Team Player

There was a significant omission from your excellent feature on Howard W. Martin Jr., Virginia State Bar president, in the June/July 2007 edition (probably due to his modesty).

Years ago, Freddie Stant and I were having cocktails at the Harbor Club one evening when I suggested that we might line up a number of lawyers who had played basketball in college and enter a team in a rather fast, over-thirty league in Portsmouth. I had played at William and Mary and Freddie at the University of Virginia, where he was a rebounder "extraordinaire." (I kidded Freddie that he had the "sharpest elbows in the conference.") The team quickly became a reality and was named The Barristers. The Barristers was a viable entity for close to ten years, after which most of us quit because Neil Johnston, formerly of the Philadelphia 76ers and the Virginia Squires, came into the league to play for another team when he went to work for a local sheriff's office.

Howard had played basketball as well as baseball at Washington and Lee, and immediately became our "big man." We also were privileged to have his partner, Tim Coyle, who was a left-handed point guard and quick as greased lightning. We had a decent ball club and won a few championships, but we could not have done so without our "big man" in the middle, whom we depended upon for both offensive and defensive rebounds. There was a lot of camaraderie on that team. "Mo" Whitlow, currently a general district court judge in Portsmouth, was a member, as well as Jim Councill of Richmond, Tommy Johnson of the Wilcox firm, Hunter Sims of the Kaufman firm, Phil Trapani—former Norfolk City Attorney—and Tommy Conner, who, frankly, was our star.

(The problem with Tommy was that if you threw the ball to him as our shooting guard, you would never get it back, and we referred to a pass to Tommy as being one made "into a black hole.") Mike Price of Old Dominion University fame completed the team of lawyers. We had one "ringer" certified public accountant, Harvey Roberts, who starred in both basketball and tennis at the University of Richmond. He was our power forward.

But through it all, President Martin, as our "big man," was the glue that held our team together, the same way that I predict that he will hold our bar together.

Montgomery Knight Jr.
Norfolk

Oliver W. Hill Memorial Contributions

Persons wishing to make contributions in memory of Oliver White Hill, the Richmond civil rights lawyer whose career included *Brown v. Board of Education* and many other cases, may consider the following options:

- The **Oliver Hill Foundation**, which works to ensure Mr. Hill's civil rights legacy. The foundation, a 501(c)(3) nonprofit, has purchased Mr. Hill's boyhood home in Roanoke, and is developing it as a center for fostering human rights. Address: P.O. 2246, Richmond, VA 23218.

- The Virginia Law Foundation's **Oliver White Hill Public Service Internships**, which support interns to work in civil rights and civil liberties law. The Oliver White Hill Foundation receives the interest earned by this fund. Checks may be written to the VLF and designated for the "OWH PSI." The VLF's address: 700 East Main Street, Suite 1501, Richmond, VA 23219.

Mr. Hill died August 5 at age one hundred.

Oliver White Hill 1907–2007

by Howard W. Martin Jr., 2007–08 VSB President

I had the privilege of meeting Oliver White Hill on only two occasions. But one did not have to know Mr. Hill personally to understand and benefit from the strength of his convictions and the example of his life and his career. I count us all fortunate to have lived in his time and to have known him, even from afar.

Oliver White Hill, who died August 5, 2007, at the age of one hundred, practiced law in Virginia for more than sixty years and left a legacy that bespeaks integrity, perseverance, and protection of the Rule of Law.

He grew up in Roanoke at a time when bullying and reports of lynchings haunted cities and towns across America. He attended a public school system that educated African-Americans only to the eighth grade, so he moved to Washington, D.C., to earn a high school diploma that would qualify him for college.

He wanted to be a lawyer. He wanted to take on racial discrimination and put America on a straighter path toward justice for all. He saw the U.S. Constitution as a living document, and he resolved to hold it to its promises.

Mr. Hill attended Howard University Law School, where he became a disciple of Dean Charles Hamilton Houston, a demanding educator who dreamed of placing African-American lawyers in every community of the nation. Mr. Hill, with fellow Howard alumni Thurgood Marshall, Spottswood W. Robinson III, and others, undertook, with considerable success, a range of civil rights causes that included use of public transportation, right to employment, and access to public places for assembly and recreation, as well as education.

As the legal successes grew, so did threats against Mr. Hill and his family. A cross was burned on his lawn. His family received harassing telephone calls. Members of the National Association for the Advancement of Colored People—an important source of the funds that supported his work—were targeted with legal and economic harassment.

Through it all, Oliver Hill had faith in the Rule of Law, and he dedicated his life to ensuring that it applied to all Americans. He relentlessly and brilliantly faced down injustice and oppression, employing the tools of scholarship, tempered argument, consummate civility, and sound legal strategy. Because of his work, America has advanced toward the ideal espoused in our Declaration of Independence, that all are created equal before the law.

Mr. Hill persevered through years of litigation capped by 1954's *Brown v. Board of Education*. As he contributed profoundly toward changing the course of justice in America, he embodied concepts the Virginia State Bar stresses in its Harry L. Carrico Professionalism Course: He was a man of integrity, a citizen lawyer, one who worked with the poor for little recompense, and a person who conducted himself with impeccable manners and civility.

In 1992, Mr. Hill was named the second recipient of the Lewis F. Powell Jr. Pro Bono Award. He credited Justice Powell, as Richmond's school board chair, with keeping the city's public schools open during the travails of desegregation. Mr. Hill endorsed Mr. Powell for the U.S. Supreme Court, and the two maintained a friendship into Justice Powell's last years.

Hill *continued on page 8*

Hill *continued from page 6*

A winner of the Presidential Medal of Freedom, Mr. Hill worked on a national stage but remained a man of his community and the Commonwealth. He mentored future judges at his Richmond law firm, Hill, Tucker & Marsh. Among them: James W. Benton Jr. of the Virginia Court of Appeals; Margaret P. Spencer, Richard D. Taylor Jr. and the late Randall G. Johnson of the Richmond Circuit; Gary A. Hicks of the Henrico Circuit; John W. Scott Jr. of the Fredericksburg Circuit; and Julian W. Johnson of Stafford Juvenile and Domestic Relations Court.

At the Virginia State Bar, Mr. Hill was a valued and active volunteer. He was instrumental in founding the section that grew into the Senior Lawyers Conference, and he served on that section's board for many years. He also was on the Special Committee on Bench-Bar Relations. He lent his name to the VSB's Pro Bono Award, given annually since 2002 to an outstanding law student. Even when he was in fragile health toward the end of his life, Mr. Hill often attended the award ceremonies and extended his thanks to the young lawyers who seek to emulate his work.

Mr. Hill stood at the summit of attorneys who face opposition and animus with unrelenting courtesy, ready humor, and refusal to succumb to anger. His personal life was rich and filled with people who loved him and with fellow lawyers who respected him beyond measure.

Oliver White Hill epitomized the best of Virginia lawyers. As Virginians, we are all better for the legacy of this most distinguished, gentle, and dignified of souls.

Conservation Easements in Virginia

by The Honorable Timothy M. Kaine, Governor of Virginia

Article XI of the Constitution of Virginia declares:

To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

I have sworn to uphold the Constitution, and Article XI speaks directly to an issue that I am particularly passionate about: safeguarding Virginia's precious natural heritage. I have made setting measurable goals a priority for my administration, and the area of conservation is no exception. I chose as the centerpiece of my environmental agenda a goal to conserve 400,000 acres by 2010. In order to achieve this very aggressive goal, we must double the rate at which we conserve land statewide (about 56,000 acres annually in the years before I took office).

Attorneys have a crucial role to play in making attainment of the goal possible. The tool most often used to protect land is conservation easements, an interest in land that the landowner gives away or sells to permanently prevent development. Accelerating the rate at which we place land under conservation easements depends, first and foremost, on willing landowners. I believe that Virginia is blessed with many landowners whose love of their land translates into a desire to preserve its bucolic character for future generations.

But landowners must have sound legal advice from attorneys knowledgeable about conservation easements to make informed decisions about conserving land. Some landowners report difficulty finding attorneys with experience working with land trusts and government agencies that can hold easements. Conservation easement work may therefore be an area of significant growth potential for attorneys in Virginia, particularly in rural parts of the state.

Lawyers are also needed to help landowners understand the tax incentives that are available for conservation easement donations. Virginia has the most generous land preservation tax credit in the nation. This tax credit is worth 40 percent of the value of a conservation easement, and an easement donor who cannot use the credits himself can sell them to other taxpayers. Many landowners who once believed that selling their land for development was the only way to recover value from their property have learned that the land

Photo by Michaele White, courtesy of the Office of the Governor

Attorneys have a crucial role to play in making attainment of the goal possible.

preservation tax credit makes permanent conservation affordable. Since 2000, more than 263,000 acres of land have been conserved under this extremely successful program.

The Virginia State Bar has launched an initiative to work with my Secretary of Natural Resources, L. Preston Bryant Jr., and the Virginia Outdoors Foundation (VOF) to promote a broader and deeper understanding of conservation easements among Virginia's attorneys. Through this initiative, lawyers who are interested in learning more about conservation easements can take advantage of an increasing number of continuing legal education offerings on the subject. For those who prefer to begin with individual research, the VSB Web site provides a link to the VOF Web site, which contains VOF's easement guidelines and an easement template that can be tailored to an individual piece of property.

Conserving land protects air and water quality, ensures the availability of habitat for wildlife, preserves the working landscapes that provide our food and wood products, and sustains Virginia's abundant historic and scenic beauty. In short, land conservation is important for our quality of life. It is also one of the few things we can do that we know will benefit future generations. I encourage all lawyers whose practice includes real estate, estate planning, or tax work to become familiar with conservation easements, the federal income tax deduction for charitable donations and Virginia's land preservation tax credit.

Justice Lemons Carries University of Richmond Rule of Law Dialogue to London

by Dawn Chase

Justice Donald W. Lemons of the Supreme Court of Virginia was to go to England early this month to continue a dialogue that began this spring in Williamsburg—or more than four hundred years ago in London.

This month's occasion started with the American Bar Association's Section on International Law Conference. The Right Honorable Lord Phillips of Worth Matravers, Lord Chief Justice of England and Wales, presented an address on the Rule of Law and terrorism. He invited Lemons, along with Justice Randy J. Holland of the Delaware Supreme Court, to present responses.

Later, Justice Lemons was scheduled to give a lecture on "Jamestown Legacy—Reflections on the Rule of Law," at the historic Middle Temple Inn of Court in London.

The invitations followed the Rule of Law Conference held April 11–14, 2007, at the University of Richmond and Historic Jamestowne. (See "Centuries after Jamestown, Rule of Law Provides Means to Racial Justice," in the June/July 2007 issue of *Virginia Lawyer*.)

The conference and subsequent program in England continued a relationship that the English Inns of Court have had with Virginia since before the first English settlers sailed up the James River in 1607.

"That story heretofore had not been told in the United States," Lemons said on September 5 in an interview at his chambers in Richmond.

Barristers at the Middle Temple Inn of Court drafted the Virginia Company Charter, through which King James I gave a stock company permission to develop a settlement along the mid-Atlantic coast of North America.

"It was the barristers—the lawyers—of the Middle Temple who were predominantly involved in drafting the charter, soliciting the stock subscriptions, financing the settlement itself, and then providing the legal structure for the colony," Lemons said.

"They drafted the documents that provided the first democratic form of government in the New World."

Lemons—a trustee of the American Inns of Court and a member of the John Marshall Chapter in Richmond—invited the English Inns to participate in the Rule of Law Conference. Each of the four English Inns prepared for the event by holding a Jamestown lecture in connection with the quadricentenniel.

And during the conference, the English Inns donated a plaque that commemorates the founding of the colony. The plaque rests at Historic Jamestowne. A photo on Lemons's wall shows Lord Phillips and United States Chief Justice John G. Roberts Jr. shaking hands across the plaque, while Lemons and retired U.S. Justice Sandra Day O'Connor look on.

Lemons and law school dean Rodney A. Smolla, then of the University of Richmond, now of Washington and Lee University, were co-hosts of the Rule of Law Conference, which drew many highly placed members of the British judiciary, as well as Roberts, O'Connor, and U.S. Justice Stephen G. Breyer.

While Americans celebrated the four hundredth anniversary of the founding of Jamestown, the Rule of Law Conference focused on the Anglo-American experience of democracy. The conference explored how ideas from England grew when transplanted into American soil, and how the Anglo-American experience compares to that of emergent democracies in different cultures.

The Virginia Company Charter conveyed the "rights of Englishmen" upon the Jamestown settlers from the beginning. But the details of those rights "took off in different directions altogether," Lemons said.

Many of the core principles remained in place. "In an Anglo-American sense, if we were to identify the things that make up a Rule of Law, we would include first of all a broad participatory democracy. The right to vote, for example, as a cornerstone of democratic expression is similar in both countries.

"You'd have the right to own property, the right to form contracts. When you have these rights, you have to have a system to be able to enforce them so that [the rights] mean something. So there would be an independent, reliable system of dispute resolution.

"In the Anglo-American experience, we have had a very high regard for the rights of conscience, and that is expressed—at least in our constitutional development—as free exercise of religious belief, free speech, the right to assemble, the right to petition government, the right to a free press."

But as the Rule of Law developed in America, the details diverged from the English version.

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Rule of Law *continued from page 17*

"What happened, of course, is that the combination of physical distance and a little bit of benign neglect on the part of the mother country allowed the American experience to move in a different direction," Lemons said.

"First of all, the common law started development in America case-by-case, and because of different needs and different circumstances the common law in America took a different direction."

An example, he said, addresses the establishment of religion. "It wasn't long after the colonists came here, and before there was any new country—in the sense of a declaration of independence and a constitution—that Thomas Jefferson introduced the Bill for Religious Freedom—a decidedly antiestablishment doctrine. Patrick Henry tried the Parson's Cause out in Hanover County, which was a decidedly antiestablishment reaction of a jury in Virginia.

"And of course, what is now the First Amendment to our Constitution has the prohibition against the establishment of religion initially by the federal government—a proscription that has now been extended to the states."

In another example, the right to trial by jury is more limited in England than the United States, Lemons said.

". . . because of different needs and different circumstances the common law in America took a different direction."

The balance of government also took different directions. In England, "Parliament remains supreme," Lemons said. But the American expression includes a separation of powers—"not only between executive, legislative and judicial branches, but (also) the separation of powers that we call federalism—where we have state systems and we have a federal system."

The conference also examined emerging democracies. "The idea of exporting democratic principles and Rule of Law concepts around the world becomes uniquely difficult as you come to areas of the world where the history, tradition, culture, and values are dramatically different than ours. It doesn't mean that you don't pursue the same values, necessarily, but it means that the application of them is a new and different challenge."

As Lemons was preparing for the conference more than two years ago, he was approached by chiefs of two Virginia Indian tribes. They asked him, "Will your Rule of Law Conference explain where the Rule of Law was when our people were displaced from their lands?"

Lemons said, "Well, I could think about almost nothing else with regard to the conference for weeks after that, because . . . I realized that there were at least two groups that appeared to have no reason for celebration of the Jamestown event: American Indians—indigenous people—and African-Americans, who were brought here in 1619 on a Dutch warship that came up the James River.

"We decided that we were going to tell the story and engage in a dialogue that was honest because we have not always been consistent about the application of these principles that we call the Rule of Law.

"The fact that we have failed upon occasion, however, does not mean that we don't extol the virtues of the concepts and continue to ask why we have departed from these concepts upon occasion, and what we can do to remedy the problem."

So Elaine R. Jones, retired president of the National Association for the Advancement of Colored People Legal Defense Fund, and Joe Shirley Jr., the president of the Navaho nation, were invited to the podium. "You could have heard a pin drop in the room as [Shirley] explained that [Indian people] feel they have been left out of the American dream."

photo © Doug Baerlein

Virginia Justice Donald W. Lemons

"I think the conference had an integrity about it that was truly remarkable," Lemons said.

What connection does the lofty assemblage of the Rule of Law Conference have with the workaday Virginia lawyer?

Lemons responded with a reference from Alexis de Tocqueville's nineteenth-century political science commentary, *Democracy in America.*

"It was the lawyers of America who held together the very fabric of this society," Lemons said. DeTocqueville observed that lawyers "permeated the institutions of America. It was the lawyers who protected the Rule of Law.

"It is so important for lawyers, at a time like this, to recommit themselves to these principles of the Rule of Law that undergird everything that is America."

Lawyer Rehab No Slap on the Wrist

VSB Supports Path to Recovery for Lawyers Willing to Work

by Dawn Chase

A lawyer impaired by substance abuse or mental illness can cause serious problems for the client who pays him for counsel and advocacy, only to find that phone calls aren't returned, deadlines are missed, and the legal matter never gets resolved.

While lawyers are free to choose among assessment and rehab programs, there is one—Lawyers Helping Lawyers—that the Virginia State Bar financially supports to ensure that attorneys can get help, even when their practices are in a shambles and their financial reserves are minimal.

Attorneys become involved with Lawyers Helping Lawyers in four ways:

- Lawyers approach the program individually to seek assistance with substance abuse, depression, or another psychiatric problem.
- Colleagues, friends, or family of lawyers seek the program's help to set up interventions when a lawyer's life or practice is harmed by his problem.
- The Virginia Board of Bar Examiners, when it flags a lawyer with a potential substance abuse problem or mental illness during an investigation for licensure, refers applicants to the program for assessment.
- The Virginia State Bar sometimes refers to LHL for evaluation, treatment, and monitoring when a disciplinary investigation detects signs of impairment.

Confidentiality

The Virginia State Bar finds out that a lawyer is receiving help from Lawyers Helping Lawyers only if the lawyer has waived confidentiality. Lawyers release this information in situations involving professional discipline, such as:

- An attorney who faces disciplinary charges discloses his LHL relationship as mitigating evidence that he is addressing an underlying problem. The bar might then request an assessment of the attorney's progress from LHL.
- The bar, in investigating professional misconduct, finds reason to suspect impairment and refers the attorney to LHL for assessment. The reports are released to the bar with the attorney's written permission.
- A bar disciplinary sanction can include a condition that the lawyer comply with a Lawyers Helping Lawyers treatment or monitoring plan. The bar can obtain reports on the attorney's cooperation with the program and results of screenings for substance abuse. If the attorney doesn't comply, he faces harsher sanctions.

The VSB is not interested in the intimate details of the lawyer's illness and treatment. It wants to know whether the attorney has an impairment that can be brought under control so he can practice effectively.

In some cases of attorney impairment, compliance with a Lawyers Helping Lawyers contract is required as a condition of an admonition or reprimand (public or private) or a suspension for professional misconduct.

In cases in which the bar determines the lawyer's illness is jeopardizing the public, the hearing on disciplinary charges may be postponed indefinitely, and the bar can ask that the attorney be summarily suspended for impairment.

After the lawyer has improved, he can petition the Disciplinary Board for reinstatement. The bar then can proceed on the postponed disciplinary matter.

Lawyers cannot avoid ethics charges by going into rehab. "We don't have any problem with somebody suffering those consequences," said Lawyers Helping Lawyers Executive Director James E. Leffler.

Public Disclosure

Impairment hearings are not listed on the public docket, and they are closed to the public. The hearing is before a panel of five members of the VSB Disciplinary Board. A guardian ad litem is appointed to safeguard the interests of unrepresented respondent attorneys.

An impairment suspension is posted on the VSB Web site with this wording: "The Virginia State Bar Disciplinary Board suspended [Attorney's] law license on impairment grounds." No details are provided, and no press release is distributed.

If an attorney is ordered to enter into a monitoring agreement with LHL as part of a public disciplinary sanction for professional misconduct, that fact is public and might be included on the Web site and in the press release that is distributed. The final Disciplinary Borad order, which often describes details of the case, also is posted on the Web.

Signs of Impairment

George H. Hettrick, a longtime volunteer with Lawyers Helping Lawyers, published a 1999 article, "Addiction to Alcohol and Other Drugs: Recognizing the Signs of Lawyer Impairment,"[1] that offers a checklist of suspicious signs, which include "borrowing" from trust accounts, procrastination, pervasive dishonesty, blaming problems on others, more than one conviction of driving under the influence, and poorly managed finances.

But Hettrick stresses that those traits in isolation do not mean the person is a substance abuser. "[T]he observation must be coupled with a pattern of gradual behavioral changes over time," he writes.

Signs that a lawyer suffers from depression are similar to those of substance abuse, Leffler said.

Protecting while Seeking Rehab

Under what circumstances would the Virginia State Bar prosecutors agree to allow an impaired lawyer to continue practicing on the condition that he comply with a Lawyers Helping Lawyers contract?

Lawyer Rehab *continued on page 20*

Lawyer Rehab *continued from page 19*

"Public protection is paramount," said VSB Counsel George W. Chabalewski. "What are the charges?" Each case is assessed individually. The prosecutor would weigh the effect on past and future clients, prior misconduct findings, the lawyer's office management practices, the immediacy of any problems, and the lawyer's medical status, including prognosis.

Impairment can include not only mental illness and substance abuse, but also irreversible conditions such as brain injury and dementia, Chabalewski said.

"In an instance where there has been no harm to a client and this person [the respondent] seeks treatment, and we think there's a likelihood he can be helped, I think we meet the needs of public protection by not only us watching him, but ensuring that Lawyers Helping Lawyers is watching him," while the lawyer continues to practice.

Financial Issues

Lawyers impaired by substance abuse and depression often have depleted their financial and social resources by the time they address their problem. They often are divorced or separated from their spouses and they have isolated themselves from colleagues. Their insurance, if they have any, rarely provides adequate coverage of inpatient mental health and substance abuse treatment, followed by outpatient medical care.

Lawyers Helping Lawyers provides the services it offers in-house for free. For other costs related to rehabilitation, it offers interest-free loans from its Stephen C. Chapple Recovery Assistance Fund. The assessments that Leffler does would cost the bar or the attorney $500 to $1,000 if they were done elsewhere in the medical community.

Slap on the Wrist?

A disciplinary requirement that a lawyer comply with an LHL substance abuse contract is tougher duty than a lot of sanction terms, such as extra continuing legal education hours or hiring an office auditor, Leffler said.

The usual contract requires a two- to three-year commitment. It usually starts with an intensive five-hour assessment by Leffler, a licensed professional counselor with a master's degree in rehabilitative counseling. A treatment plan is developed in collaboration with an appropriate therapist and can include inpatient treatment, intensive outpatient treatment, and individual and group counseling. In addition, support groups, random urine screens for drugs, and meeting weekly with LHL volunteers are part of recovery contracts.

"What you're asking somebody to do is to change their life, and this requires a great deal of work," Leffler said. "Frequently the most important thing in an attorney's life is their career, and they will go to almost any lengths to avoid not being able to be a lawyer.

"Seventy-five percent of the people who go into contract with us complete it successfully."

LHL's Future

"The bar couldn't afford to pay for the evaluations that Lawyers Helping Lawyers obtains," said Barbara Ann Williams, a former VSB counsel and now member of the LHL board.

"The most striking thing I learned after I became bar counsel was how many lawyers who have disciplinary problems also have substance abuse or mental health issues.

"Lawyers who have problems can also be very talented . . . with a lot to offer the public."

As a board member, she has become aware that "there are going to be more situations where respected members of the bar encounter cognitive defects." They will need help identifying their problems, receiving treatments that might be available, or being guided into retirement if they no longer can practice safely.

Lawyers Helping Lawyers operates on a shoestring, with a budget of $160,000 to $180,000 and about fifty active volunteers throughout the state. Leffler said that, when more money becomes available, the program hopes to expand by adding part-time positions in Southwest and Northern Virginia. LHL currently is recruiting volunteers in the Virginia Beach-Tidewater area, which Leffler said is underserved.

Williams said the VSB gets a bargain in Lawyers Helping Lawyers. "They are a very committed group of folks, with a belief in the power of redemption: No matter how dire the situation, there is always the possibility that the person can turn their life around and use their legal education to help others."

Endnote:

1 Hettrick's article can be obtained by contacting Lawyers Helping Lawyers at (877) 545-4682 or **jim@valhl.org**.

About Lawyers Helping Lawyers

Lawyers Helping Lawyers is a 501(c)(3) nonprofit organization that provides confidential substance abuse and mental health services to the legal community, including attorneys and judges and their families and staffs.

It is supported by donations. The Virginia State Bar is LHL's largest contributor, at $100,000 per year. Other donations come from The Virginia Bar Association ($20,000), Virginia Trial Lawyers Association ($17,500), Virginia Association of Defense Attorneys ($1,000), ALPS ($30,000), Minnesota Mutual ($4,000), various law firms ($15,000), and individual contributors.

LHL employs an executive director and secretary. It also is assisted by about fifty active volunteers statewide.

Services include planning interventions, assessments, referral to treatment providers, monitoring rehabilitation contracts, coordinating treatment and twelve-step groups, and providing community education.

Information on Lawyers Helping Lawyers can be obtained by calling (877) 545-4682 or e-mailing **jim@valhl.org**.

In Memoriam

William H. Abeloff
Goochland
November 1934–August 2006

James Claiborne Allred
Fairfax
October 1946–March 2007

Kenneth P. Asbury
Wise
October 1922–March 2007

Robert F. Banks
Norfolk
December 1927–March 2007

David Kent Beals
Atlanta, Ga.
July 1936–June 2007

Herman T. Benn
Suffolk
December 1911–June 2007

Leslie Annette Lyda Borden
Alexandria
March 1949–August 2006

Mark E. Borton
Longwood, Fla.
July 1929–November 2006

Andrew Elliott Carpenter
Tuscumbia, Ala.
March 1974–July 2007

Eugene E. Derryberry
Roanoke
October 1942–July 2007

William Edward Findler
Arlington
July 1948–June 2007

John M. Fischer
Fairfax
March 1940–May 2007

Reinhard W. Fischer
Phoenix, Ariz.
February 1947–February 2007

F. Rodney Fitzpatrick
Roanoke
October 1925–February 2007

Benjamin R. Gardner
Martinsville
October 1941–September 2007

Griffin T. Garnett Jr.
Arlington
August 1914–June 2007

A.A. Giangreco
Leesburg
June 1924–February 2007

John R. Hanley
Alexandria
November 1920–March 2007

James O. Harrell
Titusville, Fla.
February 1935–December 2006

Oliver W. Hill
Richmond
May 1907–August 2007

Richard E. Ingram
Martinsville, N.J.
March 1940–June 2007

Paula Ann Jameson
Arlington
February 1945–June 2007

Monroe Jamison Jr.
Abingdon
March 1955–July 2007

Roby G. Janney
Luray
April 1920–April 2007

Ann Perinchief Jarrell
Fredericksburg
April 1945–February 2007

John T. Ketcham
Bowie, Md.
February 1937–September 2006

Lewis A. Martin Jr.
Charlottesville
November 1924–July 2007

Michael Edward McKenzie
Arlington
January 1938–July 2007

Thomas Ransom Porter
Marshall
July 1950–May 2007

Gerald Milton Rubin
Northbrook, Ill.
October 1930–August 2006

Charles E. Sandeen
Largo, Fla.
November 1919–July 2007

Albert William Schlim
Newport News
December 1930–March 2007

Lynne Ann Smith
Vienna
July 1956–May 2007

Harold Kenneth St. Clair
Covington
October 1941–February 2007

Raymond H. Strople
Portsmouth
October 1940–August 2006

Valerie Szabo
McLean
March 1956–June 2007

Catherine Blackwell Tackney Talbott
Baltimore, Md.
May 1947–July 2007

Peter Augustus Theodore
Blacksburg
April 1954–July 2007

Thomas Daniel Taylor
Warsaw
September 1934–July 2007

Larry M. Topping
Poquoson
April 1932–June 2007

Lynn Vandenburgh
Minneapolis, Minn.
October 1961–May 2007

John Stanley Warner
Tucson, Ariz.
February 1919–April 2006

Elizabeth Curtin Weimar
Washington, D.C.
June 1957–June 2007

Edward R. Willcox Jr.
Norfolk
April 1928–May 2007

Richard Alan Williamson
Williamsburg
September 1943–June 2007

Virginia Law Foundation Pauses Grants

by Dawn Chase

The Virginia Law Foundation is reviewing its grant-making process to try to give more impact to its philanthropy.

During the review, the foundation will not accept new grant requests for fiscal 2009, but it will continue to provide up to $200,000 for continued support of existing projects, such as law student public service internships and certain legal services programs.

Part of that money also will be available to the Virginia State Bar and The Virginia Bar Association, subject to approval by the foundation board.

John L. Walker III of Richmond, president of the VLF board, refers to the one-year suspension of the new-grant process as a "quiet bridge cycle … which would give us time to formulate and to focus on the means by which we can become more impactive grant makers."

The VLF was founded in 1974 and from 1983 until 1995 administered Virginia's Interest on Lawyers' Trust Accounts Program. Since 1984, it has awarded more than $22 million in grants for law-related projects. The board annually allocates 5 percent of the market value of its investment portfolio—which now totals about $13 million—to grants and operations.

Despite the size and largess of the VLF, which ranks nationally among the most generous in bar foundation giving, board members feel it has taken a passive approach characterized by "fragmented support to a variety of causes," said VLF Executive Director Sharon K. Tatum, quoting a letter sent last summer to bar and community leaders by former VLF President John A.C. Keith.

Walker said, "In the past, we have supported a large number of grants. We came to the realization that, while our support was very important, … our impact had become somewhat diluted because we were making so many grants."

Grants awarded for fiscal 2008 totaled $425,000. They range from $660 for translation of "Children and Divorce" pamphlets into Spanish for the VSB's Family Law Section to $72,000 for public interest internships by students at Virginia law schools. The thirty-six grants were chosen from seventy-six requests for funds totaling $1.11 million. The list of awarded grants is available at www.virginialawfoundation.org/currentgrantawards.htm.

The bridge cycle was proposed at a retreat in April, when board members focused on the foundation's core mission and values. They rewrote the VLF mission statement to make it sleeker. It now states: "The Virginia Law Foundation promotes through philanthropy the rule of law, access to justice, and law-related education."

The VLF subsequently surveyed legal and nonprofit entities to seek input that would help it "redirect or refocus our philanthropy," said Jeanne F. Franklin of Alexandria, chair of the transition committee that is overseeing the project.

In the coming months, the committee will create ways for the VLF to:

- Identify and encourage development of innovative projects. The VLF hopes to more clearly articulate "what we'd like to see accomplished in service of the specific prongs of our mission," Franklin said.
- Develop a system for vetting proposals.
- Adopt best practices for projecting and measuring the impact of projects.
- Open the foundation to collaborations that will give more impact to its philanthropy.

Any new procedures or goals will go into effect for fiscal 2010.

Walker declined to predict what direction the foundation will take. However, a hint may be found in the VLF's first partnership, which it recently established with the Virginia Holocaust Museum in Richmond.

The foundation has pledged $100,000 toward the museum's half-million-dollar project to construct a replica of the Nuremberg, Germany, courtroom where leaders of Nazi Germany were tried after World War II. The VLF will appoint two members to the commission that oversees the exhibit and the educational programs that will accompany it.

As part of the partnership, the museum will bestow an annual "Virginia Law Foundation and Virginia Holocaust Museum Rule of Law Award"—a promotion of the VLF name in a place visited by members of the general public from throughout the world.

The VLF board decided to support the exhibit because the Nuremburg trials were a testament to the Rule of Law. "At its core, the VLF recognizes and appreciates the Rule of Law as an essential cornerstone of any stable society," Walker said.

In another project that takes the VLF in a new direction, the foundation established the Oliver White Hill Internship Program, which provides funds annually to support a summer intern to work in civil rights and civil liberties law. The Oliver White Hill Foundation will automatically receive the interest earned in this fund annually—another first.

In fiscal 2009, while the VLF transition committee does its work, the foundation will provide about $200,000 in ongoing

Grants *continued on page 37*

Want to Become a CLE Provider?—Here's How

by Dawn Chase

How does a lawyer become a continuing legal education presenter?

The answer, according to people who hire CLE teachers, is by developing practice experience, networking, building a strong résumé, and asking.

Once you've gotten a teaching engagement, give your class something to take home and use to better represent their clients, and you might be invited back.

Practice Experience
Experience is the first requirement that CLE providers look for, said Gary L. Wilburt, executive director of Virginia CLE. Would-be teachers should have five to ten years' experience under their belt. Young lawyers "may be real smart folks," but "smart" doesn't substitute for years spent developing a practice area, he said.

Networking
Join and participate in practice sections—through the Virginia State Bar, The Virginia Bar Association or specialty bars such as the Virginia Association of Defense Attorneys or the Virginia Trial Lawyers Association. "Get involved in the section's CLE development—they basically plan the seminar and they recruit speakers," said Charles Crank, business manager of Virginia CLE, where "most speakers are referred to us from other attorneys who have been presenters for us."

Virginia CLE vets potential teachers by asking others in the same practice area, "Do you know them? What is their reputation? Have they spoken before?" If someone on the panel that's putting together a seminar has served on a committee with you, you might be recommended.

Résumé
The following could be included on your CLE résumé:

- Legal topics in which you have demonstrable expertise
- Sections and associations in which you are active
- Public speaking experiences with schools, bar speakers bureaus or other programs
- Faculty experience
- Service on the bench
- Articles or books you have written or co-written
- A list of significant cases you have been involved with, broken out by bench and jury trials
- Previous CLE teaching experience, including in-house training

When compiling your list, gauge whether you're ready for your target audience. For example, Jack L. Harris, executive director of the VTLA, said, "Our programs are not training grounds where people can be a presenter fifty times before they become a good one." Quality is a bread-and-butter issue for providers. "Our reputation rests on the quality of programs," Wilburt said.

Asking
If you're part of a panel putting together a seminar, make your interest in being a presenter known. Tell other members of your section about an area of law you'd like to share your insights about.

You can even express your interest by cold-calling CLE providers, or the boards and committees that put panels together. "I take those e-mails and I take those phone calls," Wilburt said. "We do take people who just call us. We plug them into a discussion with members of a section that is selecting a panel."

"We're always looking for good speakers," Harris said.

Give Your Audience Something to Use
"The best teachers are people who love standing before a group and helping them understand particular subjects," Harris said.

"You can't have someone up there theorizing. You've got to know whether it works or doesn't work." The ideal presenter "can improve a lawyer's ability to represent clients. That's critical."

Harris also encourages speakers to provide examples so the audience can visualize how the case went—either through demonstrative evidence or by telling stories. Focus not on how knowledgeable you are, but on how you won your case and how your audience might be able to do it.

What's in It for You?
Most CLE presenters, unless they have a niche practice for which few speakers are available, don't get paid, although some travel and preparation expenses might be covered. "It's hard to carve out exceptions," Wilburt said.

But presenters do receive payback in CLE credits for themselves—the number of hours you present, plus four times the hours, up to a cap of eight hours, for preparation.

It gives lawyers an opportunity to get away from the practice for awhile.

If you speak with some frequency, it can enhance your referral base for clients, as well as generate more speaking engagements.

Finally, you earn a reputation for giving back to the profession. "The legal profession is rather unique," Wilburt said. "There is a general altruistic motive" in educating fellow lawyers. Also, "There are lawyers who really like to teach—it's different from practicing."

Edmonds Receives NABE's Top Award

Thomas A. Edmonds, executive director of the Virginia State Bar, holds the National Association of Bar Executives Award for Outstanding Bar Leadership. The award is the highest bestowed by NABE, which Edmonds served as president. With him in August during the NABE Annual Meeting in San Francisco are (l–r) VSB President Howard W. Martin Jr., Edmonds's wife Martha, and Allan B. Head, executive director of the North Carolina Bar Association, who served as NABE president in fiscal 2007.

Local and Specialty Bar Association Elections

The Alexandria Bar Association
Eugene Andrew Burcher, President
Gwena Kay Tibbits, President-elect
Barbara Sattler Anderson, Secretary
Alexander Hugo Blankingship III, Treasurer
Seth Mark Guggenheim, Director
Kathleen Maureen Uston, Director
Sarah Elizabeth McElveen, Director

Asian Pacific American Bar Association of Virginia, Inc.
Su Yong Min, President
Michael Lee Chang, Vice President
Ann Nguyen Luu, Secretary
John Minh Tran, Treasurer

Campbell County Bar Association
George William Nolley, President
Frank Austin Wright Jr., Vice President
Paul Austin McAndrews, Treasurer

Charlottesville-Albemarle Bar Association
Donald Ronald Morin, President
John Walter Zunka, President-elect
Marc Andrew Peritz, Secretary-Treasurer

Greater Peninsula Women's Bar Association
Dywona Lynette Vantree, President
Frank Alwin Edgar Jr., Secretary
Charles Edwin Powell, Treasurer
Stephen Ashton Hudgins, At-Large Board Member
Lois Norma Manes, At-Large Board Member
Polly Chong, At-Large Board Member

Local Government Attorneys of Virginia
Jan Leslie Proctor, President
Joseph L. Howard Jr., Vice President
Rhysa Griffith South, Secretary-Treasurer

Metropolitan Richmond Women's Bar Association
Leslie Ann Takacs Haley, President
Tracy H. Spencer, President-elect
Vanessa Laverne Jones, Vice President
Jayne Ann Pemberton, Secretary
Ashley Beuttel Macko, Treasurer

Norfolk & Portsmouth Bar Association
Donald Charles Schultz, President
John Lockley Deal, President-elect
Jeffrey Lance Stredler, Secretary
David Wayne Lannetti, Treasurer
Andrew Richard Fox, YLS Chair

Portsmouth Bar Association
Christine Dung Nguyen Piersall, President
Elizabeth Bartlett Fitzwater, President-elect
Anetra Leta Robinson, Secretary

Richmond Chapter, Old Dominion Bar Association
Courtney Martin Malveaux, President
Carlos LeMont Hopkins, Vice President
Yvette Anita Ayala, Secretary
Robert Edley Jr., Treasurer

Roanoke Bar Association
George Alfred McLean Jr., President
Mark Kenneth Cathey, President-elect
Francis Hewitt Casola, Secretary-Treasurer

CALL FOR NOMINATIONS

Family Law Service Award

Lewis F. Powell Jr. Pro Bono Award

Lifetime Achievement Award

Oliver White Hill Law Student Pro Bono Award

R. Edwin Burnette Jr. Young Lawyer of the Year Award

Tradition of Excellence Award

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

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If you are interested in:

- electronic filing and record keeping
- privacy and public access issues
- technology and law practice management
- the intersection of technology and ethics

Join Chair Sharon Nelson and the committee when it meets electronically and personally at the VSB Annual Meeting each June. Contact her at **snelson@senseient.com** if you would like to become a committee member.

Virginia's Eastern District Court Has New Clerk

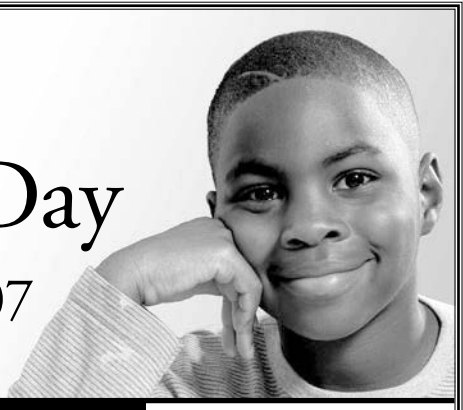
G. Fernando Galindo has been named clerk of court for the U.S. District Court for the Eastern District of Virginia. He supervises clerks offices at courts in Alexandria, Richmond, Newport News, and Norfolk, which is his home office. The appointment was effective April 23, 2007.

Galindo has worked for the federal court system for sixteen years. He joined the Eastern District of Virginia in 2004 as chief deputy clerk and has served as acting clerk since April 2006, when Elizabeth H. Paret moved to the U.S. Court of Appeal for the District of Columbia Circuit as circuit executive.

Galindo previously was chief deputy clerk for the U.S. Court of Appeals for the Second Circuit in New York, and he has held positions with the U.S. district courts for the Southern District of New York and the District of Columbia. He holds a degree in psychology from St. Mary's College in Maryland.

National Adoption Day

November 17, 2007



For more information, visit NationalAdoptionDay.org

Alexandria
Date: Sat., Nov. 17, 2007, 10:00 AM, Alexandria Circuit Court
Contact: Amel Logan, Alexandria Dept. of Social Services, 703-519-3318 x 212
Note: By Invitation Only. Please contact Amel Logan if you are interested in attending.

Campbell County
Date: Sat., Nov. 17, 2007
Campbell County Circuit Court
Contact: Carol Anne Booth, Campbell Co. Dept. of Social Services, 434-332-9753

Fredericksburg
Date: Sat., Nov. 17, 2007
Fredericksburg Circuit Court
Contact: Joan Millward, Clerk, Fredericksburg JDR District Court, 540-372-1072

Hampton
Date: Sat., Nov. 17, 2007, 11:00 AM, Hampton Marina Hotel
Contact: Shirley Bowie, Hampton Dept. of Social Services, 757-727-1965

Newport News
Date: Sat., Oct. 27, 2007
Contact: Carole Sutton, Newport News Dept. of Social Services, 757-926-6113

New River Valley
Date: Sat., Nov. 17, 2007, 10:30 AM, Skate Center, Christiansburg, VA
Contact: Depaul Family Services, 540-381-1848

Prince William
Date: Sat., Nov. 17, 2007, 10:00 AM, Prince William Circuit Court. Contact: Addie Whitaker, Prince William Dept. of Social Services, 703-792-7500

Richmond
Date: Sat., Nov. 17, 2007, 10:00 AM, Oliver Hill Courts Building. Contact: Diane Ickes - 804-646-2918 or Diane.Ickes@RichmondGov.com
Note: By Invitation Only. Please contact Diane Ickes if you are interested in attending.

Roanoke County
Date: Sat., Nov. 17, 2007
Roanoke County Circuit Court
Contact: Ellen Weinman, 540-389-3825

Lawyers Slow to Request Fee-Cap Waivers

Waivers Sought in Only 208 of Almost 43,500 Vouchers

by Dawn Chase

Court-appointed attorneys have been slow to apply for new waivers of Virginia's fee caps in criminal cases pursuant to *Code of Virginia* § 19.2-163. Hundreds of attorneys also have used the wrong form, or filled the right form out incorrectly, when they applied for payment—whether they requested a waiver or not.

In the first quarter since July 1, when the waivers went into effect, only 208 waiver requests were among the almost 43,500 vouchers for criminal court-appointed work processed by the Supreme Court of Virginia's Office of the Executive Secretary, which administers the waiver program. Of the 208 applied for, 189 were granted some or all of the amounts requested. Of $40,805 in waiver fees requested, $34,464 was granted.

The response is frustrating to those who have worked for many years to convince the General Assembly to pay higher fees to court-appointed attorneys. Supporters of higher fees hope that the $8.2 million in waivers approved by the 2007 legislature lays a foundation for eliminating the fee caps altogether.

However, unless court-appointed attorneys accurately complete the revised FORM DC-40, LIST OF ALLOWANCES, and report actual time spent in and out of court per charge, the Supreme Court of Virginia will not have the data, and the supporters will not be able to prove their premise that lawyers are putting in many more hours than they are paid for when defending the poor.

Many more fee vouchers—almost 4,350—were returned to lawyers because of errors that included:

- Lawyers used the old form that is no longer in effect instead of using the revised FORM DC-40, LIST OF ALLOWANCES (REVISED 7/07).
- Many attorneys did not indicate the actual time spent in and out of court for each charge.
- Three hundred failed to include their Virginia State Bar member numbers—a requirement on the new form.

Because the returned vouchers were not processed, the Court does not know if they included waiver requests.

Betsy Wells Edwards of the Virginia Fair Trial Project is working to identify the reasons lawyers do not seem to be taking the opportunity to increase their pay for court-appointed clients.

"Getting waivers approved and partially funded was a major public policy breakthrough," Edwards said. "The legislature will be closely monitoring the requests for and paying out of waivers.

"It is very disheartening and potentially damaging for so few court-appointed lawyers to have sought waivers. If we are to succeed in upcoming sessions in getting more money for indigent defense in Virginia, it is imperative that court-appointed lawyers apply for waivers."

One reason for the slow response might be that filling out the forms, which requires recording actual time spent per charge, is a cultural change for lawyers who had become used to receiving the same low fee regardless of the time and effort required.

Edwards said she plans to work with criminal bar associations and other groups to present training sessions for possible continuing legal education credit.

The pressure to get accurate numbers is building: The Supreme Court must report this fall on the early response, to General Assembly money committees. Proponents would like to use this and future quarterly reports from the Court to document the need for continued or additional funding during the 2008 and future General Assembly sessions. To do so, accurate and complete reporting by attorneys on the DC-40 is essential.

As lawyers adjust to the new required level of documentation, Court officials emphasize that timekeeping need not be complicated. For example, if a lawyer has a client who faces three charges, calculating time per charge can be as simple as dividing the total time spent on the client by three and listing that amount for each charge.

Changes are being made to clarify certain areas of the DC-40. The Office of the Executive Secretary anticipates the edited forms will be available after the first of the year.

Links to more information, forms, and a training video for waivers is posted on the Virginia's Judicial System Web site, **www.courts.state.va.us**.

Fee-Cap Waivers for Court-Appointed Counsel:

Some Frequently Asked Questions

Compiled by Betsy Wells Edwards

What are fee-cap waivers?

A new fee-cap waiver system was established by the 2007 Virginia General Assembly pursuant to amendments to *Virginia Code* § 19.2-163. The amendments went into effect on July 1, 2007. Two levels of additional compensation beyond the fee caps may be awarded through these waivers.

The first level is called the *supplemental statutory waiver amount.* In general district and juvenile and domestic relations district courts, the current fee cap for a single misdemeanor or delinquency charge is $120. This may be waived up to $120 in additional compensation under a first-level waiver. Single felony charges now capped at $445 can be waived up to an additional $155, and other felonies currently capped at $1,235 can be waived up to an additional $850. These first-level felony waiver amounts are available in circuit court and when the felony case is resolved in district court.

The second level, available in all courts and all cases, is called the *fee for additional waiver.* This additional fee allowance is unlimited and depends on the circumstances of the case.

How do I apply?

Any court-appointed attorney in private practice who has represented an indigent defendant in a criminal matter is eligible to apply for a waiver. The attorney must complete a FORM DC-40(A) APPLICATION AND AUTHORIZATION FOR WAIVER OF FEE CAP (7/07) for each charge for which a waiver is being sought, along with the FORM DC-40 LIST OF ALLOWANCES (REVISED 7/07) and submit these forms with a time sheet to the court in which the case is concluded. The revised FORM DC-40 (not the old DC-40) must be completed whether the attorney is applying for a waiver or just seeking compensation as a court-appointed attorney within the statutory fee cap.

What if the case began before July 1, 2007?

If the case concluded on or after July 1, 2007, the court-appointed attorney may apply for a waiver. The "trial/service date," which is the date the case concluded, is the date that will determine whether the attorney is eligible for a waiver.

I was appointed by the J&DR court in a civil matter. Am I eligible to apply for a waiver?

No. Only attorneys appointed to represent indigent adults or juveniles in criminal matters may apply for the waivers.

What is the difference between the two levels of waivers?

The first level, or *supplemental statutory waiver amount,* is limited to the amount specified in the statute for the charge; it must be approved only by the presiding judge. The second-level waiver, or *fee for additional waiver,* is not limited in amount and must be approved by both the presiding judge and the chief judge.

When I request a first-level waiver, can the judge award less than the amount specified in the statute?

Yes, *Code of Virginia* § 19.2-163 provides that the court may award "up to" the additional amounts specified for the first-level waivers.

When do I apply for a waiver, and when will I be paid?

Once the case is concluded, you must submit the required paperwork within thirty days to the court in which the case was concluded. Some courts prefer that vouchers be submitted the day a case is ended. Each DC-40 form should be processed within thirty days of the local court certifying the authorized amount for payment and submitting it to the Office of the Executive Secretary of the Supreme Court.

What criteria will the court use in deciding whether to grant my request for a waiver?

In determining whether to grant either waiver, the court will consider the effort expended by the attorney, the time reasonably necessary for the representation, the novelty and difficulty of the issues, or other circumstances. A list of examples of "exceptional case" factors that courts should consider when granting a waiver is available on the Virginia's Judicial System Web site—**www.courts.state.va.us**.

Can I appeal if my request for a waiver is denied?

No. There is no appeal process available if an application for waiver of fee cap is denied.

Do I have to complete an attorney time sheet for every charge?

No. An attorney time sheet is required only when a request for waiver is submitted. It must be attached to the DC-40 and DC-40(A) when they are submitted to the court. However, the code requires that actual hours worked per charge be documented on the DC-40 (REVISED 7/07) form, regardless of whether a waiver is requested. If a waiver is not sought, no time sheet need be attached.

Why do I have to specify actual hours spent per charge on the DC-40 form?

This information is essential for the Court to collect the data to accurately project the cost of and justify any future funding increase to or elimination of the statutory fee caps.

What first-level waiver amount is applicable if I am representing a juvenile charged with an offense that would be a felony if committed by an adult?

The first-level waiver amount for all delinquency cases in J&DR is $120.

Betsy Wells Edwards is executive director of the Virginia Fair Trial Project. For more information, go to the Virginia's Judicial System Web site, **www.courts.state.va.us**, and the article "How to Request a Fee-Cap Waiver," in the June/July 2007 issue of Virginia Lawyer. Questions should be addressed to the clerk of the court in which the case was concluded.

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- Pull up the full text of the case.
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Have more questions?

Call Fastcase at 1-866-773-2782 (8 AM to 8 PM ET), or view the Fastcase Tutorial at **Help | Tutorials**.

The Fastcase Legal Research System is a free member benefit of the Virginia State Bar, and includes a comprehensive, national online law library. To log on, visit the state bar Web site at **www.vsb.org** *and click the link for Fastcase.*

"Benchmarks" is a new feature that lists judges who are going onto and leaving the bench in Virginia state courts. The information was provided by the Supreme Court of Virginia's human resources department. The following reflects judicial changes from January 1, 2007, through August 3, 2007.

Supreme Court

Elizabeth B. Lacy retired effective August 31.

Court of Appeals

James W. Benton Jr. retired effective October 1.

Circuit Courts

4th Circuit: **Karen J. Burrell** of Norfolk succeeded **Lydia Calvert Taylor**, effective July 1.

15th Circuit: **Gordon F. Willis** of Stafford succeeded **H. Harrison Braxton Jr.**, effective April 1. **David H. Beck** of Spotsylvania succeeded **Ann Hunter Simpson**, effective July 1.

16th Circuit: **Cheryl V. Higgins** of Charlottesville succeeded **Paul M. Peatross Jr.**, effective April 1.

19th Circuit: **Charles J. Maxfield** of Fairfax succeeded **M. Langhorne Keith**, effective February 1.

29th Circuit: **Keary R. Williams** of Buchanan announced his retirement, effective December 31.

30th Circuit: **Joseph R. Carico** of Wise succeeded **Birg E. Sergent,** effective February 1.

General District Courts

5th District: **Robert B. Edwards** of Isle of Wight announced his retirement, effective December 31.

6th District: **Stephen D. Bloom** of Emporia was appointed pro tempore to replace **Gammiel G. Poindexter**, effective October 1.

9th District: **Michael E. McGinty** of Yorktown succeeded **Merlin M. Renne**, effective July 1.

11th District: **Paul W. Cella** of Powhatan succeeded **Garland L. Bigley**, effective August 1.

15th District: **Sarah L. Deneke** of Stafford succeeded **Gordon F. Willis**, effective April 1.

18th District: **E. Robert Giammittorio** of Alexandria announced his retirement, effective October 31.

23rd District: **Julian H. Raney Jr.** of Salem announced his retirement, effective December 31.

24th District: **F. Patrick Yeatts** of Rustburg succeeded **Jesse C. Crumbley III,** effective April 1.

30th District: **Chadwick S. Dotson** of Wise succeeded **Joseph R. Carico**, effective February 1.

Juvenile and Domestic Relations District Courts

4th District: **Lauri D. Hogge** of Norfolk succeeded **Joan C. Skeppstrom**, effective April 1.

6th District: **Carson E. Saunders Jr.** of Emporia succeeded **Charles A. Perkinson Jr.**, effective June 1.

8th District: **Nelson T. Durden** of Hampton retired December 31, 2006.

13th District: **Richard B. Campbell** of Richmond succeeded **C.N. Jenkins Jr.,** effective April 1. **Kimberly B. O'Donnell** of Richmond resigned effective August 31.

15th District: **Phillip U. Fines** of Spotsylvania succeeded **David H. Beck**, effective July 1.

19th District: **Helen Leiner** of Fairfax succeeded **Charles J. Maxfield**, effective February 1. … **Janine M. Saxe** was appointed pro tempore to succeed **Michael J. Valentine**, effective July 1.

20th District: **J. Gregory Ashwell** of Warrenton succeeded **H. Dudley Payne Jr.,** effective May 1.

28th District: **Florence A. Powell** of Abingdon was appointed pro tempore to replace **Eugene E. Lohman**, effective April 24.

32nd District: **Croxton Gordon** of Accomac succeeded **B. Bryan Milbourne**, effective April 1.

The Book Thief: The True Crimes of Daniel Spiegelman

Travis McDade
Praeger (Westport, 2006)
2006
$49.95

Reviewed by Lyn Warmath

The Book Thief has it all—the author combines features of a mystery, thriller, whodunit, and manhunt under one cover. The narrative reads like a crime novel, but it is the nonfiction account of one thief's exploits in the lucrative field of stolen rare maps and manuscripts. Readers encounter daring exploits, thefts, and vandalism of the worst sorts, an international hunt, discovery, the criminal justice system at work, escape attempts, courtroom drama, lawyering both inept and skillful, sentencing battles, and . . . a happy(?) ending. Well, an ending anyway.

The international cast of characters includes law enforcement officers, FBI detectives, attorneys, diplomats, librarians, and rare-book experts. The author (himself an attorney, librarian, bibliophile, teacher, and rare-books scholar) knows his audience well and taps into his readers' wide ranges of interests.

For six months in the mid-1990s, Daniel Spiegelman breached security at Columbia University's Rare Books and Manuscripts Library by accomplishing the unthinkable. A forgery expert in his earlier criminal life, Spiegelman tapped into a security gap no one in the library could have foreseen. For months on end he raided the library's vaults without detection after he discovered an abandoned dumbwaiter—a book lift—that had been only partially sealed years earlier. In late-night raids Spiegelman repeatedly maneuvered through caged areas, poured himself into the unlit, child-size elevator shaft, and shinnied six floors to reach his targets—feats that still confound those involved in the investigations.

Spiegelman was fuzzy on which targets to steal. He had no background in rare books and manuscripts. He knew the materials at his fingertips were valuable, but he had no idea just how astonishingly valuable they were. So he took what was most attractive and colorful to him—not necessarily the most valuable items. This particular library theft was so devastating because Spiegelman looted a priceless collection of maps, including its "crown jewel," a Bleau atlas. From the Bleau and other atlases, he razored out individual pages, thereby destroying forever any hope of recovery and repair to the books' former condition.

What makes this narrative different from earlier real-life library crime-and-punishment cases is the judge, who questioned the adequacy of then-applicable federal sentencing guidelines to fit the crime. Judge Lewis Kaplan's handling of Spiegelman's sentencing hearings is remarkable for the unprecedentedly heavy weight he gave to the prosecutors' arguments that Spiegelman robbed not only the library community of monetary value, but also society and researchers of important research materials that can never be re-created or replaced. The author cites case after case where earlier courts had handed out trifling punishments (probation, suspended sentences, home detention) to book thieves. The author's research revealed that "Even when a thief is caught red-handed, he is treated as less a major criminal than a person who simply had overdue library books . . . despite thefts that involve great sums of money, breaking and entering, and transporting goods across state lines." In this case, Judge Kaplan, of the U.S. District Court for New York's Southern District, was willing to buck sentencing trends in New York and followed his own path.

Ordinarily, we might expect litigators to be among those most interested in the unfolding story of federal sentencing guidelines that played a major role in this book. In the author's telling, however, sentencing guidelines become riveting reading for nonlitigators as well, as opposing attorneys wrangled over the original intent of the guidelines and the judge weighed the options for a harsher sentence than the guidelines called for.

(Careful readers may notice lapses in the publisher's copy editing, but any distractions from the carefully researched account and engaging writing are easy to overlook.)

Lyn Warmath is director of information resources at Hirschler Fleischer PC in Richmond. She received her bachelor's degree from Boston University and her master's in library and information science from Catholic University of America.

Civil Fines Controversy Proves Value of General Practitioner Representation

by Charles E. Adams

As we moved past the Fourth of July holiday into the dog days of summer, many new laws passed by the General Assembly quietly took effect. Their ramifications to the citizens of the commonwealth are largely unknown and rarely have been discussed outside a small group of niche practitioners.

In stark contrast to those quiet statutes stand the new civil penalties for traffic offenses. The penalties have already generated cacophonous debates between groups that include seasoned members of the bar and high school students who recently received their driving permits.

The governor and sponsors of the legislation that established these penalties argue that the fines allow Virginia to collect sufficient revenues to pay for transportation costs without raising taxes. Civil rights attorneys contend that the law violates the equal protection clause of the Constitution.

Advocates for parents who receive child support and representatives of the Virginia Division of Child Support Enforcement worry that these fines will hamper obligor parents from making their payments. Poverty law and legal aid attorneys express concerns that the statute will disproportionately impact the poor.

On August 2, Judge Archer L. Yeatts III of Henrico General District Court, followed the next day by Judge Thomas O. Jones of Richmond General District, found the new law unconstitutional.

The maelstrom of public opinion that surrounds the civil penalties issue reinforces my belief as a general practitioner that no part of life or law operates in a vacuum. With the present statutory scheme, one cannot separate the "criminal" behavior from the "civil" penalty when considering whether all individuals driving on the roads of the commonwealth receive the same treatment for the same crime.

Furthermore, this law will most likely have an impact far beyond the realm of traffic and criminal law, as people of limited means who receive a civil penalty often will find it extremely difficult to meet their other lawful financial obligations.

Consequently, I believe attorneys knowledgeable in many aspects of the law—the guilt or innocence of criminal law, the intricacies of a determination for child support, the concept of equal protection argued under a constitutional challenge—can definitely provide the most comprehensive representation for people charged with traffic offenses after July 1, 2007.

Although niche practitioners certainly have their places in today's legal environment, the civil-fines controversy only reinforces the truism that a well-rounded general practice attorney often serves the client best by making judgments that consider all aspects of the legal situation. ⚖

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Celebrity Client, Celebrity Lawyer?

by David J. Marquardt and David D. Masterman

In 2007, the number of news stories about celebrities and their encounters with the legal system seems higher than ever. Whether it's Paris Hilton's jail term, Britney Spears's custody case, or Michael Vick's dog-fighting charges, the news is full of such stories. Lewis "Scooter" Libby and others in the political arena are no strangers to courtrooms.

Of course, this only feels like a new development because the names have changed and the legal entanglements are different. O.J. Simpson's infamous legal troubles occurred fewer than fifteen years ago. Tom Cruise and Nicole Kidman filled tabloids with their divorce, as did Donald and Ivana Trump, while many more years ago, Lee Marvin and palimony were the fare of celebrity stories. Locally, Marv Albert's bizarre sexual assault charges in the Arlington County Circuit Court, the sniper cases of Lee Boyd Malvo and John Allen Muhammad in the Fairfax County Circuit Court, and former Redskins quarterback Joe Theismann's divorce show that high-profile legal matters occur in Virginia, not just in New York or California.

Gloria Allred and F. Lee Bailey have had a steady diet of celebrity clients. With the clients came frequent media attention, courthouse-step interviews, appearances on news programs and book deals. Attorneys can become celebrities.

When representing the famous and speaking for media consumption, attorneys are not free to do as they please. Attorneys are not publicists for their clients. Publicists in many cases answer to no higher authority than the celebrities. Publicists sometimes lie about their clients. Publicists make the celebrities look good in good times and appear better in bad times.

Attorneys' ethical standards impose responsibilities to the client and to the judicial system. When involved in a celebrity representation, an attorney must not put his own appearance, advancement or fame first. Professional obligations cannot be compromised simply because of a client's stardom, wealth, or notoriety.

An attorney's primary obligation is to the client. Rules of ethics[1] demand that attorneys must respect clients' privacy and interests. Rule 1.1 of the Virginia Rules of Professional Conduct requires attorneys to provide competent representation.

Rule 1.3 requires reasonable diligence. However, Rule 1.6 provides the backdrop by which the major issue in representing celebrity clients evolves. "A lawyer *shall not* reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, *except for disclosures that are impliedly authorized in order to carry out the representation*." VA. Sup. Ct. R. Pt. 6, Sec. II, 1.6 [*emphasis added*]

As a result of these rules, with each communication the attorney must weigh the client's interest in maintaining the attorney-client privilege versus disclosure that aids the attorney in carrying out the representation.

When representing the celebrity client, however, attorneys may be tempted to self-promote at the expense of an ethical requirement, despite the risk of discipline by the bar. After all, the opportunity to gain publicity for an attorney's practice may never be more evident than during high-profile cases. How the attorney chooses to deal with this temptation helps shape the direction that representation will take. Although self-promotion is a choice to be made with any client or case, the result of this choice is amplified exponentially with celebrity clients, due to their stature in the public eye.

Attorneys must scrutinize every decision more closely when dealing with the rich and famous, because each of those decisions is being looked at under the public microscope. Furthermore, attorneys must look after their staffs to ensure that they are operating with the same prudence.

There are some instances, however, in which an attorney has an obligation to keep the public informed in addition to protecting the client's privacy. This is primarily the case in matters involving prosecutors and other criminal attorneys, but also relevant to many civil actions involving well-known parties. Attorneys again must weigh what facts the public needs to know against what communications the client needs protected.

There are three potential rules the lawyer should be exceptionally wary of when dealing with a high-profile case:

Rule 3.4 of the Virginia Rules of Professional Conduct relates to fairness to the opposing party and counsel. Prohibited actions contained in this rule include tampering, withholding or falsifying relevant evidence, secreting witnesses, or advising a client to disregard rules or procedures.

Rule 3.6 requires that a "lawyer participating in or associated with the investigation or the prosecution or the defense of a criminal matter that may be tried by a jury shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication that the lawyer knows, or should know, will

have a substantial likelihood of interfering with the fairness of the trial by a jury." VA. Sup. Ct. R. Pt. 6, Sec. II, 3.6 This rule reflects the crux of the dilemma facing attorneys in a public trial.

Rule 3.8 defines additional responsibilities of a prosecutor, ranging from filing and maintaining only meritorious charges, making timely disclosures, and not knowingly taking advantage of unrepresented defendants.

These rules describe clear violations even in the most publicized cases. The Duke University "rape case," as it came to be known, is a model of how a prosecutor should not deal with the media or the case. Prosecutor Michael Nifong did not lose his license to practice law because of how he dealt with the media, but because he made mistakes with evidence by being public early in the case.

On occasion, what lawyers may communicate to the public is restricted. A judge may issue a gag order that limits what may be stated or cuts off communication between the attorneys and the media.

Alternatively, a judge may further privatize the case by limiting media coverage. The judiciary has responsibilities to the parties involved in these high-profile cases and to the public that wants to know every detail. In many cases, these responsibilities conflict. The recent Michael Vick case in the Eastern District of Virginia illustrates how the court could have stepped in to limit the accused's exposure. Notwithstanding his admission of guilt, which makes any argument toward his innocence irrelevant, Vick was found guilty by many well before he agreed to the plea bargain that decided his fate.

Due to the despicable nature of the crimes and Vick's celebrity, media coverage of the case became larger than the case itself. Media representatives discussed every angle of every fact (and even some that weren't). Further compounding the issue were the federal prosecutors and Vick's defense attorneys, who were not shy about addressing the media. The result was a metaphorical nationwide trial where every person with access to any news source was a juror. It is easy to see how media coverage and attorney exuberance could become a major issue during a high-profile prosecution, even prior to court proceedings.

Judges, as officers of the court, may be thrust into the spotlight while presiding over a case involving a celebrity party. As both judges and former lawyers, they must be prepared to accept the responsibilities that come with their position in the case. These responsibilities are defined in the attorney Rules of Professional Conduct and in the Canons of Judicial Conduct for the State of Virginia.

The conduct of Judge Lance Ito during the O.J. Simpson murder trial provides a prime example of the hazards that judges face in such cases. Some analysts and fellow judges criticized Ito's handling of the case, saying that he let the trial turn into a media circus. His refusal to enter a gag order led to many interesting episodes that involved the attorneys and the media outside of the courtroom.

The nature of attorney fame also tends to show that the game is not worth the candle for the vast majority of lawyers. The American Bar Association has more than four hundred thousand members; the total number of licensed attorneys in the U.S. is considerably higher. The percentage of lawyers who are commentators for CNN or Fox News as a result of having handled high-profile cases is tiny. Andy Warhol's "fifteen minutes of fame" is the most the majority of attorneys will get. This undercuts the public's faith and trust in attorneys, merely for a twenty-second sound bite on the local news.

Some celebrity clients prefer not to air their legal woes in the press. They hire attorneys who are not known for their interviews with the press. These clients want their traffic matter, divorce or contract action handled competently and quietly. Attorneys must respect this choice. If a client wishes even the fact of representation to be maintained as a confidence, the attorney must respect that wish. Staff should be trained so that if a caller asks, "Do you represent _____?", the individual will respond immediately that the firm does not confirm or deny its representation of any clients.

So what does all of this mean? There is nothing unusual about an attorney finding the representation of a celebrity client and the ensuing whirlwind of attention to be exciting. The temptation to make a repu-

Celebrity *continued on page 37*

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David D. Masterman is a principal in the law firm he founded in 2003, Masterman & Graham PC in McLean. Masterman has practiced law for twenty-three years after graduating from the University of Virginia Law School in 1984. His focus is family law. He has served as the chair of the Board of Governors for the Family Law Section of the Virginia State Bar, and now serves on the Board of Governors of the General Practice Section. He is a member of the American Academy of Matrimonial Lawyers.

Don't Let Your Granted Appeal Get 'Appendicitis'

by Elwood Earl Sanders Jr.

Rule 5A:25 and its Supreme Court counterpart, Rule 5:32, both of the Virginia Rules of Court, require an appendix in every granted state court criminal appeal.[1] This is a little-noticed but crucial area of appellate practice in Virginia. An appendix is simply a compendium of the pertinent parts of the record for the benefits of the appellate court and the parties. And, much like the appendix in our bodies, it requires little attention until there is a problem.

All appendices in Virginia begin with the designation. A designation of the contents of the appendix is the way the parties notify the court (and each other) of the pertinent items that must be in the appendix. The designation must be filed within a certain time after the appeal is granted (or, in all appeals of right, when the record is received in Richmond). Those time frames are:

- Ten days by agreement, or
- Fifteen days for appellant, and
- Ten days after that for appellee if no agreed designation.

These dates run from the date of the certificate of appeal or the record being received in the office of the clerk of the Court of Appeals. In the Supreme Court, the date of the certificate that the appeal has been granted (unless it is a capital case, in which case there is a special rule about the designation[2]) is the date the designation deadline starts to run.

An appellant's sole designation gets five additional days to file, to be followed by ten days for the appellee. If the appellee does not file a designation, he or she may lose the right to say what is in the appendix. That may be fatal to the appeal. The designation is not a place for "gotcha" litigation. The appellant should designate all germane material, both favorable and unfavorable, from the record for the appendix. One copy of the designation is to be filed with the clerk of the appellate court and one copy to each party's opposing counsel. The mailing rule[3] applies to the designation, the brief, and the appendix.

The appendix is crucial to an appeal; the appeal will be dismissed without a timely filed appendix. The appellant has the duty to prepare the appendix and file it along with the brief. The appendix must be a separate volume in the Supreme Court,[4] but that is not necessary in the Court of Appeals in the exceedingly rare event the appendix and brief do not exceed the thirty-five page requirement for the brief.[5] That deadline in granted appeals in both appellate courts is the same as the brief: forty days from the granting of appeal or the record being filed in the clerk's office of the appellate court in Richmond.[6]

The appendix in the Court of Appeals must have the " . . . basic initial pleading (as finally amended)" as well as the final order.[7] The Supreme Court of Virginia requires not only the final order in the trial court but also the orders in the Court of Appeals (if there are any) and any opinions of the appeals or circuit court, as well as the assignments of error or cross-error as granted.[8] All other germane exhibits and transcript excerpts from the record also are included.[9] The documents in all appendices must be in chronological order; the courts will generally allow a division into pleadings, transcripts and exhibits, but within each the materials must be chronological. The appendix must have a table of contents that states each item.[10] I recommend that exhibits be identified briefly in the table. The appendix cover must be copied or printed on red paper.[11]

Several rules govern transcripts or excerpts of transcripts in the appendix. The type must be twelve-point or larger.[12] The table of contents of the appendix must state the name of every witness in the transcript.[13] If it is a partial transcript, it must have the witnesses' names on the top of each page and state whether their questioning was direct, cross-examination, redirect, or other.[14] Breaks in a paper or transcript must be noted with asterisks.[15] The copy quality of the pages must be as clear as possible.

As to more substantive items, the Court of Appeals is not treating the requirement of a designation to be filed on time as fatal to an appeal, as long as the appellant includes all germane items in the appendix.[16] The Supreme Court takes a similar position. The Court in *Wilcox v. Lauterbach Elec. Co.*[17] held that:

> Failure to comply with Rule 5:32(d), however, is not ground for dismissal if an appellant includes in his appendix everything germane to the disposition of his appeal and the appellee has not been prejudiced by the failure.[18]

There are two elements for this safe harbor to be effective. Everything germane has to be in the appendix and the appellee may not be prejudiced by the omission. If the safe harbor of *Wilcox* is not followed—e.g., if the appendix does not have all the parts of the record germane to the appeal, the cases apply a stricter rule. The Supreme Court of Virginia held in *Thrasher v. Burlage.*[19]

> In *Vaughan v. Johnson and Miller*, 215 Va. 323, 324, 210 S.E.2d 139, 140 (1974), we held that "(t)he requirements of Rules 5:36 and 5:37[20] are mandatory", and since the appellant

> failed to designate the transcript, parts of which were essential to adjudication of the issues posed by the errors assigned, we dismissed the writ.[21]

While there is some room to distinguish procedurally the older and stricter cases, the best practice is to file the designation within the time limits. Otherwise, the joint appendix needs to have every document and portion of the transcript germane to the assignment(s) of error or question presented granted by or argued at the court.[22] A late designation also can prejudice opposing counsel by denying him the ten days to file an appellee's designation.[23] If the designation is late, consult with opposing counsel and file a designation—preferably a joint designation—as soon as possible.

Ominously, a line of cases, one published, holds that the court does not have to consider any record item not in the appendix.[24] The *Patterson* court held that "Because the appendix filed in this case does not contain parts of the record that are essential to the resolution of the issue before us, we will not decide the issue."[25] The *Patterson* case admittedly is not clear if the item was in the record, but since it was not in the appendix it was not considered.[26] Both Virginia appellate courts have a rule that states that the court may consider parts of the record not in the appendix.[27] This rule was not discussed in *Patterson*.[28] If one gets in the "I did not place it in the appendix—oops" situation (especially at the Supreme Court), at least try those rule citations.[29] But the *Patterson* case should impel every appellate advocate to ensure that the appendix is correct and complete when filed. If a printing company is used, counsel for the appellant must inspect the approval copy of the appendix to ensure all items designated by both parties are in the appendix and to make sure nothing germane was omitted. An appellant may place additional material from the record in the appendix, if germane, even if not designated, without permission of the court or the opposing party.[30]

There is a countervailing problem: placing too much in an appendix. If the issue is sufficiency of the evidence in a jury trial, the voir dire is probably not germane.[31] There is a risk that introducing some of a hearing or trial out of context may confuse the court. However, the rules do allow for cost sharing and sanctions if designated items turn out not to be germane.

The appellee can be asked to pay costs: "If the appellant considers that parts of the record designated by the appellee for inclusion are unnecessary for the determination of the issue presented, he may so advise the appellee, and the appellee shall advance the cost of including such parts."[32] The court also may allocate costs for unnecessary parts of an appendix to the party designating such portions.[33] If you are certain a document, exhibit or part of a transcript is not germane to any question presented, do not designate it or place it in the appendix.

To avoid your appeal getting "appendicitis," the rules governing the preparation of the appendix must be reviewed and observed. All germane items must be designated timely. The appendix must be prepared according to proper format and inspected to make sure all designated items are included. Of course, file timely. It is the fervent hope of this author that all appeals be decided on their merits.[34] ⚖

Endnotes:

1 This article is limited in scope to state court appeals in Virginia.

2 *See* Rule 5:22(b). Capital appeals have become a specialized area of criminal law; these are similarities and differences from the ordinary criminal appeal. Since a capital appeal is an appeal of right, the designation has both the assignments of error to be raised and the appendix contents. *Id.* The appellant's designation must be filed within ten days of the date the record arrives to the clerk of the Supreme Court of Virginia in Richmond. The attorney general then has ten days to file. See Rule 5:22(a), (b). The appendix is prepared and filed with the opening brief. Rules 5:31 and 5:32 otherwise [except part (d)] apply to the capital appendix. Rule 5:22(b).

3 *See* Rule 5:5(b); 5A:3(c). The mailing rule summarized is that the original can be mailed certified or registered mail to the clerk of the appropriate appellate court on or before the date it is due to be filed. I recommend that, if counsel uses this rule, its provisions be reviewed each time.

4 Rule 5:32(b).

5 Rule 5A:25(b). Otherwise the appendix must be a separate volume. *Id.*

6 In a pretrial appeal by the commonwealth, the brief (and presumably the appendix) is due twenty-five days after granting. *See* Va. Code 19.2-404. The order in these cases and the pertinent statutes should be reviewed carefully. Occasionally in cases of rehearing en banc, there are additional appendices due in a certain time. *See* Rule 5A:35.

7 Rule 5A:25(c). Any opinion of the trial court is to be included. Rule 5A:25(c)(2).

8 Rule 5:32(c). I would take this opportunity to remind all the readers of this article that the Supreme Court of Virginia requires assignments of error in every petition for appeal or the appeal will be dismissed. In cases arising from the Court of Appeals, the error assigned must be the error of the Court of Appeals, not the trial court. *See* Rule 5:17(c). In certain cases where appeal is final, including traffic and misdemeanor cases where no jail time (actual or suspended) is imposed, a jurisdictional statement is required stating that the case has a substantial constitutional question and/or a matter of significant precedential value. *Id.* These are irredeemable defaults and cannot be corrected after the due date.

9 Rule 5:32(c)(3) and (6); Rule 5A:25(c)(3) and (6).

10 Rule 5:32(e); Rule 5A:25(e).

11 Rule 5:31 and Rule 5A:24.

12 Rule 5:32(a).

13 Rule 5:32(e); Rule 5A:25(e).

14 Rule 5:32(c)(5); Rule 5A:25(c)(5). The "witnessing" rule only applies to partial transcripts. However, whether partial or entire, the table of contents of the appendix must state the name of each witness.

15 Rule 5:32(e); Rule 5A:25(e).

16 *See Teague & Little Inc. v. James J. Balchunis*, Record No. 2270-94-1 (Va. App., Unpub., July 25, 1995) (Court of Appeals held that if everything germane to the appeal is cited in the joint appendix, there is no prejudice arising from the failure

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to designate the appendix). I would note that one of the requirements of the appendix unique to the Supreme Court of Virginia is reference to the assignment or assignments of error granted. *See* Rule 5:32(c)(7).

17 233 Va. 416, 420, 357, S.E.2d 187 (1987).

18 233 Va. at 420, 357 S.E.2d at 199. *Accord Leonard v. Arnold*, 218 Va. 210, 211, 237 S.E.2d at 97 (1977); *Rhoten v. United Virginia Bank*, 221 Va. 222, 225, 269 S.E.2d 781, 783 (1980).

19 219 Va. 1007, 254 S.E.2d 64 (1979); *Accord Andrews v. Cahoon, 196 Va. 790, 796, 86 S.E.2d 173 (1955)(filing of* the designation is "mandatory and jurisdictional").

20 These are not the presently numbered rules.

21 *Thrasher v. Burlage*, 219 Va. 1007, 1009, 254 S.E.2d 64, 65 (1979).

22 *See Wilcox v. Lauterbach Elec. Co*., 233 Va. 416, 420, 357 S.E.2d 187, 199 (1987).

23 *See Thrasher v. Burlage*, 219 Va. 1007, 1009, 254 S.E.2d 64, 65 (1979)("Thrasher's delay denied Burlage the 10 days Rule 5:36 allows for cross-designation.").

24 *See Patterson v. City of Richmond*, 39 Va. App. 706, 576 S.E.2d 759 (2003).

25 39 Va. App. at 717, 576 S.E.2d at 765.

26 *See Id. Accord Shaffer v. Shaffer*, No. 1945-03-2 (Va. App., Unpub., June 8, 2004)("Moreover, even were we to accept his position, husband has failed to provide an adequate appendix from which we can conclude that wife failed to file a written motion requesting modification of the protective order. Consequently, we will not consider this argument on appeal."). The Shaffer Court of Appeals also cited Rule 5A:25 and the Patterson case. *Also see Lamberton v. Lamberton*, No. 1713-03-4 (Va. App., Unpub., September 14, 2004)(same holding as Shaffer; Patterson cited with approval).

27 Rule 5A:25(h), 5:32(h).

28 *See* 39 Va. App. at 717, 576 S.E.2d at 765. There is a helpful, albeit unpublished, case that references the rules about considering other parts of the record as justification (and distinguishes Patterson) for considering items not in the appendix. *Lewis v. Culpeper County Dept. of Social Services*, Rec. No. 2575-06-4, (Va. App. 7/31/2007).

29 I would try first moving the appellate court for leave to file an amended or supplemental appendix. A well-timed call to the Clerk's Office is helpful.

30 *See* Rule 5A:25(d); Rule 5:32(d).

31 I do agree that when appellate counsel receives the case and has to decide what issues to appeal, the entire transcript must be ordered and filed with the trial court. But that entire transcript does not have to be designated in the appendix.

32 Rule 5:32(f); Rule 5A:25(f).

33 Rule 5:32(g); 5A:25(g). Only the final pleading is to be designated (unless otherwise germane) and parts concerning damages only if damages are the issue in the case. *Id. In Metrocall of Delaware, Inc. v. Continental Cellular Corp*., 246 Va. 365, 437 S.E.2d 189 (1993), the Supreme Court was severe in its criticism of the preparation of the appendix, finding that two of the appellees refused to use discretion to prevent unnecessary materials from reaching the appendix. *See* 246 Va. at 376-77, 437 S.E.2d at 195 ("…these appellees were responsible for the printing in the appendices of such irrelevant items as proofs of service of process, proceedings dealing with disqualification of counsel, correspondence relating to designations of trial judges to preside in the matters, notices of hearings, pages of miscellaneous correspondence, subpoenas duces tecum, balance sheets, lease and license agreements, and a multi-page application with amendment for a permit to establish a cellular system, filed with the Federal Communications Commission."). The appellees were taxed the cost of the immaterial portions. This is another way to lose integrity with the court.

34 I finally recommend that those attorneys with interest in appellate practice join the Appellate Practice Subcommittee of the Litigation Section of the Virginia State Bar.

Celebrity *continued from page 33*

tation on the case or otherwise garner individual fame will always be present.

Careful attorneys fulfill their ethical obligations to their profession while realizing the marketing benefits of a well-advertised job done well. But sloppy attorneys can lose both their client and their profession. ⚖

Endnote:

1 While this article speaks of rules of ethics in terms of the Virginia Rules of Professional Conduct, it is important to note that Virginia's rules are modeled after the American Bar Association's Model Rules of Professional Conduct, as are the majority of other states' rules. To date, only New York, California, and Maine do not have rules of professional conduct that adhere to the ABA's Model Rules. Therefore the rules of ethics that are applicable to attorneys licensed in Virginia are also applicable to attorneys licensed in forty-seven of the fifty states.

The Perception Issue

by Daniel L. Gray, 2007–08 Young Lawyers Conference President

In my relatively brief life as a lawyer I've noticed we spend a lot of time wringing our hands over how the public views us. The general sentiment seems to be that we're held in low esteem and that we should be doing something about it. Every few years, someone launches a campaign to return us to our rightful place among the professions held in high regard—whatever those might be. These campaigns typically extol some worthy acts, but do such campaigns change hearts and minds? I expect not.

I've been involved in bar work for about ten years now, and it's given me some insight into this perception issue. I've noticed that the lawyers who don't spend a lot of time hand-wringing are generally the ones working to bring honor to the profession—although that isn't their primary goal. Their actions remind me of the old saw about marriage: stop looking so desperate and true love will find you.

I wish the desperate among us could see what goes on within the bar. The hand-wringing would stop.

One of my pleasures as president of the Young Lawyers Conference is the invitation to sit in on Virginia State Bar Council and Executive Committee meetings. The dedication that your colleagues bring to their endeavors—and the level of discourse on the truly important issues we face—are inspiring. I'll cite as the most recent example the fine work of Carter Glass IV and his Judicial Nominations Committee, which vetted fifteen candidates for recent Supreme Court of Virginia and Virginia Court of Appeals vacancies. Sitting in on Mr. Glass's presentation to the committee, you'd be struck by the time required of his committee, the painstaking efforts to provide every candidate a fair review, and all participants' appreciation of their roles in the judicial selection process.

If you'd be impressed by the executive committee, you'd be astonished by the Young Lawyers Conference. My immediate predecessor, Maya M. Eckstein, said at our annual meeting that the work of the conference carries on "in spite of its president." She's right about that. The president is the signal man waving the freight train by.

The young lawyers who serve as members of our board and committees and as our circuit representatives have boundless energy, dedication, and imagination. Sarah L. Petcher, Hugo R. Valverde, and their Immigrant Outreach Committee have been so successful with programs designed to assist this much-maligned populace that Ms. Petcher and Mr. Valverde were invited to address a statewide conference of juvenile and domestic relations and general district court judges.

Christopher E. Gatewood and his successor, Meghan M. Cloud, crank out the YLC's publication, *Docket Call*, which has won first place in the American Bar Association periodicals category every year in recent memory.

Jennifer L. McClellan, our president-elect (and a delegate in the Virginia General Assembly), dreams up diversity programs such as the Oliver Hill/Samuel Tucker Law Institute as easily as she dashes off her shopping list.

You'd be so impressed by your colleagues in the conference, who work so hard just because they love to do what they do. Not a hand-wringer among them.

To my Young Lawyers Conference member readers, I'd urge you not to rend your clothes and wail over the decline of our profession's esteem. We'll keep you too busy to worry about any of that. To my older readers, I say take heart. There are still a good many lawyers out there working to make you proud.

Experience Worth Honoring

by George W. Shanks, 2007–08 Senior Lawyers Conference President

Being a senior lawyer confers distinctions. Principal among them is recognition by the bar that you have attained fifty-five years of age. While some might view this as unworthy of special note, the alternative is sufficiently stark by contrast to make for a moment of quiet rejoicing. The unfortunate corollary is that more often you find yourself saying the final goodbye to your colleagues.

And the distinction also is one of honor. Longevity tends to be equated with experience. In this profession, experience worth honoring can only be acquired by years of diligence and perseverance. Experience is a commodity to be savored and shared. While it can be imparted on an individual basis, lawyer by lawyer, town by town, county by county around the commonwealth, that is an inefficient system to share this most precious of gifts: the gift of knowledge.

The Senior Lawyers Conference is more than just a group of congenial lawyers and judges, more than just a collection of knees and hips and shoulders that don't work quite right, more indeed than the sum of its parts. The Senior Lawyers Conference is the group within the bar that, more than any other, can focus its voice and its resources for the benefit of the bar and the community it serves.

Consider what the Senior Lawyers Conference and its members are doing: The ***Senior Citizens Handbook*** is the most requested publication of the Virginia State Bar. It is a collection of articles and discussions of the areas of the law that affect our graying society. Topics include Social Security, Supplemental Security Income, pensions, veterans benefits, Railroad Retirement Act benefits, the Food Stamp Program, federal tax relief, and real estate tax issues for the elderly. The book offers information on health care, housing, planning for the future, and protection of legal rights that affect finding a lawyer, consumer issues, age and disability discrimination, grandparental visitation and custody, elder abuse, and scams that target the elderly. Finally, the publication includes links to governmental and private agencies and organizations that assist the elderly with their needs.

The *Senior Citizens Handbook* not only serves the public. It belongs in each law office as a desk-side reference for the needs of every client who is a senior citizen, who contemplates becoming a senior citizen or who has family or friends who are senior citizens. It is a publication for all of us.

The Senior Lawyers Conference has not been content simply to publish this premier book. The conference also has developed a **Senior Citizens Law Day Program**. Conceived and spearheaded in 2005 by William T. Wilson of Covington, the program began with a picture-perfect demonstration by the Allegheny-Bath-Highland Bar Association and has since been replicated around the state. Using a panel presentation format, lawyers, judges, attorneys, and agency experts give in-depth information and answer attendees' questions. The program is excellent for any local bar that wants to put on a community-service project. And it is perfectly scripted by a blueprint drawn up by Bill Wilson.

But that's not all the conference is doing. The Senior Lawyers Conference can proudly claim the Herculean efforts of Frank Overton Brown Jr., the first to chair the conference. He is now the SLC's Web site and newsletter editor, and he has single-handedly made **planning for lawyer disability** a hot topic within the bar. Brown's program, "Protecting Your and Your Client's Interests in the Event of Your Disability, Death or Other Disaster," is available on request for presentation to local bars around the state. This is quintessential Frank Brown: Give him a call and he will happily schedule a continuing legal education-approved program for your local bar association, complete with computer-ready forms and a smooth delivery style that is as easy on the ears as it is on your wallet. He embodies what the Senior Lawyers Conference is all about: experience, collegiality, education, and professionalism.

And we do more: See our Web site—www.vsb.org/slc/index.html—for **more publications**: *Health Care Decision Making, Wills in Virginia,* and *Guardianship and Conservatorship Proceedings Regarding Incapacitated Persons*. The last, a twenty-nine-page downloadable booklet, contains all the basics a general practitioner requires to assist clients with the appointment of a guardian or conservator for a disabled adult.

Not bad for a collection of senior lawyers, proving once again that there is no substitute for experience.

TECHNOLOGY NOTES

Metadata: The Hidden Truth

by W. Everett Lupton

"I know it when I see it" is a famous line from U.S. Supreme Court Justice Potter Stewart's opinion in the *Jacobellis v. Ohio* pornography case. Unfortunately, many attorneys take the opposite approach when dealing with metadata: they *don't* see it, so they don't know it even exists. Unfortunately, what you don't know can really hurt you.

What is metadata? In short, metadata is data about data.[1] It is structured information about an electronic file that is usually invisible when looking at the document on screen or the printed hard copy. Metadata describes the characteristics, origins, usage, and validity of other electronic files. The following example is an illustration of metadata: "23510" is merely a number (i.e., data). By itself, it has no meaning. But when 23510 is assigned a name of "office ZIP code," "office ZIP code" is metadata about data (i.e., "23510").[2] Metadata also has become an important component of discovery following the most recent Federal Rules of Civil Procedure changes.

Here is why attorneys should be wary of metadata that is transferred with electronic documents.

Bad Day Scenario No.1: Jack represents a personal injury client. At the request of Oscar, opposing counsel, Jack decides to be courteous and e-mails a copy of the Demand to Oscar to forward to the insurance company. Jack forgets to clean, or "scrub" the metadata from his document. Oscar receives the demand and, using the metadata reading features of his word processor, discovers that Jack's demand originally asked for $156,000 instead of the current $250,000. By being courteous but ignorant about metadata, Jack may have seriously undermined his ability to negotiate.

Bad Day Scenario No. 2: Betty e-mails a copy of her Interrogatories to plaintiff's counsel Niles as a courtesy so that Niles does not have to retype all of the questions. If Betty did not scrub her e-file, all of her changes can be read by Niles. Betty's thoughts and changes in her discovery questions may be an important insight to Niles in crafting his responses or developing trial strategy.

Application metadata is information not visible on the printed page, but embedded in the document file, remaining with the file if it is copied. Most versions of Microsoft Office and Corel WordPerfect Office embed many different types of metadata in word processing, spreadsheets and other applications, including e-mail. Metadata that is usually present in Microsoft Office files include comments, all document revisions, versions, title, subject, revision number, last print date, creation date, last save time, and total editing time.[3]

Once attorneys understand it, they may wonder if the discovery of metadata is ethical or proper. The American Bar Association advises that attorneys have no ethical duty to not review or use metadata in word processing documents, e-mail, and other electronic documents sent by and received from adverse parties or their counsel.[4] Some state bars, such as Alabama and Florida, have taken contrary positions, finding such conduct to be unethical. Recently, the District of Columbia Bar has issued an opinion that seems to find it unethical if receiving counsel has "actual knowledge" that metadata was inadvertently sent.[5] As of yet, there are no Virginia or North Carolina case law or ethics opinions that apply to "metadata mining."

How do you avoid serious troubles such as those Jack and Betty encountered? First, you can just send all documents via fax or postal mail, avoid e-mail altogether. This approach is somewhat drastic and draconic in today's legal world.

Another option is to scrub your electronic documents of most metadata. The latest versions of Microsoft Office and Corel WordPerfect Office have features that can remove most compromising metadata from a document.[6]

Ways to Avoid Metadata Pitfalls:

- "Scrub" your document before saving it.
- Save your document as an image file (i.e., PDF or TIFF file).
- Avoid sending documents electronically to adverse parties.
- Institute a metadata office policy.

There are several commercial third-party scrubbing applications available that work well and are fairly easy to use. Microsoft and Corel also offer a detailed list of how to manually remove or minimize metadata from a document using older versions of their Office suites.[7] As a third option, you can convert a Word (.DOC) or WordPerfect (.WPD) file to an Adobe Acrobat Portable Document Format (.PDF) or Tagged Image Format File (.TIF). Both PDF and TIFF files are image files; the editable document is translated to a static photograph of the document.

Now you should have a working understanding of the dangers of metadata. In implementing specific office

Metadata *continued on page 42*

procedures, ask an information technology specialist for assistance in installing and using certain software. Finally, you might want to recommend this article to your clients to alert them to the dangers of metadata. ⚖

Those attorneys who decide to ignore the realities of metadata are holding a tiger by the tail.

Endnotes:

1 WIKIPEDIA, *Metadata* (*available at* **http://en.wikipedia.org/wiki/Metadata)**.

2 *See Id.*, *citing* William R. Durrell, DATA ADMINISTRATION: A PRACTICAL GUIDE TO DATA ADMINISTRATION (McGraw-Hill, 1985).

3 "Find and remove Metadata (hidden information) in your legal documents," Microsoft Corporation, 2007, *available at* **http://office .microsoft.com/en-us/word/HA010776461033.aspx**. (last visited Sept. 24, 2007).

4 ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 06-442 (August 5, 2006); *see also*, Robert L. Kelly, *The Tech Side of E-Discovery*, ABA BUS. L. TODAY, September/October 2007. Maryland has adopted the ABA approach.

5 *See* Sharon D. Nelson, Ride the Lightening, "Wacky, Wacky, Wacky: D.C. Speaks on Metadata Mining", **http://ridethelightning.senseient.com/2007/09/wacky-wacky-wac.html**, (Sept. 19, 2007, 14:56 EST).

6 MS Office 2007 has a feature called "Document Inspector" wizard to scrub documents of key metadata. Corel's WordPerfect X3 allows a user to save files without metadata. *See* Michael Gannotti, "Video: Stripping Metadata and Hidden Content from Office 2007 Documents," *Sharepoint+*, (Dec. 14, 2006), *available from* **http://sharepoint.microsoft.com**; *see also*, "Saving Documents without Metadata," *available from* **http://www.corel.com**.

7 *See* Knowledge Base Article No. 223396, How to Minimize Metadata in Office Documents, available at **http://support.microsoft.com** (last reviewed Jan. 24, 2007).

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ALPS CORNER

The Disaster That Can Result from Failure to Timely Report

by Mark Bassingthwaighte

Legal malpractice insurance carriers are often asked, "When must we report a claim?" We work with a few firms that overreport, but the problem is with firms that do not make timely reports. Late reporting is dangerous because coverage can be denied.

Cass v. American Guar. & Liab. Ins. Co. 2006 NY Slip Op 52169(U) underscores the significance of timely reporting.

In *Cass*, a New York attorney and his firm represented a client in a disability claim before a state workers' compensation board. The client's disability benefit was reduced and eventually suspended based upon the report of an orthopedist hired by the client's employer. The doctor was never cross-examined. Two experts hired by the firm failed to appear for hearings, and their testimony was precluded. In November 2005, it was determined that the client had no disability. The client sued for malpractice in March 2006, and the claim was immediately reported to the law firm's malpractice carrier. Two weeks later, the insurer denied coverage on the grounds that the claim was not reported in a timely fashion as required under the policy. The firm filed suit to challenge this decision.

The judge in this coverage dispute sided with the carrier. The judge ruled that allowing four months to pass with knowledge of circumstances that a reasonable attorney would view as likely to result in a claim was untimely as a matter of law. Further, the attorney's argument that the claim was meritless was rejected. The judge wrote, "The issue is not whether or not plaintiffs actually committed malpractice, or whether they subjectively believed there was no conduct which could give rise to a claim, but whether a reasonable attorney would have expected a malpractice claim under the circumstances."

So when should a potential claim be reported? It is not important whether a claim is viewed as frivolous or if a suit has been filed. One must comply with terms of the policy that require the insured to report upon becoming aware of any act, error, or omission that happens before the end of the policy period and that could reasonably be expected to give rise to a claim against the insured.

Don't procrastinate. There is no bright line in the real world. When in doubt, report. Not doing so can be disastrous.

For more about this issue, please see "To Report or Not To Report—That Is Not the Question," by Rob Tamelerat at **http://www.alpsnet.com/alps/Newsletter/DisplayNewsletter.aspx?id=25**.

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