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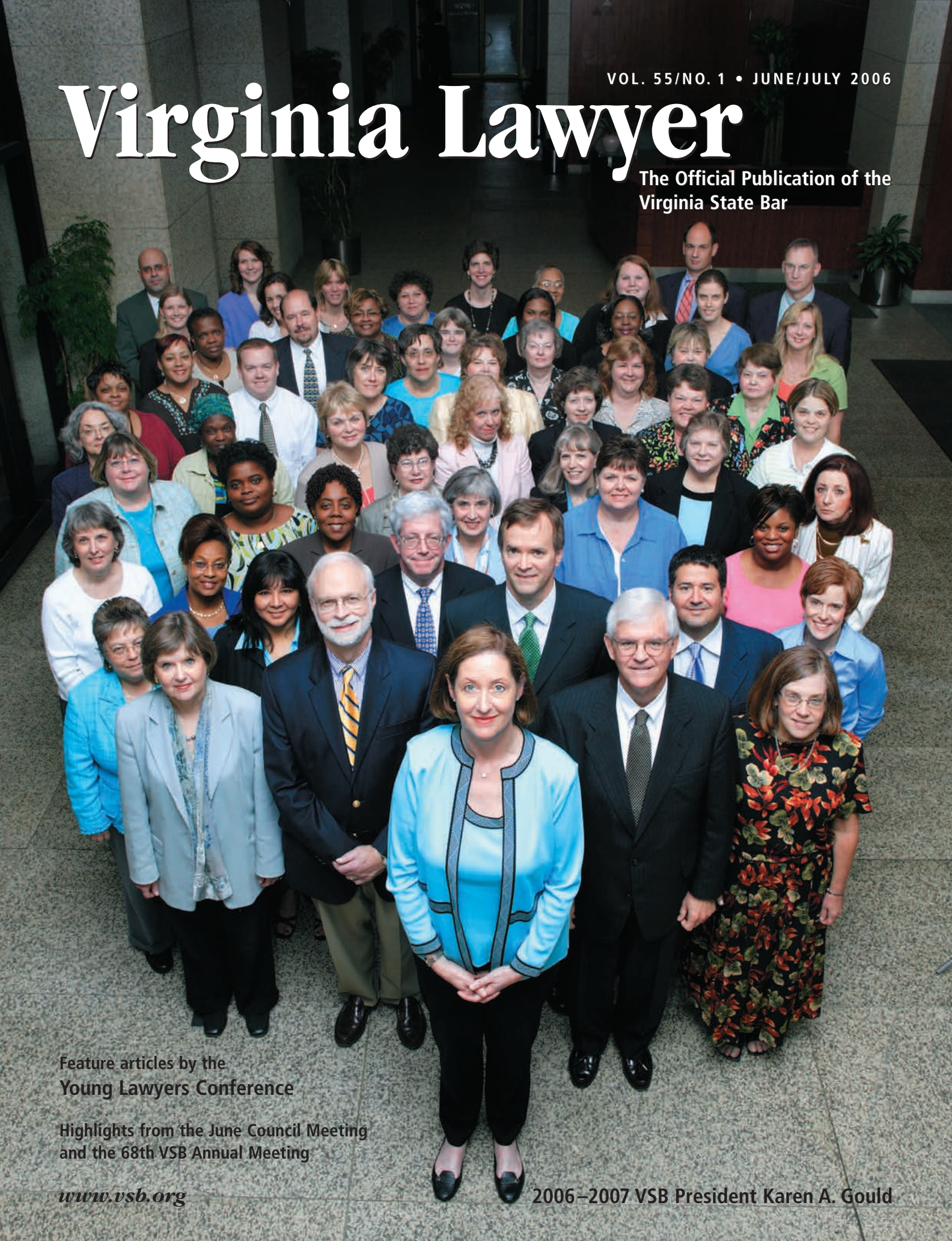
Virginia State Bar



Feature articles by the
Young Lawyers Conference

Highlights from the June Council Meeting
and the 68th VSB Annual Meeting

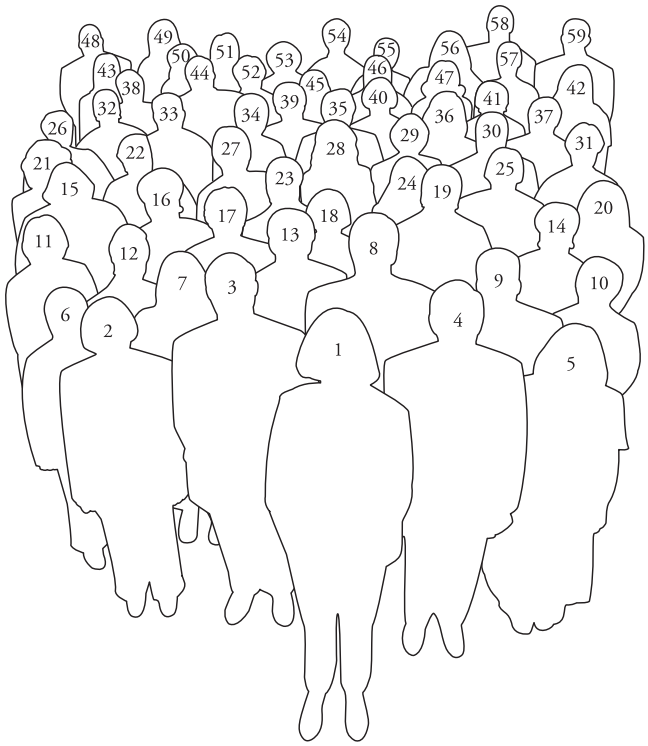
www.vsb.org

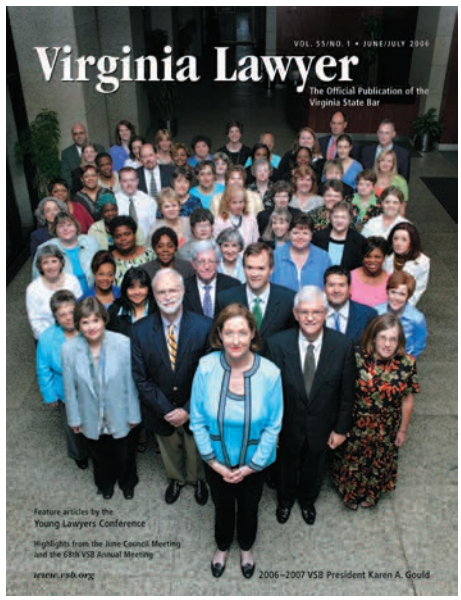
2006–2007 VSB President Karen A. Gould

Why the group shot for the president's cover this year?

It is an honor and a privilege for me to stand with the bar staff and represent the Virginia State Bar as its president this year. The staff is dedicated to carrying out the VSB's mission, which includes not only regulating Virginia's lawyers, but also helping them to be better lawyers. Without the staff's support and assistance, I would not be able to function effectively as bar president (and still have time to practice law). Likewise, Virginia's lawyers and their clients would be adversely affected if bar employees were not doing their jobs and carrying out the good work of the VSB. My thanks for the help each and every member of the bar staff provides!

—Karen A. Gould





1 Karen A. Gould, VSB President
2 Mary Yancey Spencer, Deputy Executive Director
3 Harry M. Hirsch, Deputy Bar Counsel
4 Thomas A. Edmonds (Tom), Executive Director/Chief Operating Officer
5 Susan C. Busch, Assistant Executive Director
6 Debra C. Isley
7 Lizbeth L. Miller
8 James C. Bodie (Jim)
9 Paulo E. Franco
10 Barbara J. Balogh
11 Susan B. Johnson
12 Lily M. Norman
13 James M. McCauley (Jim)
14 Sylvia S. Daniel
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26 Jacquelyn Simien-Jones
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28 Anne P. Michie
29 Jane A. Fletcher
30 Gwendolyn S. Evans (Gwen)
31 D. Nicole Bailey
32 Talaya I. Oxendine
33 Michael S. Wickham (Mike)
34 Joan V. McLaughlin
35 T. Michelle Jamison
36 Paulette J. Davidson
37 Patricia A. Sliger (Pat)
38 Cynthia B. Williams
39 Diane L. Farmer
40 Jean E. Oakley
41 Barbara O. Allen
42 Dolly C. Shaffner
43 Caryn B. Persinger
44 William H. Dickinson (Bill)
45 Mary W. Martelino
46 Alicia A. Parker
47 Sheree L. Patterson
48 Richard E. Slaney (Rich)
49 Brenda F. Holmes
50 Kathryn R. Montgomery
51 Deborah C. Hunt
52 Joy D. Harvey
53 Sharon B. Headley
54 Theresa B. Patrick (Terry)
55 Crystal V. Adams
56 Madonna G. Dersch
57 Michelle L. Townsend
58 Paul D. Georgiadis
59 Edward L. Davis (Ned)

Not pictured: Bar Counsel George W. Chabalewski, Assistant Executive Director Elizabeth L. Keller (Bet), Diane F. Anderson, Rodney A. Coggin (Rod), Dawn Chase, Reginald Barthelemy (Reggie), Charles S. Troy, Jason E. Brown, Maureen D. Stengel, Catherine D. Whitehead, Sandra H. Clarke (Sandy), Bonnie T. Waldeck, Laurie C. Fuller, J. Scott Kulp, Leslie A.T. Haley, Noel D. Sengel, Seth M. Guggenheim, Alfred L. Carr, Marian L. Beckett (Suzie), Ann-Marie Federico, Susan E. Neill, Cam Moffatt, O. Michael Powell (Mike), A. E. Rhodenizer, Jr. (Gene), James W. Henderson (Jim), Donald L. Lange (Don), David W. Jackson, Ronald Pohrivchak, Eugene L. Reagan (Gene), William H. Martin (Bill) and Robert Heinzman.

Virginia Lawyer: Voter and Constituent

by Karen A. Gould, 2006–2007 VSB President

I can no longer say that I look forward to my year as president of the Virginia State Bar. The year has begun, and I feel that I am being buffeted by a gale-force wind. Phil Anderson, my predecessor, had warned me of this feeling and how quickly the year blows by. One of the best pieces of advice I have received was from past President Joe Condo, who said that I must remember to enjoy the experience. Putting this advice into play may be akin to Dorothy clicking the heels of her red slippers together and saying "There's no place like home," as she is whisked back to Kansas from the land of Oz.

One of the privileges and penalties of this position is writing a column for *Virginia Lawyer*. I hope to use this as a "bully pulpit" as President Teddy Roosevelt would have described it. C-Span's Congressional Glossary describes a "bully pulpit" as "a terrific platform from which to persuasively advocate an agenda." (**www.c-span.org/guide/congress/glossary/bullypul.htm**).

For my first column I'll take on a subject on which we can all agree, but which nevertheless deserves attention. No one will dispute that in both the federal and the Virginia constitutions is the principle that the legislative, executive and judicial departments of government should be separate and distinct. Likewise, I don't think any lawyer will dispute the importance of an independent judiciary. Chief Justice William H. Rehnquist referred to judicial independence as "one of the crown jewels of our system of government today." The Council of Presidents of the Statewide Bars of the Commonwealth wrote:

> . . . from the beginning of our constitutional democracy, the system has depended on the independence of the judiciary from the other branches of our government. It has been long recognized that only when courts are free to make decisions according to the law, without regard to political or economic pressure, can courts protect the basic rights of individuals and decide cases fairly. Such independence is essential in order for the public to have confidence in the integrity and impartiality of its judiciary, and respect for the important and sometimes monumental, decisions rendered by those selected to serve as judges. [From "Judicial Independence in Virginia," a commentary by the Council of Presidents of the Statewide Bars of the Commonwealth, pg. 1.]

There have been times during the last couple of years when it has seemed that the principles of judicial independence and separation of powers have been forgotten during the process of appointing and reappointing judges in Virginia. The Supreme Court of Virginia's new judicial performance evaluation program might help focus the General Assembly on appropriate factors for evaluation of judges in the commonwealth. There is also a self-evaluation component of the program, which should help the judges and improve their skills.

Lawyers, judges and bar organizations—including the Virginia State Bar—also had questions this past session regarding the judicial selection process, in which it appeared that the General Assembly was not interested in the organized bars' evaluations of candidates. In recent months, statewide bars have been finding ways to help make screening and evaluation processes more relevant to the selection process.

We can be more relevant. We should become involved in the political process—not in our role as lawyers, but in our role as voters and constituents. As I think we've already agreed, a strong and independent judiciary is a bedrock of our justice system and the rule of law. Doesn't that principle—the need for a strong and independent judiciary—merit as much attention from you as a client would?

When I visit the General Assembly, I hear legislators say that they want to hear from the voters directly. Recently I heard a legislator say: "It's the personal contacts that make a difference." Another said: "It's a rule in my legislative office if a constituent wants to talk to me, they are going to get first priority on my time." And another said: "I didn't hear anything from anyone, lawyer or otherwise, about this judicial appointment, until after it had happened."

I urge you to personally inform your legislator of your opinions about judicial appointments. Don't contact only the lawyer legislators. It is more important to make contact with nonlawyer legislators. You probably think, like I used to, that the legislators

President's Message continued on page 25

Richmond Attorney Is New VSB President

by Dawn Chase

When Karen Ann Gould finished law school, she was shy of public speaking.

"I did not want to be a trial lawyer, because I didn't think I had the chutzpah," she said in an interview at her soon-to-be vacated office on West Broad Street in Richmond.

Her first trial was opposite R. Terrence Ney, now a circuit judge and a man with enviable rhetorical skills. "My voice shook, and I was a basket case," she said.

That was then. Now, as the new president of the Virginia State Bar, Gould has twenty-five years of practice under her belt. In her medical malpractice cases, she savors learning about different areas of medicine with each case. And she relishes her time in the courtroom.

"It is such a high to go out there and be in control, interacting with the judge, the jury, the witnesses," she said. "My clients think it's the most awful experience they've ever been through, and I'm having fun."

She tries to convey that satisfaction to her daughter, Elizabeth West, who just finished her freshman year in college. Gould and her husband, attorney Malcolm R. "Rudy" West, have encouraged Elizabeth to attend law school. But "she sees how hard we work," Gould said. "I hope that won't discourage her from going to law school."

To that pleasure in professional competence and dedication to hard work, add a third quality—the desire to "make a difference," as she says.

Gould was born in Ohio and moved to Richmond at age six. She received a bachelor's degree from the University of Virginia and a law degree from the University of South Carolina. She clerked for U.S. District Judge Glen Williams of Abingdon, then joined the Virginia Attorney General's Office in 1980.

As a young lawyer, she attended a meeting of the Metropolitan Richmond Women's Bar Association and heard Gail Starling Marshall, then deputy attorney general, sound the call to volunteer for bar work.

"I thought, 'She's right. We do have an obligation to do something.'" So Gould called the bar and offered her services.

In 1993, she became a volunteer in the VSB disciplinary system. She started on the Third District Committee, which hears cases in Richmond. In 1998, she moved onto the Disciplinary Board, which adjudicates the most serious cases against lawyers, and which she eventually served as chair.

She has helped the bar study its computer needs, oversee its budget, and plan for future leadership. She served on the Mandatory Continuing Legal Education Board. She was a delegate to the American Bar Association.

And on June 16, during the VSB's Annual Meeting at Virginia Beach, Gould was sworn in as VSB president, succeeding Phillip V. Anderson of Roanoke.

It's going to be a busy year. Among the biggest challenges ahead is being the ambassador for an anticipated increase in bar dues. The increase most likely will occur on the watch of Gould's successor, Howard W. Martin Jr. of Norfolk. But preparation for the increase has already begun, and explaining it will be part of Gould's job as she travels to different regions of the state.

Other tasks on Gould's to-do list include:

- Creating a committee to search for a successor to Thomas A. Edmonds, the bar's executive director, who will retire in 2007. She hopes to present a name to the VSB Council next June.
- Supporting recently launched bar projects—including the Chief Justice's initiatives on indigent defense, involuntary commitment of the mentally ill, and educational support for solo and small-firm lawyers.
- Urging the General Assembly to observe the constitutional separation of powers as it elects and reelects judges.
- Improving the VSB's relationship with the General Assembly and the Supreme Court.
- Overseeing a new task force that will look into ways to better protect clients from lawyer dishonesty.
- Steering the bar's decisions on future office space as the lease on its quarters in Richmond expires.

As a veteran volunteer in the disciplinary system, Gould is concerned that the VSB process is sometimes criticized for being unfair to solo and small-firm practitioners. "If someone were to do a study of the cases brought before the Disciplinary Board, I think those misconceptions would be dispelled," she said. "Every time I tell a war story about a case that came before the board, the lawyers in the group are appalled by the conduct of the respondent lawyer. The cases brought before the Disciplinary Board are very serious, and the board considers each case with due deliberation. Differences in penalties are

to be expected, given the differences in the facts of each case."

Gould concedes the volunteer commitments have put a strain on her law practice. "I still have to earn a living," she said. "It's difficult juggling all the balls in the air, and I expect that problem to continue."

Three years ago, Gould was in a large practice—Crews & Hancock in Richmond—which dissolved after its largest client, malpractice insurance company Reciprocal of America, was declared insolvent. She joined with other lawyers in a small firm, which since has merged to form McSweeney, Crump, and Childress & Gould P.C. A month before her presidency began, the firm moved into new quarters on South Twelfth Street in Richmond's Shockoe Bottom.

New VSB President Karen A. Gould, her husband Malcolm R. "Rudy" West and their daughter, Elizabeth West.

She plans to maintain a full caseload while she serves as president.

How does she do it?

"It's all a question of preparation," said Gould, who routinely works four to six hours on Saturdays and Sundays, and who has a reputation as well organized and technologically adept.

Gould also has good support at the firm. When she was considering running for president, one of the first people she consulted was partner Wesley G. Russell Jr. "He was the key person that I had to seek support from . . . . But for Wes, I would not be able to do the leadership position." He fills in when she cannot, for depositions, client meetings, answering discovery—the housework of a litigation practice.

She and her assistant, Janet Torrence, have worked together for almost fifteen years, and "I would be lost without her. She has a remarkable memory and ability to process lots of information and keep up with massive quantities of documents."

In her free time, Gould enjoys her three Welsh Corgis. She is an avid fan of daughter Elizabeth West's equestrian career, which includes winning a regional title in Tennessee. West goes to school at the University of the South in Sewanee. Gould herself had her own horse a few years ago. "For me, owning a horse meant that I could know what to expect from my beast. I hate fear of the unknown. I try to control my environment at all times," she said.

With the horse gone, she recently took up running. On May 20 she ran a ten-kilometer race in Richmond's Carytown and bettered her time. "Running gives me time to think and provides me with a sense of accomplishment," she said.

Gould is a serious reader who somehow finds time for a book club with law partners and other members of the Richmond legal community. She frequently reads books on her Palm Pilot. Recent titles she has taken on are *Truman*, by David McCullough—recommended to her by Tom Edmonds; *Love and Hate in Jamestown*, by David Price—recommended by Justice Donald W. Lemons; *The Island in the Center of the World*, by Russell Shorto (about the history of Manhattan); and *Team of Rivals*, by Doris Kearns Goodwin (about Abraham Lincoln and his Cabinet)—recommended by Mary Yancey Spencer, deputy executive director of the VSB.

Team of Rivals helped Gould focus on the qualities of leadership as she prepared to step into the VSB presidency, she said.

"The leaders I have most admired are the ones who put aside their personal agendas and provide an opportunity for differing views to be voiced," Gould said. "They lead, rather than dictate. They think in terms of what is best for the organization, rather than what is important to them."

Highlights of Virginia State Bar Council Meeting

June 16, 2006

At its annual meeting on June 16, 2006, at Virginia Beach, the Virginia State Bar Council heard the following significant reports and took the following actions:

VSB Budget

The Supreme Court of Virginia reviewed the VSB's proposed budget for 2006–2007 and approved it with one exception—a $50,000 allocation to Legal Services Corporation of Virginia. The Court questioned whether LSCV is the proper vehicle for distributing the bar's contribution to assist legal aid providers when not all of them are part of the LSCV network. This matter will be studied further.

The council approved the budget, which projects $10.3 million in revenues, $12.3 million in expenses and a year-end reserve of $2 million.

Legal Malpractice Insurance Study

The VSB Lawyer Malpractice Insurance Committee, at the request of the Supreme Court, is studying the adequacy of the VSB's disclosure rule to encourage lawyers to carry liability insurance. Committee Chair Darrel Tillar Mason reported the committee is studying four possible models for requiring malpractice coverage.

Currently, Virginia lawyers are not required to have malpractice insurance. However, attorneys in private practice who represent clients drawn from the general public must certify on their annual dues statement whether they have insurance. All active VSB members must disclose whether they have unsatisfied legal malpractice judgments. This information is posted on the VSB Web site. Of 16,914 lawyers who reported being in private practice representing clients in fiscal year 2005–2006, 10 percent reported they had no insurance. Of 25,182 active members, twelve reported unsatisfied judgments.

The 2006 Virginia House of Delegates encouraged the Court and the bar to evaluate the "problem" of uninsured attorneys and consider mandatory insurance or an uninsured attorneys' fund for compensating victims (House Resolution 6).

MCLE Credit for Legislators

The council, by divided votes, rejected a proposal to give state lawyer-legislators a credit or exemption that would limit their Mandatory Continuing Legal Education obligation to eight hours per year, compared to twelve hours for the rest of the bar. Proponents argued that the reduction would recognize the education legislators undergo in the lawmaking process and the time they spend away from their practices to perform an important public function. Opponents questioned whether the lawmaking process is a substitute for CLE. They also expressed concern that attorneys who perform other public or educational service would request similar reductions, and the MCLE process would be undermined as a result.

Supreme Court Planning for Future

Anne M. Whittemore, chair of the Chief Justice's Commission on Virginia Courts in the Twenty-First Century, outlined some of the topics on its table. Among them: Creation of a single-tier trial court with divisions, including a family court division; elimination of the constitutional office of circuit court clerk, and replacing it with a trial court administrator; expanding the jurisdiction of the Court of Appeals; establishing specially trained judges to preside over cases involving complex issues of science and technology; and expanding court hours to include evenings and weekends.

Matters affecting lawyers include requiring legal malpractice insurance; elimination of three-judge panels in disciplinary cases; establishing a diversionary program for lawyers with office management problems; and instituting a speedy trial provision for investigation and prosecution of bar complaints.

The commission will soon post its recommendations—which number almost three hundred—on its Web site, www.courts.state.va.us/futures_commission/home.html, and conduct public hearings around the state.

VSB Computer Project

William H. Dickinson, VSB Director of Information Technology, reported that the project to rewrite and integrate the bar's computer software is one major module away from completion. The professional regulation module is scheduled to be implemented in September. A smaller program for managing advertising in VSB publications also is scheduled to be installed by January 1.

The council also established a Special Committee on Information Technology that will oversee computer and technology needs of the bar after the upgrade is completed.

Personal Insurance for Members

Deputy Executive Directory Mary Yancey Spencer reported that the VSB issued a new request for proposals for a broker administrator to manage the VSB's endorsed health, life and other personal insurance products. The new RFP followed key personnel changes by the current broker administrator. Three proposals have been submitted, and Spencer said she anticipates no significant changes in plans and services currently available to lawyers.

New Bar Counsel

The council approved George W. Chabalewski as VSB counsel and head of the professional regulation department. (See page 17.)

Norfolk Attorney Named President-Elect of Virginia State Bar

Howard M. Martin Jr. of Norfolk has become president-elect of the Virginia State Bar. He will serve in the position for a year, then will become president for the 2007–2008 fiscal year, succeeding Karen A. Gould.

Martin ran unopposed for the seat.

A native of Norfolk, Martin practices with Crenshaw, Ware & Martin PLC, where he focuses on real estate, land use and zoning, and redevelopment law. He received his undergraduate degree from Washington and Lee University and his law degree from the University of Virginia. He served in the U.S. Navy for four years, with two years in the Judge Advocate General Corps, before returning to Norfolk to practice.

He is a past president of the Norfolk and Portsmouth Bar Association. He has served on the VSB executive committee since 2003.

He also was chair of the Second District Committee, which hears lawyer discipline cases in Virginia Beach and Norfolk, and he chaired the rules subcommittee of the VSB Committee on Lawyer Discipline.

He also served on the executive committee of the VSB Conference of Local Bar Associations.

Martin has served as a member and treasurer of The Virginia Bar Association's executive committee. He is a fellow and past president of the Virginia Law Foundation and a fellow of the American Bar Foundation.

He has served on the Norfolk board of the Hampton Roads Chamber of Commerce and as administrative board chair of Ghent United Methodist Church.

Martin is married to Heather Laird Martin. They have three children and a grandchild.

Chabalewski Is New VSB Counsel

George W. Chabalewski, a former senior assistant Virginia attorney general, has been named the new Virginia State Bar counsel. He began the job June 16, after his hiring was approved by the VSB Council.

During nineteen years at the AG's office, he defended the VSB in civil litigation, disciplinary and unauthorized practice of law matters. He also defended the state in cases arising under the Tort Claims Act and at common law.

Prior to joining the Virginia attorney general's office in 1987, Chabalewski was, during a ten-year period, an assistant states attorney, assistant public defender and public defender in Illinois.

He graduated from DePaul University and received his law degree from the John Marshall Law School in Chicago.

He succeeds Barbara Ann Williams as bar counsel. She resigned in January to return to private practice at McGuireWoods in Richmond after serving eight years.

VSB Executive Director Thomas A. Edmonds said, "Our search committee and human resources director spent a great deal of time reviewing resumes, conducting preliminary interviews with seven well qualified individuals, and meeting at length with three finalists for the position. I am satisfied we have identified exactly the right person to serve as our next bar counsel and lead our professional regulation efforts, and I know from his background and temperament that George will get off to a fast start and keep our disciplinary system functioning optimally."

VSB President Karen A. Gould described Chabalewski as "articulate, intelligent, organized and motivated. George brings a wealth of experience to the position as a skilled litigator. I feel certain that he will handle the demands of the position with vigor and diplomacy . . . . George's zest for the challenges of the position, as well as his other attributes, made him the ideal choice."

IN MEMORIAM

Alfred Bernard III
Norfolk
September 1940–November 2005

Mark Christopher Brocki
Charlottesville
July 1959–May 2005

Miles J. Brown
Annandale
February 1928–March 2005

The Honorable Joseph H. Campbell
Norfolk
February 1929–December 2005

John Francis Carman
Vienna
December 1931–March 2006

Richard A. Cohan
Charlotte, North Carolina
July 1923–July 2005

William P. Currier Jr.
Charlotte, North Carolina
January 1926–December 2005

G.D. Faulkner
Mechanicsville
December 1929–December 2005

Andre Allen Foreman
Norfolk
November 1947–April 2006

Byron E. Fox
Manakin-Sabot
January 1931–December 2005

E. William Fox Jr.
McLean
July 1944–January 2006

Thomas J. Freaney Jr.
Alexandria
January 1915–January 2006

David Brent Garland
Charlottesville
February 1943–April 2006

The Honorable Quinlan J. Hancock
Fairfax Station
April 1926–March 2006

L. W. Hiner
Richmond
April 1919–March 2006

Andrew David Kaufmann
Reston
December 1948–January 2006

Carr Lanier Kinder III
Richmond
June 1967–December 2005

Francis Xavier Lillis
Vienna
May 1932–May 2006

The Honorable Jack M. Matthews
Galax
September 1904–July 2002

Conard B. Mattox III
Richmond
November 1948–March 2006

Louis Leonard Meier Jr.
Bethesda, Maryland
October 1918–February 2006

Marcus D. Minton
Petersburg
February 1944–December 2005

Nathaniel S. Newman
Richmond
December 1922–March 2006

Robert Lee Polk
Clifton
June 1940–January 2006

Clarence F. Rhea
Gadsden, Alabama
August 1921–December 2005

The Honorable Ralph B. Robertson
Richmond
September 1943–March 2006

Stephen Graham White
Petersburg
January 1932–October 2005

Jack I. Wilkerson
Richmond
November 1919–October 2005

Virginia Law Foundation Accepting Nominations for Fellows Class of 2007

Nominations for the 2007 Class of Virginia Law Foundation Fellows will be accepted through September 11, 2006. The 2007 Class will be inducted at a dinner meeting in Williamsburg on January 18, 2007 during the Virginia Bar Association's Annual Meeting.

Candidates must (1) be an active or associate member of the Virginia State Bar for at least ten years; (2) be a resident of Virginia; (3) be a person of integrity and character; (4) have maintained and upheld the highest standards of the profession; (5) be outstanding in the community; and (6) be distinguished in the practice of law. Retired and senior status judges are eligible. Sitting full-time judges and constitutional office holders are not eligible during their tenures.

Nominations must be received by September 11 and should be submitted on a Nomination Form provided by the Virginia Law Foundation. To obtain a nomination form, please contact the Virginia Law Foundation at 700 East Main Street, Suite 1501, Richmond, VA 23219, phone (804) 648-0112, or by email at: mprichard@virginialawfoundation.org. To obtain a Nomination Form online, go to www.virginialawfoundation.org/FellNom_FormsPage.htm, and for a complete listing of current Fellows, please visit the Foundation's website at www.virginialawfoundation.org.

Advanced Skills Seminar Held for Criminal Defense Lawyers

The Chief Justice's 2006 seminar for seasoned criminal defense lawyers who take court-appointed cases drew 450 attorneys to Richmond and 100 to Abingdon on April 7.

The program, "Indigent Criminal Defense: Advanced Skills for the Experienced Practitioner," featured national and state experts who spoke on topics that included false confessions, detecting laboratory error, judgment and impulse control in the developing brain and a U.S. Supreme Court update.

The program took place at the Richmond Convention Center and by live teleconference at the Southwest Virginia Higher Education Center in Abingdon.

Among the speakers was Jeffrey P. Robinson, who practices with Schroeter, Goldmark & Bender in Seattle, Washington. He used examples from songs and movies to describe storytelling techniques that can be used in trials.

Vanita Gupta, staff attorney for the NAACP Legal Defense and Educational Fund Inc., was the luncheon speaker. She is known for leading a legal challenge in Tulia, Texas, where one-tenth of the black population was arrested in 1999 on drug charges based on information from an undercover agent with a dubious history. Eventually, all forty-six convictions were overturned.

The seminar is the second sponsored by the Chief Justice and the Virginia State Bar to provide free, high-quality continuing legal education to lawyers who defend the poor in criminal cases.

Top: Chief Justice Leroy R. Hassell Sr. (left) and Jeffrey P. Robinson.

Bottom: Vanita Gupta with Judge Walter S. Felton Jr. of the Virginia Court of Appeals. Felton served on the committee that organized the program.

Danville Welcomes Solo & Small-Firm Forum

The fourth in a series of Solo & Small-Firm Forums and Town Hall Meetings was held May 2 in Danville. The forum is Chief Justice Leroy R. Hassell Sr.'s program to provide continuing legal education on law office management to attorneys throughout the state. The Danville Bar Association hosted a reception to welcome the Chief Justice and Virginia State Bar.

Photo 1: Members of the Danville Bar Association with their guests. L–R: M. Janet Palmer of Richmond, chair of the Conference of Local Bar Associations; W. Huntington "Hunter" Byrnes; Michael C. Guanzon; Chief Justice Leroy R. Hassell Sr.; Sandra T. Chinn-Gilstrap; David W. Pugh; and W. Clarke Whitfield Jr., president of the Danville Bar Association.

Photo 2: Delegate Robert Hurt, a lawyer-legislator who represents Chatham and practices law there, attended the Danville Forum.

Photo 3: Chief Deputy Attorney General William C. Mims, the luncheon speaker for the forum, talks with Justice Cynthia D. Kinser of the Supreme Court of Virginia. Kinser chaired the committee that developed the forum.

Photo 4: Phillip V. Anderson (left), 2005–2006 president of the Virginia State Bar, with Ed Walters, chief executive officer of Fastcase—the new online legal research service that the VSB now provides free to its members.

Frank Overton Brown Jr. of Richmond Wins the Tradition of Excellence Award

Frank Overton Brown Jr., a Richmond lawyer for three decades, is the nineteenth recipient of the Tradition of Excellence Award, presented annually by the Virginia State Bar's General Practice Section. The award was presented June 17 during the VSB's Annual Meeting in Virginia Beach.

The award recognizes a Virginia attorney who has dedicated time and effort to activities that assist the community, while improving the standing and image of general practice attorneys in the eyes of the public.

Brown was a founder and the first chair of the VSB Senior Lawyers Conference, which undertakes projects to help lawyers age fifty-five and older pass on their experience to younger lawyers, and to help society in general—particularly senior citizens. He continues to serve as newsletter editor for the conference.

Five years ago, Brown began a crusade to teach lawyers the importance of preparing for the orderly handling of their practices should they die or become disabled. From Abingdon to McLean to Williamsburg, Brown has stumped the state at his own expense with the message that good planning protects clients and the lawyer's own estate.

He was nominated for the Tradition of Excellence award by William T. Wilson, current chair of the Senior Lawyers Conference. "Frank is the backbone of the Senior Lawyers Conference and makes sure that the organization works as it should," Wilson wrote. "Frank is a person of high integrity and is a shining example to us all as to what civility and professionalism ought to be."

Brown was admitted to the Virginia bar in 1976, after receiving bachelor's, master's and law degrees from the University of Richmond. His practice concentrates on trust and estate matters. He has served as a commissioner in chancery for the Richmond Circuit Court, and he is author of *Virginia Probate Handbook*. He has chaired the Henrico County Strategic Plan Team, Planning Commission and Mental Health and Mental Retardation Services Board. He also has served on the boards of the Capital Area Agency on Aging and Housing Opportunities Made Equal, and has been an adjunct professor at the University of Richmond law school.

Attorney Frank W. Morrison of Lynchburg Recognized for Lifetime Achievement

Lynchburg attorney Frank West Morrison has won the 2006 Lifetime Achievement Award from the Virginia State Bar's Family Law Section. The award, presented June 16 during the bar's annual meeting in Virginia Beach, honors an individual who has made a substantial contribution to the practice and administration of family law in the commonwealth.

Morrison's thirty-five years as a domestic relations attorney, his contributions to the development of mediation in Virginia and his extensive training of other lawyers were cited by Paul Whitehead Jr., a retired Lynchburg general district court judge who nominated him for the award.

Morrison was recognized for some of those accomplishments last year, when The Virginia Bar Association presented him with its Gardener G. DeMallie Jr. Continuing Legal Education Award. He is currently chair of the VBA's Domestic Relations Section.

He has been a partner in the firm Phillips, Morrison, Johnson & Ferrell since 1991. He has served as president of the VSB Young Lawyers Section; chair of the VSB Family Law Section; a substitute juvenile and domestic relations judge in the Lynchburg area; commissioner in chancery for the 24th Judicial District; president of the Lynchburg Bar Association; and chair of the VSB-VBA Joint Committee on Alternative Dispute Resolution. That committee gave him a "Founder of ADR" award in 2004.

Morrison also teaches negotiation and mediation at the law school at Washington and Lee University, from which he received his undergraduate and law degrees.

Christy E. Kiely of Richmond Wins Virginia State Bar's Young Lawyer of the Year Award

Christy E. Kiely, an associate with Hunton & Williams in Richmond, has won the 2006 R. Edwin Burnette Jr. Young Lawyer of the Year Award from the Virginia State Bar's Young Lawyers Conference. Named for a Lynchburg general district judge who served as president of the Young Lawyers Conference and the VSB, the award recognizes dedicated service to the conference, the profession and the community. It was presented June 16 during the VSB's annual meeting in Virginia Beach.

Kiely has chaired several Young Lawyers Conference programs. She reorganized and reinvigorated the Students' Day at the Capitol program, and she created a handbook to help future chairs. For several years, she chaired the committee that puts on the Admission & Orientation Ceremony, during which new lawyers are sworn in by the Supreme Court of Virginia.

This year Kiely also served as chair of the YLC's Domestic Violence Safety Project Committee. The committee updated two pamphlets to reflect changes in the law, and translated the brochures into Spanish. Kiely then contacted hundreds of organizations around the state and received requests for nearly two hundred thousand brochures. Kiely also solicited feedback from domestic violence groups for use in planning future projects and educational events.

She also personally provided pro bono assistance to domestic violence victims through Hunton & Williams's Women's Advocacy Project and to low-income individuals through Central Virginia Legal Aid. Each year since she began practicing, she has been recognized by her firm with the E. Randolph Williams Award for contributing more than one hundred hours of direct pro bono service in a year.

Keily holds a bachelor's degree from the College of William & Mary and a law degree from Duke University. She practices labor and employment law.

Jill A. Hanken Wins the Virginia State Bar's 2006 Legal Aid Award

Jill A. Hanken, a familiar face at the State Capitol for her advocacy on behalf of low-income people—particularly in the area of health law—received the 2006 Legal Aid Award from the Virginia State Bar's Special Committee on Access to Legal Services. The award recognizes innovation and creativity in advocacy, experience and excellence in service, and impact beyond the winner's service area. It was presented June 16 during the VSB's annual meeting in Virginia Beach.

Hanken has spearheaded many efforts to promote and improve health insurance programs for low-income people, often by establishing coalitions with other organizations. "Many Virginians receive the health care they need as a direct result of Jill's efforts over the years," according to the nomination letter signed by several legal services lawyers.

She convinced the General Assembly to change income guidelines and other eligibility rules so that more pregnant women, children and disabled or aged adults could qualify for Medicaid. She helped develop Virginia's new program that insures more children in low-income working families, and has since worked to simplify the application process and eliminate waiting periods and other barriers to enrollment.

She also successfully advocated amending the Administrative Process Act so that people who received denials for Medicaid and other public assistance can appeal to court.

Meanwhile, as a career legal services attorney with the Virginia Poverty Law Center, Hanken has argued many important and far-reaching cases on behalf of poor people, including one case in the U.S. Supreme Court. She regularly assists other advocates with their cases and provides training on Medicaid issues. "She is, quite simply, the best instructor on health care law in Virginia," wrote Steven L. Myers of the Virginia Legal Aid Society.

In 1977 Hanken received her law degree from Boston College and began working with legal services in South Carolina. She joined the Virginia Poverty Law Center in Richmond in 1980. After two years as an administrative law judge for the Virginia Department of Medical Assistance Services, she returned to the Poverty Law Center as a staff attorney specializing in health law.

George W. Dodge of Arlington and Carolyn M. Grimes of Alexandria Win the VSB's Local Bar Leader of the Year Award

George W. Dodge of Arlington and Carolyn M. Grimes of Alexandria have won the Virginia State Bar's Local Bar Leader of the Year award for 2006. The award, bestowed by the Conference of Local Bar Associations, recognizes dedication of local bar leaders who offer important service to the bench, bar and public and who work closely with the Virginia State Bar.

Dodge, a solo practitioner who focuses on elder and estate law, reinvigorated the Arlington Bar Association during his presidency in 2003–2004, and has continued his efforts since. To increase attendance, he brought luncheon meetings to the Arlington courthouse and invited celebrity speakers to dinner meetings. Dodge involved judges in bar functions and renewed the association's role in providing continuing legal education courses. He took young lawyers to lunch at his own expense, to encourage them to become involved.

Dodge is currently president of the Arlington Historical Society. His book, *Historic Images of Arlington National Cemetery*, will be published in the fall. His efforts led to a display case installed in the courthouse lobby, where memorabilia of Arlington's legal community are exhibited.

Dodge wrote the outline for and helped moderate Chief Justice Leroy R. Hassell Sr.'s December 2005 conference, "Reforming the Involuntary Commitment Process: A Multidisciplinary Effort."

He holds an undergraduate degree from the University of Richmond and a law degree and a master's degree in history from George Mason University.

Arlington Bar members who nominated Dodge wrote: "Motivated by a rare personal dedication, George's contributions to the bar far exceed the norm. Fortunately his commitment combines with unique creativity and social skills to generate novel approaches which have transformed and recharged the Arlington Bar."

Grimes practices family law with Lieblich & Grimes PC in Alexandria, and she is immediate past president of the Alexandria Bar Association. Grimes became treasurer of the association when it was experiencing a fiscal crisis. Her management led to better accounting methods, sponsorships and revenue-producing continuing legal education programs that underwrote association program costs.

Under her leadership, the association launched a "Beat the Odds" program that helps children overcome academic and other obstacles and awards college scholarships and grants. The program raised more than fourteen thousand dollars last year to help in its mission.

Grimes also encourages Alexandria lawyers to do pro bono service and report their good works to The Virginia Bar Association's Community Service Program. She currently is president of Legal Services of Northern Virginia, and she regularly volunteers to represent LSNV clients pro bono on family law matters.

She holds a bachelor's degree from Johns Hopkins University and a law degree from George Mason University.

Grimes is "one of those rare individuals who can never say no, yet always follows through on her commitments—and then goes the extra mile," according to the nomination letter submitted by three Northern Virginia attorneys and a retired judge.

The awards were presented on June 16, during the VSB annual meeting in Virginia Beach.

Ten Ways To Avoid The Disciplinary System

by Bernard J. DiMuro

1. **Always return phone calls promptly.** If you are unavailable, have a staff member return the phone call to explain the delay and try to assist the client. Most bar complaints start as complaints of simple neglect that can be sanctionable under Rule 1.3.

2. **Put the terms of your engagement in writing.** A lawyer must adequately explain the fee arrangement to a client, under Rule 1.5(b). There is no better way to do so than by putting your agreement in writing. Better yet, have the client endorse a written fee agreement. One-third of all bar complaints involve fee disputes. Also, be sure to define the scope of your representation. For example, does the fee agreement include handling the appeal or collection efforts?

3. **Bill the client regularly, even in cases where you have an advance fee that has not been exhausted.** Clients who are regularly billed and advised of the accruing fees and costs are less surprised about the costs of representation and have little to complain about later.

4. **Copy the client on all pleadings and correspondence, no matter how trivial.** Clients do not understand why it takes so long to do what we do. Sending them copies of letters which, for example, simply continue a court hearing or a deposition goes a long way toward keeping clients advised of the status of their cases.

5. **Never borrow from your trust account for cash flow or for other reasons.** This is a slippery slope—once you start "down the slope" the odds are overwhelming that you will not be able to recover. As a corollary, don't try to be your own bookkeeper, especially when it comes to a trust account. More trust account complaints start because of sloppy bookkeeping or not fulfilling the requirements of Rule 1:15 regarding maintaining the proper ledgers and undertaking the proper reconciliations.

6. **Follow the Rules on returning files.** Recently adopted Rule 1.16(e) now specifically defines the papers and materials that belong to the client and the lawyer's obligation to return documents when the attorney-client relationship is terminated. You should no longer consider "holding" the file to secure the fee.

7. **Do not take cases that you are unable to staff correctly or that you lack the competence to handle unless you associate with an attorney who has the required knowledge and skill.** Once you take a case, you are responsible for handling the matter competently. You have represented, either explicitly or implicitly, that you are able to do so. Make sure that is true. Sharing a fee with another attorney (so long as the arrangement is reasonable and consented to by the client) is infinitely better than mishandling the case and potentially having to face liability of your own.

8. **Be realistic when you set and explain retainer and billing arrangements.** Many of us have a difficult time telling a client how much a case really costs so we underestimate the fees or the retainers. Invariably, the client feels that he or she is being overcharged and stops paying the bills, gets angry and files a bar complaint.

9. **Avoid going into business with a client in return for a fee.** Inevitably when the deal goes bad, the finger-pointing is in the attorney's direction.

10. **Always be willing to assist a colleague who asks for your help or who you believe needs your help.** The whole system and the public benefit from the self-regulation of the profession. If we don't assume responsibility to help each other, we may face a day when a state or federal bureaucracy steps in to regulate our profession. (NOTE: You do not have to undertake the task of assisting a colleague with a disability that adversely affects his ability to practice law. Such resources already exist in the Lawyers Helping Lawyers program).

Bernard J. DiMuro is a partner in the firm DiMuro Ginsberg PC in Alexandria. He was president of the Virginia State Bar in 2002–2003.

Baugh, Almstead Honored at VSB Pro Bono Conference

David P. Baugh, a Richmond defense lawyer who has taken on many pro bono and First Amendment cases, was named the 2006 Lewis F. Powell Jr. Pro Bono Award recipient by the Virginia State Bar Access to Legal Services Committee.

Baugh was honored April 26 at the VSB Pro Bono Conference, which took place at the University of Virginia's Miller Center for Public Affairs.

Also honored was Ryan T. Almstead, who received the Oliver White Hill Law Student Pro Bono Award for his work with low-income clients while he was at the University of Virginia.

Baugh was recognized for his low-paid court-appointed representations of defendants in criminal cases, as well as his uncompensated work on behalf of clients in civil cases. The cases are often complex and likely to involve unpopular clients or causes.

Almstead's pro bono work included assisting patients through a Legal Aid Justice Center program at Western State Hospital. After graduating in May, he planned to return to his home region upstate New York and continue to work for legal aid.

Martha Bergmark, chief executive officer of the Mississippi Center for Justice, was the guest speaker for the awards ceremony. She talked about the legal challenges facing Mississippians after last year's Gulf Coast hurricanes, and expressed hope that the crisis will give impetus for long-delayed reform in the justice system.

The conference theme, aimed at legal services lawyers, was disaster preparedness. Speakers outlined plans for protecting office records, recovery and reestablishing services after a disaster. They also described the type of help clients are likely to need after a major event.

David P. Baugh (right) with Federal Public Defender Gerald T. Zerkin, who was in the midst of the Alexandria sentencing trial for Zaccarias Moussaoui when he traveled to Charlottesville for the ceremony.

Martha Bergmark of the Mississippi Center for Justice. (lower right)

Ryan T. Almstead (left) with Tiffany Marshall, a 2006 U.Va. graduate who is a Powell Fellow at the Mississippi Center for Justice this summer. (below)

President's Message *continued from page 8*

really don't care what I think, or what you think, or what your neighbor thinks, but that's not what I hear from the legislators.

The easy way out is for us to rely upon the bar's judicial nominations process to fulfill our responsibilities as citizens. It's easy for us to complain about the process after legislative election of a judge. It's easy to point to the legislators and complain about their actions. But next time there is a judicial vacancy, do something that's not so easy—step into your role as voter and constituent, and talk to your representatives about the selection. Let's do everything we possibly can to get the right candidate for the job. ⚖

President's Message *continued from page 8*

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Answering the Call

by Jimmy F. Robinson Jr.

Never believe that a few caring people can't change the world. For, indeed, that's all who ever have.
—Margaret Mead

Every year, new Virginia lawyers pledge to support the constitutions of our nation and state, to respect our courts and judges and to practice law with integrity, civility and concern for both paying and pro bono clients. I have seen this oath manifest daily in the work of countless young lawyers across Virginia.

Our profession is special. It is endowed with public confidence and expectation. The public expects us to fight for better wages, better schools and better services for the disabled, and to advocate our clients' positions with fervor and grace.

In my first column in *Virginia Lawyer*, I challenged Virginia lawyers to answer my service call and wrote, "As young lawyers, Virginians and Americans, our future progress depends on our efforts today." This year, lawyers across the commonwealth answered my call.

It has been a great year. The spirit of professionalism and public service exhibited by young lawyers in Virginia was inspiring.

As president of the Young Lawyers Conference, I was praised for the work done by others. The YLC Board of Governors, circuit representatives, committee chairs and committee members deserve credit for their valuable projects. These volunteers donated thousands of hours to noble causes.

I would like to thank my wife, family and friends for their support during a year that has required considerable time and travel. I have spent many nights away from home this year. My wife, Monica, who chairs the special education department at John Randolph Community High School in Henrico County, has been a constant source of understanding and encouragement. Monica's passion and commitment to bettering the lives of our youth served as my inspiration for the *YLC Juvenile Rights Handbook*. This handbook is nearing completion and will identify and explain the rights of juveniles in schools, police custody and courts. Through this initiative, the YLC hopes to provide a guide to youth and their parents about basic rights and how to protect them.

My firm, LeClair Ryan, deserves a lot of credit for making it possible for me to serve as president of the YLC. My legal assistant, Sandy Gills, and other firm staff endured not only last-minute work on cases but also calls and tasks associated with a vast array of YLC projects, speaking engagements and travel.

As the book closes on my year as YLC president, it opens on that of Maya Eckstein, a talented and creative lawyer with unending energy and dedication to the conference. I am privileged to pass on the reigns of bar leadership to Maya, and I am confident that you will enjoy working with her.

Jimmy F. Robinson Jr. is an officer with LeClair Ryan in Richmond. His practice includes the defense of employment and professional malpractice claims. He has represented employers in employment litigation matters, including discrimination, defamation, wrongful discharge, harassment and retaliation claims. Robinson also handles commercial disputes. He is president of the Virginia State Bar Young Lawyers Conference.

The FMLA Does Not Require Restoration to a Position That No Longer Exists

by Vijay K. Mago

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On April 27, 2006, the Fourth U.S. Circuit Court of Appeals upheld the dismissal of a lawsuit in which the plaintiff sought damages under the U.S. Department of Labor's Family and Medical Leave Act (FMLA) for the employer's failure to restore the plaintiff to his prior position following his return from FMLA leave. In so doing, the court joined the Third, Sixth, Eighth, Tenth, and Eleventh circuits in concluding that the FMLA does not require restoration to a position following FMLA leave if the employee would have been discharged had he not taken leave.

Facts: A Corporate Reorganization While the Plaintiff is on FMLA Leave Leads to the Elimination of the Plaintiff's Position

After starting a gaming enterprise in June 1996, the Eastern Band of Cherokee Indians entered into a contract providing Harrah's North Carolina Casino Company with "the exclusive responsibility and authority to direct the selection, hiring, training, control and discharge of all employees performing regular services for the [tribe's gaming] enterprise in connection with the maintenance, operation, and management of the [gaming] enterprise and the facility and any activity on the property." The contract also provided that Harrah's would "give preference in recruiting, training and employment to qualified members of the tribe and their spouses and adult children in all job categories of the [gaming] enterprise."

Sometime in 1994, Harrah's had hired the plaintiff to work for the parent company in Louisiana. In 1997, the plaintiff transferred to the North Carolina casino, where he became a "leased" employee. The plaintiff was "leased" in the sense that, although Harrah's maintained supervisory authority

over him, he was technically an employee of the Tribal Casino Gaming Enterprise. In 1999, the plaintiff was promoted to manager of employee relations, a job he held until his discharge in July 2003.

During his tenure at the North Carolina casino, the plaintiff took several medical leaves of absence, all of which were approved and most of which qualified under the FMLA. The plaintiff took the following leaves of absence: ten weeks from December 19, 2000, through February 26, 2001; fifteen weeks from May 1 through August 23, 2001; six weeks from March 13 through April 23, 2002; and fourteen weeks from May 1 through August 12, 2002. Following his return from each of these four leaves of absence, Harrah's restored the plaintiff to the same position without any reduction of pay or benefits.

In May 2003, the plaintiff requested another medical leave of absence to address heart problems, which Harrah's approved as FMLA leave. Accordingly, the plaintiff remained on leave for a period of eleven weeks, or until July 21, 2003. During the plaintiff's absence, Harrah's informed him that a reorganization would result in the elimination of both his position and the position of employment manager. In lieu of these positions, Harrah's created two new positions that consolidated the responsibilities of the eliminated jobs. Harrah's professed goal was to create "a synergy . . . by having . . . one manager responsible for the life of the employee from hiring to termination." The human resources director invited the plaintiff to apply for the new positions, as well as other available positions. Despite this invitation and the many descriptions of other job openings that the human resources director transmitted, the plaintiff did not apply for any position, because he was taking medication and did not have energy, and his doctors recommended that he not seek another position. Accordingly, following the plaintiff's return from FMLA leave on July 21, 2003, Harrah's discharged him.

The plaintiff sued Harrah's, alleging violations of his FMLA rights, because Harrah's failed to restore him to his position following his return from FMLA leave. On January 20, 2005, the trial court dismissed the case prior to trial at Harrah's request. Based on this decision, the plaintiff appealed to the Fourth Circuit.

. . . an employer does not violate the FMLA if it can prove that it would not have retained an employee had the employee not been on FMLA leave.

Court's Decision: The FMLA Is Not Violated if the Employee Would Have Lost His Position Even if He Had Not Taken FMLA Leave.

On appeal, the plaintiff argued that "Harrah's interfered with the exercise of his FMLA rights when, after he took his most recent leave, it refused to restore him to his previous employment position." The plaintiff based this argument on the following language excerpted from the FMLA, because it seems to convey that restoration is mandatory:

> [Any person who takes FMLA leave] shall be entitled, on return from such leave—(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

The court, however, cited to separate language excerpted from the same section of the FMLA, and providing explicitly that "nothing in this section shall be construed to entitle any restored employee to . . . any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave."

The court then noted that every other circuit court of appeals to consider an argument like the one advanced by the plaintiff has concluded that "the FMLA provides an employee only a limited right to restoration of his previous employment position." Thus, an employer does not violate the FMLA if it can prove that it would not have retained an employee had the employee not been on FMLA leave.

> We join our sister circuits in concluding that the FMLA does not require an employee to be restored to his prior job after FMLA leave if he would have been discharged had he not taken leave. Although the statutory language is ambiguous on this point, the Secretary of Labor has promulgated a regulation clearly resolving the question.

The regulation to which the court referred (and on which the court based its decision) provides explicitly that:

> An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.

Thus, an employer may deny restoration when it can show that it would have discharged the employee in any event regardless of the leave. This interpretation of the FMLA is compatible with Congress's efforts to pursue the goals of the FMLA in a manner that also accommodates the legitimate interests of employers. Based on this rationale, the court held that the trial court's dismissal of the lawsuit prior to trial

was appropriate. *Yashenko v. Harrah's NC Casino Company, LLC*, No. 05-1256 (4th Cir. April 27, 2006).

Lesson Learned

In reaching this decision, the Fourth Circuit noted that the employer clearly has a burden of coming forward with evidence that it would have discharged the employee whether or not he took FMLA leave. If an employer can demonstrate legitimate, nondiscriminatory business reasons for the discharge at issue, then the former employee may not be able to survive to trial.

In this instance, none of the plaintiff's evidence undermined Harrah's contention that it eliminated the plaintiff's position in a legitimate reorganization. Evidence that the plaintiff's job was not in jeopardy when leave began and that he received a grade increase shortly before the commencement of leave was irrelevant because the elimination of the plaintiff's position had nothing to do with job performance. Similarly, it was irrelevant that the plaintiff was the only employee who lost his job following the reorganization, because he refused to apply for another position despite repeated invitations and opportunities to do so. Finally, even though Harrah's had never previously required anyone to apply or interview for a position while on FMLA leave, the plaintiff did not introduce evidence of any situation where such action was necessary in the past.

In addition, the plaintiff's evidence failed to refute Harrah's evidence that it would have discharged the plaintiff even if he had not taken leave:

> Harrah's offered a great deal of evidence explaining its reasons for elimination of the plaintiff's position, none of which relate to his FMLA leave. Harrah's submitted substantial evidence that it had considered the elimination of the plaintiff's position several months prior to his request for leave, that its Human Resources department had been implementing a general reorganization under the leadership of [its Director] and that it had eliminated several other positions in the process, and that there was an overall shift in jobs from Harrah's to [the Tribe], consistent with the Management Agreement between Harrah's and the Tribe.

This evidence was sufficient to demonstrate that Harrah's had legitimate, nondiscriminatory reasons for the plaintiff's discharge unrelated to his FMLA leave. In addition, the plaintiff's evidence was "entirely consistent with Harrah's reorganization plan." Based on these shortcomings, the court found no reason to permit the plaintiff's claim to proceed to trial.

This decision confirms that the Fourth Circuit will not utilize employment laws like the FMLA or Title VII as vehicles for judicial review of the necessity of various business decisions. If the decision to eliminate a position occupied by an individual on FMLA leave is both legitimate and nondiscriminatory, then it will not give rise to liability under the FMLA. Indeed, in this instance the plaintiff could not avoid an early dismissal of his action despite evidence of good job performance, and even though the employer was in uncharted water in acting to eliminate the plaintiff's position during FMLA leave.

The basis for this result is clear—the employer did not act for pretextual reasons, and it was able to so demonstrate through the introduction of indisputable facts. For instance, the employer presented evidence that the origin of its decision to reorganize predated the plaintiff's decision to seek and request a leave of absence under the FMLA. Because employees do not enjoy an absolute right to restoration following their return from FMLA leave, you are free to take actions necessary to the efficient operation of your business. You must, however, be certain that your actions cannot be portrayed as pretextual.

If an employer can demonstrate legitimate, nondiscriminatory business reasons for the discharge at issue, then the former employee may not be able to survive to trial.

If the basis for the decision is not connected to the individual on FMLA leave, then invite the individual to apply for any new positions that may be available. Similarly, if the origin of your personnel decision does not predate the commencement of FMLA leave, then evaluate whether denial of restoration is necessary, and if so, whether you can otherwise effectively defend this decision. ⚖

Vijay K. Mago is a partner in the employment and insurance defense groups of LeClair Ryan. He represents employers and governmental entities in claims under the Americans with Disabilities Act, Age Discrimination in Employment Act, Family And Medical Leave Act, Fair Labor Standards Act, and the Civil Rights Acts of 1964 and 1991.

Pro Bono Award Choice

I'm writing to complain about an award noted in the April 2006 edition of *Virginia Lawyer*. I was disgusted to read David P. Baugh's quote noting his receipt of the Lewis F. Powell Jr. Pro Bono Award. In that article, Mr. Baugh is quoted as saying, "Every time the government loses a case, the Constitution gets stronger." I can only hope that Mr. Baugh's quote was taken out of context. Though many would oppose presenting the Powell award to someone who has defended a Ku Klux Klan member and an al-Quaeda terrorist, whether to take those cases is at least the subject of legitimate debate.

To state, however, that the Constitution gets stronger every time the government loses a case demonstrates a gross ignorance of government's role in protecting its citizens. Whether advocating the rights of individuals who are crime victims, victims of civil rights violations, or simply taxpayers, all government attorneys should be greatly offended that the Virginia State Bar presented the Powell award to someone who would make such a statement. Having served most of my career as an attorney in the military and in the Department of Justice, I greatly resent Mr. Baugh receiving this award.

John Siemietkowski
Washington, D.C.

Gratuitous shot?

I read Samuel Meekins Jr.'s article, "Zoning Finds Religion" in the February 2006 *Virginia Lawyer* (Vo. 54, No. 7). Meekins questions whether the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc, *et seq.* will be upheld as constitutional, given that the "Court's makeup [has been] changed by two new justices who are favorites of the religious right."

The gratuitous shot, alas, falls short. Sec. 3 of RLUIPA, applicable to inmates' prison conditions, was upheld as constitutional in *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005), foreshadowing, if not foreordaining, the constitutionality of Sec. 2, which deals with zoning and land use issues.

Cutter, by the way, was a unanimous decision, supported by justices who are favorites of the religious right, the religious left and the irreligious center field.

Robert A. Dybing
Richmond

Defense Lawyers Overlooked

In the midst of all the publicity surrounding the trial of Zacarias Moussaoui, the role of the lawyers who so ably defended him, under the most difficult possible conditions, has been overlooked. Edward B. MacMahon and Gerald T. Zerkin deserve the highest possible praise for service in the finest tradition of the bar in face of the overwhelming power of the federal government.

Negative publicity about frivolous lawsuits and lawyer bashing are the order of the day. The Virginia bar and its members should be proud that these two fine lawyers saved the life of their client, and in so doing served not only him but the law and our profession as well. We must acknowledge and congratulate our own in these difficult times.

Donald L. Logerwell
Seattle, WA

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Emergency Preparedness and Response: Legal Issues in A Changing World

by Steven D. Gravely and Erin S. Whaley

The roles of federal, state and local governments in emergencies sometimes overlap, causing conflict and confusion.

Threats of biological terror attacks, the Severe Acute Respiratory Syndrome (SARS) epidemic of 2003–2004 and a fear of pandemic disease such as avian influenza have spurred critical reevaluation of strategies for containing communicable diseases. This reevaluation—and in many cases revamping of laws—creates new demands on lawyers who advise health-care organizations. Private practice attorneys will be challenged to understand state and federal laws, regulations and agencies involved in homeland security and emergency preparedness and response, in order to counsel health-care clients before and during emergencies.[1]

As this area of law is still in its infancy, there is not a rich history and body of literature on the subject. One must look at existing laws, listen to concerns of individuals involved in preparedness activities and try to anticipate issues that may arise.

Preparedness and the Government

The roles of federal, state and local governments in emergencies sometimes overlap, causing conflict and confusion. Which level of government can best fulfill preparedness responsibilities? Each has its own strengths and weaknesses.

The federal government has responsibility and authority to coordinate national preparedness. It has a relatively large budget and access to agencies that might participate in preparedness planning, and it has ability to monitor activity on a national level. The federal government can also coordinate interstate initiatives. Bureaucracy, political considerations and constitutional limitations, however, diminish its abilities.

State governments have less money, manpower and political sway but they can better focus their activities. Due to their smaller size, they are easier to navigate than the federal government. States might also have exclusive jurisdiction over parts of preparedness, based on their police powers. Planning in the health-care delivery system usually falls under the purview of state, not federal, government.

Local governments have the most limited resources. They also have the smallest bureaucracies and the most homogenous constituency. While not everyone in a local political subdivision will support the same preparedness plan, they are from a relatively local area. Their desire to safeguard the locality might make it easier to develop local preparedness plans. Most "first responders" are based at the local level.

Conflicts arise between the three levels of government for many reasons. Jurisdictional issues present a source of angst. Federal, state and local boundaries blur, however, in applying specific preparedness programs. For example, public health activities are within a state's purview under its police powers. The federal government might want states to report incidences of specific diseases and illnesses to the Centers for Disease Control (CDC).[2] States might not want to report for fear of repercussions. For example, some states were afraid to report Human Immunodeficiency Virus for fear of that it would drive infected persons underground.[3] In such a case, is the state required to report? What authority does the federal government have for requiring such reporting?

The emergency preparedness and response landscape is sprinkled with many other components—the most dominant being a legal framework for preparing and responding to public health emergencies. Within this framework are national, state and local statutes and regulations. These laws can help or hinder an effective emergency response. Laws regarding isolation and quarantine, emergency services and disasters and public health are of utmost importance for a successful preparedness program. While many laws have been amended since September 11, 2001, some laws are archaic and unwieldy.

Preparedness and Health-Care Delivery Systems

Our health-care delivery system is fragmented, and access to services varies. Physicians, allied health care professionals (such as nurses and physician's assistants), and emergency medical services (EMS) workers are primary components of the first-responder system. Hospitals and other institutions provide equipment and technology needed to deliver care. The other institutions include ambulatory care centers, diagnostic centers, home-health agencies, urgent-care centers and long-term care facilities.

The government is a payor and regulator, but care delivery is a private sector function. This juxtaposes the government's responsibility for preparedness activities, the need for the health-care delivery systems to play a large part in preparedness planning, and the government's lack of involvement in health care delivery. Public-private cooperation is needed among the government, public health-agencies and the private sector health care delivery system.

The health-care system is already taxed: Hospitals are overcrowded[4] and waits in the emergency room are excessive.[5] There is a national shortage of more than 168,000 health care professionals.[6] Physicians work harder, are paid less and pay higher malpractice insurance premiums. EMS agencies are taxed. The system has very limited ability to "surge"— to handle an influx of patients created by a public health emergency.[7]

It was once thought that, in the event of biological attacks or another public health emergency, health-care delivery systems would only operate for a few hours before federal reinforcements and resources would arrive. This is a myth. U.S. Secretary of Health and Human Services Michael O. Leavitt says that local and state systems will have to operate for unspecified amounts of time before federal resources will be allocated.[8] The timing will vary based on the seriousness of the incident. If a biological attack affects numerous states or regions of the country, local systems will have to operate longer than if the event is localized in one state or region. Due to the existing strain on health-care delivery systems, the prospect of handling a public health emergency without federal resources complicates preparedness planning.

Preparedness, Health-Care Delivery Systems and Counsel

Health-care providers and institutions should understand what would be expected of them and the laws that will govern them in a public health emergency. They need to know the roles of other players and the effect it will have on them. Understanding a public health officer's role, responsibilities and authority might make cooperation easier.

Hospitals are often surprised when told what might occur during a public health emergency. A National Defense University study regarding hospital readiness found that, despite the investment of significant resources in preparedness, rural hospitals are ill-prepared for mass casualties and infectious disease incidents.[9] Urban community hospitals did not fare much better.[10] Literature on surge capacity has indicated the same.[11]

Due to an apparent lack of preparedness and understanding of health-care providers and institutions, counsel will be asked for advice and guidance. These calls might come in the midst of an emergency, leaving little time for research and reflection. Health-care attorneys should con-

sider the following issues now so that they can educate clients before a public health emergency and reeducate and advise clients during an emergency.

Government Authority Parameters

During a public health emergency, officials will have the power to influence health-care providers, institutions, private citizens and businesses. Since these officials rarely have exercised such powers, doing so might be met by skepticism and resistance. One can imagine a hospital administrator frantically calling his lawyer because a public health officer just presented him with an order that authorizes the officer to take control of the hospital for the duration of the emergency. Meanwhile, a small-business owner might consult a lawyer to determine whether he or she can fire an employee who is afraid to leave the house and come to work. The local sheriff might consult counsel to find out whether deputies should arrest a man who they believe is under home quarantine. The man under home quarantine might ask an attorney how he is supposed to obtain food and other necessities without leaving his house.

The role of courts in public health emergencies is another issue. Once a public health officer quarantines an emergency room, can the hospital appeal? If so, how? While the appeal is being processed, how will the emergency room be classified? Will it be quarantined? Will the hospital be entitled to an injunction?

Clients might question the consequences of disobeying a public health order. While attorneys may not advise their clients to disobey the law, they may explain the consequences. For example, a private citizen under home quarantine might ask about the ramifications of disobeying the order if he goes to the grocery store for milk and bread.

That citizen might ask questions of redress. The client might have been ordered to stay at home because he was allegedly exposed to avian influenza in Asia. He explains that he has never been to Asia nor associated with anyone who has been to Asia, and he cannot possibly have avian influenza. He is obeying the home quarantine, but considers it to be false imprisonment. He wants to sue. Whom should he sue? What type of recovery can he seek? Against what, if any, government institution could a judgment be enforced?

Clients might ask many questions regarding the government's authority during a public health emergency. A lawyer must know public health emergency statutes and regulations, emergency and disaster laws, and state isolation and quarantine laws. He must know not only about the limits of the government's power, but also the scope of appeal and redress.

During a public health emergency, officials will have the power to influence health-care providers, institutions, private citizens and businesses.

Impact of "Quarantined" Designation

During a public health emergency, it might be necessary for public health authorities to Memorial Hermann The Woodlands Hospital in Texas was forced to close and quarantine its emergency department after a patient entered with an envelope of powder, which spilled and contaminated the entire department.[12] The white powder was not anthrax, but the department was closed for five hours.[13] When faced with this type of situation, health-care institutions might ask counsel about the power of the public health authority. Counsel might be asked if a hospital can suspend discharges until public health authorities can determine that current patients do not pose a threat.

Emergency Medical Treatment and Active Labor Act Compliance

Hospitals might have questions about compliance with the Emergency Medical Treatment and Active Labor Act (EMTALA)[14] during public health emergencies. EMTALA requires a hospital emergency department to stabilize all patients before transfer. During a disaster, a hospital may find it hard to comply with EMTALA requirements. A hospital might close its doors to keep from being overwhelmed. They may be redirected to triage patients at an off-site location that is more suitable for large numbers of people.

It is not clear that battlefield triage is EMTALA-compliant. Turning away an individual who comes to a closed emergency room might also violate the EMTALA. The U.S. Department of Health and Human Services (HHS) suggests that hospitals would not be relieved of their EMTALA duties when experiencing capacity issues due to a public health emergency.[15]

It is also possible that a hospital might transfer a potentially infectious patient before evaluating or stabilizing the patient. Normally, this would violate the EMTALA. HHS says, however, that if the transfer is done pursuant to a community plan, it might not violate the statute.[16] It is not clear how the federal government will enforce EMTALA during public health emergencies.

Credentialing

Investigating credentials of health-care workers might be a problem. It is a

lengthy process that usually cannot be done quickly.

During a public health emergency, hospitals will want all available medical providers. Most will want to participate and provide aid. This includes regular medical staff physicians, hospital employees and retired and out-of-state health-care providers. If a provider is not licensed within the state, the hospital usually cannot credential him or her. A state's Emergency Medical Assistance Compact (EMAC) may credential out-of-state providers by requiring the receiving state to honor the license of the host state.[17] The State Board of Medicine or Nursing may establish emergency regulations to reinstate retired providers. Without such a regulation, however, there is not much that a hospital can do. Counsel must be familiar with the professional regulatory board regulations, as well as his state's EMAC in order to assist hospitals with credentialing questions.

Where providers are credentialed at other institutions in the state are needed to provide care, hospitals might be able to establish reciprocal credentialing agreements. These agreements are necessary before an emergency occurs.

Volunteer Management, Integration and Liability

Volunteer management, integration and liability might also need to be addressed. A variety of volunteers may assist during an emergency. They include regular health-care personnel who are not scheduled to work at the time of the emergency, health-care personnel from other institutions, retired or out-of-state health care personnel, members of medical and public health volunteer organizations and individuals with no health care background or experience.

Each type of volunteer has unique issues. For instance, when a regular employee who is not scheduled to work helps in an emergency, will she be paid overtime? Must she be assigned to her normal job duties, or may she be asked to do something outside of her job description?

Medical and public health volunteer organizations have been created to aid during emergencies. The Medical Reserve Corps (MRC) is composed of both health-care providers and lay individuals. This program was started through HHS and is implemented through units established in localities across the country.[18] Lay individuals with no health-care background and no affiliation with any volunteer group may also want to help.

If a principle-agent relationship does exist, counsel may be able to comfort the institution by finding immunity through the state emergency services and disaster statute.

Who is responsible for delegating tasks to the volunteers? If the attending emergency physician delegates a task to the head of the MRC and the MRC assigns the task to individual members, who will be responsible if the individual is negligent? A hospital, together with counsel, might consider preparing for volunteer services in advance of an emergency. It could then create agreements with volunteer groups that delineate the management and liability structure of the relationship.

Counsel might also be asked to address volunteer liability in terms of both the volunteer's own liability for acts and the institution's liability for the acts of the volunteer. Volunteer liability varies from state to state, so it is important that counsel be familiar with state law. The federal Volunteer Protection Act (VPA) does provide some immunity from civil liability for volunteers, but this law has loopholes that leave volunteers exposed.[19] Other possible sources of immunity include state volunteer protection acts; charitable immunity; if the volunteer is part of a charitable organization and it is a viable doctrine;[20] Good Samaritan immunity; sovereign immunity; emergency services and disaster law immunity; and EMAC provisions that may extend immunity to out-of-state volunteers.

Any institutional liability for the acts of volunteers will be tied to both credentialing and management issues. Institutional liability may be based on respondent-superior liability or negligent credentialing where the volunteer is seen as an agent of the institution. Counsel may help design volunteer policies for health-care institutions so that the institution can ensure that it will not be construed as the principal nor the volunteer as its agent. If a principle-agent relationship does exist, counsel may be able to comfort the institution by finding immunity through the state emergency services and disaster statute.

Communicable Disease Containment Laws

Counsel will also have to be familiar with state laws governing communicable disease containment, such as quarantine and isolation. Most states, including Virginia, have modified their laws and continue modification as new threats emerge. These laws enable public health authorities to detain persons suspected of having a communicable disease, but sometimes the laws are vague and confusing. In 2004, the Virginia legislature overhauled Virginia's quarantine and isolation statutes so that

they now address standards for isolation and quarantine, authority to impose isolation and quarantine and the enforcement of these orders.[21] The statutes also provide mechanisms for judicial review of orders of quarantine and isolation. Counsel must, therefore, be familiar with the amended statutes.

Detainment of persons suspected of having a communicable disease can raise civil liberty and liability concerns. Health-care providers might have to grapple with these concerns during an emergency if they are being asked to enforce detainment orders. In the early stages of an emergency department quarantine, health care providers may be asked to ensure that people do not leave. The health care providers might worry about personal liability when enforcing such orders and wish to consult counsel. Counsel will have to be conversant with these laws, which may prove difficult. The statutory law is relatively underdeveloped in most states, and there is a dearth of case law on this issue, since quarantine has not been used in the U.S. on a large scale in nearly one hundred years.

Emergency preparedness and response activities present significant legal issues for the public and private sector. Health-care providers will likely be at the epicenter of any emergency. Providers and their legal counsel must be prepared to respond effectively to future emergencies that can occur at any time. Counsel to health-care providers will be challenged to master this emerging area of law. ⚖

Endnotes:

1 For the remainder of this article, "public health emergency" will be used to encompass biological attacks, communicable disease outbreaks such as SARS and any other public health emergency to which hospitals and health-care providers may be asked to respond.

2 *See* "Summary of Notifiable Diseases—United States, 2001," MMWR 50(53);1-108. This article outlines the history of notifiable diseases within the United States. In 1912, the first list of nationally notifiable infectious disease list was created. The list is updated periodically, but since 1961 the Centers for Disease Control has been responsible for collecting information on these nationally notifiable diseases.

3 *See* Edward P. Richards, "Plagues, Police and Posse Comitatus: Legal Issues in Forensic Epidemiology and Public Health Emergency Response," available at **http://biotech.law.lsu.edu/cphl/slides/56** (last visited May 28, 2005).

4 *See* Illinois College of Emergency Physicians, "On Our Watch: Preparing for Overcrowding and Bioterrorism in the Emergency Department," available at **http://www.ferne.org/Lectures/EDovercrowdbioterror.pdf** (last visited Jan. 13, 2005).

5 *See* Colleen Danz, "The State of Emergency," available at **http://www.ama-assn.org/ama/pub/category/8888.html** (Last visited Jan. 13, 2005).

6 The Henry J. Kaiser Family Foundation, "American Hospital Association asks Congress not to cut funding," available at **http://www.kaisernetwork.org/adwatch/adwatch_index.cfm?display=detail&aw=330** (last visited Jan. 13, 2005).

7 *See* "Bioterrorism Detection and Response," Testimony by Dr. Harvey Meislin, Committee on Senate Judiciary. Federal Document Clearing House Congressional Testimony, May 11, 2004. See also Janet Heinrich, "Public Health, Public Health Preparedness: Response Capacity Improving, but Much Remains to be Accomplished," GAO-04-458T.

8 Comments made by Secretary Leavitt at the Virginia Pandemic Influenza Summit in Richmond, Virginia on March 23, 2006.

9 Elin Gursky, "Hometown Hospitals: The Weakest Link? Bioterrorism Preparedness in America's Rural Hospitals," available at **http://www.ndu.edu/ctnsp/rural%20hospitals.htm** (last visited Jan. 13, 2005).

10 *Id*; see also General Accounting Office, "HOSPITAL PREPAREDNESS: Most Urban Hospitals Have Emergency Plans but Lack Certain Capacities for Bioterrorism Response," available at **http://www.gao.gov/new.items/d03924.pdf** (last visited Jan. 14, 2005).

11 *See* supra note 7.

12 Jeff Tieman, "On the Front Lines; Anthrax Scare, Jittery Public Put Focus on Health Care Industry," Modern Healthcare, October 22, 2001.

13 *Id.*

14 42 U.S.C. § 1395dd (2004).

15 *See* also Department of Health and Human Services, *Guidance* (Nov. 29, 2001), available at **http://www.cms.hhs.gov/medicaid/survey-cert/112901.asp** (last visited Jan. 13, 2005).

16 *See* Department of Health and Human Services, *Guidance* (Nov. 8, 2001), available at **http://www.cms.hhs.gov/medicaid/survey-cert/110801.asp** (last visited Jan. 13, 2005).

17 EMAC Model Legislation, available at **http://www.emacweb.org/EMAC/About_EMAC/Model_Legislation.cfm** (last visited January 13, 2005), as adopted by forty-seven states, two territories and the District of Columbia. Article V provides "[w]henever any person holds a license, certificate, or other permit issued by any state party to the compact evidencing the meeting of qualifications for professional, mechanical, or other skills, and when such assistance is requested by the receiving party state, such person shall be deemed licensed, certified, or permitted by the state requesting assistance to render aid involving such skill to meet a declared emergency or disaster, subject to such limitations and conditions as the governor of the requesting state may prescribe by executive order or otherwise."

18 *See* **http://www.medicalreservecorps.gov** (last visited Jan. 13, 2005).

19 42 U.S.C. § 14501 *et seq.*

20 Charitable immunity has been eliminated in some states.

21 *See Va. Code Ann* § 32.1-48.05 *et seq.*

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Contingent Workers: Employers Beware!

by Lesley A. Pate

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The contentious national discussion of immigration has drawn attention to the composition of the nation's workforce. Companies increasingly are facing liability related to the use of contingent workers, including claims brought under the Racketeering Influenced and Corrupt Organizations Act (RICO) as demonstrated by *Mohawk Indus. v. Williams*, No. 05-465, which is currently pending before the U.S. Supreme Court.[1] Recently, immigrants staged a work boycott as a visible reminder of their participation in the American workforce.

As the policy debate on immigration continues, it is clear that the nation's workforce consists of various types of relationships. In addition to the traditional employer-employee relationship, employers frequently rely upon contingent workers, such as independent contractors, temporary employees, leased employees and outsourced employees. According to the United States Department of Labor, Bureau of Labor Statistics, 5.7 million workers were classified as contingent in February 2005.[2]

Employers view contingent workers as a way to reduce taxes, employee benefit costs and administrative burdens and to avoid liability under federal and state discrimination statutes, workers' compensation laws and unemployment statutes. Employers, however, must consider the risk of and liability associated with misclassification. To most effectively advise and represent their clients, lawyers should have an understanding of the most common types of alternative work arrangements, the legal standards for determining whether an employment or joint employment relationship exists, and the attendant consequences if an employment or joint employment relationship exists.

Types of Alternative Work Arrangements

"Contingent worker" is the term commonly used to describe an individual engaged in an alternative work relationship. Employers and their lawyers should be aware of the various types of work relationships and the differences among them. The most common types of contingent workers are:

- **Independent Contractors**—Independent contractors are self-employed individu-

als retained on a contract basis to perform specified tasks. They are compensated on a contract or fee basis and are free to render service to other companies or organizations.

- **Temporary Employees**—Temporary employees are recruited, evaluated, hired and employed by a temporary staffing agency, which assigns them to work for the agency's clients. Organizations typically use temporary staffing agencies to provide workers to supplement their own workforce during employee absences, staff shortages, special projects and seasonal work. Temporary workers are supervised by the client to whom they are assigned.

- **Leased Employees**—Leased employees are employees who are on the payroll of an employee leasing firm, which leases the workers back to the company. The leasing firm processes the payroll, administers benefits, maintains records and performs other human resources functions.

- **Outsourced Employees**—Outsourced employees work for an independent firm that has been assigned specified functions by contract. Examples of functions that a company may outsource by contract to an independent firm include accounting, security, food service or human resources.

Legal Standards for Determining Employment Relationships

Companies and organizations should not mistakenly assume that using one of these types of workers will relieve them of obligations imposed on employers under federal and state law. The label or classification assigned to a particular worker or category of workers is not determinative under federal or state employment-related statutes. Rather, businesses must undertake an individualized assessment to determine whether an employment or joint employment relationship exists. The standard for whether an employer-employee relationship exists varies under the different federal and state laws. However, as discussed below, the most important and often determinative factor is control over the worker.

Equal Employment Opportunity Laws

Title VII of the Civil Rights Act of 1964 and related statutes, such as the Age Discrimination in Employment Act, prohibit discrimination against employees, but not independent contractors. Courts have consistently held that general principles of agency law guide the determination of employee status under Title VII.[3] "The key factor in determining whether a hired party is an employee under the common law of agency is the hiring party's right to control the manner and means by which the product is accomplished."[4] Other relevant factors include:

> [T]he skills required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.[5]

The label or classification assigned to a particular worker or category of workers is not determinative under federal or state employment-related statutes.

The U.S. Equal Employment Opportunity Commission has issued enforcement guidance regarding the treatment of contingent workers placed by temporary agencies or other staffing firms. In analyzing whether a client firm in the temporary, leased or outsourced employee context is a "joint employer" for the purposes of the equal employment laws, the EEOC examines a number of factors, none of which is dispositive. The factors that may indicate that the worker is an employee of the client for the purposes of the equal employment laws include:

- The client has the right to control when, where and how the worker performs the job.
- The work does not require a high level of skill or expertise.
- The client, rather than the worker, furnishes the tools, materials and equipment.
- The work is performed on the premises of the client.
- There is a continuing relationship between the worker and the client.
- The client has the right to assign additional projects to the worker.
- The client sets the hours of work and the duration of the job.
- The worker is paid by the hour, week or month, rather than for the agreed cost of performing a particular job.
- The worker has no role in hiring and paying assistants.
- The work performed by the worker is part of the regular business of the client.
- The client is itself in business.
- The worker is not engaged in his or her own distinct occupation or business.
- The client provides the worker with benefits such as insurance, leave or workers' compensation.

- The worker is considered an employee of the client for tax purposes (i.e., the entity withholds federal, state and Social Security taxes).
- The client can discharge the worker.
- The worker and the client believe that they are creating an employer-employee relationship.[6]

Where a client of temporary agencies or other staffing firms exercises significant supervisory control over the worker, it will qualify as an employer of the worker.[7]

Fair Labor Standards Act

Under the Fair Labor Standards Act (FLSA), which prescribes standards for minimum wages and overtime pay, the definition of "employ" is broadly defined as "to suffer or permit to work."[8] The "economic realities" test governs the determination of whether a worker is an employee for purposes of the FLSA and considers the following six factors:

- The degree of control which the putative employer has over the manner in which the work was performed.
- The opportunities for profit or loss dependent upon the managerial skill of the worker.
- The putative employee's investment in equipment or material.
- The degree of skill required for the work.
- The permanence of the working relationship.
- Whether the service rendered is an integral part of the putative employer's business.[9]

The regulations promulgated by the Department of Labor under the FLSA clearly provide that joint employers are jointly and severally liable for compliance with the FLSA, particularly its overtime provisions. The regulations explain that a joint employment relationship will generally be considered to exist where: (a) there is an arrangement between the employers to share the employee's services; (b) one employer is acting in the interest of the other employer in relation to the employee; or (c) the employers may be "deemed to share control of the employee."[10] The Department of Labor's Wage and Hour Division has indicated that temporary workers hired through an agency to work at a particular business establishment are employees of both the agency and the business establishment in which they work.

Family and Medical Leave Act

The concept of joint employment also applies under the Family and Medical Leave Act (FMLA). Like the FLSA, the regulations promulgated under the FMLA by the U.S. Department of Labor provide that a joint employment relationship will generally be considered to exist where there is an arrangement between the employers to share the employee's services, one employer is acting in the interest of the other employer in relation to the employee, or the employers may be "deemed to share control of the employee."[11] The regulations further provide that "joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer."[12] Under the FMLA regulations, a temporary agency is generally designated as the "primary" employer and the client is usually designated as the "secondary" employer.[13] Primary employers are responsible for providing required notices to eligible temporary employees, approving FMLA leave, maintaining the health benefits, and restoring employees to their jobs after FMLA leave.[14] The secondary employer is responsible for accepting the employee back after FMLA leave, as long as the company continues to use the service of a temporary worker from that temporary agency.[15] In addition, the secondary employer is prohibited from interfering with a temporary employee's rights under the FMLA.[16]

National Labor Relations Act

The National Labor Relations Act excludes independent contractors from the definition of employee.[17] To determine whether an employer-employee relationship exists as to a particular worker or a group of workers, the National Labor Relations Board (NLRB) applies the "common law right of control test."[18] Moreover, the NLRB consistently held that an employer is responsible for the unfair labor practices of a joint employer when the employer knew or should have known of the joint employer's unlawful conduct but either acquiesced in the conduct or failed to protest the conduct.[19] Two or more entities are joint employers of a single work force if they share or codetermine matters involving terms or conditions of employment. "Where one employer exercises meaningful forms of control over employees of the other, notwithstanding independent contractor status, the Board may find joint employer status."[20]

Virginia Workers' Compensation

For purposes of Virginia's workers' compensation law, the borrowed servant doctrine applies. "Under the borrowed servant doctrine, a worker, although directly employed by one entity, may be transferred to the service of another so that he becomes the employee of the second entity with all of the legal consequences of the new relation."[21] Like the other employment-related statutes, control over the worker is the most important consideration in determining borrowed servant status. Other relevant considerations include:

- Who has control over the employee and the work he is performing.
- Whether the work performed is that of the borrowing employer.
- Whether an agreement existed between the original employer and the borrowing employer.
- Whether the employee acquiesced in the new work situation.
- Whether the original employer terminate its relationship with the employee.
- Who is responsible for furnishing the work place, work tools and working conditions.

- The length of employment and whether it implied acquiescence by the employee.
- Who had the right to discharge the employee.
- Who was required to pay the employee.[22]

Consequences of an Employment or Joint Employment Relationship

A business that employs or jointly employs a contingent worker may be held liable or jointly liable for payroll and unemployment taxes. The contingent worker would be entitled to any employee benefits provided by the business for which the worker is otherwise qualified. If a contingent worker has been excluded from participation in a health or welfare benefit plan and is later found to be properly classified as an employee, the temporary worker may be entitled to retroactive benefits under the plan. The reclassification of workers to employees may also result in attendant consequences from the Consolidated Omnibus Budget Reconciliation Act. Because health and welfare plans are typically a matter of contract between the employer and the employee, companies and other organizations should consider specifically excluding "leased employees" and "temporary employees or workers" from their benefit plans and contracts and specifying clearly that only employees on their payroll are considered regular employees who are entitled to benefits. Companies and other organizations should also be advised to consider having their contingent workers sign agreements acknowledging that they are not employees and are not entitled to receive benefits.

Other Considerations Associated with Contingent Workers

Regardless of whether an employment or joint employment relationship exists, businesses may be required by law under certain circumstances to provide employee benefits to contingent workers. If a company maintains a qualified plan under the Employee Retirement Income Security Act, "leased employees" are automatically eligible, even if the language of the plan excludes them, to participate in a qualified plan if and when they have been employed by the business for one year. A company that offers a matching program in connection with its qualified plan needs to be aware of this eligibility requirement for leased employees because it may have to retroactively restore matching contributions to any qualifying leased employee that it previously excluded from participating in the plan. This aspect of qualified plans is frequently targeted and audited by the Internal Revenue Service.

Moreover, businesses should be advised that temporary workers that are working more than one year could be reclassified as employees by the IRS. If workers are reclassified as employees based upon length of service, the advantages of the contingent work relationship may be lost. Thus, businesses should consider whether to limit the continuous service of temporary workers to less than a year in order to minimize the likelihood that they will be reclassified as employees by the IRS.

With an understanding of the types of contingent workers and the standards under federal and state laws for determining whether an employment or joint employment relationship exists, lawyers can appropriately advise their clients and help their clients structure any contingent work relationships so as to achieve cost savings while minimizing the risk of employer or joint employer liability. ⚖

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Endnotes:

1 In *Mohawk*, current and former employees brought suit under RICO alleging that Mohawk conspired with temporary staffing agencies and other recruiters to suppress workers' wages through the recruitment and employment of undocumented workers. The Supreme Court is expected to settle a split in the circuit courts regarding whether a company and its outside recruiters, who allegedly recruited and hired illegal workers, can constitute an "enterprise" under RICO. Comments and questions during oral argument suggest that the Court may find in favor of Mohawk, holding that RICO was not intended to provide a cause of action for the claims alleged by the former Mohawk employees. A decision is anticipated by the end of June 2006.

2 United States Dep't of Labor, Bureau of Labor Statistics, *Contingent and Alternative Employment Relationships*, February 2005, at **http:// www.bls.gov/news.release/conemp.nr0.htm**.

3 *See, e.g., Atkins v. Computer Sciences Corp.*, 264 F. Supp. 2d 404, 408 (E.D. Va. 2003) (citing *Cilecek v. INOVA Healthy Sys. Servs.*, 115 F.3d 256, 259-60 (4th Cir. 1997)); *West v. MCI Worldcom, Inc.*, 205 F. Supp. 2d 531, 540 (E.D. Va. 2002).

4 *West*, 205 F. Supp. 2d at 540.

5 *Id.*

6 EEOC, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, at **http://www.eeoc.gov/policy/docs/conting.html**.

7 *Id.*

8 29 U.S.C. § 203(g).

9 *Katz v. Enterprise Solutions, Inc.*, No 1:04cv1240 (JCC), 2005 U.S. Dist. LEXIS 37077 (E.D. Va. June 21, 2005).

10 29 C.F.R. § 791.2.

11 29 C.F.R. § 825.106(a).

12 *Id.* at § 825.106(b).

13 *Id.* at § 825.106(c).

14 *Id.* at §§ 825.106(c)-(d).

15 *Id.* at § 825.106(d).

16 *Id.* at § 825.106(d).

17 29 U.S.C. § 152(3).

18 *National Freight*, 146 NLRB 144, 145-46 (1964).

19 *See, e.g., Action Multi-Craft*, 337 NLRB 268, 277-78 (2001); *Capitol-EMI Music*, 311 NLRB 997, 1000 (1993), *enforced*, 23 F.3d 399 (4th Cir. 1994).

20 *Mingo Loan Coal Co. v. National Labor Relations Bd.*, 67 Fed. Appx. 178, 186 (4th Cir. 2003) (unpublished).

21 *Metro Machine Corp. v. Mizenko*, 244 Va. 78, 82, 419 S.E.2d 632, 634 (1992).

22 *Id.* at 83.

Year in Review: Senior Lawyers Promote Katrina Relief, Senior Law Days by Local Bars

William T. Wilson, 2005–2006 Senior Lawyers Conference Chair

When I first took office, the Senior Lawyers Conference Board of Governors was most concerned about the damage done in the Gulf Coast states by Hurricane Katrina. After Virginia State Bar Executive Director Thomas A. Edmonds conferred with his counterparts in Louisiana, Alabama and Mississippi, many members of the VSB made contributions of time and money to relieve the suffering in those states.

A Senior Law Day sponsored by the Alleghany/Bath/Highland Bar Association in Covington in May was so successful that the SLC board decided to encourage other local bars to emulate the program throughout Virginia. The Alleghany/Bath/Highland Bar Association received an award from the VSB Conference of Local Bar Associations for the program.

At the November meeting of the SLC, state Senator Emmett W. Hanger Jr. updated us on legislation affecting nursing homes and assisted living facilities. He agreed to keep us advised regarding future legislative developments.

The conference sponsored a continuing legal education program entitled "So You're Going to a Nursing Home/Assisted Living Facility" at the VSB's 2006 annual meeting. The program was designed primarily for attorneys who advise elderly citizens or their families. The program was videotaped so that it could be made available to lawyers, senior organizations and local bar associations. The panel and the audience discussed hospital-acquired staph infections, staffing problems, admission requirements, rights and duties of residents once they are admitted, and complaint procedures to address mistreatment.

The Senior Citizens Handbook provided information that was presented during the Senior Law Day and annual meeting programs. The handbook is produced by the SLC and the Young Lawyers Conference. To obtain a copy, call (804) 775-0548 or e-mail **harvey@vsb.org**.

The SLC applauded Robert J. Grey Jr., immediate past president of the American Bar Association, for his efforts to protect and preserve the right of trial by jury. Trials by jury in civil cases are fast going the way of the dinosaur. I urged the SLC to take an active role in preserving that great institution.

I also want to brag a little bit about our own Frank O. Brown Jr., former chair of the SLC, who continues to stump the state talking to lawyers about the need to plan for disability and death, especially in their law practices. Frank also manages the SLC Web site and edits its newsletter. He was awarded the 2006 Tradition of Excellence Award by the VSB General Practice Section.

I talked a lot this year about hospital-acquired staph infections. At the last session of the General Assembly, Delegate Harry L. "Bob" Purkey advanced a bill that requires hospitals to report their staph infection problems, but the reporting does not kick in until July 1, 2008. The federal Centers for Disease Control and Prevention (CDC) has asked hospitals to participate in studies voluntarily. This is not sufficient. The problem needs legislative attention, and it needs that attention fast.

We have received a great deal of support throughout the year from Chief Justice Leroy R. Hassell Sr. who has taken a special interest in the SLC. He increased our budget and supported our programs—especially our Senior Law Day programs.

None of the above would have been possible without the support of the SLC Board of Governors and Patricia A. Sliger, our liaison from the VSB.

Senior lawyers usually bring to the table wisdom that only age and hard knocks can bestow. There are more than eleven thousand senior lawyers in Virginia, and they are doing everything possible to promote civility and professionalism. It has been my honor and pleasure to serve as SLC chair.

"An Ounce of Prevention…" Continued!

by Janean S. Johnston

As stated in the June/July and December 2005 editions of *Virginia Lawyer*, all questions in this continuing series the "Firm Fitness Check-up" are answered "yes" if you are practicing safely. Any "no" response should suggest further examination of that issue to lessen risk of a malpractice suit or ethical complaint.

This article addresses records and file management. Maintaining client papers, correspondence and documents is a critical administrative function in a law office. When you take any expandable file and insert client history, attorney work product and various documents, a valuable item has been created. Proper handling of each file and the information contained therein is essential to the successful practice of law. There could be serious consequences if an important document or an entire file is lost. The failure to carefully maintain files and their contents has resulted in malpractice claims. Time and money can be wasted searching for files or locating information that is not in the file. Well-maintained and documented files help prevent loss of time and money, and often prevent malpractice claims, or at least assist in defense against allegations of negligence.

The most effective means of maintaining and controlling firm files is by integrating records management with other internal systems, such as conflict avoidance, calendaring and mail handling. Many of these law office procedures fail without a good system of file control. If a file is never officially opened for a case, no one will know that the case exists, and an outstanding docketing system cannot prevent the statute of limitations from expiring.

An excellent book for developing good file control systems is *Records Management in the Legal Environment: A Handbook of Practice and Procedure*. It can be ordered by contacting the American Records Management Association (ARMA) at **www.arma.org** or by calling (913) 342-3808. It addresses centralized filing; periodic file inventories; retention and destruction schedules; integration with other office systems; file maintenance; internal organization; and safeguarding files from disasters.

No file should ever be put in the file cabinet without a tickler or "come-up" date. Case management software makes this easy. No file should be tickled for more than sixty days unless it is a corporate file and only annual meetings need be noted. Review all open files at least once in a sixty-day period. Pull all tickled files in the morning and place them on your desk for appropriate review and any related work. Usually there will be no more than ten files to review daily. If nothing is to be done, the file can be re-tickled to a future date.
To be certain you can find a file when you need it, ask the following questions about your records management:

- Does the firm have a centralized filing system?
- Do you follow a consistent internal organizational format, so information in your files can be easily found?
- Are your files kept in an organized fashion, (alphabetically, numerically or alpha-numerically) so files can easily be retrieved?
- Does your firm have an effective system for tracking the flow of files through the office between attorneys?
- Is there a sign-out system for any files that are removed?

- Do you keep files moving without letting them pile up on your desk?
- Does the firm have a tickler system in addition to the docket/calendar system?
- Is every file assigned a tickle date before reshelving?
- Are all open files reviewed at least every sixty days?
- Does the firm have a procedure for protecting special documents or evidence?
- Does the firm have a procedure for closing files, and returning documents to clients and placing files in storage?
- Do you have a retention/destruction policy for closed files?
- Is the file room reasonably safe from damage due to water, fire, earthquake or theft?
- Are filing procedures followed consistently by all members of the firm?

If you have questions or concerns regarding your file management procedures, please call me at (703) 567-0088. Applications are also available for anyone interested in having an overall review of practices and procedures by the VSB's Confidential Law Practice Management Review program.

Look for more articles in the continuing "Firm Fitness Check-up" series. Stay tuned and stay healthy!

CLBA and Supreme Court Offer Solo and Small-Firm Forums

M. Janet Palmer, 2005–2006 Conference of Local Bar Associations Chair

This has been an exciting and busy year for the Conference of Local Bar Associations. In addition to our signature projects such as the *So You're 18* booklet and the Bar Leaders Institute, the CLBA partnered with the Supreme Court of Virginia to cosponsor Solo & Small-Firm Practitioners Forums. So far, forums were held in Abingdon, Harrisonburg, Williamsburg and Danville. We hope to continue to collaborate with the Court to sponsor more in the coming year.

An initiative of Chief Justice Leroy R. Hassell Sr. and Justice Cynthia D. Kinser, the forums provided continuing legal education to lawyers who do not work for large firms, corporations or government agencies. Chief Justice Hassell held Town Hall Meetings at the conclusion of the formal presentations to address lawyers' questions and concerns. While the justices could not answer questions about specific cases, the meetings provided lawyers with a rare opportunity to discuss a wide variety of issues with them. The Chief Justice invited a candid discussion of the issues that affect solo and small-firm practitioners—the majority of lawyers in Virginia. For questions he could not answer at the forum, the Chief Justice said that he would research the issues and contact the lawyers.

Forum speakers included Gene R. Nichol, president of the College of William and Mary, and William C. Mims, Virginia's chief deputy attorney general.

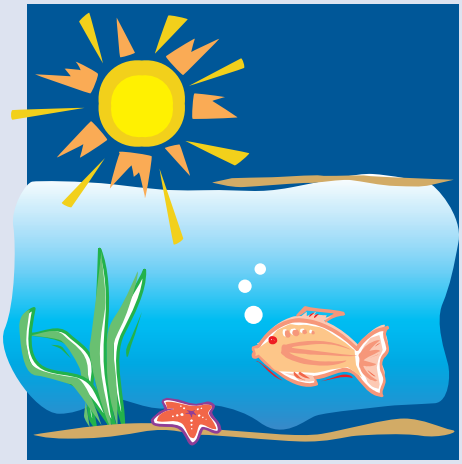
In addition to the justices, lawyers and others spoke on subjects of concern to attorneys who practice alone or in small firms. Virginia State Bar President-Elect Karen A. Gould and attorney representatives from the VSB Office of Bar Counsel gave advice on how to avoid bar complaints. Nancy Byerly Jones offered practical information on time management and practice management software. Frank O. Brown Jr. urged lawyers to have a plan for their offices in case they should die or become disabled. James E. Leffler described resources available to lawyers who may suffer from mental disabilities or substance abuse problems.

VSB President Phillip V. Anderson and CLBA officers George W. Shanks and Manuel A. Capsalis discussed practical resources provided by the VSB.

The forums showed attorneys how to avoid the pitfalls of practicing law in a small firm or as a solo practitioner.

The CLBA hopes to continue to assist the Court with this valuable initiative.

For news about local and specialty bar associations visit www.vsb.org/site/members/clba.



68th Annual Meeting

June 15-18, 2006

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1: Chief Justice Leroy R. Hassell Sr., speaking at the banquet, thanked the Virginia State Bar for implementing his initiatives to help criminal defense lawyers who take court-appointed cases; small-firm and solo practitioners; and the process for involuntarily committing people in Virginia.

2: Karen A. Gould (right) of Richmond was sworn in as the 2006–2007 president of the Virginia State Bar by Virginia Justice Elizabeth B. Lacy.

3: Virginia State Bar 2006–2007 officers (left to right): Immediate Past President Phillip V. Anderson of Roanoke, President Karen A. Gould of Richmond and President-elect Howard W. Martin Jr. of Norfolk.

4: VSB Executive Director Thomas A. Edmonds presented outgoing President Phillip V. Anderson with a caricature by Richmond attorney Michael L. Goodman.

1: Gene R. Nichol, president of the College of William & Mary and a former law school dean, was the featured banquet speaker.

2: George W. Dodge of the Arlington Bar Association and Carolyn M. Grimes of the Alexandria Bar Association were the 2006 Bar Leaders of the Year.

3: Rita P. Davis, a member of the Young Lawyers Conference Board of Governors and Frank Overton Brown Jr. of the Senior Lawyers Conference.

4: Frank West Morrison (second from right), winner of the 2006 Lifetime Achievement Award, with his family: (L–R) stepdaughter Lucy Homiller, her husband Will Homiller, wife Gail Morrison and son John Morrison.

5: Lawyers honored for fifty years of membership in the Virginia State Bar, with VSB officers and leaders of the Senior Lawyers Conference.

June 15–18, 2006 • Virginia Beach, Virginia

1: Past chairs of the Conference of Local Bar Associations: (L–R, front) Aubrey J. Rosser Jr., Joseph W. "Rick" Richmond Jr., M. Janet Palmer; (back) Jon D. Huddleston, Fairfax Circuit Judge David T. Stitt and Manuel A. "Manny" Capsalis.

2: Jill A. Hanken, winner of the 2006 Virginia Legal Aid Award, holds a Hullihen Williams Moore photograph presented to her by 2005–2006 President Phillip V. Anderson on behalf of Judge Moore and the Access to Legal Services Committee. Hanken practices at the Virginia Poverty Law Center in Richmond.

3: The Young Lawyers Conference Showcase Continuing Legal Education Program—"A Roberts and Alito High Court: The Effect on Long-Standing Precedent and Developing Areas of Law"—drew a panel of distinguished scholars (photos 4–7) and an avid audience, including former VSB President Joseph A. Condo (front) and Professor Emeritus Robert E. Shepherd Jr. of the University of Richmond School of Law (second row, left).

4: Ronald D. Rotunda, George Mason University Foundation Professor of Law.

5: Tony Mauro, U.S. Supreme Court correspondent for the *Legal Times* newspaper.

6: Michael J. Gerhardt, Samuel Ashe Distinguished Professor of Constitutional Law at the University of North Carolina-Chapel Hill.

7: Lillian R. BeVier, John S. Shannon Distinguished Professor of Law at the University of Virginia.

8: Graham Thatcher presented "Clarence Darrow: Crimes, Causes and the Courtroom," about the beliefs of and battles fought by the great trial lawyer.


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1: Virginia Secretary of Health and Human Services Marilyn Tavenner spoke at the Virginia Legal Aid Award Luncheon.

2: Christy E. Kiely, the 2006 R. Edwin Burnette Jr. Young Lawyer of the Year, stands with 2005–2006 Young Lawyers Conference President Jimmy F. Robinson Jr. (left) and Lynchburg General District Judge Burnette, a former president of the YLC and VSB.

3: Four chapters of the Virginia Women Attorneys Association were recognized for special projects by the Conference of Local Bar Associations. The chapters are located in Hampton Roads, Loudoun County, Roanoke and Northern Virginia. Receiving the awards are (L–R) Caroline E. Costle, Monica Mroz, C. Kailani Memmer, Christine Mougin-Boal, Kathleen J.L. Holmes, Angela George, Mary Catherine Gibbs and Rebecca S. Colaw.

4: Frank Overton Brown Jr. received the 2006 Tradition of Excellence Award from the General Practice Section. (L–R) Charles E. Adams, General Practice Section chair; Donald Creech, son-in-law; Frank Overton Brown Jr.; Susan V. Brown, wife; Madison L.C. Brown, granddaughter (in front of Susan); Adam M.C. Brown, grandson (beside Madison); Frank O. Brown III, son (behind Susan); Candace L.C. Brown, daughter-in-law (beside Susan); Jonathan M.C. Brown, grandson (on Candace's arm); Matthew R.O. Brown, son (behind Candace); Angela B. Creech, daughter (beside Jonathan).

5: (L–R) Arlington General District Judge George D. Varoutsos, Sandy Varoutsos, Aleithia Perry and retired Judge Frank B. Perry of Fairfax General District Court.

6: Members of the 2006–2007 Conference of Local Bars Executive Committee include (L–R), front Susan F. Pierce, Immediate Past Chair M. Janet Palmer; (middle) Edward L. Weiner, Treasurer Gifford R. Hampshire, Tracy A. Giles; (back) Secretary William T. Wilson, Chair-elect John Y. Richardson and Chair George W. Shanks.