Reply to Affirmative Action

Jonathan K. Stubbs wishes to ignite a spirited discussion of affirmative action, but his October 2008 *Virginia Lawyer* essay did not even make a prima facie case for affirmative action, let alone a compelling argument for it. He spends three-quarters of his essay chronicling the history of slavery and discrimination against African Americans and women. Those are facts we all know, or should know, but they do not answer the question of what, if anything, should be done in light of that history.

Stubbs first asks, "What is affirmative action?" but fails to answer the question. He says that affirmative action "entails policies designed to ensure that each person has the resources available to achieve his or her maximum potential." That sentence contains words but no concrete meaning. Stubbs then says the "deck is stacked" against the economically disadvantaged, and he bemoans the unfairness of an inner-city student with 1100 Student Achievement Tests losing out to a suburban student with 1200 SATs. One would thus infer that Stubbs's view of affirmative action is some sort of undefined help for African Americans, women, and poor people.

Then, just when we thought that being poor qualified one for affirmative action (along with race and gender), Stubbs ends this section of his essay stating only that "race and gender" must be considered in remedying discrimination. What happened to the poor folks? Then, just when we thought that affirmative action is some sort of undefined help for African Americans and women, Stubbs concludes his essay by referring to "affirmative action based on race, gender, or national origin." *National origin*? Where did that come from? And what happened to the poor folks? Stubbs's essay contains a total of zero facts relating to discrimination against people based on national origin, yet with a stroke of a pen he would advantage enormous numbers of people over others based on where they were born. (Stubbs not surprisingly neglects to tell us which national origins are to be favored, and how, and which are to be disfavored).

Clearly, one cannot begin a serious (let alone spirited) discussion of affirmative action until we know what that term means. When millions of people are casually included and excluded in the course of a four-page essay, it is a sign that that the term "affirmative action" cries out for more precise definition.

Stubbs makes the astounding assertion that America has "tens of millions of semiliterate, technologically unskilled workers and entrepreneurs." I don't believe that for one second. He has forty-nine footnotes, and the absence of a footnote for that whopper rings loud. Indeed, the presence of the word "entrepreneurs" in the sentence makes it positively nonsensical. Tens of millions of semiliterate, technologically unskilled *entrepreneurs*? This is not serious writing.

Stubbs's methodology is also wanting. When Stubbs tries to explain how affirmative action (whatever it means) would work, he suggests that disparity in SAT scores between urban and rural students — for example — merits deeper inquiry into the students' living circumstances to see who did the most with available resources. Yet how, exactly, will such a subjective and labor-intensive inquiry be accomplished? Most importantly, what standards will govern the inquiry? Will an inner-city student get X points for having skin of color A, Y points for being of gender B, and Z points for being poor? Will the children of rich, suburban Asian parents be triply punished for their unfortunate concatenation of parentage, prosperity, and domicile? And suppose a student is of mixed parentage, will she lose extra-credit points owing to having one parent of a disfavored race? A spirited discussion of affirmative action will surely arise when troublesome questions like these are meaningfully addressed.

Finally, and dizzyingly, Stubbs ends his piece by rhetorically pronouncing that "we can seriously consider discontinuing affirmative action" when "the President of the United States has a permanent suntan (Stubbs's regrettable phrase, which should have been edited) ... and when the overwhelming majority of Americans genuinely believe that having such a leader is not a big deal." By the time this letter is published that time will have come.

Robert A. Dybing
Richmond

Professor Stubbs's Response:

I am indebted to Robert A. Dybing for his thoughtful response to my essay. In reply to some of the main points that his letter raised, I offer the following comments.

Mr. Dybing's Claims

Basically, Mr. Dybing's letter claims that my essay fails to adequately define affirmative action and lacks facts supporting the need for affirmative action. For example, Mr. Dybing contends that insufficient evidence exists to support the argument that millions of Americans are semiliterate and technologically unskilled. Finally, he takes issue with national origin as a basis for affirmative action.

Revisiting Affirmative Action

My essay defines affirmative action as having several interrelated dimensions: (a) policies necessary so that each person can reach his or her maximum potential; (b) fair evaluation of each person's potential; and (c) availability of societal goods in a more representative fashion. This definition of affirmative action has both procedural and substantive components. From a procedural standpoint, we need national policies that foster the goal of maximizing each person's potential. Substantively, the policies need material and human resources to make them work.

Stubbs's response continued on page 10

Letters

Magazine Should Focus on Diversity of Ideas

Here's an idea for a future diversity story: Does the election of a black lawyer, who is married to another black lawyer, as president of the United States mean we can finally move beyond judging "diversity" in the legal profession simply by reference to skin color or gender? (As to the latter, more than 50 percent of the graduates of Virginia's law schools are female, and have been for more than ten years.)

For example, how about focusing on diversity of ideas and opinions — a far more Jeffersonian proposition than counting one as "diverse" merely by accident of birth? Month after month I receive *Virginia Lawyer*, full of articles written from, and promoting, a decidedly politically correct/left point of view, even though I suspect the overall membership of the Virginia State Bar is less liberal than the magazine's editorial preferences. It sure would be nice to broaden the scope of what is considered to be diverse beyond biology to other areas, such as thought, opinion, and ideas.

Brian S. Chilton
Mathews County

Joined the Cause

I was born in Virginia. I am a proud University of Richmond Spider and a graduate of the University of Virginia School of Law.

I have been in Florida in the law business since. I am still a member of the Virginia State Bar because my roots in my native state still run deep. I was so proud of your October issue of *Virginia Lawyer* and its report of the diversity initiatives. My thanks to VSB President Capsalis and all in the Virginia State Bar who are working on this. I have joined in the cause and really believe that our better angels await.

Roy C. Young
Tallahassee, Florida

Compliment and a Suggestion

Great Issue of *Virginia Lawyer*!

Also, I read the Executive Director's Message in the October issue of the magazine, and I have a suggestion to Karen Gould for a budget reduction. When I served on committees, I would get reimbursed for my mileage. Why not cut that out and have the people take off the mileage as a charitable deduction? I do that for other boards.

John M. Levy
Williamsburg

Karen A. Gould replies

Thanks for your compliment on Virginia Lawyer, *as well as for your suggestion on how to cut costs. I don't think we can impose such a budget restriction on our volunteers, but they are welcome not to put in for mileage reimbursement. Last year, we spent $120,000 on mileage reimbursement to our volunteers.*

Congratulations on Diversity Issue

I write to congratulate *Virginia Lawyer*, and in particular Assistant Editor Dawn Chase, on the October issue devoted to the Diversity Initiative, and recalling the efforts of Oliver Hill, Spottswood Robinson, and other great Virginians in overcoming Massive Resistance by resort to the courts. This issue is a valuable contribution to our history, and the bar should take measures to insure that it finds its way into every high school library as well as the public libraries throughout the commonwealth. Perhaps the Virginia Law Foundation can be called upon to support the further printing and distribution of this landmark issue.

Robert C. Nusbaum
Norfolk

Diversity Issue Praised

Kudos on the October 2008 issue regarding the Diversity Initiative, especially the work done by Assistant Editor Dawn Chase. There were so many interesting articles from so many different perspectives. It was an issue to be deservedly proud of.

Vincent Cardella
Falls Church

Stubbs's response continued from page 9

National policies such as what? One goal could be that every child in America will have a seat in a world-class school beginning in kindergarten. If as a nation we prioritized educating each American child to reach maximum potential instead of allowing resources to be determined by a fluke of history (who one's parents are, and on which side of town one is born), much of the conversation about affirmative action would be moot.

We don't live in that world. Our national priorities lie elsewhere. Accordingly, to decide who is qualified to attend a premier state university, for example, it is necessary to evaluate potential based on flexible criteria. Students across Virginia and America come from such a wide range of educational backgrounds that a mechanical one-size-fits-all approach — such as admission based primarily on test scores — simply benefits those who have the resources to prepare for the tests. Not every student has several thousand dollars to sink into Scholastic Aptitude Test courses, individual tutorials, preparatory manuals, and other test preparation resources.

Regarding how to evaluate potential, fortunately, the U.S. Supreme Court (in Justice Lewis F. Powell Jr.'s *Bakke*[1] opinion and

Stubbs's response continued on page 55

Contributors


Chase


Nelson


Barker


Palmer


Szymanski


Cromer


Rovner


Gernhardt

Dawn Chase, assistant editor of *Virginia Lawyer*, researches, writes, and edits stories for Virginia State Bar President Manuel A. Capsalis's diversity initiative. She has been a professional journalist for more than thirty years.

Ideas for future stories or comments on diversity coverage should be directed to her at (804) 775-0586 or chase@vsb.org.

Margaret A. Nelson has a criminal defense practice and is a certified guardian ad litem for children in Lynchburg. She is a former assistant commonwealth's attorney and senior public defender. She has a bachelor's degree from the College of William and Mary and a law degree from the University of Richmond. She serves on the Collateral Consequences Subcommittee of the American Bar Association's Criminal Justice Section and Virginia Association of Criminal Defense Lawyers Executive Committee, and she is co-vice chair of the Virginia State Bar Committee on Access to Legal Services.

A. Lisa Barker is the deputy county attorney for Hanover County and chair of the Environmental Law Section of the Virginia State Bar. She has an undergraduate degree from Mary Washington College of the University of Virginia and law degree from the University of North Carolina at Chapel Hill. Prior to joining the county attorney's office in 1980, she was in private practice.

Grady A. Palmer III is an assistant city attorney for the City of Chesapeake and has practiced in the land use field for five years. He has participated in proposals for industrial development involving air pollution. He has a bachelor's degree from the University of Georgia and a law degree from Regent University.

Tauna Szymanski is an associate in the Washington, D.C., and London offices of Hunton & Williams LLP. Her practice involves advising clients on climate change-related regulatory and transactional matters in the United States and the European Union, and under the Kyoto Protocol. She has worked on climate change issues since 1994. Szymanski earned a bachelor's degree in international relations and environmental studies from Carleton College and a law degree from Stanford University. She can be reached at tszymanski@hunton.com.

Mary V. Cromer received a law degree from Washington and Lee University in 2006. She served as a law clerk for Judge Glen E. Conrad in the U.S. District Court for the Western District of Virginia. After her clerkship, she worked as an associate attorney for the Southern Environmental Law Center in Charlottesville, where she focused on coal mining's impact on water quality in Virginia and Tennessee. She currently works for the Appalachian Citizens' Law Center in Whitesburg, Kentucky.

Nicole M. Rovner was appointed Virginia's deputy secretary of natural resources by Governor Timothy M. Kaine in January 2006. Previously, Rovner was director of government relations for The Nature Conservancy of Virginia. She was a staff attorney for six years at the Virginia Division of Legislative Services, where she served as counsel to five natural resources committees of the General Assembly. Rovner has a bachelor of science degree in wildlife science from Pennsylvania State University and a law degree from the University of Richmond.

Michele Gernhardt is a reference librarian in the Richmond office of Hunton & Williams LLP. She received her law degree from the University of Richmond and her master's in library and information science from the Catholic University of America. She is a member of the executive board of the Virginia Association of Law Libraries.

Correction

In the story "Faces of Diversity in the Virginia State Bar," page 26 of the October 2008 issue of *Virginia Lawyer*, the reporter misidentified the bar association in U.S. District Judge Gerald Bruce Lee's story of a racist comment at a meeting. The comment was made many years ago at the Alexandria Bar Association.

by Manuel A. Capsalis

In Search of the Lost Chord: Diversity and "Transcendent Ideals"

THIS COLUMN IS WRITTEN to offer an update on the work of the Virginia State Bar's Diversity Task Force, and to describe the proposals the task force is currently considering and which it is anticipated will be presented to Bar Council for deliberation. Even though the task force has much yet to do in finalizing the proposals discussed below, I believe it is important to present them for your reflection and to invite your comments.

The task force was created with the mission of fully assessing the state of diversity, or the relative lack thereof, in our profession and our judiciary. It was also charged with gathering information on, and creating a sustainable resource for all pipeline and ladder projects in Virginia and those that should be in our commonwealth. It was further charged with identifying and securing sources of grant funding and other financing potentially available for diversity-related projects.

The goals of the diversity task force include facilitating the promotion of diversity in bar leadership, the profession and the judiciary, as well as enhancing access to justice and the quality of legal representation. They also include focusing on the profession and judiciary of tomorrow — our youth — to better educate them to the Rule of Law, and to inspire them to become societal leaders and dedicated citizens.

These goals are daunting, to say the least, and will require a long term sustained effort. To accomplish this, I believe we need to rethink the way the bar historically has dealt with the issue of diversity. We need to consider a fundamental restructuring within the Virginia State Bar.

The task force has thoroughly reviewed and considered the past twenty-five years of diversity efforts within the bar and the legal profession. It is important to give recognition to the many wonderfully talented and dedicated individuals who committed much time and effort in the cause of diversity through the years. It is equally important to recognize how much more needs to be done.

The bar had a committee for many years beginning in the mid-1980s devoted to diversity. That committee was sunsetted. A Commission on Women and Minorities in the Legal Profession was created in 1987 and led by a cross-section of several legal organizations. The commission eventually faded away in the 1990s. There have been other fits and starts, and yet today there remains an institutional vacuum. With the notable exception over the last several years of the bar's Young Lawyers Conference, despite all the talent, all the efforts, and all the best of intentions, change has been slow and insufficient.

This begs the question of how any different result may be expected in what is now under consideration by the task force. What struck me in all these past efforts is the fact that nothing was ever successfully institutionalized within the bar structure to maximize our capabilities and focus our efforts. In particular, no system was put in place to collectively utilize the best efforts of the many specialty bar associations, themselves historically organized and dedicated to the cause of diversity.

I believe this must change if the Virginia State Bar is to succeed in this cause. On October 7, 2008, at a meeting of the task force in Richmond, I made three proposals, each of which both symbolically and substantively, I believe, will address what we hope to achieve:

1. That the enumerated powers of Bar Council, the governing body of the Virginia State Bar, be amended to specifically and expressly include the power, obligation and responsibility to promote diversity in our legal profession and judiciary.

2. That the bar's mission statement be amended. It currently states: "The mission of the Virginia State Bar is to regulate the legal profession of Virginia; to advance the availability and quality of legal services provided to the people of Virginia; and to assist in improving the legal profession and the judicial system."
I submit that the time is upon us to add the following: "and to promote diversity in the administration of justice and the practice of law." This phrase is taken from the newly revised mission statement of the State Bar of Texas, which recently instituted a comprehensive diversity initiative.

3. That we proceed with deliberate speed with the creation of a Diversity Conference, which would become the fourth conference within the bar,

> along with the Young Lawyers Conference, the Senior Lawyers Conference, and the Conference of Local Bar Associations (CLBA).

I am honored to tell you that each proposal was passed unanimously by the task force, and within the next few months will be put before council for deliberation, and I hope, implementation.

In particular, I need to highlight in this column what I believe is the meaning and significance of a Diversity Conference within the bar structure. The Diversity Conference would be similar in structure to the CLBA, in that it would be comprised of the specialty and local bar associations within the commonwealth. In other words, membership would flow through these specialty and local bars.

As a conference, its chair would have a seat on the Virginia State Bar Council and on the bar's Executive Committee, and I have proposed that at least three of the nine at-large seats on council (one of three allotted for each of three successive years), be earmarked for appointment through the Diversity Conference, ensuring that at least four seats on council would represent the conference.

By working through the specialty and local bars to secure the leadership of the Diversity Conference, we would attract the very best talents of these bar associations, and ensure they would always have a voice in the Virginia State Bar. Just as importantly, it would preserve the autonomy and integrity of these associations to allow them to function as they have historically desired.

The Diversity Conference, like the CLBA, would be project-oriented, and its potential would be enormous. It would work in coordination with the other conferences, and would be a part of the bar leadership. It would emphasize and project the best efforts of the member associations to the far reaches of Virginia.

Just as with the CLBA, the Diversity Conference's relevance and sustainability would be directly proportional to the continued relevance and sustainability of its member associations. Its core mission, simply put, would be to seek and to promote diversity of participation and equality of opportunity throughout our profession and judiciary, in the present and in the future. As reflected further below, the pursuit of participation and opportunity, in turn, would be with the goal of promoting a more profound diversity of ideas and action. This would include enhancing access to justice and improving the quality of legal representation.

IT HAS BEEN SAID that we need to precisely define diversity to create such a structure. I disagree. While diversity by necessity must not neglect consideration of race, heritage, and gender, for example, I believe that the term must be allowed to evolve. What was considered in the scope of diversity some twenty-five years ago is not what we may think of it today, and we cannot know what the next generation may believe essential in its definition. That is for a Diversity Conference to have the freedom to pursue. Diversity must be allowed to grow and evolve organically, free from preconceived notions.

It also has been expressed that with the recent presidential election, this country has now entered a post-racial era, and that there is no further need to focus on diversity. This is voiced in a letter to the editor in response to the October issue of *Virginia Lawyer* magazine:

> Here's an idea for a future diversity story: Does the election of a black lawyer, who is married to another black lawyer, as president of the United States mean we can finally move beyond judging "diversity" in the legal profession simply by reference to skin color or gender? ... [H]ow about focusing on diversity of ideas and opinions, a far more Jeffersonian proposition than counting one as "diverse" merely by accident of birth? ... It sure would be nice to broaden the scope of what is considered to be diverse beyond biology to other areas, such as thought, opinion, and ideas.

I absolutely agree with the need for diversity of "thought, opinion, and ideas." But I contend that the letter's author fails to understand a fundamental need for diversity. Diversity of ideas is itself inherently limited by the lack of diversity in those who are meaningfully able to put forth those ideas, and who are in a position to achieve them.

This is where the Diversity Conference would serve its most critical need. The conference must not be focused solely on diversity "by accident of birth," to borrow the author's terminology. Rather, it must be centrally committed to diversity of participation and opportunity, as well as diversity of ideas. The conference would have the potential to expand our horizons, not only in participation and opportunity, but also in thought and in action. It would forge a more potent constituency for access to justice and to quality legal representation, and would measurably assist our profession and judiciary.

By encouraging participation across the wide spectrum, and by promoting opportunity in areas and amongst those historically neglected or avoided, the Diversity Conference would offer the best opportunity this bar has ever had not only in promoting inclusion and equality of opportunity in our profession and judiciary, but just as importantly, in fundamentally enhancing our collective ability to achieve the stated Jeffersonian goal of diversity in "thought, opinions, and ideas."

This is particularly important as we more resolutely address the critical need to reach out to our youth, and seek to instill in them an understanding and appreciation of the Rule of Law. I am convinced that without diversity, whether it be of the person or in thought or idea, the Rule of Law is an incomplete promise to many in Virginia. The limitation of diversity, broadly defined, inherently limits our ability to

President continued on page 57

by Karen A. Gould

An Update from the Front

THE BAR STAFF AND VOLUNTEERS are constantly evaluating how we carry out the Virginia State Bar's mission. Here are some recent developments:

Multijurisdictional Practice Rules
The worldwide meltdown that followed the collapse of the U.S. economy demonstrates the interconnectedness of nations. Improvements in technology have tied Virginia to distant lands. The Virginia State Bar website gets hits from Australia, the United Kingdom, Canada, India, Brazil, Germany, Japan, and China.

The bar's Multijurisdictional Practice (MJP) Task Force, created in 2004, recognized this trend and the need to address the proliferation of foreign legal consultants and foreign lawyers who practice in Virginia. At the task force's recommendation, the Supreme Court of Virginia has approved the addition of a multijurisdictional practice rule to the Rules of Professional Conduct. When the rule goes into effect January 1, Virginia will join twenty-eight other states with a foreign legal consultant rule and more than thirty-five states with multijurisdictional practice rules. Two other MJP rules were awaiting final approval from the Court at press time.

The approved rule is the Foreign Legal Consultant (FLC) rule, Va. Ct. Rule 1A:7, found at http://www.courts.state.va.us/scv/amendments/2008_1031_1a7_rule.pdf. The FLC rule establishes certification of foreign legal consultants and carves out a limited scope of practice for them. An FLC will be permitted to render legal services only with regard to matters involving the law of the foreign nations in which the person is admitted to practice, or involving international law. The FLC cannot appear before any court and cannot hold himself or herself out as a member of the Virginia State Bar. FLCs will be certified by the Virginia Board of Bar Examiners, pay bar dues, and be subject to the ethics rules and discipline system in Virginia.

This new rule offers many benefits. The rule will

- provide unprecedented public protection by holding FLCs to the same standards as Virginia lawyers and by providing disciplinary oversight;
- give Virginia lawyers an opportunity to partner with FLCs in law firms, which enhances the marketability of a practice;
- enable corporations to hire FLCs in-house for legal advice based on the laws of the jurisdiction in which the FLC is licensed. This increases the efficiency of the many Virginia companies that conduct business worldwide.
- allow lawyers and the public to obtain basic information about FLCs, including contact information and public disciplinary history in Virginia, by contacting the VSB or consulting its website;
- open reciprocal relationships so that Virginia lawyers can receive similar courtesy when they are called to advise in other countries;
- assert Virginia's regulatory authority and self-governance of the legal profession in the changing landscape of multinational commerce.

The Supreme Court's approval is pending on two other changes recommended by the task force to address foreign attorneys who already have been practicing in Virginia. See http://www.vsb.org/site/regulation/proposed-amendments-to-rules-55-and-85-of-rules-of-professional-conduct. These changes are:

- Amend Rule 5.5 to allow foreign lawyers, in association with Virginia lawyers, to provide legal services in Virginia on a "temporary and occasional basis." (In this case, "foreign lawyers" are those licensed elsewhere in the U.S. or in another country, but not in Virginia.)
- Amend Rule 8.5 to extend the VSB's disciplinary authority over any lawyer who provides or holds out to provide legal services in Virginia, regardless of where the lawyer is licensed.

I hope that Virginia's lawyers will read these rules and ponder how to apply them to your practices and clients. We look forward to seeing the creativity and diversity that Virginia's legal community can create with this new flexibility.

Five-year Planning: MCLE, Member Services, and the Virginia Lawyer Directory

At the urging of President Manuel A. Capsalis, the VSB is reviewing how it carries out its mission and planning how it should operate during the next five years. One area that warrants a thorough look at its regulatory scheme is mandatory continuing legal education (MCLE). Some of the rules, such as requirements for a flat writing surface and reviewing videotapes with at least one other person, seem inconsistent in an environment where podcasts are being approved for course delivery. The MCLE Board has formed a study group to review the rules. The concept of mandatory education will remain, but major changes to the MCLE system may result.

Technology has made it possible for the bar to carry out its regulatory function more efficiently and economically. The ability to change addresses of record on the VSB website and to certify MCLE compliance are two examples of these improvements. Member response to the online certification of MCLE compliance has been overwhelmingly positive. Since the bar receives thousands of MCLE paper forms every week during October, the electronic option is a welcome development to staff, as well. We hope to continue to improve the VSB website. Progress is slow, however, due to financial limitations and the cumbersome process of making such changes in the state system.

Online member renewal has been postponed due to the merchant fees imposed by credit card companies. Given the bar's limited fiscal resources, it just is not possible for the bar to pay those fees, nor does it seem reasonable to pass those fees on to the members.

Another example of improving member services through technology is the Virginia Lawyer Directory, which will go live on the website in January 2009. The directory will list the VSB's active members and active corporate counsel members with their addresses and telephone numbers, unless a member chooses to opt out of inclusion. The directory will make it easier for the public and our members to find a lawyer, if they know the lawyer's last name. The bar staff fields phone calls on a regular basis from the public and other lawyers requesting contact information for our members.

The Virginia Lawyer Directory replaces the VSB's Member Directory, which since April 2007 has listed only attorneys who opted to be listed. Only 3,674 of 27,156 active members in good standing participated in that directory. The VSB received complaints from attorneys and the public who found the directory of limited use and misleading. Bars in twenty-nine other states provide comprehensive public attorney directories on-line.

Public Protection Update

Defalcations by dishonest lawyers give all lawyers a bad name. The shocking revelation of over $4 million dollars stolen from 315 clients by a Prince William lawyer has unfolded over the last year. President Capsalis convened a Public Protection Conclave in July 2008 to discuss what the bar is already doing and consider what more we should do to protect the public from dishonest lawyers. The VSB's primary mission is the protection of the public. Approximately half its resources are dedicated to that mission. The new bar counsel, Edward L. Davis, has vowed to improve the flow of cases through the system. The Task Force on Public Protection is studying whether to propose legislation to require payee notification of insurance settlements, among other remedies. The Standing Committee on Lawyer Discipline is considering whether to suggest that random trust account audits or less detailed reviews be added to the toolbox of the disciplinary system.

There is concern that, with the worsening economic situation, lawyers may turn to inappropriate use of client funds to resolve financial problems. The bar has a zero tolerance policy for such misuse.

If you have thoughts, suggestions, or concerns regarding these topics, please do not hesitate to email me at gould@vsb.org. If your voluntary bar would like me to present a one-hour continuing legal education program on the bar's disciplinary system, I would welcome the opportunity to do so.

Technology has made it possible for the bar to carry out its regulatory function more efficiently and economically.

Together at the Table: Why Diversity Is Important

Editor's Note: This article is second in a series about diversity in the Virginia bar.

by Dawn Chase

DAVID P. BAUGH AND GERALD T. ZERKIN have known each other for maybe thirty years. The best they can remember, they met when both served on an American Civil Liberties Union advisory board in the late 1970s.

As criminal defense lawyers, they have worked together representing codefendants, or as co-counsel. They find that their different styles — Zerkin, 59, meticulously prepared, and Baugh, 61, flashy and spontaneous — go well together, and the clients benefit. Now, as they pursue public defender jobs — Zerkin in the federal system, and Baugh handling Virginia death penalty cases — they touch base frequently. "If I can't find a library … I will call him anytime," Baugh said.

Their professional respect for each other grew into friendship. Baugh was best man at Zerkin's wedding and is a doting "uncle" to Zerkin's young daughter. When Baugh received the Virginia State Bar's Lewis F. Powell Jr. Pro Bono Award in 2006, Zerkin drove from Alexandria, where he was defending terrorist Zacarias Moussaoui, to attend the Charlottesville ceremony. "David is as passionate about the Constitution as anyone I know, and that's always inspirational," Zerkin said.

The fact that one man is black and the other is white seems hardly worth mentioning. They never discuss race, except as it affects a client. No diversity program brought the two together. Their relationship germinated in the diverse milieu of civil rights and civil liberties law and grew because of their shared passion for the rule of law.

The fruits include a rich legacy of cases and clients who prevailed against tough odds.

Zerkin (left) and Baugh

The Baugh-Zerkin relationship hits at the heart of what proponents of diversity in the legal profession want to see happen: Bring skilled people with different viewpoints into a room, give them a shared assignment, and watch the world become enriched.

"The legal profession has been slow, but we have finally figured out that if we want to compete, we have to have all hands on deck …"

Why Does It Matter?

Why should the Virginia State Bar be concerned with encouraging minorities and women to practice law, and to assume leadership roles in the profession? Many attorneys interviewed for this story answered with a pragmatic reason: the marketplace.

The 1998 Virginia State of the Judiciary Report projected that nearly one-third of Virginia's population growth between 1995 and 2025 will come from immigration. Other sources report that one-third of people who live in Northern Virginia — the commonwealth's most populous and diverse region — describe themselves as African American, Hispanic, Asian, or of mixed race.

Many multinational corporations have offices here. Many companies bid for contracts with governments and other businesses that place premiums on minority hiring.

George Peter Braxton, director of recruiting and diversity at Richmond-based LeClairRyan, said firms feel pressure from corporate clients to provide a legal team that includes women, people of color, and multilingual lawyers. "Clients marketing to people in general want lawyers to have better understanding of their base," he said.

The increasingly diverse community makes up today's juries. And all these citizens buy homes, get divorces, plan estates, defend against traffic tickets, draw up contracts, incorporate businesses, and litigate.

"The legal profession has been slow, but we have finally figured out that if we want to compete, we have to have all hands on deck," said U.S. DISTRICT JUDGE GERALD BRUCE LEE of Alexandria, who has worked throughout his legal career to invite minority youth and women into the profession.

"Virginia firms are competing for and securing national companies' business in a way that demonstrates we have a commitment to excellence and diversity," Lee said. The firms market their international offices and their minority and multilingual lawyers, and they project the message "we can win, because we can draw upon these assets."

Solo and small-firm lawyers in Northern Virginia have become skilled at finding clients by advertising to niche markets.

"Latinos and Asians have auto accidents, and they need access to the courts. Somebody's going to present their case," Lee said. "Maybe you want to miss out on the multimillion-dollar wrongful death case because you won't represent the trash worker who speaks Spanish. If that's where you are, great." But "somebody down the street" is poised to take that case.

"What you need to decide is, do you want to compete in the full marketplace?"

Lee described a young lawyer in Fairfax whose advertisements in a Spanish newspaper draw a steady stream of business. He handles three or four uncontested divorces a day at $500 each. "That's his business model. Maybe he's not Hunton & Williams, but he's doing fine."

With this widening spectrum of languages and cultures in our society comes new challenges for the courts and the VSB regulatory process. As policies and practices are developed to accommodate the changes, all voices need to be heard so the rules adequately protect the public and treat practitioners fairly.

"We need lawyers of diverse backgrounds to participate in the Virginia State Bar," said VSB Executive Director Karen A. Gould. "Without this diversity, the bar is myopic. It will be unable to grasp the panoply of issues that face lawyers who come from diverse backgrounds."


Braxton

VSB Counsel Edward L. Davis, who heads the professional regulation department, said, "Diversity among our district committees is essential to give the disciplinary system viability and credibility."


Lee

The Future of Justice

More abstract than marketplace issues, but equally important in the minds of many lawyers, is the future of the justice system if all citizens are not brought into the fold, taught the value of the rule of law, treated with respect and fairness in the legal arena, and given access to careers as lawyers, law professors, lawyer-legislators, and judges.

How will the justice system fare if it is widely perceived as a bunker to protect one segment of society?


Powell

"Everyone recognizes the perception," said Cleo E. Powell, who last month was installed as the first woman African American judge on the Virginia Court of Appeals and before that presided in Chesterfield Circuit Court. In many jurisdictions, when a minority defendant enters the courtroom, "the judge is not a minority, and the prosecutor is not a minority, and the defense counsel is not a minority.

With this widening spectrum of languages and cultures in our society comes new challenges for the courts and the VSB regulatory process.

"What's going on in the mind of a criminal defendant who wonders whether they are going to get a fair shake in this criminal courtroom?"

Statistics indicate that the criminal justice system is disproportionately harsh on African Americans. For example, a survey based on 2006 data provided by the Virginia Department of Corrections reported that "African American youth constituted fewer than half of all youth arrested in Virginia, but represented 73 percent of youth entering the adult correctional system." ("The Consequences Aren't Minor," Campaign for Youth Justice, 2006.) A criminal conviction can throw up barriers, even for a juvenile, that will forever thwart an individual's exercise of full citizenship rights and responsibilities. (See "Marked for Life: Long-Term Effects of Juvenile Adjudications," page 30.)

Statistics indicate that the criminal justice system is disproportionately harsh on African Americans.

"If a black person walks into a courtroom and there are no African Americans involved in the judicial administration process, given our history they may very well doubt that the rule of law will protect their rights," Gould said.

So the challenge to the bar is this: Bring a diverse spectrum of citizen-lawyers to the table to write good law, apply it skillfully, and exercise it fairly. And teach the Constitution to everyone.

Paths to the Law

In a series of interviews, Virginia lawyers described their ideas for, experiences with, and concerns about achieving diversity. They described personal styles they believe got them through doors, individual projects that helped others, bigger projects, and ideas for what more can be done.

The Optimists

Gobind S. Sethe wears a turban, but if that concerns anyone, he doesn't let it bother him. "I've always thought of myself as an American," he said. His philosophy: "Just be who you are, and try not to make an issue of it."

After a 3½-year stint defending city employees in the Bronx, he moved from New York to Fairfax County, where he was raised, and joined the Reston firm Hall, Sickels, Frei & Mims PC, where he practices plaintiffs personal injury law.

The hire came when he called senior partner Robert T. Hall, and the two had a long conversation. "Bob loves talking to people from different backgrounds and different cultures," Sethe said. In Sethe, Hall found lots of interesting details — his Sikh religion; his family roots in India; his proficiency in Spanish; the fellowship in Bangor, Maine, when he provided legal assistance to migrant workers; his world travel experiences; and his interest and education in international relations.

"One of the drawbacks of the legal environment is you don't have to be too worldly to be a lawyer," Sethe said. He thinks Hall was attracted by his "macro viewpoint of the world. It doesn't really affect us day to day."

Even in a post-9/11 world, his turban has never presented an obstacle. A much bigger challenge is being a plaintiff's lawyer in Virginia. "It's like being a defense lawyer in New York," Sethe said cheerfully.


Sethe


Sidhu


Marsh


Grey

AMANDEEP S. SIDHU, a Washington, D.C., lawyer with roots in Virginia, is a bit more sensitive about reactions to his turban, but he's equally confident about his abilities to open doors. He practices with McDermott Will & Emery LLP.

As a student at the University of Richmond, he was very involved in Sikh educational efforts nationally after September 11, 2001, when security increased and turbans became suspect.

Sidhu says he and his wife feel more comfortable living in Washington, where people are less likely to do a double take when they see his tall, imposing presence. He was a teenager living in Chester when he began wearing the turban as a symbol

that he had adopted the Sikh faith, and he knows how the unaccustomed react.

A Sikh American "may feel at a young age, 'How could I possibly practice law wearing the turban?'," he said. But he learned to carry himself with "confidence and strength." "There's nothing that can stop me from doing what I want to do," he said. "I'm able to feel comfortable in my skin."

Lawyers Helping Children

Judge Powell is one of many proponents of programs to bring children on field trips to the courthouse so that their first encounter with justice is not a fearful one. She answers questions such as "how does that radar gun work, and how do they know it's my car and not somebody else's?" She tells the visitors, "We're interested in how well you do. The system is there for a reason, but it's not targeting you because of what you are."

The Just the Beginning Foundation, which Judge Lee is involved with, serves a similar function. (See photo, page 23.) So is the VSB Young Lawyers Conference's Hill-Tucker Institute (*Virginia Lawyer,* October 2008, at 36), and the Virginia Bar Association middle school rule of law project, in which lawyers go into classrooms. (See story this issue, page 22.) Several local bar associations sponsor Barrister Book Buddies programs, in which lawyers listen to children read, and some donate computers and school supplies to classes and children who can't afford them.

To Powell, such efforts are part educational and part relationship building. They convey the message, "There's someone else out there who cares about me. … Children thrive on love and attention and care and concern."

She remembers the impact a lawyer's visit had on her when she was growing up in rural Brunswick County. Powell was in eighth grade, and her teacher invited Samuel W. Tucker, a hero in her community for his work in civil rights law, to talk about black history.

"He just talked to us as if we were real people who had something to say and something to learn. He was larger than life," she said. "He exuded confidence and wisdom, and all the things you've ever heard about Mr. Tucker."

That visit was the beginning of her career path into law. "I suspect that Mr. Tucker probably died never knowing how many lives he touched," she said.

21st Century Racism

Sen. Henry L. Marsh III of the Hill Tucker & Marsh — the Richmond law firm that led Virginia civil rights law and mentored many of today's black judges — said he has seen a change in the nature of racism in his lifetime.

"I think there's still limitation on opportunities, but it's not nearly as great as when we were coming along," he said. "It's not as obvious."

Marsh, like others, said he feels discrimination today is aimed not so much at middle-class minorities, but at an "underclass of persons" — poor people of all races.

"The whole immigration issue has created a sense of 'we-they' again," said Robert J. Grey Jr., a Richmond lawyer and former president of the American Bar Association. "The problem is that we-they then transcends the issue of immigration and becomes part of we-they in our communities and we-they in jobs — we-they in everything. Because it's an attitude. … Politicians have used it as a way to create leverage and energize blocs of voters.

Judge Powell is one of many proponents of programs to bring children on field trips to the courthouse so that their first encounter with justice is not a fearful one.

"Unfortunately, lawyers are some of the ones that are perpetuating it, as well as politicians. But you just have to stand up against that." Grey said lawyers should use their advocacy skills to "bring perspective" and to "lower the temperature of the discussion of immigration.

"I think lawyers are the standard bearers of equality and of challenging that kind of thinking."

More to come: The February 2009 edition of Virginia Lawyer *will include articles on challenges faced by women attorneys and continue reports on the experiences and ideas of minority lawyers and judges.*

Bringing the Rule of Law to Young Teens

VBA-Virginia Law Foundation Project Could Reach Every School in Virginia

by Dawn Chase

What if every middle school student in Virginia could experience the epiphany of understanding what the rule of law is?

Perhaps the exposure would make students value their citizenship more, inspire leadership, and engender respect for law and the role of lawyers in our society.

With that in mind, Virginia Bar Association President G. Michael Pace Jr., a Roanoke lawyer, has launched the VBA Rule of Law Project — an ambitious plan to pair attorneys trained to teach the rule of law with professional educators so lawyers can effectively spread their message statewide about the treasure we have in our law-based system of government.

The statewide scope and high-quality educational approach are made possible by a $50,000 grant from the Virginia Law Foundation (VLF) to the VBA Foundation. The grant is one of the first since the VLF revised its grant-making process to provide larger amounts with longer reach.

Pace, who is the son and spouse of educators, has assembled a task force of teachers and school administrators to work with lawyers to devise a curriculum that is developmentally appropriate for its target classes — seventh and eighth graders — and is consistent with the Virginia Standards of Learning.

The project will first be offered at schools in Roanoke County, Roanoke City, and Salem. To prepare teachers, the project sponsored a Rule of Law Symposium taught in early December by Dean Rodney A. Smolla of the Washington & Lee University School of Law.

The heart of the program is the volunteer attorneys, who, Pace hopes, will be provided by the state's voluntary bar associations. The volunteers will be required to take training in how to teach the rule of law. Total attorney time commitment will be less than an hour for training plus an hour for each class the lawyer agrees to attend, Pace said.

Pace envisions that the course materials and organizational blueprint eventually will be available online, so that bar associations statewide can bring the Rule of Law Project into every middle school in Virginia. Pace hopes other states, and even nations, might find the curriculum useful.

Most of the VLF's $50,000 grant will be used to develop a DVD that features prominent lawyers and judges talking about the history and meaning of the rule of law. The list of four presenters has not been firmed up yet, Pace said.

The DVD development cost is estimated to be $25,000, and another $10,000 will be needed to develop the project's website, according to the VLF grant application. The remaining $15,000 will support task force meetings for curriculum development, training programs for teachers and lawyers, and program materials.

Thomas W. Payne Jr., the VLF's development director, said the VBA Rule of Law Project "will really make a difference. It is a real credit to the legal community." Payne described the program to the Virginia State Bar Council in October as an example of the kind of projects the VLF is searching for.

Pace said he hopes the project will make today's middle schoolers "much better advocates for the rule of law than their parents have been.

"I want them to understand that the rule of law is what sets America apart … and that, absent the rule of law, life here would be much, much different. We have to understand it and preserve it."

Just the Beginning Foundation Conference

U.S. District Judge Gerald Bruce Lee (left) of Alexandria converses with students who participated in a mock trial and So You Want to Be a Lawyer Program during the Just the Beginning Foundation Conference September 25-28 in Washington, D.C. The conference — titled Reaching Back, Lifting Up — drew ninety-five students from Virginia, Maryland, and the District of Columbia; sixty federal judges from across the United States; and other judges, attorneys and law professors. Virginia State Bar President Manual A. Capsalis participated in the conference by moderating a panel that talked about the legal profession to students at Herndon High School in Fairfax County. The VSB was a cosponsor of the conference. The Just the Beginning Foundation works to inspire young people and promote diversity in the legal profession.

Diversity on the Bench Recognized

The Virginia State Bar Young Lawyers Conference held its annual Celebration of Women and Minorities in the Profession Bench-Bar Dinner November 10 in Richmond.


1

Photo 1: Jennifer L. McClellan (left), president of the YLC, congratulates Marilynn C. Goss, who this year was elected to a Richmond Juvenile and Domestic Relations judgeship.


2

Photo 2: Judges and bar leaders at the dinner included (first row) Uley Norris Damiani of Alexandria J&DR Court; (second row, left-right) event Co-chair Mollie C. Barton; Laura L. Dascher of Alleghany General District Court; Mary Grace O'Brien of Prince William Circuit Court; (third row) Cleo E. Powell, now of the Virginia Court of Appeals; Patricia Kelly of Spotsylvania J&DR Court; Marilynn C. Goss of Richmond J&DR Court; S. Bernard Goodwyn of the Supreme Court of Virginia; (top row) YLC President Jennifer L. McClellan; Jan L. Brodie of Fairfax Circuit Court; Jerrauld C. Jones of Norfolk Circuit Court; Nolan Boyd Dawkins of Alexandria Circuit Court; Penney S. Azcarate of Fairfax General District Court; VSB President Manuel A. Capsalis; and Marjorie T. Arrington of Chesapeake Circuit Court.

Afghanistan Asked, and Virginia Answered

Virginia lawyers responded quickly and enthusiastically to a U.S. Army lawyer's request for volunteers to help the new Afghan Bar Association advance the rule of law in Afghanistan.

Maj. Michael G. McGovern, who serves in the Army Judge Advocate General's Corps in Bagram, Afghanistan, wrote in October to Virginia State Bar President Manuel A. Capsalis — a fellow George Mason University alumnus — to ask his help recruiting lawyers for the project.

The VSB put the word out to members in its November 1 E-News and posted a story about the need on its website.

In a November 20 e-mail to the VSB, McGovern reported on the result:

> The response from VSB attorneys has been overwhelmingly positive to date. Approximately forty-five attorneys have responded, and their backgrounds are extraordinarily diverse and rich in experience. … I was oftentimes simply amazed at how productive and professionally involved the majority of the respondents have been during the course of their careers.
>
> Four or five of these professionals mentioned that they could speak a bit of Dari or Pashtu. Some of them expressed a personal interest in this part of the world, others indicated that they had been to Afghanistan in either a personal or professional capacity and others were semi-retired and had spare time to donate to the project. Most are based in Virginia or [the District of Columbia], but other volunteers e-mailed from the West Coast and others still from Europe.
>
> In any event, these forty-five individuals could most probably govern a country quite well based on their collective experience. …
>
> The [Afghan Bar Association (AfBA)] does not yet have the office equipment and tools (Internet or website) to communicate effectively with others outside of Afghanistan, or … outside the roaming area of their personal cell phone coverage.
>
> The U.S. Army has proposed an initiative to finance their basic office requirements (computers, telephones, Internet/website, etc.) under a program that supports projects that benefit the Afghan population. "Rule of Law" is one of the identified categories. In any event, the proposal is making its way through the funding process. The

Afghan Bar continued on page 54

New Survey Documents Struggle of Women Lawyers

Advice Offered to Firms for Recruitment, Retention

Women attorneys cannot rely on law firms to help them advance. Generally speaking, they must build their own practices and be prepared to move elsewhere as opportunities arise.

So indicates the National Association of Women Lawyers 2008 Survey on Retention and Promotion of Women in Law Firms. (http://www.nawl.org/Assets/Documents/2008+Survey.pdf)

The nationwide survey reports that "women continue to be markedly underrepresented in the upper levels of law firms," according to a press release from the association. (http://www.vsb.org/site/news/item/nawl-third-annual-survey/) "The majority of women who start as associates in firms do not reach the position of equity partners. [L]aw firm leaders, including governing committees and managing partners, are overwhelmingly male."

Men out-earn women lawyers at every stage of practice. Among equity partners, men earn on average more than $87,000 a year more than women. Statistically, women are more likely to achieve equity partner status by making lateral moves than by rising through one firm's structure.

On the positive side, almost 97 percent of large firms have implemented women's initiatives, but it is too early to say whether these steps are effective, according to the release.

The survey was sent to the nation's two hundred largest law firms, a majority of which responded.

Based on its research, the association offers pointers to law firms for recruiting and retaining women attorneys. (http://www.nawl.org/Assets/Summit+Report+2008.pdf) Firms should broaden their selection criteria for leadership, sustain and nurture women partners, correct hidden bias and stereotypes, promote mentoring, encouraging network development, institute workplace flexibility, refine the compensation process, and help women lawyer with business development.

The association offers suggestions for how a firm can achieve these goals.

Highlights of Virginia State Bar Council Meeting

October 17, 2008

At its regular meeting on October 17, 2008, the Virginia State Bar Council heard the following significant reports and took the following actions:

Disciplinary Assessments Increased
The council voted unanimously to raise assessments charged to disciplined lawyers and petitioners for reinstatement. The assessments will help offset the costs of the disciplinary system. The charges changed from $200 to $500 for district subcommittee cases, $500 to $750 for district committee cases, $750 to $1,000 for Disciplinary Board and three-judge court cases, and $750 to $1,500 for reinstatement cases. The new fees became effective immediately.

Opt-Out Virginia Lawyer Directory Approved
The council voted unanimously to provide on the VSB website a Virginia Lawyer Directory that will include public contact information for all active-status Virginia lawyers in good standing, except those who opt out of the list. Visitors will be able to look up a lawyer's name, address, and telephone number of record by searching for the lawyer's last name. E-mail addresses will not be included in the directory. The Opt-Out selection is on the Member Login site at http://www.vsb.org. The Virginia Lawyer Directory is scheduled to go online January 6, 2009.

Mandatory Legal Malpractice Insurance Rejected
The council voted 60–11 against a proposal to make legal malpractice insurance mandatory for attorneys in private practice who represent the public. The council voted to commend the work of the Special Committee on Lawyer Malpractice Insurance and Darrel Tillar Mason, who headed the mandatory insurance study and developed the proposal at the council's instruction.

Budget Cuts
VSB Executive Director Karen A. Gould reported that the scheduled 2 percent raise for the staff has been eliminated for this fiscal year because of the elimination of raises for all state employees. The bar has taken other measures to reduce expenses by closing the VSB's office in Alexandria next year, freezing staff positions that become vacant, posting more information on the VSB website and communicating by e-mail to reduce printing costs, and incorporating numerous smaller savings suggested by the staff. President-elect Jon D. Huddleston reported that the VSB drew down $215,526 from its operating reserve in fiscal 2007–08, leaving a reserve balance of $2.9 million, or 25.04 percent of the bar's operating expenditures. This was an improvement over the projected draw upon reserves of almost $285,000. The economies have postponed the need to request an increase in the dues ceiling from the General Assembly, he said.

Conrad Receivership
The receivership of Stephen Thomas Conrad has cost $455,366.35 in legal fees and expenses to date, Gould reported. The receiver has identified more than $4 million in defalcations and 315 clients victimized. The Clients' Protection Fund has received 120 petitions. Conrad was convicted in federal court of one count of wire fraud and was sentenced to eleven years in prison. His Woodbridge personal injury practice has been liquidated. Lien litigation and an insurance company lawsuit are pending. Once all funds obtainable have been received, the receiver will petition the court to establish a procedure for distribution of remaining funds, which currently total $101,000.

Professional Regulation
Edward L. Davis, in his first report to the council since he became bar counsel on June 19, described several new policies he has implemented to move cases through the system more efficiently. One new practice is a mandatory monthly conference between the bar prosecutors, district committee chairs, and liaisons from the Committee on Lawyer Discipline to discuss each assistant bar counsel's progress on district committee dockets.

From June 30 to October 10, the total number of open cases increased from 981 to 1,042, and total cases certified for trial rose from 115 to 120. Thirty-three cases have ended in a plea or trial, and eight cases were closed when three attorneys consented to revocation.

In furtherance of the VSB diversity initiative, Davis has personally invited potential candidates to serve as volunteers on district disciplinary committees, and he will contact minority bar associations to invite others to step forward.

Fastcase Review
A committee is reviewing who is using Fastcase, any problems they may be experiencing, and how problems can be resolved. The committee is determining whether Fastcase is the best service available for the price. All VSB lawyers have access to the basic service without charge as a membership benefit. To access the service, go to the Fastcase link on http://www.vsb.org.

VSB E-mail Policy Revised
The council unanimously voted to expand its e-mail policy so that a message can be sent to members if the executive director or a majority of officers deems the message appropriate. Also, e-mails can be sent to carry out the work of bar conferences, sections, committees, and task forces as necessary to carry out their work. E-mail addresses of VSB

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Virginia Lawyer Referral Service Offers Chance to Market Practice, Help Community

The decline of Wall Street is producing many challenges to lawyers and clients on Main Street.

People need legal advice as they cope with financial setbacks and associated stresses. Lawyers feel the pressures of marketing their practices in a less affluent environment, and of doing what they can to help their neighbors.

The Virginia Lawyer Referral Service (VLRS), a program of the Virginia State Bar, can help with each of these challenges. But the service itself needs support, in the form of participation by lawyers in rural areas.

The program offers a one-half-hour consultation with a lawyer close to home for a fee of $35, which the program keeps to offset its costs of operation. The consultation can be in person or by telephone.

After the consult, if the referral wants to pursue a case and the attorney agrees to take it on, lawyer and client negotiate terms of the representation. Or either one can end the relationship, with no obligations.

To select the attorney, the VLRS staff in Richmond turns to a roster of lawyers who pay $75 a year to provide consultations in up to thirty-five areas of law. The lawyers must be Virginia State Bar members in good standing with no open disciplinary complaints, and they must have legal malpractice insurance.

For the $75, the service performs several marketing tasks for its participating attorneys. The VLRS

- advertises for people who have legal problems and want to talk to a lawyer;
- takes their calls. The three-person staff fielded 26,000 calls last year, of whom 7,500 paid for consultations.
- prescreens each caller to determine whether his or her needs involve legal problems;
- collects the $35 fee up front, which minimizes no-shows and frivolous callers;
- gets client through the lawyer's door.

The referral consultations require no paperwork and no collection of money by the lawyer. A lawyer can limit the number of referrals he or she will accept in a given time, and change that number as his workflow requires.

So once the client is in the office, what is the benefit to the lawyer?

It could be a paying client. "There are some nuggets in the ore. They just have to be mined," said Daniel L. Rosenthal, a Richmond attorney who until recently served on the VLRS Committee.

Some people with resources turn to the VLRS because they're not sure how to select an attorney, and they want one referred by the bar. These people include out-of-state callers who have a legal matter involving Virginia law. Some people with resources want to gather information at minimal cost before they decide whether to become involved in a legal case.

It might be an opportunity to generate goodwill, by giving enough information during the half-hour consult to solve the referral's immediate problem. "A lot of people who think they have a legal problem can be helped by referral to an agency or consumer affairs," Rosenthal said.

If something else arises down the line, the client will remember that lawyer. "It's certainly helpful to maintaining the respect that the profession deserves," he said.

Rosenthal added that some lawyers use VLRS referrals to build a client-generating list. They send newsletters or other promotional materials to keep their firm in the referral's mind.

It might be a pro bono opportunity. Many lawyers are doing what they can to assist people in their communities. By giving half-hour increments of their time to help people answer questions and resolve conflicts, lawyers can alleviate some of the stress that comes with difficult times.

Rosenthal said that VLRS-referred clients are managed like any other. "Set the time aside, as you would in any practice, to return calls. It's really the same as screening any new case that comes in."

To maximize the time, have the referral send documents — a lease or contract, for example — so you can review it before the conversation.

The VLRS's biggest current challenge is to recruit enough lawyers to serve all areas of the state, but rural Virginia, including some of the state's most impoverished areas, is falling short.

VLRS lawyers are needed in the following counties:

1st Circuit: Accomack and Northampton
6th Circuit: Surry and Sussex
9th Circuit: King and Queen
10th Circuit: Buckingham, Charlotte, Cumberland, Halifax, and Lunenberg
11th Circuit: Nottoway
15th Circuit: Caroline, Essex, King George, Richmond, and Westmoreland
16th Circuit: Fluvanna, Greene, and Madison
21st Circuit: Henry and Patrick
25th Circuit: Bath, Botetourt, Craig, and Highland
26th Circuit: Clarke and Shenandoah
27th Circuit: Bland, Floyd, Giles, and Grayson
29th Circuit: Buchanan, Dickenson, and Tazewell
30th Circuit: Scott

To learn more about the VLRS or sign up as a participating attorney, go to http://www.vsb.org/docs/VLRS_app.pdf. For questions, contact Toni Dunson at (804) 775-0591 or dunson@vsb.org.

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members are exempt from public disclosure upon request.

Diversity Task Force
Joseph A. Condo, chair of the Task Force on Diversity, said the group conceptually supports amending the VSB mission statement to include a commitment to diversity. It also supports formation of a Diversity Conference whose chair would sit as an ex officio member of the council and executive committee, and three of whose members would fill at-large council seats.

Cleo E. Powell Sworn in at Appeals Court

Cleo Elaine Powell hugs her husband, Alvin L. Dilworth, during her investiture as a judge on the Virginia Court of Appeals November 17, while appeals court Chief Judge Walter A. Felton (partially shown) and Virginia Supreme Court justices look on.

As a practicing lawyer, Powell represented management in labor and employment law before she went on the bench in Chesterfield County and Colonial Heights, where she served in the general district and circuit courts. Powell holds a bachelor's degree in American government and a law degree from the University of Virginia.

Powell is the first African American woman to be named to an appellate court in Virginia. She was appointed by Gov. Timothy M. Kaine to succeed LeRoy F. Millette Jr., who was elevated to the Supreme Court.

Council continued from page 25

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Adoption Day Observed

National Adoption Day, an observance promoted throughout the commonwealth by the Family Law Section of the Virginia State Bar, was celebrated on November 15 at the Oliver Hill Courts Building in Richmond. Keynote speaker Eric Boisseau (right, above), who grew up in foster care, adopted his brother, Edward Boisseau (below) out of foster care. Eric Boisseau was presented with an award named for Oliver White Hill Sr., a longtime supporter of National Adoption Day, and Martha Carter, who cared for more than 360 children during her forty-year tenure as a foster parent.

Mathews Named President of the American Bar Endowment

Roderick B. Mathews of Richmond has been elected president of the American Bar Endowment, a charitable affiliate of the American Bar Association. The election took place in August at the annual meeting of the association. Mathews, a past president of the Virginia State Bar, is the first Virginian to serve as president of the endowment.

The endowment funds more than two hundred law-related public service, educational, and research programs to promote the rule of law around the world; to improve delivery of, and access to, legal services; and to provide for special legal needs of children, the elderly, minorities, and victims of domestic violence. More than $224 million has been invested in such projects by the endowment since its founding in 1942.

Mathews's focus as president will be to increase participation by ABA-member lawyers in the insurance programs that generate those dividends and in the endowment's Charitable Gift Fund, a donor-advised fund for ABA members.

Mathews is a graduate of Hampden-Sydney College, the University of Richmond Law School, and the executive program of the University of Michigan Business School. He has served as president of Richmond's Children's Hospital and is a member of the board for its foundation. He is a member of the Virginia Board of Medicine by gubernatorial appointment. He was president of the Virginia State Bar in 1987–88. He has twice served as a member of the ABA Board of Governors and its executive committee and served for twenty years in the ABA House of Delegates, including as state delegate for Virginia and as a member of the ABA's officer nominating committee.

Justice Lemons Honored by Inn of Court

Virginia Justice Donald W. Lemons has been named an honorary master of the bench by the Middle Temple Inn of Court in London, England — an honor usually reserved for chief justices of the United States.

Lemons's long association with Inns of Court includes serving as president of the John Marshall Chapter in Richmond and, currently, as vice president of the American Inns of Court Foundation.

The Middle Temple was featured prominently during a 2007 international Rule of Law Conference that Lemons co-hosted in Virginia and England in conjunction with the four hundredth anniversary of Jamestown. Barristers of the Middle Temple were involved in creation of the colony by drafting the charter, soliciting the stock subscriptions, and providing the legal structure.

In Memoriam

Henry G. Bennett Jr.
September 1928–March 2008
Danville

Hon. Beverly B. Bowers
January 1920–July 2008
Harrisonburg

Linda Woodward Bushee
June 1955–July 2008
Alexandria

Peter M. Demanio
October 1935–March 2008
Sarasota, Florida

William M. Harris
September 1924–May 2008
Virginia Beach

Thomas L. Hicks Jr.
October 1929–July 2008
Richmond

William Louis Holland
September 1935–July 2008
Alexandria

Christine Delfino Jaigobind
January 1956–August 2008
Virginia Beach

Herndon P. Jeffreys Jr.
August 1922–July 2008
Jonesborough, Tennessee

Thomas Kevin Kearney
May 1960–January 2008
Lewes, Delaware

Gregory Stephen Matney
February 1958–October 2008
Tazewell

Herbert D. Miller
April 1911–May 2007
Kansas City, Missouri

Hon. William I. Moncure
July 1911–June 2008
Blackstone

Hon. William H. Oast Jr.
June 1922–October 2008
Portsmouth

Claude E. Setliff
May 1923–June 2008
Murphy, Texas

Robert Kenneth Skolrood
May 1928–February 2008
Roanoke

Thomas M. Whiteman Jr.
June 1944–May 2008
Roanoke

General Assembly Has Judicial Performance Data

Evaluation Program Is Under New Leadership

When it convenes on January 14, 2009, the Virginia General Assembly will have in hand, for the first time, judicial performance survey data about seven district judges who are up for reelection.

The data is something the legislators say they have wanted for years — objective information to help them decide whether a judge should receive another term on the bench.

After three years of conducting anonymous surveys of Virginia's lawyers, the Judicial Performance Evaluation (JPE) Program has expanded to include jurors and — in juvenile and domestic relations court — social services workers and Court Services Unit employees. They are asked to rate a judge's patience, courtesy, fairness to all parties, and efficiency, among other qualities.

The questionnaires are sent out and collected and the data tabulated by a contractor — the Survey and Evaluation Research Laboratory at Virginia Commonwealth University. Feedback is provided only to the judge being evaluated, a retired judge who serves as an observer-facilitator, and — when the judge is up for re-election — the General Assembly.

(For more details of how the JPE Program works, see "General Assembly Will Have Judicial Performance Survey Data for 2009 Session" in the February 2008 issue of *Virginia Lawyer*. http://www.vsb.org/docs/valawyermagazine/vl0208_news.pdf.)

Meanwhile, the program, housed in the Supreme Court of Virginia's Office of the Executive Secretary, has moved to its second generation of leadership. The JPE Program oversees the contractor and provides outreach to the many groups whose goodwill is needed for the data collection to work — groups that include attorneys, court clerks, commonwealth's attorneys, public defenders, and the public.

That day-to-day nurturing is now the responsibility of Patricia G. Davis, who in mid-October took over as director of the JPE Program.

The first director, retired General District Judge Suzanne K. Fulton, left the program in June and is now sitting as a substitute general district judge in the twenty-ninth district.

Davis came to the JPE Program from Chesterfield County Circuit Court, where she was administrator of judicial operations. She formerly was clerk of the Virginia Court of Appeals.

The leadership of the JPE Commission, the body responsible for the development of the JPE Program, also has changed. Its new chair is Justice Lawrence L. Koontz Jr., who succeeded Justice Barbara Milano Keenan. Keenan led the development of JPE since 2000, when the JPE Task Force was constituted to study the creation of a JPE program.

Davis

The program evaluated 119 judges in 2008. It expects to conduct 141 evaluations and send forty-three to the General Assembly for the 2010 session, Davis said.

"I thank the attorneys who have participated in the evaluation process and encourage them to continue their valuable contribution to the program," she said. "We would not be able to carry out the purposes of the program without the cooperation of many individuals. I recognize the efforts of the clerks of court, as their support is critical. Likewise, the members of the bar have been very supportive of the program by signing the courtroom appearance sheets and providing prompt responses to the surveys."

Professional Guidelines and Rules of Professional Conduct

The 2008–09 *Professional Guidelines* were mailed to active members of the VSB accompanying the October issue of *Virginia Lawyer*.

They are available online at http://www.vsb.org/site/regulation/guidelines/

Local Bar Elections

Charlottesville-Albemarle Bar Association
John Walter Zunka, President
James Pedin Cox III, President-elect
Julia Elizabeth Sexton, Secretary-Treasurer

Hispanic Bar Association of Virginia
Manuel Enrique Leiva Jr., President
Dennis Adrian Somech, Vice President
Erika Marlene Serrano, Secretary
Carlos Enrique Wall, Treasurer

Marked for Life: Long-Term Effects of Juvenile Adjudications

by Margaret A. Nelson

Collateral consequences in juvenile criminal cases are often not immediately apparent but in the long run they can be devastating. Many are unintended results that flow directly from a court's adjudication.[1] Long-term consequences, often created by legislators at little or no budget cost, can be more severe than the "direct" criminal punishment — especially when a disposition consists solely of probation without active incarceration. The "hurried processing of even misdemeanor pleas can have serious consequences for the accused. … Even if they get no jail time, such defendants still get a criminal conviction, which can affect immigration status and some public benefits." *New York Times*, "Citing Workload, Public Lawyers Reject New Cases," November 9, 2008. Some consequences may not be apparent for years, but are inevitable. Lawyers representing youthful offenders must know these consequences before they assess the charge and before they advise the juvenile client to accept a plea bargain.

Here is an example: At a school in Anywhere, Virginia, there is zero tolerance for fighting. Adolescent Billy Bully started picking on classmate Tiny Tim. Verbal jabs led to Billy hitting Tiny; a fight broke out. When another classmate, 15-year-old Sam Samaritan, stepped in to break it up, the fight stopped briefly, but then Billy jumped on Tiny again. Sam intervened and threw Billy to the ground, causing Billy to break his arm and cut his hand. Because of the injuries, Sam Samaritan was charged with malicious wounding, a felony, and Billy Bully was charged with assault and battery, a misdemeanor. Sam's lawyer negotiated a plea agreement, which pleased the family because Sam's charge was reduced to unlawful wounding, a lesser felony, with no public trial, no detention time and no fine or community service. When they accepted the offer Sam's lawyer forgot to mention that Sam can no longer hunt with his father, he will have trouble following his family's traditional path into the Marine Corps, and he will not be employable as a police officer, as he had hoped. Because of the felony adjudication he agreed to in that "great deal," he cannot possess a weapon until he is aged twenty-nine.

Many participants in the juvenile justice system realize that problems have reached critical mass and are trying to correct them. On November 6, 2008, at the Georgetown University Law Center, the American Bar Association (ABA) sponsored a national bipartisan town hall meeting, Call to Action for Juvenile Justice. The meeting gave participants an opportunity to plead for reform of the system by the next White House administration.[2] Seasoned juvenile justice panelists included a Harvard Law professor, a Rhode Island attorney general and district attorney, a Massachusetts juvenile judge, a Pennsylvania state senator, a Georgetown Law professor, and a newspaper journalist. As a further step, the ABA has initiated a massive, collaborative assessment of state policies and statutes that impose post-conviction or post-incarceration collateral burdens on juveniles.

In Virginia and across the nation, significant statutory changes in the last two decades have increased the severity of the consequences of a juvenile adjudication. Nationwide each year, police make 2.2 million juvenile arrests, 1.7 million cases are referred to juvenile courts, an estimated 400,000 youths cycle though juvenile detention centers, and nearly 100,000 youths are confined in juvenile jails, prisons, boot camps, and other residential facilities.[3] On any given night almost 10,000 of these children are held in adult jails and prisons, where they are particularly vulnerable to victimization and abuse. "Misguided policies that purport to be 'tough on crime' increase incarceration rates, disproportionately impact poor youth and youth of color, exacerbate the problem of gang-related crime, funnel a disproportionate number of youth who have a cognizable mental health and/or substance abuse disorder into the justice system, and can in fact make our communities less safe."[4] The United States is the only nation in the world where juveniles are serving sentences for life without possibility of parole.[5]

For most of the one-hundred-year history of the juvenile or family court in the United States and until 1995 in Virginia, a juvenile adjudication was not deemed to be equivalent to conviction of a crime and did not carry forward the stigma or consequences of a criminal conviction into the rest of the youth's life. Access to juvenile proceedings and records was limited for many of the same reasons. Notably, former Chief Justice William H. Rehnquist expressed his concern about piercing this traditional veil of confidentiality in juvenile cases in *Smith v. Daily Mail*, 443 U.S. 97 (1979):

> It is a hallmark of our juvenile justice system in the United States that, virtually from its inception, its proceedings have been conducted outside of the public's full gaze, and the youths brought before our juvenile courts have been shielded from publicity. This insistence on confidentiality is born of a tender concern for the welfare of the child, to hide youthful errors and "bury them in the graveyard of the forgot-

> ten past." The prohibition of publication of a juvenile's name is designed to protect the young person from the stigma of misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the state. (443 U.S. at 107)

Attorneys who have not practiced in Virginia's juvenile courts in the last two decades may be unaware of the increasing collateral effects of juvenile proceedings. Juvenile court is no longer a place for young, green attorneys to "get their feet wet," "learn the ropes," or dabble in criminal practice before moving on, as mentors used to advise past generations. Since 2005, in response to these dramatic changes, the Indigent Defense Commission set in place specialized guidelines for certification and standards of practice for Virginia attorneys who request to serve as assigned counsel for juvenile criminal cases. Court-appointed counsel must demonstrate specific training and mentorship under an experienced attorney to gain certification for representation of juveniles.[6]

In Virginia, two significant events heightened the gravity of juvenile delinquency adjudications. In 1995 the General Assembly adopted sentencing guidelines that included juvenile adjudications as prior crimes for scoring a defendant on guideline sheets and determining range of punishment for subsequent adult convictions. In 1996 the legislature reformed the transfer system and amended other code sections to include juvenile delinquency adjudications as prior convictions for enhanced sentences. A loss of future juvenile status is a long-term consequence because, in the eyes of the law, "once an adult, always an adult."[7] These two significant alterations have changed the course of and had paramount impact on these individuals throughout their lives.

Juvenile proceedings can be far more punitive than when rehabilitation was the prevailing goal before 1995. Sadly, misinformed parents who remember the

Consequences of Adjudications and Findings of Guilt in Virginia

Grants, loans, and work study — The federal Higher Education Act of 1998 (P.L. 105-244) denies federal grants, loan, and work assistance to students convicted of drug-related offenses while they are receiving such federal financial aid.

Employment — Applicants for home health care and nursing positions will be barred from those jobs for certain misdemeanor and felony convictions involving abuse and neglect and specific violent and sexual offenses. § 32.1-162.9:1.

Sex Offender Registry — Juvenile sex offenders are included on the Sex Offender and Crimes Against Minors Registry, which posts name, age, address, phone number, crimes, and photograph on the Internet.

Voting — Virginia citizens who have been convicted of a felony are ineligible to vote unless their right to vote has been restored. Constitution of Virginia, Article 2, § 1. When a youth is convicted as an adult at age 14, he or she may never be allowed to vote.

Military Duty — For an individual with anything on his or her record worse than a minor traffic or minor non-traffic offense, a secret security clearance cannot be obtained. This could affect acceptance of a juvenile for military service. See Chapter 4 of the U.S. Army, *Active and Reserve Components Enlistment Program Manual*, AR 601-210, http://www.army.mil/usapa/epubs/pdf/r601_210.pdf

HIV and hepatitis B and C testing — A person, including a juvenile, who has been convicted of certain crimes — sexual assault (which includes consensual but statutorily impermissive sex between minors), other offenses against children, or assault and battery where the complainant is exposed to bodily fluids — can be ordered to submit to testing for these diseases any time a subsequent complaining witness requests the test.

Drug court unavailable to "violent" offenders — Juvenile offenders who previously have been adjudicated not innocent of a violent criminal offense within the preceding ten years are not eligible for participation in a drug treatment court established or continued in operation pursuant to *Virginia Code* § 19.2.297.1. (The definition of violent sometimes includes activities which do not involve threats or assaults.)

Prior convictions affect future proceedings — Juvenile delinquency adjudications count as prior convictions when sentencing an adult for a felony conviction, in state and federal courts. (*Virginia Code* § 19.2-295.1, United States Sentencing Guidelines §§ 4A1.1, 4A1.2(d)(2))

Public housing authorities — Residence in public housing can be banned. In some cases, this ban can affect a family's housing if the family accepts the juvenile back.

Possession or transportation of firearms — Convicted felons cannot carry stun weapons, explosives, or concealed weapons. If they were aged fourteen or older when adjudicated delinquent for a juvenile felony, they cannot obtain a weapon until age twenty-nine. This is one of the most significant changes which exclude young adults from military service. § 18.2-308.2. If a person violates the ban after being adjudicated delinquent for a serious felony — murder, kidnapping, armed robbery or rape — the ban is extended to a lifetime.

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juvenile system of the "good ol' days" before 1995, decide to "teach Johnny a good lesson" by letting the juvenile judge "scare him back on track," then suddenly find that the situation is out of their hands and their child's life has been changed forever. The consequences for our juvenile clients and their families can be devastating if attorneys don't know the pitfalls for youthful offenders. Juvenile justice is no longer a matter of 'fessing up, taking one's medicine, turning over a new leaf and moving on.

Endnotes:

1 Juveniles tried as minors for misdemeanors or felonies are "adjudicated delinquent of a particular act." These adjudications are not findings of guilt. The same judge who adjudicates the finding of delinquency usually disposes of the case based on options presented in a predisposition report. However, minors can be transferred and tried as an adult, found guilty, and convicted if (1) they are accused of the more serious type of criminal behavior; (2) they are aged fourteen to seventeen; and (3) there is a finding that they have done what they are alleged to have done in the charges.

2 The author attended as co-vice chair of the Virginia State Bar Access to Justice Committee and as a member of the ABA Juvenile Justice Criminal Law Section's Collateral Consequences Subcommittee.

3 Annie E. Casey Foundation, *2008 KIDS COUNT Data Book* essay: "A Road Map for Juvenile Justice Reform."

4 The Constitution Project, *Smart on Crime — Recommendations for the Next Administration and Congress,* 2008. http://www.2009transition.org/criminaljustice/

5 Annie E. Casey Foundation. *2008 KIDS COUNT*

6 The list of qualified attorneys is maintained by the Virginia Indigent Defense Commission, § 19.2-163.03 *Code of Virginia* as amended

7 In 2007 the Virginia General Assembly revised the "once an adult, always an adult" law. Now, in Virginia, if a transferred minor tried in Circuit Court is not convicted, he or she can be the subject of a juvenile court case and regains juvenile status, rather than being required to be tried as an adult for subsequent potential charges. § 16.1-271 *Code of Virginia* as amended.

The author thanks Robert E. Shepherd Jr., professor emeritus of the University of Richmond School of Law, and Melissa C. Goemann, director of the Mid-Atlantic Juvenile Defense Center, for their advice, research, and support.

Consequences continued from page 31

Immigration — The conviction of a juvenile as an adult in a criminal court may result in deportation. *Matter of C.M., supra*; *Morasch v. INS*, 363 F.2d 30 (9th Cir. 1966)

Foster care or adoption — Juvenile convictions and adjudications that would have constituted a felony if committed by an adult are considered felonies for the purpose of barring eligibility for becoming a foster and adoptive parent. An applicant with one misdemeanor assault and battery conviction not involving "moral turpitude," abuse, or neglect may adopt or foster if ten years have elapsed since the conviction. § 63.2-1721.

Space considerations impede our ability to cover numerous other areas of impact, including Medicaid benefits, other employment opportunities, release of juvenile criminal records, and obtaining credit.

As the ABA study continues, more information will become available about collateral consequences of juvenile adjudications in Virginia.

For a national perspective, see http://www.justicefellowship.org/search.asp?keywords=collateral+consequences; http://www.clasp.org/publications/every_door_closed.pdf; http://www.clsphila.org/content.aspx?id=178; and http://www.sentencingproject.org/Advocacy.aspx?IssueID=7.

Persons who wish to discuss this topic with Margaret Nelson can send their correspondence to the VSB Access to Legal Services Committee, c/o Maureen Petrini, 707 East Main Street, Suite 1500, Richmond, VA 23219, or to petrini@vsb.org.

— Margaret A. Nelson

Environmental Law Today

by A. Lisa Barker, chair, Environmental Law Section

Climate change, global warming, recycling, and green development were once the concern only of policy wonks. These environmental issues now pervade our lives and our law practices from the local level to the state, federal, and international levels. In this *Virginia Lawyer*, Grady A. Palmer III, an assistant city attorney in Chesapeake, discusses local air pollution issues. Tauna Szymanski of Hunton & Williams LLP reviews policies that affect climate change in the global context. Mary V. Cromer, formerly of the Southern Environmental Law Center and now on the staff of the Appalachian Citizens' Law Center, describes the application of the federal Clean Water Act to mining operations in Southwest Virginia. And Nicole M. Rovner, deputy secretary of natural resources for the commonwealth, reviews environmental initiatives of Gov. Timothy M. Kaine's administration.

The Virginia State Bar's Environmental Law Section provides continuing education at the bar's annual meeting. The section cooperates with other bar organizations and with the T.C. Williams Law School at the University of Richmond. The section's board of governors continues to explore relationships with other organizations to advance the educational goals.

During 2008, the section joined with the environmental law sections of the Richmond Bar Association and the Virginia Bar Association to sponsor a student writing competition in memory of Kathy Rae Frahm. Frahm volunteered for each of those organizations and, at the time of her death in September 2007, was director of policy for the Virginia Department of Environmental Quality. The winner of the competition was William Hughes, a recent graduate of the University of Virginia School of Law, who submitted an article on the Energy Policy Act of 2005.

Lawyers who work in every facet of law will find that environmental law affects their clients. I encourage bar members to become involved in our section and to join us in our activities. Other board members are Joseph John Tannery of the Chesapeake Bay Foundation; Katherine D. Will of the U.S. Army Corps of Engineers; Caleb A. Jaffe of the Southern Environmental Law Center; John K. Byrum Jr. of Troutman Sanders LLP; Angela L. Jenkins of the Virginia Department of Environmental Quality; E. Carter Nettles Jr., a practitioner in Wakefield; Kerri L. Nicholas of the Office of the Virginia Attorney General; Andrea W. Wortzel of Hunton & Williams LLP; John G. Douglass, dean of the University of Richmond School of Law; Daniel C. Summerlin III of Woods Rogers PLC; and M. Ann Neil Cosby of Sands Anderson Marks and Miller PC.

Renae Reed Patrick Named 'Citizen Attorney' by Virginia Women Attorneys Association

Renae Reed Patrick, who has devoted her career to serving the poor as a legal aid attorney and volunteer for advocacy organizations, has been presented with the Virginia Women Attorneys Association's first Citizen Attorney Award.

Currently, Patrick is the supervising attorney for Blue Ridge Legal Services in Harrisonburg, where she mentors new lawyers.

Since she became a lawyer in 1981, she has been a staff attorney for legal aid programs that serve Lexington, Northern Virginia, the Roanoke Valley, and Christiansburg, and she managed the program in Lynchburg. She also was special counsel to the Virginia Division of Child Support Enforcement.

Before she moved to Blue Ridge, she served two years as a visiting professor at Washington and Lee University School of Law, where she directed the Black Lung Clinic.

Her volunteer work has included leadership in bar associations throughout the state. She chairs the Virginia State Bar's Access to Legal Services Committee, is a member of the VSB Senior Lawyers Conference Board of Governors, and she received the VSB's Legal Aid Attorney of the Year Award in 2003. Earlier, as an attorney in private practice she chaired the board of directors of the Virginia Poverty Law Center.

She was president of the VWAA for the 2001–02 term, and served as a substitute judge in Lynchburg while previously employed at legal aid.

Projects she has worked on involve homelessness, Court Appointed Special Advocates volunteers, family law issues, and domestic abuse. Newer interests focus on consumer law, including mortgage foreclosure prevention.

VWAA President Kathleen J.L. Holmes said Patrick exemplifies the type of attorney the organization wants to single out: the person who, when others are saying "somebody needs to do something about that," becomes "the somebody who did something."

The award was created by the VWAA in response to a speech this year in which former Virginia Gov. Gerald L. Baliles extolled "lawyers of honed ability and integrity who take positions of civic and political leadership, and apply their skills for the broad public good." (See http://www.vsb.org/docs/valawyermagazine/vl1008_clba.pdf, in the October 2008 edition of *Virginia Lawyer*.)

Retired Roanoke Circuit Judge Diane M. Strickland (left) presents the first VWAA Citizen Attorney Award to Renae Reed Patrick.

The statewide organization hopes that its chapters will present the award in their regions "to identify those Virginia lawyers who have worked to make their communities better places to live, through legal representation of clients, civic involvements, or a combination of both," Holmes said.

The VWAA has ten chapters across the state. (For more information, see http://www.vwaa.org/.)

— CALL FOR NOMINATIONS —

2009 Lewis F. Powell Jr. Pro Bono Award

and the

2009 Oliver White Hill Law Student Pro Bono Award

The deadline for receipt of nominations by the bar is 5:00 PM, Friday, February 13, 2009.

For more information visit
http://www.vsb.org/site/pro_bono/resources-for-attorneys/
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Smokestacks and Neighborhoods — Can Local Governments Participate in the Regulation and Permitting of New Air Emission Sources?

by Grady A. Palmer III

In this age of increasing awareness of air quality, and greenhouse gas emissions in particular, the ability of government at all levels to participate in the reduction of air pollution is critical. A local government's role in regulating new air pollution that may affect its constituency can be important. Politics do not always drive practice. Ask someone with experience in permitting new air emission sources in Virginia and you will likely be told that the Virginia Department of Environmental Quality (DEQ) is the permitting agency. You may also be told that local governments cannot regulate emission sources. While this may be true in practice, it may not be in substance.

Laws and regulations do not clearly prohibit local governments from imposing regulation on air emissions from new sources.

A proposed industrial facility of a kind known to release air pollutants can put a local government in a quandary. The government must consider new jobs and tax revenue on one hand and concerns about public health on the other. The public often opposes industrial development that could affect residential property and the environment, and localities fear increased traffic, noise, and decreasing property values. In some cases, the concern may be less about land use and more about air pollution.

Laws and regulations do not clearly prohibit local governments from imposing regulation on air emissions from new sources. They may do the opposite — at least for certain zoning regulations — even though the General Assembly adopted *Code of Virginia* § 10.1-1321 to prohibit a local government from adopting an ordinance to regulate an emission source. The life of the law happens in the crevices.

Local Zoning Ordinances

The purposes of zoning and planning law are well-established in Virginia. The General Assembly delegated to localities the authority to establish zoning districts and regulate the use of all land and buildings to promote the health, safety, and welfare of the public.[1] This broad grant of power includes the power to allow by permit or to prohibit specific uses of buildings and land, so long as the exercise of that power is not arbitrary, capricious, or otherwise preempted or unconstitutional.[2]

Local governments adopt zoning ordinances to regulate the uses of land and buildings with a system of development standards and permit requirements. Permits allow local officials to apply the requirements of zoning ordinances to development of particular parcels. Many zoning decisions are made by administrators based on standards adopted by a locality. These decisions include approvals of building permits and certificates of occupancy. Some zoning decisions — including rezonings and special use permits — are reserved for the local governing body to approve or deny based on legislative standards. The approval of a rezoning or special use permit allows a local governing body to use proffers or conditions to mitigate the impacts of a proposed development, based on an evaluation of local needs and concerns.

The form and function of rezonings and special use permits differ in important ways. While both rezonings and special use permits are legislative, local governments have more latitude with special use permits. For rezonings, a locality depends on the applicant to submit proffers to limit the impact of the proposed development.[3] A

local governing body may deny a proposed rezoning based on land use principles, but it is prohibited from requiring the applicant to limit the proposed development by proffering conditions, and it cannot unilaterally impose proffers. Local governing bodies can, on the other hand, impose conditions to the approval of a special use permit to address specific impacts that a proposed development may produce.[4] Such conditions act as property-specific zoning regulations that must be satisfied to develop the project approved by a special use permit. A rezoning is approved with adoption of an ordinance that amends the zoning ordinance. Special use permits are approved by a resolution or a recorded vote by a local government.[5]

A locality has wide discretion to craft a zoning ordinance to include a review of proposed development with a special use permit. Once zoning districts have been established, a locality can then determine which land uses in a district should be prohibited, permitted by right, or subject to the approval of a special use permit. Special use permits can be required for land uses that may affect surrounding property and the community.[6] By requiring special use permits, localities determine that the land use is presumed to be inappropriate in the zoning district, but can be made compatible by controlling uses through conditions. Conditions can be prescriptive or proscriptive. A condition can prohibit a land user from operating at night to reduce noise, or it can require road improvements to mitigate traffic. Such conditions allow the locality to address local issues with enforceable regulations. Traffic and noise are accepted as local issues that warrant local regulations. Air pollution has local and global impacts.

Obstacles to Local Regulation

What appear to be obstacles provide opportunity for local regulation through crevices in governing statutes and regulations. An air permit application cannot be deemed complete until the DEQ receives written notification that the location and operation of a new emission source complies with ordinances adopted under the authority of Chapter 22 of Title 15-2 of the *Code.* Chapter 22 authorizes a locality to adopt a zoning ordinance and a subdivision ordinance. Once an applicant obtains a state permit, DEQ regulations state that the permit does not relieve the permittee from complying with zoning ordinances and regulations.[7] *Code* § 10.1-1321 prohibits only local ordinances that regulate emission sources, not other forms of local regulation. Together these offer local governments an opportunity to effectively regulate air emissions from a new emission source through zoning.

Special use permits allow local governments to explore these crevices and overcome the obstacles to local regulation. A zoning ordinance could require a special use permit for the types of industrial land uses that typically require a major source permit from the DEQ.[8] Before the DEQ would accept an air permit application, the applicant would need to obtain a special use permit from the local governing body. During the processing of the special use permit by local administrative personnel, the types and amounts of pollutants could be identified and studies conducted to evaluate the effects of such pollutants on the community. This information should then be provided to the governing body for legislative consideration.[9] The special use permit could be approved with conditions that would limit the types and amounts of emitted pollutants, define the methods used to achieve those limits, and require continuous emissions monitoring as determined to be necessary by the local governing body. At this point, the local government could endorse the written notification required for the DEQ to process an air permit application. That endorsement would have to be qualified to reflect the conditional approval of the special use permit. Only the construction and operation of the emission source as approved by the special use permit should be considered consistent with the zoning ordinance.

If a local government undertakes such a course, it would encounter obstacles. First, it is unclear whether the DEQ would process and review an air permit application based on the limitations of the special use permit, or whether it would approve an air permit independent of such approval and leave the applicant with the burden to sort out the details later with the local government. Since the permit regulations do not reference zoning regulations as a criterion, the DEQ would likely process and approve the air permit independent of whatever limitations on air pollutant emissions a local government placed on a special use permit that affects air pollutant emissions.[10] Second, a locality will likely hear that *Code* § 10.1-1321 prohibits it from adopting an ordinance — including a special use permit — to regulate an emission source. Third, no matter what the form of legislation, the potential for preemption looms. These

A locality has wide discretion to craft a zoning ordinance to include a review of proposed development with a special use permit.

obstacles, while substantial, may not prevail if a locality chooses to enforce the special use permit.

In the event of litigation, a court would encounter some new ideas and some familiar legal concepts. Reconciling a locality's zoning authority and the statutes and regulations that govern air pollutant permitting would require a court to construe the reach of *Code* § 10.1-1321 and consider the Supreme Court of Virginia's preemption cases. A court would likely not consider the deference issue unless the DEQ were made a party before an approval of an air permit.[11] Preemption doctrine has a fairly well-established analytical framework, but there are no reported cases on this subject matter. A carefully crafted zoning ordinance and special use permits stand the best chance for overcoming each obstacle.

While the language of *Code* § 10.1-1321 is unambiguous, zoning regulations appear to fall outside its scope. This follows from the limited wording of the statute and the nuances of zoning regulations. The language limits the effect of the statute to ordinances. Special use permits are not required to be, and generally are not, approved as ordinances or amendments to ordinances. Typically, a local governing body approves a special use permit by resolution or recorded vote. So long as a special use permit is not required solely for the emission of air pollutants, the zoning ordinance itself should not fall under the prohibition of this statute.[12] The scope of this statute appears to be limited to ordinances that attempt to supercede the regulatory efforts of the DEQ.[13] Such a reading of the statute is consistent with the emphasis placed on zoning compliance in *Code* § 10.1-1321.1 and DEQ regulations.[14]

The preemption cases may be a more complex obstacle than *Code of Virginia* § 10.1-1321. Zoning regulations have been the sources of several lines of preemption cases and present difficult scenarios for preemption analysis. State regulations usually focus directly on a regulated activity while the zoning regulations focus on the location of activity. When zoning regulations directly or indirectly prohibit activity anywhere that state law or regulation permits such activity, a court will likely invalidate the zoning regulations. Zoning regulations that stay closer to home and primarily regulate the location of an emission source and its compatibility with the community by limiting and controlling pollutant emissions should survive a preemption analysis.

Cases involving zoning regulations of alcohol sales and land application of biosolids provide a helpful contrast between zoning regulations that survive preemption and those that likely will not. Both involve local zoning control of activities permitted by state law and regulation. Local regulation with a form and function similar to traditional land use regulation survived. Local regulation that effectively banned an activity in the locality did not.

In *Chesterfield County v. Windy Hill LTD*, the court upheld a special use permit for a sports complex that prohibited the sale of alcohol at the sports complex. To address the concern of alcohol sales in the special use permit process, Windy Hill agreed to, and the board of supervisors adopted, the prohibition as a stipulation to the special use permit. Several years later, Windy Hill changed its mind and obtained a permit from the Alcoholic Beverage Control Board to sell beer on the premises. The county sought an injunction after the ABC Board refused to enforce the stipulation at the state permitting stage.[15] The court determined that the special use permit and stipulation constituted a land use regulation of a particular parcel, not a general regulation of the business or consumption of alcohol.

In contrast to the site-specific nature of the regulation in *Windy Hill,* Appomattox County adopted ordinances that would have effectively prohibited the use of biosolids on any land in the county. When local landowners obtained state permits from the Virginia Department of Health to apply biosolids to their farmland, litigation ensued. The federal district court in *O'Brien v. Appomattox County* determined that the ordinances generally prohibited what the state permit allowed and were therefore void.

The regulation by a special use permit of a use that produces air pollutants could survive the analytic framework of these two lines of cases. A special use permit that controls air pollutant emission would not be a general ordinance that would prohibit anywhere in the jurisdiction what an air permit might allow. Rather, it would share the characteristics of the parcel-specific prohibition of alcohol sales upheld in *Windy Hill.*

An effective special use permit should be supported by a legislative record to demonstrate that the control of emissions will further local land use concerns such as compatibility between industrial and residential, or maintaining a land use less intense than industrial. A locality should not seek to regulate the emission of air pollutants when local land use concerns cannot be established in a legislative record — particularly concerns about land use compatibility.

Conclusion

Localities seeking industrial development should cautiously approach regulating air emissions through a special use permit. Balancing constituent concerns and the need for industrial investment can be difficult. Special use permits offer a bridge to reconcile the two. By allowing citizens and industry to participate in the process, local governments can accommodate both for the greater good. ■

Endnotes:

1 *Code of Virginia* §15.2-2283 outlines the general purposes of local zoning.
2 *Ticonderoga Farms Inc. v. Loudoun County, et al.*, 242 Va. 170 (1991).
3 Proffers can be accepted by local governing bodies only as a voluntary offer by the rezoning applicant. *See Code of Virginia* §§ 15.2-2296, 15.2-2297, and 15.2-2298.
4 *Code* §15.2-86.A.3 provides that special use permits can be approved under suitable regulations and safeguards.

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5 Unless a charter or local zoning ordinance requires otherwise, the *Code* does not require that a special use permit be approved as an ordinance.

6 A locality should take care that the requirement for a special use permit is uniform throughout a zoning district. *See Code* § 15.2-2282.

7 *See* 9VAC5-80-930, 9VAC-80-1230, 9VAC5-80-1520, and 9VAC5-80-1665. Stating the approval of a permit does not relieve the permittee from complying with existing zoning ordinances and regulations.

8 As briefly discussed in note 6, localities must craft zoning ordinances carefully. Industrial land uses should be identified for special use permit requirements based on land use considerations that include air pollution but also other potential impacts to land use compatibility. Air pollution should be only one of several reasons to require a special use permit.

9 A complete legislative record is essential to show that the locality is primarily concerned with the land use regulation of an individual development.

10 This would likely be similar to the Alcohol Beverage Board's actions in *Chesterfield County v. Windy Hill LTD*, where the ABC Board determined that the zoning regulations were not something it could consider in its permitting process, and that the applicant and local government should seek judicial relief.

11 It is unlikely that a local government could initiate a declaratory judgment proceeding until the DEQ issued a permit contrary to the terms of the special use permit. Therefore, the deference that the DEQ owes to a limited written notification is likely left entirely to DEQ's discretion.

12 While it is not entirely clear that the term "ordinance" in this statute includes a zoning ordinance, given that the state law mandates an emission source must comply with zoning, a locality should not invite more risk than necessary. It should craft the zoning ordinance using recognizable land use principles.

13 The term "ordinance" could refer to police power ordinances that conflict with DEQ regulatory actions rather than to land use regulations adopted before the DEQ approves a permit.

14 *See* note 8.

15 *See* note 11.

U.S. Climate Change Efforts: An International Perspective

by Tauna M. Szymanski

Most readers of *Virginia Lawyer* are familiar with state and federal actions in the United States to address climate change. However, the U.S. media often do not portray what the rest of the world is doing, how the U.S. is perceived on this issue, and how U.S. efforts compare to others'. This article attempts to place current and future U.S. climate change efforts in a global context.

How U.S. Climate Policy Measures Up

The U.S. government has taken a strictly voluntary approach on national climate policy. While the U.S. was a key architect of the Kyoto Protocol in 1997 and signed it in 1998, the treaty was never submitted to the Senate for the required two-thirds ratification vote.[1] Shortly after President George W. Bush took office in 2001, he announced he would not be pursuing ratification and would not be adopting mandatory greenhouse gas (GHG) emissions controls, despite campaign promises to the contrary.[2] As of September 7, 2008, 181 nations have ratified the Kyoto Protocol. It entered into force in February 2005. The U.S. is the only industrialized country that has not ratified the treaty. The only developing countries that have not ratified are Afghanistan, Brunei, Chad, San Marino, Tajikistan, Timor-Leste, Turkey, and Zimbabwe.[3]

The U.S. was the first country to adopt emissions trading on a national scale.

The U.S. was the first country to adopt emissions trading on a national scale. The 1990 Clean Air Act Amendments departed from traditional environmental command-and-control regulation to adopt a cap-and-trade system to control sulfur dioxide emissions.[4] The success of this program led to the U.S. insisting, against vehement European opposition, on including emissions trading in the Kyoto Protocol in 1997. Given this history, it is ironic that the U.S. is one of the only industrialized countries in the world that lacks an active or incipient emissions trading program for GHG emissions and that Europe has since embraced the policy. The European Union adopted its Emissions Trading Scheme (EU ETS) in 2003 — effective from January 1, 2005[5] — and now sends its government experts to the United States to brief federal and state policymakers on how it is done.[6]

Until recently, the U.S. could count Australia as an ally in its approach to climate change. However, with a recent change of government, Australia may rapidly implement a domestic emissions trading system to comply with its Kyoto obligations. Canada has been a party to the Kyoto Protocol since late 2002, but has not adopted a domestic cap-and-trade system to comply. Several Canadian provinces have joined with U.S. states to endorse mandatory cap-and-trade for GHGs within state and provincial borders, prior to mandatory federal action. Japan, despite having hosted the Kyoto negotiations, has also been slow to adopt a mandatory emissions trading program, though in recent weeks signals have suggested this may be changing.[7]

While the Kyoto Protocol and national emissions trading programs enacted to meet Kyoto targets are the operating standard elsewhere, U.S. federal climate policy in contrast consists of a variety of voluntary and technology-based approaches. The Bush administration has advanced several initiatives that aim to foster the creation, deployment, and sharing of technologies that will reduce GHG emissions. A cornerstone of this effort is the Asia-Pacific Partnership on Clean Development and Climate.[8] More recently, the president announced a commitment to "stop the growth in U.S. greenhouse gas emissions by 2025."[9] A similar goal to reduce the GHG emissions intensity of the U.S. economy by 18 percent between 2002 and 2012 was announced in February 2002.[10] Reducing the intensity of GHG emissions reduces the rate at which emissions grow. This differs from the approach taken under the Kyoto Protocol, which would result in an absolute reduction in emissions.

Divergent Philosophies on Climate Policy

The U.S. government has said it will not adopt mandatory caps on greenhouse gas emissions unless all major emitters are required to do so. Other industrialized countries have taken the view that this should not be a prerequisite for domestic action for three reasons: the trajectory of global temperature increases is severe and rapid enough to warrant taking action immediately; industrialized countries caused the vast majority of the build-up of long-lived gases in the atmosphere and thus should remedy the problem; and developing countries are poorly equipped both economically and technologically to deal with climate change on the same scale as developed economies. Developing countries will bear the effects of climate change (particularly sea-level rise) on a much greater scale than will most industrialized countries.

While the Bush administration approach has staunch supporters domestically, it has also met with criticism from U.S. states — including those in the northeast and the west — that have moved forward to adopt mandatory caps on greenhouse gas emissions within their borders,[11] and from a number of foreign countries.

Europe has always taken a slightly different approach to environmental policy. In particular, it has espoused the "precautionary principle," which states that even where the science has not solidified, it is appropriate and justifiable for the government to regulate as a precaution.[12] This is contrary to the usual approach to environmental law in the U.S.

The Europeans approach the climate issue very differently from the United States, where the debate focuses on how to address climate change without negatively impacting the economy. Economic growth and health are always given top billing and policymakers are loath to act against this conventional wisdom. Cost-benefit analysis is integral to any U.S. policy decision.

In Europe, while there is discussion of how industry and consumers may be affected by environmental measures, the emphasis seems to be that environmental measures — including caps on GHG emissions — should be undertaken even if the economy suffers. While some in industry may vociferously oppose this, the public seems willing to sacrifice, and policymakers do not seem to give as much weight to industry and commercial interests as is given in the United States.

While climate change policy rarely ranks among the top five U.S. policy priorities — among either the public or leading politicians — it is often ranked first or second in importance in Europe. As a result, there is frustration among European leaders and the public with the approach of the United States to climate change. Most countries in Europe take their Kyoto targets very seriously and most will likely meet them. Several, including Germany and the United Kingdom — the two largest emitters in Europe — have announced unilateral goals that exceed these targets.

Future U.S. Action Imminent?

There is a good chance that the next U.S. administration will support and sign into law a national climate policy that includes mandatory controls on GHG emissions. Several bills in Congress would cap GHG emissions across the U.S. economy. Multiple litigation tracks against both government and major private sector emitters, public opinion, and state action all ensure that federal action will be needed if only to supersede and prevent an ad hoc approach. All agree that fifty state climate policies are not advisable.

While many emitters are steadfastly opposed to any type of mandatory controls on GHG emissions, most acknowledge that a carbon-constrained future is likely. Some U.S. companies have announced they are in favor of the Congress and president imposing a mandatory cap-and-trade system.[13] These companies would likely face increased expenses, but they cite three reasons for their support of such a law. First, many feel that the country has a moral duty to limit its contribution to climate change, because the United States is wealthy and it has done more than any other country to contribute to the problem. Second, they prefer the certainty of knowing what long-term obligations they may face by reducing emissions. Third, the worst-case scenario for a large company is to be forced to comply with differing regulations on GHG emissions. As long as the federal government does not act, states will continue to have varying targets, measures, and penalties, creating an unworkable patchwork system.

Most countries in Europe take their Kyoto targets very seriously and most will likely meet them.

What is happening on the multilateral stage? As a party to the United Nations Framework Convention on Climate Change, the U.S. partici-

pates in international meetings on climate change, but avoids taking part in discussions regarding mandatory caps on GHG emissions via the Kyoto Protocol. The U.S. does not support a mandatory program unless all major emitters — including China, India, and Brazil — are included in the program.

While nations continue to discuss what comes after 2012 — when the first commitment period of the Kyoto Protocol ends — a sizable, multibillion-dollar, near-global emissions market exists. Physical allowances and credits that represent actual GHG emissions and emission reductions trade on a large scale across borders every day. While only industrialized countries have implemented emissions trading programs, these programs import credits that have been generated by reducing GHG emissions in developing countries, thus involving a large number of developing countries.

Why Emissions Trading Will Likely Prevail over Other Measures

Experience with the U.S. sulfur dioxide trading program has shown that well-designed emissions trading can be a very effective means to achieve reductions in emissions at costs much lower than traditional command-and-control methods.[14] Title IV of the 1990 Clean Air Act Amendments introduced emissions trading on the first national scale globally. It set a permanent, declining cap on sulfur dioxide emissions from power plants. A company is thus incentivized to reduce emissions so that it can sell its reductions for a profit, or alternatively, to avoid having to purchase additional allowances. Instead of command and control, which dictates that each source must reduce environmental impact by a certain amount over a certain time, the program allows companies the flexibility to determine how they will comply. They may choose to retrofit their plant by installing scrubbers, to switch to cleaner fuels, to become more efficient, or to purchase allowances from others who are able to make reductions more cheaply. If a policy must be adopted, most companies prefer emissions trading over a carbon tax, since trading would provide them with greater flexibility and potentially lower costs.

Emissions trading works in part because it creates an entirely new asset class and cottage industry focused on maximizing revenues from this new asset class. This industry comprises new financial products, experts on projects that reduce emissions, policy experts, verifiers, auditors, carbon traders, climate change lawyers, and consultants — few of which existed prior to the creation of GHG emissions trading. All of this activity is initiated by the private sector seeking the cheapest, most efficient ways to create emission reductions. Similarly, the liability side of the equation has focused board rooms on the issue. Once the marginal cost of abatement reaches a certain level, decisions about fuel switching and implementing new technologies become common-sensical.

Lessons Learned from Other Countries

Assuming the U.S. decides to pursue an emissions trading system over a carbon tax or command-and-control measures, it is well-advised to take a close look at how the other systems have fared over the last four years.[15] As debates began in earnest this spring about the shape of possible U.S. federal climate legislation, many carbon market participants wondered why Washington seemed to be ignoring the only existing large-scale example of greenhouse gas emissions trading globally — the EU's Emissions Trading Scheme (EU ETS). Capitol Hill seemed to disregard the lessons that the Europeans learned in three years of active trading.

Participants in the EU ETS have been actively trading emissions allowances and credits for four years. The program went into effect on January 1, 2005, and is already into its second phase. While the program experienced a famously bumpy trial phase due to an over-allocation of allowances, the second phase is running as expected and is arguably beginning to produce reductions in emissions and force companies to alter long-term planning and emissions profiles.[16] The following lessons can be gleaned from the EU's experience and may be useful to consider for a future U.S. program:[17]

- **Good emissions data are essential**. The EU ETS's famous price crash can be directly attributed to an over-allocation of allowances, which was in turn due to a lack of accurate baseline data. Market participants should remember, however, that even markets with good data experience wild price fluctuations in their early years.

- **Real scarcity is needed both for market functioning and to achieve environmental objectives.** Once the market received verified emissions data a year into the EU ETS and realized the market was long, prices for allowances dropped from thirty euros to 1 euro cent in about eighteen months. Low allowance prices do not incentivize abatement activities and do not cause emission reductions. Price caps should be considered carefully, as a free market will allow for true supply and demand to operate and will drive private sector innovation. A de facto price cap will be set at the penalty for noncompliance.

- **Start simply and build in flexibility.** The EU ETS started by regulating one gas — carbon dioxide — and only six major emitting sectors. In the U.S. it similarly makes sense to start small, with those sectors that have accurate emissions data or can easily accumulate a year of base line data before the program commences. The program should also have the capacity to adapt as the market gains experience and as scientific, technological, and economic research advances.

- **Establish a single central emissions trading registry.** The EU ETS currently operates with different registries in each of its twenty-seven member states. The registry serves as a place to retire allowances for compliance but also as a platform for trading. While there is merit in having devolved responsibilities for registry functions, having

fifty individual registries in the U.S. would complicate the mechanics of trading and add to transaction costs.

- **Incorporate offset credits.** The EU ETS allows for project-based emission reduction credits to be used to a limited extent to help reduce the costs of compliance. It is cheaper for a regulated entity to purchase credits from a project in a developing country than to abate emissions directly. Offset programs ensure some flexibility in the system, encourage investment and technology transfer to lesser-developed countries, and help to reduce emissions globally.

- **Allow nonregulated entities to trade allowances.** Allowing nonregulated entities to trade will provide liquidity and can smooth out financial risks. Investment banks and trading houses have provided this useful function in the EU ETS by also offering creative financial emissions products such as options and swaps for hedging purposes.

- **Provide harsh penalties for noncompliance.** The first phase of the EU ETS provided for a forty-euro penalty for each allowance not surrendered. The second phase increases this penalty to one hundred euros a ton. Harsh penalties have driven early compliance and drawn boardroom attention.

- **Allow banking of allowances.** Allowing facilities to bank allowances incentivizes early emission reduction activities and overcompliance. Banking has been effective in achieving early reductions under the U.S. Acid Rain Program. It allows corporations greater flexibility in long-term financial planning.

- **Seriously consider the merits of auctioning versus free allocation.** The EU ETS freely allocated more than 95 percent of allowances during its first phase, resulting in windfall profits for a number of firms that passed along the shadow cost of allowances to consumers. This experience has caused many to advocate a minimum amount of auctioning. An auction may be more economically efficient, but there is concern in the U.S. about negative economic impact on both consumers and firms. One way to reduce this impact is to use the proceeds from the auction to compensate both firms and consumers.

- **Longer time horizons enable better financial planning.** The current review of the EU ETS has resulted in a desire for compliance periods longer than five years. The third phase of the EU ETS is likely to last eight years. The basic lesson is that firms need certainty and predictability about the future in order to make informed, long-term investment decisions.

- **Set up the system so it continues indefinitely.** The Kyoto Protocol was negotiated so that each commitment period would have to be negotiated and agreed to separately. As a result, nations have not yet agreed to a second commitment period in the treaty after the first period ends in 2012. The EU ETS default position is the opposite; it will continue indefinitely unless the member states elect to stop it. This provision is acceptable where the program also incorporates sufficient flexibility to adopt amendments easily.

The U.S. position on climate change differs significantly from the rest of the developed world. However, federal policy is likely to change dramatically in the next several years and the U.S. policy makers would be well-advised to carefully consider the lessons of GHG emissions trading learned in other countries. ■

Endnotes:

1 Kyoto Protocol Status of Ratification, available at http://unfccc.int/files/kyoto_protocol/status_of_ratification/application/pdf/kp_ratification.pdf (last accessed Sept. 7, 2008).
2 Jehl, Douglas and Andrew C. Revkin, "Bush, in Reversal, Won't Seek Cut in Emissions of Carbon Dioxide," NEW YORK TIMES, Mar. 14, 2001.
3 Kyoto Protocol Status of Ratification, available at http://unfccc.int/files/kyoto_protocol/status_of_ratification/application/pdf/kp_ratification.pdf (last accessed Sept. 7, 2008).
4 1990 Amendments to the Clean Air Act, 42 U.S.C. §§ 7401-7671.
5 European Union Emissions Trading Scheme, Council Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the community and amending Council Directive 96/61/EC, 2003 O.J. (L 275) 32, 32-46.
6 *See*, e.g., David Blair, "UK using public opinion to change US climate policy," TELEGRAPH (UK), July 20, 2008, available at http://www.telegraph.co.uk/earth/main.jhtml?xml=/earth/2008/07/20/eaukus120.xml (last accessed Sept. 7, 2008).
7 "Japan to start trial carbon trading in October," Reuters, July 29, 2008, available at http://uk.reuters.com/article/oilRpt/idUKT8025920080729?pageNumber=2&virtualBrandChannel=0 (last accessed Sept. 7, 2008).
8 Member nations include Australia, Canada, China, India, Japan, Republic of Korea, and the United States. *See* Asia-Pacific Partnership on Clean Development and Climate, http://www.asiapacificpartnership.org/ (last accessed Sept. 1, 2008). For other measures in the White House's climate policy initiative, see White House Council on Environmental Quality, "Addressing Global Climate Change," http://www.whitehouse.gov/ceq/global-change.html (last accessed Sept. 7, 2008).
9 White House, "Fact Sheet: Taking Additional Action to Confront Climate Change," available at http://www.whitehouse.gov/infocus/environment/ (last accessed Sept. 1, 2008).
10 White House, "Global Climate Change Policy Book," February 2002, available at http://www.whitehouse.gov/news/releases/2002/02/climatechange.html.

11 The states of the northeast United States are implementing the Regional Greenhouse Gas Initiative, which will commence on January 1, 2009, and aims to reduce carbon dioxide emissions from power plants 10 percent below current levels by 2019. Regional Greenhouse Gas Initiative, Memorandum of Understanding, Dec. 20, 2005, available at http://www.rggi.org/docs/mou_12_20_05.pdf (last accessed Sept. 7, 2008). Governor Arnold Schwarzenegger signed into law A.B. 32 which aims to reduce greenhouse gas emissions from all sectors of the economy to 1990 levels by 2020. California Assembly Bill 32, Part 3, signed into law Sept. 27, 2006, available at http://www.climatechange.ca.gov/publications/legislation/ab_32_bill_20060927_chaptered.pdf (last accessed Sept. 7, 2008). California and other western states are pursuing the Western Climate Initiative which would adopt a regional greenhouse gas emissions trading system.

12 European Commission Communication on the Precautionary Principle, Brussels, COM (2000) 1, Feb. 2, 2000; *see also* Maastricht Treaty (draft treaty establishing a constitution for Europe), Article III-233, 2004 O.J. (C 310) 103 ("Union policy on the environment shall ... be based on the precautionary principle and on the principles that preventive action should be taken....").

13 *See*, e.g., the United States Climate Action Partnership, http://www.us-cap.org/ (last accessed Sept. 1, 2008).

14 Chestnut, Lauraine G. and David M. Mills, "A fresh look at the benefits and costs of the U.S. acid rain program," 77 JOURNAL OF ENVIRONMENTAL MANAGEMENT 252, 255 (2005) ("The current estimate of average cost per ton of SO2 is ... less than half the mean of average costs predicted in 1990"), available at http://www.epa.gov/airmarkets/presentations/docs/jemarpbenefitsarticle.pdf (last accessed Sept. 1, 2008); U.S. Environmental Protection Agency, Clean Air Markets Program, Office of Air and Radiation, "EPA Acid Rain Program: 2001 Progress Report," EPA-430-R-02-009, at 12-13, 39, November 2002, available at http://epa.gov/airmarket/progress/docs/2001report.pdf (last accessed Aug. 31, 2008).

15 New Zealand and Australia are also in the process of setting up domestic emissions trading schemes to help them meet their Kyoto targets. These countries have carefully considered international best practices in their design.

16 *See*, e.g., "CEZ announces plans for largest onshore wind farm in Europe," CLIMATE WIRE, Sept. 2, 2008 ("CEZ, the Czech power group that is central Europe's largest company, plans to build a €1.1 billion ($1.62 billion) wind park in Romania in a move to offset emissions from dirtier coal-fired power plants, which make up a majority of the company's energy-generating portfolio.... CEZ wants to boost spending on renewable energy because an EU climate package proposal is expected to drive up fossil fuel costs starting in 2013.... 'Investment in renewables is one of the strategic measures we are taking to respond to the adopted energy-climatic package of the E.U.,' said CEZ Chairman Martin Roman in a statement.").

17 John Deacon, Robert D. Marsh, and Tauna M. Szymanski, "Learning from the EU's Emissions Trading Regime," EXECUTIVE COUNSEL

Testing the Boundaries of the Clean Water Act on the Virginia-Kentucky Border:

The Coal Industry's Proposed Use Attainability Analysis for Straight Creek in Lee County, Virginia

by Mary V. Cromer

In far Southwest Virginia along the Virginia-Kentucky border, the dramatic rise and fall of the Ridge and Valley Province abruptly gives way to the Appalachian Plateau. Instead of broad valleys, the land is characterized by narrow hollows cut as deep grooves in the plateau. For 6.6 miles, Straight Creek, a tributary to the North Fork of the Powell River, cuts through the plateau at the northern edge of Lee County, Virginia, forming one such hollow.[1] In the early twentieth century, coal was discovered in this part of Lee County, and coal companies began to develop the area along Straight Creek.

Given the many impacts to this watershed, it may not be surprising that Straight Creek currently fails to meet Virginia's water quality standards.

Development in this rugged, hard-to-access area was made possible by the Louisville & Nashville and Southern rail lines.[2] The physiography of the landscape determined the modes of development. In particular, Straight Creek's narrow flood plain provided the only flat land available for the rail lines, roads, and houses. Because of the need to ensure a stable foundation for these structures and the need to protect residents from floods, Straight Creek was dredged, moved, straightened, channelized, and generally shored up throughout the twentieth century.

Coal mining is the only significant industry for St. Charles and other communities along Straight Creek and its tributaries. Mining has had a significant impact on the water there. The watershed is still being affected by mining that occurred before the enactment of the Surface Mining Control and Reclamation Act (SMCR Act) in 1977.[3] These impacts are referred to as abandoned mine land (AML) impacts.

Most AML impacts are chronic problems caused by runoff from abandoned surface mines and mine waste piles or seepage from abandoned deep mines. AML impacts can also be acute. In 1997, acidic water containing high levels of iron erupted from an underground abandoned mine and killed more than 3,000 fish in Straight Creek.[4] More recently, one of the largest pollution events in Virginia's history occurred in this watershed in August and October 1996. These spills occurred because of subsidence under Lone Mountain Processing Inc.'s slurry impoundment.[5] The first spill — on August 9, 1996 — released 2.6 million gallons of contaminated waste into Gin Creek, which flows into Straight Creek. The second spill — on October 24, 1996 — was more significant. That spill released three thousand gallons-per-minute of contaminated water into Gin Creek. The spill continued for nine days, killing more than 11,000 fish in Gin Creek, Straight Creek, and the North Fork of the Powell River.[6] A more recent pollution spill occurred in 2003, when a mining sediment pond, put in place to trap both wastewater and storm water from an active mine, was breached and flowed into Straight Creek, killing more than 2,400 fish.[7]

Given the many impacts to this watershed, it may not be surprising that Straight Creek currently fails to meet Virginia's water quality standards. In particular, it fails to support the designated use of providing for the "propagation and growth of a balanced indigenous population of aquatic life."[8] This determination was made because Straight Creek lacks pollution-sensitive indicator species like mayflies, stoneflies, and caddisflies that are common in Appalachian streams.[9] This designated aquatic life use, which applies to all waters of the commonwealth, is the cornerstone of Virginia's water quality standards[10] and is set to ensure that all of Virginia's waters meet the

goals of the Clean Water Act. Without a special dispensation, the Clean Water Act requires that this designated aquatic life use be met and maintained to ensure, at a minimum, "water quality that provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation."[11]

Such a special dispensation can only be granted based on a use attainability analysis (UAA). A UAA is a structured scientific and technical analysis of the highest feasibly attainable use of a particular water body.[12] Despite being created by regulation twenty-five years ago, UAAs are a developing area of law under the Clean Water Act. Environmental Protection Agency (EPA) regulations and considerations of UAAs in other states provide substantial guidance as to what types of analyses are required to support a downgrading of use. As a threshold matter, under no circumstance can a use be removed or lowered if it has been attained at any point since November 28, 1975, or if it can be attained through the imposition of technology-based effluent limits for point sources and best management practices for nonpoint source pollution.[13]

If the water has not been in compliance at any point since November 28, 1975, the regulations provide an exclusive list of six water-quality stressors that can justify the downgrading or removal of a designated use. These six include "human caused conditions or sources of pollution [that] prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct them than to leave in place" and situations in which "controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact."[14] The latter refers to situations in which stricter controls are needed from permitted sources of pollution than are required under the EPA's technology-based effluent limits that apply to all industrial and construction sources of pollution. Since the Clean Water Act presumes that all waters are capable of meeting and sustaining the act's water quality goals, the EPA requires rigorous proof before allowing the downgrading or removal of any designated use.[15]

A Virginia coal industry group, Virginia Mining Issues Group (VMIG), argues that human-caused conditions are so severe that Straight Creek cannot meet its aquatic life use standard and therefore this standard should be removed or lowered.[16] On March 9, 2007, the Virginia State Water Control Board approved VMIG's request to perform a UAA for Straight Creek.[17] The approval of both Virginia and the EPA will be required before Straight Creek's designated use can be lowered. Before being granted permission to proceed with a UAA, the industry submitted a "Reasonable Grounds Determination" to justify its proposal.[18] The reasonable grounds document posits that the modifications of Straight Creek that have destroyed aquatic habitat, the proximity of current residences to the creek, and extensive mining in the watershed before the SMCR Act likely prevent the attainment of the designated aquatic life use in Straight Creek. Regarding the regulatory requirement that no use can be removed if it has been attained since November 28, 1975, the industry group states "due to SMCR Act-related improvements in mining in the watershed, the water quality is no worse than 1975."[19]

The industry's UAA will need to support all of these suppositions in order to justify downgrading Straight Creek's designated use. The analysis of Straight Creek's water quality problems will need to be both spatial and temporal. The UAA will need to assess differences in the water quality in different portions of the watershed. If compliance has been achieved since 1975 or if attainment is achievable in some segments and not others, those segments cannot be downgraded. The temporal analysis will require an assessment first of whether compliance has been achieved since November 28, 1975. If the UAA determines that it has been achieved, the process must stop there, because a downgrading of use cannot be supported, and the state must take steps, including more stringent regulation of mining in the watershed, to assure that the designated use is once again attained.

If the UAA finds that some segments of Straight Creek have not met the designated aquatic life use since November 28, 1975, the analysis must determine what is preventing attainment and whether attainment in the future is feasible. To determine the causes of nonattainment, the UAA must assess whether all point sources in the watershed[20] are in compliance with their current effluent limits and whether reasonable and cost-effective best management practices are being implemented for all pollution sources. If the assessment determines that any of these currently available controls are lacking, they must be remedied.

If the UAA determines that, even with proper enforcement of current permitting limits and the establishment and maintenance of best practices, Straight Creek could not meet Virginia's water quality standards, the UAA must assess to what extent human-caused conditions that cannot be easily remedied are to blame and whether more stringent water quality based permit limits would bring the watershed into compliance. The UAA must assess whether it is possible to remedy those human-caused conditions or whether remediation would do more harm than good, and it must assess the economic and social impact of imposing more stringent water-quality-based effluent limits on the mining industry. Only if remediation of those human-caused impacts is infeasible and only if the social and economic cost of more stringent permitting is too great can those impacts justify a lowering of the designated uses. In all cases, all other impacts must be remediated.

The record of significant pollution problems caused by active mining in this watershed since the SMCR Act will be a significant hindrance to any proposal to downgrade Straight Creek's designated use. In particular, because of the impacts of the pollution spills in the 1990s and the lack of base-line data on water quality throughout Straight Creek back to 1975, it will be difficult for the industry's study to overcome the presumption that Straight Creek's designated aquatic life use has been met since November 28, 1975. Even if that presumption is rebutted, the study will have to then separate the impacts from human alteration of the water and building near the stream

bank that cannot feasibly be remediated from those caused by active mining within the watershed.[21] For impacts caused by active mining in the watershed, the UAA will be required to determine how to reduce such impacts and the cost of doing so. Since active mining has caused several severe pollution spills in the recent past, a thorough analysis of how the current permitting regime failed to prevent these spills will be required. In addition, the UAA must perform a cost-benefit analysis of more stringent water-quality-based permitting that would reduce pollution from active mining.

It will likely be some time before the industry's study is complete. After completion the industry likely will submit its request that the aquatic life use standard be lowered for Straight Creek with its UAA as support. The Virginia Department of Environmental Quality will review the study to determine if it complies with state and federal regulations and if the requested downgrade is supported. If the department finds that the study adequately supports the requested downgrade, the agency will present the UAA to the State Water Control Board. If the board approves the study, Virginia may begin the process of changing the designated use standard for Straight Creek through formal rulemaking. This rule change will require notice and the opportunity for a public hearing under the Virginia Administrative Process Act, *Va. Code Ann.* § 2.2-4007.01. Any change in the standard that is approved through formal rule making in Virginia must be approved by the EPA. The EPA will evaluate the UAA and the state's rule change to determine whether the study conducted is sufficient to rebut the Clean Water Act's presumption that the minimum designated aquatic life use is attainable. Only if the EPA finds that the presumption has been rebutted will it approve any proposed lowering of the aquatic life standard for Straight Creek. ■

Endnotes:

1 Virginia's 2006 303(d) impairment listing for this area includes not just Straight Creek, but several of its main tributaries. Virginia Department of Environmental Quality, *Final 2006 305(b)/303(d) Water Quality Assessment Integrated Report*, at 3.3a-75, *available at* http://www.deq.virginia.gov/export/sites/default/wqa/pdf/2006ir/2006irdoc/ir06_Pt3_Ch3.3a_Category_5_List.pdf (approved Oct. 16, 2006). This article focuses only on the mainstem of Straight Creek.

2 Lee County Historical and Genealogical Society Inc., BICENTENNIAL HISTORY OF LEE COUNTY, 1792-1992. 1992, at 42.

3 30 U.S.C. § 1201, et seq.

4 Virginia Department of Environmental Quality, *Fecal Bacteria and General Standard Total Maximum Daily Load Development for Straight Creek,* at 6-24, *available at* http://www.deq.virginia.gov/tmdl/apptmdls/tenbigrvr/straight.pdf [hereinafter Straight Creek TMDL].

5 Coal slurry is the waste water left after coal processing. The water is impounded to allow coal fines and other particles to settle out. Clean water is removed from the top of the impoundment and reused in the coal processing. EPA Press Release, *Mining Company Admits to Criminal Negligence: Special Restitution Project Will Help Improve the Water Quality to St. Charles, Va.*, *available at* http://yosemite.epa.gov/r3/press.nsf/0/16b03f3109769fa785256a07006b7363?OpenDocument (Nov. 1, 1999).

6 *Id*. On November 1, 1999, Lone Mountain Processing Inc. pled guilty to criminal negligence with regard to the spills and agreed to pay $1.6 million in criminal fines and restitution. *Id*.

7 Straight Creek TMDL at 6-25.

8 9 VAC 25-260-10.

9 Straight Creek TMDL at 6-2.

10 Water quality criteria for particular pollutants or a general narrative water quality criteria, like Virginia's "free from" standard, are then required for each water depending on its designated use. *See* 9 VAC 25-260-20 ("State waters … shall be free from substances … in concentrations, amounts, or combinations which contravene established standards or interfere directly or indirectly with designated uses of such water or which are inimical or harmful to human, animal, plant, or aquatic life."). The designated aquatic life use standard is the least protective designated use and is intended to ensure what is minimally necessary to meet the goals of the Clean Water Act.

11 33 U.S.C. §1251(a)(2).

12 UAAs were created by EPA regulation on November 8, 1983. 48 Fed. Reg. 51,400 (Nov. 8, 1983). The UAA regulations are found at 40 C.F.R. §131.10(g).

13 40 C.F.R. §131.10(d), (h)(1); 40 C.F.R. §131.3; *see also* 9 VAC 25-260-10.D, 10.I.1.

14 40 C.F.R. §131.10(g)(3), (g)(6).

15 *See*, 68 Fed. Reg. 40,428, 40,430 (Jul. 7, 2003) ("EPA regulations effectively establish a rebuttable presumption that CWA §101(a) goal uses are attainable and therefore should apply to a water body unless it is affirmatively demonstrated that such uses are not attainable."); *Idaho Mining Ass'n v. Browner*, 90 F. Supp. 2d 1078 (D. Id. 2000) (upholding EPA's "rebuttable presumption" interpretation).

16 Virginia Coalfields TMDL Group, *Reasonable Grounds Documentation to Conduct an Aquatic Life Use Attainability Analysis for Straight Creek, Lee County, Virginia Under VAC 62.1-44.19:7*, submitted to Virginia State Water Control Board on Oct. 2, 2006 [hereinafter Reasonable Grounds Documentation].

17 The industry group is being permitted to conduct the UAA pursuant to Virginia Code §62.1-44.19:7.E. That subsection, added March 23, 2006, allows an "aggrieved party" to conduct a UAA with permission of the SWCB. The VMIG group's proposal is the first UAA to be undertaken under Virginia Code §62.1-44.19:7.E.

18 Reasonable Grounds Documentation.

19 VA Mining Issues Group, *Study Plan: Straight Creek Use Attainability Analysis*, submitted to DEQ on Oct. 22, 2007, *Attachment III: Response to Comments*, at 2.

20 Forty-nine of the fifty permitted point sources of pollution in this watershed are from active mines. Straight Creek TMDL at xxvi.

21 Permitted mining comprises 1,310 acres of the 17,670-acre watershed, while residential land use comprises only 145 acres. Straight Creek TMDL at 3-2.

Governor Kaine's Natural Resources Agenda

by Nicole M. Rovner, Deputy Secretary of Natural Resources of Virginia

Natural resources will take center stage in Gov. Timothy M. Kaine's final year in office. While the governor will continue to work on the focal areas of prior years — transportation, education, health care — as well as myriad other important issues, energy and the environment will receive special emphasis. No governor in recent memory has highlighted natural resources for an entire year.

Energy and the environment have been of keen interest to the governor since his term began. Two of his signature initiatives relate to land conservation and energy policy, and they will remain important through 2009.

Land Conservation

Early in his term, the governor set an aggressive goal to permanently conserve more than 400,000 acres of land by 2010. Achieving this goal would require Virginia to almost double the rate at which land was being protected before he took office (about 56,000 acres per year). The effort has been remarkably successful so far, with about 254,000 acres already conserved.

This success has been fueled largely by Virginia's best-in-the-nation land preservation tax credit, which has encouraged landowners throughout the commonwealth to donate conservation easements that restrict or extinguish development rights on their properties. Governor Kaine left his mark on the tax credit program shortly after setting his land conservation goal, when he was presented with a legislative proposal that included some severe limitations on the availability of tax credits. The governor worked with the General Assembly to increase accountability in the program while still providing a powerful inducement to landowners who wish to protect their land.

Energy and the environment have been of keen interest to the governor since his term began.

Since reform of the tax credit in 2006, landowners have been seeking conservation easements in record numbers. Restricting development in perpetuity is nevertheless a significant decision for landowners. Lawyers have an important role to play in helping landowners make conservation decisions regarding their land, as the governor pointed out in his October 2007 article in *Virginia Lawyer*.

While conservation easements are the tool most commonly used to protect important scenic and ecological attributes of open lands, they often do not provide for public access. That is why Virginia's land conservation efforts also include funding for conservation agencies to buy land. In the 2008 legislative session, Governor Kaine proposed a bond issue to finance the largest amount of funding for public land acquisition in state history. As a result, the commonwealth will acquire $30 million worth of land for state forests, natural area preserves, and wildlife management areas in the following months. The legislature also approved the governor's proposal for an additional $5 million for Civil War battlefield preservation, which will be matched two-to-one by private preservation groups to protect Virginia's most threatened battlefield sites.

Energy Policy

In April 2007, Governor Kaine issued Executive Order (EO) 48, which required state agencies to reduce the costs of nonrenewable energy purchases by 20 percent. In September of that year, he released Virginia's first comprehensive energy plan. The Virginia Energy Plan (VEP), which had been required by 2006 legislation, highlights four broad energy policy goals for the commonwealth. First, the plan calls for increased energy independence through both expanded conservation and efficiency and increased in-state energy production. Second, the plan capitalizes on economic development opportunities and increases research and development in four strategic areas — nuclear technologies, alternate transportation fuels, coastal energy production, and carbon capture

and storage. Third, the plan calls for expanded consumer education on energy use. Recognizing that the use of energy generated from fossil fuels is contributing to a global problem, the plan's final goal is by 2025 to reduce greenhouse gas emissions by 30 percent below projected levels. Many of the VEP's recommendations regarding energy efficiency and conservation would have the result of reducing emissions. To identify the additional strategies that would be needed to reach the 30 percent goal, the plan recommends the creation of a Climate Change Commission.

Many of the VEP's recommendations regarding energy efficiency and conservation would have the result of reducing emissions.

The VEP contains recommendations on strategies for achieving these four goals, as well as proposals in other areas such as renewable energy and energy infrastructure. Progress has been made on both the state government target in EO 48 and many of the recommendations of the VEP. Continued implementation of the VEP and EO 48 will be a key focus between now and 2010.

Climate Change

Pursuant to the recommendation of the Virginia Energy Plan, Governor Kaine issued Executive Order 59 in December 2007 to establish the Governor's Commission on Climate Change. EO 59 calls on the commission to

- inventory the amount of and contributors to Virginia's greenhouse gas emissions, including emissions projections through 2025;
- evaluate the expected impacts of climate change on Virginia's citizens, natural resources, and economy;
- identify climate change approaches by other states, regions, and the federal government;
- identify what Virginia needs to do to prepare for the likely consequences of climate change;
- identify any actions (beyond those identified in the VEP) that need to be taken to achieve the 30 percent greenhouse gas reduction goal.

Between February 2008 and June 2008, the commission received presentations from almost forty state and national experts about the impacts of climate change on Virginia's economy and natural resources. In September, the commission issued an interim report that addresses the inventory of emissions, impacts of climate change, and other states' approaches.

In June, the commission formed four work groups to address the remaining two tasks; their work is ongoing. One group is focusing on climate change preparation. The remaining three groups are identifying actions that need to be taken to achieve the 30 percent greenhouse gas reduction goal. One is focusing on transportation and land use actions, a second is focusing on electricity generation and other energy sources, and a third is focusing on the built environment. Work group recommendations that are accepted by the full commission will be included in the commission's final report, which will be issued in December 2008.

Conclusion

What will the Year of Energy and the Environment hold in store? Some possibilities are still in the development stage. Secretary of Natural Resources L. Preston Bryant Jr. has spent several months seeking ideas from the agencies within his secretariat, as well as a broad range of stakeholders. The focus on natural resources will likely provide an opportunity to take further steps on a number of issues that have been important to the Kaine administration, such as linking transportation and land use, restoring the Chesapeake Bay and maintaining healthy fisheries, and improving water quality throughout the commonwealth. Most certainly, there will be new land acquisitions and conservation easements to celebrate, actions to implement the recommendations of the Commission on Climate Change, and more progress toward the goals of the Virginia Energy Plan. ■

by William T. Wilson, Chair

Help Seniors and Young People — It's Easy and Rewarding

A GOAL OF THE CONFERENCE OF LOCAL BAR ASSOCIATIONS (CLBA) is to assist local bar associations with their legal and community programs.

When I attend any gathering of lawyers, we always talk about what we need to do individually and through our bar associations to help other people. Frequently, local bar associations are not active in pro bono programs. They either do not know what to do, or they are discouraged by complicated programs.

I suggest two programs that are rewarding and simple to present. They help people in the community and enhance the image of lawyers.

Senior Law Day Program — This was modeled after a presentation by the Alleghany-Bath-Highland Bar Association in 2004, when a panel made up of a general district court judge, a defense attorney, a commonwealth's attorney, and two general practice lawyers spoke to more than one hundred senior citizens at the courthouse in Covington. The panel discussed the *Senior Citizens Handbook*, produced by the VSB Senior Lawyers Conference (SLC). The SLC has adopted the Senior Law Day Program as a statewide program, and many bar associations since have sponsored similar events.

To assist local bar associations, the SLC distributes a blueprint for the program. For a copy, contact Patricia A. Sliger at (804) 775-0576 or sliger@vsb.org.

***So You're 18* Panel Discussion Program** — This program also was modeled after a project sponsored by the Alleghany-Bath-Highland Bar in 2008. The panel included a general district court judge, the bar president, the sheriff of Alleghany County, a Covington police officer, a private defense attorney, and an Alleghany County assistant commonwealth's attorney. I served as the moderator. We explained information in the Virginia State Bar-published *So You're 18* booklet to juniors and seniors at Alleghany High School. The CLBA Executive Committee encourages all voluntary bar associations to conduct similar programs. The CLBA has sent the program blueprint to all local bar associations.

The *So You're 18* program can easily be presented in 1½ hours. It is a good idea to mix other community leaders with the lawyers and judges on the panel. The booklet has been revised and is being sent to courts and social services departments.

The blueprint and copies of *So You're 18* can be obtained without charge by contacting Paulette J. Davidson at (804) 775-0521 or davidson@vsb.org.

OTHER PROGRAMS successfully sponsored by local bars include The Devil Wore Green — a trust accounting seminar offered free by the VSB — and Wills for Heroes, which helps first responders prepare basic estate planning documents. Information on these and other projects for bar members and their communities are described in the pamphlet *Legally Informed.* (Available online at http://www.vsb.org/docs/LegallyInformed.pdf.) Contact Davidson for more information.

CLBA Conferences Set

Mark your calendars for the 2009 Solo & Small-Firm Practitioner Forum and the Bar Leaders Institute. More information will be posted at http://www.vsb.org/site/conferences/clba/ and distributed in the VSB E-News when it becomes available.

Solo & Small-Firm Practitioner Forum
Shenandoah University, Winchester
Wednesday, May 20, 2009

Bar Leaders Institute
University of Richmond
date TBD

by Jennifer L. McClellan, President

Service to the Bar — New Bar Members Can Begin Now

On October 27, 2008, more than one thousand lawyers were sworn in to the Virginia State Bar at the Admission & Orientation Ceremony. I welcome these new colleagues not only to the bar, but also to the Young Lawyers Conference. I echo VSB President Manuel A. Capsalis's call to these new young lawyers to become civically engaged, and I invite them to become involved in the conference. With more than seven thousand active members, the YLC is one of the VSB's largest conferences. It is also among the most active.

The YLC has a variety of programs that serve the public and the bar. For those interested in pro bono opportunities, we have the Emergency Legal Services Program, the Virginia Domestic Violence Safety Project, No Bills Night, and Wills for Heroes.

We also offer a number of projects to educate the public, such as Community Law Week, Students Day at the Capitol, We the Jury, and distribution of a juvenile rights handbook and voting rights brochure.

As part of our service to our members and the bar, the YLC sponsors the Admission & Orientation Ceremony and First Day in Practice Seminar (cosponsored by the VSB General Practice Section), the Professional Development Conference, the Leadership Conference, seminars and athletic events at the Virginia State Bar Annual Meeting (including an attorney general candidates' debate every four years), Board Match, and our award-winning *Docket Call* newsletter.

Some projects serve both the public and the bar. For example, our Immigrant Outreach Committee conducts continuing legal education programs on the consequences of criminal convictions for immigration status, and the Mental Health Reform Committee advises pro bono clients with mental illnesses, and will conduct CLEs on the civil commitment process.

As mentioned in the October 2008 edition of Virginia Lawyer, we also have programs devoted to increasing or celebrating diversity in the profession, including the Celebration Bench-Bar Dinner (see photos on page 23), the Minority Prelaw Conference, the Oliver Hill/Samuel Tucker Prelaw Institute, and Choose Law.

In addition, we have three commissions that explore issues for which the YLC may need to develop programs. These include the Women and Minorities in the Profession Commission, the Children in the Law Commission, and the Pro Bono Commission.

We are constantly evaluating and adding new programs. This year's new programs include Unlock Your Potential, a program to provide young lawyers the tools they need to evaluate whether to make a career change. This year, we will focus on those lawyers considering starting a solo practice.

The YLC is only as good as those members who choose to participate and volunteer for our programs. As conference president, I am amazed at the energy, creativity, and dedication of our volunteers. But we need to do more to be excellent — not just great.

Becoming involved in the YLC offers more than simply the satisfaction of serving the public and the bar. It offers long-lasting friendships with a variety of attorneys from across the commonwealth — and the referral network they bring with them. It offers opportunities for developing leadership and project development skills that many young lawyers do not get until much later in their careers. It offers the opportunity to network with the best and brightest Virginia attorneys, judges, lawmakers, and academics. And yes, it offers a bit of fun.

So, to paraphrase Thomas Jefferson, come forward then and give us the aid of your talents and the weight of your character towards our mission to serve the public and the profession. Get involved and enjoy the friendship, networking opportunities, and leadership development that your service can provide.

We are constantly evaluating and adding new programs.

by Homer C. Eliades, Chair

Senior Lawyers Conference: Committed to Seniors

THE SENIOR LAWYERS CONFERENCE (SLC) remains busy investigating ways to support senior citizens in the many obstacles and challenges they may face, such as health care and housing. Meanwhile, conference membership continues to grow. It now comprises more than seventeen thousand members aged fifty-five and older.

Our conference's dedicated attorneys share their knowledge, experience, and dedication to carry out many worthwhile projects that assist the senior citizens of Virginia. It is heartwarming to see so many senior lawyers and judges respond to the call of so many worthy organizations.

The conference has updated the *Senior Citizens Handbook*, with efforts led by committee Chair William Henry Oast III. The handbook is one of the most requested publications published by the Virginia State Bar. It offers information regarding the laws and programs that affect senior citizens. The revised edition is scheduled for distribution in early 2009.

Senior Law Day Programs are very popular. Through the ongoing efforts of Conference of Local Bar Associations Chair William T. "Bill" Wilson and SLC Vice Chair John H. Tate Jr., we are seeing the expansion of the program throughout the state. Most recently, Tate was instrumental in presenting a successful Senior Law Day Program in October at Virginia Intermont College. The Bristol Bar Association, the Social Security Administration office in Bristol, and the AARP sponsored the program.

The blueprint for planning a Senior Law Day Program serves as a planning resource guide, and is available by contacting Patricia A. Sliger at (804) 775-0576 or sliger@vsb.org.

The Senior Lawyers Conference has been invited to participate in many pro bono projects. John M. Oakey Jr. has graciously agreed to chair the SLC Pro Bono Committee. John and his committee will investigate the proposed projects and recommend which projects the conference may support and become actively involved in.

The Liberty Day Project is one of the many proposals that has been presented to the conference. This project focuses on educating Americans about the Declaration of Independence and the U.S. Constitution. The project began more than ten years ago in the classrooms of elementary students.

Today, this project involves the support of local bar associations and civic organizations in other states. The Liberty Day Project is expanding its efforts to educate a broader audience with the help of the SLC and the Young Lawyers Conference of Virginia.

Frank O. Brown Jr. continues to do an outstanding job as editor of our newsletter, *Senior Lawyers News*, and our website, http://www.vsb.org/slc. He offers a continuing legal education course, Ethics: Protecting You and Your Clients' Interests in the Event of Your Disability, Death, or Other Disaster, to bar associations throughout Virginia. Planning documents are available to attorneys at http://www.vsb.org/slc/attorney/index.html to assist with planning for their future. Contact Sliger for more information.

THE SENIOR LAWYERS CONFERENCE will continue to share its experience, knowledge, and energy to promote the efforts of the Virginia State Bar and volunteer bar associations to make a difference in the lives of our senior citizens throughout our communities.

It is heartwarming to see so many senior lawyers and judges respond to the call of so many worthy organizations.

It's Not Your Father's Oldsmobile — Or Courthouse — Anymore; Fairfax Courthouse Goes High-Tech

by Sharon D. Nelson and John W. Simek

LIGHTS! CAMERA! ACTION! Let your inner Steven Spielberg come out and play. In the new high-tech courtrooms of Fairfax County, the possibilities are almost endless.

Attorneys are truly embracing the technology. At a recent continuing legal education program on the technological capabilities of the new courtrooms, the room was packed and the presenters were so peppered with questions that they had to ask the audience to hold questions so that they could get through the presentation.

These six courtrooms bear only a superficial resemblance to courtrooms of old. The walls are composed of 4 5/8-inch-thick sheets of drywall — very soundproof. The courtrooms are designed with lines of sight in mind, so everyone can see both the people and the screens. The floors are raised to hide the cabling. There is more than ten thousand feet of copper wire in a single courtroom. Every courtroom has an audiovisual closet tied into a central AV control center. The furniture is all tech-enhanced, with cables running through the legs of the counsel tables. Lighting can be adjusted to accommodate presentations. There is a central control panel (something like a TV remote, but much larger) at the counsel podium, which contains a wealth of AV equipment. There are a real-time court reporting network and assistive listening devices. A very long way from "your father's courtroom" of yesteryear.

So what kind of whiz-bang do these courtrooms offer? Certainly, the most utilized tool is the document camera. Place your photograph or document on the base, focus and — *voila* — it is now on all the large plasma screens as well as the individual screens for the jury and the judge. X-rays are often used, and can be shown in regular or negative mode, to achieve maximum clarity.

Got a DVD or a CD to play? You're covered. Ditto for playing VHS. PowerPoint? Easy stuff. Need to hook up a digital camera, webcam or iPod? Yup, you can do that too. There are all kinds of video and audio connections.

Need to get testimony from an ailing witness in California? Done — albeit you've got to get the other side to agree or, if the motion for this is opposed, convince the judge. What kind of facility do you need in the remote location? Any place with videoconferencing technology — it could be a law firm, a hotel (very common), or a Kinko's. In the words of this generation, just Google what you need. Need a protected witness or sexually abused child to testify? Simple, with testimony occurring from a room adjacent to the courtroom itself. There's even a "bat phone" on counsel's table so you can talk to your client privately if needed. Pretty Important Practice Tip — if using the phone for that purpose, do remember to mute the mike.

The screens are smart screens too. Want to insert an arrow on a graphic displayed on screen? You can do that from the counsel podium or counsel table — just make the arrow with your fingertip. The opposition and witness can annotate as well, using a different color arrow. And it can all be saved and entered into evidence, complete with annotations. Or you go backwards and delete all annotations by using the touch-screen controls.

Video arraignments with the defendant still at the Adult Detention Center? Happens all the time — and think about how much money that saves for a process that often takes sixty seconds or less, without the need for staffers to provide security and transport.

Can each piece of evidence be seen everywhere, all the time? Perish the thought. The judges have control. They can preview the evidence and then "publish" it upon approval. Also, they have a "stop" switch to mute everything at once or they can mute selected screens, at their discretion. As an example, in a gory murder trial, the judge might choose to make certain photos visible to the jury, but not to the general audience. If the technology being employed is especially complex, or maneuvering the screens is a big issue, attorneys can request the presence of a court clerk to be a kind of "production director."

Can you go do-it-yourself with this technology? The answer is a resounding "maybe" — and you're probably the best person to evaluate how well you can juggle technology with lawyering. If the combination sounds daunting, bring a colleague, a paralegal, or an outside consultant. It's hard to sound like Abraham Lincoln when you keep punching buttons repeatedly in a hapless effort to make a video fast forward.

What happens if the technology doesn't work? Well, you are likely to receive some small measure of patience from the judges, who are themselves adjusting to this new world. After receiving a modicum of patience, you'd better be prepared to charge forward in the old paper world.

What do you need do bring for a high tech trial? Your own laptop and any needed adaptors and cables (e.g., for iPods, audio cassette decks, etc.). If you are going to bring your own presentation equipment, don't forget to pre-arrange this with courthouse security.

How do you enter through the gates of this new world? First, get trained. Fairfax

Fairfax Courthouse continued on page 54

Bite-sized Environmental Law: Resources for the Jack of All Trades

by Michele Gernhardt

ENVIRONMENTAL LAW EXEMPLIFIES the vastness and complexity of our legal system. No attorney who focuses on environmental matters would claim comprehensive understanding of this entire body of law. Environmental law includes real estate, personal injury, employment, and corporate law. Thus, general and niche practitioners and specialists encounter environmental legal issues.

Many of the following resources will in turn direct you to others that are more specialized, which will help you to tackle the complex issues yourself or to refer your client to someone with more experience.

These resources provide an overview of environmental law. The content of many of these resources overlaps, but each has a different approach. Some are freely available online. Others are available only in print, but can be checked out from most academic law libraries or obtained through interlibrary loan.

Business and Industry Guide to Environmental Permits in Virginia
http://www.deq.virginia.gov/osba/pergide.html

This guide, issued by the Virginia Department of Environmental Quality (DEQ), describes state and federal environmental requirements that affect businesses and industries in Virginia. It is intended to inform company managers, facility engineers, local economic development officials, and citizens about approvals that must be obtained before a business constructs or operates a facility. (http://www.deq.virginia.gov/osba/overview.html) The guide outlines every DEQ permit program. Programs are summarized in terms of applicability, authorizing statutes and regulations, and the permit application process.

Environmental Compliance in Virginia **(Business Legal Reports)**
http://www.blr.com/product.cfm/product/FXX/funcode/WI05

This resource is a digest, designed to help readers quickly determine compliance requirements for a variety of topics. The digest format concisely outlines each compliance issue and applicable requirements. References to primary law and copies of forms are provided. Each section compares state and federal law.

Environmental Law Handbook **(Government Institutes)**
http://www.govinstpress.com/Catalog/SingleBook.shtml?command=Search&db=^DB/CATALOG.db&eqSKUdata=0865870241

Now in its nineteenth edition, each chapter of the handbook is authored by an expert in environmental law. The first two chapters outline the fundamental approach to environmental law in the United States. Each of the remaining chapters describes federal environmental statutes, such as the Clean Water Act and Toxic Substances Control Act, or topics, such as pesticides and underground storage tanks.

Environmental Laws: Summary of Major Statutes Administered by the Environmental Protection Agency **(Congressional Research Service)**
http://assets.opencrs.com/rpts/RL30798_20080107.pdf

This resource provides an overview of each of the major statutes administered by the Environmental Protection Agency. It is updated at the beginning of each session of Congress. The summaries outline the structure, authorization status, legislative history, and major authorized programs for each act.

Virginia Environmental Law Handbook **(Government Institutes)**
http://www.govinstpress.com/Catalog/SingleBook.shtml?command=Search&db=^DB/CATALOG.db&eqSKUdata=086587168X

The *Virginia Environmental Law Handbook* is a primer on Virginia environmental law. Formatted as a fleshed-out outline, the handbook concisely summarizes the major issues for each topic and provides references to primary sources. The fourth edition, written by attorneys from Troutman Sanders LLP, was published in August 2008.

Virginia Regulatory Town Hall
http://townhall.virginia.gov/

This website was created to facilitate regulatory tracking and is an excellent resource for regulatory text and interpretations. Guidance documents are organized by secretariat, agency, board, and chapter of the *Virginia Administrative Code*.

Multivolume and Specific Treatises

The resources listed above distill the entire body of environmental law down to a digestible size of a single volume or less. The goal of these resources is to provide an overview of major issues. For specifics, a multivolume or subject-specific treatise is better. Popular treatises include *Rodgers' Environmental Law*, published by West; *Grad, Treatise on Environmental Law*, published by LexisNexis; and *Law of Environmental Protection*, from the environmental law series published by Clark Boardman Callaghan. Additional resources are outlined in Jennifer Sekula's article, "Nothing Dismal About It: Researching Environmental Law Without Getting Swamped," (*Virginia Lawyer*, December 2005, at 41) (http://www.vsb.org/docs/valawyermagazine/dec05sekula.pdf).

Afghan Bar continued from page 24

> International Bar Association has provided a lawyer to help the AfBA establish itself in the Afghan professional community. …
>
> The AfBA stood up as an independent professional organization at the end of July 2008. Our office includes an Afghan attorney who contacted the AfBA president. The point was merely to identify our office and to offer our assistance to the AfBA Executive Committee. That phone call led to a series of meetings. …
>
> It was clear that these individuals were motivated and dedicated to developing the AfBA as a positive force for good governance in this country. It was also clear that they were starting from scratch and might benefit from the experience of other professional attorneys.
>
> The VSB was an obvious choice to look for experienced attorneys with an interest in volunteering to assist the AfBA as it organizes itself and its programs and qualifies its members for legal practice in Afghanistan. The [AfBA] Executive Committee and … president have expressed a great interest in communicating with professional VSB attorneys as they grow their membership.

McGovern wrote to Capsalis on November 6, "My in-box keeps filling up with VSB attorneys who wish to assist in any capacity that they can — quite a load of talent you have in your organization! … In all honesty, I should not be the least bit surprised, given that the response is totally consistent with the generosity of the American public as a whole. This installation is filled with books, food, toiletries, and clothing items (socks) donated by the ordinary American citizen. Overwhelmingly generous when one thinks about it."

McGovern, who also is a Virginia lawyer, is on a twelve-month tour with the 101st Airborne Division in eastern Afghanistan. His job description includes "rule of law coordinator," and his office supports Afghan self-government.

Fairfax Courthouse continued from page 52

County courts, as we go to press, is starting a series of CLE training sessions for lawyers with the help of volunteers from the Fairfax Bar Association's Technology Committee, specifically geared to the use of the court's new technology. Second, it is mandatory that you test everything at least the day before you go to court (court technologists will work with you). If there are problems, you've got time to resolve them. Test again thirty minutes before you go live. You'd be amazed how often what worked yesterday bellies up today. Third, remember to reserve the courtrooms as soon as you know they'll be needed. Fourth, make sure you have an "attorney badge" issued by the court, so you can bring your laptop into the courthouse without an issue.

Don't forget the formalities either. While the technology is the same for all three Fairfax courts and supported by a centralized Courtroom Technology Office, the internal processes and procedures may differ. For any business before the Fairfax Circuit Court, you need to set a Friday motion or contact Calendar Control to obtain approval from a judge before you use the high tech courtrooms. You need to fill out and submit the "Video conference and Evidence Presentation Request Form" found at http://www.fairfaxcounty.gov/courts/circuit/Evidence_Presentation.htm. You need to reserve the courtrooms at least two weeks in advance. Remember that they are available on a first-come, first-served basis. Call the Circuit Court Information Technology Department Help Desk at (703) 246-2366 or e-mail them at: ccrhelp@fairfaxcounty.gov to arrange for the two required pre-trial test connections. The General District Court and the Juvenile and Domestic Relations District Court are revising their policies to adapt to the technology.

As far as we've come, we're not done yet. Nine new high-tech courtrooms are expected by late summer 2009 for the Juvenile and Domestic Relations District Court. Beyond that, some of the older courtrooms will be renovated and retrofitted to become high-tech. Pretty soon, none of us will be practicing in courtrooms that look like those our fathers and mothers knew.

So, roll the credits, put your name in lights, and direct your own high tech trial. The future is now.

The authors are the president and vice president of Sensei Enterprises Inc., a legal technology and computer forensics firm based in Fairfax. (703) 359-0700 or www.senseient.com. Nelson is a member of the Virginia State Bar and chair of the VSB Special Committee on Technology and the Practice of Law.

Stubbs's response continued from page 10

Justice Sandra Day O'Connor's *Grutter v. Bollinger*[2] opinion) has given guidance that emphasizes a flexible, individualized, good-faith effort to evaluate each applicant's potential.[3] Writing for the *Grutter* Court, Justice O'Connor said:

> When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.[4]

An individualized admission process can include limited reliance on relatively neutral testing processes (a student's grade point average in an academic setting, for instance) and some more subjective evaluations such as written essays, letters of reference, and the student's individual life challenges and experiences (being the first child in a family to attend an undergraduate institution, for example).[5]

My honored colleague asks how many points are to be awarded for each personal attribute that an applicant has — for instance skin color, gender, or economic poverty. In *Gratz v. Bollinger*,[6] the Supreme Court rejected a university admission program "which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race."[7] Chief Justice William H. Rehnquist stated that such a program was not "narrowly tailored"[8] and failed to provide "individualized consideration."[9] The mechanical point system approach suggested by Mr. Dybing fails to adequately consider the specific potential of each individual. A holistic assessment is required. For instance, more reliance on objective criteria such as academic performance (reflected in grades, academic awards, and school projects) can help establish basic competence. Once the qualification threshold is reached, then consider other aspects of the application, including (a) what seems to be the likelihood of this individual successfully completing her studies, and (b) what the individual adds to enrich the learning experience of others.

Finally, affirmative action entails a more representative distribution of societal goods (jobs, housing, credit, educational resources) than currently exists because the current distribution has more to do with material wealth, gender, and skin color than merit. The unrepresentative nature of our nation's economic, political, judicial, and educational leadership is no more an accident than is a turtle sitting on a fence post. (If you find such a situation, you know that the turtle had some help.) That is the message of the essay's thumbnail history.

Stupidity and genius respect no color, religious, class, gender, or political boundaries. Human potential (such as math, musical, athletic, or literary intelligence) is randomly dispersed among the human population. So are human limitations. When a person is conceived, race, gender, economic class, and nation of birth have little to do with potential. It's what happens later that causes confusion.

Reference Concerns

Mr. Dybing asserts that he does not believe that tens of millions of American are semiliterate. I invite your attention to the U.S. Department of Education 2003 National Assessment of Adult Literacy[10] (National Literacy Assessment). This states that 12 percent of the estimated 222.4 million adult Americans[11] who live in households or prisons lack "basic document literacy" skills, defined as the skill to decipher a simple written document.[12] Practically, that means approximately 26.5 million adult Americans would find it virtually impossible to read a commonly used type of chart and understand it.[13]

In addition, the National Literacy Assessment concludes that 14 percent of American adults have "below basic prose literacy skills."[14] These roughly thirty million American adults would be unable to understand a short physician's instruction sheet telling them which liquids they should not drink before a medical procedure.[15]

Finally, the National Literacy Assessment estimates that 22 percent of adult Americans have "below basic" quantitative literacy skills.[16] That means nearly fifty million adults find the challenge of doing simple addition for a bank statement nearly insurmountable.[17]

The National Literacy Assessment supports the argument that tens of millions of Americans have "below basic" literacy skills. A large number of semiliterate, technologically unskilled Americans work for others or themselves, or are unemployed. Many of them cannot read simple documents or add. The essay refers to them as "unskilled workers and entrepreneurs." (Some folks with little formal education are self-employed on farms and in other small businesses.)

Race and National Origin Discrimination

Finally, my learned colleague criticizes the essay because it states that affirmative action should include discrimination based on national origin. The Supreme Court has repeatedly held that the Constitution protects individuals from discrimination based on national origin in large part because national origin has historically served as a proxy for race. Two recent Supreme Court cases illustrate the point. In *St. Francis College v. Al-Khazraji*,[18] the United States Supreme Court ruled that a citizen of the United States who had been born in Iraq could maintain a suit alleging racial discrimination under the Civil Rights Act of 1866 (42 U.S.C. § 1981).[19] The Court noted that the Congressional debates leading to the passage of Section 1981 were "replete with references to the Scandinavian races … as well as the Chinese . . . Latin Spanish … and Anglo-Saxon races … Jews … Mexican … blacks … and Mongolians were similarly categorized."[20]

In a remarkable footnote (perhaps anticipating the findings of the Human Genome Project?), the *St. Francis College* court stated that

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Stubbs's response continued from page 55

> There is a common popular understanding that there are three major human races — Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings … These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part socio-political, rather than biological, in nature.[21]

In these circumstances, the Court held that:

> Based on the history of § 1981, *we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics*. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.[22]

Likewise in *Rice v. Cayetano*[23] a case involving an Hawaiian state agency established to administer funds and programs benefitting native Hawaiians, the Supreme Court stated, "Ancestry can be a proxy for race. It is that proxy here."[24] The *Rice* Court ruled that Hawaii's statutory scheme violated the Constitution's Fifteenth Amendment's guarantee of equal voting rights.[25] *Rice* and *St. Francis College* exemplify an impressive line of Supreme Court cases in which the Court has recognized that race and nationality have been used interchangeably. (Earlier examples of the Court's recognition of the interchangeable use of race and nationality include *Ozawa v. United States*,[26] and *U.S. v. Thind*[27]).

Given the Supreme Court's precedents, my colleague's concerns about national origin discrimination are not well grounded.

Conclusion

I appreciate Mr. Dybing's spirited response to the essay. Hopefully our dialogue will push discussion in a constructive direction: what to do about tens of millions of Americans –adults and children- who cannot now or in the foreseeable future give their best gifts to this country, much less to humankind. As we begin under a new national administration, a very important start would be for the next president to make a major infrastructure investment in America's children by presenting a budget with sufficient resources so that each American child will be able to attend a world class school. Implementing such a commitment would go a long way to putting an end to the need for affirmative action. The commitment of such resources would also reduce the likelihood that America will lose its ability to lead globally because of substandard domestic educational institutions. A national budget reflecting a commitment to a first rate education as an American birthright would pay handsome dividends (in the form of new schools, teachers, and expanded curriculum) now and in the future. Such a budget would also signal the extent to which the new administration is serious about positive change.

Endnotes:

1 *Regents of Univ. of California v. Bakke*, 438 U.S. 265, at 311-24 (1978).
2 539 U.S. 306 (2003).
3 *Id*. at 311-44.
4 *Id*. at 336-7.
5 *Id*. at 338.
6 539 U.S. 244 (2003).
7 *Id*. at 270.
8 *Id*.
9 *Id*. at 271.
10 National Center for Education Statistics, United States Department of Education, *National Assessment of Adult Literacy: A first Look at the Literacy of America's Adults in the 21st Century* (2003). Available at http://nces.ed.gov/NAAL/PDF/2006470.pdf (last visited November 1, 2008). *See also*, National Center for Education Statistics, United States Department of Education, *Key Concepts and Features of the 2003 National Assessment of Adult Literacy* (2005) (elaborating, among other things, on the research methodology of the 2003 National Assessment). Available at http://dese.mo.gov/divcareered/AEL/AEL_KeyConcepts.pdf (last visited November 3, 2008).
11 *Id*. at 18.
12 *Id*. at 4, (Figure 2).
13 *Id*. 4-24.
14 *Id*. at 4, (Figure 2).
15 *Id*. at 3 (Table 1).
16 *Id*. at 4 (Figure 2).
17 *Id*. at 3 (Table 1).
18 481 U.S. 604 (1987).
19 *Id*. at 609 § 1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

20 *Id*. at 612.
21 *Id*. at 610, n. 4.
22 *Id*. at 613, emphasis added. The Supreme Court agreed with the Court of Appeals that "§ 1981, 'at a minimum,' reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of homo sapiens.' It is clear from our holding, however, that distinctive physiognomy is not essential to qualify for § 1981 protection." *Id.*
23 528 U.S. 495 (2000).
24 *Id*. at 515.
25 *Id*. at 512-524.
26 260 U.S. 178 (1922). The *Ozawa* Court upheld the denial of the citizenship application of "a person of the Japanese race born in Japan" because the framers of the original Immigration Statute of 1790 intended to "confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny to all who could not be so classified." *Id*. at 195.
27 261 U.S. 204 (1923). *Thind* rejected the claim of a Hindu from India that he was a white person under the relevant immigration statutes because "the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popu-

larly understood. … It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white." *Id*. at 214-15.

President continued from page 15

appropriately shape our profession and judiciary of the future.

I believe the time is now for this to be accomplished. Recently, Susan Brooks Thistlethwaite, a professor at the Chicago Theological Seminary, spoke of the presidential election. I find her words profound:

> Nations, like individuals, have spirits; they even have souls. I do not believe that the soul is an ineffable something, what is called the ghost in the machine. I believe that both for individuals and nations, the soul is your ability to have transcendent ideals and make your actions match your expressed values.... [The question] is whether there is an American ideal that is worthy of the name.

The challenge for our bar, at this moment in time, is whether we can summon those transcendent ideals. Do we have a committed sense of purpose to ensure that our actions match our expressed values? Do we have, simply and bluntly, what it takes to make a difference for the betterment of our honorable profession, as the guardians of the Rule of Law and as dedicated citizens of our great commonwealth?

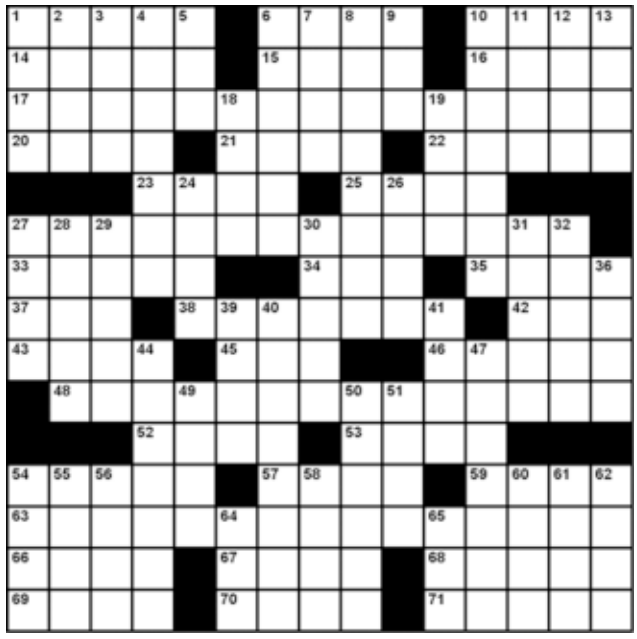
How are we to be remembered—as those who stood idly by waiting for history to surround us, or as individuals part of a collective body committed to the fulfillment of those transcendent ideals we believe are good and necessary?

I ask for your support in this endeavor. This is too important to leave to the natural order of events. The Virginia State Bar, in concert with the many specialty and local bar associations in our commonwealth, must lead the way in this cause.

Separately we can seek to achieve, and perhaps we will. Together we will achieve, let there be no doubt.

Legal Trickery

by Brett A. Spain



Crossword answers on next page.

Across

1. Sentence divider
6. October birthstone
10. Ash or cracker
14. Ancient pain reliever
15. Valley
16. Climate control unit
17. Sits?
20. Harmonize
21. Latin being
22. Domiciles
23. Musical composition
25. Clean
27. Fetches?
33. Daisylike flower
34. Georgia Bulldogs' bulldog
35. Hauls
37. Esq. indicator
38. Compensate or satisfy
42. Long or Peeples
43. Buttocks
45. Pluto's Roman counterpart
46. Ninos
48. Rolls over?
52. River in Tuscany
53. Salamander variety
54. Cager Gilmore
57. Billow
59. Facility
63. Stays
66. Expression of woe
67. Class reminder
68. Oldsmobile model
69. Pierre's pop
70. Native American tribe
71. Kicker Lawrence

Down

1. Fuzz
2. Nashville venue
3. Demeanor
4. Grand Duchy of Moscow
5. Pierre's pal
6. Ukranian or Texas locale
7. Triple threat option
8. Foreigner's status
9. QB Dawson
10. Target
11. Female reproductive cell
12. Truth alternative
13. Deeds
18. Zeus, e.g.
19. Singe
24. Equal
26. Pitcher's stats
27. Shower necessity
28. Spare
29. Prepare for a sale
30. German sausage
31. Poem variety
32. Spin
36. R.S.V.P. method
39. First place?
40. Chaos
41. Spout
44. Gad about
47. Completely
49. Gaelic
50. Below retail value
51. Observed
54. PDQ
55. Issue an opinion
56. Ivan, e.g.
58. Man or Wight
60. Yemen port
61. Withered
62. Cupid's counterpart
64. The Office station
65. Horse morsel

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

Crossword answers.

Are You Inexperienced and Solo?

by Janean S. Johnston

AS I WRITE THIS ARTICLE in October 2008, law school graduates and survivors of bar exams are being sworn into bars across the country. According to the American Bar Association, more than 70 percent of lawyers in private practice in the United States are in firms of five attorneys or fewer. Solo practitioners are sued more than twice as often as larger firms.

ALPS — the Virginia State Bar's endorsed legal malpractice insurance carrier — reports that the top three practice areas in Virginia that are vulnerable to malpractice claims are plaintiff-personal injury, real estate, and domestic relations–family law.

Most ethics complaints are not filed against newly admitted attorneys because they do not have many clients. These lawyers don't procrastinate, and they respond to client matters, return phone calls promptly, and communicate regularly. Although they don't have as many conflicts of interest, new attorneys should not feel immune to ethics complaints.

For example, the competency requirement of Rule 1.1 of the Virginia Rules of Professional Conduct ethics rules can easily trip up the new practitioner. Practical and procedural practices for serving a client competently usually are not taught in law school. At larger firms, new associates often have mentors within the firm, but solos do not have that option.

What should a new solo do to overcome the lack of an in-house mentor? One option would be to consult or associate with an experienced lawyer. Comment [2] to Rule 1.1 allows the inexperienced lawyer to spend whatever study time is necessary to learn the skills required to adequately represent a client. When the client base is small, this can be a good choice. However, remember, that not all of this time can be billed to the client if it violates Rule 1.5 regarding reasonableness of the fee.

If a potential client approaches a new attorney with a matter that the attorney has neither the experience nor the willingness to take on, the lawyer can refer the person to another attorney or to the VSB Virginia Lawyer Referral Service at (804) 775-0808 in Richmond or (800) 552-7977 outside Richmond.

The implementation of Rule 1.15, which governs safekeeping of client property and complying with trust accounting requirements, has been a major challenge for new lawyers. The VSB's sanctions for trust account violations are severe, and noncompliance is easy to prove.

To teach lawyers how to establish, maintain, and reconcile trust accounting records, the VSB has developed a continuing legal education program, The Devil Wears Green. I encourage all new solos to attend this seminar or a similar CLE program. To schedule The Devil Wore Green for a bar association, contact Michelle L. Townsend at (804) 775-0557 or townsend@vsb.org.

Other client-service issues and related ethics rules that are vital to building a thriving practice include:

- Rule 1.2 concerns the scope of representation, which is best discussed during the initial client meeting and reinforced in a fee agreement. This is also the time to explain what can be accomplished, so that unrealistic expectations are not created.

- Rule 1.5, which addresses fees and their reasonableness requirements, stresses the importance of stating clearly the basis for the fees, so that a client can give informed consent.

- Rule 1.3 requires diligence, which means that an appropriate docketing and calendaring system must be implemented to track dates and deadlines.

- Rule 1.4 governs communication issues. Part of the value in returning phone calls in a responsible and timely manner is the respect that the client feels as a result. Good communications reduces ethics complaints.

What should newly admitted solo practitioners do to survive and build a successful practice? Good solo practitioners may practice law alone, but they must not isolate themselves from other lawyers. Find other lawyers in your various areas of practice whom you respect and join bar groups for your personal and professional development. Too often solos who are truly alone become discouraged, depressed, and, sometimes, dependent on addictive substances.

Among the resources to help your practice are the VSB's Ethics Hotline at (804) 775-0564, Lawyers Helping Lawyers at (800) 838-8358, and the Fee Dispute Resolution Program at (804) 775-9423. Jay G. Foonberg's book, *How to Start and Build a Law Practice*, now in its fifth edition, is a valued resource (available at http://www.foonberglaw.com/prod/htsab.html for $69.95). I would also recommend a new book, *Solo by Choice: How to Be the Lawyer You Always Wanted to Be*, by Carolyn Elefant (available on Amazon.com for $40.50), for any newly admitted solo.

Starting out on your own can be daunting. If new solo practitioners would like advice on case management software programs or other practice management resources, please call me at (703) 567-0088.

The 2009 Virginia General Assembly will have numerous judicial elections and reelections to consider, including vacancies it was unable to resolve in past years. These include:

Pro Tempore Appointments

The following judges were appointed after the 2008 session and will be subject to election by the General Assembly:

SUPREME COURT OF VIRGINIA
Leroy F. Millette Jr. of the Virginia Court of Appeals succeeded **G. Steven Agee**, who moved to the Fourth U.S. Circuit Court of Appeals.

VIRGINIA COURT OF APPEALS
Cleo E. Powell of Chesterfield Circuit Court succeeded **Leroy F. Millette Jr.**, who was appointed to the Supreme Court of Virginia.

CIRCUIT COURT
4th Circuit: **Jerrauld C. Jones** of Norfolk Juvenile and Domestic Relations (J&DR) Court succeeded **Jerome James** of Norfolk, who retired; **Louis A. Sherman** of Norfolk General District Court succeeded **Alfred M. Tripp**, who resigned; and **John R. "Jack" Doyle III**, Norfolk commonwealth's attorney, succceeded **Charles D. Griffith Jr.**, who was not reelected in 2008.

15th Circuit: **Charles S. Sharp** of Stafford succeeded the late **John W. Scott Jr.**

19th Circuit: **Jan Lois Brodie**, deputy county attorney of Fairfax County, succeeded **Robert W. Wooldridge Jr.**, who retired, and **David S. Schell** of Fairfax J&DR Court succeeded the late **David T. Stitt**.

GENERAL DISTRICT COURT
15th District: **Michael E. Levy** of Spotsylvania succeeded **J. Overton Harris**, who retired April 8, 2008.

23rd District: **John Christopher Clemens** of Roanoke succeeded **Julian H. Raney Jr.**, who retired December 31, 2007.

J&DR COURT
18th District: **Uley N. Damiani** of Alexandria succeeded **Nolan B. Dawkins**, who was elected to Alexandria Circuit Court in 2008.

19th District: **Thomas P. Sotelo** of Fairfax succeeded **David S. Schell**, who was appointed to Fairfax Circuit Court.

Unfilled Vacancies

COURT OF APPEALS
Jean H. Clements will retire January 31, 2009.

CIRCUIT COURT
2nd Circuit: **Thomas S. Shadrick** of Virginia Beach retired in March 2008.

3rd Circuit: **Mark S. Davis** of Portsmouth moved to a U.S. District Court judgeship in the Eastern District of Virginia.

4th Circuit: **John C. Morrison Jr.** of Norfolk will retire in February 2009.

8th Circuit: **William C. Andrews III** of Hampton retired in December 2007.

9th Circuit: **N. Prentis Smiley Jr.** of Yorktown will retire in December 2008.

10th Circuit: **William L. Wellons** of Lunenburg will retire in December 2008.

12th Circuit: **Cleo E. Powell** of Chesterfield moved to the Virginia Court of Appeals.

GENERAL DISTRICT COURT
1st District: **Robert R. Carter** of Chesapeake will retire in February 2009.

2nd District: **W. Edward Hudgins** of Virginia Beach will retire in January 2009.

3rd District: **S. Lee Morris** of Portsmouth will retire in January 2009.

8th District. **C. Edward Knight III** of Hampton retired in April 2008.

12th District: **Robert D. Laney** of Chesterfield will retire in January 2009.

25th District: **John A. Paul** of Harrisonburg will retire in January 2009, and **A. Lee McGratty** of Staunton will retire in December 2008.

26th District: **Norman deV. Morrison** of Berryville will retire in June 2009.

29th District: **Gregory Stephen Matney** of Tazewell died September 30, 2008.

J&DR COURT
4th District: **Jerrauld C. Jones** of Norfolk moved to Circuit Court.

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

15th District: **J. Maston Davis** of Warsaw retired in November 2008.

24th District: **Philip A. Wallace** of Bedford will retire in June 2009.

26th District: **Marvin C. Hillsman Jr.** of Harrisonburg will retire in January 2009.

29th District: **John M. Farmer** of Clintwood was not reelected in 2008.

31st District: **James Bailey Robeson** of Manassas will retire in June 2009.

Reelections

The following judges will be considered for reelection, because their terms expire in 2009:

CIRCUIT COURT
2nd Circuit: **Edward W. Hanson Jr.** of Virginia Beach

5th Circuit: **Rodham T. Delk Jr.** of Suffolk

8th Circuit: **Louis R. Lerner** of Hampton

9th Circuit: **Samuel T. Powell III** of Williamsburg

11th Circuit: **Pamela S. Baskervill** of Petersburg

12th Circuit: **Timothy J. Hauler** of Chesterfield

15th Circuit: **Harry T. Taliaferro III** of Warsaw

17th Circuit: **Benjamin A. Kendrick** and **William T. Newman Jr.**, both of Arlington

18th Circuit: **Donald M. Haddock** of Alexandria

19th Circuit: **Jane Marum Roush** and **Gaylord L. Finch Jr.**, both of Fairfax

20th Circuit: **Jeffrey W. Parker** of Warrenton

22nd Circuit: **Joseph W. Milam Jr.** of Danville

23rd Circuit: **James R. Swanson** of Salem

24th Circuit: **J. Leyburn Mosby Jr.** of Lynchburg

26th Circuit: **James V. Lane** of Harrisonburg

28th Circuit: **C. Randall Lowe** of Abingdon

31st Circuit: **Rossie D. Alston Jr.** of Manassas

General District Court
1st District: **David L. Williams** and **Timothy S. Wright**, both of Chesapeake
2nd District: **Robert L. Simpson Jr.** and **Pamela E. Hutchens**, both of Virginia Beach

4th District: **Gwendolyn J. Jackson** and **Bruce A. Wilcox**, both of Norfolk

7th District: **Alfred O. Masters Jr.**, **Gary A. Mills**, and **Bryant L. Sugg**, all of Newport News

9th District: **Colleen K. Killilea** of Williamsburg and James City County

13th District: **Gregory L. Rupe** and **Birdie Hairston Jamison**, both of Richmond

17th District: **Dorothy H. Clarke** of Arlington

19th District: **William J. Minor Jr.** of Fairfax County

23rd District: **Jacqueline F. Ward Talevi** of Salem

26th District: **David Shaw Whitacre** of Winchester

27th District: **Gino W. Williams** of Christiansburg

30th District: **R. Larry Lewis** of Jonesville

J&DR Court
2nd District: **Deborah L. Rawls** of Virginia Beach

6th District: **Jacqueline R. Waymack** of Prince George

7th District: **Judith Anne Kline** of Newport News

9th District: **Isabell Hall AtLee** of Gloucester

10th District: **S. Anderson Nelson** of Boydton

12th District: **Edward A. Robbins Jr.** and **Harold W. Burgess Jr.**, both of Chesterfield

22nd District: **Stacey W. Moreau** of Chatham

23rd District: **Philip Trompeter** of Salem

24th District: **William R. Light** of Lynchburg

27th District: **Robert C. Viar** of Radford

Source: Human Resources Office of the Office of the Executive Secretary, Supreme Court of Virginia