcement will allow for a timely search for his replacement and an orderly transition for the affairs of the association. We have a knowledgeable and dedicated staff at the VBA built during Breck's tenure. We fully expect to maintain our high level of service to our members and continue our contributions to the public and the legal profession."

continued from page 26

inees at the White House with President Lyndon B. Johnson, a Democrat. I once asked him how it was that he was such good personal friends with other federal judges, some of whom were appointed by other presidents of another party. His reply was a lesson for us to ponder and keep:

He said, "My loyalty is to the law, not to the person who appointed me. My colleagues have taken the same oath. So, we are a fraternity, a co-equal branch of government. We take the same oath as members of the executive and legislative branches of government: 'to preserve, protect and defend the Constitution of the United States.'" And then he added, with a twinkle in his eye: "Don't you and your friends in both parties and the other two branches of government ever forget it!"

So, we gather today to salute—and say farewell to—a good man who lived life fully, who believed with every fiber of his being that "to do justice, one must ensure fairness." Who among us could have said it better? ⚖

J. Scott Kulp Joins VSB Disciplinary Staff

J. Scott Kulp has joined the Richmond office of the Virginia State Bar as an assistant bar counsel.

Kulp previously was an associate in the litigation section of Williams Mullen PC, where he handled general litigation matters. He also organized and participated in the firm's involvement in the Legal Aid Justice Center Pro Bono Housing Project.

He received a bachelor's degree in history from the University of Virginia in 1992 and his law degree from Washington and Lee University in 1996. He served as a law clerk in the chief staff attorney's office of the Supreme Court of Virginia before joining Williams Mullen in 1998.

Virginia State Bar Professionalism Course

Upcoming course dates:

MAY 5, 2005—CHESAPEAKE

JULY 21, 2005—MCLEAN

for additional dates and a registration form:

www.vsb.org/membership/professionalism.pdf

IN MEMORIAM

J. Lewis Ames
White Stone
July 1912–January 2005

Hunter Booker Andrews
Hampton
May 1921–January 2005

Stephen Geryld Christianson
Fairfax
January 1963–January 2005

Daniel Edward Fischer
Virginia Beach
April 1945–January 2004

The Honorable
Robert R. Mehrige Jr.
Richmond
February 1919– February 2005

The Honorable
Thomas R. Monroe
Arlington
March 1924–January 2005

Harlin Perrine
Salem
September 1919–January 2005

Walter Wayne Tiffany
Virginia Beach
August 1940–January 2005

Address Change?

If you have moved or changed your address, please see the VSB Membership Department's page on the Web for an **address update form** at **www.vsb.org/membership/**.

Virginia State Bar Executive Director Thomas A. Edmonds (center) presents an American Bar Association award to judges of the Richmond Juvenile and Domestic Relations District Court. The award recognizes the court's May 7, 2004, Law Day observance, which commemorated the fifthieth annivesary of *Brown v. Board of Education*. The event, named "Oliver Hill Day," was held on the birthday of Oliver W. Hill, for whom the Richmond courthouse is named. Hill was one of the lead attorneys who prevailed in the *Brown* case. The judges, left to right, are J. Stephen Buis, Anne B. Holton, Angela Edwards Roberts and C.N. Jenkins Jr. Not shown: Judge Kimberly B. O'Donnell.

Photo Credit: Jennifer L. McClellan

Virginia judges pose with American Bar Association President Robert J. Grey Jr. (center) during a Virginia State Bar Young Lawyers Conference Bench-Bar Dinner on February 28. They are (l–r) Jacqueline R. Waymack of Hopewell Juvenile and Domestic Relations District Court; Phillip L. Hairston of the Richmond General District Court (Criminal Division); Lucretia A. Carrico of Petersburg General District Court; and Aundria D. Foster of Newport News Circuit Court.

Richmond Attorney Recognized for Commitment to Professionalism

Overton P. "Opie" Pollard, executive director of the Virginia Public Defender Commission for thirty-one years, received the Virginia State Bar's Harry L. Carrico Professionalism Award during the Thirty-Fifth Annual Criminal Law Seminar on February 11 in Williamsburg.

The award was established in 1992 by the VSB's Criminal Law Section to recognize unique contributions to the improvement of the criminal justice system. Carrico, who was chief justice of the Supreme Court of Virginia for twenty-two years before he assumed senior status in 2003, presented the award.

In nominating Pollard for the award, Richmond lawyer Richard Cocke characterized him as a hard worker with good judgment. "In his quiet way he not only produces results on his own, but motivates others to raise their level of effort to accomplish significant results toward the general welfare and objectives of the organized bar," Cocke wrote.

Pollard, a native of Ashland, received his undergraduate and law degrees from Washington and Lee University. A United States Navy veteran, he practiced law privately before being hired at age thirty-nine as the Public Defender Commission's first executive director—a part-time job at the time. Under his watch, the state's first public defender office opened in 1972 to serve Staunton, Waynesboro and Augusta County. By his retirement in 2003, Virginia's public defender system had grown to twenty-one offices serving forty-eight jurisdictions and employing 234 attorneys.

In retirement, Pollard has been an active volunteer with the Virginia State Bar's Senior Lawyers Conference. He served a term as president, and edited the latest edition of the VSB's popular *Senior Citizens Handbook*.

Pollard and his wife, Anne, live in Henrico County.

The Virginia State Bar's Thirty-Fifth Annual Criminal Law Seminar drew about 640 attorneys to daylong sessions in Charlottesville and Williamsburg in February. Upper left: Overton P. Pollard received the Harry L. Carrico Professionalism Award in Williamsburg. In Charlottesville, law Professor Roger D. Groot (upper right) of Washington and Lee University talked about the state of Virginia's system for defending indigent people accused of crimes. In Williamsburg, Deputy United States Attorney General James B. Comey Jr. (bottom) discussed the effect of post-9/11 laws.

Attorneys Receive Professional and Management Guidance in Richmond, Abingdon

Clockwise, from top: Justice Cynthia D. Kinser (left) with Chief Justice Leroy R. Hassell Sr. and Nancy Byerly Jones, a North Carolina lawyer with a management consulting and mediation firm. Jones taught a continuing legal education course on law-office management during the first Solo and Small-Firm Practitioner Forum, sponsored by the Supreme Court on March 18 in Abingdon. The forum took place at the end of the Twentieth Annual Bar Leaders Institute, which featured Thomas A. Morris, president of Emory and Henry College and a political commentator, as the luncheon speaker. The Richmond Bar Leaders Institute, held March 7 at the University of Richmond School of Law, featured speaker Dadie Perlov, who talked about the structure and governance of bar associations. About two-hundred attorneys from Southwest Virginia attended the Abingdon event, and many shared their concerns and ideas with the Chief Justice during a Town Hall Forum that ended the day.

Richmond Bar Recognizes Wood, Smith

The Richmond Bar Association has recognized attorneys Julious P. Smith Jr. and Andrew W. Wood with two of its top awards.

Smith, chair and chief executive officer of Williams Mullen since 1983, received the Hill-Tucker Public Service Award, which recognizes service to society beyond the practice of law. The award is named for civil rights attorneys Oliver W. Hill and Samuel Tucker.

Wood was presented with the John C. Kenny Pro Bono Publico Award for his career-long commitment to providing pro bono service. Kenny was a leader of pro bono efforts in Richmond.

Smith's community involvement includes leadership positions with many nonprofit efforts: The CCA American Cancer Society Golf Tournament, the Greater Richmond United Way Campaign, the Virginia Foundation for Independent Colleges, Richmond Renaissance, the Multiple Sclerosis Society, the United States Olympic Committee and TheatreVirginia.

He is a member of the Salvation Army Boys and Girls Club Hall of Fame, a recipient of the Richmond Touchdown Club's Micheli Award and the 2003 winner of the Patrick Henry Public Service Award from the Wilson Center for Leadership in the Public Interest at Hamden-Sydney College.

Left: Andrew W. Wood received the Richmond Bar's John C. Kenny Pro Bono Publico Award for pro bono service. Right: Richmond Bar Association President Stephen E. Baril (L) presents the Hill-Tucker Public Service Award to Julious P. Smith Jr.

Smith serves on several corporate boards, including LandAmerica Financial Group Inc.; Hilb, Rogal and Hobbs Company; The Mutual Assurance Society of Virginia; Quarles Petroleum Inc.; and ServiceMaster Associ-ates of Virginia Inc.

Wood is a commissioner in chancery for Richmond Circuit Court. For several years, he answered legal questions on the Richmond radio program "Law Line." He works The Virginia Bar Association's pro bono hotline on Saturdays, and he represented the Richmond Tenants Organization pro bono when legal aid lawyers were conflicted out of a complex matter.

A letter nominating him for the award described him as a "silent soldier who is always willing to provide pro bono assistance when requested, with little fanfare and nothing asked for in return."

Wood is a native of Richmond. He received bachelor's and law degrees from the University of Richmond. He clerked for Judge John D. Bitzner Jr. of the Fourth U.S. Circuit Court of Appeals and worked for several law firms until 1981, when he and his wife Cheryl formed Wood & Wood.

66th VSB Annual Meeting

Virginia Legal Aid Award Luncheon

Friday, June 17, 12:30 P.M. • Cavalier Oceanfront Hotel

The Access to Legal Services Committee and Attorneys Liability Protection Society (ALPS) will sponsor a luncheon which will feature informative discussions, the annual Legal Aid Award and much more. ***Please note that the seated, plated luncheon will be held in Orion's Roof, at the Cavalier Oceanfront Hotel. Fee: $10 per ticket. Space limited.***

Annual Meeting brochures will be mailed to all Virginia State Bar members and available online at **www.vsb.org** *by mid-April.*

Spotsylvania Lawyer "Joe Monday" Wins Lewis F. Powell Jr. Award For Pro Bono Work

Joseph W. Gorrell, a retired federal worker who nine years ago went to Rappahannock Legal Services Inc. to offer his services as a volunteer lawyer, is the 2005 winner of the Virginia State Bar's Lewis F. Powell Jr. Pro Bono Award.

The award will be presented during the Fifteenth Annual Pro Bono Conference May 12.

When Gorrell, now seventy-two, arrived at legal services, he had an impressive resume that included three degrees in forestry and a law degree, forty-two years of service to federal agencies, and several awards. He did not, however, have experience with legal aid work.

But he was determined to be a long-term volunteer. He brought "considerable intelligence, enthusiasm and good humor to the table, and … he was willing and able to learn whatever it took to become a competent volunteer legal aid attorney," William L. Botts III, executive director of Rappahannock Legal Services, wrote in a nomination letter for the award.

Former Rappahannock attorney Sandra L. Karison recalled how the overextended staff, during a review of pending cases, would chorus, "Let's give this one to Joe." "These cases would involve those with a particular need for Joe's willingness to share his wealth of expertise and expansive heart," she wrote.

Gorrell adopted Monday as his volunteer day, earning him the nickname "Joe Monday" from the agency, which quickly became dependent on his presence. "Remarkably, he was willing to take almost any kind of case and …learn to do it well, whether it involved family, housing, public benefits, consumer or elder law," Botts wrote.

Gorrell also established himself as a guardian *ad litem* for indigent children and adults, and he now represents petitioners who are trying to become guardians and conservators.

Gorrell also contributes his time to Lawyers Helping Lawyers, an organization that helps people in the legal profession with substance abuse and mental health problems. He is part of a Fredericksburg group that works with the local juvenile and domestic relations court's drug court program to mentor juveniles with substance abuse problems.

He holds a bachelor's degree from Purdue University and master's degrees from the University of California at Berkeley and Yale University. He received his law degree from Catholic University in 1968.

University of Richmond Student, Advocate for Sikh Rights, Wins Oliver W. Hill Law Student Pro Bono Award

Amandeep Singh Sidhu, a University of Richmond law student who immersed himself in fighting prejudice against the Sikh community after the terrorist attacks of 2001, has been named the 2005 recipient of the Virginia State Bar's Oliver W. Hill Law Student Pro Bono Award.

The award will be presented during the Fifteenth Annual VSB Pro Bono Conference on May 12 at the law school.

Sidhu, born in Norfolk and raised in Chesterfield County, is the son of physicians originally from Punjab, India.

He was a teenager when he adopted the Sikh articles of faith, one manifestation of which is to wear a turban to cover uncut hair. When the September 11, 2001, attacks occurred, Sidhu was a College of William and Mary graduate working with American Management Systems Inc. in Washington, D.C. That day, he was driven off a road by an irate driver.

His response was to become an advocate for Sikhs and other minority communities who were targeted in the aftermath of the terrorist attacks. He continued the work when he entered law school. As a founding member of the New York-based Sikh Coalition, he became involved in such issues as racial profiling, post-9/11 security and employment issues, and discussions with video game manufacturers and filmmakers about racist portrayals of Sikhs.

Meanwhile, Sidhu maintained a full academic load and took on more leadership responsibilities at school. He was elected secretary of the Student Bar Association in his first year and is now president of the association. In that role, he encourages all students to perform community services. Their projects include a mentoring program for elementary and middle school children at a Richmond housing project.

As he was preparing for his law school exams in November 2004, a Chesterfield County gas station owned by Sikhs was set on fire, and graffiti hate speech was painted on outbuildings. Sidhu served as a liaison between the Sikh community and law enforcement.

In nominating Sidhu for the Hill Award, UR Law School Dean Rodney A. Smolla described him as "a young man who has spent much of his young life and all of his law school career emulating Hill's devotion to justice, inclusion and civil rights for all people . . . . In my 24 years of law teaching, I can think of no student more deserving of an award bearing Oliver Hill's name."

VIRGINIA STATE BAR
PRO BONO & ACCESS TO JUSTICE CONFERENCE

Thursday May 12, 2005
University of Richmond School of Law

SPECIAL ISSUES IN IMMIGRATION LAW

Exploring the Collateral Civil Consequences of Status Problems & Criminal Convictions

The Virginia State Bar's 15th Annual Pro Bono Conference is sponsored by the VSB Special Committee on Access to Legal Services. This 6 Credit CLE also includes 1.5 ethics credit hours. You may attend a single session or any combination of events. Please help our planning by indicating your preferences on the registration form.

There is a required fee of $25 for text materials and an optional fee of $11 for an RSVP catered Box Lunch for Thursday. Attendees with advance registrations may pay CLE text and RSVP lunch fees at the door.

PROGRAM AGENDA – University of Richmond School of Law

9:30 – 10:00 A.M.
Registration

10:00 – 10:10 A.M.
Welcome & Opening Remarks by Robert J. Stoney

10:10 – 11:30 A.M.
(1.5) General Ethics Session Moderated by David P. Bobzien.
Scanning Developments: Are We Spotting Trends or Finding Access to Justice Anomalies? *With hypotheticals incorporating concepts from the following:*

James M. McCauley: Helping Pro Se Litigants via Proposed UPL 207 (social workers assisting pro se litigants) and Proposed "Unbundling" Rule Amendments; New Corporate Counsel Rules that Limit Pro Bono Service Options; and LEO Advisory Opinion 1798 (caseloads).

Maya M. Eckstein: Emeritus Rule; Future Studies — The Civil Gideon Concept & Related Canadian Initiative.

Robert J. Stoney: Social Consequences of a Strained Indigent Criminal Defense System.

Michael N. Herring: Indigent Defense Reform Efforts in the 2005 General Assembly Session.

Rick Jones: Holistic & Community Lawyering — the Harlem (NY) Neighborhood Defender Cross-over Model.

David Bobzien and James McCauley: Hypos/Q&A Session.

11:30 – 11:40 A.M.
Morning Break (refreshments)

11:40 A.M. – 12:40 P.M.
***Immigration Law: Substantive Issue Spotting* — Moderated by William L. Botts III and Robert J. Stoney**

Eliot Norman: Immigration Consequences of Criminal Convictions; and

Jill A. Hanken: Virginia General Assembly 2005 Session — Immigrant Access to Public Benefits.

12:40 – 1:15 P.M.
On-site Reserved Lunch or BYO Brown Bag

1:15 – 3:00 P.M.
Exploring Career/ Volunteer Service Options & Resources in Immigration and Other Complex Practice Areas: The Tool Box Approach.

Linda M. Boykin (Moderator): Telephone Hotline Referral Model with Brief Advice — the Asian Pacific American Legal Resource Center; Other Legal Aid Resources.

Christina A. Wilkes: Equal Justice Works Fellow, Just Neighbors Ministry Inc. A Special Unaccompanied Minor (Child Rescue) Pro Bono Project.

Allen Orr Jr.: Training & Mentoring Opportunities for Young Lawyer Members of the American Immigration Lawyers Association.

M. Imad Damaj Ph.D.: Collaborations/the ACLU of Virginia and Muslim Coalition Example.

Amandeep Singh Sidhu: Sikh Coalition Goals & Volunteer Opportunities.

Mary Holper: CAIR Coalition— Incremental Commitments/ Structured Jail Visits as a Volunteer Service Option.

3:00 – 3:20 P.M.
Mid-afternoon Networking Break (refreshments)

3:20 – 5:05 P.M.
Regulatory Compliance/The Business Side of Public Interest Law

Arlene K. Beckerman (Moderator): Fiscal Integrity/Finding Investors to Seed & Sustain Your Project: What Do Volunteers Have to do With It?

Phyllis C. Katz and Prof. Ann C. Hodges: Forming and Guiding Law-related Nonprofits/ Lessons from U/R's Inaugural Interdisciplinary Course.

Natalie J. Wilson: Community Tax Law Project —Serving ESL Clients; Limited Help for Start-up & Maturing Nonprofits.

5:05 P.M. **CLE Adjournment**

VIRGINIA STATE BAR
PRO BONO & ACCESS TO JUSTICE CONFERENCE

REGISTRATION FORM

Thursday, May 12, 2005 VSB Pro Bono Conference
University of Richmond School of Law

Please enroll me for the May Conference sponsored by the VSB Committee on Access to Legal Services. I am indicating below the sessions/events I plan to attend. Approval is pending for a total of 6 MCLE credits, including 1.5 ethics hours.

Kindly assist our planning efforts by checking the events you expect to attend.

Thursday, May 12, 2005 CLEs

❑ 10:00 – 11:30 A.M.	General Ethics Session Moderated by VSB President David Bobzien
❑ 11:30 – 11:40 A.M.	Morning Break (refreshments)
❑ 11:40 A.M. – 12:40 P.M.	Immigration Law: Substantive Issue Spotting
❑ 12:40 – 1:15 P.M.	On-site Reserved Box Lunch or BYO Brown Bag
❑ 1:15 – 3:00 P.M.	Service/Resource Options: Immigration & other Complex Practice Areas
❑ 3:00 - 3:20 P.M.	Mid-Afternoon Networking Break (refreshments)
❑ 3:20 – 5:05 P.M.	Regulatory Compliance and the Business Side of Public Interest Law

Evening Pro Bono Award Ceremony and Reception

❑ 7:30 – 9:30 P.M.	Award Ceremony with reception following immediately (no charge)

NAME (Please print or type)

PREFERRED NAME (Badge)

FIRM

ADDRESS

TELEPHONE E-MAIL

❑ **Enclosed is the required $25 registration fee for CLE text materials.** ❑ **I will pay the required $25 registration fee at the door.**

❑ **I would like to order the optional lunch ($11).** ❑ **Regular** ❑ **Vegetarian**

If you wish to receive lunch, please check the box (even if you will be paying at the door) so that we may plan accordingly. If you do not order lunch, you may wish to bring a bag lunch as there are no restaurants close by.

Please fax (804) 775-0582 or mail this form to Joy Harvey, Virginia State Bar, 8th & Main Building, 707 East Main Street, Suite 1500, Richmond, VA 23219.

For additional information on the Pro Bono Conference, please call the VSB Access to Legal Services office at (804) 775-0548 or 775-0522.

If you inadvertently receive a duplicate brochure, please share it with an interested colleague. A copy of this registration form is also available on the Virginia State Bar's Website at www.vsb.org/probono.

Directions To University of Richmond School of Law

West
I-64: Take Exit 183/Glenside Dr. south. Continue south on Glenside Dr. to Three Chopt Rd., turn left on Three Chopt Road.** From US 60 (Midlothian Tnpk.): Turn left on State Rte. 147 (Huguenot Rd.), continue to Three Chopt Rd., turn left on Three Chopt Rd.**

Southwest
US 360 (Hull Street Rd.): Turn left on State Rte. 653 (Courthouse Rd.), continue on State Rd. 653, this will become State Rte. 147 (Huguenot Rd.). Continue to Three Chopt Rd., turn left on Three Chopt Rd.**

North
I-95, US 1, US 301, (Do Not Take I-295): Take Exit 79 to I-64 west, continue west on I-64. Take Exit 183-A/Glenside Dr. south. Continue south on Glenside Dr. to Three Chopt Rd., turn left on Three Chopt Rd.**

East
I-64, US 60: West on I-64. Take Exit 183-A/Glenside Dr. south. Continue south on Glenside Dr. to Three Chopt Rd., turn left on Three Chopt Rd.**

South
I-85 to I-95: Take Exit 67/State Route 150 (Chippenham Pkwy.), continue to State Rte. 147 (Huguenot Rd.), turn right on State Rte. 147. Continue to Three Chopt Rd., turn left on Three Chopt Rd.**

Returning
to I-64 from campus: Street positions and names are somewhat confusing to area visitors. From Three Chopt Rd., drivers should turn right onto the street named Horsepen Rd. to return to I-64. This street's name changes to Glenside Dr. and leads to I-64.

****Three Chopt Road to Main Gate:** Turn west on Towana Dr. or Boatwright Dr.

Lodging: A limited number of hotel rooms are available for Wednesday night and Thursday night, May 11 and 12 at the reduced rate of $83.62 including tax via single/double occupancy at the Sheraton Richmond West Hotel located at 6624 West Broad Street within several miles of the University. Hotel room availability is "first come first served" as this is "race car week" in Richmond. Reservations, with deposits, must be made prior to Tuesday, April 26th to obtain the special rate by calling 1-800/325-3535. **Be sure** to ask for a nonsmoking room if that is your preference and **to mention that you are attending the May 12 VSB Pro Bono Conference.**

What Is A Senior Lawyer?

by William B. Smith

At the Virginia State Bar, a member of the Senior Lawyers Conference is age 55 or older and in good standing. This can be called a definition in form of "senior lawyer," but what is a senior lawyer in substance?

Definitions of "senior" as an adjective include "older;" "ranking before others by virtue of tenure in office, position, or service"; and "of higher rank or standing." As a noun, a senior is defined as "a person who is older than another;" "one ranking before others by virtue of tenure;" or "one of higher rank or standing." Synonyms for "senior" are "higher ranking" and "leading" (adjectives) and "patriarch," "dean" and "elder" (nouns).

In Virginia, an older lawyer sometimes is called a "senior member" of a law firm, without a specific definition. This appellation carries a mark of distinction; it means that he or she occupies a position of respect and authority.

A 55-year-old lawyer, in many cases, has been practicing for thirty years. Presumably, he or she has broad legal knowledge and extensive experience. He also has practical experience learned through interaction with lawyers and nonlawyers in the workplace and community.

Whether they work in private practice, a corporate law department, a government agency, or a public interest organization, senior lawyers have maturity, knowledge and experience beyond that of younger lawyers.

More than nine-thousand lawyers in all kinds of professional fields are members of the Senior Lawyers Conference. They offer a reservoir of maturity, experience, knowledge, and wisdom to the profession, to the legal system, and to the citizenry.

Lawyers who serve in SLC leadership, or who are otherwise involved in the conference's activities, are ready, willing and able to contribute to SLC projects when asked. Many volunteer without being asked.

The challenges of the SLC are to develop a more organized way for the younger attorneys and members of the public involved with senior issues to obtain the benefits the senior lawyers offer, and to broaden SLC members' participation in providing these benefits. Our conference is actively working towards these ends by:

- Providing information helpful to the profession and the public through our newsletter and Web site.
- Working with legal services programs to develop a plan for retired lawyers to provide pro bono legal help to indigent people.
- Publishing the *Senior Citizens Handbook* for Virginians.
- Serving on the Involuntary Commitments Procedures Study initiated by Chief Justice Leroy R. Hassell Sr. of the Supreme Court of Virginia.

- Planning to protect clients in the event of disability or death of their attorneys.
- Improving civility and professionalism in the practice of law.
- Developing better standards to regulate assisted living facilities.
- Developing a plan for senior lawyers to contribute to the defense of indigent people in criminal cases.

The SLC board is considering other suggestions, including:

- Sending lawyers to speak at senior care facilities.
- Providing SLC members to be available at senior services facilities at regular times to offer legal advice and answer legal questions.
- Helping members serve as mentors to younger lawyers.
- Encouraging senior lawyers to become more active in local bar activities, by serving on local bar governing boards or senior committees.

I hope that all Virginia lawyers will give thought to how the vast resources of seniors lawyers can be made more available to the profession and to the general public. This publication goes to some thirty-five thousand lawyers. I invite each of you to respond to the challenges with your thoughts and ideas, by phoning, writing, or e-mailing me or Frank Brown, our newsletter editor and Web site editor, at the addresses below.

William B. Smith
Chair, Senior Lawyers Conference
115 South Lynnhaven Road, Suite 100
Virginia Beach, Virginia 23452
Telephone: (757) 463-4900
Fax: (757) 463-3521
E-mail: ddd2@daviddickerson.com

Frank O. Brown Jr.
Newsletter Editor & Web Site Editor
Senior Lawyers Conference
Post Office Box 70580
Richmond, Virginia 23255-0580
Telephone: (804) 673-7545
Fax: (804) 673-7546
E-mail: lawinorder@aol.com

Service to Senior Citizens: The *Senior Citizens Handbook*

by Richard Cocke

To senior citizens of Virginia, the most used and most useful publication of the Virginia State Bar is the *Senior Citizens Handbook*. The book keeps Virginia's senior citizens informed about their legal rights, and helps them locate useful resources. Members of the Senior Lawyers Conference and Young Lawyers Conference have made substantial efforts to produce and update the handbook. The *Senior Citizens Handbook* is an important part of the Senior Lawyers Conference's ongoing role in promoting the welfare of Virginia's senior citizens.

The *Senior Citizens Handbook* is a joint project of the Senior Lawyers Conference and the Young Lawyers Conference. The Senior Lawyers Conference comprises all members of the Virginia State Bar who are in good standing and are age fifty-five or older. At present, there are more than 9,600 members. The Young Lawyers Conference comprises of all active and associate members of the Virginia State Bar who are age thirty-six or younger, or who have been admitted to the Virginia State Bar as their initial bar within the last three years; at present there are more than 9,000 members.

The *Senior Citizens Handbook* was first published in 1979, has been revised and updated many times since then, and is currently in its tenth printing.

The handbook assists senior citizens with access to Virginia resources and with solving their problems in many areas. The handbook may be viewed at **www.vsb.org/publications/senior/index.html**.

The handbook is not intended as a substitute for professional legal assistance, and readers are strongly urged to seek the services of competent counsel for their specific legal problems and concerns.

Copies of the handbook have been provided to area agencies on aging, public libraries, nursing homes, assisted living facilities, hospitals and kidney dialysis centers. They have been distributed at public service events, and sold to the public individually and in bulk. Since 1988, 41,900 copies of the *Senior Citizens Handbook* have been distributed.

The online *Senior Citizens Handbook* is one of the top ten most popular pages on the Virginia State Bar Web site. ⚖

The Senior Citizens Handbook is an important part of the Senior Lawyers Conference's ongoing role in promoting the welfare of Virginia's senior citizens.

Richard Cocke is a member of the Senior Lawyers Conference and a past member of the SLC Board of Governors, and he was president of the Senior Lawyers Section that proceeded the SLC. He was born and raised in Roanoke, and is a 1957 graduate of the University of Virginia Law School. Cocke is a past president of the Henrico County Bar Association, and he formerly represented Henrico on the Virginia State Bar Council. He is in the private practice of law.

THE TAX LAWYER'S ROLE IN THE WAY THE AMERICAN TAX SYSTEM WORKS

by Mortimer M. Caplin

This was edited from the Erwin N. Griswold Lecture at the annual meeting of the American College of Tax Counsel on January 22, 2005.

In honor of Erwin N. Griswold, I would like to touch on four matters of relevance: Dean Griswold's impact on the tax laws; the role of the U.S. Tax Court; the role of the Internal Revenue Service; and the tax lawyer's role in the American tax system.

My first contact with the dean was in my days as a young law professor at the University of Virginia School of Law—struggling in the classroom using *Griswold, Cases and Materials on Federal Taxation.* Not that the casebook was entirely new to me; for, with the help of the G.I. Bill, I'd become well acquainted with it at New York University in my post-World War II doctoral efforts. It's hard to believe, but the *Griswold* casebook was the first ever devoted entirely to federal income taxation and it proved a godsend to me as I segued from New York law practice to teaching at U.Va. in the fall of 1950.

Erwin Griswold and I met at law professor gatherings and bar meetings, especially in the early 1950s at American Law Institute sessions in Washington as members of ALI's Tax Advisory Group. We both were hard at work on its comprehensive tax report, which later became part of the 1954 Code. Never did I tell him though that, in using his casebook, my custom was to try a personal touch by distributing mimeographed materials that totally rearranged the order of presentation and reading assignments. Nor did I ever hint that after a year or two, I switched entirely to his major competitor, the more comprehensive *Surrey and Warren.* He probably learned about the switch faster than I thought by skimming through his royalty reports—reports which he undoubtedly scrutinized with great care.

He had graduated from Harvard Law School in 1929, and his first real contact

with tax law was during his five-year stint as a fledgling attorney in the Office of the Solicitor General of the United States. Federal tax rates and tax receipts were at a low point then, and handling tax cases was not the most sought-after assignment. By default, he soon became the office's tax expert, arguing the bulk of its tax cases both in the U.S. Supreme Court and the U.S. Courts of Appeals. I should mention that, just before leaving the solicitor general's office, he was instrumental in the rule change that allowed appeals in tax cases to be made under the general title "Commissioner of Internal Revenue," without the need to specify the name of the incumbent. That's why you see older tax cases bearing the names of particular commissioners. Let me mournfully add: "*Sic transit gloria mundi*"—so passes away the glory of this world!

Erwin Griswold left the solicitor general's office in 1934, to become a Harvard Law School professor for twelve years, and then dean for the next twenty-one. He had a major influence on tens of thousands of law students as well as lawyers throughout the world. As years went by, he reminisced that he found "less exhilaration" in teaching the federal tax course as "the tax law had become far more technical and complicated . . . In the early days, the statute was less than one hundred pages long and the income tax regulations . . . were in a single, rather slight, volume." Oh, for the good old days!

In the fall of 1967, Griswold returned to the solicitor general's office, but this time as *the* Solicitor General of the United States—a position he held for six years. He'd been appointed by President Lyndon B. Johnson, and in 1969, was reappointed by President Richard M. Nixon for a second term. Nixon, however, preferred as his solicitor general a Yale law professor, Robert H. Bork—someone more closely in tune with his philosophy. Griswold's duties ended in June 1973, at the close of the Supreme Court's term, well in time to avoid the heavy lifting of Watergate and the "Saturday Night Massacre." He later said that he would not have followed Solicitor General Bork in carrying out the President's order to fire Special Watergate Prosecutor Archibald Cox.

Shortly after leaving office, Griswold joined Jones, Day, Reavis & Pogue as a partner and engaged in law practice and bar activities for some twenty years, until his death in 1994, at the age of ninety. Erwin Griswold was honored many times over, not only for his innumerable contributions to the law, but for "his moral courage and intellectual energy . . . meeting the social responsibilities of the profession."

I always suspected that any special feeling the dean may have had for me had roots in my strong backing of his plea for a single federal court of tax appeals—to resolve conflicts and provide "speedier final resolution of tax issues." He observed, "The Supreme Court hates tax cases, and there is often no practical way to resolve such conflicts." He anguished over the practicing bar's opposition to his proposal, convinced that "the real reason is that tax lawyers find it advantageous to have uncertainty and delay"—a preference for forum-shopping, if you will. But in the end, in his 1992 biography, *Ould Fields, New Corne,* he sounded a bit more hopeful: "Eventually, something along the lines proposed will have to come as it makes no sense to have tax cases decided by thirteen different courts of appeals, with no effective guidance on most questions from the Supreme Court."

One Supreme Court member, who'd had hands-on experience in tax administration and well understood weaknesses in our appellate review system, was former Justice Robert H. Jackson. The Court's most informed member on taxation, he had previously served successively as general counsel of the Bureau of Internal Revenue, assistant attorney general in charge of the Tax Division, solicitor general, and then attorney general of the United States. In 1943, in his famous *Dobson* opinion, Justice Jackson made a determined effort to strengthen the Tax Court's status in the decision-making process so as to minimize conflicts and attain a greater degree of uniformity. To these ends, he laid down a stringent standard in appellate review of Tax Court decisions:

"[W]hen the [appellate] court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand . . . While its decisions may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible."

The message was straightforward and seemingly clear; but it didn't cover U.S. district court decisions or those of the Court of Federal Claims. Also, other problems were encountered by judges and members of the bar, and dissatisfaction was high. Ultimately, this led to the 1948 statutory reversal of *Dobson* by enactment of the review standard now in the Internal Revenue Code, which requires U.S. courts of appeals to review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." And that's where the situation lies today—save for those still aspiring, as Erwin Griswold did for the rest of his life, for greater uniformity and earlier resolution of conflicts.

Justice Jackson never did change his view about the critical importance of the Tax Court. In his 1952 dissent in *Arrowsmith v. Commissioner*, he underscored this in strikingly poignant fashion, saying: "In spite of the gelding of *Dobson v. Commissioner* . . . by the recent revision of the Judicial Code, . . . I still think the Tax Court is a more competent and steady influence toward a systematic body of tax law than our sporadic omnipotence in a field beset with invisible boomerangs."

Members of the tax bar readily endorse this strong vote of confidence in the role of the Tax Court. As our nationwide tax tribunal for over eighty years, it has served effectively and with distinction as our most important court of original jurisdiction in tax cases.

Today's tax system has its genesis in World War II, when income taxes rapidly expanded from a tax that touched the better-off only to a mass tax that reached out to the workers of America. Revenue collection was turned upside down with Beardsley Ruml's "pay-as-you-go," collection-at-the-source, withholding and estimated quarterly payments, and floods of paper filings. Commissioner Guy Helvering said it couldn't be done. And, in fact, the old Bureau of Internal Revenue, with its politically-appointed collectors of internal revenue, was not fully up to the task. Congressional hearings revealed incompetence, political influence and corruption, and directly led to a total overhaul under President Harry Truman's 1952 *Presidential Reorganization Plan*. New district offices and intermediate regional offices replaced the old collectors' offices. Except for the Internal Revenue commissioner and chief counsel, who still require presidential nomination and Senate confirmation, the entire staff was put under civil service. The last step, a year later, was the official name change to the Internal Revenue Service.

The new IRS made remarkable headway in turning itself completely around by the end of the 1950s; and it was not long before it was recognized as one of government's leading agencies. In the early 1960s, new heights were reached through a fortunate confluence of events, strong White House endorsement, and unflagging budgetary support. President John F. Kennedy had a special interest in tax law and tax administration, and almost immediately called on Congress for antiabuse tax legislation and strengthening of tax law enforcement, including Attorney General Robert F. Kennedy's drive against organized crime. Of key importance was the final congressional go-ahead for installing a nationwide automatic data processing system (ADP), backed by approval of individual account numbers and a master file of taxpayers housed in a central national computer center. The IRS had entered the modern age. This same ADP design, now badly out-of-date, is still in use, albeit patched with additions and alterations. It is the dire need to modernize this forty-four-year-old system, which is the IRS's chief challenge today.

The IRS may have made mistakes, but the mistakes were not malicious or systemic.

Starting in the 1970s, the IRS began to encounter its present serious difficulties. A series of complex legislative changes, tightened budgets, an exploding workload and expensive failures to complete its "tax systems modernization" (TSM) project—all contributed to weakened performance and heightened congressional oversight. In 1995 and 1996, Congress created the *National Commission on Restructuring the Internal Revenue Service* "to review the present practices of the IRS, and recommend how to modernize and improve the efficiency and productivity of the IRS, while improving taxpayer services." A year later, the commission issued its report, *"A Vision for a New IRS,"* which led to the enactment of the *Internal Revenue Service Restructuring and Reform Act of 1998* (RRA 98).

The report centered chiefly on governance and managerial changes, including IRS modernization; a publicly-controlled oversight board; a business-type Commissioner of Internal Revenue; electronic filing and a paperless tax system; taxpayer rights; and—of primary importance—changing the IRS's culture and mission so as to place emphasis on enhanced "customer service" and functioning like "a first rate financial institution." Congress was asked to do its part too, with simplified tax legislation; complexity analyses reports; multiyear budgeting; joint hearings and coordinated reports of the different oversight committees. To the more sophisticated, the suggestions to Congress appeared more aspirational than realistic.

The U.S. House of Representatives largely followed the Commission's recommendations (H.R. 2676). But the legislation found itself pending at a tumultuous time, when the air was filled with words of U.S. Senators who threatened to: "end the IRS as we know it," "tear the IRS out by the roots," "drive a stake in the heart of the corrupt culture at the IRS," and "stop a war on taxpayers." Senator William V. Roth Jr., R-Delaware and chair of the Senate Finance Committee, took over and ran a series of dramatic televised hearings, carefully prepared by his staff, that featured a handful of allegedly abused taxpayers and IRS employees who gave testimony that shocked the nation. Never, at that time, did the IRS have the opportunity to tell its side of the story, nor was the testimony tested for accuracy or placed in proper context. Later, however, after enactment of RRA 98, court proceedings and government reports by the Government Accountability Office and the Treasury Inspector General for Tax Administration (TIGTA) clearly established that much of the testimony was not only misleading, but false. The IRS may have made mistakes, but the mistakes were not malicious or systemic. Numerous corrective news stories began to appear with sharp headlines such as: "IRS Abuse Charges Discredited," "Highly Publicized Horror Story That Led to Curbs on IRS Quietly Unravels," "IRS Watchdog Finds Complaints Unfounded," "Court Is Asked to Block False Complaints against IRS," "Secret GAO Report is Latest to Discredit Roth's IRS Hearings." But, publication came too late; the damage was already done.

Congress, the public and ultimately President William J. Clinton's administration had all been outraged by the Senate's testimony and, almost overnight, sweeping support was given to Senator Roth's proposed highly stringent treatment of the IRS. His Senate version added some one-hundred new provisions to the House bill. Some are praiseworthy and reasonably

protective of taxpayer rights, but others step over the line, unduly micromanaging the IRS's daily operations and laying the groundwork for serious delaying tactics by taxpayers and damage to the administrative process. In the end, the legislation was adopted by an overwhelming vote. One of the most criticized provisions is the "Ten Deadly Sins" sanction in section 1203 of RRA 98. This peremptory discharge procedure, which directs the IRS commissioner to terminate an employee for any one of certain specified violations, is deeply disturbing to IRS personnel. Some hesitate to enforce the tax law because of possible unfair exposure to complaints by disgruntled taxpayers. Both Commissioner Mark W. Everson and former Commissioner Charles O. Rossotti have noted this erratic impact and have requested modification. In my mind, there is little doubt that section 1203 should be totally repealed.

Commissioner Rossotti very ably captained the transition to the new culture. But, with Congress's continuing emphasis on the "customer service" aspect of tax administration, it was not until his last years that the word "enforcement" began to trickle out, along with warnings of the "continuing deterioration" and "dangerous downtrend in the tax system." This shift in emphasis was quickly hastened by new Commissioner Mark Everson, who early announced: "At the IRS our working equation is service *plus* enforcement equals compliance." He underscores repeatedly the significant "diminution of resources;" the continuing fall in collection and notices to nonfilers; the *36 percent drop* in enforcement personnel since 1996; and, since 1998, the audit rate drop of *57 percent*.

Perhaps, of even greater importance, is the negative impact this weakened enforcement has had on compliance and self-assessment. Commissioner Everson often quotes President Kennedy's admonition: "Large continued avoidance of tax on the part of some has a steadily demoralizing effect on the compliance of others." Indeed, the annual tax gap continues to grow. Last reported as a $311 billion tax loss each year—from underreporting, nonpayment and non-filing—new find-

ings of a major increase are anticipated in the IRS study now under way.

With the United States facing repeated annual deficits and a burgeoning national debt, the commissioner recently confessed: "The IRS, frankly speaking, needs to bring in more money to the Treasury." The White House confirmed this by supporting a 2005 budget increase that would have allocated to enforcement alone an increase of 11 percent. This was not to be. In the recent cutback in the increase, House Majority Leader Tom DeLay, R-Texas, commented: "I don't shed any tears for the IRS. Our priority as far as the IRS is concerned is to put them out of business." So much for the looming crisis in meeting the revenue needs of our democracy!

The IRS's final 2005 appropriation reflected barely a one percent increase—an overall grant of $10.3 billion, almost $400 million below the President's request. This tight squeeze tells clearly why the IRS went along with outsourcing to private debt-collection agencies, the collection of certain delinquent tax accounts. The statutory authorization to pay outsiders up to 25 percent of tax debts collected is technically "off-book"and through this backdoor financing, the IRS's appropriations takes no direct hit.

This then is the very serious state of affairs confronting those directly concerned with the fair and balanced administration of our tax law.

The proper functioning of our tax system is largely dependent upon the quality and responsible involvement of well-trained tax practitioners—primarily tax lawyers and tax accountants. Well over half the public seeks their help for tax advice and return preparation. They inquire, time and again, about the "rules of the road," what's right and what's wrong, what's lawful and what's not. The integrity and standards of these tax professionals serve as the nation's guideposts, with direct impact on taxpayer compliance and the self-assessment concept itself. The significance of their good-faith practices cannot be overstated.

Recent congressional and IRS investigations, however, have identified an alarming spread of extremely questionable practices, some approaching outright fraud, by a number of previously well-regarded tax practitioners.

Recent congressional and IRS investigations, however, have identified an alarming spread of extremely questionable practices, some approaching outright fraud, by a number of previously well-regarded tax practitioners. The Senate Finance Committee has zeroed in directly on practitioners as a whole, emphasizing the "important role tax advisors play in our tax system." Chairman Charles Grassley, R-Iowa, caustically observed: "At the heart of every abusive tax shelter is a tax lawyer or accountant." In full agreement, Senator Max Baucus, D-Montana, the committee's ranking minority member, added: "Let's stop these unsavory practices in their tracks by restoring integrity and professionalism in the practitioner community." In their follow-up letter to Treasury Secretary John N. Snow, they called for reinvigoration of the IRS's Office of Professional Responsibility (OPR), for its proper funding, and for extension of the authority of its new head, Cono Namorato. Much has happened since—legislatively and administratively.

Taking the lead, the *American Jobs Creation Act of 2004* greatly enhances the OPR's effectiveness through a series of new provisions that expand Circular 230's reach by confirming authority to impose standards on tax-shelter opinion writers; clarifying authority to "censure" practitioners, as well as to suspend or disbar them; granting authority, for the first time, to impose monetary penalties on individual practitioners, as well as on employers or entities for which they act; and granting injunction authority, for the first time, to prevent recurrence of Circular 230 violations.

In turn, publication of the Department of the Treasury's long-awaited Circular 230 amendments on tax-shelter opinion writing puts the OPR's momentum in high gear. The official release advises that these "final regulations provide best practices for all tax advisors, mandatory requirements for written advice that presents a greater potential for concern, and minimum standards for other advice." No doubt is left, however, that the amendments' underlying intent is to "promote ethical practice," "improve ethical standards," and "restore and maintain public confidence in tax professionals." Highlighted, too, is the caution that "one of the IRS's top four enforcement goals" is "[e]nsuring that attorneys, accountants and other tax practitioners adhere to professional standards and follow the law."

This is a harsh estimate of tax practitioners in general. As members of the profession of tax lawyers, it is difficult to ignore our collective responsibility to respond. What do we do about it? Certainly, the tax bar has not been asleep. The American Bar Association's Tax Section and the American Institute of Certified Public Accountants separately have been working on standards of practice for over forty years and each has published a series of guiding principles, which continue as works in progress. The question remains, however, of whether the tax bar has probed deeply enough.

Have we been willing to grapple with more subtle, more difficult issues? Have we articulated what we regard as "best practices" for tax lawyers, keeping in mind that Circular 230 applies to a broad range of "practitioners"? Tax lawyers are clearly distinguishable from other "practitioners" and, indeed, from lawyers in general. And it seems fair to ask: Which practices are acceptable to the *tax bar*, and which are not? At what point does the *tax bar* regard tax advice or tax practice as crossing the line? As "too aggressive"? As "things that are not done"?

These questions, of course, transcend the current concern with tax shelters only. It may not be long, in my view, before we will be asked to revisit a broader issue: "Whether, in a system that requires each taxpayer to self-assess the taxes that are legally due, a tax lawyer can properly advise a client that he or she may take an undisclosed tax return position absent the lawyer's good faith belief that the position is 'more likely than not' correct." In considering the issue, some twenty years ago, ABA Formal Opinion 85-352 crafted as a more flexible answer the "realistic possibility of success" test, which later became a touchstone used by Congress and the Treasury in assessing certain penalties. In light of unacceptable developments since then, it would seem timely for the entire subject matter to undergo a thorough review.

In his speech on *The Public Influence of the Bar,* Supreme Court Chief Justice Harlan F. Stone addressed the same theme of lawyers' ethics in relation to the great Wall Street stock market crash. Critical of "clever legal devices," and critical of lawyers having done "relatively so little to remedy the evils of the investment market," he observed that "whatever standards of conduct in the performance of its function the Bar consciously adopts must at once be reflected in the character of the world of business and finance." In his view, "the possibilities of its influence are almost beyond calculation"and he went on to advise, "It is needful that we look beyond the club of the policeman as a civilizing agency to the sanctions of professional standards which condemn the doing of what the law has not yet forbidden."

The point is: Though we are a long-recognized profession, allowed the privilege of autonomy and essentially self-regulation, no insurmountable barriers exist to prevent encroachment on this privilege, or even its end, if our practices or standards are regarded as inadequate or unrealistic. Today, we already see a gradual erosion flowing from a series of new governmental rules—by Congress, for example through the Internal Revenue Code or legislation such as Sarbanes-Oxley, or by the Securities and Exchange Commission or Public Company Accounting Oversight Board, or by Treasury through Circular 230 or other regulations.

Our profession of tax lawyers must take the initiative and become more intently involved— more proactive and not simply defensive. Problems need to be identified and solutions developed by ourselves, and where necessary, recommended for implementation by the bar in general or by appropriate governmental bodies. We cannot wait for others to compel answers. Nor can we move at the pace of the ALI project that required thirteen years to complete a two-volume *Restatement of the Law Governing Lawyers.* Ours would naturally be more immediate in time and focus, and might well look to the leadership of the ABA Section on Taxation, this organization, the American College of Tax Counsel, or some other concerned and qualified group.

As tax lawyers, we face many different responsibilities daily—to our clients, to the profession, to the public, to ourselves. How we maintain our own self-respect as lawyers, how we desire to be viewed by others, and how we use our special skills to improve the nation's revenue-raising system are all questions that cross our minds every day. In this regard, Dean Griswold counseled us to preserve our "independence of view"—separating our representation of clients from our role as public citizens seeking to improve the functioning of government.

The one exemplar he acclaimed is Randolph E. Paul, Treasury's general counsel and tax policy leader during World War II, whom the Dean refers to as "one of the early giants in the tax field." Paul asserted this individual independence throughout his entire career, while he developed a remarkable tax practice. In the closing lines of his classic *Taxation in the United States*, he made these seminal observations on "the responsibilities of tax experts":

"The most I can say is that I do not think surrender needs to be unconditional . . . I know tax advisers who accomplish the double job of ably representing their clients and faithfully working for the tax system taxpayers deserve . . . at another level. I venture the opinion that they lead a more comfortable life than do many of their colleagues. Of one thing I am very sure—that both taxpayers and the government need many more of these independent advisers."

Tonight, this room is filled with many of these independent, responsible advisers—some surely to become the giants we will salute in the future. I am certain that together we will overcome our present challenge "to restore and maintain public confidence in tax professionals." At the same time, I have no doubt, too, that we will not fail in our ongoing commitment to better the way in which our nation's needs for revenue are fulfilled, fairly and honorably. ⚖

Mortimer M. Caplin is the founding member of Washington, D.C.-based Caplin & Drysdale, a tax law firm. He holds bachelor's degrees in science and law from the University of Virginia, and a doctor of juridical science degree from New York University. Caplin served as U.S. Commissioner of Internal Revenue from 1961 to 1964. On leaving government service, he received the Alexander Hamilton Award from the Secretary of the Treasury for his distinguished leadership. He has served as trustee of many educational and charitable organizations. He is an emeritus professor at U.Va., which presented him with its Thomas Jefferson Medal in Law. He is a member of the VSB Senior Lawyers Conference.

Civility And Professionalism:

"Every action done in company ought to be with some sign of respect to those that are present."

—George Washington, Rules of Civility & Decent Behaviour

A Modest Proposal

by Frank Overton Brown Jr.

"Raise your right hand, please. Do you solemnly swear or affirm that you will support the Constitution of the United States and the Constitution of the Commonwealth of Virginia, and that you will faithfully, honestly, professionally, and courteously demean yourself in the practice of law and execute your office of attorney at law to the best of your ability, so help you God?"

This is the oath taken by newly admitted lawyers each year at the Supreme Court of Virginia. In taking the oath to "courteously demean yourself in the practice of law," each admittee attorney is binding himself or herself to an ethic of reciprocity which is part of the very fabric of our legal profession. Courtesy and civility are synonymous words. Courtesy is accepted as "behavior characterized by graciousness and consideration toward others." The Virginia State Bar's Senior Lawyers Conference's direct interest in civility springs from two sources: our individual responsibilities as legal professionals, and our Senior Lawyers Conference Bylaws, in which two of our charges are "to uphold the honor of the profession of law [and] to encourage cordial discourse and interaction among members of the Virginia State Bar."

Throughout the United States, and in other countries as well, for decades the legal profession has continued to look for ways to maintain or restore civility in the practice of law. The word "practice" means to be engaged in a learned profession, with the implication of a continuous upward progression in the skills and qualities of that profession. In Virginia, the privilege of practicing law is conferred upon lawyers by the commonwealth; in return, lawyers agree to be bound by the lawful requirements of the profession.

In looking at efforts in other jurisdictions regarding civility, it appears that most civility codes are aspirational in nature, although some have been adopted by rule or court order. Some have been promulgated by the organized bar, while others have been adopted by local or state bar associations. In many cases, civility codes are weighted toward trial practice and the courts, but the principles set out are

applicable to all areas of the practice of law. In the examples cited below, I have endnoted Internet links to facilitate the readers' access to the full text of referenced sources. These examples are not by any means all of the efforts which have been made. They are representative of common concerns and approaches regarding civility, and they demonstrate common threads in the overall fabric of programs encouraging civility.

The Supreme Court, by order entered on September 7, 1987, established the Virginia State Bar Mandatory Professionalism Course, which must be attended by any active member who is licensed after June 30, 1988, or who changes his or her membership to active status. The curriculum focuses on the Virginia Rules of Professional Conduct and lawyers' broader ethical obligations to their clients, to the judicial system and to society. The course is approved for six ethics hours of Mandatory Continuing Legal Education credit. Included in the Professionalism Course are Principles of Professional Courtesy, which were developed by the Board of Governors of the VSB Litigation Section. The preamble of the principles begins by stating: "Civility and manners, no less than a deep-rooted, broad respect for the law, are the hallmark of an enlightened and effective system of justice. Courtesy, then, emanating from all quarters, extending in all directions, becomes an indispensable ingredient in the orderly administration of the courts." The principles address courtesy toward the court, other counsel, the court clerk and staff, and the press. The professionalism course is excellent, but it is not required for active members who were licensed before July 1, 1988, and lawyers are only required to take it once.

The Virginia Bar Association, a voluntary association of lawyers, has adopted a creed, the preamble to which states: "The practice of law is and must remain a profession. As members of an honored profession, lawyers are expected to exhibit the highest standards of honesty and integrity. In addition, lawyers must strive to achieve a sense of personal honor which should be manifested, in part, by a vigorous devotion to civility in the courts, to clients and to other lawyers. Courtesy is neither a relic of the past nor a sign of less than fully committed advocacy. Courtesy is simply the mechanism by which lawyers can deal with daily conflict without damaging their relationships with their fellow lawyers and their own well-being." The creed then lists principles which are divided into guidelines for the lawyer's conduct toward the courts and other tribunals; toward opposing parties and their counsel and other colleagues in the practice of law; and toward clients and the public.[1]

On December 14, 1992, the Seventh Circuit U.S. Court of Appeals adopted "Standards For Professional Conduct," which include: lawyers' duties to other counsel; lawyers' duties to the court; and courts' duties to lawyers. The preamble states in part: "A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of these terms...A judge's conduct should be characterized at all times by courtesy and patience toward all participants."[2]

The District of Columbia Bar on June 18, 1996, adopted "Voluntary Standards for Civility," which address lawyers' duties to other counsel, parties and the judiciary; litigation matters; judges' duties to lawyers; lawyers' duties to the court; judges' duties to each other; and representations involving business transactions and other negotiations. The preamble states in part: "Civility in professional conduct is the responsibility of every lawyer . . . The organized bar and the judiciary, in partnership with each other, have a responsibility to promote civility in the practice of law and the administration of justice . . . Civility and professionalism are hallmarks of a learned profession dedicated to public service . . . The goal is to ensure that lawyers and judges will conduct themselves at all times, in both litigated and nonlitigated matters, with personal courtesy and professionalism in the fullest sense of those terms."[3]

In May 1997, the Maryland State Bar Association's Board of Governors approved a Code of Civility for all lawyers and judges, setting forth lawyers' duties and judges' duties. In its preamble the Code states: "Civility is the cornerstone of the legal profession."[4]

In October 1997, the New York State Unified Court System adopted "Standards of Civility" setting forth principles of behavior addressing: lawyers' duties to other lawyers, litigants and witnesses; lawyers' duties to the court and court personnel; judges' duties to lawyers, parties and witnesses; duties of court personnel to the court, lawyers and litigants; and statement of client's rights. The preamble states in part that: "They are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course."[5]

On December 6, 2000, the Pennsylvania Supreme Court issued a *per curiam* opinion adopting a Code of Civility. The code covers judges' duties to lawyers and other judges and lawyers' duties to the court. In its preamble, the code states in part, "The hallmark of an enlightened and effective system of justice is the adherence to standards of professional responsibility and civility . . . The conduct of lawyers and judges should be characterized at all times by professional integrity and personal courtesy in the fullest sense of these terms. Integrity and courtesy are indispensable to the practice of law and the orderly administration of justice by our courts."[6]

By order dated October 16, 2003, the Utah Supreme Court approved "Standards of Professionalism and Civility," which in the preamble states in part: "A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms . . . The following standards are designed to encourage lawyers to meet their obligations to each other, to litigants and to the system of justice, and thereby achieve the

twin goals of civility and professionalism, both of which are hallmarks of a learned profession dedicated to public service."[7]

By orders dated October 22, 2003, and January 9, 2004, the South Carolina Supreme Court amended the oath of office for attorneys in Rule 402, so that it reads in part: "To my clients, I pledge faithfulness, competence, diligence, good judgment, and prompt communication; To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."[8] All South Carolina attorneys are required to take this oath at one-hour continuing legal education seminars emphasizing professionalism.

The Advocates' Society in Ontario, Canada, has published "Principles of Civility for Advocates," which contains specific guidelines for relations with opposing counsel, communications with others, trial conduct, and counsel's relations with the judiciary. In endorsing the society's Principles of Civility, the Chief Justice of Ontario wrote: "It is also important to remember that the paths of lawyers may cross and recross over and over again. Lawyers have long memories particularly about the conduct of colleagues and in my experience there can be nothing more important than the reputation enjoyed by an advocate amongst his or her colleagues. Judges are entitled to expect that counsel will treat the court and each other with candour, fairness and courtesy. A failure to do so usually will create a much heavier burden of persuasion on an advocate, which may well undermine the interests of his or her client. 'Civility amongst those entrusted with the administration of justice is central to its effectiveness and to the public's confidence in that system.' "[9]

The efforts of the courts and the bar to promote or maintain civility must be viewed in light of the factors which affect civility, some of which are presented below.

In 2002, Justice John Simonett of the Minnesota Supreme Court delivered an address at the John E. Simonett Inn of Court in St. Cloud, Minnesota. The topic was "Civility and 'Generalized Reciprocity.' " Justice Simonett said: "What is needed is some way of convincing lawyers that civility is in their best interests. The answer may lie with the principle of generalized reciprocity. Let me explain. Several years ago Robert Putnam, a Harvard sociologist, wrote a book entitled *Bowling Alone*. It is his thesis that when people engage in civil and community activities, these social networks create a 'social capital' that has value and affects productivity in society . . . Putnam says that social capital depends on the principle of generalized reciprocity . . . In short, the principle of generalized reciprocity builds trust and honesty, and a trustworthy society is measurably more efficient than a distrustful society. The old maxims learned at one's mother's knee—'honesty is the best policy,' the Golden Rule—still hold true." [10]. In considering the value of social capital, the author is reminded of the saying that the coin in which we as professionals are really paid is in the respect of those whom we respect. It is respect for judges, respect for other lawyers, and respect for those whom we serve.

In Chapter 3 of their book titled *The Moral Compass of the American Lawyer*, Richard Citrin and Carol M. Languor wrote: "Viewed realistically, civility is something which comes from within each individual lawyer." Their point is well taken, in that if a lawyer has a sense of justice, self-respect and respect for others, those internal qualities of character will most likely result in behavior characterized by civility. The likelihood of civility in the practice of law is also increased by concerted efforts on the part of the bar and the judiciary to reinforce and to inculcate in lawyers the qualities which lead to civil conduct.

In a responsive memorandum about a faculty matter, dated March 19, 2001, to his faculty colleagues at the Howard University Law School, Professor Spencer H. Boyer wrote the following: "Civility and collegiality ought not be code words to stifle debate, passion, or advocacy, but rather the norms by which all discourse takes place . . . That civility and collegiality are reciprocal is such an elemental concept it ought not bear repeating or urging . . . Colleagues, it is not enough merely to praise the concepts; we must practice them. We embrace the trinity of civility, collegiality, and community but the dyad of civility and collegiality is the bright light showing the way to the holy grail of community."[11] Professor Boyer's comments are instructive in a broader sense to the profession of law.

Jacob Stein, a senior trial lawyer in Washington, D.C., and past president of the District of Columbia Bar, in an article in the journal *Cosmos* entitled "Civility As an Art Form in Diplomacy and the Law," wrote: "The legal profession has produced an abundance of writing on civility, commenting on the need for civility, the lack of civility, and even the need for a published code of civility . . . Many jurisdictions have adopted a written civility code for lawyers, but I question the value of such codes. I believe incivility at the trial bar is easily controlled by the trial judge. There are some judges who have no trouble with lawyers. Not only are the lawyers well behaved before these judges, the lawyers enjoy engaging in the traditional flattery which is expected of them when addressing the Court. There are other judges who are always in trouble with lawyers. Why is this? Lawyers quickly learn what a judge will put up with and which judges have such a sense of dignity that shameful conduct before such a judge is unthinkable. A judge who invariably

Lawyers have long memories particularly about the conduct of colleagues . . .

shows up late will find his or her courtroom lacking in civility. A judge who is unprepared will have civility problems. A judge who loses his or her temper, or who is undisciplined, will see lawyers acting in a similar manner."[12] These opinions are written from the point of view of a trial lawyer, and they illustrate the importance of good example and mentoring, both of which are important to all aspects of the practice of law. A civility code is not a panacea, but it can be beneficial to an overall approach to promote and maintain civility.

The author recently participated in a panel discussion presentation on civility in which the other panel members were state and federal trial and appellate judges, active and retired. The audience consisted of newly admitted lawyers. One of the panel members, a retired judge, expressed the view that there is no problem regarding civility, and that the civility panel discussion was not necessary, but all of the other panel members expressed views that reinforced the need for continuing emphasis on civility in the practice of law.

Judges and justices who participate in the VSB's Bar Leaders Institute have expressed their valuable thoughts regarding civility. Here are some of their observations:

- Civility is a fundamental component of professionalism.
- Civility is really the "Golden Rule": "Do unto others as you would have others do unto you."
- While civility requires that we pay attention to the human nature aspects of our profession, we must also always pay attention to being prepared and knowing the facts and law regarding the matters on which we are working for clients. Being civil does not excuse poor preparation.
- The art of the graceful apology is an essential component of civility.
- Lack of civility on the part of attorneys and their clients makes the job of the judge harder in deciding cases on their merits. Negative behavior antagonizes the decision maker.
- Judges are charged by law with maintaining decorum in the courtroom. Judges have a supervisory responsibility and role in promoting civility and professionalism among members of the bar. Judges should meet those responsibilities, and lawyers should help them to do so.
- Depositions should be conducted in the same civil manner as if the judge were in the room.
- Tardiness, rudeness and lack of preparation are forms of incivility.
- Disrespectful, deliberately provocative behavior and invectives should never be part of a professional's conduct.
- The negative behavior of individual attorneys may provide the basis for members of the public generalizing about the legal profession as a whole.
- Lawyers have an obligation to control not only their own conduct, but also that of their clients.
- All members of the bar have the responsibility and the opportunity to have a positive influence on other members of the bar. Senior lawyers in particular should set the example.
- Professionalism and civility benefit everyone: lawyers, judges and the public.

In summary, there is a continuing need for an emphasis on civility in the practice of law. The author recommends that the Supreme Court of Virginia consider taking the following actions regarding civility and professionalism:

- Emphasize the importance of judges' roles in promoting and maintaining civility and professionalism, both in and out of the courtroom;
- Require that the Virginia State Bar develop a one-hour continuing legal education course on civility and professionalism, including Standards of Civility and Professionalism (which are directed toward all areas of the practice of law, not just litigation practice).
- Require that all active members of the Virginia State Bar attend the civility and professionalism course annually, and that the course qualify for MCLE ethics credit.
- Require that the oath of office be administered each time the attorney attends the civility and professionalism course, as an ongoing reminder of the meaning and contents of the oath. ⚖

Endnotes:

1 http://www.vba.org/whoweare.htm

2 http://www.insd.uscourts.gov/civility.pdf

3 http://www.dcbar.org/for_lawyers/ethics/legal_ethics/voluntary_standards_for_civility/preamble.cfm

4 http://msba.org/departments/commpubl/publications/code.htm

Civility *continued on page 53*

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

Assisted Living Facilities in Virginia

by William T. Wilson and Jack W. Burtch Jr.

For nearly thirty years, Assisted Living Facilities (ALFs) have been used by many older or disabled adults in Virginia in need of assistance in daily living activities. These private, state-regulated establishments care for more than thirty-four thousand people in Virginia. The Senior Lawyers Conference is concerned about a number of issues affecting ALFs in Virginia, including growing numbers of residents, increasing needs of residents, a shrinking available labor pool and inadequate funding and regulatory oversight.

The *Code of Virginia* defines Assisted Living Facilities as:

> "any congregate residential setting that provides or coordinates personal and health care services, 24-hour supervision, and assistance for the maintenance or care of four or more adults who are aged, infirm or disabled and who are cared for in a primarily residential setting."

ALFs in Virginia are regulated by the Department of Social Services (DSS) because they are considered "non-medical" residential settings. The DSS states, "Assisted living facilities are *not* nursing homes. A nursing home is a facility in which the primary function is the provision, on a continuing basis, of nursing services and health-related services for the treatment and inpatient care of two or more non-related individuals. Nursing homes are regulated by the Virginia Department of Health."

This medical/nonmedical distinction is a key part of the purpose for ALFs. However, investigations by state agencies and the news media, most notably *The Washington Post*, have found that ALFs in Virginia are being used for purposes for which they were neither intended nor equipped to handle. ALFs are becoming increasingly popular as alternatives to nursing homes and as another type of institution for the mentally challenged. By the mid-1990s, nearly half of ALF residents suffered mental disabilities. The Virginia Uniform Assessment Instrument (UAI), a set of guidelines used to determine the level of care needed by patients, was

updated in the early-1990s. It assists ALF staff in distinguishing mentally disabled patients whose needs can be met in an ALF from those who need other types of facilities. A 1997 Joint Legislative Audit and Review Committee (JLARC) study found that the assessment instrument was still an insufficient tool because ALF staff were not trained to use it.

The Department of Social Services has been challenged in regulating ALFs. A series of *Washington Post* articles demonstrated some disturbing trends. Records show that across the state and in all types of homes, many disabled and vulnerable adults experience poor care and inadequate supervision. These patients represent a range of backgrounds and afflictions. As the industry has grown, so has the number of complaints. Grievances lodged with Adult Protective Services, a division of the DSS, have increased by two-thirds in the past eight years.

According to national studies, the problems in Virginia's facilities are common across the country, but Virginia is the only state in which all the homes were disqualified from a federal funding program after inspectors in 1999 found medical and physical neglect of residents.

According to the *Post* articles, a large part of the problem may be due to the inability of state agencies to enforce regulations with significant fines and revocation or suspension of ALF licenses. Compared to other states, Virginia has less stringent regulation of its homes and weaker enforcement tools. Maryland, for example, can impose a ten-thousand-dollar fine when a home violates standards. That compares to a maximum fine of five hundred dollars in Virginia. In the past decade, resident deaths and injuries in Virginia have triggered dozens of lawsuits against facilities.

Some ALFs have compromised the health and safety of their residents in the following ways:

- Acceptance of residents in need of medical care which their staff is not equipped to provide.
- Inadequate supervision of residents.
- Insufficient staff numbers.
- Gross undertraining of staff.
- Failure to properly distribute medication to residents.
- Insufficient facility preparation for emergencies such as fires.

These deficiencies in care have led to the abuse, neglect or exploitation of over four thousand ALF residents in the past ten years. Fifty-one deaths and 135 other cases of sexual assault or physical injury can be, directly or indirectly, attributed to poor standards of care. A number of incidents involving ALF residents were outlined in detail in the *Post* series.

- A female resident suffered uncontrolled seizures in November 2002 at an ALF in Richmond after staff workers failed to dispense her epilepsy medication for twenty-five days. At the hospital, doctors worked for two hours to stop the seizures and were forced to administer drugs to paralyze the woman and put her on a ventilator, which saved her life.
- A seventy-nine-year-old female resident, an Alzheimer's patient whose husband visited her daily, burned to death in September at an ALF in Henry County. The fire started at a laundry room electrical outlet and spread quickly through the one-story brick building. When firefighters arrived, they found her lying half inside a doorway, her hair and clothes on fire.
- At an ALF in Springfield, a man with dementia wandered into the room of an eighty-one-year-old woman while she slept and repeatedly punched her in the face, severely bruising her. Three weeks earlier, staff members had found the same man in another woman's room, holding her head under the covers and telling her to "shut up."
- From 1997 through 1999, state officials reprimanded an ALF in Danville for a range of problems, including abuse, neglect and insufficient staff. Residents at the home—a rundown, leaky building—were eating out of a nearby trash bin.

The *Post* article also includes a quote from the DSS director of licensing, Carolynne Stevens. Ms. Stevens, in an e-mail to her colleagues, said, "The assisted living industry has been used as a dumping ground and a cost dodge for twenty-five years. It will be a dangerous place for vulnerable people until we stop kidding ourselves that is a sane or moral approach."

Besides the JLARC review of 1997, there have been a number of other studies by state agencies. JLARC conducted evaluations of ALFs in 1979 and 1990. The Joint Commission on Health Care reviewed financial and licensure aspects of ALFs in 1998 and 1999. The Virginia Department for the Aging and the Aging Action Agenda Task Force have conducted ongoing studies of ALFs as part of the Virginia State Plan for Aging Services.

In the past year, the Task Force Committee on ALF Oversight (of the Virginia Department of Aging) and the

A number of statutory, regulatory and administrative activities are currently in motion that may help to improve conditions in ALFs.

Subcommittee on Admission Criteria and Level of Care reported the following problems with ALFs:

- Improper medication management.
- Poor risk assessment and enforcement guidelines including negligible fines.
- Lack of cooperation between the DSS and the Department of Mental Health, Mental Retardation and Substance Abuse Services.
- Insufficient screening of potential residents.
- Inaccessibility of potential residents' medical records to ALF staff.
- Lack of funding and access to information on obtaining funding.

The Aging Action Agenda Task Force has recommended the following actions to help alleviate these problems:

- Requiring that ALFs have certified nurse assistants with medication management training.
- Increase health care oversight from quarterly to monthly.
- Increase maximum fines from five hundred to ten thousand dollars.
- Develop cooperative licensing between the DSS and the mental health department.
- Standardize training for potential-resident screeners.
- Educate ALF staff about the availability of additional Medicaid and Medicare funding.

A number of statutory, regulatory and administrative activities are currently in motion that may help to improve conditions in ALFs. Over a dozen bills were introduced in the 2005 General Assembly addressing licensure procedures for ALFs. Two complementary bills—HB 2512 and SB 1183—were passed. These specifically address several commonly recognized problems.

HB 2512 requires administrators of assisted living facilities to be licensed by the Board of Long-Term Care Administrators within the Department of Health Professions. The bill renames the Board of Nursing Home Administrators as the Board of Long-Term Care Administrators. The licensing provisions will not take effect until July 1, 2007. The Board of Long-Term Care Administrators will submit proposed criteria for licensing assisted living facility administrators on or before January 1, 2006.

SB 1183 permits the commissioner to issue an order of summary suspension of a license to operate an assisted living facility and adult day care center (licensee) in cases of immediate and substantial threat to the health, safety, and welfare of residents or participants. The bill also authorizes the commissioner to deny, revoke, or summarily suspend certain authority of the licensee to operate. It may permit the licensee to operate, but may restrict or modify the licensee's authority to provide certain services or perform certain functions that the commissioner determines should be restricted or modified in order to protect the health, safety, or welfare of the residents or participants. Prior to any summary suspension, the commissioner must appoint an acting administrator.

The bill also increases the maximum civil penalties for assisted living facilities from five hundred to ten thousand dollars per license period. It directs that the civil penalties be paid into the newly created Assisted Living Facility Education, Training, and Technical Assistance Fund to provide education and training for staff of and technical assistance to facilities. The bill requires ALFs to have mental health screening for residents, and an individualized services plan must be developed for mentally challenged residents. The bill requires ALFs to disclose information about the services, policies, staffing patterns, fees, and ownership structure of the facility, and a description of conditions that would require the discharge of a resident from the facility.

In addition to the changes mandated by HB 2512 and SB 1183, the Governor's proposed budget included regulatory staff increases to permit more frequent inspections of facilities; several budget amendments were introduced in both houses to increase the amount of ALF Auxiliary Grants, including related amendments to eliminate the obligation for localities to pay 20% of such grants to residents.

The State Board of Social Services has begun taking its own steps toward improvement of ALFs in Virginia. The board approved a Notice of Intended Regulatory Action at its December meeting.

On January 3, the DSS launched the first phase of its planned Web-posted inspection reports a full year early, in order to increase information available to the pub-

lic. The information, which dates back one year, is available by going to **www.dss.state.va.us** and clicking on either "Adult Day Care" or "Assisted Living Facilities" on the left rail under the heading "Adults."

A number of ALF administrators have taken internal steps in anticipation of changes. They have increased the training opportunities currently available to their staffs and are planning to tailor the training to changes as they come—particularly those related to care of high-need populations and management.

It would seem, as a practical matter, that the distinction between nursing homes and ALFs has become somewhat blurred. Many ALF residents are severely mentally challenged or otherwise incapable of taking care of themselves. Although nursing homes are heavily regulated, ALFs are comparatively free from regulation. A recent edition of *Trial* magazine said that ALFs are rapidly becoming the nursing homes of the future. Under the present system, however, they are taking on responsibilities they are not equipped to handle. For example, some ALFs have accepted patients who either had or were at severe risk for developing pressure sores. This practice is in violation of Virginia's regulations, which prohibit ALFs from admitting or retaining patients who have pressure sores; who are ventilator dependent; who require nasogastric tubes or intravenous therapy; and who need continuous licensed nursing care.

There is a need for a critical look at existing ALF standards of care for senior citizens. The procedures being used for the screening and placement of senior citizens at the proper level of care (nursing homes *versus* ALFs) and the existing state regulatory scheme require careful scrutiny. Where it can be of service, the Senior Lawyers Conference will be ready to help. ⚖

William T. Wilson is chair-elect of the Senior Lawyers Conference. A lawyer for forty-two years, he practices plantiffs' personal injury law, workers' compensation and Social Security disability in the Covington firm Wilson, Updike & Nicely. He served sixteen years in the Virginia House of Delegates and twenty years as commissioner of accounts in Alleghany County. He received his undergraduate degree from Hampden-Sydney College and his law degree from the University of Virginia.

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

Civility *continued from page 49*

5 http://www.nycourts.gov/jipl/standardsofcivility.pdf

6 http://www.pacode.com/secure/data/204/chapter99/subchapDtoc.html

7 http://www.utcourts.gov/resources/rules/ucja/ch23/

8 http://www.scbar.org/member/cle/Oath_text.asp

9 http://www.advocates.ca/civility/principles_tex.htm

10 http://www2.mnbar.org/benchbar/2003/feb03/civility.htm

11 http://www.law.howard.edu/faculty/pages/boyer/avm9q.htm

12 http://www.cosmos-club.org/journals/1999/stein.html

13 http://www.cosmos-club.org/journals/1999/stein.html

Working with the Senior Lawyers Conference—A Collaboration with a Difference

Savalle C. Sims, 2004–2005 Young Lawyers Conference President

The Senior Lawyers Conference has long stressed the restoration of civility in the profession and emphasized professionalism in every facet of the practice of law. With more than seven thousand members, the Senior Lawyers Conference has nearly as many members as the Young Lawyers Conference. The Senior Lawyers Conference provides a wealth of resources, including a program on planning for a lawyer's own disability or death and programs on retirement planning for lawyers.

For several years, the Young Lawyers Conference has had the privilege of working with and learning from the Senior Lawyers Conference. The collaboration between organizations results in a collaboration with a difference—the perfect blend of youthful enthusiasm, wisdom and perspective.

One such collaboration produced the *Senior Citizens Handbook*—an invaluable public resource. The Young Lawyers Conference was pleased to have the opportunity to assist the Senior Lawyers Conference in the publication, distribution and translation into Spanish of the *Senior Citizens Handbook*.

In addition to the strong working relationship that the Young Lawyers Conference has developed with the Senior Lawyers Conference, the Senior Lawyers Conference serves as an unofficial mentor for the Young Lawyers Conference. We call upon members of the Senior Lawyers Conference to speak at our leadership and professional development conferences.

I have learned many lessons from working with the Seniors Lawyers Conference. Here are a few:

- **Value professionalism:** Do not feel that, as a young lawyer, you have to cast aside principles such as civility to gain a competitive edge against more seasoned lawyers. Always maintain professionalism in your dealings with opposing counsel, the court and your clients.

- **Follow the Golden Rule:** Treat your colleagues, clients and others as you would wish to be treated.

- **Find a Mentor:** Find a senior mentor with whom you can develop a meaningful relationship. The perspective and experiences of senior lawyers are invaluable. They have seen and done it all.

- **Get Involved:** Get involved in professional and bar organizations beyond young lawyer conferences to increase knowledge, networking and interaction with senior lawyers or find ways to partner on projects with senior lawyers.

Many young lawyers have contacted me recently mourning the death of Robert R. Merhige Jr., an honorary member of the Senior Lawyers Conference and a noted jurist before he retired and resumed the practice of law in 1988. I understand that Judge Merhige was a wonderful mentor to many young lawyers. The Young Lawyers Conference will miss him.

The Young Lawyers Conference looks forward to continuing our work with the Senior Lawyers Conference—and to joining the ranks of the Senior Lawyers Conference to continue our tradition of collaboration. ⚖

R. EDWIN BURNETTE JR. YOUNG LAWYER OF THE YEAR AWARD

Young Lawyers Conference
Virginia State Bar

Seeking Nominations

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

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

The nomination deadline is April 29, 2005. Letters of nominations and any supporting materials should be sent to:

Kathleen M. Uston,
Law Office of Kathleen Uston, 118 S. Royal Street, Alexandria, VA 22314
(703) 683-0440; Fax: (703) 549-8664; law@uston.com

—VSB Attorney Profile—

Leslie A.T. Haley

This is one in a series of Virginia Lawyer magazine profiles of state bar attorneys.

Leslie A. Takacs Haley has been an assistant ethics counsel at the Virginia State Bar since 1998.

Haley received a bachelor's degree in business administration in 1976 from West Virginia University. She worked for Philip Morris USA for ten years, starting as a sales representative and rising to a division manager, before she returned to West Virginia for law school. She received her law degree in 1993, after spending her third year as a visiting student at the University of Richmond School of Law.

She became an associate with a general practice at Lee Robert Arzt, Attorneys-at-Law, in Richmond, before joining the VSB staff.

Haley is a member of the Greater Richmond Bar Foundation Board, Metropolitan Richmond Women's Bar Association, Richmond Bar Association, and Chesterfield/Colonial Heights Bar Association.

She is president of the Chesterfield County Council of PTAs, a fitness instructor for the YMCA and Robious Sports and Fitness Club in Chesterfield, a director and former president of the Walton Lake Homeowners Association, legislative chair of the Evergreen Elementary School PTA, and parish committee member of St. Marks United Methodist Church.

You started out with a career in business and marketing. A decade later you were in law school. What happened during that time that called you to law?

I always possessed an interest in a career in law, but after undergraduate school I felt I needed time to explore the "real" world and earn money. I was very fortunate to land a job with Philip Morris in sales that exposed me to an incredible corporate management training program as well as the experience of personal growth. I spent the majority of my time traveling and quickly climbed the corporate ladder, but after ten years decided to pursue my dream of law, knowing that I still had that desire and was envious of a more family-oriented lifestyle. I left behind many professional and personal friends whom I still stay in contact with.

How does the real-life practice of law compare to what you thought it would be like?

The practice of law in many ways is exactly as I envisioned. One of the best things about being a lawyer is the multitude of opportunities a law degree affords. Many lawyers have never practiced a day in their lives, but are involved in business, nonprofit groups, volunteer efforts, government entities or academia. I have always believed that a law degree opens doors and the opportunity to make a difference in the world.

I also realized that success in the practice of law is not only about legal skills, but business acumen as well. It's difficult to be a solo or small-firm practitioner and please your clients, manage your dockets and office staff (if you're lucky enough to be able to afford staff), and run your business. I have a lot of respect for the solo or small-firm lawyer.

Part of your job is providing one-on-one consultations with members of the bar over ethical quandaries. What categories do their questions fall into?

We provide ethical guidance to attorneys across the state each and every day, and the number of inquiries we receive continues to grow. We get a wide range of questions, but many times lawyers are calling just to make sure that they are doing it the right way. They seek guidance on possible withdrawal from difficult matters that involve difficult clients, conflict issues, and disposal of client files. While we encourage lawyers to do research on their own to identify potential ethics issues, no lawyer becomes an expert on ethics from one professional responsibility course in law school. Virginia lawyers are very lucky to have an ethics staff available to consult and we encourage our members to call us for assistance. Our consults are totally confidential and can sometimes help a lawyer identify a potential pitfall that could lead to a bar complaint.

You have developed an interesting format for teaching legal ethics at seminars — "Legal Jeopardy." Please describe it, and test us.

After speaking for many years to the legal profession on legal ethics in that deadly Friday four-to-six-p.m. time slot, it occurred to me that there must be a more entertaining and enlightening way to teach. A colleague mentioned he had seen something similar to a Jeopardy game used as a teaching tool in another jurisdiction, and so we put this together. As in any teaching environment, when you get your audience involved in the process the quality and impact of the message improves.

So, (1) What is the difference between a retainer and an advanced legal fee? (2) Can you take a referral fee on a case for which you retain no involvement or responsibility? (3) Can you represent both husband and wife in an uncontested

divorce? (4) Can you defend a client on a criminal drug charge when the witness testifying on behalf of the commonwealth is a former client of yours? (5) What do you do with the fax you just received from opposing counsel that was intended for the opposing party? (6) Who "owns" the client file? (Answers can be found at the end of the article.)

You are the staff to the Standing Committee on Lawyer Advertising (SCOLAS). How in the world do you keep track of all the attorney ads out there?

This may be my most challenging role at the bar, as the SCOLAS interprets the *Rules of Professional Conduct* that deal with lawyer advertising and solicitation. The role of the SCOLAS includes monitoring lawyer advertising, so we attempt to gain a comprehensive list of all lawyers and firms across the state that engage in video and audio advertising. However, it's an imperfect process. We currently have a rule pending before the Supreme Court of Virginia that would require lawyers to place on file with the Virginia State Bar a copy of all video and audio advertising within thirty days of airing. We hope this rule amendment will make the committee's monitoring function easier and absolve us of the notion that we are engaged in selective scrutiny.

You've put your marketing experience to use at the Virginia State Bar in other ways. You helped the Senior Lawyers Conference and the Trusts and Estates Section produce a brochure, "Planning Ahead: Protecting Your Client's Interests in the Event of Your Disability or Death." Don't all lawyers do that?

As a profession, we are our own worst enemies! We take care of our clients' interests, but forget about our own and those of our families. An unplanned occurrence, such as a freak accident, unexpected illness or untimely death, can occur at any time. Our clients are left not only without counsel but also without an ability to access their files and their funds in trust, and our families are ill equipped to wind up a law practice. It takes a plan that provides direction to provide for these events. Lawyers need to plan for their future and protect their own assets as well as the interests of their clients.

The "Planning Ahead" brochure is available at the VSB Web site, along with other planning materials produced by the Senior Lawyers Conference. The link is www.vsb.org/slc/attorney/index.html#publications.

You played a role watching over the VSB's interests at the General Assembly this year. What did you learn from the experience?

I found it to be very interesting and enlightening to see how the process works, or sometimes doesn't. I was fortunate to have guidance from our staff and some "inside connections" with several senators whom I know personally, as the General Assembly can be somewhat intimidating to a newcomer. Our bill patrons and the support staff at the General Assembly could not have been more helpful. They are wonderful people who kept their cool and pleasant demeanor and helped guide me through the maze.

The legislation I was involved with was fairly innocuous. My role was to educate the legislators on the details of the proposed statute changes. In listening to other discussion and debate in committees I sometimes found it problematic that the number of lawyers in the General Assembly continues to decline. Traditionally, the lawmakers of our country have been lawyers, with good reason.

Tell us about your family.

I am blessed to have two healthy, challenging children, who are both in elementary school. My daughter Reagan is very involved in swimming, dancing, piano and Girl Scouts and at age ten is certainly her mother's daughter in the challenges she poses to my every request. My son Alex is seven and has tried every sport he can at this age, as well as piano and Boy Scouts. My husband Joe is a transportation analyst with Philip Morris, where he has spent his career. His traveling has been curtailed with the company's recent move to Richmond, and for that we are all grateful. I am also very lucky to have a beautiful stepdaughter, Meghan, who is a freshman at Old Dominion University. She lives in Norfolk with her mother, but with cell phones, e-mail and instant messaging we all feel very connected. I also feel fortunate to have my parents, who are healthy and still live in my hometown of Monroeville, a suburb outside Pittsburgh. My brother and his family are also in Pittsburgh. My mother-in-law lives in Danville with many of my husband's siblings and their families.

In addition to your paying job here at the bar, you take on big volunteer commitments. Currently you are president of the Chesterfield County Council of Parent Teacher Associations, a member of the Greater Richmond Bar Foundation board, legislative chair for your local elementary school's PTA and a member of the staff-parish committee at your church. How do you budget your time to get it all done?

I truly believe in giving back your time and talents. What greater reward does life offer than to see the successes of your contributions and to feel like you have contributed to the world in which we all live? I believe that lawyers give back much more to their communities than most members of the public ever realize. I am committed to education on many levels. Our children have so many more challenges to face than our generation ever dreamed of, and the only way they will ever be equipped to compete in our global society is if we do this as a joint partnership, with schools, parents, business, and community. That is my goal on a small scale in our county, but that's where differences are made.

My impact as legislative chair at my local school keeps me involved at this level in a

small but distinct way. Every year I am discouraged by the parents' lack of interest in legislative issues related to our schools and our children's education.

In addition, I'm honored to serve on the GRBF Board. This young foundation has just begun its work, but many will soon realize what a fabulous impact it will have in our metropolitan area, as far as affording support to the public in the form of greater access to legal services.

While I realize that it is a juggling act for me to handle all these involvements I multi-task well and have incredible support from all factions of my life. Additionally, I hope my children grow up to appreciate the importance I place on these interests and values. I hope they adopt my mantra of giving back to their communities.

Your jobs as a fitness instructor no doubt help relieve stress. What else do you do to unwind?

I love teaching group exercise. I started when I was in my late twenties. Exercise has always been my escape where I can kick back, forget the outside world, and let the other side of my personality emerge.

I also enjoy gardening, reading, and just hanging out with my kids. They keep me young and connected to my community and their interests, and they ground me when I get too wound up in all the other aspects of life.

[Answers to "Legal Jeopardy" questions: (1) A retainer is earned when paid; an advanced legal fee is put into trust to be drawn upon as earned. (2) Yes (LEO 1739). (3) No. (4) No. (5) You call opposing counsel alert them to the receipt of the inadvertent fax and follow their directions or involve the court in the process (LEO 1702). (6) The file is the property of the client (Rule 1.16(e)).]

CALL FOR YLC BOARD NOMINATIONS

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

YLC District	consists of Judicial Circuits
1st District	Circuits 1, 3, 5, 7 & 8
3rd District	Circuits 6, 11, 12, 13 & 14
4th District	Circuits 17 & 18
6th District	Circuits 9 & 15
8th District	Circuits 23 & 25
9th District	Circuits 10, 21, 22 & 24
and three At-Large positions	

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

Kathleen M. Uston
Law Office of Kathleen Uston
5735 Mallow Trail
Mason Neck, VA 22314
(703) 683-0440, Fax: (703) 549-8664, law@uston.com
The deadline for receipt of nominations is May 1, 2005.