Pro Tempore Appointments

The following judges will be subject to election by the General Assembly during the 2009 session.

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

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

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

19th Circuit: **Jan Lois Brodie,** deputy county attorney of Fairfax County, succeeds **Robert W. Wooldridge Jr.**, who retired, and **David S. Schell** of Fairfax J&DR Court succeeds **David T. Stitt**, who died May 10, 2008.

15th Circuit: **Charles S. Sharp**, commonwealth's attorney for Fredericksburg, succeeds **John W. Scott Jr.,** who died April 16, 2008.

GENERAL DISTRICT COURT
15th District: **Michael E. Levy** of Stafford succeeds **J. Overton Harris**, who retired.
18th District: **Uley Norris Damiani** of Alexandria succeeds **Nolan B. Dawkins,** who was elected to circuit court.

STATE CORPORATION COMMISSION
James C. Dimitri, a partner at McGuireWoods LLP in Richmond and a former staff attorney at the Virginia Poverty Law Center, succeeds **Theodore V. Morrison Jr.**, who retired Dec. 31.

Vacancies

CIRCUIT COURT
2nd Circuit: Virginia Beach seat vacated by **Thomas S. Shadrick**, who retired

8th Circuit: Hampton seat vacated by **William C. Andrews III**, who retired

GENERAL DISTRICT COURT
8th District: Hampton seat vacated by **C. Edward Knight III**, who retired April 30, 2008

19th District: Newly funded Fairfax seat

29th District: Seat vacated when **Gregory Stephen Matney** of Tazewell died September 30

J&DR COURT
8th District: Hampton seat vacated by **Nelson T. Durden**, who retired

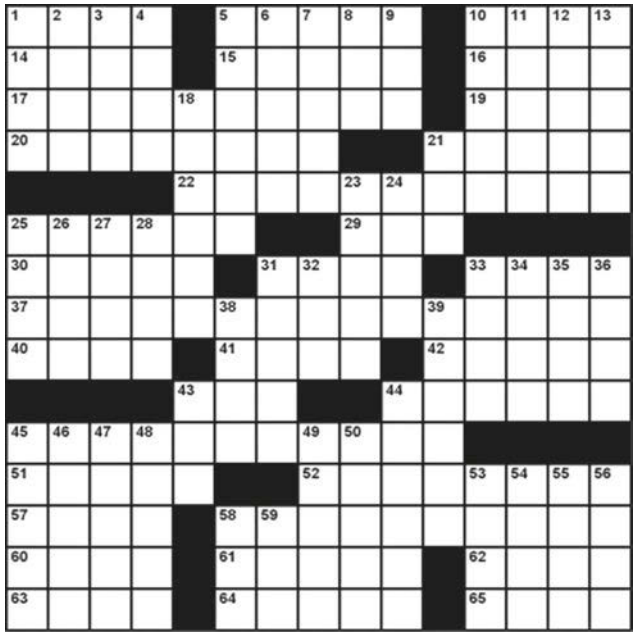
19th District: Seat vacated by **David S. Schell**, who was appointed to circuit court

29th District: Seat vacated by **John M. Farmer** of Clintwood, who was not reelected

SOURCE: HUMAN RESOURCES OFFICE OF THE OFFICE OF THE EXECUTIVE SECRETARY, SUPREME COURT OF VIRGINIA

If You Build It, They Will Sue

by Brett A. Spain



Crossword answers on next page.

Across

1. Ran
5. Separate
10. Dines
14. Mote
15. Alaskan "barracuda"
16. Thing
17. Construction case evidentiary hurdle?
19. Singer Simone
20. Flavored liqueur
21. Sticker
22. Conflict of interest cure in a construction case?
25. Wages often
29. Criminal or common, e.g.
30. To a considerable degree
31. Noted biologist Jonas
33. Land measure
37. Outlines a construction dispute?
40. Prepares for feathers
41. Aqua shade
42. Nepal neighbor
43. ____-de-sac
44. Elmo's street
45. Legislature's discussion about construction law?
51. Pass on
52. Genesis creation
57. Release
58. Consequence of most construction (and construction disputes)?
60. Peace symbol
61. Laud
62. Principal
63. Wallet fillers
64. The Jonas Brothers, for a few more years
65. Utah ski resort

Down

1. World Cup organizer
2. Crackpot
3. Needle case
4. Dierdorf and Quayle
5. Indifference
6. Singer Page
7. Visa applicant
8. Duran Duran hit
9. Spike TV precursor
10. Tendon
11. Erie Canal city
12. Institution or colony
13. Lilliputian
18. Order
21. Lawn moisture
23. Portia's new bride
24. H.H. Munro pen name
25. Area meas.
26. Distinctive air
27. Perjury defendant
28. Money machines
31. Panache
32. Gotcha!
33. Foreclosure sale warning
34. USS *Maine*'s resting place
35. Designer Acra
36. Punta del ____
38. Patriot target
39. Do longshoreman work
43. Wail
44. CSN&Y member
45. A Corleone
46. Car dealership return?
47. Popeye's gal
48. Hall's singing partner
49. Montana city
50. Author Chekhov
53. Austen novel
54. Actual
55. Fit
56. Sicilian volcano
58. Place
59. Common computer file extension

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

Crossword answers.

Ending the Attorney-Client Relationship

by John J. Brandt, Risk Manger

WE FREQUENTLY CREATE an attorney-client relationship with its attendant rights and responsibilities. But what of the termination of that relationship?

Discharge by the Client — Rule 1:16(a)(3) Va. Rules of Professional Conduct (2007-08) (VRPC)
A client may discharge a lawyer at any time, regardless of cause of the engagement agreement, and that attorney's actual authority to represent the client ends. The relationship also ends when the client dies or when a corporate client no longer functions as a corporation.

The only condition upon the client's right to discharge is if the client matter is in court and the tribunal refuses to enter an order terminating representation or substituting new counsel. Rule 1:16(c) VRPC. Under that circumstance, the attorney must continue the representation to the best of his or her ability.

Discharge by the Attorney
A lawyer may withdraw from representing a client so long as it can be accomplished without material adverse effect on the client's interests. Rule 1:16(b) VRPC. Specific grounds that may require termination of the relationship by the attorney include, but are not limited to:

- a client's persistent criminal and fraudulent activity;
- the use of the lawyer's services to perpetuate a crime or fraud;
- a client's actions that the attorney considers repugnant or imprudent;
- a client's failure to fulfill a substantial financial or other obligation that the attorney has previously warned the client could lead to attorney withdrawal; or
- an irreparable breakdown of the attorney-client relationship due to the client's difficult behavior.

Of course, if the matter handled by the attorney is in suit, the attorney must seek the entry of an order permitting his withdrawal or substitution of other counsel.

Before withdrawing, the attorney should have a witnessed personal conference with the client during which the attorney clearly communicates the basis for the withdrawal.

An attorney has an obligation when he terminates the relationship to allow reasonable time to secure other counsel, to return all of the client's papers and property, and to refund all fees and costs not earned by the attorney. 1:16(d) VRPC. The attorney also must preserve the former client's confidences and not take unfair advantage of the client by abusing knowledge or trust acquired during the representation.

The attorney should memorialize termination of the attorney-client relationship with a "termination letter" that summarizes the services rendered by counsel and states the reasons for the termination. Such a letter will start the statute of limitations running for any alleged errors by the attorney.

Attorney liens and calculating fees
An attorney may and should protect his entitlement to his fees upon the discharge by applying the attorney's lien statute, § 54.1-3932 *Va. Code* (1950), as amended. The question of a discharged attorney's entitlement to fees has created sometimes confusing legal and ethical opinions. *Heinzman v. Fine*, 217 Va. 958, 962-64, 234 S.E.2d 282, 285-86 (1977), holds that a contract for representation between attorney and client does not compel the client to pay the agreed amount, even if the client discharges his attorney without cause. Rather, the court ruled that because the client always has the right to terminate his attorney under Rule 1:16(a)(3) VRPC, the attorney could not enforce a contingent fee contract. The court reversed the trial court that had enforced the contingent fee. Instead, the appellate court adopted the *quantum meruit* rule as "the most functional and equitable measure of recovery." The court did endorse the right of the attorney to protect his *quantum meruit* fee by the statutory lien process found in § 54.1-3932 *Va. Code* (1950), as amended. This *quantum meruit* rule should encourage all attorneys, including the plaintiff's bodily injury lawyers, to maintain careful track of their hours in the event that fee litigation ensues.

Legal Ethics Opinion 1812 (2005) addresses whether a plaintiff's attorney can enforce a clause in the standard fee agreement that values the attorney's services at a specific hourly rate if either side terminates the contract. (The opinion also addressed whether a contingency fee could be enforced and concluded that it could not, based on *Heinzman*). The opinion concludes that such an alternative fee arrangement is permissible so long as it is adequately explained to the client (Rules 1.4(b), 1.5(b) VRPC); so long as it is reasonable (Rule 1.5(a) VRPC); and so long as it does not unreasonably hamper the client's absolute right to discharge the lawyer (Rule 1:16(3) VRPC).

The opinion concludes that simply listing hourly fees in the representation agreement does not *ipso facto* create the basis for *quantum meruit* recovery. The opinion notes that *quantum meruit* is a common-law concept, but that Rule 1:5(a) VRPC includes eight factors that

may be considered in determining the reasonableness of a fee, including time and labor required, novelty and difficulty, customary fee charged, and *whether the fee is fixed or contingent.* (Emphasis added.)

Two subsequent cases, *Hughes v. Cole*, 251 Va. 3, 19-25, 465 S.E.2d 820, 829-31 (1996) and *Zelnick v. Adams*, 263 Va. 601, 612, 361 S.E.2d 711, 718 (2002), raise the real possibility that a trial court may rely on the fact that the parties had a contingent fee contract in fashioning the ultimate *quantum meruit* fee owed by the client. Although it is probably dicta, the *Zelnick* Court stated:

> [N]othing should . . . preclude the trier of fact from fashioning an award [of attorney's fees] appropriate to the unique circumstances of the case, *including a contingent award at an appropriate percentage. Id.* (Emphasis added.)

Unfortunately for the attorney, subsequent litigation barred his claim. *Zelnick v. Adams*, 269 Va. 117, 606 S.E.2d 843 (2005).

The bottom line appears to be that listing an hourly fee and a contingent fee in the representation agreement does not guarantee that they will be the basis for a *quantum meruit* recovery, but neither are they summarily excluded.

Attorneys should remember that they cannot ethically retain a client's file when they are discharged, even if the client owes costs and fees. Rule 1:16(e) VRPC; *see also* Legal Ethics Opinion 1690 (1997).

Conclusion

Either the client or the attorney may terminate the attorney-client relationship. Careful advice to the client and good draftsmanship of the representation agreement will be extremely helpful if the agreement is terminated and legal and ethical issues develop over what *quantum meruit* fee is owed to the attorney.

Virginia lawyers can reach John Brandt at (800) 215-2854 for a free consultation on any risk management issues.

Virginia Lawyer Diversity Issue

When Virginia State Bar President Manuel A. Capsalis determined that he would make a priority of improving the number of minorities in the legal profession and in VSB leadership, Dawn Chase was assigned to research and write stories to support the initiative.

Chase, assistant editor of *Virginia Lawyer* and *Virginia Lawyer Register*, interviewed thirty-five judges, attorneys, law professors, about their experiences and ideas for improvement.

She will continue to write about the topic in future issues of *Virginia Lawyer*. In December, the magazine will focus on ideas that leading minority legal figures in Virginia have for encouraging minority persons to join the profession.

Before joining the VSB in 2003 as public information coordinator, Chase was associate editor of *Virginia Lawyers Weekly* for seven years, beginning in 1997. Previously, she was a beat reporter and feature writer for the *Richmond News Leader* for thirteen years. She covered religion, health and science, mental health, and consumer issues, and she wrote major series on schizophrenia and head trauma. She also worked as a legal assistant for the Chesterfield County firm Bowen, Champlin, Carr, Foreman & Rockecharlie.

Chase has a bachelor's degree in mass communications from Virginia Commonwealth University.

Ideas for future diversity stories or comments on this issue are invited, and should be directed to Rodney A. Coggin at (804) 775-0585 or coggin@vsb.org.

Chase

DIVERSITY THEME


Condo


Stubbs


McClellan


Dunnaville

Joseph A. Condo established the Millennial Diversity Initiative while he was president of the Virginia State Bar in 2000–01, and he now serves on the bar's governing council and as chair of the VSB Diversity Task Force. He is a fellow of the American Academy of Matrimonial Lawyers. He has a bachelor's degree in political science from LeMoyne College and a law degree from Catholic University of America. He practices family law with Condo Roop Kelly & Byrnes PC in McLean. [page 16]

Jonathan K. Stubbs has taught at the University of Richmond School of Law since 1989—since 1995 as a professor of law. He holds undergraduate degrees from Haverford College and Oxford University, a juris doctor degree from Yale University, and master of laws and of theological studies from Harvard University. He is the editor of *Brown, The Big Bang and Beyond: The Life Story of Oliver W. Hill Sr.* [page 18]

Jennifer L. McClellan has been a leader in the VSB Young Lawyers Conference through much of her career as a lawyer. She developed the Oliver Hill/Samuel Tucker Prelaw Institute in 2000, currently serves as YLC President and on the VSB Council, and she is a member of the Diversity Task Force. She is an attorney for Verizon and represents Richmond as a delegate in the General Assembly. She has an undergraduate degree from the University of Richmond and a law degree from the University of Virginia. [page 27]

Richmond lawyer **Clarence M. Dunnaville Jr.** has been a driving force behind the Oliver White Hill Foundation for many years. He has been involved in civil rights and diversity projects throughout his career, which included serving as an assistant U.S. attorney for the Southern District of New York. Last year, he was presented with a Segal-Tweed Founders Award from the Lawyers' Committee for Civil Rights Under Law. [page 31]

R. Webb Moore is a shareholder with Hirschler Fleischer PC in Richmond and serves on the publications committee of the VSB Construction Law and Public Contracts Section. He is a licensed professional engineer in Virginia and a patent attorney registered with the U. S. Patent and Trademark Office. [page 47]

Michael A. Branca is a partner at Peckar & Abramson in Washington, D.C. His practice focuses on construction and public contract law. He is the chair of the Government Contracts Section of the Federal Bar Association and a member of the board of governors of the VSB Construction Law and Public Contract Section. [page 48]

Kristan B. Burch is a partner in the litigation section of Kaufman & Canoles PC. Since joining the firm, Burch has focused on construction law and intellectual property law. She received a bachelor's degree from the University of Virginia and a law degree from the College of William and Mary. She is a member of the board of governors for the VSB Construction Law and Public Contracts Section. [page 52]

CONSTRUCTION LAW AND PUBLIC CONTRACTS THEME


Moore


Branca


Burch


Metz


Cheatham


Paulk


Shelley


Hamm

Todd R. Metz is a partner at Watt, Tieder, Hoffar & Fitzgerald LLP in McLean. He specializes in domestic and international construction matters. He is a graduate of the George Mason University School of Law. Metz is secretary of the VSB Construction Law and Public Contracts Section. [page 56]

Christopher W. Cheatham is an associate with Watt, Tieder, Hoffar & Fitzgerald LLP in McLean. He is a graduate of the University of Texas School of Law. Cheatham is the first practicing attorney in Virginia to be designated a Leadership in Energy and Environmental Design accredited professional by the Green Building Certification Initiative. [page 56]

Courtney Moates Paulk is an associate in the litigation section of Hirschler Fleischer PC in Richmond. Her practice focuses on construction law, insurance coverage, and commercial, real estate, and land use litigation. She also handles civil and commercial disputes that arise from employment and general business liability. She received a bachelor's degree from what is now Mary Washington University and a law degree from the University of Richmond. [page 60]

Blackwell N. Shelley Jr. has a civil litigation practice with Shelley & Schulte PC in Richmond. He has a bachelor's degree from the University of Virginia and a law degree from Washington and Lee University. He is a member of the VSB sections on Trusts and Estates and Bankruptcy, the Richmond Bar Association's Bankruptcy Section, the Virginia Trial Lawyers Association, and the Judicial Conference of the Fourth Circuit Court of Appeals. [page 67]

Marie Summerlin Hamm is a past president of the Virginia Association of Law Libraries and is assistant director of collection development at Regent University Law Library. She holds a master's degree in library science from Syracuse University and a law degree from Regent University School of Law, where she has taught courses in legal research and writing as an adjunct professor. [page 68]

Virginia Lawyer Diversity Issue

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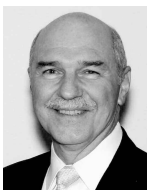
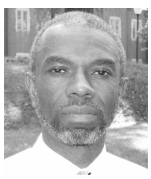

Condo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The Better Angels of Our Nature

by Manuel A. Capsalis, VSB President

THIS ISSUE OF *VIRGINIA LAWYER* HAS BEEN A LONG TIME COMING, and one I have anxiously awaited. In preparing for my term as Virginia State Bar president, it was clear to me that diversity needed to be a pressing priority, one which, along with public protection, required a renewed commitment and focus.

The concept of this issue began to take shape many months ago. This is our attempt to engage a meaningful and honest dialogue, and to assist in better understanding and appreciating the importance of this subject. There is no effort to sanitize the history of diversity (or more accurately the relative lack thereof) in our profession, the bench, and within the bar structure.

We began this task with two simple and undeniable facts. The first is that for our profession and our judiciary to be truly responsive to the needs of society, we must be more reflective of the demographics of society. The second is that, as a whole, we are not.

This is not to say that effort has not been made. Many within our ranks have long committed themselves to this cause, with varied success. Despite these efforts, we have so very far to go. To suggest that our work is done, is wrong.

In presenting this issue of *Virginia Lawyer*, we accept the reality that if we are serious in seeking a dialogue, we must examine the path our profession has taken to the present. We acknowledge the fact that if we are committed in seeking the goal of diversity, we must be prepared to strongly challenge both bench and bar to understand and learn from the past, and armed with this knowledge, to firmly and resolutely take those actions necessary to better achieve our goal.

As reflected in this issue, I submit that what we seek is, distilled to its purest form, an affirmation of the Rule of Law, the very essence of our system of justice. We cannot deny that the preservation of the Rule of Law is inextricably linked to diversity, without which justice is an incomplete principle and, tragically, a hollow promise to many who live among us.

We must recognize the reality that in this place in our history, to borrow the words of the late Sen. Robert Kennedy, we still live in a society in which many of our fellow Virginians share a Commonwealth, but not a community, "bound to us in common dwelling, but not common effort." Why should we care? The answer lies in the unique importance of our profession. If not us, then whom can society look to?

The title of this column is taken from the last six words of Lincoln's incredibly elegant First Inaugural Address. Can we, as a self-styled honorable profession, live up to our better angels? Can we truly claim any measure of satisfaction that we have exhausted our abilities?

I believe we can do better. I believe we have it within us to enlist our tremendous and unique talents and our energies, to better promote diversity within our profession and our judiciary and, in turn, to become more responsive to our society. I believe we have it within us to better reach out to those who would be the lawyers and judges of our future — our youth — to educate them about the Rule of Law and to instill in them the discovery of what they are capable of achieving as dedicated citizens and as the leaders of tomorrow. We have it within us to better challenge our youth of all colors and all backgrounds to join our profession, and to accept the glorious burden as the guardians of the Rule of Law. I believe we must do better.

I am advised by some that we do not have a problem with diversity, that there is no longer discrimination de jure or de facto. I am advised that the natural order of events, whatever that may be, eventually will take care of itself.

To those who preach the counsel of patience, respectfully, I decline your advice. I have no desire to stand by passively, and hope that history will surround us. In a state that reveres the memory of Lee and Jackson, I hope we may someday securely place in the pantheon of our heroes the names of those such as Samuel W. Tucker, and Spotswood W. Robinson III, and Oliver White Hill.

It is with that hope that I ask you to take this issue to heart. In the words of Robert Kennedy, there **can** be a bond of common faith, and there **can** be a bond of common goal. And as the guardians of the Rule of Law — and as the sentinels to liberty, and freedom, and order — it is our responsibility individually, and collectively as a profession, to achieve no less.

Let us welcome that responsibility. And so this issue of *Virginia Lawyer* is offered to you, the reader, with the hope that you will reflect on this subject, and join in the cause. Our better angels await.

VSB Diversity Task Force

Virginia State Bar President Manuel A. Capsalis appointed a Diversity Task Force to develop ways to encourage more participation by minorities in the legal profession. In his inaugural address in June, Capsalis stated, "For our legal profession and our judiciary to be properly responsive to the needs of society, we must be more reflective of the demographics of society."

The following persons serve on the task force:

Joseph A. Condo, McLean — chair

Judge Joanne F. Alper, Arlington Circuit Court

Richard C. Baker, Arlington

Kathy Mays Coleman, Richmond

Clarence M. Dunnaville Jr., Richmond

Michael A. Glasser, Norfolk

Michael C. Guanzon, Danville

W. David Harless, Richmond

Michael HuYoung, Richmond

Manuel E. Leiva Jr., Fairfax

Del. Jennifer L. McClellan, Richmond

C. Kailani Memmer, Salem

Judge R. Terrence Ney, Fairfax

Todd A. Pilot, Alexandria

Judge Cleo E. Powell, Virginia Court of Appeals

Edward L. Davis, VSB Counsel — ex officio

Karen A. Gould, VSB Executive Director — task force liaison

Minority and Women's Bar Associations in Virginia

Asian Pacific American Bar Association Inc.
Su Yong Min, President
(703) 383-0563; smin@suyongminlaw.com

Hispanic Bar Association of Virginia
Manuel E. Leiva Jr., President
(703) 352-6400; mleiva@leivamarkslaw.com

Peninsula Bar Association
Shawn William Overbey, President
(757) 926-5333; soverbey@overbeyandassc.com

Northern Virginia Black Attorneys Association
Gina Lucretia Marine, President
(703) 696-8912

Old Dominion Bar Association
Statewide Chapter
Beverly J.A. Burton, President
(804) 646-7953

ODBA — Richmond Chapter
Kimberly Friend Smith, President
(804) 786-5239; kfsmith@courts.state.va.us

ODBA — Roanoke Chapter
Melvin Leroye Hill, President
(540) 344-7947

Virginia Association of Black Women Attorneys
Charlotte Peoples Hodges, President
(804) 475-5484

Virginia Women Attorneys Association
Statewide
Tracey Hovey, Administrative Director
(804) 282-6363

VWAA — Charlottesville Area Chapter
Catherine Hailey Vaughan Robertson, President
(434) 973-3331

VWAA — Hampton Roads Chapter
Virginia E. Brown, President
(757) 965-9210

VWAA — Northern Virginia Chapter
Cynthia Kaplan Revesman, President
(703) 383-0154

VWAA — Roanoke Chapter
Leah Suzanne Gissy, President
(540) 510-3026

The Virginia State Bar would like to know of other minority bar associations that may exist in the commonwealth. Please send the information to Paulette Davidson at davidson@vsb.org, or call her at (804) 775-0521.

Chief Justice Hassell: Breaking the Color Barrier for 42 Years

Leroy Rountree Hassell Sr., Virginia's first black Chief Justice, grew up in Norfolk on the cusp of school integration. As a young man, he took on challenges that many would find daunting. Now he urges the Virginia State Bar to improve its outreach to minorities. And he encourages minority attorneys to accept the invitation to participate.

by Dawn Chase

LEROY ROUNTREE HASSELL SR. was in sixth grade, getting ready to make the leap from elementary to junior high school.

It was 1967, and Virginia's latest strategy for dealing with court-ordered school desegregation was a freedom of choice plan that allowed a student to leave a school where his or her race was in the majority and transfer to a school where his race was in the minority. Hassell had watched the Rev. Dr. Martin Luther King Jr. on TV urging black people to overcome their fears and exercise their choice.

So Hassell, twelve years old, left his neighborhood near Norfolk State University, took a city bus to all-white Lake Taylor Junior High School in Norfolk, and went on a tour. "I have no idea why I chose Lake Taylor," he said in an interview last month in his office at the Supreme Court of Virginia in Richmond.

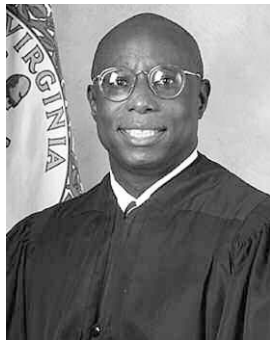
He liked what he saw: "It had the lake. It had nice tennis courts, and real basketball nets, and in the science rooms each kid had his or her own butane lamp, microscope, the little sink." All-black Jacox Junior High — the school he was assigned to — had none of those amenities.

The fact that someone asked him if he was the janitor's son did not deter him. Hassell chose Lake Taylor. He and thirteen others were the first black students to attend there.

"It was a very turbulent time," he said. "There were some kids who were bigots, and they would call you n——. But most of the kids were very responsive, and I made friends there. I still hear from some of them."

Hassell played junior varsity football, ran track, played French horn in the band, competed and won several oratorical contests, and served as student government chaplain. "I had a very good three years there. I wouldn't trade the experience for the world."

"I met a kid — I have no idea what happened to him — he was the only person in junior high school with a driver's license. He befriended me, … and whenever any kid bothered me he went to settle the score. His grandfather was a judge in Norfolk.


Hassell

"This kid stayed in trouble," Hassell recalled. "It was nothing for him to go joyriding in a police car, turning the siren on, pulling people over." Did Hassell ever go along? "No. No," he said, only half laughing. "I wasn't that foolish. He would have gone home and I would have gone to jail. A black kid in a police car in Norfolk wouldn't have fared very well — particularly if he was driving."

On to Norview High School — still in the minority — Hassell was an award-winning debater. One particularly satisfying victory was in 1973 — the year the University of Richmond opened its high school debate tournament to black students.

One debate coach — "I'm not going to call her name, because it doesn't speak well of her," Hassell said — used to chide his coach. "She asked him, 'Why do you spend so much time with a n——? Because you know they can't think. They'll never be great debaters…. You ought to focus your time on the white kids.'"

That coach was one of the judges in the Richmond tourney. Most of Hassell's scores came in at 29 and 30 — with 30 the maximum — but "she gives me about a 24. I still scored more points than anybody else." He won the tournament.

More high school memories: After two years of segregated proms, the student government called an end to the practice. "When we have our class reunions, we still pat ourselves on the back, … because we were the first class to say 'this is nonsense, and we're going to have a joint prom,' and we did."

In 1970, Hassell hiked to the Norfolk federal courthouse, where he heard Henry L. Marsh III of Hill, Tucker & Marsh law firm in Richmond argue against the Norfolk freedom of choice

school desegregation plan before the Fourth U.S. Circuit of Appeals. That was his first exposure to Marsh, who would become part of his life years later in Richmond politics and, now, as chair of the Senate Courts of Justice Committee in the General Assembly.

But then Hassell was a teenager — the only kid in the courtroom, by his recollection — there to witness history and learn the future of his education.

Hassell tells his stories matter-of-factly. "I got along with the black students and the white students. There was racial turmoil, but you dealt with it." He was enveloped by nurturing parents, five siblings, a loving extended family, and financial security. "I had a blessed and fulfilled childhood….

"You don't let obstacles deter you. You simply work hard, pray, and move on. And you don't become embittered by your bad experiences."

NOW-CHIEF JUSTICE HASSELL LAYS OUT HIS POSITION on diversity in the legal profession:

"Diversity is important, and since I've been Chief Justice I've pushed for racial diversity, gender diversity, religious diversity, geographic diversity. You will find no committee that I have appointed in which we failed to include judges from all parts of the state geographically. We include women. We include minorities.

"It's important because people have different experiences, which in part shape their perspectives."

The General Assembly, which elects Virginia judges, has done a "pretty good job" improving diversity on the bench, but "we have to do better," he said. "There is no black circuit court judge west of Chesterfield County."

He said he is trying to do his part as head of Virginia's judicial branch. "The courts must always strive to be fair and inclusive. Virginia's judicial system has a very poor history in terms of being inclusive. We have a great judicial system. But our judicial system has not been kind to black Virginians, to some degree Jewish Virginians, and, historically, female Virginians. We have to make sure we never treat any segment of our population unfairly because of geography, race, gender, religion, or national origin, or handicap."

When the Virginia State Bar submits candidates to him for committee appointments, he requests that underrepresented persons be among them. For example, when he reviewed a list of prospective faculty for the Professionalism Course, "I couldn't discern any black persons at all," and he asked that minority candidates be included.

"You have to do more than simply say, 'Who are the good lawyers?' because when you ask that question you tend to focus on your friends or people in your network. You have to go one step further and say, 'Have I missed anybody?' So often, good people are missed.

"When I look at a list of so-called 'best lawyers in Richmond,' 'best lawyers in Virginia,' … so often I see an omission of talented black and talented women lawyers who — in my judgment from what I've seen in their appearances before the Court — should be on the list. But they are conspicuously absent, which tells me that when groups compose their initial list of lawyers they are thinking about people they know, and they are not inquiring about people they don't know….

"There are still people who have yet to understand that it is wrong to exclude based upon gender, geography, race, or religion…. It's significantly diminished, but it still exists.…

"The [VSB] has to undertake greater outreach efforts to make minority lawyers feel more welcome. I've gotten complaints from black lawyers who feel or who felt that the bar was not the warmest place. The bar has to make a greater effort to attract minority lawyers and say, 'You are welcome, and we would like your participation.'"

He then turned to the responsibility of minority lawyers. "Black lawyers have got to want to participate with the bar. There are responsibilities to be assumed by the black lawyers, and there are efforts to be made by the bar, so it's not a one-way street."

"People have got to walk in accord if they choose to walk together. Until that happens, there will not be meaningful change."

The Diversity Imperative

by Joseph A. Condo

Editor's Note: Joseph A. Condo was president of the Virginia State Bar in 2000-01.

IN AUGUST 2000 A GROUP CONVENED at the Virginia State Bar offices in Richmond. In the room that day were representatives of virtually all the minority bars, as well as a number of individuals who have distinguished themselves by their strenuous and creative efforts to make the legal profession more accessible to people of color. Among those present — to name just two — were U.S. District Judge Gerald Bruce Lee and Robert J. Grey Jr., the first African American to chair the American Bar Association House of Delegates, who would go on to become only the second African American to serve as president of the ABA.

This was the first meeting of what I grandly dubbed the Millennium Diversity Initiative (MDI), which I charged with finding ways to expand minorities' access to the legal profession. The idea for the initiative had been sparked a few months earlier when I read about a persistent disparity in bar passage rates in Virginia and elsewhere between whites and ethnic or racial minorities, including Americans of African, Asian, Hispanic, and Native American origin. In conversations with many people familiar with the issue of minority access, I learned that the problem extends along a continuum that stretches from the age when minority children begin thinking about their choice of career, through high school, college, and law school, extending to law firm recruitment and retention, and into the judiciary.

In my opening remarks to the gathering, I recited a poem titled "The Bridge Builder." It tells the story of an old man on a journey who, as darkness is falling, encounters a deep, wide chasm with a treacherous river flowing through it. He crosses the chasm with little difficulty, and then, in the fading light, turns and builds a bridge across the gorge. Another traveler asks the old man why, having already crossed, he is wasting his energy to build the bridge. The poem concludes with his response:

> The builder lifted his old gray head:
> "Good friend, in the path I have come," he said,
> "There followeth after me today,
> A youth, whose feet must pass this way.
> This chasm, that has been naught to me,
> To that fair-haired youth may a pitfall be.
> He, too, must cross in the twilight dim;
> Good friend, I am building the bridge for him."
> (Will Allen Dromgoole, "The Bridge Builder")

I confessed to those assembled that I had only recently come to appreciate the relative ease with which I had crossed the chasm into this profession, and I had only recently realized that even then, at the dawn of the twenty-first century, that chasm is still treacherous and impassable for many people of color who want to cross it. Like many others, I wanted to believe that the increase over the years in the numbers of African, Asian, and Hispanic Americans whom I saw around me in the bar meant that we were achieving racial equity in this profession. But I came to realize that this was not so, and resolved to make it a priority of my presidency to address this deficiency.

I reminded those present on that morning in 2000 that many others had tried and failed to solve this stubborn problem. It was ambitious — some would say foolhardy or grandiose — to think that we could attack such an enormous, multifaceted challenge and make any real difference. But it was imperative then, and is more urgently so now, that those of us who have crossed the chasm turn and build that bridge. There is no one else.

Some of the Millennium Diversity Initiative's projects were more successful than others. One shining success is the Oliver Hill/Samuel Tucker Prelaw Institute, a weeklong program to introduce at-risk minority high school students to the culture and precepts of the legal profession, held every summer since 2001 in Richmond. The program was spearheaded by the VSB Young Lawyers Conference under the energetic leadership of Jennifer L. McClellan and is now ably run by Rasheeda N. Matthews and Yvette Ayala. This program recognizes the need to bring our efforts to bear on young people, who are at the front end of the pipeline that must be traversed by minority youth if they are to attain admission to law schools and then to the bar — to let them know that a career in law is something they can aspire to and to provide the academic and social support to help them realize this aspiration.

As the progenitor of the MDI, I have derived deep satisfaction from the success of the Hill/Tucker Institute. But this satisfaction has been tempered by the reality that this success represents only a few small steps in the arduous ascent of this steep mountain — that has not become any less so in the years

since the MDI was established. And so I was thrilled when VSB President Manny Capsalis invited me to chair a task force he created to again focus the attention of the lawyers of Virginia on broadening the diversity of the legal profession.

The stakes in this endeavor are enormous. By some accounts, minorities in Virginia perceive our justice system as tilted against them. When they look at the bar and the bench, they see few faces that look like theirs. Admission to law school and admission to the bar continue to be insurmountable barriers for too many people of color in Virginia. So do recruitment and employment by law firms and, later, retention and advancement in those firms. And while we have made great strides in diversifying the bench by elevating more women and African Americans, no Asian has yet donned a judicial robe in Virginia, and only one Hispanic has. The imperative of diversifying our profession, and the benefits to be derived from doing so, are manifest. To be truly responsive to the public we serve — to be able to empathize with their legal needs, their troubles, and their struggles — our profession, and by extension the justice system, must reflect their diversity. At the moment, we do not: in a nation that in about twenty-five years will soon comprise more than 50 percent people of color, the legal profession is 92 percent white.

In addition to focusing on pipeline projects such as the Hill/Tucker Institute, President Capsalis has asked us to address another, equally troubling issue: the absence of a significant presence of women and minorities in the committees and governance of the Virginia State Bar itself. The VSB has never had a person of color serve as its president. And it took almost sixty years for a woman to become president. This barrier was broken when Kathleen O'Brien served as our first woman president in 1994, but in the fourteen years since Kathleen's term, only two other women, Jeannie P. Dahnk and Karen A. Gould, have held the position. President Capsalis has reminded us that this inequity is unacceptable; that it is imperative that the leadership of the VSB represent the diversity — in gender as well as color — of its lawyer population.

In the 2000 movie *Keeping the Faith*, there is a scene in which a young priest is experiencing a crisis in his commitment to his vows and his religious vocation. He goes to see his mentor, a monsignor, who tells him:

> You cannot make a real commitment unless you accept that it's a choice you keep making again, and again, and again.

When each of us chose law as a career, we also chose to make a commitment to work for justice and support the rule of law. I ask you to join us as we again direct our energy and our labors to the imperative of strengthening the rule of law and achieving social justice in the commonwealth by bringing to the legal profession the same rich diversity we see in the communities we serve.

Judge John W. Scott Brought Diversity to Fredericksburg — Twice

At the celebration of Oliver White Hill's one hundredth birthday in May 2007, Judge John W. "Scottie" Scott and his wife, Alda L. White, shared the Virginia State Bar dinner table.

White leaned toward her husband and named the many leaders of Virginia's government and legal community who milled around them and occasionally approached to shake Judge Scott's hand. White was her husband's eyes — his vision had been impaired since birth. Together they greeted members of the network that had brought John Scott to the law, to the bench, and to the table that night.

There were Richmond Sen. Henry L. Marsh III and numerous other legislators from the General Assembly and Congress, many of Judge Scott's professional "siblings" in breaking barriers, and, at the head table, Oliver Hill — the lawyer who had extended the invitation to many of them to join the justice system.

Judge Scott's civil rights story began in 1963 when he and five others sued to be allowed to attend the all-white James Monroe High School in Fredericksburg. Their victory was "a major turning point for integration in Fredericksburg," according to the *Fredericksburg Free Lance-Star*.

His attorney for that battle was Samuel W. Tucker of the Richmond civil rights firm Hill, Tucker & Marsh.

That's when the young Scott realized the power a judge has and decided to go to law school, White said. "He used to say just with the stroke of a pen his life changed."

He went to Wesleyan University, then the University of Virginia School of Law. He worked for the National Association for the Advancement of Colored People Legal Defense Fund. His work impressed Hill, Tucker & Marsh, and the firm invited him to join it. Mr. Scott said he wanted to return to his hometown. So HT&M established a satellite office in Fredericksburg, just for him

That's when Alda White entered his life. After beginning her legal career as a legal aid lawyer in Emporia, she had accepted a job as assistant county attorney for Stafford County. "When I started, there weren't a lot of black people there," she said. "I'd never been anywhere where the janitors were white, but there, the janitors were white."

Everywhere she went, people asked her if she knew John Scott. "It didn't take rocket science for me to figure out that he must be black." So one day she did something completely out of character — she picked up the phone,

Scott continued on page 33

Why America Still Needs Affirmative Action

by Jonathan K. Stubbs

> *The best proof that we needed and still need affirmative action was that the segregationists were and still are resisting desegregation. If there were no authoritative pressure segregationists would never change their discriminatory practices.*
>
> —Oliver W. Hill[1]

Affirmative action has gotten a bad rap. Many people think of affirmative action as race-based policies that favor unqualified persons because of the color of their skin.[2] Resentments and misunderstandings flow from such perceptions in part because race remains America's most inflammatory unfinished business.

To ignite a spirited, thoughtful discussion as well as practical action regarding affirmative action, this article briefly discusses what constitutes affirmative action; evaluates why affirmative action programs that consider race, gender, and class remain necessary; and offers some thoughts regarding when affirmative action should end.

What is affirmative action?

Affirmative action entails policies designed to ensure that each person has the resources available to achieve his or her maximum potential; evidence of such potential is fairly evaluated; and valuable societal goods such as jobs, education, housing, and financial credit are made available to qualified individuals in a more representative fashion.[3]

An example illustrates the problem: Imagine two candidates for admission to a premier state university. One attends an urban high school of six hundred students with only two honors level courses, a small library with seven working computers, one classroom with twenty-six computers that a teacher can use if she reserves the room a day in advance, and an antiquated science lab. Fewer than 20 percent of the graduating seniors receive post–secondary education such as college or advanced vocational training.[4]

In contrast, suppose the second student attends a nearby suburban high school. That school offers more than twenty honors and advance placement classes, provides each student with her own laptop computer, features a modern science lab, and sends more than 80 percent of the graduating seniors to college.

Now assume that both students have A-minus grade point averages and take the same college admissions tests. If the inner-city student scores 1100 on the Scholastic Aptitude Test and the suburban student scores 1200, which student is more qualified? Do we look solely at classroom performance and use the test scores as "tie breakers"? Alternatively, do we also consider a combination of factors, including the educational resources available to each individual? In other words, do we evaluate what each person did with what she had?

Admission based primarily on the numbers asks us to enter a world of make-believe. In fantasy land, we pretend that each student had the same opportunities to excel. We know that to be an illusion. In the real world, many urban and rural schools do not have the material and human resources to place their students on an equal playing field with wealthier suburban schools. State-of-the-art computer and science labs, small classes that provide individualized instruction, modern vocational training facilities, and challenging advanced academic courses are expensive and require well-trained teachers. The coal miner's daughter or factory worker's son might have the potential to discover an avian flu vaccine, but we will never know because a numbers-based admissions deck is stacked against the economically disadvantaged and favors materially wealthier children.

Evaluating potential requires some prophecy. How else can you know how well a person who is admitted to a college or hired for employment will do until the person has a chance to perform?[5] A system more attuned to individually assessing how effectively a person used available resources makes sense.

Many persons have little problem with affirmative action plans for persons on the lower economic rungs of society.[6] Yet such affirmative action supporters rebel when someone mentions the proverbial eight-hundred-pound gorilla: consideration of gender or the color of a person's skin. Opponents of race- and gender-based affirmative action assert that we are all human. True. And the Human Genome Project has told us that at the molecular level, all humans are 99.9 percent the same.[7] True, too.

But let's be real. If you took a brief look at American history and at our contemporary society, you would not know how similar we are. An abbreviated recapitulation of our history, and contemporary situation helps illustrate the reality of past and present discrimination, and reinforces why race and gender must still be considered in remedying such discrimination.

A Thumbnail History and Some Major Contemporary Challenges

In 1857 in the infamous *Dred Scott* case, Chief Justice Taney summarized the first 250 years of American race relations as follows:

> They [Negroes] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the Negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race.[8]

Following the Civil War, the Thirteenth and Fourteenth amendments abolished slavery, acknowledged that blacks were citizens, and sought to protect blacks from southern legislatures that attempted (through "Black Codes") to re-enslave blacks by prohibiting them from owning property, serving on juries, moving without restriction, making contracts, and freely choosing vocations.[9] The Fifteenth Amendment recognized black men's right to vote.

Voting

The Supreme Court interpreted these constitutional amendments in such a stingy manner that state laws were found consistent with the equal protection clause, even though the laws required racial segregation and prevented women from voting or practicing law.[10] The Court's interpretation of the Reconstruction amendments made the legal status of blacks and women after the Civil War not much different than their status before it.[11]

Moreover, from the 1880s through the first decade of the twentieth century, political, business, and religious leaders espoused white supremacy. For example, during the Virginia Constitutional Convention of 1901–1902, then-state senator Carter Glass stated:

> Discrimination! Why that is what we propose; that exactly is why this Convention was elected — to discriminate to the very extremity of permissible action … with a view to the elimination of every Negro voter who could be gotten rid of, legally, without materially impairing the numerical strength of the white electorate.[12]

In fact, within one hundred days of the promulgation of the new constitution, more than 125,000 of the 147,000 African American voters in Virginia were purged from the voting rolls.[13] When the poll tax became effective in 1903, many poor white males lost their voting rights, and the small remnant of black voting strength was reduced even further.[14]

After making ample provision for disenfranchising black voters and ensuring segregation in public education and transportation, Virginia's political elite refused to allow the electorate to vote upon the new state constitution. Following the precedent of other oligarchies in Mississippi, South Carolina, North Carolina, and Louisiana, Virginia's constitutional framers merely proclaimed the constitution as being in effect.[15]

In *Jones v. Montague*,[16] African American plaintiffs, represented by John S. Wise — a former Confederate Army officer — challenged the newly decreed Virginia state constitution. Plaintiffs alleged that state officials had conspired to deprive plaintiffs of their rights under the U.S. Constitution. The U.S. Supreme Court concluded that, because the U.S. House of Representatives was the judge of its members' qualifications and had seated the persons from Virginia who claimed to have been elected under the newly proclaimed state constitution, the Court could not intervene.[17] The Court shirked its duty to address the egregious deprivation of constitutional rights that flowed from massive election fraud and racial discrimination in the electoral process.

Until passage of the Nineteenth Amendment in 1920, many states excluded all women from voting.[18] The poll tax was used to disenfranchise poor and less-knowledgeable voters. It survived until 1966, when the U.S. Supreme Court found the Virginia poll tax unconstitutional in *Harper v. Virginia Board of Elections*.[19] The legacy of a race- and gender-based political system is obvious: today, most of state governors — as well as state and federal legislators and all of America's presidents — have been white males.

Housing

During the Great Depression, the federal government created a national program that required loan underwriters to promote housing segregation. For example, to make loans, the Federal Housing Administration (FHA) directed lenders to use color-coded residential neighborhood maps. Neighborhoods were graded A (green), B (blue), C (yellow), and D (red). Upper-class, all-white neighborhoods typically received A grades, and communities with blacks, immigrants, and Jews frequently received Cs and Ds.[20]

Oliver W. Hill referred to the U.S. government's master plan for national housing segregation as replete with "gimmicks that were used to maintain and guarantee segregated communities."[21] Prominent social scientists have pointed out the pernicious and effective nature of such "gimmicks":

> One infamous housing development of the period — Levittown, New York — provides a classic illustration of the way blacks missed out on this asset accumulating opportunity. Levittown was built on a mass scale, and housing there was eminently affordable, thanks to the FHA's … accessible financing, yet as late as 1960 "not a single one of the Long Island Levittown's 82,000 residents was black."[22]

Not long after the Court's decision in *Brown v. Board of Education*, the federal government began implementing a national transportation program. A prominent feature of the new highway system was easy travel for white persons seeking

homes in government-funded, lily-white suburbs.[23] Accordingly, segregated suburbs like Levittown are not surprising.

Today, federal, state, and local governments continue to channel taxpayer money to affluent, nearly all-white neighborhoods and schools created using the FHA's planning blueprints dating from the 1930s. In *San Antonio v. Rodriguez*, the U.S. Supreme Court exacerbated gross disparities in educational opportunities by ruling the Constitution does not recognize that individuals have a right to an education.[24] The Court also stated that wealth is not a "suspect class" that would require the state to furnish compelling justification for policies that discriminate against poor children.[25] Thus the Court upheld Texas's school financing system, even though the system made it impossible for poor children to have resources equivalent to those of their wealthy counterparts.[26] In the Seattle and Louisville schools decisions, [27] the United States Supreme Court ruled recently that the school systems of those two jurisdictions attributed too much weight to race in attempting to voluntarily desegregate. The majority myopically overlooked continuing governmental subsidy of tried, true, and effective housing development schemes designed to maintain racial and class segregation. With *Rodriguez*, the recent school cases ensure perpetuation of a divided nation by race and material wealth.

Former Senator Edward W. Brooke III of Massachusetts — one of two living members of the Kerner Commission, the popular name of the National Advisory Commission on Civil Disorders appointed in 1968 by President Lyndon B. Johnson — recently pointed out that the commission report implicated the federal government in establishing and maintaining the ghettos that predictably exploded forty years ago.[28] Unless steps are taken to create jobs, better housing, high quality schools, and affordable health care and day care, it is quite conceivable that America's cities may erupt again.

A 2004 Pew Hispanic Center Report points out that, on average, whites are eleven times wealthier than Hispanics and sixteen times wealthier than blacks.[29] Much of the wealth differential is attributable to differences in home ownership rates that flow from the government's segregated housing and racially discriminatory loan programs.[30] To make matters worse, the government is similarly implicated in its relationships with lenders that make subprime loans to people of color with credit scores that merit conventional loans, especially when the subprime loans help keep the borrowers bottled up in segregated communities.[31] In August 2008, the United States Census Bureau reported that the median income of African Americans was 62 percent of that of whites, and for Hispanics the median income was 70 percent of whites'.[32] Census Bureau reports indicate that in 1968 the median family income for black families was 60 per cent of white families – a 2 per cent increase over forty years.[33]

Education

After World War II, black GIs such as Oliver Hill and his law partner, Samuel W. Tucker — who had risked their lives to "make the world safe for democracy" — confronted the bitter reality that the doors of segregated colleges and universities in many states remained shut to them. Under the GI Bill of 1944, those same doors opened widely to welcome returning white GIs[34] such as former President George H.W. Bush, who could attend any college in the United States.[35] With taxpayer money and legally entrenched racial quotas, the paths of white GIs — mostly men — were smoothed. For example, even in elite schools that were nominally opened to black GIs, unofficial quotas kept the population of black students and other outcasts, such as Jews, at token levels.[36]

Moreover, women were denied admission to many colleges and universities — particularly as undergraduates. One year before World War II ended, Pauli Murray, a pioneering African American woman lawyer who later became an Episcopal priest, received widespread attention when she applied for admission to the all-male Harvard Law School in an unsuccessful struggle to overcome "Jane Crow" — gender discrimination.[37] Through Eleanor Roosevelt's intervention, Murray obtained support from President Franklin Delano Roosevelt, though to no avail as Harvard stood firm in keeping its law school all male and nearly all white.

Many colleges and universities throughout the United States were in lockstep with Harvard's example. Princeton and Yale universities first admitted women to their undergraduate programs in 1969. The University of Virginia followed in 1970.

Today, white males are a minority group who make up slightly less than 35 percent of the nation's population.[38] It is estimated that white men account for 95 percent to 97 percent of senior managers of Fortune 1000 industrial and Fortune 500 companies[39], as well as approximately 80 percent of United States senators and tenured professors.[40]

In 2006, ten Fortune 500 companies had women chief executive officers, and in 2007 five African Americans held such positions.[41] At the end of the twentieth century, white males were receiving over 90 percent of the federal government's funding for prime public contracts.

In Virginia, a Department of Minority Business Enterprises report covering 1998-2003 found that the state awarded over 99.5 percent of the state's procurement dollars to businesses owned by white persons.[42] Over 98 percent of the procurement dollars went to white-male–owned businesses.[43]

Snapshot of Virginia's Judiciary

In Virginia, where the General Assembly elects judges, in 1974, Barbara Milano Keenan became the first woman elected to a Virginia circuit court.[44] The first African American elected a full-time judge after Reconstruction was Willard Douglas, also in 1974.[45] Two hundred years after Virginia joined the United States the General Assembly elected Angela E. Roberts the first African American woman to a full-time judgeship in Virginia.[46] Recently, Governor Timothy M. Kaine appointed Judge Cleo E. Powell, a circuit judge serving in Chesterfield County, to the Virginia Court of Appeals. Judge Powell is the first African American woman appointed to a state appellate court. While

this is an important milestone, many qualified women of color are admitted to the Virginia State Bar. Inexplicably, the Virginia General Assembly has never elected a woman of color to serve on its highest appellate court.

Regarding the Virginia State Bar itself, there has never been a person of color who has served as president of the bar, and very few persons of color or women who have been elected by the circuits to the bar's governing council.

Employment

Princeton Professor Devah Pager has published results of studies conducted in Newark, New Jersey, and Milwaukee, Wisconsin, that indicate when persons with black skin seek employment, some employers treat them as though they are criminals. In both cities, white job testers who reported they had a criminal conviction were more likely to be called back for job interviews than blacks who had the same professional qualifications but no criminal records.[47]

This brief (and incomplete) narrative of American history and contemporary society suggests that race, gender, and class still matter. In a world shaped by bias, affirmative action remains necessary to assess individual potential while redressing bias.

Signs of hope exist. Since the 1954 *Brown* decision, American society has begun desegregating in many areas. In higher education, sons and daughters of steelworkers, coal miners, sanitation workers, small farmers, the working poor, and individuals receiving welfare benefits have been able to attend prestigious colleges and universities. In the past, with few exceptions, such institutions admitted only the sons of rich white people. Our national problem has been that many of us seem to believe that the limited progress we have made is enough.

The law can promote needed progress. The Declaration of Independence proclaimed freedom for all: "We hold these truths to be self-evident that all men are created equal and that they are endowed by their Creator with certain unalienable rights." Abraham Lincoln stated this "was the word, 'fitly spoken,' which has proved an 'apple of gold' to us." Lincoln argued that "The Union, and the Constitution, are the picture of silver….The picture was made, not to conceal, or destroy the apple; but to adorn, and preserve it. The picture was made for the apple — not the apple for the picture."[48] The privileges or immunities clause of the Fourteenth Amendment and the Ninth Amendment of the Constitution are part of the constitutional picture of silver crafted by American statesmen to protect our God-given rights of liberty. America's Constitution provides ample support for recognizing and protecting education as a fundamental human right.

Moreover, education is essential to reaching one's human potential. In a global economy, a high-quality education for all Americans is vital for our national survival. India and China each have a middle class comprised of increasingly well-educated adults. India's middle class is larger than the entire population of the United States and by 2020 China is expected to have a middle class of seven hundred million persons.[49] How will America — with tens of millions of semiliterate, technologically unskilled workers and entrepreneurs — be able to compete with these two economic powers, much less with the European Union, and Japan? If America fails to invest in all its inhabitants, by the middle of the twenty-first century it will become an impoverished, has-been participant in the global community.

In these circumstances, some people have suggested that affirmative action should be ended because it has achieved its end: Senators Barack H. Obama and Hillary R. Clinton performed well in the primaries. Recently, the Republican Party nominated Alaskan Gov. Sarah Palen for the vice presidency. The notion that affirmative action has thus succeeded is at best wishful thinking, bordering on sheer folly. Clinton's, Palin's, and Obama's accomplishments are historic, but in the broader social context their achievements have not made the political and economic structure more representative of the people of this great land. One hopes that *positive change* is coming. To say, however, that affirmative action should end because of one person's extraordinary individual achievement is like telling a lung cancer patient because you are no longer coughing and spitting up blood it's OK to resume smoking.

How Long?

Affirmative action properly understood requires individualized attention directed toward two related goals. First, evaluate how well a person is likely to perform if given an opportunity; and second, ensure that qualified persons from a wide variety of backgrounds receive such opportunities to demonstrate their potential. Realistically, for the foreseeable future, standardized tests will play an important role in allocating educational and employment opportunities.

At some point in our nation's future, persons from diverse backgrounds (irrespective of race, gender, or class) will demonstrate similar performance levels on standardized tests or other proxies for "being qualified." Achieving such performance levels is a laudable goal. But that is not enough. We should have a straightforward national test. When the president of the United States has a permanent suntan, or is a woman, or is a person whose first language is not English, and when the overwhelming majority of Americans genuinely believe that having such a leader is not a big deal, then we can seriously consider discontinuing affirmative action based on race, gender, or national origin.

Endnotes:

1 Oliver W. Hill Sr., *The Big Bang: Brown v. Board of Education and Beyond*, 338 (Jonathan K. Stubbs, ed. 2007).

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3 Robert Belton, "The 40th Anniversary of Title VII of the Civil Rights Act of 1964 Symposium: Title VII at Forty: A Brief Look at the Birth, Death, and Resurrection of the Disparate Impact

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35 *See* Servicemen's Readjustment Act of 1944, 58 Stat. 285 (WWII veterans "whose education was impeded, delayed, interrupted, or interfered with by reason of his entrance into the service" were eligible).

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[38] U.S. Bureau of the Census, Census 2000 Summary File 2 (SF 2) 100 Percent Data, Detailed Table PCT3 (A White Alone, not Hispanic or Latino) (2002).

[39] Glass Ceiling Commission, *Good for Business: Making Full Use of the Nation's Human Capital*, iii-iv (1995).

[40] *See*: http://womenincongress.house.gov/; *see also Congressional Quarterly*: http://oncongress.cq.com/corp/flatfiles/editorialFiles/temporaryItems/mon20041103-3minorities.pdf. The Senate is 1 percent African American, 3 percent Latino, 16 percent female, 2 percent Asian American. The House is approximately 17 percent female, 9 percent African American, 5 percent Latino, and 1 percent Asian American. Maxine Waters, "Not Only Should Affirmative Action Be Preserved, It Should be Expanded to Eliminate Discrimination," *Roll Call*, Dec. 8, 1997; Cathy A. Trower and Richard P. Chait, "Faculty Diversity: Too Little for Too Long," *Harvard Magazine*, Mar.-Apr. 2002, at 33-37.

[41] Earl Ofari Hutchinson, "Corporate America — Don't Preach Diversity, Practice It," *New America Media*, Oct. 31, 2007 available at http://news.newamericamedia.org/news/view_article.html?article_id=163769a6 f444ee96938797936ff896f4 (last visited July 7, 2008).

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[42] MGT of America, *A Procurement Disparity Study of the Commonwealth of Virginia*, Jan. 12, 2004.

[43] *Id*.

[44] Sandra Gross Schneider, "Women's Entry into the Legal Profession in Virginia," 34 *Virginia Bar News*, Apr. 1986, at 45.

[45] Hill, *supra* note 1 at 277; Gerald B. Lee, Veryl V. Miles, and G. Nelson Smith, III, "The Black Lawyer in Virginia: Reflections Upon a Journey, 1938-1988," 37 *Virginia Lawyer*, 1988, at 34.

[46] Brooke A. Masters, "Lawyer's Judicial Appointment Is a Milestone for Prince William Court," *Washington Post*, Mar. 13, 1990, at B4.

[47] Devah Pager, *The Mark of a Criminal Record*, 108 *American Journal of Sociology* 937, 958 (2003).

[48] Abraham Lincoln, "Fragment on the Constitution and the Union," *The Collected Works of Abraham Lincoln* 169 (Basler ed., 1953), cited in Paul Brest, *et al*, *Processes of Constitutional Decision Making: Cases and Materials*, 286 (5th ed. 2005).

[49] India's middle-class population numbers 325-350 million out of a population of 1.1 billion. *See* U.S. Department of State, http://www.state.gov/r/pa/ei/bgn/3454.htm (last visited Aug. 29, 2008). *See*, Peter Ford, "Consumer Tidal Wave on the Way: China's Middle Class," *Christian Science Monitor*, Jan. 2, 2007 available at http://www.csmonitor.com/2007/0102/p01s02-woap.html (last visited Aug. 29, 2008); Leslie T. Chang, "Gilded Age, Gilded Cage: China's Sudden Prosperity Brings Undreamed of Freedoms and New Anxieties," *National Geographic Magazine*, May 2008 available at http://ngm.nationalgeographic.com/2008/05/china/middle-class/leslie-chang-text (last visited August 29, 2008).

VSB Does Not Collect Racial or Ethnic Data

How many of Virginia's lawyers identify themselves as African American? Asian? Hispanic?

The Virginia State Bar does not know, because it does not collect that information.

Now, some black attorneys, such as Robert J. Grey Jr. of Richmond, a former president of the American Bar Association, say it's time to start counting, so the bar can evaluate where it stands in attracting diverse people to the profession, evaluate how those lawyers are faring, develop programs to improve shortfalls, and measure the effectiveness of the programs.

"You have to see what kind of progress you're making," Grey said. "At one time, that would have stigmatized you." Now, "I think that's old-school thinking." Enough checks and public scrutiny are in place to detect abusive use of the information. "We've got to develop trust with each other."

Despite the lack of racial and ethnic demographic data, the VSB in 1996 hired Dr. Michael Pratt of Virginia Commonwealth University's Center for Public Policy to study whether certain groups were disproportionately represented in the disciplinary system.

The study had been recommended by Virginia's Joint Legislative Audit and Review Commission to make sure that there were not geographical disparties in the way cases were handled, according to the VSB's *1997–98 Annual Report*. The VSB Council expanded the query to examine possible disparity on the basis of race, gender, or ethnic background.

Pratt's double-blind study depended on a confidential questionnaire to be filled out by respondants in disciplinary cases. The conclusion? The only statistically significant predictors of who was more likely to be sanctioned were firm size and the number of concurrent complaints the attorney was facing during the study period.

"One might expect that in smaller firms attorneys are more vulnerable to circumstances that affect the flow of their caseloads and practice requirements," according to the study's executive summary. "Also, an attorney who has had a number of complaints received for investigation during a given period of time is likely to have experienced business, professional, and/or personal problems that affected his or her standards of practice."

Faces of Diversity in the Virginia State Bar

In this, the first in a series, minority Virginians talk about challenges they have faced — some self-imposed, some imposed by others' bigotry. They approached these challenges as puzzles they had to figure out and adapt to or overcome. Future stories will focus on their ideas for how they and society can bring down the barriers.

by Dawn Chase

FOR THIRTY YEARS, U.S. District Judge Gerald Bruce Lee has been sharing his heart, his time, and his networking skills with projects that promote diversity in the legal profession.

He is pleased with a number of pipeline initiatives adopted by local bar associations, minority bars, law firms, and corporations. But he's tired of talk. In appropriately restrained language, his message to people who want to improve diversity is "put up or shut up."

"There are many models that work for minority recruitment," he said in an interview in his chambers at the Alexandria federal courthouse. They include:

- Participate in job fairs advertised for minorities. These can yield employees for law firms and members or volunteers for bar groups.
- "Women and minorities are encouraged to apply." "Bilingual attorneys are encouraged to apply." These simple sentences on advertisements for law firms and corporations extend an invitation.
- If your firm has paralegals with talent, encourage them — and support them if possible — to go to law school. Then continue to nurture them as lawyers.

When minority persons join your firm, another task begins: creating an environment that is welcoming, supportive of good work, and rewarding.

WHEN ROBERT J. GREY JR. went to Washington and Lee University more than thirty years ago for an admission interview with the law school dean, he dressed for the occasion.

"I did not know the circumstances of the environment I was going into," he said. "I show up in a polyester double-knit suit that looked like something James Brown might have worn on stage. Had my platform shoes on. Had my Afro out to here. I thought I looked good.

"When I walked into his office and looked at him in a white shirt, skinny tie, and black suit, I knew that I had not figured that one out. But he let me in the school."

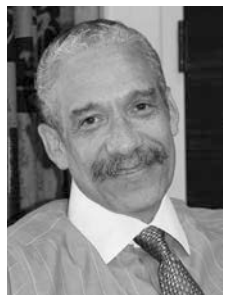
"Getting it" is a challenge faced by many young people regardless of race, said U.S. District Judge Gerald Bruce Lee. "There's this fear that you're not going to measure up. You don't know whether to ask questions. You think, 'I'm not sure whether I should know this.'"

For minority persons, "It's amplified times ten."

Large and medium-sized law firms that aspire to retain minority lawyers offer structured opportunities for:

- mentorship;
- social interaction with all members — not only other minorities;
- feedback on progress;
- dealing with insensitivity, conflict, or misunderstandings;
- addressing individual needs, such as providing time for child rearing.


Lee


Grey


Min

"If they don't feel that they are doing good work, what I think happens to lawyers across the board — particularly women — [and] if they don't feel they're a part of a firm, they'll think, 'Well, I wonder what's going on down the street,'" Lee said.

Grey now is a partner at Hunton & Williams in Richmond. His ABA presidency behind him, he is now running for mayor of Richmond. His confidence, thoughtfulness, generosity with his time, and elegant bearing make him stand out in any room.

It's difficult to believe what he says next: "I can't say I 'got it' on the first bounce. It took me a couple bounces to get it — all the way down the line…. I think if you never give up, you'll find a way."

Advocates of diversity say that advice works both ways. If you are a young minority lawyer determined to make a career, you'll find a way. If you are a law firm determined to make a professional home for that lawyer, you'll find a way.

"IGNORANCE GOES BOTH WAYS," said Su Yong Min, a solo practitioner in Fairfax and president of the Asian Pacific American Bar Association of Virginia (APABA). Part of her bar group's mission is to educate non-Asians about Asians and their culture, as well as to teach its own members how to adapt to mainstream American culture.

APABA is diverse in its own right. Its members have roots in South Korea, Japan, China, Vietnam, India, Pakistan, and other nations.

One challenge that many Asian lawyers face — "our own glass ceiling, self-imposed," Min calls it — is reluctance to market themselves. "Self-advantage is discouraged" in many cultures, she said. The taboo also prevents women from asking for salary raises.

But in the American legal world, "you really do have to self-promote." So in their gatherings and mentorships, Asian lawyers work on ways to promote themselves tastefully, with the civility that their culture also demands.

"Judge Lee is the first to tell you maintaining civility in our profession is so very important," said Min, one of many young lawyers who have worked with Lee and quote him frequently. "Incivility arises because everyone is so stressed out. Perhaps I have been insensitive to somebody and didn't even know about it." Stress management also is a topic discussed by APABA members.

Min listed several other advantages of APABA membership:

- mentorship;
- information about the Virginia State Bar and other statewide bar group events;
- a platform for advocacy;
- a conduit to interact with other minority bars, to work on projects of mutual interest — such as job fairs — and create coalitions for promoting individuals for judgeships;
- a venue for developing referral networks and social bonds;
- education of young people about law and of society about Asians.

"If you feel like you're not familiar with subgroups, then it's easier to talk to them as if they're outsiders," Min said. "But if you know even one member of that subgroup, it's hard to be uncivil to them."

LEE'S CURRENT DIVERSITY PROJECT is the Just the Beginning Foundation (http://www.jtbf.org/), which held a conference Sept. 21–25 to introduce Washington, D.C.-area middle and high school students to judges, attorneys, law professors, and college students. The Virginia State Bar is one of the conference's many cosponsors.

As Lee has mustered Virginia support for the Just the Beginning mission, he is bringing together whites, blacks, Asians (including Min), and Hispanics. The project is as much about building coalitions among working lawyers as it is about recruiting young students to the legal profession.


HuYoung

When they work on a project together, "people learn that they have many common experiences, common virtues, and similar ideals and a platform from which to address diverse issues," he said.

The shared work will develop into business and professional bonds, he said. "There will be cases exchanged and referred to each other." Participants will recommend each other for leadership positions and judgeships because they have worked together and know each others' character.

MICHAEL HUYOUNG has heard a million of them:

- "No tickee, no laundry." (A South Richmond circuit judge, now deceased)
- "Aren't you the wrong nationality to be practicing law? Shouldn't you be a chemist or an engineer?" (Same judge)
- "Son, what nationality are you?" (Another late South Richmond circuit judge and World War II veteran) "Chinese," HuYoung responded. "That's good. I'm glad you're not Japanese, because if you were Japanese you and I would really have a problem." After a pause, "Are you a Communist Chinese?"

Now, young Asian attorneys gasp when HuYoung tells these stories and ask, "Why didn't you file a complaint?"

Those were different times — the early 1980s — and that's not HuYoung's style. His response was and is to laugh and plunge back into the criminal defense work he savors.

His sense of humor and gift of gab got him through the crucibles of the Richmond commonwealth's attorney's office, Richmond's Manchester courthouse, and the man's-man criminal law practice of South Richmond lawyer Richard R. "Dick" Ryder. Now HuYoung is well-established. He practices with Barnes & Diehl PC in Chesterfield. He is a role model for Asian Pacific American Bar Association members in part because he is among a handful of Asian Americans on Virginia's substitute judges list.

There was a time, though, when he could not deflect bigotry so easily.

HuYoung was at the end of a two-day trial that ended with a jury hung eleven to one in favor of acquittal. Most of the jurors looked disgusted when they returned to the courtroom. The judge questioned the holdout, who revealed that he thought HuYoung — the defense lawyer — was Japanese. "You

can't believe anything that Nip tells you. You gotta remember Pearl Harbor," the juror said.

"That's the worst I felt ever as an attorney," HuYoung said. "If the [defendant] had a white attorney he would have been found not guilty."

Now, he always tries to question potential jurors about their attitudes toward him as an Asian. "You have to push the judge to let you ask those questions," he said.

"IT WASN'T TOO LONG AGO that Spanish immigrants had a reputation of being hardworking, industrious people who took care of their families," said Alexander N. "Alex" Levay Jr. of Leesburg, a past president of the Virginia Hispanic Bar Association. With the 9-11 attacks, however, came an escalating anti-immigrant sentiment that politicians and pundits have used to replace the racist name-calling of old, and Hispanics have taken the brunt of it.

"They get the code. They know it's racist to talk about Hispanics a certain way, so they use 'immigrants,'" Levay said.

Levay himself is a puzzle. Half-Peruvian, half-Hungarian, he has been labeled Italian, Hawaiian, Spanish, and impolite terms as well. His neighborhood outside Manhattan, where his father practiced medicine, was multi-ethnic. "It was all there, and because I guess I was a mix people didn't know what to make of me a lot…. I could move in and out of groups pretty easily." On forms, he usually checks "other."

He remembers his grandmother — who had read the Bible in German, Hungarian, and English — and his Peruvian great-aunt, cooking side-by-side in the kitchen at home. With no common language, they produced exotic international meals. "They liked to make people happy, and they liked to cook," Levay said.

He chafes at the intolerance he sees today — what seems to be a disproportionate number of minorities pulled for minor traffic infractions and cited for zoning violations and police raids on brown-skinned people, in search of illegals." The practice in Prince William County "made it an inhospitable place. Legal Latinos aren't wanted either," Levay said.

In courts, "I've seen judges ask people for legal documentation. 'Are you legal? Let me see your license,' before they have said their names," Levay said. He has seen young people treated condescendingly and people denied bond on minor charges. He has witnessed impatience with language issues — judges not wanting to wait for interpreters to come before they proceed with trial.

He attributes his career to an "affinity for the underdog," his exposure to abject in the shadow of affluence in Peru and Manhattan, and his parents' willingness to go the extra mile to help people.

Levay served as a court-appointed attorney in a capital conspiracy case against a member of the MS-13 gang in Northern Virginia. The gang has terrorized communities internationally.

Whether it was the common language or the knowledge of the culture his Salvadoran client had emerged from, Levay drew close to the young man.


Levay

He remembers accompanying the client's family, visiting from El Salvador, to the detention unit at Christmas. "I was holding his infant child as his mother and his wife were speaking to him through the glass partition. We were helping the family unit survive, if possible — just to spend time, just to spend a couple of hours.

"The mother had dressed the baby in a Santa suit. My arms were getting heavy after a while, but my heart felt good." The client eventually was acquitted and deported.


Baugh

DAVID P. BAUGH RECALLS that when he was just starting out in law, "there was a presumption that I hadn't done my homework. And there was a presumption that I wasn't prepared. It was a really tremendous advantage when I got to court."

He is now the state capital public defender for central Virginia. His long history in private practice includes successful defenses of terrorists in the first World Trade Center bombing and of a Ku Klux Klansman in a cross-burning case.

The latter taught him something about prejudice: "People think that bigotry is evil. And they're not evil — ergo, they're not bigots. But most bigotry, whether against gays or against African Americans — is mainly a product of ignorance. It is their presumption about groups that makes them discriminate against groups. And until we come to grips with this, we are not going to solve this problem."

Baugh said there weren't that many differences between himself and the Klansman client. "Ninety percent of the things he wanted for his family, I wanted. It was only those few things we differed on. He believed that slaves were brought to America by a race of Russian pygmy Jews."

Bringing different people to the room is important for groups such as the Virginia State Bar because it teaches people manners, he said. "As long as a person of color is in the room, you won't hear the n'-word."

Actually, that's not always the case. Judge Lee tells the story of when he attended an Alexandria Bar Association meeting years ago and an elderly member, not knowing he was there, announced from the podium, "I've been working like a n—— all week."

That incident led to the formation of the Northern Virginia Black Attorneys Association, Lee said.

Faces of Diversity continued on page 37

Bringing Color to Virginia's Legal Profession: Young Lawyers Lead the Way

by Jennifer L. McClellan, Young Lawyers Conference President

WHILE GREAT STRIDES HAVE BEEN MADE in the legal profession with regard to diversity, the profession still does not reflect society at large. For example, in 2007, while women made up more than 50 percent of the U.S. population, they make up only 30.1 percent of lawyers, 17.9 percent of partners in private practice, 15.7 percent of Fortune 1000 general counsels, and 16.6 percent of Fortune 500 general counsels.[1]

According to the 2000 Census, individuals of color made up approximately 30 percent of the U.S. population. However, minorities accounted for only about 9.7 percent of the profession as a whole.[2] Progress has been especially slow for minority women in the profession.[3]

We can and must do better to ensure that the bar reflects the society it serves and fosters an inclusive environment.

To that end, the Virginia State Bar Young Lawyers Conference has a long history of programs devoted to increasing the diversity of the legal profession.

First, the Minority Prelaw Conference was developed more than fifteen years ago for minority college students interested in a legal career. The conference provides basic advice about getting into and through law school, from Law School Admission Tests and financial aid to the bar exam. First held in the Richmond Circuit Court, the conference was a one-day event each April to provide information on the law school and early lawyering experience, with seminars on LSAT preparation, financial aid, challenges during law school, career guidance for postdegree attorneys, networking, a panel of the various legal career opportunities, and other topics relevant to potential attorneys. The program quickly outgrew the courthouse and was held at the University of Richmond for several years.

Participant feedback indicated a need to include more time for networking among the students, speakers, legal practitioners, and law school representatives. As a result, the YLC changed the conference to two days with more networking opportunities in February at George Mason University. However, students and college career counselors asked the YLC to restore an April conference. At the same time, the YLC Board observed a lack of participation from students west of Charlottesville. As a result, the YLC developed a second, one-day, conference at Washington and Lee University and targeted Southwest Virginia students. Over years, these programs have served thousands of students, some of whom are now practicing attorneys.

This year, the YLC will add a third conference to our roster at the College of William and Mary, for students east of Richmond.

In 2001, the YLC joined with the VSB's Millennium Diversity Initiative to implement the Oliver Hill/Samuel Tucker Institute to reach out to minority, disadvantaged, or academically at-risk students whose exposure to the legal system is through television (at best) or the juvenile justice system (at worst). For one week in July, students are introduced to the legal profession by living on a college campus and attending a number of classes and seminars on career opportunities in the law, test-taking strategies, and the college admissions process. Students meet with law school professors, judges, practitioners, guest lecturers, and state and local bar association members. Students also take a field trip to the Fourth Circuit U.S Court of Appeals to meet with Judge Roger L. Gregory, the first African American appointed to that court. This year, the students also toured the Virginia State Capitol and met with First Lady Anne B. Holton. The institute culminates in a mock trial and graduation banquet, where a prominent African American member of the bar is featured. For the first few years of the program, Oliver W. Hill attended the banquet to meet the students. We have now served more than one hundred students in this program, some of whom have completed college and are planning to enroll in law school next year.

Over the past twelve years, the YLC's Annual Bench/Bar Celebration Dinner honors newly elected women and minority judges from across the state, providing an opportunity for young lawyers to interact with the judges in a casual, relaxed atmosphere. Over the years, our keynote speakers have included Judge Gregory, former American Bar Association president Robert J. Grey Jr., Virginia Chief Justice Leroy R. Hassell Sr., First Lady Anne Holton, Judges James R. and Margaret P. Spencer, and Justice Elizabeth B. Lacy. This year's dinner on November 20 will feature Justice S. Bernard Goodwyn, who also served as a speaker in 1997 when he was appointed to the Chesapeake General District Court.

This year, the YLC will implement an ABA pipeline program for high school students of color titled Choose Law: A Profession for All. This program uses a video, a written guide, a website, attorney volunteers, and educators to encourage individuals of color to become attorneys. Students learn about the importance of the legal profession and how the law affects all aspects of their lives. The project also teaches students that attorneys of color have played a crucial role in the development of this noble profession. Choose Law shares the many opportunities open to lawyers and lays out a path for getting started.

Richmond Memorials Mark Diversity Milestones

Richmond is the place where, in 1956, Massive Resistance was conceived as a challenge to court-ordered desegregation.

Forty years later, Richmonders engaged in an emotional debate over whether Monument Avenue was the right place for a statue of tennis champion and humanitarian Arthur Ashe. The sculpture of a black man in a warm-up suit holding aloft a tennis racquet and a book doesn't match his uniformed neighbors, who were Southern leaders of the Civil War.

But in the past three years, new Richmond memorials have been dedicated that mark society's progress in achieving diversity. Among them:

- The old Finance Building on the Capitol grounds was renovated and rededicated in 2005 as the Oliver White Hill Sr. Building. When it was erected in 1895, the building housed the State Library and the Supreme Court of Virginia. By some accounts, it was in that building that state leaders concocted Massive Resistance.

- The Virginia Civil Rights Memorial was dedicated on July 21, also on the Capitol grounds. The four-panel memorial depicts the student walk-out from Moton High School in Farmville that led to the 1954 U.S. Supreme Court decision *Brown v. Board of Education*; Oliver Hill and Spottswood W. Robinson III — the lawyers who crafted the Virginia challenge to separate-but-equal schooling; the Rev. L. Francis Griffin — the Moton Parent Teacher Association chair who asked Hill and Robinson to take the case; and six persons of different races striding toward the future (see cover).

- The new Richmond federal courthouse that opened last month at 701 East Broad Street is named for judges Spottswood W. Robinson III and Robert R. Merhige Jr. In addition to being a leader of Virginia civil rights litigation, Robinson was the first African American appointed to judgeships in the District of Columbia's U.S. District Court for the District of Columbia and U.S. Court of Appeals. He eventually became chief judge of the appeals court. Merhige, who was white, served thirty years as a U.S. District Judge for the Eastern District of Virginia. He presided over many civil rights cases that opened schools to women and people of color. "His courage in the face of significant opposition is testament to his dedication to the rule of law," according to a press release from U.S. Sen. John W. Warner of Virginia.

The YLC is not satisfied to stop with these signature programs. Our Women & Minorities in the Profession Commission constantly reviews the state of our profession to look for opportunities for improvement. For example, last year, when VSB Executive Director Karen A. Gould posed the question of why women and minority lawyers usually do not stay active with the VSB when they "age out" of the YLC, the commission tackled that question head-on, resulting in a report and recommendations to the VSB Executive Committee. Their findings showed that VSB involvement beyond the YLC is not just a problem with women and minority lawyers, but with young lawyers as a whole.

As we look to enhance diversity, we must remember that diversity encompasses more than just gender, racial, and ethnic diversity. The Young Lawyers are also committed to, and will focus on this year, increasing diversity of region, practice type, and — naturally — age.

As I noted upon being sworn in as president of the conference, and in my first *Docket Call* newsletter article, Virginia young lawyers have been responsible for some of the most dramatic events in American history. This year, we will work to expanding the involvement of young lawyers beyond the YLC to the Virginia State Bar as a whole. We stand ready to serve.

Endnotes:

1 http://www.abanet.org/women/CurrentGlanceStatistics2007.pdf
2 http://www.abanet.org/minorities/publications/milesummary.html
3 *See id.*

You Are Cordially Invited — The VSB's Outreach to Minorities

The Virginia State Bar sponsors the following programs to encourage minorioty participation in the legal profession:

Oliver Hill/Samuel Tucker Prelaw Institute — Gives high school students a live-in college experience, teaches them about the law, and encourages them to enter the legal profession. A project of the VSB Young Lawyers Conference. http://www.vsb.org/site/conferences/ylc/view/oliver-hill-samuel-tucker-prelaw-institute/

Law in Society Award essay contest — Gives all high school students in Virginia an opportunity to win scholarships by writing essays on a legal topic. Sponsored by the VSB Litigation Section in cooperation with the Publications and Public Information Committee. http://www.vsb.org/site/public/law-in-society-award-competition/

Minority Prelaw Conference — A seminar to encourage college undergraduates to attend law school, guide them through the Law School Application Test, and expose them to law classes and discussions about legal practice. A project of the YLC. http://www.vsb.org/site/conferences/ylc/view/minority-prelaw-conference/

Bench-Bar Dinner — Honors women and minorities who have recently become judges. A project of the YLC. http://www.vsb.org/site/conferences/ylc/view/bench-bar-dinner/

In addition, the VSB leaders are eager to invite minorities and women to participate in the many committees, conferences, and sections that form the Virginia State Bar. Chief Justice Leroy R. Hassell Sr. places a high priority on minority participation (see article, page 14). To find a project that interests you, explore the VSB website at http://www.vsb.org.

"Virginia needs lawyers — women and men — of every color, faith, and ethnicity, and from every region of the commonwealth," said VSB Executive Director Karen A. Gould. "Clients need you, and the profession needs you as leaders of the Virginia State Bar, as legislators, and as judges.

"The VSB invites you to serve. We will receive you with open arms and put you to work with other dedicated attorneys. Your viewpoint is irreplaceable." To volunteer, contact your VSB Counsel representative. (See page 5.)

If you have suggestions for projects to increase the diversity of the VSB, contact Joseph A. Condo, chair of the Diversity Task Force, at (703) 442-0888 or jac13@crkblaw.com.

Sowing Future Lawyers: Hunton & Williams, William & Mary Start Diversity Project

If you want to encourage high school students to become lawyers, you have to provide them with

- a path they can follow to get a legal education and pursue a career;
- lawyers to serve as role models;
- social support and persuasion;
- a chance to explore legal tasks.

So says Street Law Inc., a nonprofit organization that educates the public about law and democracy. Using educational strategies supported by empirical data, Street Law has developed several pipeline initiatives to encourage youth to consider and pursue legal careers — including one that since 2001 has been using corporate counsel to nurture minority lawyers.

Now Street Law is embarking on a new pilot project that can be used by private law firms: the Legal Diversity Pipeline Program, cosponsored by the National Association for Law Placement (NALP). Five firms will participate nationally in the project. One is Hunton & Williams, which will work with law students from the College of William and Mary to bring the program to high school students from Richmond Public Schools. The program is scheduled to begin in January.

Richmond is taking a different slant than the other pilots by including law students working alongside the H&W lawyers to mentor the teenagers — thereby establishing two tiers of pipeline. The law firm provided twenty thousand dollars for curriculum materials, Street Law staff time, travel, training, and technical assistance. NALP is also providing funding for the program.

Robert E. Kaplan, associate dean at W&M, said the program will include:

- classes on substantive areas of law and career pathways;
- job shadowing;
- college planning;
- mock trials;
- mentoring relationships.

The Legal Diversity Pipeline Program will take place at a Richmond high school yet to be selected and at Hunton & Williams in Richmond. Kaplan and Aimee McKim, legal recruiting director at H&M, are overseeing it.

For more information, contact rekapl@wm.edu or amckim@hunton.com.

The Aged, the Young, the Poor: Oliver White Hill Foundation Seeks Justice Through Law

by Clarence M. Dunnaville Jr.

OLIVER WHITE HILL, who died last year at age one hundred, grew up in a society in which racial segregation was required by law. He determined at an early age to become a lawyer and dedicate his life to ending that pernicious law.

In his autobiography, *The Big Bang:* Brown v. Board of Education *and Beyond*[1], Hill relates that when he was in his sophomore year of college, his stepfather's brother — a lawyer in Washington, D.C. — died, and the widow gave Hill his law books. Upon reading the annotated United States Constitution and cases cited, he determined that the Supreme Court had taken away the civil rights of Negroes in the case of *Plessy v. Ferguson*[2], decided a decade before he was born.

Hill states:

> I saw no hope of regaining [Negro rights] through the political process prevailing in the late 1920s. At that time, it was not even possible to get Congress to enact legislation to make lynching or murdering Negroes a crime. Therefore, I determined to go to law school, become trained as a lawyer, and endeavor to get the Court to reverse its previous error in *Plessy.*[3]

Clarence Dunnaville and Oliver W. Hill in front of Mr. Hill's boyhood home at 401 Gilmer Avenue, Roanoke, Virginia.

Hill was admitted to the Virginia bar — sworn in first by a Roanoke court — in 1934.[4] Shortly after, he began challenging required segregation based on race. He participated in most of the important civil rights cases that struck down segregation and ultimately did indeed reverse the Jim Crow doctrine mandated by *Plessy.* He and his law partner, Spottswood W. Robinson III, represented the plaintiffs in *Davis v. School Board of Prince Edward County* — one of the five cases consolidated by the U.S. Supreme Court under the name *Brown v. Board of Education of Topeka.*[5] Of Hill's cases, the *Brown* decision had perhaps the most profound effect upon the nation.

In the one hundredth birthday edition of Hill's autobiography, he states:

> I played a small part in alleviating the evils of segregation and related conditions. Through the Rule of Law, these changes have occurred during my lifetime. Much work

Editor's Note:

In 1913, six-year-old Oliver White Hill moved to Roanoke, eventually settling at 401 Gilmer Avenue Northwest. His mother and stepfather worked in the hotel industry in Hot Springs. Oliver stayed in Roanoke, where the schools were better, in the care of family friends Bradford and Lelia Pentecost.

Oliver lived most of his childhood in that home. He heard the stories of the Norfolk & Western Railroad men who worked with Mr. Pentecost. Oliver took odd jobs — he worked in an ice cream store, where he was paid in ice cream. He sold the New York Examiner on street corners, shouting, "Extra, extra, read all about it!" if the news was really big. He delivered ice. He served meals to strike breakers during the Great Railroad Strike of 1922. He shined shoes.

Sometimes, Oliver would get together with other poor Negro children — that was the term used then — and engage in rock fights against poor white boys. "I guess the rock-throwing battle was more of a game," Hill mused in his autobiography. "Perhaps because segregation prevented us from competing in baseball or softball games against the white children, the only games that we felt that we could participate in was something combative like rock battles."

Once, Oliver was trying to make some money by collecting empty whiskey bottles and redeeming them for change at a distillery when some white men threatened and chased him. He called the experience "scary and unforgettable." "While my childhood was pleasant for the most part, like Langston Hughes said, 'Life for me ain't been no crystal stair,'" he recounted.

Back at 401 Gilmer Avenue, Mrs. Pentecost prodded Oliver toward tending to his schoolwork. Sometimes she would send him on contrived errands to the attic, where he would have to walk through pitch darkness to twist the light bulb in the center. "Later I learned that the real purpose of the search was to teach me not to be fearful of the dark," he recalled. "I was delighted because it benefitted me."

After Hill earned his law degree, he returned to live in that house as he began practicing law. His career soon would take him to Richmond and cases that forever changed the social landscape of the United States.

Oliver White Hill died in August 2007, as his Roanoke boyhood home was being restored so it could be a site of service and justice for the poor. This article by Hill's friend Clarence M. Dunnaville Jr. describes the foundation that made that restoration possible and the dreams that Hill's friends have for his legacy.

remains to be done. … I believe that human earthlings can meet the challenge and do great things.[6]

In 2000, I co-founded the Oliver White Hill Foundation (the Foundation) as a vehicle to continue some of the unfinished work of Hill and his associates. Hill served as chair of the Foundation board from its inception until his death. He attended every board meeting, and his vision and guidance at his advanced age were both inspiring and challenging.

The Foundation seeks to engage in programs that will carry on the legacy of Hill and his associates in the areas of access to justice, legal education, civil rights, and public service. It also will work to improve the judicial system.

Mission
The Foundation's mission includes the following goals:

- Provide access to justice for minority, poor, elderly, mentally disabled, and other persons.
- Develop a new generation of lawyers dedicated to civil rights, civil liberties, and public service.
- Encourage students from elementary through high school to pursue careers in law and public service.
- Work with law schools, bar associations, and others to make the judicial system more just.
- Alleviate inequities in the treatment of persons caught "in the criminal justice web."
- Support other organizations and programs dedicated to civil rights and liberties.
- Mentor minority persons who are interested in entering the legal profession, and help develop leadership skills.

The Foundation has established partnerships with the Washington and Lee University School of Law (W&L), the City of Roanoke, the Virginia Law Foundation, the Blue Ridge Legal Services Corporation, Total Action Against Poverty of Roanoke, the Virginia Department for the Aging, and the Roanoke Bar Association (RBA). Former RBA president George A. "Al" McLean Jr. performed the closing on the purchase of Hill's boyhood home, and the RBA was the first substantial contributor to the purchase of the home, starting about five years ago.

The Foundation plans to increase the number of partnerships, and establish a nationwide reach. At this point, it has undertaken the following projects:

Law Student Internships
The Foundation has sponsored law students each summer since 2001, to serve as interns with the Lawyers' Committee for Civil Rights Under Law and the National Association for the Advancement of Colored People Legal Defense and Educational Fund. The program is partially funded by the Virginia Law Foundation on an ongoing basis. Participants have been selected from the law schools at W&L, the University of Virginia, American University, the Catholic University of America, and Howard University. The Foundation plans to expand the program to include more students and draw students from additional law schools.

***The Big Bang* 100th Birthday Edition**
The Foundation published a second edition of Hill's autobiography and receives a portion of its sales. The book is available from the Foundation for $35.

Hill's Early Home
The Foundation has purchased and restored the home at 401 Gilmer Avenue Northwest in Roanoke, where Oliver Hill lived as a boy and while he was establishing his first law practice. With the help of the City of Roanoke, foundations, and corporate and individual supporters, the home and restoration are fully paid for.

W&L Elder Law Project
The Washington and Lee University School of Law, in partnership with the Foundation, will use the Hill home as a center to provide pro bono legal services to benefit elderly residents of the Roanoke area. The Elder Law Outreach Project — part of W&L's new third-year clinical program for law students — will serve senior clients referred by Blue Ridge Legal Services and use volunteers from the Roanoke Bar Association to mentor students, who will conduct intake of clients and serve as caseworkers. The students also will devise community lawyering strategies.

Oliver White Hill was closely associated with W&L. He received an honorary doctorate degree from the university and visited the law school on a number of occasions late in his life. It is a fitting honor to his legacy to establish the Elder Law Outreach Project and other joint projects of the Foundation and university to be based in the house.

Contemplated New Projects
The Foundation-W&L partnership also is considering developing the following projects:

- juvenile outreach in local schools through practical law and mock-trial programs;
- representation in Supplemental Security Income matters — a needed service that the local legal aid program offers on only a limited basis;

- assistance for prisoners who file pro se complaints about their conditions of imprisonment;

- children's rights and guardianships for mentally disabled or elderly persons;

- housing issues, including foreclosures;

- community development services, such as business planning and corporate and tax advice for small businesses and nonprofits.

In addition to the contemplated projects with W&L, the foundation is considering a significant number of other new projects, including:

- establishing a meaningful program in memory of Hill at Howard University School of Law – Hill's alma mater;

- developing an ongoing relationship and supporting role with the National Black Students Association, and sponsoring programs with the association on access to justice and pro bono obligations of lawyers;

- partnering with other law schools to establish projects similar to the W&L programs. The Foundation has held preliminary discussions with officials of several law schools relating to such potential programs.

- sponsoring symposia on access to legal services, civil rights, and public service;

- producing and distributing engaging educational materials relating to the Foundation's mission and the public interest;

- working to make the criminal justice system more fair and to improve access to competent legal counsel for all who become caught up in the criminal justice web. Hill continued throughout his lifetime to help persons accused of crimes or in prison. In his ninety-ninth year, he assisted in an individual's release from prison. The Foundation will work with legal scholars, law students, and concerned organizations to foster researcher projects, symposia, and program to influence decision makers to improve the administration of justice.

- mentoring young persons (particularly persons of minority groups) at the high school level and below to encourage them to pursue careers in law and public service. The Foundation hopes to expand the W&L juvenile outreach program throughout the state.

- serving as a policy development center on issues relating to the administration of justice, civil rights, and civil liberties.

It is the vision of the Foundation that it will be a vehicle to improve access to justice, help make the judicial system more just, and instill in young students the will to enter the field of law and engage in public service.

The Foundation is grateful for the inspiration of Oliver White Hill.

Endnotes:

1 Oliver W. Hill Sr., *The Big Bang:* Brown v. Board of Education *and Beyond* 73 (2d ed. GrantHouse Publishers 2007).
2 163 U.S. 537 (1896).
3 *The Big Bang*, 73.
4 *Id.*, 92.
5 347 U.S. 483 (1954).
6 *The Big Bang, xiii*

Hill Internship Inspires Public Service, But the Bills Must Be Paid

Brian Thornton Wesley had a pretty good advisor when he was trying to pick his law school. He went to Oliver W. Hill Sr.

The civil rights lawyer never told him what his choice should be, but by the end of the conversation, "I knew that it was really going to be Howard University," said Wesley, who just finished his education there.

His ties with Hill began at an early age. Wesley's grandfather, Bill Thornton, was a founder of the Richmond Crusade for Voters. "I learned the Oliver Hill story at a young age. But it took me probably sometime in college to really grasp what had transpired and what he overcame."

The ties continued after Wesley graduated from the University of Virginia with a degree in psychology, worked for a District of Columbia law firm in the accounting and conflicts-and-ethics departments, and started law school. Wesley spent the summer of 2007 serving an Oliver White Hill Internship, established by the Hill Foundation and funded by the Virginia Law Foundation (VLF) to continue Hill's service to end discrimination.

The internship trains law students in civil rights and civil liberties law. Wesley served his with the National Association for the Advancement of Colored People's Legal Defense Fund.

The experience was rich, he said. He made weekly visits to meetings of U.S. Senate Judiciary Committee meetings, attended symposiums on the death penalty and general civil rights law, and was involved in two cases before the U.S. Supreme Court. He got to know civil rights attorneys from across the country and a Hurricane Katrina expert down the hall.

Other Hill interns have reported similarly inspiring experiences. One — Jacob T. Penrod, who now practices with Hoover Penrod PLC in Harrisonburg — wrote to the VLF, "Students lucky enough to be involved with the Oliver Hill Internship Program should come away from the experience with a better understanding of how lawyers are in a unique position to transform society for the better."

Most of the interns ended up in private practice, and Wesley is planning to do the same thing. "You have to find some income to pay the bills … even if your heart is screaming at you that you want to improve civil rights," he said.

He plans to go back to U.Va. to earn a master's degree in business administration, and go into practice with his father, Ronald R. Wesley, a lawyer in Richmond.

The Virginia Law Foundation is tracking Hill interns to see where they end up, but board member Monica T. Monday concedes that paying student loans takes precedence for many. "It is certainly the hope of the … board members and staff that students will be inspired by this work to pursue careers in the public service," she said. But "for some of the students, it's not possible to go into public service with the kind of debt load they have," she said.

The VLF also is looking at whether it can play a role in debt forgiveness programs to encourage public interest law. "It may be that there is a larger role for the Virginia Law Foundation," Monday said.

Wesley

Preparing the Soil: Pipeline Projects Require Knowledge of Student Development

Encouraging adolescents to consider law as a career is not always as simple as describing the intellectual, financial, and humanistic rewards of the profession.

Many of today's minority lawyers were the first in their families to go to college. Some had to find their own ways through the college admission and financing process, the Student Achievement Tests and Law SATs, the hard work that college and law school entail, networking and interviewing to land first jobs, and the politics of practicing and progressing in those jobs.

Programs such as Street Law Inc.'s Legal Diversity Pipeline Project are based on research about the best ways to approach students at different developmental stages.

Street Law's prospectus for the program's pilot summarizes research about what has to be addressed if a law firm wants to convince high schoolers that law is an achievable and desirable profession.

One of the most important attributes students must master is self-efficacy — the concept that they are capable of developing skills and support necessary to pursue a legal career. They also need social competency and work readiness skills, such as the abilities to form interpersonal relationships with people of diverse backgrounds, take leadership, dress appropriately, and follow workplace rules that govern attendance and punctuality.

Good programs to motivate students can be labor-intensive for the mentors — the programs require individuals and law firms to dedicate time and sometimes other resources to an ongoing relationship with promising students. Educators have developed proven strategies for helping students attain these skills.

For more information on Street Law pipeline projects, contact Lee Arbetman at LArbetman@streetlaw.org

VBA Diversity Job Fair

The Virginia Bar Association's Second Annual Diversity Job Fair, held August 16 in Richmond, drew twenty-three Virginia legal employers, who interviewed more than one hundred law students from as far away as Utah.

The VBA Young Lawyers Division, which sponsored the fair, made improvements to the project since the first fair, said Dana A. Dews, one of five cochairs of the project.

They expanded the list of participating employers to include not only Virginia's largest law firms, but also public-interest projects such as the American Civil Liberties Union of Virginia, legal aid programs, and the U.S. Navy Judge Advocate General's Corps. (Details are available at the Diversity Job Fair website, http://www.vba.org/diversityjobfair.htm.)

They advertised the fair to students nationally because Virginia law firms reported in a preliminary poll that "we are not seeing a lot of diverse candidates in our on-campus interviews at the schools," Dews said. The organizers did not attempt to define who is a minority, but invited "anybody who thinks they're a diverse candidate."

From the student résumés, each employer could preselect up to thirteen students, and the organizers assigned five others by lottery. Previously, selection had been entirely by lottery — a practice that neither students nor employers liked.

The project requires almost a year of planning, Dews said. Five VBA cochairs worked with the Richmond Legal Diversity Alliance — a group of law firm recruitment officers oversaw:

L–R: Monica McCarroll, Dana A. Dews, Elaina L. Blanks, and Karen A. Robinson, four of five cochairs of the VBA's Diversity Job Fair in 2008.

- publicity;
- sponsorships to offset the costs;
- a website for student and employer registration;
- interviews scheduling;
- volunteers and VBA staff who worked at the fair;
- housing and a luncheon sponsored by Williams Mullen.

The VBA does not know yet whether students received callbacks or whether matches were made. The organizers have asked students and employers for feedback.

Dews said the Young Lawyers Division's Minority Recruitment Committee replaced an annual diversity seminar with the job fair after it concluded, "We can't just keep putting on seminars. We need to do something proactive."

The response proved to Dews that law firms are eager to hire diverse associates, and "the diverse candidates are out there, and they want to come to Virginia."

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called him, and said, "I'm Alda White, I'm the assistant county attorney in Stafford, and I'm black."

"He thought that was the funniest thing he'd heard," she said. "I guess people thought all black people know each other."

Their friendship grew into marriage. They had three sons.

In 1989, John Scott became Stafford County's first African American judge. Seven years later he moved from general district to circuit court.

On April 17, at age 59, Judge Scott died after eye surgery. The stunned community bestowed accolades on him in newspaper editorials and Web logs. They praised him for his careful attention to each litigant and each case, and for his big heart. *The Free Lance-Star* noted that he was a model train collector.

"He encountered, personally and through clients and complainants, his share of ugly discrimination," the paper eulogized. "But he knew that on the line to greatness, bitterness was a siding and vengeance a broken track."

Alda White remembers when their youngest son, Jeffrey — now a college graduate — came home from elementary school and said, "Did you know there was a time when white people and black people couldn't go to school together?"

His parents marveled at Jeffrey's astonishment. "He thought it was something in ancient times," White said.

Washington & Lee Students Will Serve Poor Elders at Hill's Boyhood Home

by Dawn Chase

Oliver W. Hill's boyhood home in Roanoke has a new mission: to serve as the site of the new Washington and Lee Community Law Center that will train students in the practical application of law as they provide pro bono legal help.

The program has begun with an Elder Law Project, which involves six third-year law students each semester from Washington and Lee University (W&L), local attorneys with the Roanoke Bar Association, and local agencies that assist seniors, including legal aid. It has started small, helping a limited client population with advance directives, powers of attorney, simple wills, and some Social Security matters.

Eventually, "that's going to kick us into Medicare and Medicaid issues," said Mary Z. Natkin, W&L's assistant dean for clinical education and public service. After that, eventually, the law center will take on juvenile justice and other projects.

The clinic is part of W&L School of Law Dean Rodney A. Smolla's vision that every student have at least one practice experience in which they perform service to the public and the bar before they graduate.

Smolla put the plans for the practicum in place as soon as he became dean last year. The clinic is scheduled to begin operating this semester.

He said he is delighted that the school was able to lease the newly renovated Hill boyhood home for the project. The connection with one of Virginia's leading civil rights lawyers is "very powerful," Smolla said.

Hill "is one of my personal heroes and one of the heroes of the profession." He exemplified "the power of will and determination. He had an iron will and an iron heart, and that determination was infectious." Smolla finds inspiring "the idea that we would go back to his [home] and use it as the staging ground for providing legal services to the needy in that area."

Smolla includes diversity as "one of many things that are important to me in my life as dean. … Diversity enhances the educational experience of our students and helps us fulfill our mission in society. Internally, I think there's a widespread consensus that the quality of education improves when students are exposed to students of diverse backgrounds."

He said he means "diverse" in the broad sense – "conservatives, liberals, men, women, religions, races, economic backgrounds, from different parts of the country and the world." The mix leads to "a richer, a more realistic set of discussions."

Oliver W. Hill's boyhood home


Smolla

Students tend to form strong bonds in law schools, where they work on teams and as partners in competitions. A program that promotes diversity also prepares lawyers for the corporations that will be the employers or clients of many of them.

"In corporate America there is a very high value placed on diversity" – a value that has been emphasized for the past thirty years, Smolla said. Richmonder Lewis F. Powell Jr., in the *California Regents v. Bakke* decision, was the first American Supreme Court justice to articulate the defense of pursuing diversity, "because we are in a global marketplace in which most American businesses understand that the movement of business, the movement of products, and the movement of people is an international and diverse enterprise," Smolla said.

Despite the dedication of W&L and most American law schools to diversity, recruiting qualified candidates is challenging for several reasons, Smolla said.

"The profession needs to do more to excite elementary school students, high school students, college students, about the possibilities of law as a profession. It's not simply what you see on television."

Bar associations around the United States are sending lawyers, judges, and law professors into schools — "particularly schools which are underrepresented in the profession," he said. "The willingness of bar groups to work with school districts and get people into schools in thoughtfully designed programs is invaluable."

Students arrive at law school with varying capabilities that have no correlation to race or ethnicity. "There are students who shake your hand firmly, meet your eyes with confidence. You almost picture them coming to the negotiation room. There are students who are much more awkward, much more

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Highland

diffident. Race has nothing to do with that. Gender has nothing to do with that," Smolla said.

"We, like almost all law schools in Virginia, have mechanisms to support students who have academic difficulties. We make a big point of emphasizing that there's no stigma attached" in taking advantage of tutoring support for course work and the future bar exam.

One of the biggest challenges is "the crushing debt that they graduate with"—debt that can amass to eighty thousand dollars by the end of law school. Programs are needed to provide loan forgiveness in exchange for public interest practice, he said.

Despite the pressure to graduate a more diverse population of future lawyers, "It is important that it not be a shallow numbers game, and that you don't seek diversity in a statistical sense for its own sake," Smolla said. "We can't and we shouldn't treat students as pawns in a diversity game. Every student has to be considered individually."

The students who staff the first generation of the W&L Community Law Center have begun seeing clients. They were scheduled to move into the Hill house on October 10.

The students are supervised by Howard Highland, a twenty-six-year-old 2008 W&L law graduate. Highland is from Centreville in Fairfax County. He majored in anthropology as an undergrad at the University of Texas at Austin, and feels drawn to civil rights because of his interest in American Indian law.

As the first W&L Oliver Hill fellow, Highland will live on the second floor of the home where Hill spent his youth until the unavailability of a high school education for black people in Roanoke led him to Washington, D.C. The man of the "iron will and the iron heart" recollected in his autobiography: "I don't remember any time ever thinking I was going to drop out of school…. For some reason, I always thought I was going to college."

The 'Instant Generation' Meets the Law: Hill/Tucker Institute Raises Future Attorneys

ELIZABETH M. EBANKS, an attorney with LeClairRyan in Richmond, was giving a talk on cross-examination — a topic interesting enough to hold the attention of most of the twenty-one teenagers in her audience. But she wasn't counting on it.

She played examples from the movies *Legally Blonde* and *My Cousin Vinnie* of cross examination done terribly and done extremely well.

In the conversation that followed, the students were enthusiastic and engaged. What did the lawyers do right, and wrong? she asked. She introduced legal terms — demonstrative evidence, prosecutor, plaintiff.

She touched on legal ethics — "When you're an attorney, you have to be as good as your word. If you lose your credibility, that's it."

Later, Yvette A. Ayala took the lectern and expanded on the lesson. She addressed court etiquette. She told them, "In Virginia, we say, 'May it please the court, Your Honor, I am Yvette Ayala …"

She gave them pointers for the mock trial the students were preparing. Don't ask a question if you don't know the answer, because the answer can come back to bite you, she advised: "Cross examination is like handling a snake."

And she provided reassurance to the student who expressed concern that he doesn't know how to ask leading questions to draw out the answers he wants.

"You don't have to be like the people in the movie. Just be yourself," she said.

Rule No. 1, if you want to volunteer with the Oliver Hill/Samuel Tucker Prelaw Institute: You have to know how to talk to teenagers.

The institute break is a summer program held annually at the University of Richmond to give high school students the experience of college — living in a dorm, eating in a dining hall, and attending classes. The purpose: to teach them about law and, the sponsors hope, motivate some of them to become lawyers.

The students at this year's Hill/Tucker Institute came primarily from Central Virginia, referred by guidance counselors, teachers, and lawyers in the community.

The Virginia State Bar's Young Lawyers Conference sponsors and does all the work for the weeklong program, with considerable support of time and money from their law firms. The cost of this year's Institute — about fourteen thousand dollars — was donated primarily by the Verizon Foundation.

1. Left-Right: Students Turquoia Simmons, Porscha Quarles, Darren McLeod, Calvin Walker, and Dominique Connor.

2. Top-bottom, left-right: Hill/Tucker Institute intern Josh Brown, Codirectors Yvette Ayala and Rasheeda N. Matthews, intern Jasmine Johnson, and Ayala's daughter, Yriannah Richards, who spent the week at the program helping her mother.

Additional donations from Superior Document Services, Lexis-Nexis, and Capital One's African American Network supplemented this year's Institute. Institute volunteers were from law firms LeClairRyan, McGuireWoods, Troutman Sanders, Hunton & Williams, and Harrell & Chambliss, and companies Kaplan, Capital One, Verizon, and Dominion.

The money is donated through the Millennium Diversity Initiative, a nonprofit corporation that Joseph A. Condo established when he was VSB president to provide resources for projects that advance diversity in the legal profession. (See his article, page 16.)

The program itself was started as a pipeline project in 2000 by Jennifer L. McClellan, who now is YLC president. As she reports in her column on page 27, some of the institute's first graduates are planning to enter law school next year.

This year, Ayala, owner of Dominion Law PLLC, and Rasheeda N. Matthews, a client manager at Capital One, were codirectors of the institute, which does the fundraising; arranges the room, board, and classroom space; sets up transportation for off-campus activities; reviews student applications; and lines up speakers. Twenty speakers — attorneys, Judges Roger Lee Gregory and Judge Gary A. Hicks, and First Lady Anne B. Holton, a former judge — participated this year.

Ayala and Matthews served shifts round-the-clock, teaching, counseling, coaching, supervising, mediating, and consoling.

Rule No. 2, if you want to volunteer: Be prepared to resolve conflicts or soothe feelings.

During a break for lunch, four students gathered to share their experiences of law and lawyers. They were Turquoia Simmons, seventeen, of Highland Springs High School, who is interested in chemical or electric engineering; Darren McLeod, sixteen, of Hermitage High in Henrico County, who aspires to careers in baseball until he's about thirty-one, followed by foreign relations or, maybe, law; Calvin Walker, sixteen, of Huguenot High in Richmond, who envisions a future as a criminal prosecutor; and Dominique Connor, eighteen, of Powhatan High, who sees herself practicing civil law at a big firm.

Connor said, "I want to be able to take care of my parents."

Except for Walker, the students' ideas about lawyers were pretty vague before they came to the institute. "At one point, I did want to be a lawyer, but I don't like to argue a lot," Simmons said. McLeod had gone to middle school with Gov. Tim Kaine's son, and he learned some things when Kaine came to talk.

Walker has a very specific goal: After graduating from law school, he will take the North Carolina bar exam and work in Charlotte in the district attorney's office. "I want to put the big criminals in jail," he said.

Though they've been raised in schools in the Richmond metropolitan area, the students didn't know much about Oliver W. Hill before they came to the institute named for him and his partner in civil rights litigation, Samuel W. Tucker. McLeod had heard of Hill, but "I always thought he was one of the people that helped the lawyers."

They all talked about how grateful they were to their families and the mentors who encouraged them. But they also have concerns about paying for college, whether they can do the work, global warming, future quality of life, and "what's going to happen when we run out of gas."

They also worry about what Walker called "the racism thing." "A lot of us don't give any leeway to other people," he said. McLeod worries about Chinese human rights violations. Simmons concluded, "Racism is always going to be a problem." If people were going to do something about it, "actually, we should have done it like twenty years ago."

Rule No. 3, if you want to volunteer: You have to know how to listen to teenagers.

The students are "unashamed to show their feelings. … The counselors need not to be afraid to ask questions, and they need to be willing to be real and answer teenagers' questions, which aren't always comfortable," Ayala said. The students will ask if you lived with your boyfriend, if you smoked cigarettes in high school. "You don't have to answer them," she added.

"It is challenging to make the instant generation slow down long enough to make them care about the law," Ayala said. "You have to have an ability to make a profession that's traditional, so steeped in process, so slow-moving, attractive to kids who are used to an instant society.

"Everything takes forever in law." Teaching them the rewards of legal practice is like "valuing the meal that's made in the slow cooker more than the one that's made in the microwave."

Lawyers who help out with the Institute make long-lasting connections, Ayala said. "It's a great opportunity for attorneys to be re-inspired."

How have the students' impressions of lawyers changed since they've been to the institute?

McLeod was delighted to learn that law is taught by the Socratic method, because he is already versed in that from his high school.

Walker said, "I've learned how trustworthy and honest they are, how they're not in it for the money. There are only a handful of people nowadays that are actually putting forth an effort instead of complaining about things. I think lawyers are those kind of people."

Plans for the 2009 Hill/Tucker Prelaw Institute are underway. To volunteer, contact HillTuckerInstitute@gmail.com .

— Dawn Chase

Faces of Diversity continued from page 26

Baugh says the advantage of having minorities present — from the minority perspective — is that they can set limits. "It starts by individuals saying they don't like that and leaving the room."

"There are still ignorant judges and ignorant lawyers who view people not as individual but as groups. That's stereotypic, and they're wrong."

But Baugh sees hope for diversity on the horizon. "We have a generation of people who don't think it's a big thing. That is progress, no matter how you cut it."

In December: Virginia lawyers talk about Generation X and diversity, participation in bar organizations, and reaching out to children. Interviews include retired Virginia Court of Appeals Judge James W. Benton Jr. and new Court of Appeals Judge Cleo E. Powell; Virginia Sen. Henry L. Marsh III; Manuel E. Leiva Jr., president of the Hispanic Bar Association of Virginia; and others.

by Karen A. Gould

Our Budget Challenge — Your Responses

IN THE JUNE/JULY EDITION of *Virginia Lawyer*, I asked for feedback from our members on what programs they would cut in order to balance the Virginia State Bar's budget. While only eight members responded, I suspect that their opinions are shared by others. In the following list of programs that were suggested for elimination, I am taking some of my previous descriptions a step farther, to provide more details about these programs, the purposes they serve, their costs, and how they tie into the VSB's mission to regulate and support Virginia lawyers.

Three people recommended that two Young Lawyers Conference (YLC) programs be eliminated: the Celebration of Women and Minorities in the Legal Profession dinner and the Minority Prelaw Conference.

In 2008, the Women and Minorities celebratory dinner did not cost the bar a penny because the YLC covered the cost with sponsor donations. The conference was organized almost entirely by YLC volunteers, with minimal VSB staff assistance.

The two Minority Prelaw Conferences held in 2008 cost $11,000. Hundreds of volunteer hours were invested by the YLC organizers and speakers. They and their law firms made this investment because they believe in this program with a passion. It is a pipeline project that encourages minority college undergraduates to attend law school, and it has been deemed by the VSB's leadership to be an essential component of the VSB mission. It was through the efforts of Manuel A. Capsalis, the bar's current president, that a third Minority Prelaw Conference has been added to the YLC's schedule for this fiscal year.

Two people questioned whether we should be distributing *Virginia Lawyer* magazine and the YLC's newsletter, *Docket Call*, by e-mail, rather than the current practice of printing hard copies and mailing them to all members. *Virginia Lawyer* is projected to cost $18,000 per issue in fiscal 2009 to print and mail after advertising revenue is deducted. The magazine is published five times per year, for a total cost of $90,000.

The VSB's Publications Committee sent out a survey in 2003 to 2,500 VSB members and received just under 400 responses, an almost 17 percent response rate. By a better than seven-to-one margin, the respondents preferred paper over electronic publications. More recent surveys by the Florida and Indiana state bars have indicated that 65 percent of the lawyers in those states still prefer paper over electronic publications. The VSB's Publications Committee met on August 26, 2008, and decided to rely on the Florida and Indiana surveys and thereby save the $15,000 it would cost to conduct another survey. The committee also decided, based on the 2003 VSB survey and the Florida and Indiana surveys, that the time has not yet come for distribution of the magazine through an electronic format only. People still want to receive *Virginia Lawyer*, the VSB's flagship publication, in its current format.

You will have noticed in the last *Virginia Lawyer Register* — the bar's magazine that disseminates disciplinary opinions, rule changes, and proposals published for comment — that we have already changed the format and substantially reduced its size. Now most of the information is summarized, and lawyers are directed to links on the VSB website to view the complete documents. The $45,000 these changes will save this year has already been factored into the bar's budget. We plan to start transmitting the *Register* by e-mail in addition to mailing it, to make it easier for our members to click on the links provided to the full disciplinary opinions, rule changes, and proposals. Perhaps in the future it will be deemed appropriate to discontinue the written version of the *Register* if electronic delivery is well-received and used by the bar. Communication of this information is essential to fulfillment of the VSB's mission. Lawyers want to keep abreast of this information, and we want to make it as easy on them as possible.

The YLC's *Docket Call* will cost $19,500 to print and mail in fiscal 2009. Many of our sections and conferences have decided to publish their newsletters by e-mail, but some have not. I will raise this issue with the leadership of the YLC to ask whether it is necessary to mail a hard copy of the *Docket Call* to their 9,655 members.

Another publication recommended by one member for termination is the *Senior Citizens Handbook*, which is one of the bar's most requested publications. Because the substantive information is provided by members of the Senior Lawyers Conference, the only costs associated with the *Handbook* are printing costs and some mailing costs, which are projected to be $5,600 this year for one thousand copies. This is a relatively small price tag for a publication that provides invaluable information on

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law, benefits, and programs for Virginia's seniors, and that brings the bar much goodwill from the legislature and the public. While the *Handbook* is posted on the VSB website, seniors are not as likely to have Internet access, and many Virginians request the printed volume each year for the $4 cost of mailing.

Several people suggested either eliminating or charging for the Pro Bono Conference, held yearly by the VSB's Access to Justice Committee. This past year's program cost $10,720. The registration fee of $25 helped cover the cost of materials. Next year, the committee hopes to make materials available online to help reduce costs even further. Many of the people who attend this conference are unpaid or minimally paid lawyers who provide legal services for the poor; charging market rates for this conference is unrealistic.

The program serves several purposes: it is a wonderful event to celebrate and highlight the contributions of lawyers and law students honored for pro bono service; it provides an opportunity for the pro bono, poverty, and public interest law communities to discuss common issues and learn about new developments; and it encourages lawyers to provide pro bono and reduced-fee services in areas of compelling need.

Rule 6.1(a) of the Rules of Professional Conduct charges all lawyers with the responsibility of rendering 2 percent per year of their professional time to pro bono public legal services. Improving access to justice is one leg of the bar's three-legged mission. The importance of the access committee and this conference should not be overlooked. The bar staff fields calls from thousands of people each year desperate for assistance negotiating the legal arena, but too poor to pay for it. Yet the bar devotes a pittance of its dues revenue to support this mission.

The Solo & Small-Firm Practitioner Forum also was recommended to be eliminated or changed from being free to charging admission. This program was instituted at the request of the Supreme Court of Virginia to provide assistance to an often-overlooked but huge segment of the bar's population: lawyers who practice in the solo and small-firm environment. Last year's program cost $5,340. The continuing legal education program is geared specifically to topics helpful to lawyers in that practice setting: trust accounting, technology developments and pitfalls, and research tips for the bar's online legal research program, Fastcase. The CLE program is followed by a town hall meeting with Chief Justice Leroy R. Hassell Sr., during which he responds to questions from the audience. The Solo & Small-Firm Practitioner Forum is well-received by the lawyers who attend and is oversubscribed each time.

TWO RESPONDENTS WENT BEYOND THE PROGRAMS listed in the column to suggest that savings could be obtained by reducing the number of prosecutors in the disciplinary system and reducing or eliminating the Mandatory CLE requirements.

We already have plans to cut costs from the disciplinary system by closing our satellite office in Alexandria in 2009. Rather than pay to keep the office up and running, we have given the four attorneys who work there the option of teleworking from their homes with support from Richmond. Two clerical positions will be eliminated. The changes will take place when the Alexandria lease expires on September 30, 2009, and will save approximately $200,000.

The MCLE requirement is set out in the Rules of the Supreme Court of Virginia, and cutting or eliminating MCLE is not an option.

We carefully evaluate on an ongoing basis the number of staff necessary to carry out the bar's mission and decide whether we need to fill vacant positions. We currently have a hiring freeze in effect on any new positions.

ONE PERSON RECOMMENDED ELIMINATING FASTCASE. The provision of an online legal research program is required by Paragraph 21 of Part 6 of the Rules of the Supreme Court of Virginia.

WE HOPE TO SAVE PUBLISHING COSTS of approximately $45,000 next year by making the contents of the *Professional Guidelines*[1] available on the website in html format, which will enable the bar's publications staff to keep the rules current at all times. Electronic access to the Rules of Professional Conduct and the Rules of the Supreme Court that govern the organization and operation of the VSB will ensure that the most up-to-date version of the rules will always be available to our members.

ONE LAST NOTE: A very important factor in our expenses over which we have little control is receivership expenses incurred when the bar is ordered by a court to close out practices of lawyers due to criminal acts, death, disability, or abandonment. The receivership budget of $200,000 for FY2007–08 was exceeded by $313,475 because of the receivership of the practice of Stephen Thomas Conrad, who is alleged to have stolen an estimated $4 million in money meant for clients. Mr. Conrad has pleaded guilty to one count of mail fraud and will be sentenced on November 14, 2008. The total expenditure for receiverships was $513,475 for the year ended June 30, 2008. Virginia Code Sections 54.1-3900.01 and 54.1-3936 govern receiverships, and require that receivers be reimbursed "reasonable fees, costs, and expenses." There are no provisions in the statutes for the receivers' fees being limited to a certain amount or percentage. The statutes further provide that the VSB must pay these monies if it has funds available. Next year's budget for receivership expenses has been increased to $300,000. We should all hope that we do not have another Conrad situation this year to further complicate our budget situation, not to mention the damage that such situations wreak upon the reputation of lawyers.

I APPRECIATE THE INPUT OF THOSE WHO RESPONDED to the last column. As you can see, determining what to cut from our budget is difficult, particularly when the amount needed to be cut is close to $400,000. The VSB staff — particularly the publications department — has been ingenious and dedicated in devising ways to reduce expenses.

There were many areas in the budget for FY2008–09 in which projected expenditures were reduced, amounting to a reduction in expenses of approxi-

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VSB Disciplinary Volunteers, Staff Meet for Annual Conference

Volunteers and staff who make up the Virginia State Bar Professional Regulation Department met in Portsmouth July 11–12 for the annual Disciplinary Conference.

The two-day program opened with the Public Protection Conclave (see story page 41). The conference followed with educational programs for new and experienced members of the VSB Disciplinary Board, district disciplinary committees, and the Standing Committee on Lawyer Discipline (COLD).

1: Stephen H. Ratliff of Fairfax (left) is the chair of COLD's subcommittee that is exploring random audits or reviews of attorney trust accounts, as an educational tool and to deter theft. Edward L. "Ned" Davis (right) attended his first disciplinary conference in his new role as VSB counsel.

2: Left-right: John D. Whittington of Manassas, vice chair of COLD; Alan Cooper, news editor of *Virginia Lawyers Weekly*; and Steven C. McCallum, vice chair of the disciplinary Third District Committee. Cooper, the luncheon speaker on July 12, summarized challenges that affect the disciplinary system, the reputation of lawyers, and the public's access to information about disciplinary cases against a lawyer.

3: The Schultz family: David R. (left), Judith Ann, and their son, Donald C. Since he retired from active law practice a decade ago, Dave — who lives in Glen Allen — has served on the Fifth District Committee, COLD, and the Disciplinary Board. Now Don, who practices in Norfolk, serves on the Second District Committee. In June, Dave ended his second term on the Disciplinary Board.


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VSB Leaders Examine Public Protection Efforts

Leaders of the Virginia State Bar's efforts to protect people from unscrupulous lawyers met in Portsmouth in July for the first-ever Public Protection Conclave.

VSB President Manuel A. Capsalis made reference to alleged recent defalcations by Virginia lawyers that exceed $10 million. "The question properly framed … is whether we can do a better job," he said to the participants.

VSB Executive Director Karen A. Gould reminded the group that "the bar's primary mission is protection of the public."

Present were volunteer lawyers with an interest in public-protection issues, as well as staff attorneys from the VSB executive and professional regulation staffs.

Capsalis convened the conclave the morning of the VSB's annual Disciplinary Conference on July 11 to discuss how the bar protects the public and where improvements can be made. He foresees the possibility of ongoing meetings — annually or more frequently — to assess how well the VSB is meeting its public protection mission.

Ideas discussed during the meeting included:

- Payee notification. This issue again is under study by the VSB Public Protection Task Force in the wake of the receivership of a Woodbridge lawyer who is suspected of having stolen at least $4 million in insurance money from hundreds of clients. The receiver in the case found evidence that payee notification could have reduced the losses. A previous proposal — considered and defeated 7–54 by the VSB Council in October 2007 — would have sought statutory requirement for insurance companies to notify third-party claimants or judgment creditors when the companies issue settlement checks to claimants.

- Random audits or less formal reviews of attorney trust accounts. In states where these are conducted, the audits educate lawyers, deter them from theft, and occasionally catch wrongdoers. A subcommittee of the VSB Committee on Lawyer Discipline is studying random audits.

- Quicker resolution of disciplinary matters and accountability to victims, complainants, and witnesses.

- A possible fast-track process for embezzlement receiverships. The former Receivership Task Force could be reconstituted to deal with these issues and the possibility of statutory authority for a less formal receivership when a lawyer dies or becomes disabled.

- Mandatory participation by lawyers in fee dispute resolution, which is rarely used.

- Providing pro bono assistance to clients who are victims of lawyer defalcations, to assist them through the Clients' Protection Fund application process.

- Requiring lawyers to carry a universal fidelity bond that would protect clients from defalcation.

- Better publicity about what the VSB does to protect clients and contact information so the public can access the assistance.

- Increased diversity in the legal profession, including the VSB volunteers and staff, so the bar can be more responsive to society.

- More support for lawyers who suffer from substance abuse and mental illness. Suggestions included education of law firms in how to intervene, working with the Conference of Local Bar Associations to provide more local assistance, and requiring mandatory continuing legal education on stress and life balance.

Capsalis said the VSB will study the suggestions made during the conclave. "I believe we were able to create a very good template for better and more efficiently providing public protection," he stated in an e-mail to participants.

Mandatory Continuing Legal Education
MCLE DEADLINE: October 31, 2008

Failure to complete twelve CLE hours including two hours in ethics/professionalism by October 31, 2008, will result in a $100 non-compliance fee. (See the Rules of the Supreme Court of Virginia Part 6, Section IV, Paragraph 19.)

Check and certify your MCLE record online with the Member Login at http://www.vsb.org.
Watch for your Form 1, End of Year Report, in November, and be sure to follow the instructions for proper completion.

VSB Employee Named 'Adoption Angel' by National Group

Lydia M. Maddox, an assistant in the office of the Virginia Lawyer Referral Service at the Virginia State Bar, was honored as a 2008 Angel in Adoption during a ceremony September 16 in Washington, D.C.

She was chosen for the award by U.S. Sen. John W. Warner of Virginia through the Congressional Coalition on Adoption Institute, a nonprofit organization that raises awareness of children in need of loving, safe homes and eliminates barriers to adoption.

Four Virginia families were among the 130 adoptive families and organizations recognized.

Maddox, who lives in King William County and is single, became involved through Third Union Baptist Church in caring for nine siblings who were removed from a local home by social services workers and put into foster care.

Two of the children, now aged twelve and seventeen, were taken in by Maddox's mother, Burrell Maddox. As Lydia Maddox helped care for them, she decided to adopt them. On November 28, 2007, the adoption was finalized, and Lydia, Tameka, and Lyric Maddox officially became a family.

Lydia Maddox took her commitment further. "Ms. Maddox … has made it a clear mission on her part to keep the children in touch with their siblings before and since the adoption," according to the biography Warner submitted to the coalition. "Not only does she make sure that her children stay in touch, but she goes out of her way to visit with the other siblings wherever they have been placed to make sure they are all in touch with each other. She has been the 'link' for all nine of the siblings."

Maddox works in the VSB's Richmond office, where she answers calls from persons who are seeking legal assistance and matches them with lawyers from the Lawyer Referral Service panel. She formerly worked briefly for One Church, One Child—a Richmond organization that works with churches to encourage adoption.

Maddox said her new role as mother gives her opportunities to "do things that my mother actually did with me and my siblings," and "enjoy childhood again as seen through their eyes."

Lyric (standing), Lydia (bottom left), and Tameka Maddox—officially a family—at the Angels in Adoption gathering.

Of the other seven children, two are old enough to live independently, three are in the process of being adopted, and two are still in foster care.

"Ms. Maddox has a big heart and has 'adopted' into her life these nine children, even if she has only legally adopted the two," the biography stated.

Saunders Joins VSB Staff

M. Brent Saunders has joined the Virginia State Bar staff as an assistant bar counsel. He will prosecute disciplinary cases in the Norfolk and Virginia Beach areas.

Saunders has spent his legal career in Danville. He most recently was a partner with Daniel, Medley & Kirby PC, where he practiced liability defense and commercial litigation and handled corporate and business matters.

He was an assistant commonwealth's attorney from 2001 until 2004. He practiced with Clement & Wheatley PC from 1998 until 2001.

Saunders received a bachelor's degree in mass communication in 1994 from James Madison University and a law degree in 1998 from the University of Richmond.

He has been active with the VSB Young Lawyers Conference, the Virginia Association of Defense Attorneys, and the Local Government Attorneys' Association of Virginia.

Before he left Danville this year to move to Richmond, he was president of the Free Clinic of Danville, which offers medical care to the working poor. During his presidency, the clinic obtained a grant that enabled it to significantly expand its services.

Saunders and his wife, Alice, have two children: Lucy, five, and Nathaniel, one.

Millette Becomes Virginia Justice

1: New Justice Millette (left) with Governor Kaine, who made the pro tem appointment to succeed Justice G. Steven Agee.

2: VSB President Capsalis presented a resolution on behalf of Virginia's bars.

Photo credit: Steve Helber, Associated Press

LeRoy F. "Lee" Millette Jr. of Manassas was sworn in as a justice on the Supreme Court of Virginia September 5 in a ceremony in Richmond.

Millette ascended to the Virginia Court of Appeals just over a year ago. When Justice G. Steven Agee joined the Fourth U.S. Circuit Court of Appeals and the General Assembly failed to elect a successor, Gov. Timothy M. Kaine appointed Millette.

Millette will be subject to election by the General Assembly in the 2009 session.

Millette, 59, was raised in Alexandria and Fairfax County. He holds economics and law degrees from the College of William and Mary. He practiced privately in Woodbridge for twelve years, then served as an assistant commonwealth's attorney in Prince William County.

He became a general district court judge in 1990 and a circuit judge in 1993.

As a Prince William Circuit judge, Millette presided over the trial of sniper John Allan Muhammad, who with a young partner killed ten people and injured two in Virginia and Maryland in October 2002. Muhammad is now awaiting execution.

Virginia State Bar President Manuel A. Capsalis presented a resolution on behalf of Virginia's statewide bars to express warm wishes and confidence that Millette will make significant contributions on the state's highest bench.

In Memoriam

Carter R. Allen
Waynesboro
August 1921–July 2008

Neill H. Alford Jr.
Charlottesville
July 1919–October 2007

Lloyd V. Anderson Jr.
Stuart, Florida
April 1943–August 2008

John K. Bancroft
Fairfax
May 1936–August 2007

Anthony J. Castorina
Arlington
October 1934–June 2008

Frank Raymond Clokey
Winchester
March 1939–July 2008

Lester L. Dillard
South Boston
September 1919–June 2008

Virginia Straley Duvall
Corolla, North Carolina
October 1940–May 2008

Joseph Richard Egan
Washington, D.C.
November 1954–May 2008

Thomas James Foltz
Alexandria
July 1947–July 2008

Edward James Friedman
Baltimore, Maryland
April 1951–July 2008

Edward A. Gage
Exeter, New Hampshire
April 1919–October 2007

Royce Lee Givens Jr.
Falls Church
August 1944–March 2008

Harold M. Gouldman Jr.
Montross
July 1916–May 2008

J. Marshall Gulley
Charlotte, North Carolina
February 1924–April 2008

Lorenza John Hammack Jr.
Lawrenceville
October 1922–June 2008

James A. Harper Jr.
Richmond
December 1929–October 2007

George E. Haw Jr.
Richmond
May 1921–June 2008

William Joe Hoppe
Richmond
February 1946–July 2008

M. Harrison Joyce
Martinsville
October 1920–December 2007

Anita Elaine Karu
McLean
July 1948–February 2008

William Barnes Lawson Jr.
Arlington
July 1925–November 2007

Dean E. Lewis
South Charleston, West Virginia
October 1930–May 2008

Pamela Marie Long
Washington, D.C.
February 1965–April 2008

Arthur Lowy
Alexandria
January 1928–January 2008

Jennifer Kelly Martin
Manassas
December 1962–March 2008

Thomas B. Mason
Roanoke
January 1919–March 2007

John M. McCarthy
Kents Store
September 1941–May 2008

Jesse Willard Meadows III
Chatham
December 1965–July 2008

Murdaugh S. Madden
Washington, D.C.
February 1922–January 2008

Eugene Williamson McCaul
Mechanicsville
June 1916–May 2008

Catherine V.P. Miller
Fredericksburg
August 1923–December 2007

Donna Lynn Miller
Nevillewood, Pennsylvania
May 1957–March 2008

Bryant Austin Newton Jr.
Slocomb, Alabama
September 1922–July 2008

Otis W. Nuckols
Richmond
March 1921–July 2008

Walter Parrs Jr.
Memphis, Tennessee
August 1943–September 2007

Matthew Andrew Pavuk
Washington, D.C.
July 1954–May 2008

Byron Robert Prusky
Philadelphia, Pennsylvania
December 1935–May 2008

John F. Rixey
Virginia Beach
October 1926–May 2008

Jerry Smith
Alexandria
November 1947–October 2007

Morton B. Spero
Chester
December 1920–July 2008

Ronald P. Stenlake
Plano, Texas
March 1941–May 2008

William Craig Summers
Richmond
November 1950–November 2007

John Dirffie Tyler
Wilbur-by-the-Sea, Florida
June 1943–January 2008

Richard A. Ward
Irvington
October 1922–July 2008

Sarah Willis Wilcox
Fairfax
September 1940–January 2008

Local Bar Elections

Hanover County Bar Association
Dale George Mullen, President
James Allen Kline IV, Vice President
Michael D'Wayne Clower, Secretary
Shawn Alan Gobble, Treasurer

Martinsville-Henry County Bar Association
Joan Ziglar, President
Kimberly Richardson Belongia, Vice President
Carroll Boston Correll Jr., Secretary-Treasurer

Mecklenburg County Bar Association
Katherine Axson Keel, President
Jonathan Elder Green, President-elect
Charles Glasgow Butts Jr., Secretary-Treasurer

Middle Peninsula Bar Association
Brian W. Decker , President
John A. Singleton, Vice President
Amy M.P. VanFossen, Secretary-Treasurer

Montgomery-Radford Bar Association
Paul Michael Barnett, President
Kay Kurtz Heidbreder, President-elect
James Clinton Turk Jr., Vice President, Radford
Christopher Austin Tuck, Vice President, Montgomery
Clifford Lee Harrison, Secretary
Marshall Jay Frank, Treasurer

Newport News Bar Association
Michael Scott Stein, President
Herbert Valentine Kelly Jr., President-elect
Robert Wayne Lawrence, Secretary
Steven Andrew Meade, Treasurer

Portsmouth Bar Association
Elizabeth Bartlett Fitzwater, President
Anetra Leta Robinson, President-elect
Kimberly Lynn Moore, Secretary

Richmond Criminal Bar Association
Richard W. Johnson Jr., President
Dean C. Marcus, Vice President
Susan L. Parrish, Secretary
Ann Cabell Baskervill, Treasurer

Virginia Association of Commonwealth's Attorneys
Joel Robert Branscom, President
Neil Samuel Vener, President-elect
Robert Beman Beasley Jr., Vice President
John Raymond Doyle III, Secretary-Treasurer

Virginia Women Attorneys Association
Kathleen Joanna Lynch Holmes, President
Chandra Dore Lantz, President-elect
Barbara Margaret Rewald Marvin, Secretary
Catherine Mary Reese, Treasurer

Williamsburg Bar Association
Cressondra Brown Conyers, President
Daniel Read Quarles, Vice President
William Hunter Old, Secretary
Gordon Carmalt Klugh, Treasurer

Wise County & City of Norton Bar Association
Martha Suzanne Kerney-Quillen, President
Jennifer Ashley Sturgill, Vice President
William Joseph Sturgill, Secretary-Treasurer

CALL FOR NOMINATIONS

Harry L. Carrico Professionalism Award

Sponsored by the VSB Section on Criminal Law

Nominations must be received no later than December 5, 2008.

For more information visit http://www.vsb.org/site/sections/criminal/view/Professionalism-Award/

On September 14, 2008, at the Mariner's Museum in Newport News, Victoria Redel spoke at a program entitled "Remembering the Saga of the S.S. *Quanza*," sponsored by the Peninsula Jewish Historical Society. Redel, whose father, Irving Redel, was a seventeen-year-old refugee on board the *Quanza*, is the acclaimed author of *The Border of Truth*, a novel based on the 1940 experiences of the passengers on the ship. Frank O. Brown Jr. of the Virginia State Bar Senior Lawyers Conference, who wrote an article on the *Quanza* in the April 2008 issue of *Virginia Lawyer* (see "Jacob L. Morewitz, Eleanor Roosevelt, and the Steamship *Quanza*," *Virginia Lawyer*, April 2008), gave brief remarks and made a presentation of the April 2008 issue of the magazine to Redel. *Photo credit Susan Brown.*

Pro Bono Work Honored in Winchester

Attorneys in the Winchester area have been recognized for pro bono work through the Blue Ridge Legal Services Pro Bono Referral Program. The awards were presented at the annual meeting of the Winchester-Frederick County Bar Association.

Awards went to James R. Larrick Jr., Marilyn A. Solomon, and the members of law firm Buchbauer & McGuire PC — Peter W. Buchbauer, James J. McGuire, Lawrence P. Vance, and Kelly C. Ashby. Thomas A. Louthan, a past president of the bar association, also received an award for his help with a recent pro bono recruitment drive.

CALL FOR NOMINATIONS

2009
LEWIS F. POWELL JR. PRO BONO AWARD
and the
2009 Oliver White Hill Law Student Pro Bono Award

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

For more information visit http://www.vsb.org/site/pro_bono/resources-for-attorneys/ and scroll to Awards & Honors.

Legal Aid Programs Offer Foreclosure Assistance

Virginia legal aid programs are joining other organizations in offering assistance to people faced with losing their homes because of unmanageable mortgages, often obtained through subprime loans.

Foreclosure assistance programs give lawyers a place to send people who come to them for help, and a place to provide pro bono help.

Some legal aid programs have obtained newly available federal funds to provide attorneys, paralegals, and housing counselors trained to assist people in foreclosure who meet the legal aid income guidelines.

The mortgage assistance staff helps the homeowner negotiate with lenders and evaluate the benefits of declaring bankruptcy. They also refer clients to other agencies to help with housing and social services where needed.

The legal aid-based services currently are available in at least two hard-hit areas — Southwest and Northern Virginia. Southwest Virginia Legal Aid Society is offering the service by phone and mail through its Castlewood and Christiansburg offices. Legal Services of Northern Virginia (LSNV) has created a Foreclosure Legal Assistance Project.

Foreclosures are increasing precipitously throughout the state. According to figures from the Virginia Housing Development Authority, Virginia had only 3,300 homes in the foreclosure process in mid-2006. In spring 2008, 18,300 were in foreclosure statewide. More than 10,000 of those were in Northern Virginia.

James A. Ferguson, executive director of LSNV, said the decline began with holders of subprime mortgages who could not keep up the payments, but now has expanded to other homeowners who have fallen behind because they lost their jobs or are tapped out by increased fuel costs and inflation.

Larry Harley, director of Southwest Virginia Legal Aid, added to that list people who fall ill or whose families break up.

The foreclosure crisis has affected working people who normally don't meet the poverty guidelines required for legal aid assistance, but now need legal and economic help. Ferguson said that suburban residents are now facing crises that used to be limited to the poorest people. "Our focus is low-income folks," but with the foreclosure activity "we also are seeing people from all across the economic spectrum."

Local governmental bodies such as the Fairfax County Board of Supervisors are trying to address the problem to avert more foreclosures before anticipated federal relief arrives. In Northern Virginia, blocks of seemingly affluent neighborhoods contain a handful of occupied houses among many that are abandoned.

Information on other programs that offer foreclosure assistance can be found on websites sponsored by Virginia Gov. Timothy M. Kaine (**http://virginiaforeclosureprevention.com/index.asp**) and Attorney General Robert F. McDonnell (**http://www.oag.state.va.us/CONSUMER/mortgage_Foreclosure_Prevention.html**).

Free and Low-Cost Pro Bono Training

Visit the Pro Bono page on the VSB website for free and low-cost pro bono trainings and volunteer opportunities:
http://www.vsb.org/site/pro_bono/resources-for-attorneys

Construction Law and Public Contracts

by R. Webb Moore

Virginia construction lawyers and their clients are challenged during these uncertain economic times. The Construction Law and Public Contracts Section of the Virginia State Bar presents five articles written by members of our section to assist members of the bar in meeting those challenges.

Michael A. Branca reviews the Virginia Fraud Against Taxpayers Act and its impact on the construction industry. Kristan B. Burch addresses who needs a state contractor's license in Virginia and why. Todd R. Metz and Chris W. Cheatham describe green building construction projects in Virginia. Courtney Moates Paulk asks whether unlicensed contractors may recover money damages under Virginia law, and Marie Summerlin Hamm of the Virginia Association of Law Libraries covers construction law research resources.

The construction law section comprises more than seven hundred members under the leadership of a board of governors. Richard F. Smith is our chair, and Jack Rephan is immediate past chair. The section has six standing committees — seminar, handbook, newsletter, publications, summer program, and website.

The Twenty-Ninth Annual Fall Construction Law Seminar, which will be held on November 7 and 8, 2008, at the Williamsburg Lodge, will be an opportunity for Virginia practitioners to obtain a year of continuing legal education credits in two days.

Virginia CLE will soon publish the *Virginia Construction Law and Public Contracts Deskbook*, edited by Smith with contributions from other section members. This volume should be on the shelves of every law library in the commonwealth.

Opportunities for involvement, participation, and contribution abound in the Construction Law and Public Contracts Section. We invite Virginia lawyers to contact Dolly C. Shaffner, VSB section liaison, at (804) 775-0518 or shaffner @vsb.org for more information. Visit our website at **http://www.vsb.org/site/sections/construction/**.

Fraud Initiatives that Impact the Construction Industry

by Michael A. Branca

The Virginia Fraud Against Taxpayers Act[1] (FATA) became effective on January 1, 2003. The FATA established a new cause of action in Virginia aimed at those who submit false claims for payments to the commonwealth. There are no reported FATA cases. However, the FATA is modeled after the Federal Civil False Claims Act[2] (FCA), which is used by the U.S. Department of Justice to regulate the conduct of contractors, subcontractors, suppliers, and other construction industry participants on federal and federally funded projects. A reasonable question, therefore, is whether the FATA will be employed in a similar manner in Virginia. Assuming that it is, then the case law that governs implementation of the FCA will likely be borrowed by Virginia courts in the implementation of the FATA. Below is a summary of the FATA and surveys of intriguing construction-related FCA cases.

Violations of the FATA are severely punished.

Prohibited Acts

The FATA identifies seven prohibited acts, the first three of which have been most commonly prosecuted under the FCA. The FATA establishes liability to the commonwealth for any person who:

- knowingly[3] presents, or causes to be presented, to an officer or employee of the commonwealth a false or fraudulent claim[4] for payment or approval;
- knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the commonwealth;
- conspires to defraud the commonwealth by getting a false or fraudulent claim allowed or paid.[5]

Civil Penalty and Damages

Violations of the FATA are severely punished. Any person who commits a prohibited act is liable to the state for a civil penalty between $5,500 and $11,000, plus three times the amount of damages sustained by the commonwealth.[6] Moreover, the violator also is liable to the state for the costs of the civil action brought to recover any penalty and damages.[7] FATA violators also are likely to be subject to the debarment and suspension provisions of the Virginia Public Procurement Act (VPPA).[8]

Enforcement

The FATA has two enforcement mechanisms. The attorney general of Virginia is charged with investigating violations and bringing civil actions against alleged violators.[9] The FATA provides the attorney general with broad powers to investigate alleged violations.

The FATA provides a detailed procedure for private plaintiffs to bring a civil action on behalf of the commonwealth.[10] The FATA deputizes the public to act as private attorneys general. Under the FCA, these private attorneys general are called qui tam relators. The FATA provides the private plaintiff with a substantial bounty, ranging from 10 percent to 30 percent of the proceeds of the action or settlement of the action, depending upon the private plaintiff's contribution to the prosecution of the action.[11]

Federal False Claims Act

As indicated above, the FATA was modeled after the FCA and, accordingly, the FATA provisions quoted from and discussed above have identical or nearly identical FCA counterparts. Thus the implementation of the FCA is a good predictor for the future implementation of the FATA.

Elements of an FCA Cause of Action

A cause of action for an FCA claim requires that the claim was presented to an agent of the federal government for payment, the claim was false or

fraudulent, the contractor knew that the claim was false or fraudulent, and the falsity was material to the government's decision to pay the claim.[12]

Falsity

Although the FCA does not define false, there is wide agreement that a claim must be a lie in order to be considered false.[13] The U.S. District Court for the Eastern District of Virginia has stated:

> It is well-established that the FCA requires proof of an objective falsehood. *See Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1477-78 (9th Cir. 1996). Thus, to establish falsity "plaintiff must demonstrate that an objective gap exists between what the Defendant represented and what the Defendant would have stated had the Defendant told the truth." *United States v. Prabhu*, 442 F.Supp. 2d 1008, 1033 (D. Nev. 2006). Importantly, courts have held that "[a] legitimate estimate by a contractor of work performed is not a 'false claim.'" *San Francisco Bay Area Rapid Transit Dist. V. Spencer*, 2006 U.S. Dist. LEXIS 88022 at 51 (N.D.Ca. 2006).[14]

Disagreements between owners and contractors over the requirements of a contract are common, and frequently these disagreements are based on competing interpretations of specific contract language. In a typical case, either the parties amicably resolve the dispute or a judge is called upon to determine which party's interpretation is correct. Where the owner is the federal government, however, the application of the FCA may hinge on the contractor's interpretation. Although not a bright-line rule, the consensus view is that a contractor's interpretation that is objectively unreasonable may be considered a lie and consequently can serve as the basis of an FCA cause of action.[15] In one leading case, the U.S. Court of Appeals for the Federal Circuit utilized a plausibility standard:

> If a contractor submits a claim based on a plausible but erroneous contract interpretation, the contractor will not be liable, absent some specific evidence of knowledge that the claim is false or of intent to deceive. Yet when a contractor adopts a contract interpretation that is implausible in light of the unambiguous terms of the contract and other evidence (such as repeated warnings from a subcontractor or the fact that the interpretation is contrary to well-established industry practice), the contractor may be liable under the FCA or the Contract Disputes Act even in the absence of any deliberate concealment or misstatement of facts.[16]

In this case, the Federal Circuit concluded that the FCA was violated because the contractor's interpretation was contrary to clear contract requirements and therefore could not be deemed plausible.

Employing the plausibility standard, the U.S. Court of Federal Claims recently rejected an FCA counterclaim.[17] In an earlier opinion, the court had denied the contractor's differing site condition claim.[18] Based on this denial, the U.S. argued that the contractor's claim was false and therefore violative of the FCA. The court disagreed, and stated:

> Plaintiff's failure to establish a Type I differing site condition claim *ipso facto*, does not evidence that the Plaintiff submitted a false or fraudulent claim. That determination involves a "fact specific reasonableness determination." *See Crane Helicopter Servs. v. United States*, 45 Fed. Cl. 410, 434-35 (1999) (*citing United States v. Seay*, 718 F.2d 1279, 1286 (4th Cir. 1983), cert. denied, 467 U.S. 1226, 104 S.Ct. 2677 (1984).
> . . . .
>
> In this case, the contract documents did not indicate a precise quantity of SRF that would be found on site, only that some amount of SRF would be available ... Consequently, the plaintiff had to estimate the amount of SRF that would be available in order to submit a bid. Although hindsight has shown that the plaintiff's estimate was not accurate, it was not in direct contravention of clear contract specifications. *See Commercial Contractors Inc.*, 154 F.3d at 1368. Furthermore, the plaintiff's assumption was not so unreasonable, given the information in the contract documents, as to rise to the level of a false claim.[19]

Disagreements between owners and contractors over the requirements of a contract are common

The irony in this case was that the court was first required to decide the merits of the contractor's differing site conditions claim and then, after denying that claim, to decide whether the claim had sufficient merit so as not to be deemed false. The court obviously found enough merit to reject the FCA counterclaim.

The Knowledge Requirement

The "knowing" standard is met even without proof of a specific intent to defraud the government.[20] On the other hand, gross negligence regarding the truth or falsity of the information is not sufficient to meet the knowing standard.[21] The knowledge element and the falsity element are often analyzed together in FCA claims relating to the correct interpretation of a contract's requirements. The falsity element is more of an objective standard, such as whether the contractor's interpretation was plausible. The issue is slightly different from the perspective of the knowledge element. Courts will examine whether the contractor's reliance on its contract interpretation was in good faith, because a contractor cannot possess the requisite mental state to satisfy the FCA where its interpretation was developed and relied upon in good faith.[22] In contrast to the largely objective standard utilized to judge the falsity element, consideration of the knowledge element is a far more subjective exercise.

FCA Violations in the Construction Industry

FCA violations have been found in every stage of a construction project, from bid preparation and submission to project closeout. Virginia authorities could potentially administer the FATA similarly.

Bid and Proposal Preparation

False information or misrepresentations included within the contractor's bid or proposal can serve as the basis of an FCA claim.[23] This conduct has been deemed to be fraud-in-the-inducement.[24] In one recent case, the court of federal claims held that the contractor committed fraud-in-the-inducement through bait-and-switch tactics concerning the identification of key personnel, subcontractors, and means and methods in its proposal.[25] The court found that the contractor did not intend to supply the personnel, use the subcontractors, and follow the means and methods identified in the contractor's proposal. Accordingly, the proposal constituted a fraudulent misrepresentation.[26]

Statutory and Regulatory Compliance

Contractors regularly certify their compliance with various statutory and regulatory schemes. For example, in the federal arena contractors certify that they are paying the prevailing wages under the Davis-Bacon Act, that they have not violated the Anti-Kickback Act, that the materials that they are supplying are in accordance with the Buy American Act, and that the contractor is in compliance with the contract's Disadvantaged Business Enterprise requirements. Virginia has similar certification requirements in its public procurements. A contractor that submits a materially false certification may subject itself to liability under the FCA or the FATA.[27]

Monthly Pay Applications

A contractor's monthly pay application contains a host of representations and certifications on both federal and Virginia projects. For example, the standard Virginia Department of General Services payment application form includes the following certifications:

- The work covered by this certification has been completed in accordance with the contract documents.
- All previous progress payments received from the owner on account of work done under this contract have been applied to discharge in full (except for allowable retainage) all obligations of contract.

Similarly, Federal Acquisition Regulation Clause 52.232-5(c), Payments under Fixed-Price Construction Contracts, includes three certifications:

- The amounts requested are only for performance in accordance with the specifications, terms, and conditions of the contract.
- All payments due to subcontractors and suppliers from previous payments received under the contract have been made, and timely payments will be made from the proceeds of the payment covered by this certification, in accordance with subcontract agreements and the requirements of Chapter 39 of Title 31, *U.S. Code* [the Prompt Payment Act].
- This request for progress payment does not include any amounts that the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract.

The first certification in the DGS form and the first certification in the FAR clause address the work performed for which payment is requested. In the federal arena, the certification has been deemed to be false under the following circumstances:

- The quantity of work performed is overstated.[28]
- The quality of the work does not comply with the requirements of the contract.[29]

The Virginia and federal Prompt Payment acts[30] require contractors to promptly pay their subcontractors from monies received from the government on those subcontractors' behalf. As reflected above, these prompt pay requirements are incorporated into the monthly payment application certifications on federal and state projects. Failure to pay subcontractors in accordance with these requirements — or worse, failure to pay at all — could lead to allegations of FATA or FCA noncompliance. For example, in one federal case, despite failing to pay its

subcontractor all of the amounts received from earlier pay applications, the contractor executed the standard FAR certification on subsequent payment applications. This conduct was deemed to violate the FCA.[31] A contractor on a public project in Virginia making similar misrepresentations would likely be found in violation of the FATA.

Other Federal Anti-fraud Tools

The FCA is frequently used in tandem with other federal antifraud statutes. For example, the Contract Disputes Act[32] (CDA) provides that a contractor who is unable to support any part of its claim due to a misrepresentation of fact or fraud shall be liable for an amount equal to the unsupported part of the claim in addition to all costs incurred by the government in reviewing the claim.[33] In a recent case, the court of federal claims held that a construction contractor violated the antifraud provision of the CDA.[34] The court described the purpose of the CDA's anti-fraud provision as follows:

> This subsection is included out of concern that the submission of baseless claims contribute to the so-called horsetrading theory where an amount beyond that which can be legitimately claimed is submitted merely as a negotiating tactic.[35]

The court concluded that the contractor violated the anti-fraud provision by certifying a total cost claim that was not supported by the contractor's records or by its expert witnesses. The court found that the contractor's claim was submitted as a "negotiating ploy to gain leverage against the Government," and this constituted evidence of bad faith in the contractor's certification.[36] The contractor's total certified claim was in the amount of $63.9 million, and the court found that $50.6 million was unsupported as a result of the contractor's fraud.[37] Accordingly, the court entered judgment against the contractor in that amount.

The Forfeiture of Fraudulent Claims Act (Forfeiture Statute) provides that "[a] claim against the United States shall be forfeited … by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof."[38] To prevail under the Forfeiture Statute, the government is required to prove by clear and convincing evidence that the contractor knew that its claims were false, and that it intended to defraud the government by submitting those claims.[39] If the government meets its burden of proof, then the contractor's claim is forfeited in its entirety.[40]

The harsh application of the Forfeiture Statute in the construction setting was exemplified in a recent case in which the court of federal claims rendered a decision ordering the forfeiture of more than $53 million in claims pending in that court and related jurisdictions arising out of several government projects.[41] The forfeiture was triggered by violations of the FCA and the Anti-Kickback Act not directly related to any of the claims themselves. ■

Endnotes:

1 *Va. Code* §§ 8.01-216.1 *et seq.*
2 31 *U.S.C.* §§ 3729 *et seq.*
3 "For purposes of this section, the terms 'knowing' and 'knowingly' mean that a person, with respect to information (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." *Va. Code* § 8.01-216.3C.
4 "'Claim' means any request or demand, whether under a contract or otherwise, for money or property that is made to a contractor, grantee, or other recipient if the commonwealth provides any portion of the money or property that is requested or demanded, or if the commonwealth will reimburse such contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded." *Va. Code* § 8.01-216.2.
5 *Va. Code* § 8.01-216.3A.
6 *Va. Code* § 8.01-216.3A.
7 *Va. Code* § 8.01-216.3B.
8 *Va. Code* § 2.2-4321. The FATA does not expressly provide that violators are subject to suspension or debarment. Nevertheless, given the nature of a FATA violation and the purpose underlying the suspension and debarment provisions of the VPPA, it is reasonable to assume that suspension and debarment officials would rely on a FATA violation in reaching a suspension or debarment determination.
9 *Va. Code* § 8.01-216.4. The FATA defines "attorney general" to include deputies and assistant attorneys general employed and specially designated by the attorney general. *Va. Code* § 8.01-216.2.
10 *Va. Code* §§ 8.01-216.5 - 8.01-216.7.
11 *Va. Code* § 8.01-216.7A and 216.7B.
12 *See e.g., U.S. ex rel Harrison v. Westinghouse Savannah River Company*, 176 F.3d 776, 784-85 (4th Cir. 1999); *United States ex rel. Werner v. Fuentez Systems Concepts Inc.*, 319 F. Supp. 2d 682, 684-85 (N.D.W.Va. 2004), *aff.* 2004 U.S. App. LEXIS 2556 (4th Cir. 2004).
13 *U.S. ex rel. Phillips v. Pediatric Services of America Inc.*, 142 F.Supp.2d 717 (W.D.N.C. 2001); *U.S. v. Southern Maryland Home Health Services Inc.*, 95 F.Supp.2d 465 (D.Md. 2000).
14 *United States ex rel. DRC Inc. et al. v. Custer Battles LLC et al*, 472 F. Supp. 2d 787, 797 (E.D.Va. 2007) (DRC III).
15 *Commercial Contractors Inc. v. U.S.*, 154 F.3d 1357, 1366 (Fed.Cir. 1998); *U.S. ex rel. Bettis v. Odebrecht Contractors of California Inc.*, 393 F.3d 1321, 1329 (D.C.Cir. 2005), *citing, U.S. ex rel. Siewick v. Jamieson Science and Engineering Inc.*, 214 F.3d 1372, 1378 (D.C.Cir. 2000).
16 *Commercial Contractors Inc. v. U.S.*, 154 F.3d 1357, 1366 (Fed. Cir. 1998).
17 *Trafalgar House Construction Inc. v. United States*, 77 Fed.Cl. 48 (Fed.Cl. 2007).
18 *Trafalgar House Construction Inc. v. United States*, 73 Fed. Cl. 675 (2006).
19 *Trafalgar House Construction Inc. v. United States*, 77 Fed.Cl. 48, 55-56 (Fed.Cl. 2007).
20 *Riley Construction Company v. U.S.*, 65 Fed.Cl. 264, 268 (2005).
21 *See e.g., U.S. v. Krizek*, 111 F.3d 934, 941 (D.C.Cir. 1997) (reckless disregard lies on a continuum between gross negligence and intentional harm).

Fraud continued on page 55

A Contractor's License: Who Needs One and Why

by Kristan B. Burch

When completing work for a contractor, one of the first questions to ask is whether each of the contractors involved has a valid Virginia contractor's license. The answer to this question not only is relevant to contract negotiations but also affects construction disputes for completed work. The answer to the licensure question can be quickly obtained by entering the names of the contractors in the search box on the Virginia Department of Professional and Occupational Regulation's (DPOR) website (**http:www.dpor.virginia.gov**).[1] This article examines the basic statutory requirements for licensure and the consequences of failing to comply with such requirements.

There are three different classes of contractors, with the requirements for licensure varying amongst the three classes.

Who Needs a Contractor's License?

The licensure requirements for contractors flow from the following statutory provision: "No person shall engage in, or offer to engage in, contracting work in the Commonwealth unless he has been licensed under the provisions of this chapter."[2] The *Code of Virginia* contains several narrow exceptions to the licensure requirements, including exceptions for governmental agencies that perform work with their own forces and persons who perform or supervise construction of no more than one primary residence owned by them and for their own use during any twenty-four month period.[3] Likewise, licensed architects and engineers are excluded from the licensure requirements when they engage in contracting work or operate as owner-developers when bidding on or negotiating design-build contracts or performing services other than construction services under a design-build contract, as long as all construction services are rendered by a licensed contractor.[4]

What Type of License Is Needed?

There are three different classes of contractors, with the requirements for licensure varying amongst the three classes.[5] To determine whether a contractor is Class A, B, or C, the contractor should look at the cost of the contracts and projects for which he is doing work. The code defines a Class A contractor as one who performs or manages construction when the total value for a single contract or project is $120,000 or greater, or when the total value of all work by the contactor within any twelve-month period is $750,000 or greater.[6] A Class B contractor performs or manages construction when the total value for a single contract or project is between $7,500 and $119,999, or when the total value of all work by the contractor within any twelve-month period is between $150,000 and $749,999.[7] A Class C contractor performs or manages construction when the total value for a single contract or project is between $1,001 and $7,499, or when the total value of all work by the contractor within any twelve-month period is less than $150,000.[8]

A recent decision by the Circuit Court of Fairfax County underscores the importance of applying for and obtaining the proper class license.[9] In *Daniel Jones Remodeling LLC v. Chiu*, the plaintiff was a contractor seeking an additional $62,355.42 from homeowners in connection with a partial remodeling job. Under the contract with the homeowners, the contractor was entitled to $128,600 plus additional compensation for any extra labor or materials resulting from alterations or deviations. The circuit court dismissed the plaintiff's complaint because the contractor only had a Class B contractor's license but had entered into a contract with the homeowners for more than $120,000.[10]

What Are the Requirements for Each Class?

For each of the licensure classes, the contactor must submit a written application and pay a fee established by the Board for Contractors (Board).[11] As part of the application process, the contractor must provide information for the previous five years regarding outstanding debts or judgments past due, outstanding tax obligation, defaults on bonds, and past or pending bankruptcies.[12] In addition, when the applicant is a firm, it must disclose whether any members of its

"responsible management"[13] or any individuals for the firm have had a misdemeanor conviction within three years of the application or have had any felony convictions.[14] For Class A and Class B applications, the contractor also must submit information regarding financial position.[15]

As part of the application process, applicants for Class A, B, and C licenses must name a qualified individual who is at least eighteen years old and is a full-time employee of the firm or is a member of the responsible management of the firm.[16] Applicants for Class A and B licenses also must name a designated employee[17] who is at least eighteen years old, is a full-time employee of the firm or is a member of the responsible management of the firm, and has passed a board-approved examination (or is exempted from such exam requirement).[18]

What Happens if a Contractor's License Lapses?
A contractor license issued in Virginia expires two years from the last day of the month in which the license was issued.[19] In order to be eligible to renew its license, the contractor must continue to meet all of the requirements for that class of licensure.[20]

Before a license expires, the DPOR mails a notice of renewal to the contractor at the last known address.[21] Even if a contractor does not receive the notice from the DPOR, the contractor still is required to renew the license before it expires.[22] The contractor must complete the renewal form and return the form and appropriate fee[23] to the DPOR within thirty days of the date when the license expires.[24]

If the DPOR receives the form and the fee after the thirty-day period, then the contractor must follow the reinstatement procedure and pay the reinstatement fees.[25] A contractor is not eligible to have its contractor license reinstated if one year has passed from the expiration date of the license and instead must apply for a new license.[26] To the extent that a license is reinstated by the DPOR, the contractor is seen as having been continually licensed without any interruption.[27] If the board refuses to reinstate a license, the contractor can appeal that decision.[28]

Does a Contractor Need a New License When Its Name Changes?
A contractor license is issued to a firm and is not transferrable.[29] If the legal entity holding the license is dissolved or altered, then the new business entity must obtain a new license.[30] For example, if a contractor is a corporation and that corporation dissolves, then the new entity must apply for a new contractor license.[31] Likewise, if the contractor is a sole proprietor and the sole proprietor dies, then the business must obtain a new contractors license.[32] If the contractor simply changes its name without altering the corporate structure, then the contractor must report the name change to the Board in writing within thirty days of the name change, and a license with the new name will be issued.[33]

What Information Must Be Regularly Updated with the Board?
A contractor must report in writing to the Board the following changes within the following time periods:

- Address change — thirty days to report[34]
- A change in the officers of a corporation, the managers of a LLC, or the officers or directors of an association — ninety days to report[35]
- Change of designated employee — ninety days to report[36]
- Change of qualified individual — forty-five days to report[37]

On What Grounds Can the Board Deny or Revoke Licenses?
The *Code of Virginia* and the *Administrative Code* contain detailed lists of prohibited conduct by contractors.[38] The Board has the power to suspend, revoke, or deny renewal of a contractor's license if the contractor violates any of the statutes or regulations relevant to contractors.[39] Likewise, if a contractor is shown to have a "substantial identity of interest" with a contractor whose license has been revoked or not renewed, the Board also can suspend, revoke, or deny a license.[40]

A contractor license is issued to a firm and is not transferrable.

What Are the Criminal Penalties for Contracting Without a License?
Undertaking work without a valid contractor's license or performing work without the proper class of license is prohibited and constitutes com-

mission of a Class 1 misdemeanor.[41] In addition, a contractor is subject to a fine not to exceed five hundred dollars a day for each day in violation.[42] While the case law is sparse, appellate-level decisions confirm that criminal charges are being brought against individuals who fail to comply with the licensure requirements.[43]

What Are the Civil Ramifications for Contracting Without a License?

The Supreme Court of Virginia describes the purpose of the licensure statutes and regulations as "protect[ing] the public from inexperienced, unscrupulous, irresponsible, or incompetent contractors."[44] To "effectuate this purpose," Virginia courts have denied unregistered contractors the right to enforce contracts "as a penalty for failing to comply with the registration statutes" while permitting the innocent party to enforce the contract.[45] Likewise, a surety that guarantees the performance of an unlicensed contractor remains liable for damages for the unlicensed contractor's breach of contract.[46]

Through amendments to the statutory scheme, the legislature has sought "to strike a balance: to penalize those whose violations of the statutory scheme are knowing, but to excuse those who perform in good faith and whose violations are inadvertent."[47] Section 54.1-1115(C) provides that no person can assert lack of licensure as a defense to a lawsuit "if the party who seeks to recover from such person gives substantial performance within the terms of the contract in good faith and without actual knowledge that a license … was required … to perform the work for which he is seeking to recover payment."[48] Likewise, a mechanic's lien filed by an unlicensed contractor with actual knowledge of the licensing requirements can be held unenforceable and invalid.[49] Under the applicable statute and case law, the standard boils down to a determination of whether the unlicensed contractor had knowledge of the licensure requirements.

Conclusion

Careful compliance by contractors with the licensure statutes and regulations is critical based on the harsh consequences for engaging in contracting work without a valid license. Not only could a contractor be subject to criminal penalties, but it also may lose the right to enforce contract and lien rights. ■

Endnotes:

1 Searches can determine whether a contractor has a Virginia contractor license and to check the compliance history and any disciplinary actions for a contractor. Any person can file a complaint against a licensed contractor, and the Director shall investigate such complaints and take disciplinary action as needed. *Va. Code Ann*. § 54.1-1114.

2 *Va. Code Ann*. § 54.1-1103(A). "Contracting work" is not defined by the *Code of Virginia*. Nevertheless, the term "contractor" is defined. *Id.* at § 54.1-1100; *see also Bowers Family Enters. LLC v. Davis Brothers Constr. Co. Inc.,* 55 Va. Cir. 11 (Richmond 2001) (holding that Bowers would have been acting as a contractor, not a construction manager, and accordingly would have needed a license).

3 *Va. Code Ann*. § 54.1-1101. Section 1101 contains additional categories of entities and persons to which the licensure requirements do not apply.

4 *Id*. at § 54.1-1103(D).

5 The applicable regulations also define the different types of contractors, including those that provide specialty services. 18 *Va. Admin. Code* (VAC) 50-22-20, 50-22-21.

6 *Va. Code Ann*. § 54.1-1100.

7 *Id.*

8 *Id.*

9 *Daniel Jones Remodeling LLC v. Chiu*, No. CL-2007-14511 (Fairfax County Apr. 24, 2008) (*Va. Lawyers Weekly* No. 008-8-126).

10 *Id*. at n.2.

11 *Va. Code Ann*. §§ 54.1-1106, 54.1-1108, 54.1-1108.2. The fee schedule for licenses and exams is set forth in 18 VAC 50-22-100.

12 18 VAC 50-22-40(C), 50-22-50(E), 50-22-60(E).

13 18 VAC 50-22-10 lists the individuals included in "responsible management."

14 *Id*. at 50-22-40(E), 50-22-50(G), 50-22-60(G).

15 *Id.* at 50-22-50(D), 50-22-60(D).

16 *Id.* at 50-22-40(B), 50-22-50(C), 50-22-60(C). The minimum number of years of experience varies between the three classes: Class C is two years; Class B is three years; and Class A is five years.

17 *Id.* at 50-22-50(B), 50-22-60(B).

18 *Va. Code Ann*. § 54.1-1108.1.

19 18 VAC 50-22-110; *see also Va. Code Ann*. § 54.1-1109.

20 18 VAC 50-22-130(B).

21 *Id.* at 50-22-120.

22 *Id.*

23 *Id.* at 50-22-140.

24 *Id.* at 50-22-130(A).

25 *Id.* at 50-22-130(A), 50-22-160. The reinstatement fees are set forth in 18 VAC 50-22-170.

26 *Id.* at 50-22-170.

27 *Id.* at 50-22-180(A)-(B).

28 *Id.* at 50-22-190.

29 *Id.* at 50-22-210.

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 50-22-230(A).

34 *Id.* at 50-22-230(B).

35 *Id.* at 50-22-220(A).

36 *Id.* at 50-22-220(B). The fee for this change is set forth in 18 VAC 50-22-250.

37 *Id.* at 50-22-220(C). The fee for this change is set forth in 18 VAC 50-22-250.

38 *Va. Code Ann.* § 54.1-1115; 18 VAC 50-22-260.

39 *Va. Code Ann.* § 54.1-1110.

40 *Id.*

41 *Va. Code Ann*. § 54.1-1115.

42 *Id.*

43 *See, e.g., Haley v. Commonwealth of Virginia*, No. 2023-98-4, 2000 WL 29989 (Va. Ct. App. Jan. 18, 2000) (appealing conviction for contracting without a state contractor license); *Sams v. Commonwealth of Virginia,* No. 1007-96-2, 1997 WL 147445 (Va.

Ct. App. April 1, 1997) (appealing conviction of two counts of unlawfully and feloniously practicing a profession or occupation without first obtaining a valid license or certificate); *see also McCary v. Commonwealth of Virginia,* 42 Va. App. 119, 128, 590 S.E.2d 110, 115 (Va. Ct. App. 2003) ("McCary's failure to obtain a license is probative of his fraudulent intent").

44 *F.S. Bowen Elec. Co. Inc. v. Foley,* 194 Va. 92, 96, 72 S.E.2d 388, 391 (1952); *see also Bacigalupo v. Fleming,* 199 Va. 827, 832, 102 S.E.2d 321, 324 (1958).

45 *Sutton Co. Inc. v. Wise Contracting Co. Inc.,* 197 Va. 705, 709-10, 90 S.E.2d 805, 808 (1956); *Cohen v. Mayflower Corp.,* 196 Va. 1153, 1162-63, 86 S.E.2d 860, 865 (1955).

46 *Cohen,* 196 Va. at 1163, 86 S.E.2d at 865-66.

47 *J.W. Woolard Mech. & Plumbing Inc. v. Jones Dev. Corp.,* 235 Va. 333, 339, 367 S.E.2d 501, 504 (1988); *D&S Elec. Inc. v. RC Elec.,* CL07-1314 (Norfolk Dec. 13, 2007).

48 *See, e.g., All Am. Contractors Inc. v. Betonti*, 53 Va. Cir. 24 (Fairfax County 2000) (holding that parties failed to establish lack of actual knowledge of licensure requirements); *Dodson Roofing Co. v. Johnson*, 32 Va. Cir. 400 (Richmond 1994) (holding that contractor was innocently unaware of substantive requirements of contractors' statutes, and therefore his lack of licensure cannot be used as a defense); *see also In re Anderson*, 349 B.R. 448, 461 (E.D. Va. 2006) (applying safe harbor provision to appellees as there was no persuasive evidence that either acted in bad faith and with actual knowledge of licensure requirements).

49 *Lower v. Cranch,* 32 Va. Cir. 110 (Loudoun County 1993) (holding that if subcontractor had actual knowledge that contractor was not licensed, such knowledge would bar recovery on subcontractor's mechanic's lien); *see also Butler v. Creative Design Builders Inc.,* 24 Va. Cir. 362 (Louisa County 1991) (to the extent that an owner could assert a lack of licensure defense against the general contractor, then owner also can assert that defense against subcontractor's lien).

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22 *U.S. ex rel. Oliver v. The Parsons Company*, 195 F.3d 457, 463 (9th Cir. 1999); *U.S. ex rel. Norbeck v. Basin Electric Power Cooperative*, 248 F.3d 781, 791-794 (8th Cir. 2001); *U.S. v. Newport News Shipbuilding Inc.*, 276 F.Supp.2d 539, 564-65 (E.D.Va. 2003).

23 *See e.g., U.S. ex rel. Bettis v. Odebrecht Contractors of California Inc.*, 393 F.3d 1321, 1326-27 (D.C.Cir. 2005); *U.S. ex rel Harrison v. Westinghouse Savannah River Company*, 176 F.3d 776, 787-88 (4th Cir. 1999); *U.S. ex rel. Wilkins v. North American Construction Corporation, et al*, 173 F.Supp.2d 601, 631-34 (So.D.Tx. 2001); *U.S. v. CFW Construction Co. et al*, 649 F.Supp. 616, 618 (D.S.C. 1986); *U.S. v. General Dynamics Corporation*, 19 F.3d 770 (2nd Cir. 1994).

24 *Id.*

25 *Daewoo Engineering and Construction Co. LTD. v. United States*, 73 Fed. Cl. 547, 596-97 (2006).

26 *Id.*

27 *U.S. ex rel Harrison v. Westinghouse Savannah River Company*, 176 F.3d 776, 786-87 (4th Cir. 1999) (general survey); *U.S. ex rel. Plumbers and Steamfitters Local Union v. C.W.Roen Construction Co.*, 183 F.3d 1088 (9th Cir. 1999) (prevailing wages); *Ab-Tech Construction Inc. v. U.S.*, 31 Fed.Cl. 429 (1994), *aff'd*, 57 F.3d 1084 (Fed.Cir. 1995) (SBA minority contracting requirements); *U.S. ex rel. McNutt v. Haleyville Medical Supplies, Inc.*, 423 F.3d 1256 (11th Cir. 2005) (Anti-Kickback Act) .

28 *Commercial Contractors Inc. v. U.S.*, 154 F.3d 1357, 1365 (Fed.Cir. 1998).

29 *Id.*, *U.S. ex rel. Shaw v. AAA Engineering & Drafting*, 213 F.3d 519, 532-33 (10th Cir. 2000); *U.S. v. Aerodex Inc.*, 469 F.2d 1003, 1007-08 (5th Cir. 1972); *U.S. ex rel. Oliver v. Gyro House*, 2000 U.S.App.LEXIS 36527, pp. 6-8 (9th Cir. 2000).

30 *Va. Code* § 2.2-4354; 31 U.S.C.A. § 3905

31 *Lamb Engineering & Construction Company v. U.S.*, 58 Fed.Cl. 106, 109-11 (2003).

32 41 *U.S.C.* § 604.

33 *Commercial Contractors Inc. v. U.S.*, 154 F.3d 1357, 1362 (Fed. Cir. 1998).

34 *Daewoo Engineering and Construction Co. Ltd. v. United States*, 73 Fed. Cl. 547 (2006). This case has been appealed by the contractor to the Federal Circuit Court of Appeal.

35 *Id.* at 584.

36 *Id.* at 584-85.

37 *Id.* at 597.

38 28 U.S.C. Section 2514.

39 *Commercial Contractors Inc. v. U.S.*, 154 F.3d 1357, 1363 (Fed. Cir. 1998).

40 *Id.*

41 *Morse Diesel International Inc., d/b/a AMEC Construction Management, Inc. v. United States*, 74 Fed. Cl. 601 (2007).

As Green Building Moves Forward, Claims and Disputes Will Follow

by Todd R. Metz and Christopher W. Cheatham

Green building — which decreases energy, water, and materials use in building design and the construction process — has seen a significant increase in popularity in 2008. This increase is due to rising energy costs, elevated demand, increased profits, a decrease in associated cost premiums, and the incorporation of green building strategies in state and local codes and regulations. In Virginia alone, there are more than 54 green building projects that have been certified through the U.S. Green Building Council (USGBC) Leadership in Energy and Environmental Design (LEED) rating system and 344 registered projects seeking LEED certification. Virginia counties and cities have followed the nationwide trend of incorporating regulations and incentives for green building, while the state legislature has mandated that public projects incorporate green building practices.

Green projects result in lower operating costs, improved public and occupant health, and less effect on the environment.

Just as construction claims and disputes often follow construction projects, it is only a matter of time before green building construction claims and disputes follow green building projects. Due to the unique and unknown aspects of green building and inexperience with this type of construction, it is likely green building disputes will become prevalent in the near future.

Green Building Basics

Green building incorporates design and construction practices that reduce a building's impact on health and the environment through better siting, design, construction, operation, and maintenance. Green projects result in lower operating costs, improved public and occupant health, and less effect on the environment.

The preeminent system for measuring a building's greenness is the LEED rating system created by the USGBC. Under the LEED rating system, buildings are scored based on five major categories: sustainable sites, water efficiency, energy and atmosphere, materials and resources, and indoor environmental quality.

Different LEED scoring systems apply to different types of projects and increased green performance results in higher ratings: certified, silver, gold, or platinum. The USGBC determines certification after construction is complete, when an applicant submits documentation that demonstrates compliance with the requirements of the applicable rating system.

Other rating systems have recently been introduced to compete with the LEED rating system. For example, the Environmental Protection Agency's Energy Star program offers an energy management strategy that has been used for more than sixty-two thousand buildings across the country. In 2004, the Green Globes system was introduced to the United States by the Green Building Initiative as an adaptation of a Canadian system. Green Globes has emerged as the main challenger to the LEED rating system.

The opportunities and benefits associated with green building also result in increased expectations. As more parties undertake green building — because of anticipated increased profits or government mandates — the possibility of failed expectations will increase. These failed expectations will result in disputes, claims, and litigation.

Green Building Legal Issues

Construction projects often result in claims and litigation, and it is naïve to assume that green building will not follow the same course. Owners, contractors, designers, and insurers should assess where green building risks exist and continue to monitor legal developments in this emerging industry. Green building disputes are most likely to include contract claims and noncompliance with regulations and codes.

Contract Claims

With the emergence of green building, parties have learned and adapted to new construction

techniques and practices. These new methods have created fertile ground for disputes and litigation, because parties' expectations of the end result invariably differ. In particular, certification of green building projects, new or modified terms of art, and the interrelated components of green projects create scenarios ripe for litigation.

Owners and developers move forward with green building projects with the goal of achieving a specific certification. For example, on June 24, 2008, the joint venture of The PNC Financial Services Group Inc. and Vornado/Charles E. Smith unveiled a plan for the District of Columbia's first office building designed to achieve LEED Platinum certification. However, they may not reach this certification level.

Obviously, if an owner announces before construction that they plan to achieve a specific certification level, that owner will have certain expectations of the completed building. So what happens if a building fails to achieve the green building certification level anticipated by the owner? The owner may blame the architect or its consultants, contractors, and subcontractors. The liability of these parties will be determined by the relevant contract terms. Lawyers who represent the project participants must recognize this risk during contract formation, counsel their clients on how the contract documents address the risk, and determine ways to allocate or mitigate the risk. The participants and their counsel must understand the process so they can avoid pitfalls that accompany this industry.

The owner wants to achieve the stated level of certification for financial and reputational reasons. Damages that result from the failure to achieve that level could include lost rents, lost tax credits, and diminished asset value. Some of the probable damages could be characterized as "consequential damages." Owners should make sure that there is no consequential damages waiver in the design or construction contract, and that recoverable damages are specifically defined. The owner also must consider whether the risk of failure is covered by the architect's professional liability insurance or the contractor's performance bond.

The architect is retained to design a building that meets a predetermined certification level. The architect should understand what it is promising and how it can achieve that level.

Precontract considerations include:

- Is there a limitation of liability clause?
- What is the standard for imposing liability — strict liability or negligence?
- Does professional liability insurance cover the failure to achieve certification, and what are the limits of that coverage?

Because changes in the design can result in an unforeseen impact on certification, the architect should either limit the owner's right to make changes during construction or make the owner assume the risk of a lower level of certification where changes are made.

The contractor should ensure that the contemplated certification is not construed as a performance specification, and should avoid guarantees. The contractor should agree only to construct the building in accordance with the approved design and using the approved materials. If the contractor complies with the contract, there should be no liability even if the building does not achieve the desired certification level. Because the lack of certification can have a significant financial impact on the owner, the contractor should avoid suggesting changes through substitution or value engineering that could have a negative impact on certification.

Counsel also must consider the owner's remedy if the contractor's acts or omissions result in the building not achieving the desired certification. Although specific damages may be difficult to prove with certainty, a contractor may be exposed to significant liability if it is responsible for the building's failure to achieve the desired certification.

A liquidated damages clause is a good option to limit liability. Limits on an owner's right to demand corrective work also should be considered. Tearing out and replacing installed work that is otherwise acceptable may be necessary to achieve the certification. Ironically, such economic waste contradicts the intent of green building. The contractor also should make sure that potential liabilities flow down to its subcontractors.

Green building claims also are likely to arise where previously used construction terms, when applied to green building, lead to confusion and disputes. Construction terms of art may take on new meanings when applied to green building projects and practices. For example, how parties interpret "substantial completion" may differ if green practices are incorporated into a project. Substantial completion has been defined as "the stage in the progress of the work when the work or designated portion thereof is sufficiently com-

plete in accordance with the contract documents so that the owner can occupy or utilize the work for its intended use." *AIA Document A201, § 9.8.1*.

While parties to a typical construction project have a general understanding of "substantial completion," incorporation of green building practices, such as Environmental Quality (EQ) credit 3.2 under the LEED for New Construction Rating System, may change when substantial completion occurs. Under EQ credit 3.2, after all interior finishes have been installed but prior to occupancy, a party must perform a building "flush-out" by supplying a specific volume of air to the project area. If the flush-out requirement is incorporated into the contract, a contractor that bases its schedule on the typical definition of substantial completion may be surprised to learn of additional time, and perhaps liquidated damages, associated with the flush-out.

Finally, it is important for all project participants to recognize that design changes during construction also could result in significant disputes. Green building projects comprise specific interrelated practices and strategies. Removing or modifying one strategy will most likely have a direct corollary effect on another strategy. Consequently, a single change, whether it results from a design error or an owner preference, could have a ripple effect on other aspects of the design.

As an example, one of the primary green building strategies that is directly affected by other strategies is a building's level of energy performance. A project may achieve points based on increased levels of energy performance above the baseline energy level. A building that uses less energy to heat, cool, ventilate, and power building components will achieve more points. The number of points a building can earn will be affected by changes to or the elimination of other green strategies that affect energy performance.

A green building design may call for a specific window that provides necessary light. If the window type is changed later, more or less light may be transmitted into the building, resulting in increased heating or cooling needs. By changing the specified window, the entire energy performance of the project may change, costing the project precious LEED points required for certification. If the architect is unable to promptly recognize and address the ripple effect, the contractor is likely to be delayed and may have to replace installed work. If the architect fails to recognize the impacts, certification may be lost. In either case, claims are likely to be asserted. How the design and construction contracts address this circumstance is important to all project participants.

Green Building Codes and Regulations

Owners, contractors, and designers not only must evaluate and manage special risks related to green building during contract formation and administration. They also must keep apprised of green building legal developments and review and evaluate new and proposed green building codes and regulations. These codes and regulations can have a significant impact on construction projects, forcing parties to incorporate green strategies at the risk of noncompliance. While East Coast cities — particularly Washington, D.C., and New York City — have enacted progressive codes and regulations that require green building components, Virginia is just now entertaining the idea of regulating green building practices.

During the 2008 legislative year, Gov. Timothy M. Kaine and the General Assembly grappled with how to require green building practices, including which rating system is most appropriate for Virginia. As part of the 2008 budget process, the legislature added the following provision to the governor's budget: "All new and renovated state-owned facilities … that are over 5,000 gross square feet shall be designed and constructed consistent with the … U.S. Green Building Councils [*sic*] LEED rating system or the Green Globes rating system." Design and construction entities undertaking public project developments will need to be aware of this important amendment.

While the Commonwealth of Virginia is just now dabbling in green building regulations, Virginia counties and cities have approved more progressive regulations. For example, Alexandria has set a goal to achieve LEED-Silver rating for all new city-owned facilities larger than 5,000 square feet. Arlington County encourages private developers to evaluate the environmental impacts of all site plan projects.

Additionally, Arlington County allows special exceptions from zoning ordinances and more flexibility in building form, use, and density than is normally allowed in specific zoning districts if the following five requirements are met:

- LEED Accredited Professional — Each project must include a LEED accredited professional as part of the project team.
- LEED Scorecard — A LEED Scorecard must be submitted as part of the site plan application. A specific number of LEED credits will be negotiated and included in the project.
- Construction Waste Management Plan — All site plan projects must prepare and implement a construction waste management plan.
- Energy Star — For multifamily residential projects, appliances, and fixtures must meet the U.S. Environmental Protection Agency's Energy Star standards. (*see* **http://www.energystar.gov**)
- Green Building Fund — All site plan projects that do not receive LEED certification from the U.S. Green Building Council must make a contribution to the County's Green Building Fund, calculated at three cents per square feet.

Furthermore, Arlington County has created an incentive program to encourage green building. Within the incentive program, there is an enforcement mechanism — a contribution to the Green Building Fund — if parties do not meet the other four green building requirements.

While the commonwealth and its cities and counties have incorporated some green building requirements into regulations, the future of green building regulations and codes can be seen in Washington, D.C. On March 8, 2007, the District passed the Green Building Act of 2006 (Green Building Act), becoming the first major U.S. city to require private projects compliance with the LEED rating system. After January 1, 2012, all privately owned buildings that involve new construction or substantial improvements must comply with LEED certification requirements.

Since enacting the Green Building Act, the District of Columbia has also moved forward to green its building codes. The top priority for the amendments is to remove impediments to green building.

Conclusion

As demand for and profit from green building continue to increase, more parties will become involved with this type of construction. Unsuspecting parties could face liability for green building projects if expectations are not met, confusion arises as to the content of contract, or codes and regulations are not complied with. Parties should fully analyze both legal and political aspects of green building before entering the fray. The green building legal and regulatory fields are dynamic and must be monitored in order to mitigate any potential risk. ■

Can an Unlicensed Contractor Recover Damages under Virginia Law?

by Courtney Moates Paulk

Two recent opinions, both applying *Code of Virginia* § 54.1-1115, discuss whether unlicensed contractors are entitled to recover damages in the Commonwealth of Virginia. The first, *R.R. Gregory Corporation v. Labar Enterprises of Rochester Inc., et. al.*, 2008 WL 3376642 E.D.Va. 2007 (November 8, 2007), appears to conclude in the affirmative. The second, *Daniel Jones Remodeling LLC v. Johnny Cheng-Teh Chiu, et al.*, 2008 WL 2227791 Fairfax Circuit Court (May 21, 2008), clearly holds in the negative. Both opinions apply exactly the same subsection *Va. Code* § 54.1-1115(C), but focus on entirely different language included in that subsection.

Subsection (B) states that any person who undertakes contracting work without a valid license shall be fined up to five hundred dollars per day for each day that the person is in violation ...

Code § 54.1-1115 relates to the regulation of contractors and defines acts that are prohibited and considered to be Class 1 misdemeanors. Subsection (A) identifies particular acts that constitute the commission of a Class 1 misdemeanor. For example, "contracting for, or bidding upon the construction, removal, repair or improvements to or upon real property owned, controlled or leased by another person without a license or certificate, or without the proper class of license as defined in § 54.1-1100 for the value of work performed" is considered a Class 1 misdemeanor. Subsection (B) states that any person who undertakes contracting work without a valid license shall be fined up to five hundred dollars per day for each day that the person is in violation, in addition to any penalties for the commission of a Class 1 misdemeanor.

Subsection (C) is relatively short, but appears to have provided enough fodder and ambiguity for discussion in both the *Gregory* and *Daniel Jones* cases. Subsection (C) states: "[n]o person shall be entitled to assert the lack of licensure or certification as required by this chapter as a defense to any action at law or suit in equity if the party who seeks to recover from such person gives substantial performance within the terms of the contract in good faith and without actual knowledge that a license or certificate was required by this chapter to perform the work for which he seeks to recover payment. Failure to renew a license or certificate issued in accordance with this chapter shall create a rebuttable presumption of actual knowledge of such licensing or certification requirements."

In the *Gregory v. Labar* opinion, Judge T.S. Ellis III in the Alexandria Division of the Eastern District of Virginia address the language in subsection (C) regarding "substantial performance" but fails to focus on the "good faith" or "actual knowledge" requirements. *Gregory* involved a breach of contract action that arose as a result of alleged delay and unsatisfactory work on the part of the subcontractor (Labar).

Gregory, the general contractor on a project to construct Leeland Elementary School in Stafford County, subcontracted with Labar to perform the site work on the project. During construction, on September 26, 2005, Gregory terminated Labar's subcontract as result of Labar's delay and entered into another subcontract with Rice Contracting to complete Labar's work. Gregory filed suit against Labar alleging breach of contract. Gregory sought damages in the amount of $925,000 as a result of additional costs incurred by Gregory in paying Rice Contracting to complete Labar's contract work. Labar filed a separate suit against Gregory, also alleging breach of contract, in which it sought payment for work it performed on the project in August and September 2005, prior to termination of the contract. The cases were consolidated.

In response to the suit filed by Labar, relying on *Code* § 54.1-1115(C), Gregory argued that

Labar was precluded from asserting its claim for unpaid invoices from August and September 2005 because Labar did not have a contractor's license at the time of the project. The court stated: "Virginia allows a party to assert an adversary's lack of licensure as a defense in a suit for unpaid balances only where the unlicensed adversary has not given 'substantial performance within the terms of the contract.'"

In addressing Labar's performance, the court said : "The parties dispute the meaning of the statutory phrase 'substantial performance' in this context. The record shows that Labar performed approximately 65 percent of the subcontract work. Labar argues that it has therefore performed the substantial part of the work contemplated by the subcontract. Gregory urges a more formalistic approach, arguing that 'substantial performance' means performance 'in good faith and in compliance with the contract except for minor and relatively unimportant deviations.' 17A Am. Jur. 2d Contract § 619. Gregory suggests that performance of only 65 percent of the subcontract work does not meet the standard definition of substantial performance."

Prior to addressing the substantial performance issue, the court concluded that Labar breached its subcontract with Gregory by failing to complete work on time. As a result, the court unfortunately declined to address head-on Gregory's argument relative to Labar's failure to have a valid Virginia contractor's license. The court stated: "In the circumstances, it is unnecessary to resolve this dispute, for even if Labar is not barred from bringing its claim, it has failed to introduce sufficient evidence to allow a determination of that claim. More to the point, because Labar breached its contract prior to Gregory's alleged failure to pay, such a failure would not constitute a breach of contract even if it were established by the evidence. *Horton v. Horton,* 487 S.E.2d 200, 204 (Va. 1997) (holding that a party committing a material breach cannot thereafter enforce the contract)."

The Virginia Board for Contractors reports that Labar did not obtain its initial contractor's license until December 2005. Yet, in reading the opinion, it does not appear that either side argued the actual knowledge language included in subsection (C). Moreover, the court never concludes whether 65 percent performance would constitute substantial performance under the contract. So, why did the court even discuss the competing arguments relative to substantial performance if it did not intend to rule on the issue? If the court believed Gregory's argument to be dispositive — that Labar was precluded from asserting its claim because it did not have a contractor's license — it would have included this as an additional basis for denying Labar's claim. Yet, it did not.

In the *Daniel Jones* case, the issue before Judge Charles J. Maxfield in the Fairfax Circuit Court was whether the plaintiff, a Class B contractor, could maintain an action on a contract valued at $128,600 with additional claims as a result of change orders totaling $62,355.42. Pursuant to *Code* § 54.1-1100, a Class B contractor is permitted "to perform or manage construction, removal, repair, or improvements when (i) the total value referred to in a single contract or project is $7,500 or more, but less than $120,000."

The plaintiff was paid $128,913.51 for work it performed on the project — an amount greater than the original contract amount of $128,600 and also greater than the statutory cap for the value of allowable work to be performed by a Class B contractor on a single contract or project.

Relying on *Code* §§ 54.1-1100 and 54.1-1115, the defendant filed a plea at bar asserting that the plaintiff, as a Class B contractor, could not maintain an action on a contract valued at an amount greater than $120,000.

In response, the plaintiff argued that the lack of case law involving a contractor who exceeded his licensing limitations required that the court overrule the plea in bar. Alternatively, the plaintiff argued that *Code* § 54.1-1115(C) "saves" the contract because the plaintiff was unaware of the monetary restriction placed on his license.

In considering the plea in bar, the court adhered to "strict construction rules so as to give effect to legislative intent" to *Code* §§ 54.1-1115 and 54.1-1100. Further, the court stated "Under the plain meaning doctrine, where a statute is written in 'words that are clear and unambiguous, courts may not interpret them in a way that amounts to a holding that the legislature did not mean what it actually has expressed.'" (citations omitted)

Moreover, the court never concludes whether 65 percent performance would constitute substantial performance under the contract.

The court first focused on *Code* § 54.1-1100 and the value of work permitted to be performed

by a Class B contractor. The court then considered *Code* § 54.1-1115(A)(1) which states that "contracting for . . . construction, removal, repair or improvements to or upon real property owned . . . by another . . . without the proper class of license . . ." shall be considered a Class 1 misdemeanor. The court stated: "Virginia has long held that 'a contract made in violation of a police statute enacted for public protection is void and there can be no recovery thereon' . . . The statutory scheme of Section 54.1-1100 *et seq*. is designed to protect the public and is a valid exercise of police powers" (citations omitted).

Addressing the plaintiff's argument regarding the absence of case law, because the language "without the proper class of license" was recently added to the statute in 2004, the court was not concerned about the lack of case law addressing the point. The court also held that this recent addition "evidenced a legislative intent to protect the public from contractors who exceed their authorization just as it protects the public from contractors without licenses. The deficiencies on the part of the contractor are treated identically under the statute."

In response to the plaintiff's other argument, relative to actual knowledge, the court held that subsection § 54.1-1115(C), "which protects good faith violations of the chapter, does not apply to the case at bar." The court stated: "Clearly this section is designed to protect innocent contractors and places a burden on them to know when their license expires. It creates no exception for a contractor innocently or otherwise exceeding the monetary limits of his [license] and the court cannot read such a saving provision into the statute."

Ultimately, the court sustained the plea in bar and dismissed the plaintiff's case.

Virginia attorneys should always ensure that contractor clients hold valid licenses and are operating within the confines of their class of license.

The *Gregory* case involved a commercial project, whereas the *Daniel Jones* case involved a residential project. While neither the statutes nor the courts discuss a distinction in applying the law to commercial versus residential projects, the *Daniel Jones* opinion focuses on the violation of police statutes and protecting the public from contractors who exceed their authorization. Despite no such distinction in the statutes, this perhaps leaves the door open for unlicensed contractors performing work on commercial projects to argue that they should not be held to the same standard as unlicensed contractors performing work on residential projects.

An additional argument could be made that upstream contractors on a commercial project should know better than to enter into a contract with an unlicensed subcontractor. However, it is uncertain whether such arguments would be successful considering the plain language of the statutes.

While not addressed in either case, *Code* § 54.1-1115(B) was modified again in 2008 to include language that any person who undertakes work without a valid Virginia contractor's license "shall also constitute a prohibited practice in accordance with 59.1-200 provided the violation involves a consumer transaction as defined in the Virginia Consumer Protection Act, and shall be subject to any and all of the enforcement provisions of the Virginia Consumer Protection Act." This provision only applies to unlicensed contractors and not to persons holding the improper class of license. This addition should be of particular concern to unlicensed contractors performing work on residential projects, as a violation of the Virginia Consumer Protection Act could result in an award of treble damages and attorneys fees.

Further, this amendment may support an argument that unlicensed contractors performing work on residential projects really are held to a higher standard than those performing work on commercial projects. However, this language attempts to address that distinction by providing an additional and quantifiable remedy to consumers involved in residential projects.

Virginia attorneys should always ensure that contractor clients hold valid licenses and are operating within the confines of their class of license. When confronted with a claim, the first inquiry should be to confirm the licensing status of the individual or entity attempting to recover.

I recently defended two instances in which contractors were not operating with appropriate licenses. First, a subcontractor holding a Class B license and performing work under a contract valued at greater than three hundred thousand dollars attempted to assert a claim against a general contractor on a commercial project. Second, a residential contractor that attempted to assert a claim against a homeowner had allowed its license to lapse, no longer employed its employee who took the licensing exam, had yet to notify the Board for Contractors that it no longer employed this particular employee and had failed to hire a new employee who had passed any level of contractor's exam.

These facts, in light of *Code* 54.1-1115 and the *Daniel Jones* case, provided two compelling, and hopefully successful, arguments against the ability of these contractors to recover from my clients. ■

by William T. Wilson, Chair

The Conference of Local Bar Associations: A Work in Progress

I HAVE GOOD NEWS TO REPORT from the Conference of Local Bar Associations (CLBA). We had a great year last year under the able leadership of chair John Y. Richardson. The CLBA conducted a Solo & Small-Firm Practitioner Forum in Richmond on May 1, and a Bar Leaders Institute on May 16, 2008, when nationally recognized experts spoke about media skills and public protection initiatives. At the VSB Annual Meeting on June 20, the CLBA presented former VSB president Jeannie P. Dahnk with the Local Bar Leader of the Year Award and commended bar associations throughout the commonwealth for their accomplishments.

On July 21 at Regent University School of Law in Virginia Beach, we presented a Solo & Small-Firm Practitioner Forum that featured presentations on fee dispute resolution, legal research tips, trust accounting, and disaster preparation. Former Virginia Gov. Gerald L. Baliles spoke about lawyers' responsibility to be civic and political leaders (see below for a copy of his remarks), and Chief Justice Leroy R. Hassell Sr. conducted a town hall meeting.

The CLBA has adopted a model program, the So You're 18 panel discussion, that local bars can use to teach teenagers about rights and responsibilities that come with adulthood. The program is patterned after one presented by the Alleghany-Bath-Highland Bar Association in Covington. A blueprint that summarizes the presentation can be obtained by contacting Paulette J. Davidson at (804) 775-0521 or davidson@vsb.org.

The success of that program led the CLBA to adopt it statewide. A blueprint summarizes the panel discussion and will be sent to local bar associations, with a request that they have similar programs. The Alleghany-Bath-Highland bar patterned its So You're 18 panel discussion after a Senior Citizens Law Day program they held in May 2004.

The CLBA plans to continue distribution of *So You're 18* handbooks and to conduct more Solo & Small-Firm Practitioner Forums and Bar Leaders Institutes. It will present the Local Bar Leader of the Year award at the VSB Annual Meeting at Virginia Beach in June 2009, and will again present awards to exceptional bar associations.

Contact Davidson or call me at (540) 962-4986 for more information on how the CLBA can help your bar association. We are always a work in progress, so helpful suggestions are welcome.

The Remarks of The Honorable Gerald L. Baliles
Former Governor of Virginia
Director of the Miller Center of Public Affairs at the University of Virginia
at the Solo & Small-Firm Practitioner Forum
Regent University School of Law, Virginia Beach, Virginia
July 21, 2008

Distinguished guests, ladies and gentlemen.

It's a pleasure to be a part of your forum for solo and small-firm practitioners.

I grew up in a small town in a rural area along Southern Virginia's Blue Ridge Parkway. I knew as a child, observed as a teenager, and worked with as an adult, many wonderful lawyers — in small towns and large ones — who were solo or small-firm attorneys. They have always impressed me with their dedication to the law, their representation of their clients, and their leadership roles in their communities.

That's what I want to talk about today — the decline of the citizen lawyer and necessary revival.

Bill Wilson, your program chair and a good friend of mine, is a good example of that citizen lawyer tradition that I want to talk about — a good lawyer who has found the time to serve in the Virginia General Assembly, on the board of Virginia Intermont College, chairman of the Virginia State Bar's Senior Law Section, a leader in his church and civic organizations.

When one thinks about it, Virginia has an unrivaled tradition of

citizen lawyers — lawyers of honed ability and integrity who take positions of civic and political leadership, and apply their skills for the broad public good. Many of our schoolbook heroes from Virginia history (four hundred years of it now) are lawyers: Patrick Henry, Thomas Jefferson, James Monroe, John Marshall, Lewis Powell, Oliver Hill, and Leroy Hassell — to name only several.

And this assembled gathering today — without flattery — brings together true citizen lawyers, of the first order, from across the commonwealth.

The profession is strong in Virginia, its seedbed, and is doing good work, all the political chatter and criticism notwithstanding.

A colleague and I were remarking the other day that the future of the profession is promising, too — the Commonwealth today has a more glittering array of law schools, I think, than perhaps any other state.

But something hard to put a finger on, something hard to name exactly, increasingly feels awry with the profession, with OUR profession. I suspect you've had occasional senses of it, too.

According to an old Roman saying, an illness that is at first hard to diagnose but easy to treat, later becomes increasingly easy to diagnose but impossible to treat.

It's hard to put a finger on it, this sense of something amiss, but I have it.

Sometimes the sense washes across me when I'm reading *Virginia Lawyers Weekly* and I see an article about this or that company "automating" some of its legal needs — having a software program fill out patent applications or employment contracts. Not too many years ago a bill was introduced in the General Assembly to allow automated legal kiosks that would dump out legal formula wills and divorce papers. And today, I'm sure you must have seen the advertisements by a recognizable name in the legal profession about the convenience of visiting a website to find the forms to assist one with setting up wills, opening businesses, and a variety of related legal services anywhere in the country.

Sometimes it washes over me when I'm at a bar meeting and I talk to law students who express a deep concern that actually practicing law will be intolerable, and they lament heading down the track to becoming a lawyer. Or it rushes over me when I talk to lawyers in practice who are burned out and desperate to change careers.

I am not humorless, but it hits me when I hear the ubiquitous lawyer jokes, and I laugh at most of them.

It hit me recently when I realized how few lawyers there are now in the General Assembly — maybe two dozen. When I was first elected to the House some thirty years ago, almost three quarters of the members of the General Assembly were lawyers. The best, most substantive debates came up on the floor when a lawyer would ask a penetrating question that hadn't been considered in committee. Citizen lawyers have been at the heart of the work of the General Assembly.

When I look at civic organizations today in Virginia, I likewise also often find myself wondering, where are the citizen lawyers?

Automated contracts, lawyer jokes, nervous law students, and burned-out lawyers point to a real unease with, and in, the profession. Our thinning ranks in the General Assembly and civic organizations, even bar activities, point to diminished leadership by citizen lawyers.

I think the unease and our diminished leadership are related.

Let me explain.

Over the past generation, to be sure, the billable hour, especially in the larger firms, has come to lord it over us like never before. The dizzying array of statues and regulations has only grown, demanding more and more time of us to keep pace, and fostering more and more tight specialization. In many regards wisely, we've become very conscious of conflicts of interest, and often preclude ourselves, and our law partners, from sitting on boards — public or private — with which we may do business in our practice.

The past few decades have brought us an increasing number of excuses for avoiding summons to leadership as a profession.

You've heard theses response, I'm sure: "I'm too busy" — "It's outside what I do" — "I can't, because I have a potential conflict." Any of these, in any given circumstance, may be utterly appropriate for any one of us, individually, to say.

We may, though, have begun to say them collectively as a profession.

When we don't rise to service, and our profession fails to deeply encourage it, it's not entirely surprising that law students become nervous and lawyers become burned out — because I believe lawyers choose the profession and go into practice *in order* to contribute to the public good. Lawyers are practical, but lawyers also — especially the best — have a twinge of idealism, a yearning to do good, to act as citizen lawyers, in the long tradition.

Much of the dissatisfaction in the profession, I think, stems from frustration in not engaging in earnest in that tradition so proudly established in the Commonwealth many generations ago.

In my judgment, we would very much help ourselves by a new devotion, as a profession, to leading as citizen lawyers. We would help our image and understanding with the public as well. But, most importantly, we would also further contribute to the public good, in vital ways, that others — nonlawyers — simply cannot accomplish with the same honed ability. Shaped by practice, lawyers have skills that are sorely missed when absent in public affairs.

Maybe we don't enunciate these skills often enough.

Consider them with me quickly. On reflection I think it's clear what is missing when we don't offer them to the public good.

These "lawyers skills" fall into three basic categories — to my way of thinking. Put very simply, lawyers are good at connecting the dots, we're good with language, and we've typically got a good "people sense."

Let's look briefly at each of these.

Good at Connecting the Dots.
Lawyers by profession assess risk all the time. All the time we're thinking "how does this affect that?" We do this in almost everything we do — cases, contracts, transactions, advising. Having to assess risk all the time leads to very logical thinking. Lawyers have a practiced ability to see all the way through things and separate the wheat from the chaff.

This logical thinking, risk assessing, leads also to a honed sense for trends, especially with the government, which is really a machine made up of law. Sensing trends — connecting the dots — is very important. Again and again throughout our history in Virginia and America, lawyers have stood to protect freedoms: Jefferson for religion, Lincoln against slavery, Thurgood Marshall for civil rights.

Lawyers have always known that the old saying from Shakespeare — "First thing we do, let's kill all the lawyers" — is not a reproach but a compliment. Lawyers are especially entrusted to be guardians — whom tyrannizing and demagogic forces (at loose today, just as in history) would just as soon not have around.

Good with Language.
Lawyers, because we tend to write every day, tend to write well and precisely. And also, since by profession we're required to speak frequently, we tend to speak well. Also importantly, with their practiced precision with language, lawyers tend to *listen* well, too, and get to the heart of matters.

Language is crucial. The written word is what the public has to memorialize agreements and set policy and law. The spoken word is the means to explain and debate, so plainly vital to democracy.

Good "People Sense."
Lawyers, because of what we do — in our practice, our pro bono work, in our duties as citizen lawyers — deal substantively with lots and lots of people doing lots and lots of different types of things — things the details of which lawyers come to have a real sense of. Because lawyers know and deal with so many different people in such detailed ways, we tend to be good at directing traffic — at making connections: "Oh you need help with this — well, Jones might be good to talk to; you might also try Smith."

Related to this: law is a profession that especially has in it a real diversity of people, too, something I'm very proud of. Lawyers, maybe a little more than the average person, know people of all colors and all stripes — making them even better at making connections.

On the "people sense" front as well, because of all of the people lawyers deal with and all of the human drama we witness, lawyers often have a good, quick sense of what motivates people. In a given situation, we have a honed sense for "what's really going on," for what games (if any) are being played and who's playing them. We also usefully, even in the thick of debate with people on any given matter, understand that the disagreement is not — or need not be — personal, not *ad hominem*.

So, we're good at connecting the dots, good with language, and have a good "people sense" — which is another way of saying: we're good at helping bring some *order*, some *understandability* to things that are unclear, things that are hazy — unclear trends, unclear language, unclear situations with people.

In a complex, fractious world (only becoming more and more so) lawyers are clarifiers and harmonizers — or can be, when we take it upon ourselves to get involved.

I think a lack of involvement, that has been increasing, is at the root of the unease in the profession, and at the root of the unease *with* the profession.

I think a lack of involvement is also a harm to the public.

The public good — government and civic life — fundamentally depends on citizen lawyers, present from the beginning of the American experiment in free society, and depends on citizen lawyers' rare abilities — to clarify, to harmonize.

I'm preaching to the very faithful here, of course, my friends. You carry the tradition.

Indulge me here, to close with a few thoughts.

You are citizen lawyers. So, keep serving — and offer to lead the organizations you are a part of. Take on new ones.

Very candidly, whether Republican or Democrat, consider public office. If not you, then who?

Find a young lawyer of promise — or two — or three — and tell them with conviction that they are a part of the Virginia tradition, unbroken, of citizen lawyers, with duties to the commonwealth and the public good.

We can help with the needed revival of the citizen lawyer, already alive among you here. The way I see things, anything awry can be set straight, and our profession, already storied, should ensure that storied days are still ahead. That's the way our predecessors thought. That's what they would want us to do — all across Virginia.

There's one other thing they might want me to say: It's time to wrap things up and say thanks very much.

So, many thanks for lunch and the invitation to be a part of your proceedings.

Besides, as that non-lawyer, Mark Twain, used to say: "Being talked to death is a terrible way to go."

Thank you.

by Homer C. Eliades, Chair

To Uphold the Honor

IN TAKING PEN IN HAND to write my first column as chair of the Senior Lawyers Conference, it occurred to me that many of you may not know a lot about us. The conference was established in June 2001, and was formerly known as the Senior Lawyers Section. The conference's focus is directed toward issues of interest to senior lawyers, their clients, and the general public. Membership comprises all active and associate Virginia State Bar members in good standing and aged fifty-five and older Membership increases on a daily basis as Virginia lawyers reach that magical age of fifty-five. Currently, the SLC has approximately fourteen thousand members.

Our mission, as stated in our bylaws is, "*To uphold the honor of the profession of law, to apply the knowledge and experience of the profession to the promotion of the public good, to encourage public discourse and interaction among the members of the Virginia State Bar and to serve the particular interests of senior lawyers and promote the welfare of seniors generally.*"

Here are some of the ways we strive to fulfill our mission:

The SLC hosts a website at **http://www.vsb.org/slc/index.html** that offers useful information and links for the public and the legal profession. The site received approximately two thousand hits during the past year. Frank O. Brown Jr. does a splendid job as editor of our newsletter, *Senior Lawyer News,* as well as our website editor. All newsletters are posted on the website, and a hard copy of the Spring 2008 edition was mailed to conference members.

Guardianship and Conservatorship Proceedings Regarding Incapacitated Adults was produced by the SLC and continues to be the fourth most downloaded file on the VSB's website.

A continuing legal education course titled *Ethics: Protecting You and Your Clients' Interests in the Event of Your Disability, Death or Other Disaster* is presented by Frank O. Brown Jr. to bar associations throughout the state. The course provides two ethics credits and is by request. If your bar association is interested in this program, please call (804) 775-0576 or e-mail Patricia "Pat" A. Sliger at sliger@vsb.org.

The *Senior Citizens Handbook* has been the VSB publication most requested by the public and those in the legal profession. The SLC is in the process of editing and implementing extensive revisions to the handbook. It will be available in late fall or early winter. We would like to acknowledge the Virginia Law Foundation for its grant to offset the handbook's printing expenses. Handbooks are distributed to libraries, hospitals, and other state agencies, and at Senior Citizens Law Day programs across the commonwealth.

The Senior Citizens Law Day program was designed and implemented by William T. "Bill" Wilson, a former chair of the conference. He developed a blueprint with ideas and instructions for presenting a program and contacted local bar associations and others to promote it. A copy of the blueprint is available from Pat Sliger by calling (804) 775-0576 or sliger@vsb.org.

The Senior Citizens Law Day program has been successful due to the promotion and participation of local bar groups and civic organizations. The program provides community service that is visible, meaningful, focused, and appreciated. Although the program is for senior citizens, it also is extremely beneficial to family members and caregivers. The program generates goodwill and a positive image of lawyers and the legal profession.

OTHER VENTURES THAT HAVE BEEN A SOURCE OF PRIDE include our involvement with the VSB's Annual Meeting in June. The conference sponsored a workshop with the General Practice Section and the Virginia Joint Committee on Alternative Dispute Resolution. It was titled "When and How to Use Mediation in Cases Involving Elderly Clients: Nursing Home Issues, Estate Settlement and Trust Disputes, Power of Attorney, Conservatorship, Guardian Matters, and More." Panel members were retired Judge Robert L. Harris Sr., William H. Oast III, and Edward E. Zetlin. Frank O. Brown Jr. was the moderator.

The conference also hosted a luncheon in honor of those who recently completed fifty years of service as a member of the VSB. Spouses, family members, and guests were invited to the luncheon, at which the honorees were presented certificates. Many attendees renewed friendships, and everyone seemed to enjoy the camaraderie.

Electronic Evidence — Who's Liable?

by Blackwell N. Shelley Jr.

In 2003 and 2004, the decisions in *Zubulake v. UBS Warburg* made litigation counsel directly responsible for the indifference of their clients' information technology departments. *Zubulake* opened a new field of concern for lawyers and a growing realization that ignorance of esoteric computer voodoo could lead to embarrassment or, worse, liability.

The year after *Zubulake* featured continuing legal education programs in which lawyers were exhorted to learn how computers work and why e-mail is "dangerous." Soon, lawyers began publicly using terms like e-discovery and e-preservation. In December 2006, the Federal Rules of Civil Procedure were amended to eliminate the differences between electronically stored information (ESI) and paper-based information, and to impose on trial counsel new responsibilities related to the identification, preservation, and production of ESI.

Decisions about the application of new rules (and old principles) to ESI have increased. Opinions have evolved from issues of discoverability to issues of privilege, privacy, and admissibility. This article summarizes recent noteworthy opinions.

Lorraine v. Markel American Insurance Co., 241 F.R.D. 534 (D. Md. 2007), dealt with the admissibility of ESI. The plaintiff and the defendant filed cross-motions for summary judgment challenging a $14,000 arbitration award. To their respective motions, each side attached unauthenticated copies of e-mails, "ostensibly supplied as extrinsic evidence of the parties' intent with regard to the scope of the arbitration agreement." *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. at 537. The court noted that the parties had failed to comply with the rule requiring that motions for summary judgment be supported by admissible evidence, and dismissed both motions without prejudice. E-mails, the court said, "are a form of computer generated evidence that pose evidentiary issues that are highlighted by their electronic medium." *Id.*

The court provided a lengthy, practical, and scholarly analysis of problems that are, by and large, unique to electronic evidence, including authenticity of intangible electronic documents, such as e-mail, website postings, text messages, chat room content, computer stored records and data, computer animations and simulations, and digital photographs. The court also examined hearsay issues in the context of computer-generated or computer-stored statements and the original writing rule as it applies to ESI. At slightly more than fifty pages, *Lorraine v. Markel Ins. Co.* is the most comprehensive articulation of the application of the Federal Rules of Evidence to ESI.

In *In re Subpoena Duces Tecum to AOL LLC*, 550 F. Supp. 2d 606 (E.D. Va. 2008), the court examined the interplay between third-party discovery of ESI and the Electronic Communications Privacy Act (the Privacy Act), 18 U.S.C. §§ 2701-03 (2000). In that case, a subpoena *duces tecum* was served on America Online seeking all of a subscriber's e-mails for a set time period. The court found that the Privacy Act creates a zone of privacy to protect Internet subscribers from having their personal information publicly disclosed by unauthorized parties and noted that the Privacy Act imposes penalties on Internet service providers and others who divulge private information. The Privacy Act makes no exception for disclosures made pursuant to third-party subpoenas; consequently, for this reason and others, the court quashed the subpoena.

Victor Stanley Inc., v. Creative Pipe Inc., et al., 250 F.R.D. 251 (D. Md. 2008), is a cautionary tale about the waiver of privilege. The defendants' counsel had foregone the opportunity to agree to a "clawback" provision in the event that privileged matter was inadvertently produced during discovery. During discovery, the defendants inadvertently produced 165 documents containing privileged matter after conducting a key-

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Bulletin: New Rule Added to Federal Rules of Evidence

On September 8, 2008, the U.S. House of Representatives unanimously passed a bill adding Rule 502 to the Federal Rules of Evidence, which previously had been approved by the Senate. President Bush is expected to sign the legislation.

Rule 502 is intended to control the rising cost of e-discovery and document production in litigation by providing a limited safe harbor against inadvertent production of privileged material. For Fourth Circuit practitioners, the new rule may provide some guidance as to whether a strict or limited waiver standard applies to inadvertent disclosures. *See In re Grand Jury Proceedings*, 727 F.2d 1352 (4th Cir. 1984) (strict waiver); *Martin Marietta Corp. v. United States*, 856 F.2d 619 (4th Cir. 1988) (limited waiver); *see also Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 237 (D. Md. 2005) (citing cases and discussing waiver in context of voluminous e-discovery).

The new rule, explanatory notes, and statements of congressional intent may be found at http://www.uscourts.gov/rules/index2.html#502pass (last visited September 18, 2008).

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word search of the ESI and a cursory manual review of the non-searchable ESI. The court found that the recent amendments to the Federal Rules do not change the Fourth Circuit's strict rules on privilege waiver. In making the determination whether the efforts of defense counsel were reasonably designed to prevent inadvertent disclosure of privileged material, the court said that the burden fell to the defendants to prove that the keyword search they performed on the text-searchable ESI was reasonable. To do this, the court stated that defendants would, first, have to identify the terms used in the keyword search. Second, the defendants would have to demonstrate that the persons who selected the keywords were qualified to design a proper search. Finally, the defendants would have to demonstrate that there was quality-assurance testing sufficient to show that the keyword search worked. In this case, the defendants did not pass any of these tests, and the court ruled that they had waived the privilege asserted for the 165 documents.

For lawyers, an inescapable fact is that most of the information needed to prove a case — other than witness testimony — presently exists somewhere in electronic form. The obvious (and less obvious) differences between ESI and paper-based information are typically resulting in courts' studying the medium, as much as the information itself, in order to resolve familiar issues like privilege or admissibility. Like it or not, understanding the medium now plays a significant role in a lawyer's ability to argue that information is or is not discoverable, admissible, or privileged. ■

Deconstructing Construction Law Resources

by Marie Summerlin Hamm

FOR THOSE ENGAGED IN CONSTRUCTION LAW PRACTICE, complex facets of contract, tort, and property routinely converge like a law school hypothetical run amok, with a healthy dose of alternative dispute resolution, litigation, environmental, labor, bankruptcy, and tax issues occasionally mixed in for good measure. Despite the need to research effectively across a multitude of subject areas, veteran practitioners count a few trusted treatises as friends and are sometimes hesitant to venture into electronic resources. This article encourages experienced researchers to take advantage of increasingly flexible pricing packages for commercial services and exhorts those just entering the labyrinth to explore the impressive array of resources available through bar association special-interest sections.

Fee-based Tools

Legal information vendors are beginning to appreciate construction law practitioners as a potential market for electronic resources. Westlaw now offers the Virginia Construction Law Advisor Plus Library. The library includes International Code Council (ICC) Model Codes with commentary, state and general practice guides, a forms finder, zoning and planning practice guides, news and current developments, and, of course, *Bruner and O'Connor on Construction Law*. The company touts "unlimited access for one low monthly fee."

Loislaw, now owned by Wolters Kluwer, can put selected titles from the well-known Aspen "Redbook" series on your desktop. The "deluxe" Construction Law Library Online contains twelve titles, including Cushman's *Fifty State Construction Lien and Bond Law*, *Sweet on Construction Industry Contracts*, and the *Legal Guide to AIA Documents.* Though Virginia is not yet among the states of emphasis, the package does offer a wide variety of e-forms and general practice guides. The company is known for reasonable pricing and flexible subscription plans.

LexisNexis offers a "Construction Law Library" on CD-ROM that is comprised of *Construction Law,* an electronic version of the eight volume Matthew Bender looseleaf set; *Construction Law Digest:* and the "construction law case library." Think all these options sound too good to be true? Too pricey to be feasible?

The rigid access and pricing structures of yesteryear have disappeared. Vendors are increasingly willing to tailor a plan to a firm's size and research needs.

Bar Section Resources

Though section and division websites provide a wide variety of freely accessible information, the old "membership has its privileges" adage holds true even within a bar association. Sections, forums, and divisions not only offer attorneys an opportunity to become meaningfully involved in their bar associations, but also afford access to a wide variety of "members only" resources.

The Virginia State Bar's Construction Law and Public Contracts Section website includes an index to the many construction-related articles published in *Virginia Lawyer* from 1991 to the present. Each *Virginia Lawyer* issue published since June 1999 is available on the Virginia State Bar website, and older individual articles can often be retrieved by searching the title (in quotations) on Google. Section members receive a periodic newsletter, *The Construction Law and Public Contract News*, as well as access to the *Construction Law Handbook* and a digest of construction-related cases.

The Virginia Bar Association's Construction and Public Contracts Law Section website provides a linked list of member articles published in the *VBA News Journal*. The entirety of the July/August 2007 issue focused on construction law-related subjects. The complete issue is available on the VBA website.

With more than six thousand members and twelve divisions, the American Bar Association's Forum on the Construction Industry provides a plethora of networking and educational opportunities and produces a variety of publications. A subscription to *The Construction Lawyer*, a quarterly national law journal, is a member benefit. A subject index with Westlaw search tips is posted on the forum's website. Also available on the website is the thrice-yearly newsletter, *Under Construction*. The forum's construction-related publications can be purchased or downloaded on the ABA Web store site.

For those who seek quick immersion into an unfamiliar facet of construction law, the continuing legal education programs and materials created by the sections are invaluable.

Conclusion

In construction, it's imperative to have the right tool for the job at hand. The same could be said for construction law research. Take time to explore the multitude of resources available and add a few new tools to your skill set.

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mately $523,000. This shows the admirable job the staff has done of achieving economies in our expenses. Despite unavoidable increased expenses in some areas, the FY 2008–09 proposed budget is $205,000 less than the previous year. Some of the economies were immediately instituted and resulted in savings during FY2007–08. I am pleased to report that a preliminary review of the fiscal year just ended indicates that our expenses were approximately $600,000 under budget (despite being over budget on receivership expenses by $313,475), and revenue was almost $300,000 over budget.

While the staff remains focused on saving money in the bar's daily operations, changes in programs and the direction of the bar's efforts to fulfill its mission have to come from the VSB's voluntary leadership: the officers, the council and the bar's many committees, conferences, and task forces. The voluntary leadership of the bar will have to make tough decisions on what should be cut, or our reserve will be exhausted and the VSB will be forced to seek a dues increase. ■

Endnote:

1 The *Professional Guidelines* contains the Rules of Professional Conduct, the Rules of the Supreme Court regarding the organization and operation of the Virginia State Bar, and regulations that govern the Consumer Real Estate Settlement and Protection Act, MCLE, and Licensed Legal Aid societies.