Malpractice Proposal Needs Member Comment

by Karen A. Gould

At its October 2007 meeting, the Virginia State Bar Council directed the Special Committee on Lawyer Malpractice Insurance to develop a proposal to require Virginia's lawyers to carry legal malpractice insurance. This action by the council is a classic illustration of the point made by VSB President Howard W. Martin in his President's Column on page 12. The VSB does not act independently of the will of its members and the Supreme Court of Virginia. The VSB's many volunteers direct the operation of the VSB and steer the path for regulation of its members, subject to approval by the Court. In this case, the Special Committee on Lawyer Malpractice Insurance is acting at the direction of the council, which includes members elected by the lawyers of each judicial circuit and the elected chairs and president of the three VSB conferences, along with nine at-large members appointed by the Supreme Court.

This direction from the council came after almost a year of debate by the Lawyer Malpractice Insurance Committee on whether malpractice insurance should be a requirement of bar membership for those who represent clients drawn from the general public in private-practice settings. The committee was divided on the issue and asked the council for its opinion on whether the concept should be pursued. Debate at the October council meeting included proponents who contend the burden on attorneys of requiring insurance is outweighed by the public protection needs of their clients. Opponents argued that, with about 90 percent of Virginia lawyers reporting that they are insured, the bar doesn't have a problem.

The VSB's many volunteers direct the operation of the VSB and steer the path for regulation of its members, subject to approval by the Court.

After hearing the arguments pro and con and debating the topic, the council by a vote of 38–21 directed the malpractice insurance committee to develop one or more proposals "for mandatory malpractice insurance for Virginia attorneys engaged in private practice drawing clients from the general public." The recommended proposal(s) will be considered at a subsequent council meeting. Just because the council has directed the development of a mandatory malpractice insurance rule is not determinative of whether the requirement will be approved either by the council or by the Supreme Court.

Once the proposal is developed, it will be published for public comment. At that time, I urge you to provide the bar with your comments and to contact council members who represent your circuit to express your opinion. To locate a council member from your circuit, consult the list on page 4 of this magazine, or search for your circuit at **www.vsb.org/site/about/council**. Council members are your representatives; in order for them to vote intelligently on this issue, they need your feedback. We are fortunate to have a system of self-regulation, but a true system of self-regulation needs the involvement of every lawyer. Please let us hear from you. ⚖

Thank You, Volunteers!

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

One of the best things that happens in the Virginia State Bar is that hundreds of lawyers throughout the state volunteer their time and energy for bar and law-related activities each year. This contribution costs nothing in general tax funds from the commonwealth, yet it delivers a tremendous amount of service for the citizens of Virginia, as well as for the community of attorneys. On behalf of the bar, I thank each of you for the volunteer commitment you make in the interest of our profession.

I think of the volunteer structure of the bar as a pyramid, where the top levels are only as strong as the broader base that supports them. As you can see from the diagram on page 13, that structure in Virginia is based on more than 760 lawyers throughout the state who are active on bar committees, in bar programs, and in community outreach based on bar-initiated activities.

At the top of the pyramid are the three officers and the 75 members of the VSB Council, who serve with commitment and often with considerable sacrifice. This policy-setting group is the executive arm of the bar and represents all thirty-one judicial circuits in the state.

The next level carries out the primary mission of the bar: the self-regulating disciplinary system, which is executed by the Disciplinary Board and the local district committees. This method of self-governance is unique among Virginia professions. Volunteer lawyers and laypersons, backed by a professional support staff, initiate recommendations on disciplinary policy, shape ethics rules, and sanction attorneys who break those rules. When the volunteer lawyers and their lay compatriots do a good job at lawyers' self-regulation, the public and the profession benefit. The 135 lawyers, working in the disciplinary system with 59 nonlawyer volunteers, personify a professional conscience that must hold steadfast as they discipline their peers. The contributions of these lawyers and laypersons cannot be measured in hours alone.

The pyramid is further supported by more than 200 lawyers and judges who serve on the bar's sixteen other committees that collectively carry out the bar's missions — Budget and Finance, Lawyer Advertising and Solicitation, Lawyer Discipline, Legal Ethics, Professionalism, Unauthorized Practice of Law, Access to Legal Services, Bench-Bar Relations, Information Technology, Judicial Nominations, Lawyer Malpractice Insurance, Lawyer Referral, Midyear Legal Seminar, Personal Insurance for Members, Publications and Public Information, Resolution of Fee Disputes, and Technology and the Practice of Law — and two special boards that govern the Clients' Protection Fund and Mandatory Continuing Legal Education.

The strong base of the pyramid includes the boards that govern the twenty VSB sections, which work through newsletters, Web sites, and CLE programs to keep members current in specific areas of the law. Almost 280 attorneys, judges, and law professors serve on those boards of governors.

The base also includes the 59-lawyer leadership cadre of the three conferences that support the work of the Young Lawyers, Senior Lawyers, and Local Bar Associations.

A very conservative estimate of time committed by bar volunteers annually is 6,200 hours. Multiply that by a rate of $150 per hour, and the "budget" for contributions by bar volunteers is almost $1 million. So again: thank you volunteers, for enabling us to be the good stewards of our own profession, and for delivering the great community benefits of education, protection, and legal services.

From a personal perspective, I can affirm the value of being a volunteer in the bar. For almost twenty years, I have worked with wonderful, committed, intelligent men and women who sincerely care about the issues confronting the bar and its twenty-seven thousand active members. Working together to do the work of the bar is a rewarding experience. Volunteers meet together, work together, plan together, sometimes disagree, travel together, and laugh together, with a wonderful spirit of cooperation and collegiality. I believe they get the job done, and done well. My volunteer experience has reminded me why most of us went into the law in the first place: to engage in what former dean Hardy C. Dillard of the University of Virginia School of Law called "man's unyielding search for freedom, order, and human dignity." I submit to you that all of us, as legal

Volunteers *continued on page 13*

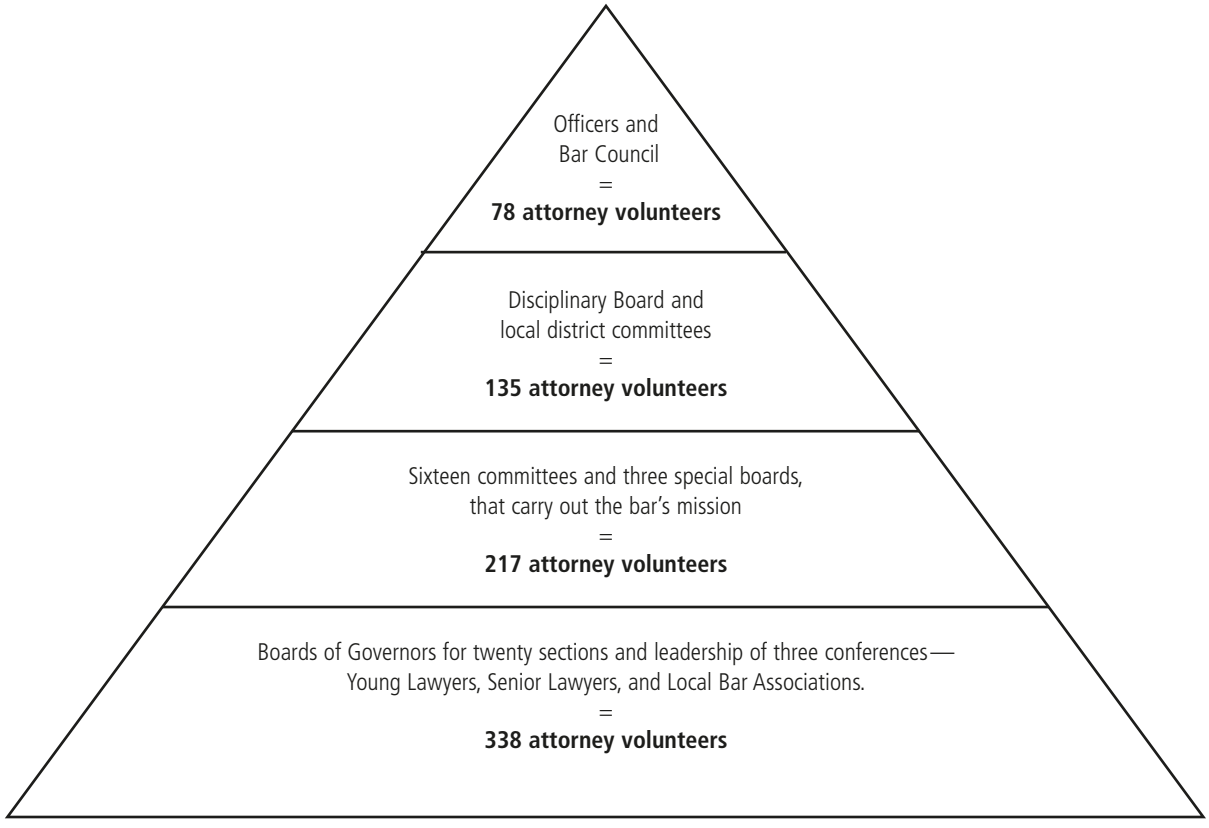
Volunteers *continued from page 12*

practitioners, in each and every one of our cases or assignments, are seeking one or more of those goals: freedom, order, and human dignity. Those are the components of the Rule of Law, the cornerstone of our individual liberties. Our volunteer hours are protecting, improving, and promoting the Rule of Law in our society.

I could never suggest naming an "outstanding volunteer" for the year, because so many volunteers would merit that award. However, there is a single one among us who has carried out the volunteer role to its fullest extent and has been the ultimate example of what a volunteer can be. She is our new executive director, Karen A. Gould. Karen's selection is a direct reflection on her valuable volunteer career. Her involvement in and command of the levels described by the pyramid has been unequaled. And her commitment to the bar grew with each volunteer position she held. With that experience and knowledge base, I would venture to say she is the best-prepared and most enthusiastic new director in the country. Her volunteer work trained her well, and the bar will see the direct benefits of that training for years to come. Thank you, Karen, for giving up your volunteer hat for the one you now wear as executive director.

In closing, I invite any of you who have interest in serving on the bar council or any of the conferences, committees, or sections to contact Karen or me, and let us know of your interest. There is always work to be done and plenty of opportunity for you to serve and gain the "psychic income" benefit from your service. ⚖

Virginia State Bar Volunteer System



Total volunteers:	768
Estimated volunteer hours annually:	6,144
Estimated yearly value:	$921,600

Attorney volunteers include lawyers, judges, and law professors

General Assembly Will Have Judicial Performance Survey Data for 2009 Session

by Dawn Chase

In fall 2008 the Supreme Court of Virginia's Judicial Performance Evaluation Program will send the General Assembly aggregate evaluative survey data about seven district judges who are up for reappointment in 2009.

This will be the first time legislators will have that information, which is compiled from surveys completed by attorneys who appeared before each judge in the preceding year. The surveys evaluate each judge's performance based on factors found in Virginia's Canons of Judicial Conduct.

That data will be collected this year, said Suzanne K. Fulton, director of the Judicial Performance Evaluation Program since it began in 2006.

Each of the seven judges has received the results of previous surveys for self-improvement purposes. Only cumulative assessments from the final survey, conducted the year before a judge's term expires, are shared with the Assembly.

Attorneys who appeared before the judge in the prior year will be sent the questionnaires, on which they rank the judge's performance in twenty-two categories and, if they choose, write additional comments.

Throughout the process, the survey responses and summary reports are considered confidential and are not subject to disclosure.

The Judicial Performance Evaluation Program was developed by a commission appointed by the Court and chaired by Justice Barbara Milano Keenan. The program was a response to concerns by legislators that they had no objective data to rely on when deciding whether a judge should be re-appointed.

To shepherd the program through its first years, the Court's Office of the Executive Secretary hired Fulton, then recently retired as a general district court judge in the Thirtieth District (Lee, Scott, and Wise counties and the city of Norton). Fulton has traveled across the commonwealth to introduce the program to judges and attorneys.

To attorneys, she stresses the importance that they participate. "The lawyer who has an issue with a judge is going to respond to the survey immediately," she said. Lawyers with different experiences should respond as well for the survey to be representative.

The response to earlier performance surveys has been strong. Eighty percent of attorneys who were sent surveys have returned them. Eighteen thousand surveys about more than sixty judges have been processed by the Survey and Evaluation Research Laboratory at Virginia Commonwealth University, which holds the contract for gathering the information, sending it to the judge and a facilitator, and keeping the results confidential — even from the Court.

Fulton said confidentiality is essential. "The only way [the program] is going to work is if the lawyers feel comfortable enough to participate." The list of lawyers who are sent surveys and their responses are kept in separate computers and cannot be accessed via the Internet or other outside connection, she said.

To safeguard anonymity, "I tell the lawyers, please do not put any identifying information in your comments." The survey form states, "[P]lease word your comments so that they are not likely to identify you, either directly or indirectly."

In addition to providing data to the General Assembly, the evaluations serve as a self-improvement tool for judges. After each evaluation, the judge discusses the results with a facilitator — a retired judge who has observed the evaluated judge in the courtroom.

When the evaluation program has run a full cycle (six years for district judges and eight for circuit judges, based on their term lengths), this will be the evaluation schedule:

- All new judges will be evaluated after their first year on the bench. Those results, including the comments, go only to the judge and his or her facilitator, and the data is shredded when the evaluation is completed.
- Every judge is evaluated midterm—year three for district judges and year four for circuit judges. Again, those results go only to the judge and a facilitator, and the data is destroyed.
- Every judge is evaluated the year before the term expires. All survey data again goes to the judge and a facilitator. An aggregate report of responses to the twenty-two surveys goes to the General Assembly. The comments do not go to the Assembly.

Neither the Court nor the Judicial Performance Evaluation Commission ever see the survey results. Results also are not disclosed to the Judicial Inquiry and Review Commission.

Currently, only lawyers are surveyed, but the commission plans in 2008 to include others present in the courtroom, such as jurors, court service unit employees, and Social Services representatives.

Judicial Performance *continued on page 58*

Bigger Type, Briefer Briefs:

Supreme Court of Virginia Changes Format for Appeals

by Elwood Earl Sanders Jr.

The Supreme Court of Virginia has promulgated new rules that became effective February 1, 2008, and will affect every attorney who appeals in that Court.

Supreme Court Rule 5:6 requires the following format for all briefs and pleadings (petitions, briefs in opposition, and motions) filed in the Supreme Court of Virginia:

- **Margin width:** One inch around all sides of the paper. Text should consume 6 ½ by 9 inches per page. This replaces the former requirement, "approximately 6 by 9 inches."

- **Margin content:** No text or footnotes in the margin area. Only page numbers are allowed.

- **Type size:** 14-point, rather than 12- point

- **Fonts allowed:** Courier, Arial, or Verdana. The Times New Roman font is no longer acceptable. (See illustrationon page 20 for comparison.)

- **Page limit:** 50 pages for both appellant and appellee briefs and 15 pages for reply briefs. This revises the awkward and perhaps anachronistic rule that required 50 pages for typed and 36 for printed (15 and 12 pages for reply briefs).

- **Page numbers:** The rule now expressly states that the 50-page limit does not include the cover page, index, table of citations or authorities, or certificate.

- **Brief cover:** Briefs, but not appendices, must include counsel's
  - name
  - Virginia bar number
  - address
  - telephone number
  - facsimile number
  - e-mail address, if applicable

- **Other briefs:** Rules 5:28 and 5:29 apply the same requirements for counsel information, 14-point type, and fonts to appellee's and reply briefs.

- **Consequences of not adhering to format changes:** Thankfully, no appeal will be dismissed for failure to follow this rule the first time. The Court will send a letter that orders corrections and sets a deadline. But the Court can take sterner action, including dismissal of the appeal, if corrections are not made timely the first time.

Other rule changes require:

- **Number of copies:** 12, instead of 20, copies of each brief and appendix.

- **Electronic copy:** Under Rule 5:26, an electronic copy of each brief and the appendix must be
  - filed contemporaneously with the written briefs
  - in Microsoft Word format, preferably, although Word Perfect and PDF files are acceptable
  - submitted on floppy or compact disc, or by e-mail to **scvbriefs@courts.state.va.us**

- **Petition for rehearing:** All petitions for rehearing must comply with requirements of Rule 5:6 above. The word count is reduced to 3,000 from 7,500. This applies to petitions for rehearing in the event of denial of the grant of an appeal (Rule 5:20A) and petitions for rehearing after a grant of appeal and an adverse decision on the merits (Rule 5:39A).

These rules only apply to Supreme Court appeals by attorneys. Virginia Court of Appeals filings are not affected at this time, nor are pro se prisoner filings.

See typographic illustration on next page.

Elwood Earl Sanders Jr. is the appellate procedure specialist for Lantagne Legal Printing in Richmond. He served as the state's first appellate defender from 1996 to 2000 and was an associate with the Framme Law Firm from 2000 to 2007. He is an adjunct assistant professor at the University of Richmond School of Continuing Studies, and he has been on the adjunct faculty of the UR School of Law. Sanders is a member of the appellate practice subcommittee of the Virginia State Bar Litigation Section.

Type Sizes and Fonts Required under Rule 5:6

Formerly allowed:

Times New Roman, 12-point:

COMES NOW the plaintiff in error and argues to this Honorable Court …

New Choices:

Courier, 14-point:

COMES NOW the plaintiff in error and argues to this Honorable Court …

Arial, 14-point:

COMES NOW the plaintiff in error and argues to this Honorable Court …

Verdana, 14-point:

COMES NOW the plaintiff in error and argues to this Honorable Court …

Supreme Court Waiver Forms Updated

The Supreme Court of Virginia has issued revised forms for applying for fee-cap waivers in indigent criminal defense cases. The new forms, which went into effect January 1, 2008, clarify information needed for waivers. The Court will continue to accept the July 1, 2007, version of the old forms. The new forms can be viewed at **http://www.courts.state.va.us/news/2007_0626_waivers_of_statutory_fee_caps.html**.

The Court's Office of the Executive Secretary has produced a revised graphic outline that describes how the fee-cap waiver works. It is posted on the Virginia State Bar Web site at **www.vsb.org/docs/Waivers-fee-caps-010208.pdf**.

The waiver process, which began July 1, 2007, ended the year with 1,036 fee-cap waivers granted out of 1,104 requests. Waivers granted totaled $254,573, out of $286,605 requested.

—Dawn Chase

Gould Receives Award for Achievement

Karen A. Gould, executive director and chief operating officer of the Virginia State Bar, (third from left) received the 2007 Women of Achievement Award from the Metro Richmond Women's Bar Association in December. The award recognizes women who exemplify legal professionalism, and Gould was honored for her contributions to the profession as well the community. Joining Gould at a December luncheon were (l–r) Stephanie E. Grana, MRWBA past president, Leslie A.T. Haley, MRWBA 2007–08 president, and Bonnie M. Ashley, MRWBA Awards Committee chair.

SCC Expands E-filing of Case-Related Documents

The State Corporation Commission (SCC) has expanded attorneys' ability to file documents electronically in commission cases.

Beginning February 15, the SCC began allowing electronic filing of documents of up to 100 pages. Electronic filing is optional and strictly offered as a convenience to case participants. As an incentive to encourage electronic filing, electronic submissions are exempt from the commission's rule requiring an original and fifteen printed copies.

Those interested in the new e-filing procedure are required to submit a filer authorization form, which can be downloaded from the SCC's Web site at **scc.virginia.gov/caseinfo.htm**. (Click on Electronic Filing for the form and additional information.) For further assistance, contact Ken Schrad at (804) 371-9141 or **ken.schrad@scc.virginia.gov**.

In Memoriam

John Alderman
Hillsville
October 1907-August 2007

Hudson Branham
Richmond
June 1921-December 2007

Robert Henry Camp
Raleigh, N.C.
October 1933-December 2007

Douglas W. Davis
Richmond
July 1945-October 2007

William J. Demik
Dunwoody, Ga.
December 1912-September 2007

Randolph Davis Eley Jr.
Pulaski
August 1946-October 2007

James Gilbert Harris
Roanoke Rapids, N.C.
December 1936-October 2007

Eldred Hill Jr.
McLean
July 1928-January 2007

Peter Anthony Kalat
New York City, N.Y.
November 1939-December 2007

The Hon. F. Nelson Light
Virginia Beach
August 1924-November 2007

Carolyn O'Neal Marsh
Richmond
December 1926-December 2007

James Edwin McKinnon
Richmond
August 1955-December 2007

Harry Russell Moore
Bedford
1921-2007

George J. Viertel
Rockville, Md.
June 1912-July 2007

John Dabney C. Walker
Knoxville, Md.
January 1953-September 2007

Richard Frederick Wheeler
Bristow
October 1951-November 2007

Clarence M. Dunnaville Jr. Receives Civil Rights Award for Legal Work

Richmond lawyer Clarence M. Dunnaville Jr., who has contributed his legal skills to the civil rights struggle throughout his career, has been presented with the Segal-Tweed Founders Award from the Lawyers' Committee for Civil Rights Under Law.

The award is presented annually to a Lawyers' Committee board member who has displayed outstanding leadership and service in the cause of equal justice under the law. It is named for Bernard G. Segal and Harrison Tweed, two icons of public service law who served as cochairs of the committee in its first years.

Dunnaville, 74, began his civil rights activism in the 1950s while a student at Morgan State University. He picketed segregated theaters and participated in sit-ins at lunch counters in Baltimore. As a college student, he was present at the U.S. Supreme Court to hear oral arguments in *Brown v. Board of Education.*

As a new lawyer, Dunnaville volunteered with Lawyers' Committee projects in Mississippi. He faced death when a sheriff's deputy pointed a shotgun at his head and ordered him out of Marks, Mississippi.

After the Rev. Martin Luther King Jr. was assassinated, Dunnaville cofounded the Council of Concerned Black Executives and the Association for Integration in Management to encourage major corporations to hire and promote minorities and to elect minorities to their boards of directors.

Dunnaville, a native of Virginia, continued his volunteer civic work throughout his career, which included serving as an assistant U.S. attorney for the Southern District of New York.

Above: Virginia State Bar President-elect Manuel A. Capsalis (left) congratulates Dunnaville (center) and his son Andrew Dunnaville of Arlington, a member of the Air Force Judge Advocate General's staff. Left: Dunnaville's granddaughter, Alexandra Dunnaville (talking with Capsalis), also attended, along with Dunnaville's wife and sons Chris and Peter.

He was a volunteer for Vice President Hubert H. Humphrey's Task Force on Youth Motivation, and he was named a Black Achiever in Industry by the YMCA in Harlem, New York.

Now, as a lawyer in Richmond, Dunnaville is a driving force behind the Oliver White Hill Foundation, which has purchased Hill's boyhood home in Roanoke and is developing a center that will work with Washington and Lee University law students to provide pro bono service to citizens of the area.

At the December 10, 2007, award ceremony at Sutherland, Asbill & Brennan LLP in Washington, D.C., Dunnaville offered tribute to his wife, Norine, who he said paid the bills working for Alfred A. Knopf while he volunteered in Mississippi.

—Dawn Chase

The following judicial changes took place from November 2, 2007, through January 22, 2008.

Pro Tem Appointments

Court of Appeals

LeRoy F. Millette Jr. of Prince William County Circuit Court in Manassas, to succeed **James W. Benton,** who retired

Positions Filled by the General Assembly

Circuit Court

19th Circuit: Bruce D. White of Fairfax, to succeed **Kathleen H. MacKay**, who retired … **Robert J. Smith** of Fairfax Juvenile and Domestic Relations Court, to succeed **Arthur B. Vieregg,** who retired

General District Court

6th District: Stephen D. Bloom of Emporia, to replace **Gammiel G. Poindexter,** who retired

Juvenile and Domestic Relations District Court

2-A District: Croxton Gordon of Eastville, to succeed **B. Bryan Milbourne,** whose term ended

19th District: Janine M. Saxe of Fairfax, to succeed **Michael J. Valentine**

28th District: Florence A. Powell of Abingdon, to succeed **Eugene E. Lohman,** who retired

30th District: Jeffrey S. Hamilton of Gate City, to succeed **James Michael Shull,** who was removed for judicial misconduct

Departures Announced

Circuit Court

2nd Circuit: Thomas S. Shadrick of Virginia Beach, retired effective March 31, 2008

4th Circuit: Alfred M. Tripp of Norfolk, resigned effective February 1, 2008

8th Circuit: William C. Andrews III of Hampton, retired effective December 31, 2007

15th Circuit: John Richard Alderman of Hanover, retired effective January 31, 2008 … **George Mason III** of Montross, retired effective March 31, 2008

16th Circuit: John R. Cullen of Culpeper, retired effective June 30, 2008

19th Circuit: Robert W. Wooldridge Jr. of Fairfax, retired effective August 31, 2008

Judges Reappointed by the General Assembly

Circuit Court

2nd Circuit: A. Bonwell Shockley and **Glen A. Tyler,** both of Chesapeake … **A. Joseph Canada Jr.** and **Patricia L. West,** both of Virginia Beach

7th Circuit: H. Vincent Conway Jr. of Newport News

10th Circuit: Leslie M. Osborn of Boydton

11th Circuit: James F. D'Alton Jr. of Petersburg

12th Circuit: Michael C. Allen and **Cleo E. Powell,** both of Chesterfield

14th Circuit: Gary A. Hicks and **Catherine C. Hammond,** both of Richmond

16th Circuit: Daniel R. Bouton of Orange

19th Circuit: Stanley P. Klein of Fairfax

20th Circuit: Burke F. McCahill of Leesburg

26th Circuit: Dennis Lee Hupp of Woodstock

27th Circuit: Robert M.D. Turk of Christiansburg

General District Court

1st District: Colon H. Whitehurst of Chesapeake

8th District: Albert W. Patrick III and **Bonnie L. Jones**, both of Hampton

12th District: Robert D. Laney of Chesterfield

13th District: Robert A. Pustilnik of Richmond

16th District: William G. Barkley of Charlottesville

19th District: Ian M. O'Flaherty and **Lorraine Nordlund,** both of Fairfax

20th District: Dean S. Worcester of Leesburg

23rd District: Francis W. Burkart III of Roanoke

31st District: Wenda K. Travers of Manassas

Juvenile and Domestic Relations District Court

12th District: Jerry Hendrick Jr. of Chesterfield

13th District: Angela Edwards Roberts of Richmond

21st District: Junius P. Warren of Martinsville

31st District: Janice Justina Wellington of Manassas

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

Lawyers Helping Warriors

Resources for Assisting Service Members, Veterans

Virginia is home to 122,000 active-duty service members and 790,000 veterans.

Some return from one battlefield to find themselves on another: Struggles with bureaucracies to have applications for benefits fairly considered. Difficulties getting their old jobs back. Arguments over consumer contracts. Landlord-tenant disputes. Domestic strife exacerbated by separation and stress.

Some face broken marriages and unemployment. Some have injuries that make their struggles tougher. Some veterans face poverty and homelessness.

Some active-duty service members and veterans, poor though they may be, have incomes too high to qualitfy for legal aid services.

Military bases have legal assistance offices that provide low-income active-duty service members with wills, powers of attorney, and other law-office services. The judge advocate general officers who provide that assistance often are not allowed to practice in civilian courts. Those service members turn to the local civilian bar for help.

"There are a lot of lawyers who want to help," said Kyndra K. Rotunda, an Arlington lawyer who devotes much of her practice to helping wounded warriors receive military benefits. "But a lot of lawyers don't have any experience in this particular area of law."

For example, the military's disability compensation procedures are similar to workers' compensation. But each branch of the military has its own rules and regulations, so it is important for private practitioners to receive some instruction in military law before representing wounded troops, Rotunda said.

Fortunately, several groups in Virginia work to assist service members and veterans. Some of these groups can advise or train lawyers who want to assist a client themselves. The groups take referrals. And some welcome pro bono volunteers.

These groups include:

Virginia Department of Veterans Services

The department operates more than twenty field offices to provide information, assistance, and advocacy for military veterans who live in Virginia. Areas the department can help with include pensions and benefits, homelessness, spousal conflict resolution, education, and home loans. Services are described at **www.dvs.virginia.gov/statebenefits.htm**. Veterans can walk into the field offices and receive same-day service, or they can make an appointment.

To Help: The department currently has no structured program for pro bono volunteers. However, the department will, with a client's permission, work with lawyers to help provide services. The department welcomes organized groups that are willing to take on specific projects.

Contact: Addresses and contact information for field offices can be accessed through a map at **www.dvs.virginia.gov/Veterans_Service_Field_Offices_Click_Map.html**. For other information, call (804) 786-0294.

Virginia Committee for the Employer Support of the Guard and Reserve

The thirty volunteer lawyers and nonlawyers who make up this group serve as neutral ombudsmen in employment disputes governed by the Uniform Service Employment and Reemployment Rights Act, which George R. Aldhizer Jr., a twenty-five-year committee volunteer, says might be "the toughest labor statute in the country." Ombudsmen intervene in disputes in response to reservists who return from duty to find that their employer won't take them back or restore them to an equivalent job. And they intervene at the request of an employer who feels the reservist did not meet his or her responsibilities to qualify for reemployment under USERRA. Much of the work is by telephone. Ombudsmen also provide training to inform employers of their rights and responsibilities under USERRA. In 93 percent of cases referred to the committee, the dispute is resolved with the help of the ombudsman.

To Help: The committee accepts two or three new volunteers a year. Currently, they must attend a national training program, although plans are underway to provide self-teaching materials.

Contact: To be put in touch with an ombudsman, call (800) 336-4590. For questions about the program and volunteering, contact Thomas Stephen, executive director of the Virginia program, at (804) 236-6443 or **Thomas.Stephen.ctr@varich.ang.af.mil**.

Clinic for Legal Assistance to Service Members

CLASM is a George Mason University program through which attorney-supervised law students help active-duty service members with a range of civil issues—contracts, landlord-tenant, uncontested divorces, and administrative matters, for example. Clients are persons who would suffer undue financial hardship if they were to hire a lawyer. Cases are selected that are manageable by students.

To Help: The clinic needs lawyers to act as mentors to the students. It also welcomes lawyers who are willing to accept pro bono referrals of cases the clinic can't accept.

Contact: To refer a client, contact (703) 993-8214. To volunteer or ask questions, contact Joseph C. Zengerle, executive director of CLASM, at **jzengerl@gmu.edu**.

Joint Leadership Council of Veterans Service Organiations (JLC)

This group offers lawyers an opportunity to provide pro bono legislative advocacy on issues that affect veterans. The council includes representatives of twenty-five veterans organizations.

To Help: The council has adopted seven

Veterans *continued on page 59*

Lawyers Helping Warriors

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Contact: Addresses and contact information for field offices can be accessed through a map at **www.dvs.virginia.gov/Veterans_Service_Field_Offices_Click_Map.html**. For other information, call (804) 786-0294.

Virginia Committee for the Employer Support of the Guard and Reserve

The thirty volunteer lawyers and nonlawyers who make up this group serve as neutral ombudsmen in employment disputes governed by the Uniform Service Employment and Reemployment Rights Act, which George R. Aldhizer Jr., a twenty-five-year committee volunteer, says might be "the toughest labor statute in the country." Ombudsmen intervene in disputes in response to reservists who return from duty to find that their employer won't take them back or restore them to an equivalent job. And they intervene at the request of an employer who feels the reservist did not meet his or her responsibilities to qualify for reemployment under USERRA. Much of the work is by telephone. Ombudsmen also provide training to inform employers of their rights and responsibilities under USERRA. In 93 percent of cases referred to the committee, the dispute is resolved with the help of the ombudsman.

To Help: The committee accepts two or three new volunteers a year. Currently, they must attend a national training program, although plans are underway to provide self-teaching materials.

Contact: To be put in touch with an ombudsman, call (800) 336-4590. For questions about the program and volunteering, contact Thomas Stephen, executive director of the Virginia program, at (804) 236-6443 or **Thomas.Stephen.ctr@varich.ang.af.mil**.

Clinic for Legal Assistance to Service Members

CLASM is a George Mason University program through which attorney-supervised law students help active-duty service members with a range of civil issues—contracts, landlord-tenant, uncontested divorces, and administrative matters, for example. Clients are persons who would suffer undue financial hardship if they were to hire a lawyer. Cases are selected that are manageable by students.

To Help: The clinic needs lawyers to act as mentors to the students. It also welcomes lawyers who are willing to accept pro bono referrals of cases the clinic can't accept.

Contact: To refer a client, contact (703) 993-8214. To volunteer or ask questions, contact Joseph C. Zengerle, executive director of CLASM, at **jzengerl@gmu.edu**.

Joint Leadership Council of Veterans Service Organiations (JLC)

This group offers lawyers an opportunity to provide pro bono legislative advocacy on issues that affect veterans. The council includes representatives of twenty-five veterans organizations.

To Help: The council has adopted seven

Veterans *continued on page 59*

Health Law 101:
Issue-Spotting In Dealing With Health-Care Providers

by William H. Hall Jr.

The anti-kickback statute prohibits arrangements that might be common in other industries.

Health care is among the most highly regulated industries in the United States. Understanding the regulatory framework for health care is increasingly important, whether a practitioner represents health-care providers or others who deal with health-care providers. Some clients' risks are unique to the health-care industry. This article outlines legal issues that affect health-care providers and those who interact with them.[1]

The Federal Anti-Kickback Statute

A federal anti-kickback statute[2] applies to any arrangement involving individuals or businesses that provide health care or who can influence referrals for health care. The law prohibits individuals and businesses from knowingly and willfully soliciting, receiving, offering, or paying any remuneration, in cash or in kind, directly or indirectly, in return for referring an individual to a person for furnishing or arranging for the furnishing of items or services reimbursable under federal health-care programs, or purchasing, leasing, ordering, or arranging for or recommending, purchasing, or ordering any good, facility, item or service reimbursable under a federal health-care program. Violation of the anti-kickback statute is punishable by fines of up to $25,000 and imprisonment for up to five years for each violation. In addition, if a person is convicted of violating the law, the person is subject to exclusion from federal health-care programs.

The anti-kickback statute prohibits arrangements that might be common in other industries. For example, a business might provide gifts or referral fees for others who send clients to the business. If, however, a hospital paid a referral fee to a physician, that referral fee would subject both the hospital and the physician to prosecution under the anti-kickback statute.

The anti-kickback statute is broadly drafted. To protect legitimate transactions, the Office of the Inspector General (OIG) of the Department of Health and Human Services issued safe harbors under the anti-kickback statute. An arrangement that meets the terms of a safe harbor will not be subject to prosecution. To benefit from a safe harbor, the arrangement must comply with each standard within the safe harbor. Compliance is not mandatory, and there are a number of legitimate arrangements that may not comply. But it is important to understand whether an arrangement complies with a safe harbor, and to advise clients accordingly.

There are safe harbors for space rental, equipment rental, personal-service and management contracts, bona fide employment relationships, and investments in group practices. Each safe harbor includes requirements. While the safe harbor for employment relationships does not require an employment agreement, most other safe harbors require a written agreement. The safe harbors for equipment rental and space rental each require that the lease term be at least one year and that the aggregate rental charge be set in advance. These safe harbors also require that the rental charges be consistent with

fair market value and not determined in a manner that takes into account the volume or value of referrals or other business generated between the parties for any items or services reimbursable under Medicare, Medicaid, or other federal health-care programs. The safe harbors for equipment and space leases and the safe harbor for personal-service and management contracts also require that the items and services not exceed those that are reasonably necessary to accomplish the commercially reasonable business purpose for the arrangement. For example, if a physician practice contracted with an independent referring physician to lease space from that referring physician, but had no legitimate need for the space, the arrangement would not comply with the space rental safe harbor even if the rental rate was consistent with fair market value and the arrangement met other standards of the safe harbor.

Stark II Physician Self-Referral Statute

In 1989, the OIG reported that Medicare patients of physicians who owned or invested in clinical laboratories received 45 percent more clinical laboratory services than Medicare beneficiaries in the aggregate. In response to this study and to reduce the rising costs of health care, Congress enacted a federal physician self-referral statute. That law is Stark I, named after the primary sponsor of the legislation, Rep. Fortney "Pete" Stark. Stark I applied only to physician self-referral for clinical lab services. Other studies found that physicians who maintained financial interests relating to other types of health-care goods and services also referred more patients. In response to these studies, Congress adopted the Stark II statute[3] that expanded the prior legislation to cover not only referrals of clinical laboratory services, but referrals for other services as well, including physical, radiation and occupational therapy; radiology services; durable medical equipment and supplies; parenteral and enteral nutrients, equipment and supplies; prosthetics, orthotics, and prosthetic devices and supplies; home health services; outpatient prescription drugs; and inpatient and outpatient hospital services. These services are identified under the Stark II statute as designated health services.

Under Stark II, if a physician or an immediate family member of the physician has a financial relationship with an entity, the physician may not refer Medicare or Medicaid patients to that entity for designated health services unless an exception is satisfied. The Stark II statute and regulations define financial relationship to include both direct and indirect ownership and investment interests, as well as direct and indirect compensation arrangements. An ownership or investment interest can involve directly owning an interest in the entity that furnishes designated health services, or owning an interest in another company that owns an interest in the entity that furnishes designated health services.

Even if a physician does not receive payments directly from an entity that furnishes designated health services, Stark II affects the arrangement, and the physician may be treated as having a financial relationship. In the absence of an exception, the referring physician can be treated as having an indirect compensation arrangement when there is an unbroken chain of financial relationships between the referring physician (or a member of his or her immediate family) and the entity furnishing designated health services. While the language relating to indirect compensation arrangements is broadly drafted, the referring physician (or an immediate family member) does not have an indirect compensation arrangement unless the physician (or a family member) receives aggregate compensation from the person or entity in the chain with which the physician or immediate family member has a direct financial relationship that varies with or takes into account the volume or value of referrals or other business generated for the entity; and the entity furnishing designated health services has actual knowledge of, or acts in reckless disregard or deliberate ignorance of, the fact that the referring physician or immediate family member receives aggregate compensation that varies with or takes into account the volume or value of referrals or other business generated by the referring physician for the entity furnishing the designated health services.

Referral also is important. The term includes any request by a physician for, ordering of, or certifying or recertifying the need for any designated health service, or the establishment of a care plan by a physician that includes a designated health service. Under these standards, a physician need not direct a patient to a particular provider in order to be considered to have made a referral.

Stark II is sometimes characterized as a strict-liability statute because the referral prohibition applies even if the service is medically necessary and there is no inappropriate intent to direct referrals. Unless an exception applies, a physician may not refer a Medicare beneficiary for designated health services to an entity with which the

Even if a physician does not receive payments directly from an entity that furnishes designated health services, Stark II affects the arrangement …

physician has a financial relationship, even if the services are medically necessary. The statute imposes substantial civil monetary penalties upon any person who presents or causes to be presented a bill or a claim for a service involving a prohibited referral. If a physician or entity enters into an arrangement that the physician or entity knows or should know has a principal purpose of ensuring referrals by the physician to a particular entity, and that would otherwise violate Stark II, the statute provides for civil monetary penalties of up to $100,000 for the physician and the entity. This penalty is a penalty on circumvention schemes.

The Stark II statute and regulations include a number of other exceptions that permit some common relationships. Exceptions apply to compensation arrangements and ownership/investment interests. One that is most commonly used is for in-office ancillary services. This exception is available for both ownership/investment interests and compensation arrangements. The in-office ancillary services exception is only available for services furnished through certain referral structures, in certain locations, and billed by the physician performing or supervising services.

The Stark II statute and regulations also include exceptions for compensation arrangements relating to office space and equipment rentals, bona fide employment relationships, personal service arrangements, physician recruitment, and an exception for certain fair-market-value compensation arrangements. While the exception for bona fide employment relationships does not require a written agreement, most other exceptions under Stark are only available where the parties have signed a written agreement. The exceptions typically will not allow physicians to be paid in a manner that varies with the value or volume of referrals, but in some circumstances the regulations allow compensation based upon a fair-market-value per-unit fee. The requirements of each exception are detailed, and it is imperative to assess the terms of each exception before relying on any exception.

Virginia Practitioner Self-Referral Act

While the Stark II statute applies only to designated health services for beneficiaries of governmental health-care programs, the Virginia Practitioner Self-Referral Act[4] includes restrictions applicable to all health-care services and all patients, regardless of whether a governmental payor is involved. Under the statute, absent an exception, the practitioner may not refer a patient to an entity outside the practitioner's office if the practitioner or any immediate family member is an investor in the entity. The statute covers physicians and other individuals licensed or certified by any of the health regulatory boards within the Virginia Department of Health Professions.

However, the prohibition does not apply if the practitioner directly provides health services within the entity and is personally involved with the provision of care to the patient. The prohibition likewise does not apply to services provided within the practitioner's office or group practice as defined under the act. Under § 54.1-2413.E, if a referring practitioner has a financial arrangement that would quality for an exception under Stark II standards for ownership or investment interest, the referral will not be treated as violating Virginia law.

The Virginia statute also provides the Virginia Department of Health Professions with authority to issue advisory opinions relating to proposed arrangements. The opinions apply only to the individuals and entities involved but can provide insight regarding application of the Virginia statute. The advisory opinions are available on the Web site of the Virginia Department of Health Professions at **www.dhp.state.va.us**.

Standards for Tax-Exempt Organizations

Because a number of health-care providers (especially hospitals and health systems) are exempt from federal income tax under § 501(c)(3) of the Internal Revenue Code, it can be important to assess these special standards in providing guidance to health-care providers. An organization can jeopardize its tax-exempt status if it enters into arrangements involving private inurement, by paying an insider more than a fair-market-value share of the profits. The Internal Revenue Service has defined "insider" to include officers, directors, and others in a position to exert substantial influence over a tax-exempt organization. In representing a tax-exempt organization or others dealing with tax-exempt organizations, it is important to ensure that any payments to insiders are consistent with the fair market value of any items or services provided.

In addition to the prohibitions against private inurement, it is important to assess tax-exempt financing. The applicable standards typically prohibit tax-exempt organizations from dedicating the proceeds of tax-exempt bond financing to private business use. For example, if a tax-exempt entity were to use the proceeds of a tax-exempt bond issuance for construction of an office building that was leased entirely to private for-profit businesses, the underlying bonds could lose their tax-exempt status. The IRS says that management agreements also can create risks of private business use. For example, if a tax-exempt health system financed a clinic with the proceeds of tax-exempt bonds and entered into a management agreement for the clinic, the management agreement could implicate the standard that prohibits private business use of tax-exempt bond financing. In Revenue Procedure 97-13, the IRS issued guidance for determining whether a management agreement will be considered to result in private business use; the determination of whether a management agreement may jeopardize the tax-exempt status of bonds depends upon the term of the agreement and the compensation structure.

In addition to legal standards for the tax-exempt entities, there also are legal standards that apply to individuals participating in transactions with tax-exempt entities. The Internal Revenue Code establishes excise taxes on disqualified persons who enter into excess benefit transactions with tax-exempt organizations.[5] Disqualified persons include offi-

cers, directors, and trustees of a tax-exempt organization, others who exert substantial influence over the affairs of the organization, and individuals who have held such a position within five years prior to the excess benefit transaction. Excess benefit transactions include arrangements in which a disqualified person receives above fair market value for items or services provided by the individual to the tax-exempt organization. If a physician served as a director on the board of a tax-exempt hospital and, one year after leaving the board, leased space to the hospital at a rental rate more than fair market value, the arrangement would constitute an excess benefit transaction. Under the excise tax provisions, a disqualified person may be subject to excise taxes of up to 200 percent of the amount of the excess benefit, and organization managers (defined to include officers and directors of the tax-exempt organization) who approve of the transaction knowing that it is an excess benefit transaction also may be subject to significant excise taxes. Given these standards, it is important to ensure that arrangements are consistent with fair market value and that appropriate documentation is maintained to demonstrate that terms of arrangements are reasonable.

Protections to Prevent Patient Dumping

The Emergency Medical Treatment and Active Labor Act (EMTALA)[6] was enacted in 1985 to address congressional concerns regarding patient dumping by hospital emergency departments. EMTALA imposes standards relating to hospitals that participate in the Medicare program. The hospital must conduct a medical screening examination for any patient who requests one, or who is deemed to have requested one. A medical screening examination is a medical exam conducted to determine whether a patient is suffering from an emergency medical condition. Under EMTALA, emergency medical conditions include conditions that, if not treated immediately, could place the individual's health in serious jeopardy, or result in serious impairment to bodily function or serious dysfunction of any bodily organ or part. This definition of emergency medical condition encompasses many conditions beyond what one might typically view as an emergency.

Another standard under EMTALA relates to providing care for any emergency medical condition. If the patient has an emergency medical condition, the hospital must either provide necessary stabilizing treatment, or, if the hospital cannot provide necessary treatment, the hospital must transfer the patient.

Because most providers bill electronically, most health-care providers are subject to the HIPAA privacy standards.

While many issues under the EMTALA statute and regulations affect hospitals, physicians also are affected by EMTALA. The third primary standard under EMTALA requires hospitals to make arrangements for physician call coverage for medical specialties that members of the hospital's community may reasonably expect to be available on an emergency basis. While the EMTALA regulations and guidance provide hospitals with some flexibility in establishing call coverage rosters for physicians, if a physician on the hospital's call roster fails to respond or refuses to provide care, both the hospital and the physician involved are subject to civil monetary penalties of up to $50,000 for each violation. Both the hospital and the physician may be subject to exclusion from participation in Medicare and Medicaid.

The Health Insurance Portability and Accountability Act (HIPAA)

Health-care providers are subject to patient privacy and security regulations. In Virginia, the primary medical record privacy standards are the Health Insurance Portability and Accountability Act (HIPPA) privacy standards (codified in 45 CFR Parts 160 and 164) and the standards under Virginia Code § 32.1-127.1:03. The HIPAA privacy standards apply to health-care providers who transmit health information in electronic form in connection with certain transactions, including electronic billing. Because most providers bill electronically, most health-care providers are subject to the HIPAA privacy standards.

The HIPAA privacy standards draw a significant distinction between use of patient information (typically referring to use and dissemination of patient information within an organization) and disclosure of information (typically referring to dissemination of patient information to others outside of the organization). Under the HIPAA privacy standards, health-care providers are permitted to use patient information for treatment purposes, payment activities, and health-care operations. Health-care providers are allowed to disclose patient information to other health-care providers for treatment purposes, for payment activities, and for certain limited health-care operations by other providers. HIPAA privacy standards include other exceptions to allow uses and disclosures of health information, but the requirements of each exception are detailed. Providers must ensure each use and disclosure of information complies with an exception under HIPAA privacy standards. HIPAA privacy and security standards require covered entities to maintain policies and procedures addressing patient privacy and security of patient information. Covered entities must provide training for their employees and volunteers on the standards for privacy and security of patient information.

Where a health-care provider wishes to share patient information with counsel or others (such as billing companies, accountants, or others providing services to the

health-care provider), the provider must sign a business-associate agreement before sharing information. HIPAA regulations include standards addressing specific provisions that must be included in agreements with business associates. Attorneys should note also that, under the regulations, even if a patient's name is omitted from a record, the record may still be subject to the HIPAA regulations if the record includes other information that could be used to identify the patient. For example, if a record includes a patient's Social Security number, address, date of birth, or other similar information, the HIPAA regulations will still have an impact on use and disclosure of the record.

Virginia Code § 32.1-127.1:03 includes standards similar to those within portions of the HIPAA privacy standards, but there are differences. While the HIPAA privacy standards include default provisions that give providers thirty days to give a patient access to records, the Virginia statute typically requires that patients be given access within fifteen days. Virginia law includes specific provisions relating to subpoenas for medical records, and those provisions include some specific requirements beyond those mandated under HIPAA privacy standards.

In addition to the requirement under the HIPAA regulations and Virginia Code § 32.1-127.1:03, other standards can affect the use and disclosure of patient information. Federally assisted drug and alcohol programs are subject to more stringent restrictions on uses and disclosures of patient information.[7] Records containing human immunodeficiency virus information are subject to additional restrictions under Virginia Code § 32.1-36.1, and Virginia Code § 20-124.3:1 includes certain special restrictions relating to mental health providers in cases in which the custody or visitation of a minor child is at issue.

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Certificate of Public Need

Under Virginia Code § 32.1-102.3, before beginning any project, individuals and businesses must obtain a certificate of public need (COPN). Projects include the establishment of a medical care facility, such as hospitals, nursing homes, specialty clinics, and portions of a physician's office developed for the provision of outpatient surgery, cardiac catheterization, computed tomographic scanning, gamma knife surgery, lithotripsy, magnetic resonance imaging, magnetic source imaging, positron emission tomographic scanning, radiation therapy, and nuclear medicine imaging. Physicians and others who wish to provide these specialty services in Virginia are subject to the Virginia COPN requirements.

Conclusion

Health-care providers are subject to a multitude of regulatory requirements that often are complex. Compliance can hinge upon details, facts, and circumstances that might appear minor in other industries. When assessing health-care providers' business arrangements, attorneys must determine whether the parties comply with those requirements. ⚖

Endnotes:

1 Medical malpractice risks and other professional liability risks are always important factors in assessing transactions involving health-care providers, but a detailed discussion of those issues is beyond the scope of this article.

2 42 U.S.C. § 1320a-7b

3 42 U.S.C. § 1395nn

4 Chapter 24.1 of Title 54.1 of the Code of Virginia

5 26 U.S.C. § 4958

6 42 U.S.C. § 1395dd

7 42 C.F.R. Part 2

Custody and Admissibility of Mental Health Records:
Data Trumps Rhetoric

by Leigh D. Hagan, Scott D. Landry, and T. Michael Blanks

This statute protects parents' mental health records and information as confidential and permits parents to bar their mental health professionals from testifying.

In what area of law may litigants put their mental states at issue and, at the same time, claim a privilege? The strategy of having it both ways is not permissible when pleading a claim of psychological damages, workers' compensation, disability, competence, insanity, or sentencing. Only when the best interest of a child is before the court may litigants claim a superior mental health posture on the one hand and unilaterally block all discovery of their counseling records and bar any testimony from mental-health professionals relating to that claim.

In what area of law must litigants secure advanced written permission of the opposing party in order to have a mental health expert testify? Is there any area of law which creates a privilege for a nonparty? Is there any legal issue in which mental-health professionals are statutorily barred from testifying because they hold licenses, yet unlicensed professionals are permitted to testify? Yes — when the interest of a child hangs in the balance.

Does any area of law permit litigants to testify about what a therapist said in the presence of the other litigant, yet bars professionals from testifying about what they actually said and meant? Again, the answer lies in Virginia Code § 20-124.3:1, only when the interest of a child is at stake.

Is there any statutory scheme that grants greater protection to the able adults while potentially compromising the interests of those who cannot speak for themselves? Yes — again, § 20-124.3:1.

§ 20-124.3:1 and Mental Health Records in Custody Cases

This statute protects parents' mental health records and information as confidential and permits parents to bar their mental health professionals from testifying. The parents also have the power to thwart discovery, even if therapists are not called to the stand. This power is not limited to barring the bad news. The statute also invests the power in one parent to bar the positive and constructive mental health testimony offered about the other parent.

The prohibition is not limited to opinions. It is not an effort to reign in advocacy testimony in scientific clothing nor is it intended to limit junk science or raise the standard for scientific testimony. The prohibition extends to any and all "records concerning a parent, kept by any licensed mental health care provider."[1] This blanket protection is not limited to what a litigant might have said or done in the presence of the mental health professional. It renders confidential any information obtained during or from therapy. It protects custody litigants from anything they told counselors about anything and anyone at any time. The therapist cannot disclose records or testify about a litigant's behavior, demeanor, attire, or statements. This privilege extends to nonparties, including any of the parents' adult relatives.

Two exceptions apply: First, the mandated reporter may notify the Department of Social Services of suspicion of an abused or neglected child. Second, it states, "this section shall not apply to mental health care providers who have conducted or are conducting an independent mental health evaluation pursuant to a court order."

Rationale for the Privilege and Prohibitions

The Virginia Academy of Clinical Psychologists (VACP) promoted the bill that passed in 2002. The proponents wanted to see families get the treatment they need to remain intact. In theory, when patients realize their records can be subpoenaed, they stop treatment and lose an opportunity to help their families in crises when they need access to care. Upon hearing the testimony of family law practitioners and others, the Virginia General Assembly delayed the effective date until 2003. Failed efforts at compromise led to enactment of the current statute.

In 2006, VACP conceded that there was no research to support its position that families will not get the help they need if records can be discovered. In 2007, a bill to repeal this statute failed in a tie vote in the Senate Courts Committee.

Appellate Review and Unanticipated Consequences

The cases reported since enactment of § 20-124.3:1 exemplify how this statute has been used to thwart the presentation of necessary and relevant information in child custody proceedings. The Virginia Court of Appeals rendered its first decision interpreting and applying the privilege in the case of *Schwartz v. Schwartz*, in which the court ruled that a coparenting therapist's testimony was inadmissible under § 20-124.3:1 because, although the therapist was not the treating therapist of either parent, he was the treating therapist of the child, and there was no requirement that the parent be the patient. *Schwartz v. Schwartz*, 46 Va. App. 145 (2005).

By giving such an expansive reading to the privilege set out in § 20-124.3:1, the *Schwartz* court minimized the court's paramount concern in child custody proceedings, which is the "best interests of the child" standard. Further, when the mental health of a parent is a relevant or even critical issue in child-custody proceedings, the application of § 20-124.3:1 by the *Schwartz* court forces future litigants to go to extreme measures and additional expense just to introduce mental health evidence.

In another troubling decision made pursuant to § 20-124.3:1, the *Shoemaker* court in *Shoemaker v. Shoemaker* allowed a mother to simultaneously admit her own therapist's testimony and prohibit therapist testimony proffered by the father. *Shoemaker v. Shoemaker*, 2007 Va. App. LEXIS 126 (2007). The court ruled that the testimony offered by the father was inadmissible because the father was an adverse party attempting to admit therapist testimony in a custody proceeding, which the court ruled was necessarily being offered against the mother. As such, the therapist would necessarily testify as to impressions made by the child and statements that could have been made by the mother.

The father argued that the mother should not be able to use § 20-124.3:1 as both a sword and a shield, and that the court's admission of the mother's testimony was error. The court struck down the father's argument, holding that the introduction of the mother's evidence was harmless error.

The *Rice* court took the privilege under § 20-124.3:1 one step further by excluding testimony that would have been adverse to a mother's position in a grandparent's visitation case. The court held a therapist's testimony about the grandparents was inadmissible because it was on behalf of or against one or both of the parents. *Rice v. Rice*, 49 Va. App. 192 (2006).

Unanticipated consequences of § 20-124.3:1 have significantly complicated the preparation and presentation of essential best-interest considerations with regard to not only mental health concerns relative to potential custodians but also for the court to understand the child's needs. The tragedy of *Rice* is the preclusion of testimony by a child's therapist premised on the notion that merely being called as a witness by one party "is necessarily testifying on behalf of or against one or both of the parents" — even if the anticipated testimony seeks to advise the court of the mental health needs of the child. Barring sufficient financial resources, time, and a child of sufficient age to fully engage a psychologist in both spoken and written word for an independent assessment, the odds of being able to present evidence of a child's mental health status or progression in any talk or play therapy and identify detrimental conduct causing trauma is akin to doing so by Ouija board. It's likely that most parents in custody actions cannot afford an independent assessment, do not desire to wait for the period of time it takes, and cannot identify such severe circumstances anticipated by the neglect-or-abuse exception to the privilege.

Often the court's receipt of helpful information related to a child's mental health is dependent on the parents' consent. But culprits do not cooperate. So, the child who cuts her arms and legs and relates to her therapist that it is due to her father's constant yelling and cruel behavior has little hope. The father did not cut his daughter's arms and legs. His tirades and demeaning behavior were observed only by younger siblings. A child's disclosure to his therapist about how it makes him feel to watch his parents fight, to be called names, to be subjected to additional cruel actions, or to witness a parent's break with reality offers little relief when it essentially remains a secret shielded from the court. Not only does § 20-124.3:1(B) preclude such on a parent's nod, but as explained in *Rice*, the mental health provider may not advise the court of the problem, progress in treatment, or cooperation of the parents. Secrets are easy to keep, especially when they involve a young child who may only be adequately assessed utilizing play therapy and for whom an independent assessment is of limited value as noted in the dissent to the majority in *Rice*. The child's therapist is muted by privilege, and the young child by intimidation.

Often the only way for a child to share with the court her fear, anxiety, or anger and the perceived causes is to testify. Even an in camera interview, if granted, gambles that a child will respond to the court's inquiry. Somehow the court, in this first encounter, must gain the child's trust and then encourage responses to open-ended questions probing the most traumatic events of the last year or two — typically all within a fifteen-minute interview. This single encounter with the court hardly compares to a therapeutic relationship formed over several months.

Statewide Survey of GALs

Rather than resting on a priori assumptions, authors Leigh D. Hagan and Scott D. Landry undertook a statewide survey of guardians ad litem (GALs) qualified for the representation of children pursuant to § 16.1-266. We chose GALs to avoid the argument that the debate about this law is a conflict between aggressive lawyers and members of the helping professions, as some have mischaracterized the debate. GALs represent the interest of the children and do not represent parties in the litigation. Their standards foster vigorous, effective, and competent representation of children's interests and welfare.[2]

The Sample

We sent surveys to a sample of certified GALs in each of Virginia's thirty-one judicial districts. Respondents replied anonymously. The analysis derives from the eighty-eight valid responses from qualified and experienced guardians on behalf of children. The majority of respondants practiced as GALs for more than five years. On average, the respondents devote 26 percent of their law practice to GAL appointments. To assure that survey data were based on well-informed respondents, those who indicated that they were not at all familiar with § 20-24.3:1 were permitted to omit the remainder of the survey and return it to us. Of the valid responses, at least 91 percent were at least slightly familiar with the statute and the *Schwartz* and *Rice* appellate decisions.

None of the respondents believed that the statute benefits children primarily.

GALs' Views of § 20-24.3:1: The Data

Almost half of the respondents reported that this statute caused a moderate to significant impact on their practice as GALs (e.g., obtaining therapy records, calling therapists as witnesses, providing the court with relevant therapy information, having children testify or serve as informants because of a lack of access/present therapy information, etc.)

Almost 69 percent said that the law caused moderate to significant negative consequences for children. None reported a significantly positive consequence. A large majority of GALs reported that they are now more often faced with the choice of having the children testify or giving a statement in some fashion than they would have prior to this statute.

None of the respondents believed that the statute benefits children primarily. The majority concluded that this protection benefits the adults more than the children. A substantial minority advised that this statute actually undermines the GAL's efforts on behalf of children.

One of the proponents of the statute suggested that we previously published an article teaching lawyers how to circumvent the law.[3] Of concern to this statute's advocates were strategies that might help with discovery of records otherwise protected by § 20-124.3:1. At a continuing legal education program, a panel discussion took up the following question: is it appropriate to request or subpoena a party's therapy records for case development purposes even if the statute bars the admissibility of those records?[4] The conference concluded with a consensus that the pursuit of the records is appropriate because the attorney has a duty to act with reasonable diligence taking whatever lawful and ethical measures are required to vindicate a client's cause. Although the records themselves might not be admitted into evidence, the information might assist the attorney in developing other permissible avenues to present critical information to the court.

We posed the question to the GALs. Eighty percent said that it is appropriate to request or subpoena a party's therapy records for case development purposes even if the statute bars the admissibility of those records. These data correspond to the consensus developed at the CLE on this specific issue.

Saving Families in Crisis: Reality or Rhetoric?

VACP's primary theory for promoting the original bill in 2002 and rebutting efforts for its repeal in 2007 was that when there is no confidentiality, parents will no longer seek professional help with their marriage. We asked GALs if they found support for this rationale over the last four years that the statute has been in force. Eighty-two percent found little or no support for this theory. None found significant support.

Recently, E. Archer and A. Stolberg surveyed the peer-reviewed scientific literature and refuted the assumptions that discoverability of treatment records impedes people from using therapy.[5] These researchers' findings, the GAL survey, and the concession from the statute's supporters converge on one conclusion: there is no empirical evidence to support the claim that this privacy shield for parents and their adult relatives in any way preserves families. Of greatest concern is the finding that this statute shields parents and other adults from the natural consequences of their own conduct while undermining children's interests.

Ultimate Issue: Preserve or Repeal § 20-124.3:1?

The majority of GALs participating in this survey believe that children's interests would be better served by repealing the statute entirely. Only a small minority of certified GALs would like to see this statute preserved.

The original rhetoric that gave rise to this statute collapses in the face of data about the unintended consequences. The unintended tragic consequences and appellate opinions severely aggravate the efforts of GALs on behalf of the children whose interest should be paramount. ⚖

Endnotes:

1 § 20-124.3:1

2 Standards to Govern the Appointment of Guardians Ad Litem Pursuant to § 16.1-266, Code of Virginia

3 Hagan, L. & Blanks, T.M. (Oct. 2004). Hiding the ball or necessary protection: § 20-124.3:1 Custody and admissibility of mental health records. *Virginia Lawyer*. 53 (3) 52-55

4 § 20-124.3:1: Making the best of an unfortunate statute. Mental Health Issues in Family Law Cases: Implications of Virginia Code Section 20-124.3:1. Virginia Continuing Legal Education. Fairfax, Va. (August 15, 2007).

5 Archer, E. & Stolberg, A. (Nov. 21, 2007). Draft Report on Empirical Investigations of the Impact of Therapist Testimony on Client Disclosure and Participation in Psychotherapy.

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Noncompetition Agreements Collide with Virginia's Corporate Practice of Medicine Doctrine

by Derek W.H. Kung, Patrick C. Devine Jr., and Lynn F. Jacob

. . . by statute in Virginia it is unlawful to "engage" in the practice of medicine "without holding a valid license as required by statute or regulation."

The Supreme Court of Virginia's March 2, 2007, decision in *Nipun Parikh v. Family Care Center Inc.*[1] has raised concerns regarding the enforceability of noncompetition agreements between physicians and the practice entities that employ them. The case has caused considerable concern in the health-care industry in Virginia, where practitioners and providers have relied for almost two decades on significant authority that supports the ability of nonprofessional entities to employ physicians to provide medical services and to enforce the provisions of those agreements.[2]

In its narrowest interpretation, the case simply says that a nonprofessional corporation cannot enforce a noncompetition provision in an employment agreement with its former physician employee when the drafter describes the interest that the corporation intends to protect as its right to "engage in the practice of medicine." That is because by statute in Virginia it is unlawful to "engage" in the practice of medicine "without holding a valid license as required by statute or regulation."[3]

On the other hand, the broadest reading of *Parikh* suggests that no entity, even a professional corporation, could enforce noncompetition agreements to preclude its licensed physician employees from providing competing professional services, because no entity can obtain a license to provide such professional services.[4] Based on the Court's holding, it could be argued that such a nonlicensed entity would not have a legitimate interest in precluding its licensed physician employees from performing services that only licensed individuals may perform.[5]

Either interpretation seems inconsistent with two Virginia statutes enacted in 2003 that expressly provide that professional medical services may be "rendered" by an unlicensed entity through the use of licensed practitioners.[6]

This article provides an overview of the Virginia corporate practice of medicine doctrine and the Virginia law of noncompetition agreements, discusses the implications of the *Parikh* decision, and suggests a legislative change.

The Parikh Decision

In *Parikh*, a Virginia professional corporation, Family Care Center Inc. (FCC), entered into an employment contract with Dr. Parikh, a licensed physician. The contract contained a noncompetition clause that provided that:

> upon termination of employment for any reason and for a period of three years thereafter, [Dr. Parikh] agrees to pay [FCC] ten thousand dollars each month employee is *engaged in a competing practice* of General Practice, Family Medicine Ambulatory Care or General Internal Medicine within a radius of twenty miles measured from the offices of [FCC].[7]

Upon the death of the physician owner of FCC, the deceased's widow became its owner. This caused FCC to be converted from a professional corporation to a non-

professional corporation by operation of law.[8] Shortly after the physician owner's death, and almost a decade after Dr. Parikh began his employment with FCC, Dr. Parikh resigned from FCC and began working for a competing medical practice within one mile of FCC's office.[9]

The Court in *Parikh* identified as the "dispositive question" whether FCC has a legitimate business interest in enforcing the covenant not to compete under the terms of the employment agreement. The Court concluded that FCC could not engage in the practice of medicine, as the employment agreement recited, "because it does not have a license to practice medicine . . . as required by Virginia Code §§ 54.1-2902 and 2929."[10] Therefore, because FCC "cannot engage in a competing practice of medicine with Dr. Parikh . . . , it has no legitimate business interest in enforcing the covenant not to compete with Dr. Parikh."[11]

Overview of Virginia Corporate Practice of Medicine Doctrine[12]

The theoretical basis for the corporate practice of medicine doctrine is that only individuals who have received the requisite training and licensure should be permitted to arrange or deliver medical care or to own an entity that provides physician services. The public is protected if unlicensed persons are not allowed to commercially exploit the practice of medicine or to interfere unduly with the independent professional judgment that the physician is ethically and legally required to exercise in the delivery of patient care. The doctrine also evolves from the concept that professionals should not be permitted to share profits or split fees with nonprofessionals.

The following administrative and legislative actions have been relied on to conclude that the corporate practice of medicine doctrine should not apply in Virginia to preclude a hospital's or medical school's employment of a physician, at least where the agreement specifically provides that the entity will not interfere with the physician's exercise of independent professional judgment.[13]

First, Virginia has never had an express prohibition on nonprofessional corporations practicing medicine; however, from 1948 until its repeal by the General Assembly in 1986, Virginia Code § 54-278.1 did create a limited prohibition on the corporate practice of medicine by providing:

> [i]t shall be unlawful for any physician to practice his profession as a lessee of any commercial or mercantile establishment, or to advertise, either in person or through any commercial or mercantile establishment, that he is a duly registered practitioner and is practicing or will practice medicine, as a lessee of any such commercial or mercantile establishment. But nothing herein shall be construed to prohibit or prevent the rendering of professional services to the officers and employees of any person, firm or corporation by a physician, whether or not the compensation for such service is paid by the officers and employees, or by the employer, or jointly by all or any of them . . .[14]

The repeal of that statute in 1986 arguably confirms the legislative intent that the practice of medicine not be limited to professional entities in Virginia.[15]

Second, in opinions issued in 1989, 1992, and 1995, three Virginia attorneys general consistently confirmed that it is permissible for the practice of medicine to be conducted by unlicensed corporations and foundations owned by hospitals and medical schools.[16]

Third, the General Assembly presumably put the issue to rest in 2003 when it passed Virginia Code § 13.1-542.1 ("Practice of certain professions by corporations") and § 13.1-1101.1 ("Practice of certain professions by limited liability companies"). Virginia Code § 13.1-542.1 states that "professional services . . . may be rendered . . . by a corporation." Virginia Code § 13.1-1101.1 does the same for limited liability companies.[17] "Professional services" are defined in Virginia Code §§ 13.1-543(A)(3) and 1102(A) as "any type of personal service . . . that requires as a condition precedent to the rendering of such service . . . the obtaining of a license," including "practitioners of the healing arts."

Overview of the Law of Noncompetition Agreements in Virginia[18]

Virginia courts have repeatedly acknowledged the enforceability of noncompetition agreements that are "narrowly drawn to protect the employer's legitimate business interest, [are] not unduly burdensome on the employee's ability to earn a living, and [are] not against public policy."[19] In analyzing the factors relevant to the validity of a noncompete agreement, the Court considers the nature of the activity restricted, the existence of a legitimate business interest protected by restricting the activity, the geographic scope of the restriction, and the duration of the restriction.[20]

Virginia law "favors the enforcement of contracts intended to protect legitimate business interests[,as i]t is as much a matter of public concern to see that valid agreements are observed as it is to frustrate oppressive ones."[21] However, the restraint must not be any greater than is necessary to protect the employee's legitimate business interest.

Finally, the Court has consistently held that noncompetition agreements will be narrowly construed as disfavored restraints on trade, and any ambiguity in the language in the restrictive covenant will be construed strictly against the employer.[22]

The Collision

The Supreme Court's decision in *Parikh* was unanimous and was written by its chief justice. As such, its holding and dicta can be expected to be cited frequently in litigation between employers and employees in health-care settings.

To fairly evaluate the potential impact of this decision on Virginia's corporate practice of medicine doctrine and on the law of restrictive covenants, a review of some of the pronouncements included in the case is instructive.

The Court rests its holding that FCC "has no legitimate business interest in enforcing the covenant not to compete with Dr. Parikh" on three specific findings.[23] First, the Court states that "the assertions in the employment agreement . . . that [FCC] is presently 'engaged in the practice of medicine'"[24] are incorrect. FCC "could not and cannot do so because it does not have a license to practice medicine from the Board of Medicine as required by Code §§ 54.1-2902 and 2929."[25] Second, the Court states that because FCC "cannot practice medicine,"[26] it "cannot engage in a competing practice of medicine with Dr. Parikh, who is a physician licensed to practice medicine . . ."[27] Third, the Court reasons that because FCC "cannot lawfully engage in the practice of medicine, it has no legitimate business interest in enforcing the covenant not to compete with Dr. Parikh."[28]

The Court also acknowledges that Virginia Code § 13.1-542.1 expressly "permits a corporation which is not a professional corporation *to render* professional services unless otherwise prohibited by law or regulation."[29] However, the Court concludes that it need not decide (i) "the scope of medical services, if any, that a corporation may 'render,'" (ii) "the meaning of the word 'render' contained in Virginia Code § 13.1-542.1," or (iii) "whether a nonprofessional corporation 'rendering' professional services can enforce a covenant not to compete . . ."[30]

Instead, the Court held that, by statute, only "licensed" persons can "engage in the practice of medicine" (even though a nonlicensed entity may "render professional services"). A corporation cannot be licensed (only an individual can), so the Court concluded that FCC may not lawfully "engage in the practice of medicine" and had "no legitimate business interest in enforcing the covenant not to compete . . ."[31]

In *Parikh*, the Court's analysis makes a distinction between an unlicensed entity "engaging in the practice of medicine" (which the Court says is not permitted) and the entity "rendering" professional services (which is permitted).[32] This distinction seems inconsistent with the legislative history and purpose of Virginia Code §§ 13.1-542.1 and 1101.1 and with three attorney general opinions that for almost two decades have consistently been relied on to permit hospitals and medical schools to employ and enforce their agreements with physicians.[33] Further, the Virginia Code does not appear to provide for any functional distinction between "rendering medical services" and "engaging in the practice of medicine." Indeed, the Virginia Code appears to use the terms "practice," "render," "furnish," "perform," and "engage in" interchangeably in describing permissible ways to deliver medical services.

For example, Virginia Code § 13.1-542.1 is specifically titled the "*Practice* of certain professions by corporations" and subsequently states that "professional services . . . may be *rendered* in this Commonwealth by" professional and nonprofessional corporations (emphasis added). Virginia Code § 13.1–1101 has a similar title.

The Virginia Code thereafter defines "professional services" of the type that may be "rendered" by nonlicensed entities as:

> any type of personal service to the public that requires as a condition precedent to the rendering of such service . . . *the obtaining of a license*, certification, or other legal authorization and shall be limited to the personal services rendered by . . . [p]ractitioners of the healing arts.[34]

Elsewhere, Virginia Code § 54.1-2903 uses the terms interchangeably in defining what constitutes "practice," stating that:

> signing any statement certifying that the person so signing has *rendered professional service* to the sick or injured . . . shall be prima facie evidence that the person signing or issuing such writing is *practicing* the healing arts within the meaning of this chapter. . . . (emphasis added)

Similarly, Virginia Code § 8.01-581.1 defines the term "health care provider" for purposes of coverage under the Medical Malpractice Act as including:

> a corporation, partnership, limited liability company or any other entity, except a state-operated facility, which employs or *engages* a licensed health care provider and which primarily *renders* health care services. (emphasis added).

The Medical Malpractice Act also defines "health care" to mean "any act, or treatment *performed or furnished* . . . by any health care provider, for to, or on behalf of a patient . . .[35]

When courts construe the meaning of statutes, the will of the legislature trumps all other rules of construction. "[T]he true intent and meaning of the statute is to be gathered by giving to all the words used their plain meaning, and construing all statutes in *pari materia* in such manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation."[36] The reason for considering statutes in *pari materia* is that this permits "any apparent inconsistencies [to] be ironed out whenever that is possible."[37] Additionally, whenever a given controversy involves a number of related statutes, they should be read and construed together and in harmony to give full meaning, force, and effect to each.[38]

It is also noteworthy that Virginia Code §§ 13.1-542.1 and 1101.1 read, in part, "[u]nless otherwise prohibited by law or regulation, the professional services defined in subsection A of § 13.1-543 may be rendered in this Commonwealth by . . ." a corporation or limited liability company. The General Assembly's caveat "unless otherwise provided by law or regulation" presumably was designed to preserve the right of the General Assembly to limit the entity form from which certain professional services may be provided. For example, Virginia Code §§ 54.1-3205 and 2716, et seq., expressly prohibit the

employment of optometrists and dentists, respectively, in certain settings.[39]

The Virginia Code imposes no such specific restrictions against physicians. Indeed, the 1992 attorney general opinion concluded that "if the General Assembly had intended to impose a similar prohibition on corporate employment of physicians, it could have done so in the same express manner."[40]

There are two avenues available in harmonizing the potentially contradictory provisions of Virginia Code §§ 13.1-542.1 and 1101.1 and Virginia Code §§ 54.1-111, 2902 and 2929. The first is to find a material difference between "rendering medical services" and "engaging in the practice of medicine," as the Court apparently did in *Parikh*. The second is to acknowledge that entities "render" medical services through the services of their licensed professional employees, and that doing so is consistent with Virginia Code §§ 54.1-111, 2902 and 2929. The action of the General Assembly in 2003, when it enacted Virginia Code §§ 13.1-542.1 and 1101.1, appears consistent with the latter interpretation.[41]

It is in reliance on this second interpretation that hospitals and medical schools around Virginia have made significant investments in acquiring and operating physician medical practices. Those entities derive their value from the professional services provided by their licensed employees and therefore would appear to have a legitimate business interest in protecting that investment. The value of such investments is determined by the income that the owner of the entity will receive as a result of the services rendered by the physician employees.[42] Reasonable restrictive covenants are necessary to protect that investment, and it is difficult to understand why an entity that may legitimately employ a physician to "render professional services" would not have a legitimate business interest in the potential revenues generated by those services.[43] To change the system now would be tremendously disruptive.

A Legislative Solution

To clarify the issue raised by *Parikh* and to minimize disruption to the health-care industry inherent in a broad reading of the decision, The Virginia Bar Association requested that Del. John M. O'Bannon III sponsor legislation in 2008 to address the holding in *Parikh*. The version expected to be introduced would create a new Virginia Code § 54.1-111(D) that provides:

> [n]either this section nor § 13.1-543, § 54-1-2902, and § 54.1-2929 shall be construed to prohibit or prevent any corporation of a type listed in § 13.1-542.1 or § 13.1-1101.1 which employs or contracts with an individual licensed by a health regulatory board from (i) practicing or engaging in the practice of a profession or occupation for which such individual is licensed, (ii) providing or rendering professional services related thereto through the licensed individual, or (iii) having a legitimate interest in enforcing the terms of employment or its contract with the licensed individual.

Drafting Suggestions

Unless the Court clarifies its reasoning in *Parikh*, or the General Assembly addresses the issue, it would seem advisable not to include in physician employment agreements recitations that a practice entity is "engaged in the practice of medicine" and to limit the prohibited activities to those that a practice entity is statutorily permitted to pursue. Thus, a recital, if used at all, that the practice is in the business of "rendering professional services through its licensed physician employees" would appear preferable because the language describes verbatim an activity permitted under Virginia Code §§ 13.1-542.1 and 1101.1.

Likewise, the restrictive covenant should only preclude the employee from "rendering professional services" of a type that the professional provided while employed by the practice. Including language that highlights the business interest sought to be protected also is recommended.

Finally, it would be helpful to include provisions (i) reciting that the physician sought the advice of counsel (or was advised to seek the advice of counsel) prior to signing the employment agreement; (ii) stating that during the course of employment, physician will have access to employer's patients and proprietary business information; (iii) addressing severability, nonsolicitation of patients, referral services, injunctive relief, and attorneys fees; and (iv) evidencing physician's continued ability to earn a living upon cessation of employment.

Conclusion

The Court's decision in *Parikh* creates considerable uncertainty as to the enforceability of restrictive covenants between physicians and the entities in which they practice. It is not clear whether the decision hinges on (i) on a poor choice of words by the drafter of the noncompete provision, (ii) an inherent ambiguity between Virginia Code §§ 54.1-111(A), 2902 and 2929, on one hand, and Virginia Code §§ 13.1-542.1 and 1101.1 (and Virginia Code §§ 13.1-543(A) and 1102), on the other, or (iii) broader policy issues relating to the nature of permissible employment arrangements between physicians and the entities in which they practice. While careful drafting may alleviate some of the concerns, the better course is for the General Assembly to reconcile any

While careful drafting may alleviate some of the concerns, the better course is for the General Assembly to reconcile any statutory ambiguity.

statutory ambiguity and give clear direction to the industry. ⚖

Endnotes:

1 273 Va. 284, 641 S.E.2d 98 (2007).

2 *See e.g.* 1989 Va. Op. Att'y Gen. 283; 1992 Va. Op. Att'y Gen. 147; 1995 Va. Op. Att'y Gen. 235. The repeal of Virginia Code § 54-278.1 also evidences the General Assembly's intent to permit nonprofessional corporations to operate medical practices.

3 Va. Code § 54.1-111(A)(1). *See also* Va. Code §§ 54.1-2902 and 54.1-2929.

4 *See* Va. Code § 54.1-2929. As the Court noted in *Parikh*, the statute regulating "licensure to practice medicine in Virginia, applies to individuals, not corporate entities." 273 Va. at 290, 641 S.E.2d 101, n.3.

5 *See generally Parikh*, 273 Va. 284, 641 S.E.2d 98; s*ee also* Va. Code Ann. §§ 54.1-2902 and 54.1-2929 (1950). It is unclear why the Court focuses on the statutory conversion of Family Care Center Inc. from a professional corporation to a nonprofessional corporation on the death of the licensed owner, as neither entity could hold a license to practice medicine. Va. Code § 13.1-352(B) exists to provide the spouse of a deceased owner of a practice an avenue for continuing the practice by employing another licensed physician or selling the practice to licensed physicians.

6 Va. Code §§ 13.1-542.1 and 13.1-1101.1.

7 *Parikh*, 273 Va. at 287, 641 S.E.2d at 99 (internal quotations omitted) (emphasis added).

8 Va. Code § 13.1-552(B). Va. Code § 13.1-544(A) establishes the eligible organizers and shareholders of a professional medical corporation and limits such ownership to individuals licensed to practice medicine. Va. Code § 13.1-552(B) states that a professional corporation loses its "professional" status automatically upon the occurence of an event resulting in ownership of the entity by a nonlicensed individual.

9 *Parikh*, 273 Va. at 99, 641 S.E.2d at 286, 287.

10 *Id.* at 101, 641 S.E.2d at 291.

11 *Id.*

12 *See* M. Martin, "Corporate Practice of Medicine … Dead or Alive in Virginia?," *VSB Health Law News* (Feb. 1999); P. Devine, "A Checklist for Avoiding Pitfalls in Business Ventures with Physicians in Virginia," *Virginia Lawyer*, 36 (Mar. 1992); P. Devine, "Hospital Acquisitions of Medical Practices," *Virginia Lawyer* at 19 (July 1996). *See also* 1995 Va. Op. Att'y Gen. 235; 1992 Va. Op. Att'y Gen. 147; 1989 Va. Op. Att'y Gen. 283; "Clerk's Office Legislative Proposal for the 2003 Session of the Virginia General Assembly," which accompanied SB 879 (2003 Session); Report for the Departments of Health and Health Professions, "Commercial Walk-In Medical Clinics in the Commonwealth", House Document No. 45 (1990). For a discussion of authority that is not supportive of the absence of a corporate practice prohibition in Virginia, *see Virginia Beach SPCA v. South Hampton Roads Veterinary Association*, 229 Va. 349, 329 S.E.2d 10 (1985) (holding SPCA was unlawfully practicing veterinary medicine without a license because it employed a veterinarian to render services through its not-for-profit animal hospital); *Ritholz v. Commonwealth*, 184 Va. 339, 35 S.E.2d 210 (1945) (holding that an optical company was engaged in the unauthorized practice of optometry because it exercised too much control over its contract optometrists); 1955 Va. Op. Att'y Gen. 146 (holding a hospital cannot practice medicine but may employ a radiologist to assist an attending physician by reading X-rays). It is important to note that states have varying positions on the corporate practice of medicine. For example, the Illinois Supreme Court has held that a not-for-profit corporation cannot enforce an employment agreement with its physician employees because Illinois prohibits the corporate practice of medicine. *Carter-Shields, M.D. v. Alton Health Institute*, 201 Ill.2d 441, 777 N.E.2d 948 (2002) (The court held that a noncompetition agreement could not be enforced because the physician's employment agreement violated the prohibition on the corporate practice of medicine).

13 It is not clear whether the same rule would hold true where the employer was an entity that did not primarily provide health-care services. *See* M. Martin, "Corporate Practices of Medicine . . . Dead or Alive in Virginia?," *Virginia Health Law News* 4 (Feb. 1995); Report for the Departments of Health and Health Professions, "Commercial Walk-In Medical Clinics in the Commonwealth," House Document No. 45 (1990).

14 *See also Stuart Circle Hospital Corp. v. Curry*, 173 Va. 136, 146, 3 S.E.2d 153, 157 (1939) (holding that "while a hospital may not be licensed to practice medicine, within the intent of the broad statutory definition thereof, it may actually engage in so much of said practice as is customary and necessary in the proper conduct of its business, without being required to comply with the regulations provided for an individual"); *P.M. Palumb Jr., M.D., Inc. v. R. Bennett, M.D.*, 242 Va. 248, 409 S.E.2d 152 (1991) (physician employment agreement containing a noncompetition agreement upheld, despite the fact that contract violated the then-statutory prohibition on professional corporations rendering medical services through independent contractors). *But see* 1955 Va. Op. Att'y Gen. 146 (distinguishing *Stuart Circle Hospital* and holding that a statutory change enacted since that court decision means "that today a hospital is prohibited from practicing medicine in Virginia . . . [but] a hospital would not be practicing medicine if it employed a radiologist . . . to furnish diagnostic aids to the attending physician practicing in the hospital").

15 *See also* 1992 Va. Op. Att'y Gen. 147 at 151 (discussing the history of the corporate practice of medicine doctrine in Virginia and the repeal of Virginia Code § 54-278.1); *Godlewski v. Gray*, 221 Va. 1092, 1096, 277 S.E.2d 213, 215-216 (1981) ("when [a statute] is revised, or when . . . portions of the former are omitted, the missing part . . . will be considered as annulled and revoked").

16 *See supra* note 2.

17 Interestingly, Senate Bill 703, as originally introduced by Sen. William C. Wampler Jr., was drafted to provide that there could be no "corporate practice of medicine" in Virginia except through professional corporations and professional limited liability companies. The bill as enacted did just the opposite.

18 *See* Edward L. Isler, Virginia CLE: 25th Annual Business Law Seminar: 2007 Update on Covenants Not to Compete, Duty of Loyalty, and Other Business Torts (written materials on "Covenants Not to Compete in Virginia"); S. Sinclair, "Defending a Physician Against Enforcement of a Covenant Not to Compete", *Virginia Health Law News* 20, 21 (Feb. 1995). The Court has regularly held that well-drafted, reasonable non-competition agreements between physicians and the practices that employ physicians are enforceable.

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19 *Omniplex World Services Corporation v. US Investigations Services Inc.*, 270 Va. 246, 249, 618 S.E.2d 340, 342 (2005); *see Simmons v. Miller*, 261 Va. 561, 580-581, 544 S.E.2d 666, 678 (2001).

20 *Simmons*, 261 Va. at 580, 544 S.E.2d at 678; *Omniplex World Services Corporation*, 270 Va. at 249, 618 S.E.2d at 342; *Modern Environments Inc. v. Stinnett*, 263 Va. 491, 493, 561 S.E.2d 694, 695 (2002).

21 *Meissel v. Finely II, et al*, 198 Va. 577, 584, 95 S.E.2d 186, 191 (1956). The Court has previously held that a legitimate business interest exists when service corporations use restrictive covenants to protect against detrimental competition by a former employee who had access to confidential information or who used client information to the detriment of the former employer. *See Advanced Marine Enterprises Inc. v. PRC Inc.*, 256 Va. 106, 119, 501 S.E.2d 148, 155 (1998).

22 *Simmons*, 261 Va. at 581, 544 S.E.2d at 678; *Clinic Valley Physicians Inc. v. Garcia*, 243 Va. 286, 414 S.E.2d 599 (1992) (The Court held that a noncompetition covenant in a physician employment agreement that the employer drafted to apply on "termination" of employment did not apply on the "nonrenewal" of an employment agreement with a fixed term that had expired).

23 *Parikh*, 273 Va. at 291, 641 S.E.2d 101.

24 *Id.*

25 *Id.*

26 *Id.*

27 *d.*

28 *Id.* Confusingly, the Court says it reaches the first conclusion because "the litigants do not argue" it, reaches the second conclusion because "the litigants do not discuss" it, and reaches the third conclusion because the issue "is not before us in this appeal."

29 *Id.* at 290, 641 S.E.2d at 101 (emphasis in original).

30 *Id.*

31 *Id.* at 291, 641 S.E.2d at 101.

32 *Parikh*, 273 Va. at 290, 641 S.E.2d at 101.

33 *See supra* note 15, 16.

34 Va. Code § 13.1-543(A)(3) (emphasis added). *Accord* Va. Code § 13.1-1102(A).

35 Va. Code § 8.01-581.1 (emphasis added). That provision was added to the Medical Malpractice Act specifically to confirm, among other things, that hospital and medical school affiliated medical practices are "health care providers" that are permitted to enjoy the benefit of the Virginia medical malpractice cap for the services they provide.

36 *Lucy v. County of Albermarle*, 258 Va. 118, 130, 516 S.E.2d 480, 485 (1999) (citing *Tyson v. Scott*, 116 Va. 243, 253, 81 S.E. 57, 61 (1914)).

37 *Lucy,* 258 Va. at 130, 516 S.E.2d at 485 (quoting *Commonwealth v. Sanderson,* 170 Va. 33, 38, 195 S.E. 516, 518 (1938)).

38 *Boynton v. Kilgore*, 271 Va. 220, 229, 623 S.E.2d 922, 927 (2006). When the language of a statute is ambiguous or appears to be inconsistent with other portions of the statute, courts are to harmonize any ambiguity or inconsistency in the statute to give effect to the General Assembly's intent without usurping the "legislature's right to write statutes." *Parker v. Warren*, 273 Va. 20, 24, 639 S.E.2d 179, 181 (2007) (citing *Boynton*, 271 Va. at 229-230, 623 S.E.2d at 927 (2006)).

39 Va. Code § 54.1-3205 provides in part that "[n]o licensed optometrist shall practice optometry as an employee, directly or indirectly, of a commercial or mercantile establishment." Va. Code § 54.1-2716 provides that "[i]t shall be unlawful for any dentist to practice his profession in a commercial or mercantile establishment", while Va. Code § 54.1-2717 states that "[n]o corporation shall be formed or foreign corporation domesticated in the Commonwealth for the purpose of practicing dentistry other than a professional corporation as permitted by Chapter 7 (§ 13.1-542 et seq.) of Title 13.1."

40 1992 Op. Va. Att'y Gen. 147 & 151.

41 *But see Sexton v. Cornett*, 271 Va. 251, 257, 623 S.E.2d 898, 901 (2006). The Court stated that:

> courts assume that a legislative body, when enacting new legislation, was aware of existing laws pertaining to the same subject matter and intended to leave them undisturbed. Otherwise, the older laws would have been amended or expressly repealed. Consequently, when two statutes are in apparent conflict, it is the duty of the court, if reasonably possible, to give them such a construction as will give force and effect to each.

42 The value of a practice when sold is, in part, calculated by determining the practice's "goodwill." The Court has previously recognized quantifying the value of "goodwill" based on the value of the difference between the price a business would sell for and the value of its nongoodwill assets as an acceptable valuation method. *Advanced Marine Enterprises v. PRC, Inc.*, 256 Va. 106, 119-20, 501 S.E.2d 148, 156 (1998) (citing *Russell v. Russell,* 11 Va. App. 411, 416, 399 S.E.2d 166, 169 (1990)) (The Court accepted this formula as a valid way to calculate damages for violation of a noncompete clause).

43 Furthermore, the existence of a nonlicensed employer's legitimate business interest in its patients and records is evidenced by the fact that the patient is a patient of the practice and the medical records are the property of the practice. *See* Va. Code § 54.1-2403.3. Like any other business that generates revenue through the provision of service to customers (patients), FCC would seem to have had a legitimate business interest in protecting itself from competition by a former employee who has had access to its confidential business and patient information and had established contacts with its patients while serving as an employee of the corporation. The Court's decision states that FCC continued to have a licensed physician employee following Dr. Parikh's departure. Thus, the practice could continue to operate. The practice also would continue to have a legitimate business interest in retaining its patient base for the purpose of selling the practice. *See* Va. Code § 13.1-552.

Repeal of § 20-124.3:1 of the Virginia Code: Restoration of Judicial Discretion

by Carol Schrier-Polak

Under current Virginia law (§ 20-124.3:1, Virginia Code 1950 as amended) mental health evidence is inadmissible in child custody and child visitation cases absent consent of the parents, abuse or neglect, or a child custody evaluation.

This statute is in direct conflict with § 20-124.3 of the Virginia Code requiring judges to make informed decisions when determining the best interests of children in custody and visitation and to consider all relevant evidence including but not limited to the mental condition of the child, the mental condition of each parent, the relative propensity of each parent to actively support the child's contact and relationship with the other parent, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child. No greater decision affects the lives of children and their parents.

In the 2005 case of *Schwartz v. Schwartz* (46 Va. App. 145), the Virginia Court of Appeals reversed a contempt order entered by the Circuit Court of Fairfax County when, in violation of the current statute, the judge permitted the therapist to testify that the mother, in violation of the court's prior custody order, repeatedly denigrated the father in the presence of the child, continually devalued the father outright, and never made a supportive statement about the father alone or in the presence of the children—all of which the therapist said was unusual. The court of appeals held that the testimony was inadmissible because it was information about a parent. While the trial court stated that the therapist was for the child, the therapist testified that he had been contacted by the attorneys for the parents, was serving as a coparenting coordinator and cotherapist for the parents, and was meeting with and working with the children.

On December 28, 2006, the court of appeals in *Rice v. Cromer* (Record No. 0226-06-2) relied on *Schwartz v. Schwartz* to hold that the therapist for a child who had been abused by her father previously could not testify in a visitation case between the father's parents and the mother since any information related to a child would necessarily relate to a parent.

Both *Schwartz* and *Rice* demonstrate how the current statute prevents a court from hearing all relevant information when determining the best interests of a child.

The Virginia Trial Lawyers Association, The Virginia Bar Association Commission on the Needs of Children, the VBA Coalition on Family Law Legislation, and the Virginia Chapter of the American Academy of Matrimonial Lawyers support repeal of § 20-124.3:1.

By repealing Virginia's current law, Virginia's privilege statutes and the Virginia Health Records Privacy Act (§ 32.1-127.1:03, 1950 Code of Virginia as amended) would regulate custody and visitation cases just as they have been effective in considering the admissibility of health evidence in noncustody-related matters that come before the court.

While the current statue has an exception for experts who have conducted a child custody evaluation, this exception has proved to be ineffective. Courts are refusing to order evaluations because of the lack of qualified custody evaluation experts and the costs involved in conducting a comprehensive evaluation. Recently a number of judges have accepted the position of many mental health professionals that the statute prevents a therapist from speaking with a child custody evaluation expert. Not only does such a position make the statutory exception meaningless, it is in direct conflict with professional standards for custody evaluations that require the expert to obtain relevant information from collateral sources, including but not limited to mental health providers.

In response to a survey of guardians ad litem who represent the best interest of children in Virginia, GALs overwhelmingly believe the current statute undermines the interests of children, protects the adult caregivers, does not preserve families, and often requires children to testify in litigated disputes.

There is no empirical evidence to support the argument of some mental health professionals that parents will not participate in therapy if their records are disclosed in court. In fact, the research demonstrates that patients who have a positive relationship with their therapists will participate in therapy even knowing that their records will be disclosed.

Last year's efforts to repeal the current statute resulted in a tie vote when the bill was heard by the Senate Courts of Justice Committee. While legislation to repeal did not pass in 2007, the General Assembly took notice that many mental health pro-

fessionals, as well as attorneys, feel strongly that the current law regarding mental health records is not in the best interests of children.

In response, legislation to repeal the current statute will again be introduced during the 2008 legislative session.

Carol Schrier-Polak has practiced domestic relations law for more than thirty years. She has written and lectured extensively about prenuptial agreements, tracing and allocation of marital and separate property, and mental health and family law. She is a past president of the Virginia Chapter of the American Academy of Matrimonial Lawyers, a former member of the Virginia State Bar Family Law Section Board of Governors, and a member of the Virginia State Bar Council. She has a master's degree in social work.

VSB Health Law Section

The membership of the Health Law Section consists of those in legal practice devoted to dealing with the administration of health care. The section has been active in the continuing legal education field. The section also publishes a newsletter. The section's board invites all members to attend its meetings. Many meetings include an informal program or roundtable discussion of current topics. The section also produces programs of interest to the general health care professional.

www.vsb.org/sections/hl/index.htm

One of a Kind

by John Y. Richardson Jr., 2007–08 Conference of Local Bar Associations Chair

The Virginia State Bar's Conference of Local Bar Associations annually solicits nominees for the Local Bar Leader of the Year Award. In reviewing each nominee's accomplishments, emphasis is placed on his or her activities in the last ten years. Although the award is based on local bar service, the nominee's dedication to the bench, the bar as a whole, and the public is important. The award is presented at the Virginia State Bar Annual Meeting in Virginia Beach.

Last year's Local Bar Leader of the Year Award winner set a standard that is difficult to recite, much less to accomplish.

On the civic side, our award winner coached for ten years and volunteered in Boy Scouts and Girl Scouts. He was president of the zoology society that oversees Mill Mountain Zoo and was chair of the Mill Mountain Advisory Committee.

I am partial to persons who, like our honoree, coach youth teams—especially teams their own children play on. It is truly a learning experience for the coach, the kids, and the parents. For those of us who have tried cases, it also provides a host of moments that add color to closing arguments. I am convinced we become better persons and parents from this experience.

Our award winner's most impressive work to those who share his profession was with his local bar association, which he served as president and chair of its foundation.

Because of his efforts, his association's committee system improved. Programs were better-coordinated. He arranged for free continuing legal education credits at bar meetings. Members were recognized for their service—for example, he ensured that his bar members were eligible for the U.S. President's Volunteer Service Award.

During our winner's term as bar president, programs prospered and grew. New programs bloomed.

He also excelled as chair of his local bar foundation. A foundation gala black-tie fund-raiser supported a scholarship program and a holiday party for homeless children in local shelters.

The 2007 Bar Leader of the Year was Steven I. Higgs of the Roanoke Bar Association, a solo practitioner. He is a graduate of Washington and Lee University and University of Richmond School of Law.

Steve's example should be an inspiration to each of us to make the most of our time. He also should inspire us to recognize outstanding members of our own local bars.

See the Web page below for nomination information. Many derserving members are out there.

23rd Annual Conference of Local Bar Associations

Awards *of* Merit Competition

and the

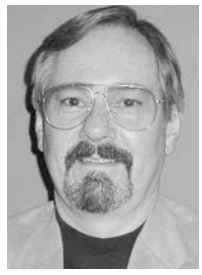
13th Annual Conference of Local Bar Associations

Local Bar Leader *of the* Year Award

The deadline for the receipt of nominations is April 25, 2008.

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

Democracy In America



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

It is again the season of the race for the presidency. The political show reveals the genius of our democratic system. One of our system's earliest keen observers is still considered among the best: Count Alexis de Tocqueville. Tocqueville was a lawyer by training. He came to America from France to study the prison systems in Philadelphia and Auburn, New York, that employed the then-new concept of productive inmate work to promote rehabilitation.

Tocqueville's legacy of that visit — his insightful book *Democracy in America* — is a reminder of the importance of lawyers in the development of this country. It also is a reminder to members of the Senior Lawyers Conference to share their experience and wisdom with their communities.

Tocqueville traveled through the United States during Andrew Jackson's presidency in 1831. He came away with a profound respect for the democratic model our forefathers created.

He listed conditions and circumstances that make American democracy enduring: He found Americans to value literacy for its functional benefits; he found America to have a passion for trade; he found Americans to be both religious and moral; he was impressed with the breadth of America's middle class.

And he found that lawyers were considered to be of the first rank of importance in local communities and in government at all levels.

Tocqueville saw the foundations of democracy in local government. He saw the moderating of passions and ideas in their public expression in town meetings, nonpolitical civic organizations, and the public square. To his mind, the right of assembly and the free exchange of ideas and sentiments allowed democracy to flourish instead of descending into the tyranny of the majority.

The individuals at the center of that process and, in Tocqueville's view, largely responsible for its intellectual order, were lawyers. Indeed, Tocqueville observed that, in a nation that abjured royalty, lawyers were America's aristocracy, preferred at all levels of elective office.

Tocqueville has been seen as a visionary with respect to the forces that would assail American democracy. His book is a description of the way this country was in the 1830s, and it reminds us of what we must consider each time change is called for. We also should reflect on his confidence in the American experiment while its stewardship lay in the hands of its lawyers.

I am appalled at the general decline in the number of lawyers in elective office. As Tocqueville observed, "There is hardly a political question in the United States which does not sooner or later turn into a judicial one." Developing good policy requires more than a desire to be of public service. It demands clear and concise thinking, an understanding of the law and its procedures and processes, and a sense of history and precedent for the innovative ideas that worked and those that failed.

It is the duty of all members of our profession to involve themselves in the community, whether through elected office, political or nonpolitical organizations, or religious or charitable groups. We have much to share. Those of us who have seen decades pass have the time to share it with our neighbors.

If you share these beliefs, I have a suggestion: Spearhead an effort by your local bar association to sponsor a Senior Law Day program. Use the Senior Lawyers Conference flagship publication, the *Senior Citizens Handbook* (**www.vsb.org/publications/senior**) and the blueprint prepared by SLC past-chair Bill Wilson (**www.vsb.org/slc/attorney/newsletters.html**, Spring 2007, page 6). For your audience, contact your community's churches and local clergy association, agency on aging, rest homes, and nursing homes. You will be astounded at the enthusiasm displayed for such a presentation.

And you will be gratified that you are contributing to the successful continuation of our grand adventure of democracy in America.

Looking Back and Forward: YLC's Midyear Assessment

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

I write this article at the midpoint of the 2007–08 bar year. Before we rush headlong towards the annual meeting, I want to tell you some of what the Virginia State Bar's Young Lawyers Conference has accomplished with the efforts of its board, committee chairs, circuit representatives, and volunteers.

Committee chairs Rasheeda N. Creighton and Yvette A. Ayala presented our Oliver Hill/Samuel Tucker Law Institute at the University of Richmond in July. They shepherded a record twenty-two high school students through the week-long camp, which includes law-related classes, lectures, and social activities. I have helped chaperone students during the institute for three years, and I'd estimate that Rasheeda and Yvette are probably just now recovered.

Alana N. Malick and Mollie C. Barton treated seven newly appointed judges to a marvelous night at the Bull and Bear Club in Richmond on October 16 during our annual Bench-Bar Celebration Dinner. Alana and Mollie organized this event, which was punctuated by a wonderful address from Senior Justice Elizabeth B. Lacy, who presented each honoree with an edition of *Virginia's Historic Courthouses*. Participants were struck by the warmth of the event, which recognized the sacrifices each honoree had made to be a member of the judiciary. Mollie has since gone on to chair the YLC's Commission on Women and Minorities in the Profession, which held a strategy session on participation of women and minorities in the bar after they "age off" the Young Lawyers Conference.

Ken L. Alger, who revitalized the conference's Domestic Violence Safety Project, presented a series of continuing legal education programs on protective orders and handgun issues as they relate to domestic violence victims throughout the commonwealth. Ken brought the CLE to Roanoke in June and to Winchester in November. He will present it in Virginia Beach in June 2008.

Frances E. Scott again ran a flawless VSB Admission and Orientation Ceremony for almost two thousand bar admittees on October 29. Francie is a model of organization in a sea of chaos. Ryan A. Glasgow continues to inspire favorable commentary from bar staff and attendees at the First Day in Practice Seminar, which also served a record number of new admittees the day after the A&O Ceremony.

Under the leadership of committee chair Bryan M. Rhode, the YLC implemented its Wills for Heroes project in Chesterfield, where, in fall 2007, volunteers provided free wills and advance medical directives to local sheriffs, firefighters, and police officers. Keeping a steady eye on the program they helped implement were Carson H. Sullivan and Erin S. Whaley.

Lest you find these achievements extraordinary in this particular year, the American Bar Association awarded the conference first place in its annual comprehensive category (akin to "best overall") for the 2006–07 bar year. We won over many better-funded, more populous states. The credit for this recognition goes to the leadership of Immediate Past President Maya M. Eckstein and to the hard work of YLC members last year.

Mental Health Project

Many of you have certainly noticed the increased interest in the issue of mental health reform in recent months. Though born out of the tragedy in Blacksburg, renewed attention to the issue is heartening to those of us who have been active in mental health issues. The conference is developing a program to bring legal services to the mentally ill population of the commonwealth. We plan to have volunteer lawyers meeting with mentally ill clients at the Northern Virginia Mental Health Institute in Fairfax and the Region 10 Blue Ridge Clubhouse in Charlottesville. Volunteer lawyers will briefly advise and counsel walk-in clients and refer them to other volunteer lawyers in different areas of practice, who will, we hope, provide pro bono consultation.

If you are in or near these jurisdictions and wish to provide access to legal services to a population desperately in need, please contact me at **dgray@cgglawyers.com**; or, in Charlottesville, Nathan J.D. Veldhuis at **nathan.veldhuis@tremblaysmith.com**.

RISK MANAGEMENT CORNER

Dealing with Client Property

by John J. Brandt

Lawyers frequently encounter questions about their clients' property. Issues include how long to maintain a client's file materials and disposition of a client's trust funds or property after the case is closed, when the client cannot be reached—or the client fails to cash the trust check forwarded by the attorney.

How long after a case is closed must an attorney maintain a client's file?

"All original, client-furnished documents and any originals of legal documents or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, *upon termination of the representation*, those items shall be returned within a reasonable time to the client or the client's new counsel upon request . . ." (Emphasis added.) Rule 1.16(e).

All trust accounting records of a closed case "shall be preserved for at least *five full calendar years* following the termination of the fiduciary relationship." Rule 1.15(e)(1)(v), *VSB 2007–2008 Professional Guidelines*. (Emphasis added.)

For purposes of any possible malpractice claim, the statute of limitations begins to run as of the time the case is concluded. The statute is five years for a written engagement and three years if there is no written agreement.

After a case is concluded, most attorneys write a closing letter and return to the client all original documents.

What should the lawyer do with the remainder of the file, such as copies of documents, memos to the file, and legal research? No rules require that these materials be kept, but many practice management consultants recommend that these files be maintained for at least five years—the statute of limitations for a written engagement.

The nature of the case may dictate shorter or longer file retention. For example, an attorney representing a criminal defendant sentenced to death should keep the file until the sentence is carried out. Estate attorneys typically maintain their client's files until after the death of a testator or grantor. Other factors, such as representing a person with a disability, may justify longer file retention.

Before a lawyer destroys a client's file, the lawyer should inform the client by letter that the documents remaining in the file will be destroyed within sixty days unless the client appears to claim them. The lawyer is never required to "provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interests, staffing considerations, or difficulties arising from the attorney-client relationship." Rule 1.16(e). Some attorneys inform a client in the closing letter that all remaining documents in the client's file will be destroyed "on or about [date]," and that the client should make timely arrangements to pick up any documents. Some lawyers also explain their file retention policies in their engagement letters.

Before destroying a file, a lawyer should record on an index card or computerized file the client's name, address, telephone number, type of case, court, names of persons deposed, contact information for the court reporter, a brief description of the outcome, and the date of termination of the case.

The attorney may decide how to destroy a file. It is not recommended that files be bagged and deposited in a trash bin or public landfill. (After a Virginia attorney bagged and disposed of a divorce file, it was posted on the Web by enterprising fraternity brothers.) Shredding is the preferred method of file destruction. Shredding companies will come to your office, shred quickly and economically, and certify their work in writing.

What should a lawyer do with client funds held in trust after repeated efforts to return the funds have failed?

Attorneys sometimes attempt to refund a client's trust account funds only to find the client has moved without a forwarding address, or the client simply fails to cash the check.

An attorney should exercise due diligence to locate the owner and promptly disburse those funds. If that fails, the attorney should file the unclaimed funds with the Virginia Department of the Treasury, Division of Unclaimed Property, P.O. Box 2478, Richmond, VA 23218-2478. The division can be contacted at (800) 468-1088 or **www.trs.virginia.gov** (unclaimed property link). The Web page has the forms necessary to submit the unclaimed funds. Virginia has adopted the Uniform Disposition of Unclaimed Property Act, § 55.210.1 Va. Code (1950), as amended. An attorney would be a "holder" as defined under § 55-210.2: "a person . . . who is (i) in possession of property belonging to another . . ." The attorney must first exercise due diligence, which includes but is not limited to "the mailing of a letter by first-class mail to the last known address of the owner as indicated on the records of the holder." *Id.*

Under § 55-210.2:1, the funds are presumed abandoned if the owner fails to

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Health Law and Technology: A Primer and a Warning

by Alan S. Goldberg

Attorneys for providers, payers, vendors, and others in health-care delivery must understand information-technology challenges and opportunities. What follows may not be profound—or obvious. It is often the simple and not the complex that creates trouble in areas of health care and technology.

In health care, privacy and security are paramount. Federal, state, local, and contractual law provisions are not always consistent. Knowledge of health-care privacy and security laws must precede an analysis of which laws complement or preempt others, and which laws are independent of others.

The privacy rule under the Administrative Simplification subtitle of the Health Insurance Portability and Accountability Act (HIPAA) of 1996 says that when state laws contradict and are more stringent than the HIPAA privacy rule, the state laws preempt the HIPAA rule. Now that the use of electronic health information is increasing, clients must review whether protected electronic information reposes in jurisdictions with laws that preempt HIPAA. Clients should include references to state preemptive laws in notices of privacy practices of entities covered under HIPAA.

There are challenges to privacy assertions when clients use an .edu e-mail address or other electronic mail accounts for communication of health information that is not directly related to their professional work for academic or other institutional health-care organizations. Questions arise: Do no-privacy policies that govern the e-mail account create inconsistencies with HIPAA privacy obligations? Can protection of the attorney-client privilege for communications be asserted when using such e-mail accounts?

HIPAA privacy provisions and nondisclosure agreements can be inconsistent. Some nondisclosure agreement documents include a provision that accounts for the HIPAA privacy rule regarding confidential health-care information. The following clause may be considered to address this concern:

> **Exclusion.** Notwithstanding anything contained in this agreement to the contrary (except that confidential information which, regardless of becoming publicly or otherwise available, is required by law to be confidential, including under the administrative simplification subtitle of the Health Insurance Portability and Accountability Act of 1996, Public Law 104-109, shall be included as and shall remain confidential information if, as, and to the extent confidentiality is required under applicable law), confidential information shall not include any information which would otherwise be classified as confidential information but: (a) is or becomes publicly available other than through unauthorized disclosure by a receiving party or a receiving party's representative, or (b) is shown by written record to have been independently developed by a receiving party.

Attempts to protect privacy may be thwarted by computer terms. Words that describe computer technology functions do not always mean what they seem. Microsoft's Windows XP application, for example, requires a feature called "start" to get to another feature that turns off the computer. A more troubling feature is the common delete key. When a file is "deleted" using the delete key, the file does not disappear. The information in the file remains available on the hard drive or elsewhere in the computer. Finding the supposedly deleted file can take time and knowledge of how computer software and hardware work together to create and retain information, but usually it is not difficult.

Other inadvertent disclosures of electronic information can occur when an Internet browser cache is not cleared or when a list of document files previously opened in an application such as Microsoft Word for Windows is not cleared. Failing to clear a cache could mean that an otherwise protected Web page that contains health information can be viewed without password protection. Failure to clear a list of document files could mean that names and health and other information included in a document file title can be disclosed unintentionally.

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Health and Medical Law Resources

by Jeanne Ullian

Quality health and medical resources of interest to the legal practitioner are available both in libraries and on the Internet. Many of the Internet resources, whether from government agencies or private entities, are free and user-friendly.

PubMed (**www.ncbi.nlm.nih.gov/sites/entrez**) is the preeminent resource for identifying and locating medical journal articles. Subject specialists at the National Library of Medicine (NLM) index the articles in Medline, a database of more than five thousand selected journals. PubMed coverage of Medline is from 1950. Print products such as *Index Medicus* provide journal indexing from 1879. Searching PubMed is free. Utilize the drop-down boxes to limit your search; however, do not be fooled by the simplicity of the Entrez search engine. For specific subject searches, enlist the assistance of a medical librarian who is familiar with MeSH—the controlled vocabulary used by the Medline indexers. With this help, you restrict your search to the most relevant articles. All entries in PubMed include a complete citation and many also include an abstract. The LinkOut feature alerts you to the availability of full text on publisher or third-party Web sites, including libraries with print or electronic holdings and related resources.

MedlinePlus (**http://medlineplus.gov**) is a complementary Web site from the NLM that provides free and reliable health and medical resources for professionals and consumers. Use it to familiarize yourself with a disease or condition as well as to find those keywords that will improve your search in PubMed or other medical and legal databases. Don't miss the link to Drugs and Supplements. If you usually rely on the *Physicians' Desk Reference* (PDR) for drug information, try this online resource that provides the same PDR information for most products plus additional helpful information from medical professionals.

The **Centers for Medicare & Medicaid Services** site (**www.cms.hhs.gov**) provides searchable, full-text access to the Centers for Medicaid Services manuals and transmittals, as well as other related information. If you are new to this area and find the government site overwhelming, use **HCPro Boot Camps** (**www.hcprobootcamps.com/links/index.cfm**) as your entry point. It simplifies the task of finding coding sources (CPT, ICD-9-CM), billing and compliance resources, and full-text statutes and regulations. Another related resource, if fraud and abuse are topics of interest, is the Web site of the **Office of the Inspector General** (**http://oig.hhs.gov**).

The **American Health Lawyers Association** (AHLA) (**www.healthlawyers.org**) is the major membership organization for health-care attorneys. Even if you do not join, you will find many useful free resources on this site, including nineteen subject-specific electronic mailing lists. Look to AHLA for continuing education and publications on timely topics.

Sign up for the free alert service from **Horty Springer** (**www.hortyspringer.com**), which describes itself as the first law firm to devote itself entirely to health-care law. In my estimation, this site has the best and most useful list of health-care links for the legal professional.

The ***Virginia Medical Law Report*** (**www.vamedicallaw.com**) from *Virginia Lawyers Weekly* is a bimonthly publication available free to medical professionals and for a nominal subscription fee to others. The current issue and an archive back to 2004 are available as PDFs.

The **National Center for Assisted Living** (**www.ncal.org/about/state_review.cfm**) provides a state-by-state summary of assisted-living regulations in twenty-one categories as well as other related consumer information.

Some quick picks include the following:

- Certificates of Need (**www.ncsl.org/programs/health/certneed.htm**) from the National Conference of State Legislatures
- Licensing (**www.dhp.virginia.gov**) from the Virginia Department of Health Professions
- Case Law research (**www.vsb.org**) through Fastcase (access free to members of the Virginia State Bar)
- Antitrust issues (**www.ftc.gov/bc/healthindex.shtm**) from the Federal Trade Commission

Virginia's three academic medical libraries allow public access and have skilled medical librarians on staff. Check their Web sites for information on hours and services. (Eastern Virginia Medical School's Edward E. Bricknell Medical Sciences Library at **www.evms.edu/evmslib/index.html**, University of Virginia Health System's Claude Moore Health Sciences Library at **www.healthsystem.virginia.edu/internet/library/**, and Virginia Commonwealth University's Tompkins — McCaw Library for the Health Sciences at **www.library.vcu.edu/tml/**.

WorldCat (**www.worldcat.org**) provides access to the catalogs of many public and academic libraries and some private libraries. Search free to see which libraries have the journal or treatise you need. Enter your location and the

Resources *continued on page 51*

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There are many areas of concern involving how health information is to be protected. Health lawyers and others cannot solely rely on others to learn about and help address these concerns.

Alan S. Goldberg is a solo practitioner in McLean, having completed thirty-nine years with a large Boston and Washington, D.C., law firm. He is a past president of the American Health Lawyers Association, a past member of the council of the American Bar Association Health Law Section, a past cochair of the Virginia State Bar Health Law Section, and a member of the Rules of Professional Conduct Review Committee of the District of Columbia Bar, the VSB Special Committee on Law and Technology, and the council of the Health Law Section of The Virginia Bar Association. He is currently cochair of the Health Technology Committee of the Northern Virginia Technology Council. He is an adjunct professor of health law at George Mason University, and he served in the judge advocate general corps of the U.S. Navy.

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claim them "for more than five years after it became payable . . ." Thus, if the lawyer closes a file and writes to the client with a check for $950 in trust funds remaining after the case is closed, and more than five years pass without success in distributing the funds, the attorney must presume the funds are abandoned and should remit a check for the unclaimed funds, less lawful charges, to the Division of Unclaimed Property, with the appropriate forms (AP-1 and 2). However, under § 55-210.10:2, the attorney "*may voluntarily* report the trust account funds *prior to the statutory due dates, whereupon the property shall be presumed abandoned* . . ." (Emphasis added.) The director of the unclaimed property division suggests six months as a reasonable period of time for an attorney to hold trust funds after trying to locate the owner. Then the attorney may simply send a trust account check in the amount remaining (less any lawful charges) to the division. There is no minimum amount that may be forwarded.

Although § 55-210.2:2 states that the commonwealth will not take custody of unclaimed property unless the owner's last known address, as shown on the attorney's records, is in Virginia, there are exceptions when the owner's address is unknown and when the owner is in a state without unclaimed property laws. The Virginia unclaimed property division then may accept unclaimed trust funds irrespective of the whereabouts of the owner. Attorneys should call the unclaimed property division if they have questions about the procedure.

Once the attorney has filed with the commonwealth, he is "relieved of all liability to the extent of the value of the property so paid or delivered . . ." § 55-210.15. That section appears to indemnify the attorney in case of legal proceedings against him.

Section 55-210.26:1 creates interest and penalty surcharges against at an attorney "who fails to pay or deliver property within the time [five years] prescribed by this chapter . . ." Fortunately, the Treasurer of Virginia can waive interest and penalties unless willfulness is obvious.

Attorneys should properly reconcile their trust accounts and remit funds to the clients. Clients should promptly collect any trust funds left in the attorney's account. If an attorney has followed the requirements and the client fails to accept the funds, the Virginia Uniform Disposition of Unclaimed Property Act offers the attorney a method to clear his trust account. ⚖

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results will be ordered by geographical proximity.

For help, ask a librarian. Visit, call, or e-mail a medical reference librarian at Eastern Virginia, U.Va., or VCU. Don't expect them to be available 24/7, but do expect them to be helpful and reliable. You also can start with a librarian in your firm, public law library, or public library. We work together to make sure our users receive the service and information they need. ⚖

Jeanne Ullian is the firm librarian in the Norfolk office of Williams Mullen. She received her bachelor's degree from the College of St. Catherine in St. Paul, Minnesota, and her master of science degree in information sciences from the University of Tennessee at Knoxville. She is a member of the Virginia Association of Law Libraries.

2008 GENERAL ASSEMBLY
Virginia Lawyer-Legislators

The 2007 elections resulted in a net gain of five Virginia lawyers to the state Senate.

In 2005—the last time *Virginia Lawyer* counted the number of state legislators in active practice in Virginia—there were ten in the Senate and twenty-eight in the House of Delegates.

When the current session opened on January 9, 2008, fifteen of the forty state senators were in the active practice of law in the commonwealth. The number in the House increased since 2007 by one—now twenty-nine of one hundred delegates.

For many years, lawmakers have expressed concern about declining representation of the legal profession in their ranks.

Virginia Gov. Timothy M. Kaine—himself a lawyer—issued a call in 2004 for more lawyers to join the ranks of legislators. The General Assembly needs their intellectual training, their abilities to understand different points of view, and their skill at debating without personalizing conflict, he said.

In May 2005, U.S. Magistrate Judge Dennis W. Dohnal of the Eastern District of Virginia paid tribute to the citizen-lawyer during the Virginia State Bar's pro bono awards ceremony. More than half of the signers of the Declaration of Independence were lawyers, Dohnal observed.

The lawyer statesman "was one who was possessed of practical wisdom and persuasive powers. He was devoted to the public good while being keenly aware of human frailties as well as political realities—what should be done, what could be done, what might be done in time," Dohnal said.

Dean W. Taylor Reveley III of the College of William and Mary School of Law said, as he presented the college's Citizen Lawyer Award in 2005, "[Thomas] Jefferson wanted law students at William and Mary to learn not simply how to be skilled practitioners of law, but also how to be leaders for the common good at the community, state and national levels; Jefferson wanted William and Mary law students imbued with a sense of responsibility to lead for the common good, recognizing the comparative advantages that lawyers have for such leadership and the importance of law in American society."

The following lawyer-legslators are attorneys licensed in Virginia or another U.S. jurisdiction. Most work in law firms. They also include a prosecutor, a consultant, and a corporate counsel. They are listed with their party affilitations and legislative districts, the law schools they graduated from, the years they were admitted to the bar (Virginia, in all but one case), and their contact information.

More information on legislators can be found on the General Assembly's Web site at **legis.state.va.us**.

—Dawn Chase

SENATE

Kenneth T. "Ken" Cuccinelli II
Republican—37th
George Mason University
Admitted 1996

10560 Main St., Ste. LL-17
Fairfax, VA 22030
District (703) 766-0635
Capitol (804) 698-7537
District37@sov.state.va.us

SENATE

R. Creigh Deeds
Democrat—25th
Wake Forest University
Admitted 1984

P.O. Box 5462
Charlottesville, VA 22905
District (434) 296-5491
Capitol (804) 698-7525
District25@sov.state.va.us

SENATE

John S. Edwards
Democrat—21st
University of Virginia
Admitted 1970

P.O. Box 1179
Roanoke, VA 24006
District (540) 985-8690
Capitol (804) 698-7521
District21@sov.state.va.us

SENATE

Robert Hurt
Republican—19th
Mississippi College
School of Law
Admitted 1995

P.O. Box 2
Chatham, VA 24531
District (434) 432-4600
Capitol (804) 698-7519
District19@sov.state.va.us

SENATE

Henry L. Marsh III
Democrat—16th
Howard University
Admitted 1961

422 E. Franklin St., Ste. 301
Richmond, VA 23219
District (804) 648-9073
Capitol (804) 698-7516
District16@sov.state.va.us

SENATE

Ryan T. McDougle
Republican—4th
College of William
and Mary
Admitted 1996

P.O. Box 187
Mechanicsville, VA 23111
District: (804) 730-1026
Capitol (804) 698-7504
District04@sov.state.va.us

SENATE

A. Donald McEachin
Democrat—9th
University of Virginia
Admitted 1987

4719 Nine Mile Rd
Richmond, VA 23223
District (804) 288-3381
Capitol (804) 698-7509
District09@sov.state.va.us

SENATE

Thomas K. Norment Jr.
Republican—3rd
College of William
and Mary
Admitted 1973

P.O. Box 6205
Williamsburg, VA 23188
District (757) 259-7810
Capitol (804) 698-7503
District03@sov.state.va.us

SENATE

Mark D. Obenshain
Republican—26th
Washington and Lee
University
Admitted 1987

P.O. Box 555
Harrisonburg, VA 22803
District (540) 437-1451
Capitol (804) 698-7526
District26@sov.state.va.us

SENATE

J. Chapman "Chap" Petersen
Democrat—34th
University of Virginia
Admitted 1994

P.O. Box 1066
Fairfax, VA 22038
District (703) 349-3361
Capitol (804) 698-7534
District34@sov.state.va.us

SENATE

Frederick M. Quayle
Republican—13th
Lawyers Title of
Chesapeake Inc.
University of
Richmond
Admitted 1966

P.O. Box 368
Chesapeake, VA 23439
District (757) 483-9173
Capitol (804) 698-7513

SENATE

William Roscoe Reynolds
Democrat—20th
Washington and Lee
University
Admitted 1967

P.O. Box 404
Martinsville, VA 24114
District (276) 638-2315
Capitol (804) 698-7520
District20@sov.state.va.us

SENATE

Kenneth W. Stolle
Republican—8th
Virginia Law Reader Program
Admitted 1983

2101 Parks Ave., Ste. 700
Virginia Beach, VA 23451
District (757) 486-5700
Capitol (804) 698-7508
District08@sov.state.va.us

SENATE

Richard H. Stuart
Republican—28th
University of Richmond
Admitted 1992

P.O. Box 1146
Montross, VA 22520
District (804) 493-8892
Capitol (804) 698-7528
District28@sov.state.va.us

SENATE

Jill Holtzman Vogel
Republican—27th
Holtzman Vogel PLLC
DePaul University (Illinois)
Admitted1996

117 E. Picadilly St., Ste. 100-B
Winchester, VA 22601
District (540) 662-4551
Capitol (804) 698-7527
District27@sov.state.va.us

HOUSE OF DELEGATES

David B. "Dave" Albo
Republican—42nd
University of Richmond
Admitted 1988

6367 Rolling Mill Pl., Ste. 102
Springfield, VA 22152
District (703) 451-3555
Capitol (804) 698-1042
DelDAlbo@house.state.va.us

HOUSE OF DELEGATES

Ward L. Armstrong
Democrat—10th
University of Richmond
Admitted 1980

P.O. Box 1431
Martinsville, VA 24114
District: (276) 632-7022
Capitol (804) 698-1010
DelWArmstrong@house.state.va.us

HOUSE OF DELEGATES

Clifford L. "Clay" Athey Jr.
Republican—18th
University of Dayton (Ohio)
Admitted 1994

35 N. Royal Ave.
Front Royal, VA 22630
District (540) 635-2123
Capitol (804 698-1018
DelCAthey@house.state.va.us

HOUSE OF DELEGATES

William K. "Bill" Barlow
Democrat—64th
University of Viginia
Admitted 1965

P.O. Box 240
Smithfield, VA 23431
District (757) 357-9720
Capitol (804) 698-1064
DelWBarlow@house.state.va.us

HOUSE OF DELEGATES

Robert B. "Rob" Bell III
Republican—58th
University of Virginia
Admitted 1995

2309 Finch Ct.
Charlottesville, VA 22911
District (434) 245-8900
Capitol (804) 698-1058
DelRBell@house.state.va.us

HOUSE OF DELEGATES

Robert H. "Bob" Brink
Democrat—48th
College of William and Mary
Admitted 1978

P.O. Box 7668
Arlington, VA 22207
District (703) 531-1048
Capitol (804) 698-1048
DelRBrink@house.state.va.us

HOUSE OF DELEGATES

William H. Fralin Jr.
Republican—17th
University of Richmond
Admitted 1989

P.O. Box 20363
Roanoke, VA 24018
District (540) 772-7600
Capitol (804) 698-1017
DelWFralin@house.state.va.us

HOUSE OF DELEGATES

C. Todd Gilbert
Republican—15th
Southern Methodist University
Admitted 1996

P.O. Box 309
Woodstock, VA 22664
District (540) 459-7550
Capitol (804) 698-1015
DelTGilbert@house.state.va.us

HOUSE OF DELEGATES

H. Morgan Griffith
House Majority Leader
Republican—8th
Washington and Lee University
Admitted 1983

P.O. Box 1250
Salem, VA 24153
District (540) 389-4498
Capitol (804) 698-1008
DelMGriffith@house.state.va.us

HOUSE OF DELEGATES

Franklin P. "Frank" Hall
Democrat—69th
American University
Admitted 1966

P.O. Box 3407
Richmond, VA 23235
District (804) 897-5900
Capitol (804) 698-1069
DelFHall@house.state.va.us

HOUSE OF DELEGATES

William J. "Bill" Howell
Speaker of the House
Republican—28th
University of Virginia
Admitted 1967

P.O. Box 8296
Fredericksburg, VA 22404
District (540) 371-1612
Capitol (804) 698-1028
DelWHowell@house.state.va.us

HOUSE OF DELEGATES

Salvatore R. Iaquinto
Republican—84th
Regent University
Admitted 1996

P.O. Box 6888
Virginia Beach, VA 23456
District (757) 430-0102
Capitol (804) 698-1084
DelSIaquinto@house.state.va.us

HOUSE OF DELEGATES

William R. "Bill" Janis
Republican—56th
University of Virginia
Admitted 1999

P.O. Box 3703
Glen Allen, VA 23058
District (804) 726-5856
Capitol (804) 698-1056
DelBJanis@house.state.va.us

HOUSE OF DELEGATES

Johnny S. Joannou
Democrat—79th
University of Richmond
Admitted 1969

709 Court St.
Portsmouth, VA 23704
District (757) 399-1700
Capitol (804) 698-1079
No e-mail

HOUSE OF DELEGATES

Joseph P. "Joe" Johnson Jr.
Democrat—4th
University of Richmond
Admitted 1960

164 E. Valley St.
Abingdon, VA 24210
District (276) 628-9940
Capitol (804) 698-1004
DelJJohnson@house.state.va.us

HOUSE OF DELEGATES

Terry G. Kilgore
Republican—1st
College of William & Mary
Admitted 1988

P.O. Box 669
Gate City, VA 24251
District (276) 386-7011
Capitol (804) 698-1001
DelTKilgore@house.state.va.us

HOUSE OF DELEGATES

Lynwood W. Lewis Jr.
Democrat—100th
University of Richmond
Admitted 1988

P.O. Box 760
Accomack, VA 23301
District (757) 787-1094
Capitol (804) 698-1000
DelLLewis@house.state.va.us

HOUSE OF DELEGATES

G. Manuel "Manoli" Loupassi
Republican—68th
University of Richmond
Admitted 1992

6002-A W. Broad St., Suite 200
Richmond, VA 23230
District (804) 440-6222
Capitol (804) 698-1068
DelMLoupassi@house.state.va.us

HOUSE OF DELEGATES

Jennifer L. "Jenn" McClellan
Democrat—71st
University of Virginia
Admitted 1997

P.O. Box 406
Richmond, VA 23218
District (804) 698-1171
Capitol (804) 698-1071
DelJMcClellan@house.state.va.us

HOUSE OF DELEGATES

Kenneth R. "Ken" Melvin
Democrat—80th
Georgetown University
Admitted 1977

801 Water St., Ste. 300
Portsmouth, VA 23704
District (757) 397-2800
Capitol (804) 698-1080
DelKMelvin@house.state.va.us

HOUSE OF DELEGATES

Brian J. Moran
Democrat—46th
Catholic University of America
Admitted 1989

4154 Duke St.
Alexandria, VA 22304
District (703) 370-2890
Capitol (804) 698-1046
DelBMoran@house.state.va.us

HOUSE OF DELEGATES

Paul F. Nichols
Democrat—51st
George Mason University
Admitted 1978

12660 Lake Ridge Dr.
Woodbridge, VA 22192
District (703) 492-4200
Capitol (804) 698-1051
DelPNichols@house.state.va.us

HOUSE OF DELEGATES

Christopher Kilian "Chris" Peace
Republican—97th
University of Richmond
Admitted 2006 in Washington, D.C.

P.O. Box 819
Mechanicsville, VA 23111
District (804) 730-3737
Capitol (804) 698-1097
DelCPeace@house.state.va.us

HOUSE OF DELEGATES

Clarence E. "Bud" Phillips
Democrat—2nd
Virginia Law Reader Program
Admitted 1988

P.O. Box 36
Castlewood, VA 24224
District (276) 762-9758
Capitol (804) 698-1002
DelBPhillips@house.state.va.us

HOUSE OF DELEGATES

David E. Poisson
Democrat—32nd
University of Arizona
Admitted 2004

2 Pidgeon Hill Dr., Ste. 340
Sterling, VA 20165
District (703) 421-6899
Capitol (804) 698-1032
DelDPoisson@house.state.va.us

HOUSE OF DELEGATES

Lacey E. Putney
Independent—19th
Washington and Lee University
Admitted 1957

P.O. Box 127
Bedford, VA 24523
District (540) 586-0080
Capitol (804) 698-1019
DelLPutney@house.state.va.us

HOUSE OF DELEGATES

Stephen C. "Steve" Shannon
Democrat—35th
University of Virginia
Admitted 1999

P.O. Box 1143
Vienna, VA 22183
District (703) 281-5200
Capitol (804) 698-1035
DelSShannon@house.state.va.us

HOUSE OF DELEGATES

David J. Toscano
Democrat—57th
University of Virginia
Admitted 1986

211 E. High St.
Charlotesville, VA 22902
District (434) 220-1660
Capitol (804) 698-1057
DelDToscano@house.state.va.us

HOUSE OF DELEGATES

Onzlee Ware
Democrat—11th
North Carolina Central University
Admitted 1988

325 N. Jefferson St.
Roanoke, VA 24016
District (540) 344-7410
Capitol (804) 698-1011
DelOWare@house.state.va.us

Proposed Amendments to MCLE Regulations 104 and 105

The Virginia Mandatory Continuing Legal Education (MCLE) Board solicits comment from members regarding these proposed amendments to MCLE regulations 104 and 105 to provide for more timely receipt of applications for MCLE course approval. The MCLE board will receive any input or comments to the address below through April 30, 2008.

MCLE BOARD
707 East Main Street
Suite 1500
Richmond, VA 23219
or **Cartwright@vsb.org**

REGULATION 104
PROCEDURE FOR APPROVAL OF PROGRAMS

(f) Any member seeking credit after attending, or any sponsor seeking approval after presenting a course or program, shall submit to the Board within 30 days after the date of the program all information called for on the Application for Approval of a Continuing Legal Education Course. The Board will then determine whether the program qualifies under these Regulations and, if so, how many credit hours are approved. The Board will promptly notify the applicant of its decision.

REGULATION 105
PROCEDURE FOR ACCREDITATION OF SPONSORS

(e) The approval procedure of Regulation 104 does not apply to accredited sponsors. An accredited sponsor must notify the Board at least thirty days ~~two weeks~~ in advance of a program of the name, date, location and credit hours allowable for a particular course, including, where appropriate, credit hours in the area of legal ethics or professionalism. The Board may request additional information regarding a course or program. The Board will provide the sponsor with copies of the Board's Certification of Attendance and Certification of Teaching for each course or program and the sponsor shall make available, collect and transmit such forms in accordance with the requirements of Regulation 104(d).

Judicial Performance *continued from page 17*

The list of lawyers is compiled by the court clerk in each jurisdiction from a sign-in sheet placed in the courtroom and from the Office of the Executive Secretary's Court Automated Information System. In most jurisdictions, all lawyers who recently appeared before the judge are surveyed. In large circuits and districts, a statistically representative sample of these attorneys receives the questionnaires.

Lawyers are notified by a letter from Chief Justice Leroy R. Hassell Sr. that they will be sent a survey. If a lawyer does not respond to the first survey, a second is sent. Whether an attorney has responded also is not disclosed.

The questionnaire asks attorneys to rank judges on a scale of unsatisfactory to excellent — "no opinion" is also an option on such factors as "patience displayed," "attentiveness," "consistency in treatment for all parties," "latitude the judge allows lawyers in presentation of the case," "knowledge of the law," "promptness in rendering decisions," "competence as a judicial administrator," and "starts court on time."

Lawyers also are asked for an "overall performance" assessment, and whether the judge's performance has changed since the last evaluation.

"Judges have reacted positively to feedback from the survey," Fulton said. "They feel it's legitimate feedback." Before the program, judges told her, "We sat in our courtrooms and everybody laughed at our jokes, but they had no choice, and they told us we were brilliant, but they had no choice. The judge isn't in a position to get honest feedback."

Based on what judges have told her — Fulton never sees survey results — they have changed practices in response to the surveys.

In her presentations, she gives hypothetical examples of feedback, drawn from her experiences in courtrooms: "Don't cut witnesses off halfway through their testimony." A judge who might use a laptop computer to research cases from the bench could be criticized for "paying her bills online." Facial expressions, such as grimaces, could be misconstrued.

"Judges need to learn," Fulton said. "This is a way to teach."

After getting the program successfully launched with much reassurance and encouragement to all participants, Fulton is resuming her retirement effective January 31, 2008, to travel and plan the next stage of her life.

The Court is advertising for a successor at **www.courts.state.va.us/jbrr/jbrr.htm**. Scroll to Judicial Performance Evaluation Program Director.

Fulton says her experience with the program has reinforced her ideas about the Virginia bar — "that they're good, honest people making a living." ⚖

Veterans *continued from page 23*

top legislative objectives for the current General Assembly session. Projects encompass, among other things, tax relief, mental health care, custodial rights of mobilized reservists, and a grant to deploy TurboVet System Web tool for filing veterans disability claims. The objectives and position papers on each are posted at **www.dvs.virginia.gov/jlc.htm**.

Contact: Sam Wilder, chair of the Joint Leadership Council, can be reached at (804) 530-1682 or **sdwilder1@comcast.net**.

Community Mediation Center

This Norfolk-based center offers mediation programs for military members and their families in the Hampton Roads area. The mediators work with issues that affect military families, including child custody and visitation, landlord-tenant matters, and contractual disputes. The mediators are knowledgeable about the stresses that affect service families — long and sporadic work hours for the service member, dangerous and intense assignments, deployment and redeployment, moving around, and child discipline and spousal relationship difficulties that develop under these circumstances. Clients are charged on a sliding scale. Mediators include attorneys and nonattorneys. They must be certified by the Supreme Court of Virginia. For more information, see **www.conflictcrushers.org**.

To Help: The program welcomes attorneys who are certified mediators. It also offers mediation training — up to six courses per year — that applies toward Supreme Court certification. The program charges for mediation training, but offers recertification training free to volunteers.

Contact: Amanda Burbage, community relations director, at (757) 480-2777 or **amandab@conflictcrushers.org**.

Virginia Lawyer Referrral Service

The Virginia State Bar operates this service to match people with lawyers in their communities. Some lawyers have indicated an interest in assisting with issues that affect military members or veterans. For a $35 fee, the lawyer will provide a half-hour consultation; any fee for additional legal service is negotiated between the client and lawyer. For more details, see **www.vsb.org/site/public/lawyer-referral-service**.

To Help: A downloadable application form is available at the Web site.

Contact: Persons seeking a lawyer may call (800) 552-7977.

This sampling captures only a few Virginia programs that help meet legal needs of service members and veterans. If you know of others, please contact Dawn Chase at (804) 775-0586 or **chase@vsb.org**.

— Dawn Chase

Veterans *continued from page 23*

top legislative objectives for the current General Assembly session. Projects encompass, among other things, tax relief, mental health care, custodial rights of mobilized reservists, and a grant to deploy TurboVet System Web tool for filing veterans disability claims. The objectives and position papers on each are posted at **www.dvs.virginia.gov/jlc.htm**.

Contact: Sam Wilder, chair of the Joint Leadership Council, can be reached at (804) 530-1682 or **sdwilder1@comcast.net**.

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Contact: Amanda Burbage, community relations director, at (757) 480-2777 or **amandab@conflictcrushers.org**.

Virginia Lawyer Referrral Service

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To Help: A downloadable application form is available at the Web site.

Contact: Persons seeking a lawyer may call (800) 552-7977.

This sampling captures only a few Virginia programs that help meet legal needs of service members and veterans. If you know of others, please contact Dawn Chase at (804) 775-0586 or **chase@vsb.org**.

— Dawn Chase

Book on Military Lawyers' Role in Fighting Terrorism Published

Kyndra K. Rotunda, the Arlington attorney quoted in the adjoining article, "Lawyers Helping Warriors," has published a book titled *Honor Bound: Inside the Guantanamo Trials*. It will be released this spring (Carolina Academic Press, 2008).

Rotunda served in the U.S. Army Judge Advocate General's Corps. She assisted war casualties at Walter Reed Army Medical Center and their families. She advised the detention camp commander at Guantanamo Bay and worked with the International Committee of the Red Cross there. She worked with a team that investigates international leads related to terrorism, and she was a prosecutor with the Military Commissions Prosecution Team. She now is a major in the JAG Corps of the U.S. Army Reserve.

Rotunda is a former director of George Mason University Law School's Clinic for Legal Assistance to Service Members, where she led efforts to represent combat wounded troops. She now has a private practice that represents military families in all areas of law, including cases arising under the Servicemembers Civil Relief Act, disability cases before military Physical Examination Boards, and Traumatic Servicemembers' Group Life Insurance appeals.

Rotunda also consults with the National Veteran's Legal Services Program, a veterans services organization, to help create instructional materials and train lawyers around the nation about military disability and combat-wounded cases.

Rotunda is a resource for Virginia lawyers who are representing service members in these arenas. She can be reached by e-mail at **kyndrak@yahoo.com**. Her Web site is **www.kyndrarotunda.com**.