Diversity Aspirations Will Encourage Future Black Leaders

I want to congratulate the Virginia State Bar on its Diversity Initiative. This is a much-needed initiative as the ranks of black law students and, subsequently, black attorneys seem to be decreasing not only in the commonwealth but across the country. The Diversity Initiative issue of *Virginia Lawyer* is a keepsake, and I plan on sharing it with my fellow lawyers across the country.

As associate commissioner of the Central Intercollegiate Athletic Association, the country's oldest historically black college conference, with member schools in Virginia (Virginia State University, Virginia Union University, and St. Paul's College), North Carolina, Maryland and Pennsylvania, I am constantly in contact with leaders in the black community nationally. Specifically, I am also in contact with our future black leaders at these respective campuses. I would certainly love to spread the word to these future leaders about the virtues of a career in law and the good things the bar is doing in our community.

Please let me know what I can do to assist in this very worthy cause. I look forward to hearing from you.

Jeffrey W. McLeod
Hampton

"Diversity" Ends in a Racial Head Count

Back in the mid-1990s, I was emerging from college to pursue the career I had before law: journalism. I was working as an intern for the Washington, D.C., bureau of a major paper and loving every minute of it.

The themes of the Virginia State Bar's Diversity Initiative swirled around me then, as they do now. The college paper I worked for filled its pages with coverage of minority events, staffers fretted over sensitivity, and the field of professional journalism that lay before me was much concerned with "diversity."

But what that meant for me, as a twenty-something white male, was not immediately clear until I sought my first job. I'd homed in on the *Boston Globe*, which had a one- or two-year fellowship for young journalists with limited experience. I was told, in no uncertain terms, that whites were prohibited from applying.

I was knocked for a loop by this. Though my familiarity with law was limited to the First Amendment and defamation cases I'd learned in journalism school, it just didn't strike me as something that could fly in America.

It wasn't. My complaint with the Equal Employment Opportunity Commission was affirmed. The program was found to be illegally discriminating against whites. In the meantime, I'd found other employment, but I've never forgotten this experience. In fact, it was one of the things that motivated me to go to law school.

It's this perspective that I bring to Manuel Capsalis's seemingly unopposed drive for diversity. Mr. Capsalis blows a polished trumpet indeed, intoning 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."

But "diversity," to me, is a nice way of saying "whites need not apply." There is simply no escaping the fact that whatever grandiosity its supporters adorn it with, "diversity" typically ends in a racial head count. Whatever one thinks of affirmative action, it is a policy that comes with undeniable costs and victims.

And I must ask, how does Mr. Capsalis's insistence that Virginia's legal profession "be more reflective" of its demographics square with the idea that race shouldn't matter? These notions are at direct odds. In the supposed pursuit of making race irrelevant, institutions practicing affirmative action succeed in making race so relevant that it excludes everything else.

It's particularly bizarre, as well, when he suggests that unless persons of a certain race see faces like theirs in the profession, the law loses legitimacy. By this reasoning, whites ought not view President Obama as legitimate.

Another problem with the bar's diversity crusade, striking in light of its societal position as an upholder of the law, is that the legality of many forms of affirmative action are very much in doubt. This is true even when clients demand that the firms they hire be "diverse." For a treatment of this issue, see Curt Levey's article, "The Legal Implications of Complying with Race and Gender-Based Client Preferences" (http://www.fed-soc.org/publications/pubid.744/pub_detail.asp).

Yet from the *Virginia Lawyer* articles, you'd never guess there were any doubts. I suspect that some of the programs sponsored or endorsed by the VSB are subject to court challenge. Is the Oliver Hill/Samuel Tucker Prelaw Institute offered to poor white students in Appalachian Virginia? Is a legal diversity pipeline program open to young people of all races?

A summer journalism program operated by Virginia Commonwealth University and the Dow Jones Newspaper Fund was challenged after a white student, Emily Smith, was denied entry because of her race. In response to the suit, the operators of the program agreed in 2007 to stop denying admission to whites. (http://chronicle.com/news/article/1660/dow-jones-will-end-race-exclusive-minority-programs-with-colleges)

It seems that the leadership of the VSB won't actually be engaging in much of a debate on this issue. Mr. Capsalis reports that the powers of the bar should now include "the power, obligation and responsibility to promote diversity in our legal profession and judiciary," and "promote diversity" is now proposed to be emblazoned on the mission statement. How easily dissenters will be brushed aside now!

But this does not mean that the Emily Smiths of the world cease to exist.

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Head Count continued from page 9

If we truly mean to pursue justice, those voices must be heard as well.

David E. Wilson
Fairfax

Disband Task Force, Withdraw Proposal

I have read with growing concern the columns in *Virginia Lawyer* of Virginia State Bar President Manuel A. Capasalis, beginning in July and continuing in October and December, concerning his Diversity Initiative.

In the "President's Message" of the June/July 2008 issue, Mr. Capsalis wrote:

> I believe we must renew our commitment and focus on diversity. 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....
>
> I believe the preservation of the Rule of Law is inextricably linked to diversity. Simply put, the Rule of Law without diversity is, at best, an incomplete principal, and at worst, a hollow promise to many to who live among us. We cannot deny the need for a vigilant commitment to diversity.

Without defining what he means by "diversity," Mr. Capsalis announced that he was authorizing the creation of a Diversity Task Force, to "review the current state of diversity within our profession, both state and local, and report its findings and recommendations to the Bar Council for consideration."

In the October issue, Mr. Capsalis continued his disquisition:

> We began this task with two simple and undeniable facts. The first is that for our profession and 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….
>
> 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 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.

Then, in the December issue, Mr. Capsalis continues his lecture. He reports that his Diversity Task Force proposed that the bar's enumerated powers be amended "to specifically and expressly include the power, obligation, and responsibility to promote diversity" and that the mission statement of the bar be amended to add that it must "promote diversity in the administration of justice and the practice of law." The task force also calls for a Diversity Conference whose membership would "flow through" the speciality bars — that is, certain associations defined by race, sex, or national origin.

Having argued vociferously that "diversity" is "inextricably linked to the Rule of Law," Mr. Capsalis then declines to tell the reader what it means.

> It has been said that we need to precisely define diversity to [make such structural changes]. I disagree. While diversity by necessity must not neglect consideration of race, heritage, and gender, … I believe that term must be allowed to evolve. What was considered in the scope of diversity some twenty-five years ago is not what we may think of it today, and we cannot know what the next generation may believe essential in its definition. That is for a Diversity Conference to have the freedom to pursue. Diversity must be allowed to grow and evolve organically, free from preconceived notions.

Mr. Capsalis ends with a rumination on the "transcendent ideal" of diversity and a call to lawyers to join in pursuing this "ideal."[1]

It's hard to know where to begin in addressing the fundamental flaws with Mr. Capsalis's manifesto.

First, it is sophistry. It is marked by his repeated statements of urgent personal belief in "diversity" and his affront and condescension to anyone who questions his meaning or firm intention. He answers one letter writer by telling the author that "he fails to understand the fundamental need for diversity," a term that Mr. Capsalis himself tells us cannot be defined. Thus, Mr. Capsalis casts himself as some sort of Gnostic keeper of the secret truths that mere mortal lawyers can neither understand nor question.

How can we understand the "fundamental need for diversity" when its very proponent cannot tell us what he means by the term? According to Mr. Capasalis, if we must ask the question, we have already missed the point. We must, instead, allow it to "grow and evolve organically, free from preconceived notions" (as opposed, apparently, to the "natural order of events," which Mr. Capsalis soundly rejects). One day, perhaps, the augurs of his proposed Diversity Conference may let us know what it means; or perhaps not; or perhaps they will later change the meaning and the concurrent obligation.

In any event, the VSB Council must, according to Mr. Capsalis, change the very structure of the bar and the legal system to oblige the bar, its members, and even the judiciary to promote "diversity" — which is something, I know not what. And not only that, but it is urgent and necessary and unquestionable that the bar do so.

If Mr. Capsalis has evidence that the bar or the courts routinely or systematically discriminate against persons or groups based on race, sex, or national origin, let him put on his evidence and make his case as any other lawyer is required to do. That would show clarity and conviction. Mr. Capsalis demonstrates neither.

Second, Mr. Capsalis simply presses an ideology on the bar. If ever there was a code word involving race or ethnicity,

"diversity" is it. Mr. Capsalis offers us little glimpses at it — that it involves "taking into account gender, race, and heritage" in the administration of justice and the practice of law. But he is quick to close the curtain, noting that the "transcendent ideal of diversity" cannot be captured; it must be free to fly to the heavens or wherever it will. How on earth does Mr. Capsalis believe he can persuade thousands of lawyers with this kind of evasiveness and verbal sleight of hand?

Let's be clear: "diversity," in Mr. Capsalis's usage, is nothing but the preferential treatment of persons or groups based on race, sex, or national origin in order to remedy generic past discrimination — a political notion that remains hotly disputed. Mr. Capsalis appears to wrap himself in the mantle of civil rights in demanding indefinable "diversity." But many would take issue with this presumptive assertion.

Martin Luther King Jr. famously dreamt of a day when his children would "not be judged by the color of their skin but by the content of their character." Mr. Capsalis proposes the opposite: that unless we take account of the color of a person's skin, we can have no justice. This kind of thinking and action is hardly "transcendent"; in fact, it is both literally and figuratively superficial. It judges the worth of persons based on their outward appearance. It would have Lady Justice recast without her blindfold.

The notion is inimical to the first words of the Virginia Declaration of Rights: "that all men are by nature equally free and independent...." To be sure, in the past, some of the most noted members of the Virginia bar, such as Thomas Jefferson and George Mason, who inspired and penned these words, were unable to reconcile their view that all men are created equal with the routinely and relentlessly unequal treatment of African Americans and others under the law. Even after the Civil War and the adoption of the Fourteenth Amendment, requiring states to provide the equal protection of the law to all persons, Virginia continued for another century treating some persons "more equally" than others under Jim Crow — that is, by plainly unequal legal barriers based particularly on race and ethnicity.

Little more than a generation after this disparity was corrected by law, Mr. Capsalis proposes to lead the bar into the same disparity: to treat certain people more equally than others. Only now, he would have us prefer "people of color" to, if you will, "people of non-color" solely on that basis. This is simply a political ideology that rejects the civil rights movement of Dr. King as too limited and too timid. As Mr. Capsalis writes: "Despite these [prior] efforts, we have so very far to go. To suggest that our work is done is wrong." And, our work is what? To prevent invidious discrimination or to ensure that the bar, on the surface, is properly colored?[2]

If Mr. Capsalis wishes to promote his ideology, then he is free to do so on his own time and his own nickel and with those who voluntarily associate with him. But, the bar is not a voluntary organization. To practice law in Virginia, one must be a member of the Virginia State Bar. Forcing lawyers to associate themselves with this ineffable and "evolving" political ideology is wrong. Forcing lawyers to pay their tithes at the altar of the "transcendent ideal of diversity" is doubly wrong.

Rather, the bar should continue, as one prior bar president phrased it, to "stick to its knitting": that is, to require competent and ethical practice, and to encourage access to legal services. The race, color, creed, sex, or national origin of those who so practice is now, and should remain, irrelevant to the bar's mission. The best and brightest of practitioners should be considered for the bench without regard to color, creed, sex, or heritage on the one hand, or quotas, tokenism, and conditions of "diversity" on the other. To argue for a different institutional structure is plainly political.

Third, and most importantly, Mr. Capsalis's initiative puts the bar, and by extension the Supreme Court of Virginia, on a collision course with the Constitution of Virginia. Article I, §11 of the constitution provides, in part, that "the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex or national origin shall not be abridged...." That is to say, no Virginia government agency may legally discriminate against or in favor of any person on these bases. But, this is precisely what Mr. Capsalis proposes: that the bar and the courts specifically promote individuals and groups solely on the basis of race, color, sex or national origin, to the detriment or exclusion of others on the same basis.

This constitutional provision proves that Mr. Capsalis's assertion, that "the preservation of the Rule of Law is inextricably linked to diversity" is false. The law specifically prohibits the preferential or detrimental treatment required by "diversity" and, in doing so, allows for a true flourishing of freedom and independence and the enjoyment of life, liberty, and happiness envisioned by the opening words of the Virginia Constitution, without regard to the superficial and irrelevant characteristics of color or race or sex.

It would be bad enough if, say, the County of Fairfax or the Virginia Department of Agriculture applied the discriminatory scheme proposed by Mr. Capsalis and his task force; but for the bar and the Supreme Court to adopt it would be the worst possible case. The Supreme Court is the ultimate guardian of Virginia's Constitution and laws and the bar is charged with aiding in this duty. For the Court to encourage or even allow an obligatory program of preferential treatment based on race, color, sex, or national origin in the administration of justice or in the practice of law, in specific contravention of the constitution, would bring shame and scandal on it.

What would the public think about an organization of thousands of lawyers and judges who never even bothered to check their own fundamental laws in their haste to promote "diversity"? How would the public think that the courts could avoid applying the same discrimination in cases before them? This initiative invites disaster.

Disband continued on page 57


Chase


Parrish


Haley


Ford


Graham


O'Keeffe


Bell


Urbanski


Kirtner


Emmert


Goldberg


Campbell


Becker

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by Manuel A. Capsalis

The Ways of a Gentle Warrior

HARRY TRUMAN ONCE SAID, "Men make history and not the other way around . … Progress occurs when courageous, skillful leaders seize the opportunity to change things for the better." There are perhaps but a few well-known individuals in our Virginia legal profession in the past fifty or so years who arguably deserve such praise. There is one person who undoubtedly has earned his place in this pantheon, yet, because of his modest and humble demeanor, he remains unknown to many. His name is Clarence M. Dunnaville Jr.

I first met Clarence in December 2007, when I attended the annual awards presentation of the Lawyers' Committee for Civil Rights Under Law, an organization formed in 1963 at the direction of President John F. Kennedy to engage the bar to provide legal services to confront racial discrimination and to promote equal justice through the rule of law. Among the recipients that December evening was Clarence Dunnaville, who received the Segal-Tweed Founders Award, which is presented to an individual "who has displayed outstanding leadership and service in the cause of equal justice under law."

As was described in his biography presented at the ceremony, Clarence became actively involved in the cause of civil rights while a student at Morgan State University in the 1950s, participating in picketing of segregated theaters and restaurants, and as a part of the famous lunch counter sit-ins in Baltimore, which eventually led to their desegregation. While in college, he had the privilege of being present in the U.S. Supreme Court to hear the argument of Thurgood Marshall and Spotswood W. Robinson III in *Brown v. Board of Education*.

Attorney General Robert F. Kennedy appointed him as an assistant U.S. attorney for the Southern District of New York. He served on Vice President Hubert H. Humphrey's Task Force on Youth Motivation. In the 1960s he served as a volunteer civil rights attorney in Jackson, Mississippi. In 1967, as a "Mississippi Attorney," Clarence was invited to leave the township of Marks by a deputy sheriff, who emphasized the request by aiming a shotgun at Clarence's head to facilitate his timely departure.

He was a cofounder of the Council of Concerned Black Executives and the Association for Integration in Management. He also cofounded the Oliver White Hill Foundation, where he continues to serve. Over the years, he has been the recipient of a great many awards and accolades. He has argued cases too numerous to list, advocating for equal justice and protecting the rights of the disadvantaged. He continues to maintain an active practice in Richmond.

Ralph Waldo Emerson once said, "The reward of a thing well done is to have done it." A person of Clarence's stature certainly would be excused if he wanted the world to take note of his achievements. Clarence is not that type of person. Now in his mid-seventies, Clarence is as active and energetic as ever, going about his business, fighting for justice.

He continues on undeterred, even in the face of personal adversity. On January 3, his beloved wife of forty-two years, Norine, passed away. Just a few days later, awaiting her funeral, Clarence dutifully attended a meeting of the bar's Diversity Task Force, where, true to form, he was fully engaged, the giver of sage advice. One week later, politely declining the offer of a continuance while he mourned the loss of his wife, Clarence appeared before the Supreme Court of Virginia to argue for a constitutional civil right to counsel for the indigent in cases involving fundamental rights, such as parental

There are perhaps but a few, well-known individuals in our Virginia legal profession in the past fifty or so years who arguably deserve such praise.

rights. By all accounts, he was as eloquent and persuasive as ever.

As David Bernhard, one of his co-counsel explained, "Being in the presence of Clarence and particularly interacting with him in the context of the law is an educational experience with few parallels. Whether it is as a warrior for civil rights, accomplished lawyer, promoter of innovative ways to teach the law and diversity, leader of the Oliver White Hill Foundation, or advocate for the rights of the poor, Clarence has been in the forefront challenging the law to be a bit better and to live up to ideals espoused which are yet unachieved." This recent case before the Supreme Court was but one more example of the difficult and sometimes unenviable tasks he has taken on in a legal career spanning five decades.

It is a job he assumes without complaint and always with good cheer. As Richmond-based attorney W. David Harless recently told me, "I cannot recall a time when I have been with Clarence that he has not been overflowing with encouragement and grace. For Clarence, the focus is nurturing relationships, with friends and stranger alike. He expresses unconditional concern without preconception." Kathy Mays Coleman describes him as having a "marvelous quality of making you feel like you are his friend, immediately." As Rodney A. Coggin, publications director of the Virginia State Bar, described, "It is easy to forget about his wealth of experience fighting the toughest fights in the name of fairness and civil rights. So I always ask him what he's up to and every conversation leads to something important and enriching."

I encountered all this firsthand in December 2007 when I attended the ceremony for presentation of the Segal-Tweed Founders Award. I had never met Clarence and knew very little about him. At a ceremony honoring his years of advocacy and achievement, at a time when the focus of the occasion obviously should have been entirely on him, he did something that I will never forget. To my great shock, Clarence introduced me to the crowd. If truth be told, I felt somewhat embarrassed, as I was honored just to be in the same room with this giant of the law. I was nothing compared to him. After the ceremony, he introduced me to his entire family, and we had a long, wonderful conversation. From that timeless evening, I have had the privilege of considering him a dear friend and mentor.

President Manuel A. Capsalis (left) congratulated Dunnaville (center) and his son Andrew Dunnaville of Arlington, at the awards presentation of the Lawyers' Committee for Civil Rights Under Law in December 2007.

If you have not had the pleasure of meeting Clarence Dunnaville, I hope you someday do so. He is a living history of our profession. Luckily for us, he is very much our living future as well. He continues on, as Emerson stated, content in knowing that the reward of things well done is simply to have done them.

If you have not had the pleasure of meeting Clarence Dunnaville, I hope you someday do so. He is a living history of our profession.

As much as anyone I have ever met, he personifies the very best of our calling. As David Bernhard best put it, "Clarence is a walking history of achievement and the epitome of moral leadership by example. He is a jewel in our Virginia legal community." Our profession is so much the better because of him.

by Karen A. Gould

The VSB's Cost-Cutting Initiatives

AS THE ECONOMY WORSENS, I am grateful that the Virginia State Bar (VSB) started examining how it could save money and cut costs with the advent of 2008. In the fiscal 2008-09 budget approved by the VSB Council and the Supreme Court of Virginia before cuts were made, the reserve was projected at $520,187, or 4.2 percent of the bar's operating expenses, by July 2010, with $1,075,000 drawn from the reserve in FY2009-10 to help pay bar expenses. Obviously, the 2010-11 fiscal year would have resulted in serious cuts in operating expenses — even before the economic downturn — unless action was taken.

When I see how layoffs, devaluation of investments, and a stagnant market are affecting lawyers, I am doubly grateful that we can forestall a dues increase at this time and still provide the services necessary for self-regulation.

The VSB staff has worked hard on the cost-cutting initiative. Our agency's financial situation has been improved in part by the mandatory elimination of raises for our employees this year and next — unfortunately at the expense of our hard-working staff, who are foregoing even a cost-of-living adjustment.

The following is a list of the measures we have instituted:

FY2008-09
Elimination of raises for FY2008-09.

Freezing of hiring for new positions and hiring to replace people only when those positions are deemed essential to bar operations.

Use of the State Mail System for all mail, which eliminates the need for a full-time person in the VSB mail room and saves on postage and the cost of leasing a postage machine.

Elimination of one assistant ethics counsel position, replaced with an administrative assistant position.

Curtailing staff and officer travel.

Redirecting disciplinary opinions, rule proposals, rule changes, and other bar regulatory business to the *Virginia Lawyer Register's* Web edition at VSB.org, and mailing out a print summary and index to the material on the Web.

Replacement of roller-ball pens with less expensive ballpoints.

Elimination of bond letterhead.

Elimination of sodas, flavored teas, and hot chocolate.

FY2009-10, in Addition to the Previous Items
Elimination of raises for FY2009-10.

Elimination of one VSB Executive Committee meeting.

Elimination of the leased offices in Alexandria.

Consolidation of support for the Northern Virginia office in the Richmond office, resulting in the elimination of one paralegal position.

Limiting distribution of the print publication of the *Professional Guidelines* to the volunteers and any members who request a hard copy. The *Professional Guidelines* will be posted on VSB.org in easily accessed html-formatted text. In this format, we will be able to update the guidelines on an ongoing basis so members always have immediate access to the current rules.

Uncontrollable Costs
While the majority of costs required for regulation of the legal profession are constant and predictable, an important expense over which we have little control is receiverships. The receivership budget of $200,000 for FY2007-08 was exceeded by $313,475 because of the *Conrad* case, for a total expenditure on receiverships of $513,475. Receivers are appointed by the circuit court judges pursuant to Virginia Code §§ 54.1-3900.01 or 54.1-3936. The statutes require that the receivers be reimbursed "reasonable fees, costs and expenses," and the statutes do not provide for limiting receivers' fees to a certain amount or percentage. The statutes require the Virginia State Bar to pay these fees, costs, and expenses, if it has funds available.

The 2008-09 budget for receivership expenses has been increased to $300,000. As of December 31, 2008, $231,448 has been paid in receivership expenses. Additional bills are awaiting payment, and more are expected. It would appear that the receivership budget will be exceeded this fiscal year.

Receiverships are but one small element of the bar's expenses related to its responsibility to protect the public,

and, because of these responsibilities, the bar's expenses fluctuate somewhat.

The bar's expenses also increase every year as a result of fixed costs: rent, salary increases (usually), and benefits are examples. Despite what many perceive as a large number of new admittees every year, dues revenue increases yearly by only approximately 2.6 percent.

The Dues Cap and the Budget

Before we can increase dues, several hurdles must be successfully negotiated: the leadership of the VSB must decide it is time to seek a dues cap increase; the council must approve seeking such an increase; the Supreme Court must agree that we can approach the General Assembly with the request; the General Assembly would have to pass legislation that raises the statutory ceiling for bar dues; and the Supreme Court would then tell us how much to charge in dues.

In the future, we will not be using reserve-dependent accounting to balance our budget.

The Supreme Court has indicated that it does not see a dues cap increase in our future for the next several years, given the economic climate.

In the future, we will not be using reserve-dependent accounting to balance our budget. Instead, the Supreme Court has indicated that it prefers for the bar's revenue to approximate expenses. We will have to live within our means in the future, without subsidy from a reserve. A small reserve will be maintained as a rainy day fund to protect against unforeseen contingencies.

The Future

The bar staff is starting its budget review process for FY2009-10. At this point, the only cost-cutting measures we can identify involve eliminating programs or services. We have been successful, however, in pushing off the need for a dues cap increase in the near future.

I would appreciate your comments and suggestions on this and any other topics, including what you would like me to address in this column. My email address is gould@vsb.org; my phone number is 804-775-0550.

Lives of Women Lawyers Are More Than Billable Hours

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

by Dawn Chase

WHILE WOMEN NOW ARE WELL-REPRESENTED IN THE RANKS OF LAWYERS, statistics about law firm success indicate that the glass ceiling is still intact—especially for women of color.

A 2008 survey on retention and promotion of women in the nation's two hundred largest law firms by the National Association of Women Lawyers reports that

> For more than two decades women have graduated from law schools and started careers in private practice at about the same rate as men, yet women continue to be markedly under-represented in the leadership ranks of firms, accounting for fewer than 16 percent of equity partners….
>
> At every stage of practice, men out-earn women lawyers…. Men equity partners earn on average over $87,000 a year more than female equity partners.

The survey, available at http://www.nawl.org/Assets/Documents/2008+Survey.pdf, suggests a disheartening outlook for the prospects of women who want to pursue a big-firm career.

Beyond measurement of graduation from law school, and success in big firms, and the comparatively few women who sit on the bench, statistics do not address many of the complexities faced by women practicing law.

Are caretaking responsibilities for children and elderly relatives dragging them down? NALP–The Association for Legal Career Professionals reports that women vastly outnumber men among part-time lawyers, with Richmond law firms leading the nation (20.4 percent of women associates). http://www.nalp.org/parttimelawyers. Part-time practice obviously puts a lawyer at a competitive disadvantage on the partnership track.

Men are far less likely to opt for part time (1 percent nationally, 0.3 percent in Richmond). The numbers do not otherwise address the fact that lifestyle choices in the youngest generation of lawyers affect the commitment of both women and men to the traditional work-dominated career path.

The numbers do not report on how often women sit first chair for trial work. While they track what happens to lateral hires after they arrive at big firms, the numbers do not specify what the lawyers were doing before they changed employers. Were they practicing elsewhere, or involved in another line of work? If they came from outside law, how does that previous experience affect skill level, rainmaking, and, ultimately, promotion?


Thompson

The numbers' implied stories of crushed ambitions and hard work unrewarded do not correlate with the experience of many women Virginia lawyers whose careers, albeit untraditional in the big-firm sense, have enabled them to employ their energies in deeply satisfying ways, to be of service to others, and to have influence in many areas of life where they can continue to learn and grow.

To those women, that wisdom is money in the bank.

"It's like a daily new movie here—a constant study of human society," said Arlington lawyer **Betty A. Thompson**, who last month celebrated her sixtieth year of practice—most of it in family law. She is eighty-four. "There's not a day goes by that I'm not learning something about the law. The longer you do this, the less you know. You never reach the top."

Thompson said that, from the beginning, she had "a sense of being responsible for my own future. I've never treated myself as a 'woman lawyer,' but as a lawyer."

She states that "I have never felt discriminated against by my male peers nor by male jurists." Other women who have heard her stories might see it differently.

When Thompson graduated from George Washington University School of Law, a professor who had watched over her took her aside and said, "We've arranged for you to have an interview for a job at the Federal Trade Commission."

Thompson rejected that beneficence outright. "I'm going to be a real lawyer," she told him. "I never even went to the interview." Instead, she made cold calls to Northern Virginia law firms asking for work. After much jaw-dropping and closed-door consultations with their bosses, receptionists would emerge to tell her there was nothing available. "At best, potential employers thought I was a 'lawyerette,'" she said.

Finally, she found a clerical position with an attorney who taught bar review courses. That led to her opening her own office, first as a general practitioner, then as a family lawyer. "It's often said that your clients determine your practice," she said. She has taken on associates and partners over the years, but she has always run her own show.

When Thompson was feted by the Virginia Women Attorneys Association in her fiftieth year of practice, she observed, "Nothing in life is permanent…. You think you've got it together, but gradually over time everything is changing, and so you have to continue to regroup and adapt to what's going on around you."

It's a skill that has sustained women through the centuries, and Thompson uses it adeptly in her life. Sixty years sounds like a long time, but "it seems like yesterday," she said.

Mary Lynn Tate, an Abingdon attorney who focuses on personal injury law, business litigation, and transactions, is another woman who held her head high and marched into the profession with a clear inner conviction that she was meant to be a lawyer. Reared in Tennessee and southwest Virginia, the daughter of a coal miner who shared her love of television news and politics, she retains the soft-spoken graciousness of the region, as well as the steel just below the surface.

Tate went to the University of Richmond on a debate scholarship. While in law school, she worked for eminent attorneys at Hunton & Williams in Richmond, then lawyers in Abingdon. "They let me be their shadow," she said. "My first year, I got to argue a case at the Fourth Circuit." She was appointed by U.S. District Judge Glen M. Williams to handle Section 1983 cases involving treatment of prison inmates. Williams became a friend and a mentor.

In practice, she continued her education. She invited noted plaintiffs attorney Robert T. Hall of Reston to associate in a case so she could observe. "I'll never forget the impact his taking the defendant doctor's deposition had on me," she said. She attended a summer program at Harvard Law School on federal jurisdiction and practice.

Now she has applied to be considered for a Fourth Circuit Court of Appeals judgeship.

She said her goal and the measure of her success has always been "when I've been able to help somebody or, in a business setting, make the playing field equal or obtain redress for some wrongful conduct."

When time came to practice, Tate returned to Southwest Virginia. "I can go anywhere and do this, but I was comfortable being here, and felt there was a real need for competent legal services."

Finding clients in Abingdon has never been a problem, she said. "This is a matriarchal society." Through the generations, men have worked in the mines, hunted, and fished, and women managed the family and the household money. Going to a woman for advice, once a trusted relationship is established, is customary in the region, Tate said. Once people saw her in court, her reputation spread.


Tate


Alper

Learning to negotiate the judicial system and do business with male lawyers when she was starting out in 1976 took more time. "Some male lawyers did really nasty things," she said. Tate recalled that when she was two years out of law school she attended a deposition scheduled in Boston by opposing counsel. When her turn came for discovery, the other lawyer said she couldn't, because she had not filed notice to conduct cross-examination.

Tate insisted that she in fact had the right to cross. The impasse was resolved when she placed a call to Judge Williams. "First he chuckled a little bit, then he got pretty mad," she said. He spoke to the other lawyer, and cross-examination commenced.

The incident could as well have been a power play over a less experienced male lawyer, but as Tate describes it, it required her to step beyond the obsequiousness that many women are trained in. "Had I been the least bit timid or slow," the opportunity would have been lost.

She turned to another cultural example to describe the phenomenon: a study of commercial airline collisions found that some crashes are attributed to a lack of assertiveness in communication between a subordinate copilot and a captain. The copilot knows there is an urgent situation, but is reluctant to offend the captain by pointing it out directly. Airlines have taken measures to reduce the hierarchical symbols, such as addressing the pilot as "captain" in the cockpit, to eliminate the impediment.

Tate joked that she had an early introduction to the assertiveness her job requires from "yelling at two older brothers."

Judge **Joanne F. Alper** of Arlington has war stories of her own, from when she was starting practice in 1973. She, too, was mentored — by Harvey B. Cohen, a lion of the bar in the Washington, D.C., metropolitan area. "He took me everywhere," she said. She started working for him as a clerk, and "I never had to look for another job. I was one of the crowd early on."

The association didn't shield her from bias, however. Once, she called a male lawyer on a case and he growled, "I'm not

going to talk to some broad. Put your boss on." She ran into clients who "didn't really want a woman lawyer."

"When you tell women some of those stories today, they can't believe it," she said.

She practiced with Cohen's law firm for eighteen years. When she had her first child, there was no policy for maternity leave — "we just sort of set our own rules," she said. She took six weeks. For the second, "I was a partner, so I only took four weeks off."

"The pressure on men has always been if you're going to be a dog in the race you've got to be the top dog." … But many women say, "I don't want to be the managing partner. I like what I'm doing."

Her husband, a prosecutor in the District, had more flexibility and provided much of the child care. She also relied on colleagues in the office to cover for her during the occasional family emergency: "the kid's sick and you don't have day care, and you've got to be in court. We've all been there."

In 1991, with her older child just starting high school, Alper went on the bench. Now, she sits on Arlington's circuit bench, and she has thrown her hat in the ring for a Virginia Court of Appeals seat.

Alper said women should not define their success by looking at what the statistics measure.

"The pressure on men has always been if you're going to be a dog in the race you've got to be the top dog," she said. But many women say, "I don't want to be the managing partner. I like what I'm doing."

"I don't know why women aren't putting their names forward more often," she said. The questions she thinks most candidates ask themselves are, "Do I have the desire to do it? Do I have the political ability to do it? Do I want to run and lose?"

Before flex time became an employee benefit, **Gail Starling Marshall** was working it out for herself.

She graduated from the University of Virginia School of Law in 1968 — one of two women in the class. She remembers at a student gathering in her first year she spotted the only African American student, and the two were drawn to each other in the sea of white men. "Is there only one of you, too?" he asked. "No," Marshall said. "There are two of me."

She offered an example of the travails of law firms adjusting to female lawyers: When she was applying for a job at an established and respected law firm, she asked how much she would be paid. The interviewer, apparently not sure how to deal with that, said, "We pay our *men* such-and-such."


Marshall

Once, when Marshall told that story, someone asked, "Why didn't you tell the story with the name of the firm in it?" "Because I was glad they offered me a job," she said. She did not — and does not — want to discourage firms from "making baby steps."

Her career ladder has been more of a career zigzag, she said. She worked for a commission that revised the Constitution of Virginia, taught at U.Va. for four years, then joined Hogan & Hartson in Washington, D.C., as an associate.

That's where the flex time came in: She had married a widower with four children and later added a daughter to the family. She commuted, taking a bus or train between their home in Rapidan in Culpeper County and the District. She learned to be disciplined and efficient and she got the work done. Her husband, a university professor, took the lead caring for the children.

The firm worked with Marshall to accommodate her schedule, but in those early days with no precedent, the firm worried about details such as whether her male counterparts would be resentful. Still, Marshall became a partner in litigation at Hogan & Hartson.

Women faced another pressure back then: to be a credit to their gender. Marshall recalled hearing a conversation in which a U.S. senator and another attorney were tut-tutting over women taking law school slots that men could have had. Their theory was that women weren't as likely to practice. She spoke up and informed them that "one hundred percent of the women from my law school class practice law." Again, baby steps.

In 1985, Mary Sue Terry was elected attorney general of Virginia, and Marshall was invited to join her staff as deputy AG for judicial affairs. The offer required leaving her partnership, but she took it. The commute to Richmond began.

Terry was Marshall's first woman mentor, and she was an unselfish coach. As attorney general, Terry could have taken over the big cases, but she encouraged Marshall to handle them and argue them all the way to the U.S. Supreme Court.

To describe her experience of letting go the secure law firm career to risk the unknown, Marshall pulled out a 1999 *New Yorker* article about Michelle and Barack Obama. He was trying to decide whether to pursue a political career. They were looking forward to having children. Michelle, a lawyer, foreshadowed the ride that lay ahead:

> [W]e are going to be busy people doing lots of stuff. And it'll be interesting to see what life has to offer. If I had stayed in a law firm and made partner, my life would be completely different. I wouldn't know the people I know, and I would be more risk-averse. Barack has helped me loosen up and feel comfortable with taking risks, not doing things the traditional way and sort of testing it out, because that is how he grew up.

http://www.newyorker.com/reporting/2009/01/19/090119fa_fact_cook?yrail

Now, Marshall works part time as counsel to the Town of Orange, practicing from her home with the modern conveniences of faxes, e-mail, FedEx, and the Internet. She serves as appointed counsel in federal and state courts. She does pro bono work, teaches, and volunteers for other projects, legal and nonlegal.

Elizabeth B. Lacy, the first woman to serve on the Supreme Court of Virginia, shares the view that the definition of career success is different for different people, but she remains concerned about the relative scarcity of women on the bench and at the helm of law firms.

"The larger law firms in this country have a tremendous impact in a number of different ways," she said. For one, they have access to the legislative halls, which gives them influence on the direction of the justice system and legal profession.

"Women need to be part of this."

In addition to the perspectives they contribute to issues, the presence of women in leadership and on the bench has a "hugely symbolic aspect," she said. "How many young black men now think they can be president, when they didn't think that before?"

But statistics suggest that women — the older generations at least — have not been persuaded by law firms' attempts to make accommodations. "Ninety-eight percent of law firms offer flex hours. … Five percent of lawyers take advantage of it. There is a perception that it's a disadvantage for your career," she said.

Raising a family takes time from traditional partnership tracks and puts women on a different schedule. But the choice does not necessarily kill a career. Lacy herself took a six-year hiatus when she moved to Virginia from Texas, and yet won appointment to the state's highest Court. She now is retired from the bench.

She said it will be interesting to see how members of the millennial generation fare in their decisions to sacrifice the corner office for work-life balance, trading less money for more time.

Marshall quoted U.S. Justice Ruth Bader Ginsberg's observation that a reasonable work-life balance will not be achieved until law firms do away with the billable hour. Many professions and some law firms now price their services as a project package. Charging by the hour is increasingly considered anachronistic. Yet firms are slow to relinquish it because it is the best measure they know of productivity — along with the number and quality of clients a lawyer recruits.

Lacy

Holmes

Kathleen J.L. Holmes, president of the Virginia Women Attorneys Association, is confident that the overt discrimination of the past has abated. "The incidents of [women] being required to show a bar card in various corners of Virginia are few and far between," she said.

She is one of the big-firm success stories — she's a partner with William Mullen, she practices in McLean, and she's a wife and mother. Her husband is a stay-at-home father. She's very active in bar work, and she's applying for a judgeship on the Fourth U.S. Circuit Court of Appeals.

The numbers contained in the statistics are "downright abysmal," she said. She anticipates that ultimately "there is going to be a shift in the practice of law and the kind of compensation that lawyers make." Holmes does not know what the result will be, but she suspects that the the law firm paradigm will shift as profoundly as the publishing world has in response to the Internet.

But, she says, the reality always will be that "law firms tend to be run by people who bring in the business. That's the key point, I think. It's the bottom line."

"The larger law firms in this country have a tremendous impact in a number of different ways," … For one, they have access to the legislative halls, which gives them influence on the direction of the justice system and legal profession.

Pointers for the Ladder — or Zigzag — of Success

Suggestions from women lawyers about steps that could expand women's — or anyone's — options in the practice of law:

Believe that if you're talented and work hard, you'll find a place. "The reality of the workplace today is that we need talented people," said Kathleen Holmes, president of the Virginia Women Attorneys Association. "It can't matter whether that person is male or female, their race or culture or religious background."

Mentorship. There are never enough mentors for young lawyers of any background. Women and minorities value all advice from experienced attorneys — especially those who are "like them."

Work on your presentation. Remember Caroline Kennedy's recent political debut, splattered with hundreds of "you knows"? Get a speaking coach or media trainer to help you express yourself without verbal tics and with uncomplicated complete sentences that get to the heart of the matter. Learn to use a microphone and present yourself on camera.

Gail Starling Marshall of Rapidan has noticed in her law school teaching that many female students end every sentence, even declarative ones, with an upward inflection as if they are unsure of themselves. That mannerism plays into a gender stereotype. Women should train themselves out of it, she suggests.

Help develop the law. Throughout her career, family attorney Betty A. Thompson has found sections of law that needed tweaking. She introduced herself to legislators she thought would be interested and worked with them and like-minded lawyers to write legislation that addressed the problems. Eventually, one of those lawmakers approached her about serving on the bench — an offer she declined.

The General Assembly sponsors many commissions and studies on an ongoing basis. Participation offers a chance to contribute, networking opportunities, and a change of pace for a practitioner.

Throw your hat in the ring. Apply for judgeships and promotions. If you're shy, work through it. Most of these jobs don't come with an engraved invitation. "I think there are women who would very much like to be on the bench or in management positions, but there's a feeling they're not allowed to go there, or they don't know how to take the heat when they go there," Abingdon lawyer Mary Lynn Tate said. "You've got to be willing to lose to ever succeed."

Holmes said the Virginia Women Attorneys Association and its local chapters circulates news of judicial openings to encourage participation in the process.

Take a So You Want to Be a Judge course. The VWAA, Metropolitan Richmond Women's Bar Association, and minority bars offer the courses, which cover aspects such as introducing yourself to legislators, building a portfolio, soliciting endorsements, and the interview process. Marshall suggested that the Virginia State Bar could explore ways it could work with the association to bolster the program.

Provide interview coaching. Marshall says this is valuable for recent law school graduates, but it also is helpful to lawyers who face the question "you were out of the market for ten years?" "It's doubly important for women who are making career changes," she said.

Negotiate. Law firms today are laying off attorneys. The firm manager calls an associate in and says, "We love your work. We're going to give you two months' severance pay." "Ask for three months," Marshall said. Ask for a letter of recommendation. "That would come second nature to a man. He would bargain for more than they were offering."

Firms: give credit for bar work and pro bono. Lawyers who want to contribute their skills to their community look for firms that support them. "When an hour spent on bar work is treated the same way as an hour billing a client, you will see more participation," Holmes said.

"If you're going to tout that your firm does pro bono, then it's got to count on the hours," Marshall said. She added that she appreciates the Virginia State Bar's lead in recognizing work for the underprivileged not only by big firms, but from public sector and legal aid attorneys.

Firms: consider moving toward "value billing" based on project scope or case outcome. The lifestyle problems of big-firm lawyers are "not served by a lactation room," Marshall said. Tying value to quality instead of quantity of work has the potential of improving a lawyer's life.

Read "Actions for Advancing Women into Law Firm Leadership." Produced by the National Association of Women Lawyers National Leadership Summit in July 2008, this provides insights into where the bumps are for women in law firms, and how to smooth them over. http://www.nawl.org/Assets/2008+Summit+Report.pdf

Get involved in bar work. "Men are always working. They can convince themselves that when they're involved in bar work, they're still working," Marshall said. But women, she suspects, tend to use their volunteer time with a wider variety of activities that aren't necessarily tied to the law.

Women should involve themselves in their local bars at least, she recommends. Participation is particularly important for people who practice part time or who don't go to court. Bar work gets your name out there, so people won't ask "who's that?" when your name appears on a list of prospective judges.

The Virginia State Bar Council has eighty members, eighteen of whom are women. Most were appointed by the Supreme Court to at large seats or elected to seats from Nothern Virginia. "It is sad that you do not have more women on council," said retired Virginia Justice Elizabeth B. Lacy. She suggested that might improve now that the VSB has a female executive director.

Network. The VWAA moved beyond introducing lawyers and judges to each other: it sponsors events that bring women of different professions, including law, together to exchange business cards and share a program about how to leverage technology to market a practice or business.

Bar groups and firms should include families in events. "The Virginia State Bar has been fantastic in this regard, making their annual meeting family friendly," Marshall said. Family-inclusive events send the message that "your family is important to us, and if your family is not happy, then you're not happy at work."

When you're on hiatus, stay in touch. Most people don't give up their law license when they take time off or cease practicing for other employment. Lacy recommends that the VSB identify those people and encourage them to stay active in the profession by serving on committees or participating in sections.

Reach out to help other lawyers. "That came with the territory of being the first woman on the Court," Lacy said. She made herself available to the bar and other groups, which she found personally enriching because it helped her "stay in touch with the real world of lawyers…. I enjoy the people. I enjoyed the change of pace — particularly on the appellate bench. It sure beats sitting in front of a computer everyday."

Thompson said practice "is not about having clients and making money. It's about giving back to the profession." Lawyers who don't do that miss out on "the real enjoyment that comes from giving of yourself."

Don't whine. This advice comes from Thompson, who in the 1960s used to return to her office in the evening and clean, because she couldn't afford a maid service.

"Too many young people today come into an office and say 'what are you going to do for me?' Don't be so damned selfish. Put more emphasis on 'what I can do for the firm.' Never say 'I don't know.' Be creative and think. Don't practice law by ear. Go to the book and read the Code. Don't be afraid of hard work."

Define "success" on your own terms. Some people need to step back — for a while, at least — to give priority to child rearing, caring for an elderly parent, or a special project one feels called to do. "The thing that I want to speak against is defining work in large firms as being what all lawyers are striving for," said Gail Marshall.

"Either women are bamboozled — going into law without realizing that they have little chance of success — or they go knowing they will be successful." Marshall believes that law students make the choice because they feel a law degree will help them achieve success that is not measured by the statistics.

Marshall describes her career as a zigzag that has included many jobs, many people, and many interests.

"I am very happy with my lives as a lawyer and particularly with the variety of work and problem-solving, people-serving opportunities it has offered," Marshall said. "And I was delighted when my daughter, Starling, decided on a legal career. We have a roaring time analyzing, criticizing, arguing, and discussing all sorts of legal issues and issues within the profession. She is brimming with confidence."

— Dawn Chase

"You've got to be willing to lose to ever succeed."

U.Va.'s Julian Bond to Conduct Civil Rights History Tour

H. Julian Bond, an early leader of the American civil rights movement and now a history professor at the University of Virginia, will lead a bus tour that follows the path of the movement throughout the South February 28–March 6.

The program — Civil Rights South: In the Footsteps of the Movement — will begin and end in Atlanta, Georgia. It will move on a chronological path through Alabama — Tuskegee, Selma, and Birmingham.

Bond was the first president of the Southern Poverty Law Center, and he has been chair of the National Association for the Advancement of Colored People since 1988. He received a Library of Congress Living Legend Award in 2008.

For details, see http://www.virginia.edu/travelandlearn/2009civilrights.html, or call (800) 346-3882.

Two Decades of the Professionalism Course

The twentieth anniversary of the Harry L. Carrico Mandatory Professionalism Course was observed December 4, 2008, with a luncheon in Richmond. Since the Supreme Court of Virginia began requiring the course, 129 courses have been offered and more than twenty-six thousand Virginia attorneys have attended. Among the attendees were (left-right), Senior Justice Carrico, for whom the course is named; Virginia State Bar President Manuel A. Capsalis, who served on the Professionalism Course faculty; and Justice Donald W. Lemons, who from 1993 to 1995 chaired the VSB committee that recommended adoption of today's Virginia's Rules of Professional Conduct.

In Memoriam

John J. Ambler Jr.
Norfolk
February 1943–December 2008

Alvin Powers Anderson
Williamsburg
February 1948–November 2008

William M. Baskin
Great Falls
August 1921–December 2008

John N. Beall Jr.
Asheville, North Carolina
January 1923–April 2008

Charles W. Best Jr.
Norfolk
August 1936–August 2008

Jerome F. Connor
Wilmington, North Carolina
January 1927–June 2008

George Seymour Cummins
Blackstone
May 1922–November 2007

Charles R. Dalton Jr.
Norfolk
February 1924–November 2008

William A. Dickinson
Herndon
September 1916–August 2007

William Earl Fears
Onancock
September 1921–August 2008

James I. Hardy
Alexandria
November 1913–August 2008

William A. Johnston III
Winchester
November 1929–December 2008

Robert S. Lancaster
Sewanee, Tennessee
July 1909–February 2007

Edward Baxter Lemmond
Richmond
May 1942–September 2008

George W. Mitchell
Wadsworth, Ohio
September 1922–March 2008

E. Carter Nettles Jr.
Wakefield
March 1936–December 2008

James MacNeill Nolan
Richmond
August 1957–December 2008

Stanley A. Phillips
Virginia Beach
November 1918–March 2008

Francis B. Plattner
Arlington
November 1920–August 2008

I.M. Scott
Haverford, Pennsylvania
November 1912–October 2008

Prof. Robert E. Shepherd Jr.
Richmond
September 1937–December 2008

Charles A. Somma Jr.
Richmond
February 1928–August 2008

Boyd V. Switzer
Richmond
September 1941–December 2008

John Andrew Tilhou
Virginia Beach
January 1954–September 2008

Charles F. Urquhart III
Courtland
August 1942–September 2008

Alexander "Sandy" Wellford
Glen Allen
January 1930–December 2008

I. Leake Wornom Jr.
Newport News
December 1926–September 2008

Criminal Defense Lawyers Establish Shepherd Memorial Scholarship

The Virginia Association of Criminal Defense Lawyers (VACDL) has established a scholarship in memory of Robert E. Shepherd Jr., a University of Richmond law professor emeritus who was a national champion of justice for children and families.

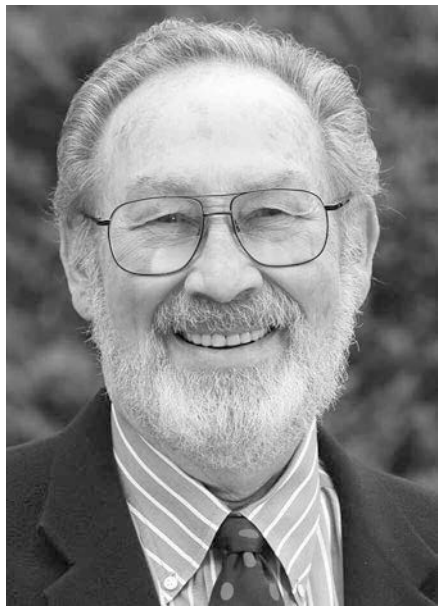
The Shepherd scholarship will pay for the recipient to attend one of its continuing legal education programs, as well as room and board. Applicants must be members of the Virginia State Bar and have a demonstrated desire to practice in juvenile and domestic relations courts. They cannot be full-time or part-time prosecutors. Lawyers who are not members of the VACDL are encouraged to apply.

The association will post the application form April 1 at www.vacdl.org. The deadline for applying is September 1.

Prof. Shepherd died December 11 at age 71, after a battle with cancer. After his retirement in 2001, he continued teaching and working on behalf of children until his final days.

"His teaching, writing, and legislative advocacy have had a profound impact on the lives of children and youth throughout Virginia and the nation," said UR law school Dean John G. Douglass. "His broadest and deepest legacy will remain the hundreds of students whom he mentored throughout his teaching career and with whom he shared equal measures of his inquisitive spirit, his sense of fair play, and his deep human compassion for those most in need."

Prof. Shepherd was instrumental in drafting Virginia's first statute on child abuse. He chaired the American Bar Association's Juvenile Justice Committee and the Virginia Bar Association's Committee on the Needs of Children, and was a thirty-year active member of the Virginia State Bar Criminal Law Section, for which he edited the section newsletter and oversaw its annual seminar.



Robert E. Shepherd Jr.

He received the ABA's Livingston Hall Juvenile Justice Award in 2005 and the VSB Harry L. Carrico Professionalism Award from the Criminal Law Section in 2003.

The family requested that contributions be made to the Robert E. Shepherd Jr. Endowed Fellowship Fund at the University of Richmond School of Law.

Local Bar Elections

Hopewell Bar Association
Mary Katherine Martin, President
Susan Mary O'Prandy Fierro, Vice President
Walter Douglas Stokes, Secretary-Treasurer

Northern Neck Bar Association
John Robert Rellick, President
James Rawleigh Simmons, Vice President
Paul Christian Stamm Jr., Secretary-Treasurer

• SAVE THE DATE •

The Virginia State Bar Committee On Access To Legal Services
and The University Of Richmond National Center For Family Law
Invite You To Mark Your Calendars For The

Virginia State Bar
Annual Pro Bono & Access to Justice Conference

April 20–21, 2009
Richmond

Coming Home in Lean Times:
Addressing Legal Needs of Warriors and Ex-Offenders

Monday, April 20, 2009
DAYTIME CLEs and EVENING AWARD CEREMONY
LEWIS GINTER BOTANICAL GARDEN EDUCATION AND LIBRARY COMPLEX

- **8:30 a.m. Registration**
- **9:00 a.m. to 5:00 p.m. CLEs**
  - **Track I** — Community Re-integration Challenges Facing Veterans and Military Service Members and Their Families: Traditional and New Direct Service Approaches; ADR; "Wounded Warrior" Litigation Models
  - **Track 2** — Inmates & Ex-Offenders: Disproportionate Confinement; Drug Courts; Collateral Consequences; Re-entry Models
- **General Sessions:**
  - **Ethics:** Rules as Tools in Catastrophe Response & Recovery
  - **IRS National Taxpayer Advocate to Uncle Sam:** "Extend Compassion in Recession"
  - **Networking:** Opportunities for Providers and Volunteers
- **7:00 p.m. Award Ceremony and Reception**

Tuesday, April 21, 2009
OPEN HOUSE EVENT — "UR DOWNTOWN"
A Multidisciplinary Collaboration between the University's Center for Civic Engagement and the Law School.
626 East Broad Street, Suite 100, across from the new Federal Courthouse

- Power Point, Panel Discussion, & Tour
- Catered Reception

Of special interest to Guardians ad Litem, Mediators, Civil Legal Services Providers, JAG Officers, Pro Bono Directors and Volunteers, and other Justice System Advocates and Professionals

See http://www.vsb.org/site/events/item/pb-conference/ for registration details (including pending MCLE and GAL credit approval information). CLE text materials will be available to registrants via the VSB website in April.

Getting to Know the Litigation Section

by Jennifer L. Parrish

Until I became a member of the Litigation Section Board of Governors, I had no real idea of what the Virginia State Bar Litigation Section really did and why it benefitted me, other members of the bar, and the public at large. Now, in my job as section chair, I am often convinced that I still have no idea what we do. We have so many projects being handled by so many selfless volunteers that it can be difficult to keep track of them all. I hope you get to know us, and I encourage you to either join or become more active.

The Litigation Section, with more than 2,800 members, is the largest section in the Virginia State Bar. Our board of governors comprises thirteen lawyers and three judges.

Highlighted below is a sampling of some of the projects and accomplishments of our section.

Law In Society Essay Contest
One of the most important projects our section funds each year is the Law in Society Award Competition, an essay contest for Virginia high school students. Essays address a topic related to law that is developed by the VSB Special Committee on Publications and Public Information. The current contest receives logistical assistance from the Virginia Department of Education. Section members score the essays and present prizes and awards to the winners. This year's topic for the students is "Safety or Censorship: Do Internet Filters Help or Hinder Education?"

Continuing Legal Education
The Litigation Section sponsors a continuing legal education workshop at the VSB annual meeting in June, and a CLE program at the bar's Midyear Legal Seminar.

Section Secretary Robert L. Garnier will present "Stop Talking Like a Lawyer — The Lost Arm of Communication in Mediation, Negotiation, and Litigation" at the June meeting. Lawyers will gain practical insights and skills to resolve conflicts, build rapport, create favorable impressions, enhance credibility, and persuade.

The tentative topic for the Midyear Legal Seminar is "Winning Your Case in Discovery." Because of what some term as the "disappearing jury trial," we may focus on winning strategies to use in discovery.

Newsletter
In 2008, our section said goodbye to long-term Newsletter Chair Kevin W. Holt, who did a stellar job for many years. Our new newsletter chair, Joseph M. Rainsbury, took over with the fall 2008 newsletter. In each newsletter, our section writes articles of interest to litigation lawyers and reviews current law review articles.

Appellate Practice Subcommittee
For several years, the section's appellate practice subcommittee has been chaired by Steven L. Emmert. Our new chair is Monica T. Monday. Steve has moved mountains by single-handedly bringing the number of subcommittee members to more than fifty this past year. More than fifty lawyers from the public and private sector attended the subcommittee's Appellate Summit in 2008 and received four hours of CLE credit. Supreme Court Justice Lawrence L. Koontz Jr. and Virginia Court of Appeals Judge Robert P. Frank spoke candidly about what does and does not work in their respective courts. The seminar included cutting-edge presentations on interlocutory appeals and the Supreme Court's new crackdown on specificity in assignments of error.

The appellate practice subcommittee also formed two committees to plan future symposia and summits. The section's appellate handbook also will be revised by the subcommittee, after we see what changes the Supreme Court of Virginia makes to the rules.

Website
The Litigation Section maintains a website at http://www.vsb.org/site/sections/litigation. You can view the website by going to vsb.org. From there, you can download a membership application and read the Litigation Section's newsletters.

Long-range Planning Committee
VSB President Manuel A. Capsalis is preparing a five-year strategic plan for the Virginia State Bar. He has requested that each section formulate its own five-year plan. We have formed a long-range planning committee for this purpose, headed by Vice Chair Gregory J. Haley.

Young Lawyer Committee
Our Young Lawyer Committee has a new chair, Nathan J.D. Veldhuis of Charlottesville. This committee has conducted exemplary seminars across the commonwealth.

We look forward to welcoming you to the Litigation Section.

From Courtroom to Conference Room: Reflections on Mediation

by Gregory J. Haley and Scott C. Ford

Every lawyer with a litigation practice must master mediation. The skills of an effective courtroom advocate are very different from the skills of an effective lawyer at mediation. This article analyzes, from the perspective of trial lawyers, how to approach and manage a mediation to achieve the best results for your client.

Mediation has become popular because it can settle litigation.

What Is Mediation?

In mediation, parties agree to try to settle a dispute using a neutral third party to facilitate, manage, and preside over a structured negotiation. The mediator is often a retired judge, a sitting judge, or a seasoned litigation attorney.

At a mediation conference, all parties participate in a joint session with the lawyers and the mediator present and then split into separate groups. The mediator then shuttles between the groups with messages, analysis, and persuasive or evaluative commentary until the dispute is settled or the negotiations end.

The Rise of Mediation

As the number of cases brought to trial has decreased, the use of mediation has increased. Mediation has become popular because it can settle litigation. An intriguing question is why mediation is so popular and so effective. The analysis of this question is critical in developing mediation practice skills.

Mediation is effective because:

- The parties have more control over the outcome, as compared to the win-lose result that often occurs in litigation. There is also more flexibility in structuring an outcome.
- It is sometimes difficult to predict how a jury or judge will decide a case.
- A settlement ends the cost, stress, and inconvenience of continued litigation.
- The mediation process leads to settlement by incorporating important emotional and psychological effects, such as a party's opportunity to be heard by the other side. Unlike litigation, mediation allows the parties to talk directly to each other. A good mediator will allow each side that opportunity. Further, most parties that devote substantial time to a mediation become invested in the process and desire to reach a compromise if possible.
- The mediator's comments can serve as an important reality check to the parties.
- Preparing for mediation forces the parties to take a critical and realistic look at their positions.

There also is significant value in considering why mediation efforts fail and the case does not settle, or your client agrees to bad settlement terms. Mediations fail because:

- The necessary parties with settlement authority are not present to personally experience the give-and-take of the negotiation process.
- The lawyer has not properly prepared for the mediation.
- There is anger, hostile presentation, pride, and tricks or surprises. United States Magistrate Judge Michael F. Urbanski of the U.S. District Court—Western District of Virginia observed wryly that "the tricks never work."
- The mediator makes mistakes.

- A party does not participate with the good faith intent to reach a resolution.

- A party succumbs to litigation fatigue and just wants to end the litigation on any terms and at any cost.

Before Mediation
Good lawyers know that the best way to settle a case is by getting ready for the trial. In every communication with the opposing side, the lawyer must demonstrate competence and readiness to try the case. Proper mediation preparation is also good trial preparation.

Evaluation of the case includes its strengths and weaknesses, the facts, and the law. The lawyer should share the case evaluation with the client. These steps will avoid surprises and establish realistic expectations.

The litigation then proceeds through pleading, discovery, and motions phases until the facts and legal issues identified in the evaluation are confirmed or adjusted. The timing of mediation depends on the case. It is generally helpful to have at least some discovery done to fill out the fact issues. It also helps if some event is imminent, such as a summary judgment, an important motions ruling, or trial. If the dollar dispute is relatively low, early mediation is advisable before both sides have reached the point that neither side can afford to settle.

The Psychology of Mediation
Mediation is effective in part because of the time invested by the parties with the goal of resolution in mind and because of the role of the neutral third party to highlight the strengths and weaknesses of each case.

The lawyer should try to make certain that the client understands the following:

- The mediator represents only the settlement of the case. Some mediators settle a dispute on any terms the parties agree to. They may not be interested in justice or fairness. Other mediators — particularly judicially appointed mediators — will consider and argue interests of justice and fairness. The lawyers have to consider and adjust to the mediators' styles.

- The mediator will identify and emphasize every weakness in each case. You should prepare your client for this.

- Negotiation involves incremental movements by each side. The client must be patient.

- The lawyer must prepare the client for the possibility that mediation will not end litigation. The client should be prepared to walk away if the mediation result is not acceptable.

Mediation offers an excellent opportunity to change the other side's perception of the case, because the lawyer can talk to the opposing party without the filter of opposing counsel

Independent Negotiation
It is essential for each party to exchange offers and demands before the mediation session, to minimize the possibility of a wasted mediation effort and reduce the temptation for gamesmanship. The exchange also gives at least a framework for analyzing competing expectations. The exchange requires the lawyers to take an updated look at the case, plan a settlement strategy, and involve the client. A lawyer should not use mediation as a substitute for talking with the other side and trying to negotiate a settlement.

Choosing the Mediator
Picking the right mediator depends on the characteristics of the case and the parties involved. What problems are holding up settlement? Does the client have unrealistic expectations? Is he or she too emotional or naive about the uncertainties if the case goes to trial? Examine the other side as well. Is opposing party too zealous or unable to analyze the facts or law? A lawyer can identify the obstacles to the mediator.

Training and experience are essential to be an effective mediator.

Training and experience are essential to be an effective mediator. A retired judge brings authority and credibility that are important in reaching a settlement or convincing a recalcitrant lawyer or client. If the lawyer anticipates that the mediator will have to assert an independent evaluative role to make the other side more realistic, then pick an assertive mediator. Cases such as construction or patent law may need a specialized mediator.

The Mediation Agreement
The parties should enter into a mediation agreement that addresses cost sharing, confidentiality, and other matters.

Preparation

- Prepare your client, develop settlement arguments that include the organization of themes and the opponent's weak points. Identify nonmonetary factors that can be used as "bargaining chips" at the mediation. This allows for concessions on significant but relatively painless points.

The client should understand that your role at mediation is very different than your role at trial ...

- Educate your client about the mediation process, and engage the client's participation in finalizing the settlement strategy. The client should understand that your role at mediation is very different than your role at trial: in mediation, you will be trying to develop a rapport with the other side. The client should understand that anger, sarcasm, or disrespect is likely to result in failure. In some cases, an apology by your client might be appropriate.

- Advise the client about who should attend, what clothes to wear, and that the process may take many hours. The lawyer and the client should identify the party representative. Parties with authority to settle the case must be in attendance. Consider how certain personalities may interact when selecting participants.

- Prepare a mediation submission including a brief memorandum, pleadings, exhibits, and case law. The parties generally exchange these materials. The mediation submission should be concise and address the strengths and weaknesses of your case.

- Have a private discussion to help prepare the mediator and identify problem areas, including problem personalities. Private discussions ensure that the mediator understands relevant legal theories and the facts. It is also an opportunity to identify obstacles to settlement.

- Prepare for success. List agreement points. Bring a draft agreement to the mediation. Carefully analyze the tax consequences of the possible settlement alternatives.

Premediation Conference Call
A premediation conference call among the mediator and the lawyers will address who will attend the mediation, logistical arrangements, and the exchange of submissions. Mediators require that each party be represented by a person with appropriate settlement authority, as well as lead counsel. In cases involving insured parties, a representative of the insurance company is often required. Personal injury cases should be analyzed to determine if any third-party liens are involved. If liens are present, agreements to resolve them should be addressed prior to the mediation. Participants should attend the mediation in person as participation by telephone is seldom effective.

Logistics
The lawyer should make sure that there are adequate facilities for the mediation, including at least two conference rooms and word processing capabilities. Facilities should be comfortable for the participants, as they may be there for several hours. Arrange for necessary computer-enhanced presentations.

Joint Session
Judge Urbanski said that the joint session at the beginning of mediation is most important. He recommended a "soft-spoken, matter-of-fact presentation." John B. McCammon of the McCammon Group said that zealous advocacy is not effective and that mediation requires a collaborative process. Courtroom strategies may fail at mediation, he said. For example, at mediation, listening is just as important as talking; speaking softly is better than speaking loudly; and being open is better than hiding information. It may be more effective to present information in a more neutral manner rather than in a more traditional advocacy style.

The joint session should be conducted in a conciliatory tone. Forcing the other side into a defensive posture may result in the failure of the process. Retired judge Robert L. Harris Sr. said that a bulldog or abusive approach is likely to cause people to let pride prevent a successful mediation. The lawyer with good mediation skills will express appreciation for everyone attending and a desire to resolve the dispute on a fair basis. Each side makes a presentation. Whether the clients participate in these presentations depends on the case and the clients.

This is the lawyer's opportunity to change perceptions of the facts, the merits of the case, the weaknesses in the opposition's case, and the capabilities of the lawyers. The lawyer speaks directly to the other party in a structured setting. Some lawyers effectively use Power Point and other presentation technology in these joint sessions. Computer-assisted presentations, exhibits, and demonstrations can be effective.

The Private Caucus

The private caucus includes opportunities to reevaluate aspects of the case in light of the other side's presentation or the mediator's comments. Waiting for the other side to go through that evaluative process can involve long periods of waiting. The mediator will not acknowledge the strengths of your case, but will emphasize the strengths of the opponent's case. He or she will do the same in the caucus with the other side. The parties can expect the mediator to become more assertive and more evaluative late in the process.

In commercial litigation, there are opportunities for creative negotiations that address the parties' nonmonetary interests. The best mediators will push each party to identify what interests underlie their litigation positions and how an agreement can be crafted to address those interests.

Lawyers should request that the parties and/or the lawyers meet again to discuss certain issues if the mediator's "shuttle diplomacy" is not effective. The client should be told that what is said to the mediator in a private caucus may be repeated. However, the mediator may be given confidential information and asked to keep it so.

The Many Faces of the Mediator

Every mediator has different talents and strengths. It is critical that the lawyer do his or her homework prior to the mediation and talk to others that have worked with the mediator to understand the mediator's style. Urbanski observed that some lawyers want the mediator to negotiate for them. It is, however, the lawyer's job to marshal the positive arguments, disprove and minimize the opposing arguments, and give the mediator the tools to dismantle the other side's position and undermine their confidence in their case.

On the other hand, there is a natural tendency to treat the mediator as an authority figure, with the corresponding desire to hear what this authority figure thinks about the dispute. The lawyer must make sure that the client is not unduly awed or coerced by the mediator. If a client who has not been properly prepared hears a mediator make negative comments about their case, they will be understandably distressed.

Finally, it is an accepted practice that judicially appointed mediators do not tell the trial judge about the mediation proceedings and related communications. If there is doubt or concern about this issue, it should be discussed with the mediator.

Deal or No Deal

If the case is settled, it must be written and signed before the parties leave. A settlement template should be brought that can be edited on a laptop computer.

If there is no settlement, the effort may not have been wasted. Settlement negotiations can continue with or without the mediator. If the parties are dissatisfied with the initial mediator, they can choose another and try again. In any event, the lawyer has had the opportunity to influence the opposing party's analysis. If the case does not settle at mediation, expect the mediator to follow up communications to bring about settlement.

Mediation and negotiation skills are a critical component of a necessary larger skill set for lawyers. Lawyers have trained for centuries in the techniques associated with the battle of litigation. The art of collaboration with the opposing lawyer, the mediator, and the opposing party necessary at mediation is still a relatively recent skill. Good trial techniques are the opposite of good mediation techniques. A settlement will generally follow so long as the lawyer is prepared, understands the issues, and recognizes that advocacy in the courtroom is very different than mediation advocacy. ■

Mediation and negotiation skills are a critical component of a necessary larger skill set for lawyers.

The authors express their appreciation to retired judge Robert L. Harris Sr., U.S. Magistrate Judge Michael F. Urbanski, J. Scott Sexton, and John B. McCammon for offering their time, important insights, and suggestions.

Have You Made A Last-ditch, Desperate, and Disingenuous Attempt to Subvert the Legal Process Today?

by Travis J. Graham and James J. O'Keeffe IV

… leave the anger out of your court documents … it's against the law, and … it absolutely does not work.

It has been a long time since we've been wrong about anything. It has been even longer since we were incorrect, and together we cannot remember the last time that we misread a case. This is not to say that either of us is especially smart or perceptive. It's just that, over the past few years, we've noticed a trend in the language we see in briefs and pleadings. We've somehow gone from being "wrong" to being "absurd," "ridiculous," and "disingenuous," "myopic" in our view of the world, and "prone to wild exaggeration." Now, instead of just being "incorrect," we're "hopeless"—we "engage in subterfuge," "obfuscate the facts," "muddy the water," "employ a selective memory," "conveniently forget" facts in the record, and generally spend all day trying to "pull the wool over the court's eyes." Our pleadings "smack of desperation" and serve as gross "admissions of failure." Opponents call us on our "scurrilous allegations," which are, sadly, "as baseless as they are preposterous." We have made many an "eleventh-hour attempt" to do this or that on the basis of distorted facts, all to divert focus or mislead the court. We weave arguments out of "whole cloth," and most everything we do these days is "transparent," "desperate," "last-ditch," or amounts to an "about-face" of one kind or another. The pleadings telling us so are filled with so much underlining, bold print, and capitalization that they are basically black.

From our conversations with practitioners and judges, we know that we are not alone in noticing—and resenting—a trend toward the increased use of inflammatory language in pleadings. Everyone with whom we've spoken agrees that letters, pleadings, and briefs laced with attack and insult make life a little worse for all of us. We all understand that accusing someone of being "disingenuous" or describing opposing counsel's position as a "pretext" is just an elegant way of calling another lawyer a liar. No one seriously contends that this language serves a useful purpose in the practice of law.

But you don't have to take our word for it. Over the past few months, we've conducted research and engaged in discussions with a number of judges and justices on the subject of civility in pleadings. The results are enlightening. Based on our investigation, we offer two good reasons—neither remotely disingenuous—to leave the anger out of your court documents: first, it's against the law, and second, it absolutely does not work.

Demeaning Language Is Against the Law

Use of demeaning language in court documents runs contrary to the Principles of Professionalism, the Virginia Rules of Professional Conduct, and the *Code of Virginia.*

Principles of Professionalism

The Principles of Professionalism for Virginia Lawyers is a set of ideals endorsed by the Supreme Court of Virginia and the Virginia Bar Association. (http://www.vsb.org/docs/2008-09_priniciples.pdf) The preamble to the principles reminds us that in our oath, "all Virginia lawyers pledge to demean themselves professionally and courteously." The principles go on to instruct us to "treat everyone as [we] want to be treated—with respect and courtesy." "Everyone" includes clients, judges, court personnel, and opposing counsel and their staffs.

We are further cautioned to "avoid ad hominem attacks, recognizing that in nearly every situation opposing lawyers are simply serving their clients as [we are] trying to serve [our] clients," to "avoid reciprocating unprofessional conduct by opposing counsel," and "to resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers." While these principles lack the force of rules or law, they provide a clear statement that our profession does not approve of discourteous conduct, including written insult.

Virginia Rules of Professional Conduct

Rule 3.4 of the Virginia Rules of Professional Conduct, which deals with fairness to opposing parties and counsel, provides that a lawyer shall not "intentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings," and that a lawyer shall not "file a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Admittedly, these provisions do not explicitly command lawyers to avoid inflammatory language in written documents. But Comment 8 to the rule states that

> in adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feelings should not influence a lawyer's conduct, attitude, or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

It would seem that the drafters of the rule contemplate that "fairness" to opposing counsel necessarily includes an element of courtesy.

Oddly, Virginia has not adopted another rule, which appears in the American Bar Association Model Rules and has been held by courts to directly address intemperate language in written documents. ABA Model Rule 8.4(d) provides that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice." While this is a broad pronouncement, courts have held that the provision subjects a lawyer to discipline for the use of "offensive and sarcastic language."[1] The comment to Virginia Rule 8.4 provides no indication as to why the Virginia rule omits this subsection. The omission seems to eliminate one means of redressing intemperate and offensive language in written documents.

Virginia Code § 8.01-271.1

Virginia law, however, does provide a means by which the courts may sanction intemperate language, at least when that language is directed to the courts themselves. Virginia Code § 8.01-271.1 — Virginia's equivalent to Federal Rule 11 — has been held by the Supreme Court of Virginia to prohibit offensive writing directed at a tribunal. In *Taboada v. Daly Seven Inc.*,[2] the court responded to a petition for rehearing that contained several very clear instances of what it termed "intemperate language." The Court found that the language was intended "to ridicule and deride the court," which it held to be an "improper purpose" for a pleading within the meaning of Code § 8.01-271.1(iii).[3] The filing attorney was sanctioned accordingly.

More recently, the Supreme Court of Virginia upheld sanctions imposed by a circuit court for the use of contemptuous language in a pleading. The Court agreed that a pleading containing such language was filed for an improper purpose within the meaning of Code § 8.01-271.1(iii). It stated that "[c]ontemptuous language and distorted representations in a pleading never serve a proper purpose."[4] In both cases, the Supreme Court of Virginia reminded practitioners that Code § 8.07-271.1(iii) "is designed to ensure dignity and decorum in the judicial process," and that it "deters abuse of the legal process and fosters and promotes public confidence and respect for the rule of law."[5]

… the Supreme Court of Virginia upheld sanctions imposed by a circuit court for the use of contemptuous language in a pleading.

Taken together, these principles, rules, and laws make it clear that inflammatory language for its own sake is improper.

Uncivil Language Doesn't Work

There is a second and perhaps even more powerful reason to leave the loaded language out of your court documents: it simply does not work.

Not Effective Advocacy

In the course of preparing this article, we spoke with a number of sitting judges and justices. Without exception, they felt that the use of inflammatory language is hopelessly ineffective as a persuasive technique—and some found it to be affirmatively counterproductive. Virginia Justice Lawrence L. Koontz Jr. summarized the general consensus when he told us, "I can't think of a reason why a lawyer would take that approach." He finds it disturbing to see inflammatory language in briefs, and sometimes wonders what has happened to the concept of courtesy, which he says, "ought to be as natural as breathing."[6]

… the best treatment that an overly aggressive lawyer can hope for is to be ignored.

This makes perfect sense. Judges are trying to do a job—specifically, they are trying to arrive at the legally correct result in a given case. The proper purpose of a brief or pleading is to help the judge arrive at this result. Careful legal analysis and an accurate recitation of the material facts will aid the judge; invective will not. Accordingly, as Koontz told us, "[a] strong brief is based on analysis, and application of the facts to the law," while inflammatory language is "not effective and is at minimum a distraction."[7]

Further, the judges all stressed that their time is extremely limited and jealously guarded. One state trial court judge told us in no uncertain terms that "[f]or a judge, time is the most valuable commodity.… Lawyers who wish to waste the time of the court—for which their clients are paying—to no useful end are a scourge on the profession."[8i] Overstating the facts or law or engaging in ad hominem attack wastes time that the court could be using to analyze the issues. Michael F. Urbanski, a magistrate judge of the U.S. District Court–Western District of Virginia, agreed that shrill language "gets in the way. … It's annoying, it's distracting, and it wastes the client's money."[9]

In fact, the best treatment that an overly aggressive lawyer can hope for is to be ignored. Judge Martin F. Clark Jr. of the Patrick County Circuit Court told us that he finds overblown language in pleadings to be so pervasive that it does not even register anymore; he characterizes it as "stagecraft."[10]

Because judges have limited time to devote to your case, anything that you write that does not affirmatively advance your client's position necessarily hurts it.[11] Superfluous language dilutes the force of your arguments and increases your risk of error. Error, in turn, will erode your credibility and your effectiveness as an advocate. Further, an unending stream of angry rhetoric tries the patience of the average judge; it gets on judges' nerves the same as yours and mine. Judge Clifford R. Weckstein of the Roanoke City Circuit Court invoked Oklahoma federal Judge Wayne E. Alley's classic cry of disapprobation: "If there is a Hell to which disputatious, uncivil, vituperative lawyers go, let it be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes."[12]

Weakness in Argument

Inflammatory language is not only annoying and distracting to the judge but, as several jurists told us, it signals weakness in the underlying legal argument.[13] Koontz noted that when the justices see certain language, "it's an indication that counsel does not think his or her case is strong on the facts and the law."[14] As Weckstein phrased it, "the judge assumes that if you have the goods, you will go with the goods instead of resorting to smoke and mirrors."[15]

Even though judges may be inured to a certain degree of hyperbole, some words indicate deficiencies in the underlying argument so strongly that they will likely prompt questioning from the court.[16] Virginia Justice Donald W. Lemons offered some examples of phrases that particularly catch his attention, and not in a good way:

- a statement that an opponent is "disingenuous";
- a claim that an opponent's position is merely a "pretext";
- an assertion that opposing counsel "would have the court believe" something;
- a statement that "opposing counsel misstates" the facts or the law;
- anything that amounts to a personal attack on the trial judge or opposing counsel.

He advised us that a lawyer who accuses another of misrepresenting the law or the record—even euphemistically—likely will be called upon to justify his or her statement.[17]

Several judges made it clear that such an indiscretion will never directly hurt a client's cause. The courts are "unlikely to hold one way or

another because they find a lawyer's conduct to be unprofessional."[18] But unseemly conduct may divert the court's attention from the key issues in the case. Accusing opposing counsel of misrepresenting an appellate record, for example, may prompt the court to explore the issue at oral argument. That, in turn, will require the accusing lawyer to spend precious minutes of argument off-point, explaining to the court whether a given record citation fully supports, only arguably supports, or does not support his opponent's position. The result cannot be beneficial to the client.[19]

Just because a judge won't penalize your client because of your behavior, however, is not a license to misbehave. Each judge and justice with whom we spoke reiterated the importance of a lawyer's reputation. A notoriously difficult lawyer who finds himself in a bind is likely to find that opposing counsel are less cooperative than they might be.[20] He might even find that the court is less receptive to requests for discretionary relief, such as continuances. Although Weckstein conceded that "every lawyer is entitled to one bad day," he also told us that "[i]f you are a pettifogger, your name will come up in judicial conversations. And where a judge might otherwise think you're having a bad day, he or she will know that you've had bad days before."[21]

How to Respond to Uncivil Language

How should a lawyer respond to less-than-civil behavior? The jurists with whom we spoke offered a variety of solutions.

Lemons suggested engaging the issue head-on — for example, by noting that the opposing brief is replete with emotionally charged language and hyperbole, ceding victory in the name-calling contest, and getting back to the merits.[22]

By contrast, Urbanski suggested that a lawyer faced with venomous language in a pleading should not even acknowledge it. He or she would be better served by simply addressing the merits of the case. Urbanski noted that, "[a] judge's job is to do justice, not be a kindergarten monitor…. It's not my job to play referee."[23] He believes that an attorney should look past incivility unless it causes injustice — and at that point, the proper recourse is a motion for sanctions, not a reply in kind.

Koontz tends to agree with this approach. When faced with a brief full of name-calling, he suggested that the safest course of action is to "[i]gnore it. You never want to sink to that level of conduct, and you can ignore ad hominem attack with a certain degree of safety, because it won't be ignored by the court."[24] ■

Endnotes:

1 *See, e.g., In re: Abbott*, 925 A.2d 482 (Del. 2007). Mr. Abbott was sanctioned for statements he made in two briefs to the effect that opposing counsel presented a "fictionalized" account of a hearing, offered an "imaginary, make-believe set of reasons" to support their position, "fabricated" conclusions, made "ridiculous" arguments, and engaged in "pure sophistry" to "magically transmute" the law and create decisions "from whole cloth."
2 272 Va. 211, 636 S.E.2d 889 (2006).
3 *Id.* at 215-16, 636 S.E.2d at 891.
4 *Williams & Connolly LLP v. PETA,* 273 Va. 498, 519, 643 S.E.2d 136, 146-47 (2007).
5 *Id.* at 519, 643 S.E.2d at 146, *quoting Taboada*, 272 Va. at 215-16, 636 S.E.2d at 891.
6 Interview with Hon. Lawrence L. Koontz Jr., Justice, Sup. Ct. of Va., in Roanoke, Va. (Nov. 19, 2008).
7 *Id.*
8 Interview with Hon. Clifford R. Weckstein, Judge, 23d Judicial Cir. of Va., and Hon. Martin F. Clark Jr., Judge, 21st Judicial Cir. of Va., in Roanoke, Va. (Nov. 11, 2008).
9 Interview with Hon. Michael F. Urbanski, Magistrate Judge, U.S. Dist. Ct. for the W.D. of Va., in Roanoke, Va. (Nov. 17, 2008); *see also* Weckstein & Clark, *supra* (opining that name-calling is unprofessional and "gets in the way" of efficient case resolution).
10 Weckstein & Clark, *supra.*
11 For a full and thoughtful discussion of the point that anything that doesn't help, hurts, from which this section borrows, *see generally* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008).
12 Weckstein & Clark, *supra.*
13 Koontz, *supra*; Weckstein & Clark, *supra.*
14 Koontz, *supra.*
15 Weckstein & Clark, *supra.*
16 Koontz, *supra*; telephone interview with Hon. Donald W. Lemons, Justice, Sup. Ct. of Va. (Nov. 6, 2008); Weckstein & Clark, *supra.*
17 Lemons, *supra.*
18 *Id.*
19 *Id.*
20 Urbanski, *supra.*
21 Weckstein & Clark, *supra.*
22 Lemons, *supra.* For some excellent examples of this technique, *see* BRYAN A. GARNER, THE WINNING BRIEF 341-43 (2D. ED. 2003).
23 Urbanski, *supra.*
24 Koontz, *supra.*

Corporate Reps at Deposition Must Be Knowledgeable

by Thomas G. Bell Jr.

A recent decision by Magistrate Judge Michael F. Urbanski of the U.S. District Court – Western District of Virginia provides useful guidance and warning for corporations or other entities required to provide a knowledgeable corporate representative for a discovery deposition.

Nearly all trial lawyers at some point have faced the frustration of deposing a corporate representative who is designated for the deposition, but when questioned lacks sufficient information …

Rule 30(b)(6) of the Federal Rules of Civil Procedure allows and requires a corporation or other business or government entity to be deposed. Under the familiar procedure, the party that requests the deposition "must describe with reasonable particularity the matters for examination." In turn, the entity must name a person or persons to testify on its behalf, by designating a specific individual for each matter on which examination is requested. The rule requires that the "persons designated must testify about information known or reasonably available to the organization," so there is an obvious requirement that the designated person be able to speak for the entity and not just as an individual. Rule 4:5(B) of the Virginia Rules of Court closely tracks Rule 30(b)(6) and establishes a similar procedural framework for cases in Virginia circuit courts.

Nearly all trial lawyers at some point have faced the frustration of deposing a corporate representative who is designated for the deposition, but when questioned lacks sufficient information to provide adequate discovery of the company's evidence or lacks understanding of his responsibility in the case.

Lawyers who represent business entities often have difficulty getting their clients to understand and take seriously their obligations under the rule. The designation as a deponent for a company is obviously not one that an employee generally welcomes. Often the designated corporate representative is unhappy about his or her designation and is faced with a difficult and time-consuming obligation outside of normal job duties. There is an understandable desire to get the deposition done with a minimum of effort so the employee can get back to his or her real job. Litigation is often seen as an annoyance and a distraction, particularly when there is insurance coverage for any loss and the company's assets are not at risk.

The facts in *Spicer v. Universal Forest Products* (2008 U.S. Dist LEXIS 77232, W.D. Va., decided October 1, 2008) reveal a particularly flagrant corporate failure to comply with the requirements of the rule and the severe consequences of that failure. Judge Urbanski's decision in that case should be required reading for any business representative designated in a Virginia case — state or federal. It should impress on any designee the importance of the assignment.

Spicer alleged that he was fired by Universal from his job at its Pearisburg plant in violation of federal laws prohibiting age and disability discrimination and in retaliation for filing a workers' compensation claim. Universal's defense was that his termination was for poor job performance and a result of a decline in the business at its Pearisburg plant.

The plaintiff's counsel issued a notice under Rule 30(b)(6) designating at least sixteen separate topics for inquiry, including the basis of the business downturn defense and the company's response to the workers' compensation claim. He was required to travel from Roanoke to Grand Rapids, Michigan, to take the deposition. Before the deposition was scheduled, Universal had filed two motions for protective order to narrow the scope of the topics to be addressed at the deposition, so it certainly had knowledge of what the deposition was to cover.

When the corporate representative was deposed, he stated in response to questions on all or nearly all the topics that he had no knowledge on which to respond for the company. He

revealed that his only preparation was a conference with the company's counsel, that he had not reviewed any documents except with counsel, that the documents he reviewed did not relate to the topic, and that otherwise he had done no preparation. Counsel refused to let him answer any questions about the nature of their pre-deposition discussions or the documents they had reviewed, so the representative was unable to provide any responsive information. As Urbanski noted, "It is clear from review of the transcript that Hendricks was simply unaware of his role as 30(b)(6) corporate designee."

After the deposition, plaintiff's counsel filed for sanctions pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure. That rule authorizes sanctions against an offending party that include waiver of defenses, rendering a default judgment, contempt, and payment of attorney's fees and expenses.

The designated representative testified that he had no information about business conditions at the Pearisburg plant or any financial reports of the company, but admitted that he could have obtained that information if he had done any investigation. He gave a similar response on questions about the workers' compensation claim.

Urbanski held that a "corporation must make a good-faith effort to designate people with knowledge of the matter sought by an opposing party and to adequately prepare its representatives so that they may give complete, knowledgeable, and non-evasive answers in deposition." Citing the case of *United States v. Taylor*, 166 F.R.D. 356 (M.D.N.C. 1996), the opinion stated:

> The testimony elicited at the *Rule 30(b)(6)* deposition represents the knowledge of the corporation, not of the individual deponents. . . . If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the designees so that they may give knowledgeable and binding answers for the corporation. Thus, the duty to present and prepare a *Rule 30(b(6)* designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved.
>
> *Rule 30(b)(6)* explicitly requires [a corporation] to have persons testify on its behalf as to all matters known or reasonably available to it and, therefore, implicitly requires such persons to review all matters known or reasonably available to it in preparation for the *Rule 30(b)(6)* deposition.

Urbanski noted that preparing for corporate depositions could be burdensome, but that did not relieve the corporation of its responsibility to prepare. The burden of preparation is simply an obligation imposed on the corporation in return for its ability to take advantage of the legal protections available to a corporation.

Universal argued that the information sought was otherwise attainable and had been provided to the plaintiff through other witnesses, so that the lack of knowledge of the corporate representative did not prejudice the plaintiff. While Judge Urbanski gave Universal some leeway where that information had been obtained from other witnesses, he noted that on some of the topics, especially the financial condition of Universal's Pearisburg plant, there was no information elsewhere. He further found that, "The fact that four Universal employees were deposed does not relieve Universal of its obligations under Rule 30(b)(6). Providing plaintiff with discoverable information through non-30(b)(6) depositions and document production does not excuse Universal's failure to prepare its corporate designee for the 30(b)(6) deposition. . . . The mere fact that a corporation produces all of its documents relating to an allegation does not relieve it of its responsibility to produce competent witnesses."

The burden of preparation is simply an obligation imposed on the corporation in return for its ability to take advantage of the legal protections available to a corporation.

Faced with the flagrant lack of preparation, Urbanski concluded, "Whether by design or oversight, it is clear that Universal completely disregarded its obligations under *Rule 30(b)(6)*. Spicer has been prejudiced in terms of the expenses incurred in preparing for and attending a 30(b)(6) deposition in a distant city that was utterly futile and in its inability to obtain discoverable information on the company's alleged financial downturn."

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Because the trial date was near, Urbanski declined to reschedule the corporate deposition since that "would only serve to punish plaintiff's counsel by requiring them to retrace their steps instead of preparing for the impending trial." He imposed sanctions, beginning with ordering Universal to pay the attorney's fees and costs incurred by the plaintiff in preparing for, traveling to, and conducting the deposition, as well as those incurred in pursuing the motion for sanctions.

As previously noted, Universal designated a 30(b)(6) witness who could provide no evidence regarding its claim of a financial downturn at its Pearisburg plant. To compound its problems, two weeks after the 30(b)(6) deposition Universal filed an affidavit outlining the financial problems of the Pearisburg plant and moved for summary judgment based on the affidavit, despite stonewalling plaintiff's efforts to inquire about the issue at the 30(b)(6) deposition.

In discussing the summary judgment affidavit, Urbanski noted that the court had narrowed the scope of the financial inquiry condition to that of the Pearisburg plant but the witness failed to provide any supporting information. The court concluded, "It is incongruous that Universal can contend, based on this affidavit, that there is no dispute of fact as to the financial condition of its Pearisburg plant when counsel for the plaintiff was given no opportunity at the 30(b)(6) deposition to probe this defense, as the corporate deponent was utterly unprepared to testify on this subject." ■

Employee Use of Company Computers – A Privilege Waiver Mine Field

by Michael F. Urbanski and Timothy E. Kirtner

No one thinks about it. Everyone does it — uses a work computer for personal purposes. Today, employees use work computers to communicate with lawyers, spouses, doctors, or even pastors. Many companies have written policies and on-screen warnings stating that users have no expectation of privacy. What is the legal status of personal information on such computers that would otherwise be subject to a privilege? How have courts addressed no-privacy policies in the context of the broader public policy that protects privileged communications?

Federal courts have addressed the issue of whether communications made on or through employer-owned computers are protected from discovery and use at trial

Federal Decisions

Federal courts have addressed the issue of whether communications made on or through employer-owned computers are protected from discovery and use at trial under the protections of the marital and attorney-client privileges and the work product doctrine.

In *United States v. Etkin*, No. 07-CR-913, 2008 WL 482281 (S.D.N.Y. Feb. 20, 2008), the court held that, in light of the employer's computer use policy, defendant could not claim the marital communications privilege. The defendant moved to preclude introduction at trial of an e-mail that was sent using his government-issued e-mail account, asserting the marital privilege. Each time defendant logged on his computer, however, the screen warned of computer monitoring and notified users that they had no legitimate expectation of privacy. The court was persuaded by the screen warning that any expectation of privacy was "entirely unreasonable" and therefore, the communication was not confidential. *Id.* at *5; *see also Sprenger v. Virginia Tech*, No. 7:07cv502, 2008 WL 2465236 (W.D. Va. June 17, 2008).

The public policy underlying the attorney-client privilege is to encourage "full and frank communication between attorneys and their clients." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Courts analyzing the confidentiality of e-mails and documents sent from work computers have reached differing conclusions in applying the attorney-client privilege.

For example, in *Long v. Marubeni America Corporation*, No. 05Civ.639, 2006 WL 2998671 (S.D.N.Y Oct. 19, 2006), the court found that the company's electronic communications policy (ECP) rendered any use of the company's computers nonconfidential, and found the attorney-client privilege not to attach and the work product doctrine waived. Unbeknownst to employees, when they used password-protected e-mail accounts, the company's computers "had an automatic administrative function that stored temporary Internet files in a separate folder that was accessible only to authorized [company] employees. Retained within the folder were residual images of the plaintiffs' e-mail messages." 2006 WL 2998671 at *1. The court found such communications not to be confidential because of the breadth of the employer's ECP, which (1) prohibited personal use of company computers; (2) stated that employees had no right of personal privacy in any e-mail or word processing document; and (3) the company had the right to monitor all data on its computer system. *See also Kaufman v. Sunguard Invest. Sys.*, No. 05cv1236, 2006 WL 1307882 (D.N.J. May 10, 2006) (Employee waived attorney-client privilege by communicating with her counsel over employer's e-mail system).

A leading case that reached a contrary conclusion is *In Re Asia Global Crossing Ltd.*, 322 B.R. 247 (Bankr. S.D.N.Y. 2005). In *Asia Global*, the court laid out four factors to consider in measuring an employee's expectation of privacy in his computer use:

> (1) does the corporation maintain a policy banning personal or other objectionable use, (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies.

Asia Global, 322 B.R. at 257. Because the employer did not have a formal policy regarding use of computers, the court held that the use of work e-mail to communicate with a personal attorney did not destroy the attorney-client privilege. *Id.* at 261.

Asia Global and *Etkin* both looked toward the Fourth Amendment reasonable expectation of privacy standard to determine the reasonableness of intent that the communication remain confidential. Recognizing that the "question of privilege comes down to whether the intent to communicate in confidence was objectively reasonable," the court in *Asia Global* expressly equated the question to whether there was an objectively reasonable expectation of privacy. *Asia Global*, 322 B.R. at 258.

Many federal cases that involve computers and the Fourth Amendment reasonable expectation of privacy take place in the workplace. In *O'Connor v. Ortega*, 480 U.S. 709 (1987), the Supreme Court held that public employees did have Fourth Amendment rights in their offices, but that their reasonable expectations of privacy could be "reduced by virtue of actual office practices and procedures, or by legitimate regulation." *Id.* at 717. Because of the many different types of public work environments, the Court noted that questions of public employees' reasonable expectations of privacy should be addressed on a case-by-case basis. The Fourth Circuit has held that a public employee had no reasonable expectation of privacy in his Internet use in light of the employer's computer use policy. *United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000).

In two cases similar to *Etkin* involving computers with flash-screen warnings and Fourth Amendment rights, courts held that defendants had no reasonable expectation of privacy in their work computers. *See United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002) (upholding a seizure of a state-owned computer because defendant had no reasonable expectation of privacy in light of flash-screen warning); *United States v. Bailey*, 272 F. Supp. 2d 822 (D. Neb. 2003) (holding that flash-screen warning obviated any defendant reasonable expectation of privacy). *See also Muick v. Glenayre Elecs.*, 280 F.3d 741 (7th Cir. 2002) (notice that laptops were subject to inspection of privacy).

The Second and Fifth Circuits, however, have held that employees had a reasonable expectation of privacy in office computers. *See United States v. Slanina*, 283 F.3d 670, 676 (5th Cir. 2002) (employer did not have a policy notifying employees that computers were monitored); *Leventhal v. Knapek*, 266 F.3d 64, 73 (2d Cir. 2001) (employer only had an anti-theft policy that prohibited use of computers for personal business, and computers were subjected to "infrequent and selective search[es] for maintenance purposes"). The Court of Appeals for the Armed Forces has also held that an employee had a reasonable expectation of privacy in her work computer even though there was a flash screen warning at log-in. *United States v. Long*, 64 M.J. 57, 64 (C.A.A.F. 2006). The court distinguished *Simons* on the basis that the policy in *Simons* was "very specific," restricted use to official business, and notified the user that the system was subject to inspection. *Id.* at 65. The log-on banner in *Long* did not contain a notification that users had no expectation of privacy in use of the system. *Id.* at 65. All these factors added up to a qualification of defendant's privacy expectation in her e-mails, but not an elimination of an objectively reasonable expectation of privacy. *Id.* at 64.

A more nuanced approach was taken by the court in *Curto v. Medical Communications Inc.*, No. 03CV6327, 2006 WL 1318387 (E.D.N.Y. May 15, 2006). There, the court found no waiver of privilege by an employee communicating with her counsel over a company laptop, even though the employer had a policy that prohibited the personal use of computers. The court considered the fact that the employee worked out of her home, communicated with her counsel through a personal AOL account, and attempted to delete the e-mails before returning her computer. Under these circumstances, the court found any disclosure to be inadvertent and not a waiver of privilege.

Likewise, in *Sims v. Lakeside School*, No. C06-1412RSM, 2007 WL 2745367 (W.D. Wash. Sept. 20, 2007), the court found an employee manual to be clear that an employee had no reasonable expectation of privacy in e-mails sent over the employer's e-mail accounts. However, the court found that Web-based e-mail communications with plaintiff's spouse or lawyer to be privileged, reasoning that the public policy in favor of confidential communications to trump the provisions

of the employee manual. This aspect of the analysis undertaken by the *Sims* court ought not be underestimated, as it is one of the few opinions that elevates the public policy in favor of preserving privileged communications over an employer's internal computer usage policy.

… it is one of the few opinions that elevates the public policy in favor of preserving privileged communications over an employer's internal computer usage policy.

Selected State Decisions

The Supreme Court of Virginia recently addressed waiver of the attorney-client privilege for information stored on a company computer in *Banks v. Mario Industries of Virginia Inc.*, 274 Va. 438, 650 S.E. 2d 687, 695-96 (2007). In *Banks*, Troy Cook, a manager of a sales division of Mario Industries, made plans to develop a competing business. Prior to Cook's resignation, Cook sought legal advice from his personal lawyer regarding his resignation. Cook prepared a memo for his attorney on a computer owned by Mario. This memo, in which Cook addressed issues concerning Mario, its industry, and his planned resignation and new business, became a key piece of evidence at Mario's civil suit for breach of fiduciary duty.

The Roanoke City Circuit Court admitted the memorandum into evidence over Cook's attorney-client privilege objection. Citing *Clagett v. Commonwealth*, 252 Va. 79, 92, 472 S.E.2d 263, 270 (1996), for the proposition that "the [attorney-client] privilege is waived where the communication takes place under circumstances such that persons outside the privilege can overhear what is said," the Supreme Court of Virginia held the trial court's finding of waiver to be without error. The Court founded its ruling on the fact that Mario's employee handbook provided that there was no expectation of privacy regarding Mario's computers and that Cook created the memorandum on a Mario-owned computer and printed it off before deleting it.

The *Banks* court found the memorandum not to be privileged, notwithstanding the fact that Cook made efforts to delete the memorandum from the Mario computer. The opinion does not reach the question of whether Cook's efforts to delete the memorandum could constitute circumstances under *Clagett* where the communication could not be "overheard." Nor does it reach whether the circumstances of being overheard are impacted by the fact that it took a forensic computer expert to resurrect the memorandum. Waiver is fact specific, and such argument may find resonance in future cases. On the *Banks* facts, therefore, one could argue that waiver of the privilege occurs at the moment the memorandum is typed on a company-owned computer, regardless of whether anyone other than the author saw it or had access to it before it was deleted. The danger, of course, is that waiver of the attorney-client privilege can be broad subject matter waiver. *See United States v. Jones*, 696 F.2d 1069, 1072-73 (4th Cir. 1982).

The issue of an employee's efforts to delete a document was addressed in another case in which an employee went to work in a competing role. In *National Economic Research Associates, Inc. v. Evans*, 21 Mass. Rptr. 337, 2006 WL 2440008 (Mass. Super. 2006), NERA sued David Evans, one of its former consultants, for breach of a non-solicitation agreement following his resignation and subsequent employment with a competitor.

While still employed at NERA, Evans communicated with his personal lawyer concerning his departure and start of work for his new employer. Many of these communications were conducted by e-mail, with Evans sending and receiving e-mails from his personal, password protected e-mail account with Yahoo rather than his NERA e-mail address. Evans frequently used the laptop issued to him by NERA to communicate with his lawyer via the Internet. As in *Long*, Evans's e-mails with his lawyer left a trail on his computer.

Before Evans left NERA, he deleted personal computer files and ran a defragmentation program, which he understood would prevent recovery of the deleted personal files. Evans did not, however, delete his e-mails from his Yahoo account as he had no idea that they were stored on his work laptop. After Evans left, NERA hired a computer forensic expert who was able to retrieve the communications between Evans and his lawyer.

NERA argued that the attorney-client privilege did not apply to these e-mails, and, even if it did, Evans waived the privilege. NERA contended that its policies made it clear that any e-mails sent over company computers could not be considered confidential. NERA's policy contained admoni-

tions that personal use of e-mails should be kept to a minimum; that computer resources are property of the company; that any information sent over such resources may be reviewed; and that e-mails are not confidential and may be routinely read by the company. As such, NERA argued that Evans's communications with his lawyer were not made in confidence.

The court agreed with NERA that the warnings in the employee manual rendered nonconfidential any e-mails sent via the company e-mail address and network.[1] The court disagreed, however, that a reasonable person would have known that the hard disk of a computer makes a screen shot of all it sees — including password protected Internet e-mail accounts — and stores it in a temporary file. The court found such communications to be privileged.

The court found further that Evans had not waived the privilege. He had taken adequate steps to protect the confidentiality of his communications with his lawyer by using his private password protected e-mail account, he did not store these e-mails on his work computer, and he attempted to delete all personal data off of his work laptop. The Massachusetts court practically rationalized its holding by concluding that:

> If NERA's position were to prevail, it would be extremely difficult for company employees who travel on business to engage in privileged e-mail conversations with their attorneys. If they used the company laptop to send or receive any e-mails, the e-mails would not be privileged because the "screen shot" temporary file could be accessed by the company. If they used the hotel computer to avoid this risk, the communication would still not be privileged because the hotel could access the temporary file on its computer. Pragmatically, a traveling employee could have privileged e-mail conversations with his attorney only by bringing two computers on the trip — the company's and his own.

2006 WL 2440008 at *5. At the end of the day, the specific holding in *NERA*, like the federal decisions of *Curto* and *Sims*, was fairly narrow and specific: the court in *NERA* concluded that there was no privilege waiver for an employee's attorney-client communications unintentionally stored in a temporary file on a company-owned computer that were made via a private, password protected e-mail account over the Internet.

Conclusions and More Questions

How does one begin to rationalize such apparently divergent decisions? Certainly, one way to do so is to recognize that the facts of each case dictate the outcome. For example, use of a company e-mail account and server or word processing program to communicate with one's spouse or lawyer is fraught with danger, particularly where the employee is on notice of the employer's policy that such information is owned by the company and that he has no expectation of privacy, and particularly in the context of employee-versus-employer litigation. The case for waiver is even clearer where employers expressly prohibit personal use of work computer systems. On the other hand, using a personal, password-protected e-mail account that bypasses the employer's server or taking steps to delete a document created on an employer's computer system may give rise to the argument that there was no waiver of a privileged communication. In litigating issues of privilege waiver in this electronic age, parties and courts need to be mindful of the balance that must be struck between the public policy that protects certain confidential communications and the private rights of employers who own computer hardware and software over which employees conduct both the employers' and their own personal business.[2] ■

Endnotes:

1 To that extent, the *NERA* opinion also is consistent with a New York decision in *Scott v. Beth Israel Medical Center Inc.*, 17 Misc. 3d 934, 847 N.Y.S.2d 436 (2007). There the court found that plaintiff doctor, who had sued his former employer for breach of his employment contract, waived the attorney-client privilege as to e-mails sent to his counsel using his employee e-mail address and sent over the employing hospital's server. Applying the *Asia Global* test, the court found that the hospital's computer use policy stated that its computers were for business purposes only, the hospital's policy allowed it to access any information on its system and Scott had both actual and constructive notice of this policy. As such, the court found that Scott's e-mails were not confidential communications protected by the attorney-client privilege and that any work product protection was waived by Scott's use of the hospital e-mail system in the face of the hospital's computer policy.

2 Finally, it is worth noting that the civil cases discussed above concern disputes between employees and employers. Should the *Banks* decision and

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Caveat Appellant: Supreme Court Cracks Down on Insufficient Assignments of Error

by L. Steven Emmert

[Editor's Note: This was adapted from an article and postscripts originally posted on the author's website, Virginia Appellate News & Analysis, http://www.virginia-appeals.com/, beginning on June 18, 2008.]

Assignments of error are a very important part of every petition for appeal in the Supreme Court of Virginia. They are jurisdictional, and omitting them from your brief will inevitably result in your appeal's being euthanized at an early date by a procedural panel of the justices.

Several recent developments have convinced me that the Supreme Court is looking with much greater care at assignments and dismissing appeals where the assignments aren't satisfactory. This, in turn, leads to the arrival of some very unwelcome orders in attorneys' mail, followed by very delicate conversations with the client, describing how the lawyer's mistake has scuttled the appeal.

Some of the rulings I'll describe here caught me by surprise. They signal the need for every appellant's counsel to reevaluate how he or she crafts assignments.

Assignments: The Rule

The Supreme Court has described the purposes of assignments in these terms: "[A]ssignments of error serve several distinct and important functions. Their chief function is to identify those errors made by a circuit court with reasonable certainty so that this Court and opposing counsel can consider the points on which an appellant seeks a reversal of a judgment. In addition, assignments of error also enable an appellee to prepare an effective brief in opposition to the granting of an appeal, to determine which portions of the trial record should be included in the parties' joint appendix, and to determine whether any cross-error should be assigned." *Friedline v. Commonwealth*, 265 Va. 273, 278 (2003).

Virginia is one of only five states that use "binding" assignments of error — those that irreversibly restrict the scope of the appeal to the issues framed thereby. Here, assignments frame the permissible appellate issues much as initial and responsive pleadings do in trial courts. If you plead a cause of action for negligence, the trial court won't listen to your argument or admit your evidence on a breach of contract claim.

Let's start with the relevant text from Rule 5:17(c):

> Under a separate heading entitled "Assignments of Error," the petition [for appeal] shall list the specific errors in the rulings below upon which the appellant intends to rely. Only errors assigned in the petition for appeal will be noticed by this court. Where appeal is taken from a judgment of the Court of Appeals, only assignments of error relating to questions presented in, or to actions taken by, the Court of Appeals may be included in the petition for appeal to this court. An assignment of error which merely states that the judgment or award is contrary to the law or the evidence is not sufficient. If the petition for appeal does not contain assignments of error, the appeal will be dismissed.

Each of these sentences contains a useful lesson in its own right. The first sentence creates the requirement, and gives us the only available guidance on the level of detail required: "shall list the specific errors in the rulings below." (Just what "specific" means in that sentence is the subject of considerable discussion.) The second sentence tells you that if you assign errors only to issues A, B, and C, then the Court won't consider your argument on alleged legal errors D and E. If you want the Supreme Court to consider an issue, you must list it. So far, so good.

The third sentence contains an important procedural guideline. If you're coming from a loss in the Virginia Court of Appeals, keep in mind

that the Supreme Court must address its ultimate ruling to that court, not to the trial court. That means that you have to assign error to what the Court of Appeals did, not to what the trial court did. (If you're chicken-hearted about this, it is permissible to use the following language: "The Court of Appeals and the trial court erred in ruling that …") In the fourth sentence, the rule gives us one example of an assignment that doesn't measure up to the requirement of specificity. And the final sentence announces the death penalty for petitions that contain no assignments at all.

A direct violation of the rule has always been fatal.

Unfortunately, that same death penalty awaits appellants who submit insufficient assignments. If you do include assignments of error, but they aren't specific enough, the Court will dismiss your petition for appeal, citing Rule 5:17(c). (In effect, the rule is applied as though the words, "or does not contain sufficient assignments of error," were added.) And you don't get a do-over; you will not be permitted to amend your assignment to make it comply with the rule (as you would have the opportunity to do in the trial court if your complaint had been impermissibly fuzzy). Your appeal simply dies, and all you can do is place phone calls to your client and your insurance carrier.

Racheting Up Enforcement

A direct violation of the rule has always been fatal. For example, the Commonwealth Transportation Commissioner saw one legal argument die a premature death last year, when it listed the following assignment in a condemnation appeal: "The trial court erred in failing to find that the jury commissioners' report is contrary to the evidence at trial." The Court ruled that this assignment directly violates the fourth sentence of the rule. *CTC v. Target Corp.*, 274 Va. 341, 352-53 (2007).

I saw at least anecdotal evidence that the Court ratcheted up its enforcement of this rule in 2008. As a result, many assignments that I would once have regarded as safe are now insufficient in the eyes of the Court. Here are some of last year's developments:

- In May, the Supreme Court issued an order directing a Tidewater attorney (who has, I understand, a substantial appellate practice) to show cause why his privilege to practice in that Court should not be suspended. The reasons behind this order are many in number but uniform in nature — he's had nine appeals dismissed for procedural violations, most of those relating to assignments of error.

- On June 4, as I sat in the Supreme Court awaiting my turn to argue orally, I saw an appeal by the Commonwealth in a sexually violent predator case. The Chief Justice interrupted the assistant attorney general and asked how her assignment of error was sufficient. He then read it aloud, and I think I can paraphrase it accurately here: "The trial court erred in excluding the expert testimony of Dr. John Jones." I wondered to myself what could be wrong with that assignment. After all, the lawyer seemed to "lay his finger on the error." That's been the standard for assignments for a long time in Virginia, going back at least to *First Nat'l Bank v. William R. Trigg Co.*, 106 Va. 327, 342 (1907) (quoting an 1810 New York case).

- On June 10, the court entered an order dismissing an appeal for an insufficient assignment in a legal malpractice case. In that appeal, the lone assignment read, "The trial court erred in granting [the appellee's] motion for summary judgment." Again, this assignment specified the exact legal ruling that was being appealed, but the Supreme Court found it wanting.

Contrast that dismissal with the successful appeal of *Shutler v. Augusta Heath Care*, 272 Va. 87 (2006), the Supreme Court granted Shutler's petition based on the following single assignment of error: "The trial court erred in granting the defendant's motion for summary judgment."

There is, you will readily discern, no meaningful difference between these two assignments. But the *Shutler* assignment led to a reversal, while the one in the legal malpractice claim led to a dismissal.

The Supreme Court since has granted rehearing in the legal malpractice case, thereby reinstating the appeal on the Court's docket. But at least one justice evidently felt that it was unfair to change course on the entire appellate bar with no advance notice. I have no idea whether the appellant will get his writ, nor whether the judg-

ment will ultimately be reversed. But at least the Court has righted what I see as an injustice against the lawyer or the appellant, who might have been facing a bar complaint for suffering a procedural dismissal that he could not possibly have seen coming.

With the June 10 ruling, I finally put the three developments together and made an unmistakable deduction: The Court is getting noticeably tougher on appellants in evaluating the sufficiency of assignments, and it has done so without advance notice.

Don't Change the Wording

Vagueness is not the only assignment-related issue that gets the Court's unwelcome attention. One particularly venal sin (just ask any justice and watch as the skin on the back of his or her neck gets red) is an appellant trying to change the wording of the assignments after getting a writ. Perhaps the writ panel asked pointed questions, and he wants to ensure that his wording is sufficient.

Unfortunately, no dice. The general rule is that once you file your petition, the language of the assignment is chiseled in stone. I am aware of no exceptions to this rule. I believe you could get leave of Court, if you ask for it nicely, to correct something like an obvious typographical or spelling error, but I have never seen this done. I cannot conceive that the Court would ever consent to a substantive change.

This sin is venal and not mortal because it doesn't necessarily carry the death penalty. You can still proceed with your appeal, but you'll be limited to the original assignment as set forth in your petition. See, for example, *Hamilton Dev. Co. v. Broad Rock Club*, 248 Va. 40, 43-44 (1994). Of course, you will have alienated the Court by doing this, as the justices will perceive that you're trying to pull a fast one.

How to Protect Your Appeals

So, what's a careful appellant to do? It would be easy to overreact and craft assignments that are replete with detail — say, two pages apiece. The trouble with that is that now the assignments are taking over the brief. This kind of assignment is part of what got the Tidewater lawyer the show cause order last month. Two pages each is just too long.

The best advice I can give you is something I heard recently from one of the justices – use the word "because" in your assignments. For example, if the appellant in the legal malpractice case had written, "The trial court erred in granting [the appellee's] motion for summary judgment, because a material dispute of fact existed on causation," then I sense his appeal would still retain vitality. Similarly, if the lawyer in the sexually violent predator case had written, "The trial court erroneously ruled that the expert testimony of Dr. John Jones was speculative and therefore inadmissible," the Supreme Court would have the detail it needs to evaluate the issues in the appeal in something other than a vacuum.

This new development has alarmed experienced appellate attorneys. I regard this as a very unfortunate trend, because, among other reasons, it's always best to have decisions made on the merits instead of on technical rules violations. In addition, those who follow the Court only casually may well chalk this up to a common misperception that the justices look for any excuse they can find to dismiss as many cases as possible, purely to cut down on their workload. But the Court has the right to interpret its rules as it sees fit, and it is not wrong to view this kind of defect in terms of the Court's very jurisdiction. Jurisdiction is something the Court will never take lightly.

Despite the grant rehearing in the June 10 legal malpractice case, The Court has not retreated from its sterner emphasis on detail in assignments. That ship has sailed. The notice is out now, and future appeals will probably not be handled quite so leniently. ■

by William T. Wilson, Chair

Local Bar Leaders, Small-Firm Lawyers Training Provided by the CLBA

AS MOST OF YOU KNOW, the Conference of Local Bar Associations (CLBA) endeavors to teach local and statewide bar associations how the Virginia State Bar operates and the types of programs it offers to them. The CLBA executive committee comprises fourteen lawyer representatives from voluntary bars around the state. The VSB coordinator is Paulette J. Davidson.

CLBA programs include the Bar Leaders Institute (BLI) and the Solo and Small-Firm Practitioner Forum. The BLI provides instruction to bar leaders about projects that promote good legal practice and pro bono opportunities. The Solo and Small-Firm Practitioner Forum is oriented to the nuts and bolts of practicing law and managing a law office. There is also an ethics component.

While some bar associations are active and present thought-provoking, imaginative, and effective programs, other bar associations are lethargic. Bar associations in the latter category need to be inspired by the CLBA. I have also observed that when local judges—juvenile and domestic relations, general district, and circuit— are involved in their local bar associations, the associations seem to do better. I call this the "Mary's Little Lamb" philosophy: wherever judges go the lawyers "are sure to follow." Although some judges are reluctant to become too involved in bar activities, most of them do so. They frequently have been inspired by the Chief Justice of the Supreme Court of Virginia. In recent years, both former chief justice Harry L. Carrico and current Chief Justice Leroy R. Hassell Sr. have encouraged judges to become more active in their local bar associations.

Past VSB president Edward B. Lowry, former VSB executive director Thomas A. Edmonds, and I once visited Chief Justice Carrico to discuss this concept. He was receptive to our suggestion that judges ought to be more active in their local bars and agreed to encourage them to do so.

The next BLI is scheduled for April 15, 2009, at the Virginia Historical Society in Richmond. If you are a leader in your local bar association, or if you aspire to be, please attend.

In addition, the CLBA will present a Solo and Small-Firm Practitioner Forum in cooperation with the Supreme Court of Virginia on Wednesday, May 20, 2009, at Shenandoah University in Winchester. Chief Justice Hassell will conduct a town hall meeting, during which he will take questions and comments from the audience. Again, I urge you to attend.

Details and registration information for both events will be posted on the CLBA website at http://www.vsb.org/site/conferences/clba/.

The *So You're 18* booklets are a great resource for many organizations. These booklets tell high school seniors about issues that face them when they reach adulthood. The bar has distributed more than twenty-six thousand booklets in English and 784 in Spanish. Many J&DR courts distribute the booklets at driver's licensing ceremonies. Schools, libraries, and departments of social services also use the booklets. If your bar association is looking for ways to reach the community and would like to distribute the booklets at a local high school or conduct a panel discussion, we have a blueprint available for your presentation. You may contact Ms. Davidson at davidson@vsb.org or (804) 775-0521 for a copy of the blueprint.

If you need advice or assistance please do not hesitate to call Ms. Davidson or me. My telephone number is (540) 962-4986.

CLBA Conferences

More information will be posted at http://www.vsb.org/site/conferences/clba/ when it becomes available.

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

Bar Leaders Institute
Virginia Historical Society, Richmond
April 15, 2009

by Jennifer L. McClellan, President

The YLC at 35: A History of Service

AT OUR LAST YOUNG LAWYERS CONFERENCE BOARD MEETING, while reviewing the conference's bylaws, I lingered over the preamble:

> Pursuant to the Resolution adopted by the Virginia State Bar Council at its June 1971 Annual Meeting that an organization of younger members of the Virginia State Bar be created, James A. Howard, 1973–74 president of the Virginia State Bar, appointed an Initial Board of Governors for such organization consisting of nine active members of the Virginia State Bar and charged that Board with the responsibility of implementing the Council Resolution by organizing the "Virginia State Bar Young Members Conference."

That's right: The YLC celebrates its thirty-fifth anniversary this year.

The YLC's first president, Karen W. Kincannon, was the only president to serve two terms. In her first year, the YLC organized the conference, recruited volunteers, and developed programs to assist the bar and improve the legal system.

During the 1977–78 bar year, the YLC, under the leadership of Diane M. Strickland, developed a long-range plan. President Frank W. Morrison (1979–80) developed the committee structure and recurring projects.

During the term of R. Edwin Burnette Jr. (1985–86), the YLC president became an ex officio voting member of the VSB Executive Committee. Since then, the YLC has had a voice in developing VSB policies, provided services to its members and the public, and promoted its members for appointment to bar leadership positions.

The YLC has published brochures and handbooks to educate the public about its rights and responsibilities. The *Senior Citizens Handbook*, which until recently was a joint project between the YLC and the Senior Lawyers Conference, was first published in 1979 and updated several times. This handbook addresses laws, issues, and programs that affect Virginia's elder citizens; provides practical guidance; and lists resources and contacts at public and private organizations that serve seniors. In 1998, in response to needs of Virginia's Hispanic population, YLC President Julie D. McClellan (1998–99) launched a project to translate the handbook into Spanish. The conference has distributed tens of thousands of copies of the *Senior Citizens Handbook* to senior citizens at retirement communities, community gatherings, churches, mall walkers programs, government agencies, public libraries, law offices, and senior citizens groups.

Under the leadership of Julie McClellan, the YLC founded the Virginia Domestic Violence Safety Project, chaired by future YLC president Maya M. Eckstein (2006–07). This committee developed pamphlets that outline the legal rights of domestic violence victims and a safety brochure, which were distributed across the commonwealth through corporations, police and sheriff departments, social services agencies, and the courts. These publications were also translated into Spanish.

More recently, under the leadership of Savalle C. Sims (2004–05), the YLC helped distribute voting rights brochures and handbooks developed by the Virginia State Board of Elections in response to the Help America Vote Act. Under the leadership of Jimmy F. Robinson Jr. (2005–06) and Eckstein and in partnership with JustChildren, the YLC developed, published, and distributed the *Juvenile Rights Handbook* to educate children younger than eighteen about their rights and responsibilities with respect to schools, the courts, and the police. Under YLC President Daniel L. Gray (2007–08), this handbook was translated into Spanish.

In the early 1980s, YLC President Bruce M. Wallinger (1981–82) fostered programs to educate the public about the law and the legal system, including Community Law Week. Held in conjunction with Law Day on May 1, Community Law Week promotes programs that educate communities about the law, including individual legal rights and responsibilities, and that provide pro bono legal service to the public. The YLC has also sponsored a No Bills Night program during Community Law Week, and provided educational programming on *Brown v. Board of Education*, the jury system, and the Bill of Rights.

In conjunction with the Virginia Bar Association Young Lawyers Division, YLC presidents James A. Hoffman II (1993–94) and Sharon Moon (1994–95) developed the Emergency Legal Services Response Plan to provide legal services to victims of natural disasters. The plan was

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implemented for the first time in 1995 in response to heavy rains and flooding in the Shenandoah Valley, and again in response to Hurricane Felix, the blizzard of 1996, and flooding in Southwestern Virginia. Since then, the Emergency Legal Services team has activated hundreds of volunteers to provide legal services to victims of natural disaster across the state — most recently, tornadoes in Suffolk and Colonial Heights.

Other projects implemented by the YLC in its thirty-five years include setting up child witness waiting rooms at courthouses, hosting regional trial competitions, and operating programs for crime victim compensation, peer mediation, and diversity.

I am proud to serve as president during this thirty-fifth anniversary. When I pass leadership in June to Lesley A. Pate, the YLC will be older than most of its members. However, our dedication to serving our members, the bar, and the public, will be as strong as the day President Kincannon took the gavel.

Seeking Nominations

The Virginia State Bar Young Lawyers Conference is seeking nominations for the **R. Edwin Burnette Jr. Young Lawyer of the Year Award**.

This award honors an outstanding young Virginia lawyer who has demonstrated dedicated service to the YLC, the profession, and the community.

The nomination deadline is May 1, 2009. Nominations should be sent to:

Daniel L. Gray
Immediate Past President
Cooper Ginsberg Gray PLLC
10201 Lee Highway, Suite 520
Fairfax, VA 22030
703-934-1480
Fax: 703-280-4370
dgray@cgglawyers.com

Learn more about the Young Lawyers Conference at
http://www.vsb.org/site/conferences/ylc/

YLC Board Elections

At its Annual Meeting on June 19, 2009, the Virginia State Bar Young Lawyers Conference will be electing members to the Board of Governors.

All nomination are due on May 1, 2009, and any letter of interest or nomination should be sent to:

Daniel L. Gray
Immediate Past President
Cooper Ginsberg Gray PLLC
10201 Lee Highway, Suite 520
Fairfax, VA 22030
703-934-1480
Fax: 703-280-4370
dgray@cgglawyers.com

Any VSB member who is active and in good standing, and under the age of 36 or in the first 3 years of practice is eligible to serve on the YLC Board.

by Homer C. Eliades, Chair

Senior Lawyers Assist the Elderly and Others

AS WE LOOK FORWARD, we remember the past and we attempt to set goals that are realistic and that benefit the elderly.

The Senior Lawyers Conference includes attorneys and judges ages fifty-five and older who are motivated to assist the elderly in walking through the mine fields of life. Life today is very complicated, and these complications make life more challenging to seniors. We are also acutely aware that the process of aging can alter physical and mental capacities.

The Senior Lawyers Conference adopts projects that will benefit the elderly. The conference has been asked to take on many projects, and we continue to evaluate which of these projects should be supported by the conference. Bear in mind that we have no staff other than Patricia A. Sliger, our liaison with the Virginia State Bar, who is a great asset to us.

The single largest project is our *Senior Citizens Handbook*. This book provides information about law that affects the lives of seniors, including wills, appointment of guardians, Medicare and Medicaid, powers of attorney, long-term care, Alzheimer's disease, and real estate transfers. This invaluable reference book has been distributed by our conference, and the public's appreciation is evidenced by the numerous requests that the conference has received for copies. This enormous project has been successful because of the tireless efforts of the senior lawyers in our conference. These outstanding lawyers have contributed their time and effort to reviewing and updating the information. We thank those individuals, as well as the bar staff, for a job well done.

The conference, through the efforts of William T. "Bill" Wilson, initiated a Senior Law Day Program, which has been presented in several locations throughout the state. John H. Tate Jr. recently presented this program in conjunction with Virginia Intermont College and the Bristol Bar Association. The conference hopes to see more of these programs presented in other areas. We thank Bill and John for their efforts, and we encourage local bar associations to become familiar with the program and use it.

The conference has been approached to consider promoting a Liberty Day Program, which educates Americans about the Declaration of Independence. We also have been asked to put together a group of senior pro bono attorneys to help victims recover monies they lost due to the defalcations of millions of dollars by Steven Conrad, a now-disbarred Prince William County attorney.

The conference adopts projects that benefit not only the elderly, but all citizens of the commonwealth. It has been suggested that the conference circulate a booklet, *So You're 18*, to juniors and seniors in high schools throughout the state and present a program about their responsibilities when they reach age eighteen. It is a deserving program and one that the conference will consider accepting as a project. *So You're 18* is published by the VSB Conference of Local Bar Associations.

There has been concern that many estates are being managed by individuals who are not equipped to carry out the responsibilities of an executor, administrator, or attorney-in-fact. There also are cases in which estates have been mismanaged, wasted, or embezzled. The recovery of wasted or embezzled funds is difficult if the qualifying fiduciary has limited assets or no assets at all. The Senior Lawyers Conference has been asked to study whether every fiduciary should be required to post a bond with surety, in order to ensure recovery of assets that were mishandled or embezzled.

John M. Oakey Jr., as chair of the Senior Lawyers Pro Bono Committee, continues to investigate the proposed projects, and his committee will submit its recommendations.

We of the Senior Lawyers Conference strive to improve the lives of seniors and their children and grandchildren as well. Our future endeavors will be dedicated to successfully coping with seniors' ever-changing lives and doing what we can to support them in the challenges they face.

Professional Competence and Information Technology

by Alan S. Goldberg

WHETHER PROFESSIONAL COMPETENCE for attorneys clearly requires the ability to use information technology safely recently has been the subject of articles published by the District of Columbia Bar[1] and the Florida Bar.[2] Concerns for members of the Virginia State Bar include compliance with the Virginia Rules of Professional Conduct and other judicial rules and policies. They also include federal and state privacy laws that protect health records and other information. Those include the Health Insurance Portability and Accountability Act of 1996 and the Internal Revenue Service Section 7216, Disclosure or Use of Tax Information by Preparers of Returns, and Virginia privacy laws.

A Microsoft Office Excel reformatting mistake caused 179 contracts erroneously to appear in a spreadsheet forming a part of an agreement for the purchase of Lehman Brothers assets, and soon thereafter was the subject of litigation in the U.S. Bankruptcy Court for the Southern District of New York.[3]

The amendments to the Federal Rules of Civil Procedure effective December 1, 2006, address e-discovery and other federal and state discovery rules and impose stringent technology-related requirements on attorneys anticipating and involved in litigation.[4] Metadata concerns are discussed in continuing legal education programs. The rules may differ in each jurisdiction.[5]

Some attorneys do not understand basic techniques for practicing safe computing. The following are simple technology tips that can enhance professional competence, regardless of your expertise level:

Whoops — where did my e-mail go? Don't begin a new e-mail by inserting addresses in the "to" and "copy to" fields. Instead, use the body of that e-mail for temporary addressee information and fill in the addresses when the e-mail is ready to send. That way, an inadvertent click will not send a flawed e-mail beyond any hope of retrieval.

Stop thief! According to the Insurance Information Institute's 2007 Theft Statistics, based on the Federal Bureau of Investigation's Uniform Crime Reports, a motor vehicle is stolen in the United States every 28.8 seconds.[6] Why would any attorney ever leave a laptop that contains confidential information in an unattended automobile?

Behold the litigation hold. Every attorney, regardless of practice area or position in any firm or organization, should know what a litigation hold is; when a litigation hold likely arises; and how to protect electronically stored information. Review *Zubulake v. UBS Warburg* and decisions of Judge Shira A. Scheindlin.[7] Also see the resources available at the Sedona Conference website.[8]

Before you use it, learn it. Today's computer programs are more complex, even though some software developers say that their programs are easy to use. Instruction manuals often are computer files that have to be opened and printed or read online, which discourages study. No attorney should use a computer program of any complexity without studying the developer's manual and instructions provided by third-party vendors. And beware of hidden files that sophisticated users can open and read.

Neither a borrower nor a lender be. Sometimes an attorney will use another's computer. Unfortunately, every action on a computer creates a hidden history. Clients, legal strategies, and confidential information — even information created on so-called Web-based e-mail that uses a commercial online service provider — can be found by a technology sleuth. In

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HIPAA Alert

The American Recovery and Reinvestment Act of 2009 — the economic stimulus legislation currently before Congress — at press time included provisions that would expand privacy and security rules under the Health Insurance Portability and Accountability Act.

The changes could impose new requirements on attorneys and others who are deemed to be "business associates" under HIPAA. The legislation would impose civil and criminal penalties on business associates for privacy violations.

If the legislation passes as currently written, substantial amendments would have to be made to business associate agreements. The process will be confusing at first, as federal and state governments will have to resolve ambiguities with state laws. Attorneys who have business associate relationships with entities covered by HIPAA should watch the progress of this legislation. Drafts of the legislation are available at http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.+1:.

— Alan S. Goldberg

Litigating in Today's World: Getting an Edge on the Competition

by Evelyn M. Campbell

IN THIS TIME WHEN BUSINESSES ARE DOWNSIZING, declaring bankruptcy, or closing their doors forever — and everyone is trying to grab a share of a rapidly shrinking pie — it isn't enough just to do an excellent job for your client when he or she comes calling. You have to be several steps ahead of him and anticipate his needs.

To gain this edge, you have to do a type of sleuthing known as competitive intelligence (CI). As law firms fight to keep existing clients, gain more of existing clients' business, and lure new clients, CI has gained prominence. Almost everywhere you turn someone is touting some form of CI for the legal industry.

New CI tools help show which other law firms represent different client profiles. By reviewing client profiles a couple times a year, you may be able to spot a trend in litigation for a client, or you may see an opportunity to target an untapped litigation area for another client.

Where do you find these tools? LexisNexis has Courtlink and atVantage, and ThomsonWest has West Monitor Suite. If you are searching for a company's litigation profile, these programs give "nature of suit" description of the cases, the jurisdiction of the litigation, which law firms and attorneys handled the litigation, and a listing of cases. The profile will tell you how much of its total legal business a client is sending your law firm and who is getting its other business.

For example, Chart A provides the nature of suit analysis of PepsiCo Inc.'s litigation, showing number of cases and percentage of total cases for the past two years.

Chart B shows that 32.8 percent of the PepsiCo's litigation is handled by Aultman, Tyner, Ruffin & Swetman Ltd. Another 59.9 percent of the legal work is split among multiple law firms who each have tiny pieces of the pie.

The resource also provides profiles of your competitors' client lists, and lists their attorneys.

If you do not have access to these sometimes costly tools, you will have to work a little harder. PACER (http://pacer.psc.uscourts.gov/) is a familiar and often overlooked resource. While not as sophisticated as the other tools, the U.S. Party/Case Index provides a means of searching for a company's litigation. This will list the company's cases — the case name, the court, the date filed, and the nature of suit.

To know what is happening to your client, track litigation and news.

In monitoring lawsuits filed against your client, there will be instances when you will know of a complaint that has been filed before your client has been served. You will be first at your client's door with the information, and the goodwill generated will be invaluable. Many services track federal litigation, including Lexis and Westlaw and their Courtlink and CourtExpress products. Bloomberg Law also has a speedy alert service.

Unfortunately, no service provides comprehensive state court monitoring. Courthouse News Service (http://www.courthousenews.com) provides coverage of Virginia courts, and complaints are downloadable for a fee.

News tracking is easier. Lexis, Westlaw, and Bloomberg have substantial news databases that allow news alerts. With Google News — a powerful free tool — you can choose whether to monitor news and blog postings. When you are reading newspapers or trade publications online, check to see if they provide free alert services.

It will take only a few minutes each day to look through the CI results, and the edge gained over the competition will be priceless.

Chart A: Nature of Suit Analysis, PepsiCo Inc.

Torts/Negligence	1204	40.9 %
Commercial Law and Contracts	387	13.1 %
Employment/Labor	321	10.9 %
Small Claims	218	7.4 %
Business Organizations	180	6.1 %
Creditor/Debtor	107	3.6 %
Intellectual Property - Trademarks	63	2.1 %
Tax	53	1.8 %
Appeals	52	1.8 %
Administrative	51	1.7 %
Other Practice Areas	310	

Chart B: Law Firms That Handle PepsiCo Litigation

Aultman, Tyner, Ruffin & Swetman, Ltd.	441	32.8 %
Pattishall, McAuliffe, Newbury, Hilliard & Geraldson LLP	48	3.6 %
Sheppard Mullin Richter & Hampton LLP	28	2.1 %
Phelps Dunbar LLP	23	1.7 %
Other Law Firms	805	59.9 %

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I urge Mr. Capsalis to disband the Diversity Task Force, withdraw its proposals to the bar council, and cease funding or supporting it immediately. If, in his conscience, he believes that he cannot abandon this initiative, then let him have the honor and courage to resign and pursue it on his own with his own resources.

If Mr. Capsalis will not end this improper initiative, then I urge the bar council to reject the recommendations of the task force, and vote to disband it, cease all bar funding and support for it, and require an accounting from Mr. Capsalis for the members' funds applied to it. If the bar council will not act, I urge the Supreme Court to end this initiative before it taints the judicial branch.

Finally, I urge members of the bar to oppose this illegal and ill-advised initiative and to make their opposition known.

Joseph W. Stuart
Fairfax

Endnotes:

1 In this passage, Mr. Capsalis quotes the "profound" words of Rev. Susan Brooks Thistlethwaite, a self-described "progressive" and "expert in contextual theologies of liberation." Rev. Thistlethwaite made a name for herself last fall in her persistent castigation and questioning of Alaskan Gov. Sarah Palin's qualifications to serve as vice president based on the governor's perceived religious beliefs. *See, e.g.,* "Palin: Is She Subject to Her Husband?" 9/3/2008, and "Extreme Religion", 9/15/2008, in Washington Post/Newsweek *On Faith* weblog (http://newsweek.washingtonpost.com/onfaith/susan_brooks_thistlethwaite/). Perhaps this was an application of Rev. Thistlethwaite's "transcendent ideals" – to question the articles of a person's faith and apply a religious test to public office.

2 Mr. Capsalis alludes to Abraham Lincoln in calling on the "better angels of our nature" to promote "diversity" in the administration of justice. Mr. Lincoln used the phrase in March 1861, during his First Inaugural Address, appealing to the Southern states to avoid civil war. How did that work out for Mr. Lincoln? Probably in the same way "diversity" will work out, since discrimination based on race or color or any other superficial characteristic always invokes far more demons than angels.

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general, the only reliable way to erase digital information is to destroy the media. Think before you create digital words that may survive forever on someone else's computer.[9]

Specific competence in information technology may not yet be included explicitly in ethical and professional responsibility rules. But the profound nature of how the practice of law has changed because of computers surely implicates proactive efforts by attorneys to understand computer technology.

Endnotes:

1 "Speaking of Ethics, R U Competent?," by Saul Jay Singer, *Washington Lawyer*, November 2008, accessed at http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/november_2008/ethics.cfm on January 8, 2009.

2 What Every Attorney Needs to Know About Electronic Technology," by D. Patricia Wallace, *The Florida Bar Journal*, October, 2008 Volume 82, No. 9, accessed at https://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/0f70a83688e3cd0d852574ce0055401c? on January 8, 2009.

3 *Motion of Barclays Capital Inc. for Relief Concerning Certain Contracts Erroneously Posted with the "Closing Date Contracts,*" accessed at http://abovethelaw.com/Barclays%20Relief%20Motion.pdf on January 9, 2009.

4 *See* Amendments Approved by the Supreme Court — Submitted to Congress (April 2006) — (Effective December 1, 2006), accessed at http://www.uscourts.gov/rules/congress0406.html on January 9, 2009.

5 District of Columbia Bar Opinion 341, Review and Use of Metadata in Electronic Documents, accessed at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion341.cfm on January 9, 2009.

6 Insurance Information Institute, Issues Updates, Auto Theft, December 2008, accessed at http://www.iii.org/media/hottopics/insurance/test4/ on January 9, 2009.

7 Opinion and Order, U.S. District Court for the Southern District of New York, *Zubulake v. UBS Warburg LLC, et al.,* accessed at http://www.nysd.uscourts.gov/rulings/02cv01243_order_072004.pdf on January 9, 2009.

8 The Sedona Conference, accessed at http://www.thesedonaconference.org on January 9, 2009.

9 "Hard drive destruction 'crucial,'" BBC News, accessed http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/technology/7816446.stm?ad=1 on January 9, 2009.

Americans with Disabilities Act: Synopsis of 2008 Amendments

by Jennifer M. Becker

EIGHTEEN YEARS AFTER the Americans with Disabilities Act of 1990 (the ADA) was enacted to eliminate discrimination against individuals with disabilities, President George W. Bush signed the ADA Amendments Act of 2008 (amendments) "to restore the intent and protections of the ADA." The amendments, Public Law No. 110-325, passed both houses of Congress by unanimous consent and became effective January 1, 2009.

The amendments affect Title I of the ADA — the employment title, which prohibits disability-based discrimination in the workplace. Under the ADA, covered employers must avoid singling out workers with disabilities because of their impairments. Employers also must avoid adhering to standard practices that adversely affect workers with disabilities. Covered employers must also provide reasonable accommodations to account for the disabilities of employees.

To date, the predominant issue in Title I cases has been whether an individual's impairment is a disability, as that term is defined in the ADA. The amendments retain the ADA's three-pronged definition of "disability" as having a physical or mental impairment that substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment.[1] However, since the amendments require that the definition of disability be construed in favor of broad coverage of individuals under the ADA[2], it is more likely now that an individual's impairment will be considered a disability.

The amendments include the following provision:

Mitigating measures are no longer to be used in determining disability. *In Sutton v. United Airlines Inc.* and its companion cases, the U.S. Supreme Court has held that corrective and mitigating measures, such as medication and assistive technology, must be considered in determining whether an individual is disabled under the ADA.[3] The amendments explicitly overturn these cases and mandate that the determination of whether an impairment substantially limits a major life activity be made without regard to the ameliorative effects of mitigating measures, with the exception of eyeglasses and contact lenses.[4]

Perception of impairment is now sufficient whether or not impairment limits a major life activity. Prior to the amendments, under the third prong of the ADA's definition of disability, an individual was required to show that he or she was perceived as having an impairment that substantially limits a major life activity. Under the amendments, an individual will now meet the definition of disabled if he is simply perceived as having an impairment, without regard to whether the impairment limits or is perceived to limit a major life activity.[5]

The amendments provide a list of "major life activities." Under the ADA, an impairment substantially limits a major life activity if it prevents a person from performing a function that the "average person in the general population" can perform.[6] The amendments set forth a non-exhaustive definition of "major life activities" that builds on the Equal Employment Opportunity Commission's (EEOC's) definition and other activities that have been added by court decisions, such as eating and major bodily functions.[7] Under the amendments, the term "major life activities" includes, but is not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and major bodily functions.[8]

Less is needed to prove that one is "substantially limited" in a major life activity. Under the Supreme Court's ruling in *Toyota Motor Mfg. Ky. Inc. v. Williams*[9] and the EEOC regulations,[10] in order to be considered "substantially limited" in a major life activity, an individual was required to prove that he was unable to perform or "significantly restricted" from performing such activity.[11] The amendments denounce the strict standard for "substantially limits" set forth in *Toyota* and the EEOC regulations as having created an inappropriately high level of limitation necessary to obtain coverage under the ADA, and they mandate that the term be interpreted less strictly.[12] The amendments also express Congress's expectation that the EEOC will revise its regulations to define "substantially limits" to be consistent with findings of the amendments.

Other rules of construction and amended findings. The amendments set forth other rules of construction to broaden coverage under the ADA. Under the amendments, an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.[13] Furthermore, an impairment that is episodic or in remission is considered to be a disability if it would substantially limit a major life activity when active.[14] The amendments also change two findings in the ADA that the Supreme Court has considered to impose limitations on its interpretation of the ADA: the findings that "some 43,000,000 Americans have one or more physical or mental disabilities" and that "individuals with disabilities are a discrete and insular minority."[xv]

Two of the 2008 amendments' key accomplishments are to broaden the definition of disability and lessen the "sub-

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others like it apply outside of this context? Suppose, for example, that an employee drafts a memo to his divorce attorney on the company computer and then deletes it. Further, suppose that a lawyer for the employee's wife subpoenaed the employee's computer records from his employer. Setting aside for the moment questions about what steps the employer might or is obligated to take in response to the subpoena, has the employee waived the attorney-client privilege by typing the memo on the company computer? Following *Banks*, the answer would seem to be yes. Under the "reasonable expectation" of privacy standard employed by the federal courts, however, the opposite result may be reached.

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stantially limits" standard. As a result, it should be easier for a plaintiff to prove that he is disabled, which should result in more ADA claims going to trial than before.

Endnotes:

1 42 U.S.C. § 12102(1).
2 42 U.S.C. § 12102(4)(A).
3 *Sutton v. United Airlines Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999); *Albertsons Inc. v. Kirkingburg*, 527 U.S. 555 (1999).
4 42 U.S.C. § 12102(4)(E)(i).
5 42 U.S.C. § 12102(3)(A).
6 29 C.F.R. 1630.2(j)(1)(i).
7 29 C.F.R. 1630.2(i); *Lawson v. CSX Transp. Inc.*, 245 F.3d 916 (7th Cir. 2001) (holding that eating is a major life activity); *Fiscus v. Wal-Mart Stores Inc.,* 385 F.3d 378 (3d Cir. 2004) (holding that eliminating waste from the blood is a major life activity).
8 42 U.S.C. § 12102(2).
9 *Toyota Motor Mfg. Ky. Inc. v. Williams*, 534 U.S. 184 (2002).
10 29 C.F.R. 1630.2(j).
11 *Toyota*, 534 U.S. at 198. 29 C.F.R. § 1630.2(j)(1).
12 42 U.S.C. § 12102 (4)(B). ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(4), 2008 Stat. 3406, 3553-3554 (2008).
13 42 U.S.C. § 12102(4)(C).
14 42 U.S.C. § 12102(4)(D).
15 42 U.S.C. §§ 12101(a)(1) and (7), prior to being amended by the ADA Amendments Act of 2008.

Virginia Forced-Sterilization Case Is Still Law, Eighty Years Later

Paul A. Lombardo

***Three Generations, No Imbeciles: Eugenics, the Supreme Court and* Buck v. Bell**, by Paul A. Lombardo. 365 pp., illustrated. Baltimore, Johns Hopkins University Press, 2008. $29.95. ISBN 978-0-8018-9010-9.

Reviewed by Robert T. Adams

IN A VERY READABLE 279 PAGES, Paul A. Lombardo sets forth the facts about the eugenics movement in the United States and, more specifically, in Virginia. *Buck v. Bell*, the 1927 United States Supreme Court case based upon Virginia's involuntary sterilization statute, sanctioned decades of state-sponsored efforts to "improve" the human species by using the most oppressive means short of Nazi Germany's Final Solution. While most attorneys are aware of Justice Oliver Wendell Holmes's famous statement, "Three generations of imbeciles are enough," they may not know that *Buck v. Bell* has never been directly reversed and, arguably, has not even been impliedly reversed. Thus, Professor Lombardo's work engenders troubling questions for us today.

While *Three Generations, No Imbeciles* is mostly a factual history, Lombardo points out that current members of the U.S. Supreme Court, as well as some unsuccessful nominees, have questioned the constitutional correctness of subsequent opinions of the Court, such as *Skinner v. Oklahoma* and *Roe v. Wade*, which seem to erode the reach of *Buck v. Bell*. Should those cases be reversed, could this 1927 precedent that was the legal foundation for a horrendous foray into a brave new world provide a basis in the twenty-first century for some equally intrusive exercise of the state's police power? An eerie question.

Perhaps the single most interesting chapter in the book is the synopsis of the trial in circuit court which became the basis for the Supreme Court's decision. Chillingly, it illustrates how a well-drafted law can be perverted by those who administer it because they are not individuals of good conscience and have agendas of their own. Every law student, lawyer, and judge should read this chapter to see how badly power can be abused by even the most distinguished members of our society.

The one question not fully explored in *Three Generations, No Imbeciles* is how so many intelligent, well-respected community, state, and national leaders came to support the eugenics movement. Eugenics was enthusiastically embraced by the "best" people, including U.S. presidents, wealthy philantropists, scientists, and, ultimately, the justices of the Supreme Court. Sadly, Lombardo never directly addresses this question. America in the early twentieth century was unlike America today in a host of attitudes, social issues, rights, and technology and science. It would have added to the book if Lombardo had deoted more time to describe life in 1927, lest we view the eugenics movement only through the contact lenses of today, rather than the thick bifocals of days long ago.

From time to time, Lombardo comes tantalizingly close to describing some of the key players in *Buck v. Bell*, such as Dr. Joseph S. "Sterilization" Dejarnette, as monsters. But he wisely refrains, because not only were they then well-respected professionals but they were also aligned with the thinking of a majority of Americans, both distinguished and undistinguished. However, he does an excellent job of pointing out the foibles of some of these crusaders, some of whom could have been targeted for sterilization themselves had they been born in less fortunate circumstances. More importantly, he describes the deliberation and zeal with which these eugenicists effectively oppressed and terrorized a group of citizens whose principal problem was that they were poor rather than being mentally retarded ("feebleminded," in the parlance of that day).

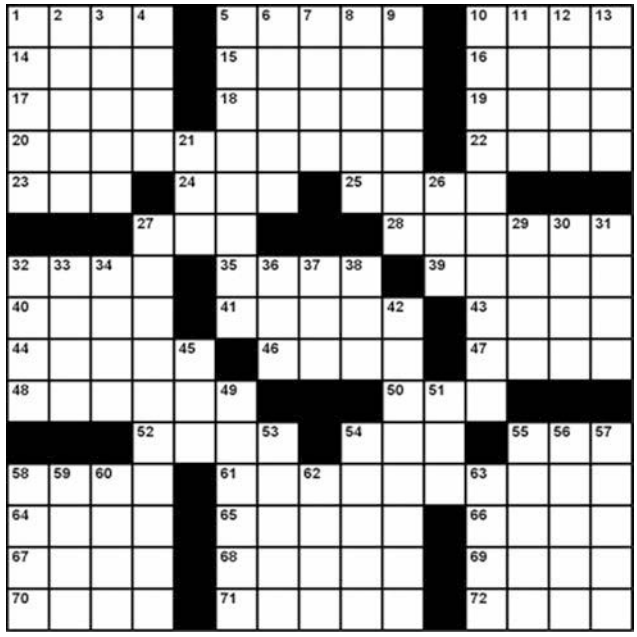
Aside from two chapters that focused on developments in Germany, which could have easily been omitted, *Three Generations, No Imbeciles* is a good read. It documents mistakes that should make each of us chary today as we continue to strive for improvement of the human race.

For eugenics is still with us; we call it genetic counseling and gene therapy. Therefore, we should seriously consider whether *Buck v. Bell* can be dusted off and used to effectuate some new effort at improving the human species. *Three Generations, No Imbeciles* shows us that may not be so far-fetched as it sounds

Editor's note: Paul A. Lombardo, author of Three Generations, No Imbeciles, *was on the faculty of the University of Virginia School of Law for sixteen years. He directed the Center for Mental Health Law at U.Va.'s Institute of Law, Psychiatry and Public Policy and the university's Program in Law and Medicine at the Center for Biomedical Ethics. He now is a professor of law in the Center for Law, Health and Society at George State University. He is a member of the Virginia State Bar.*

It's Off To Work We Go

by Brett A. Spain



Crossword answers on page 62

Across

1. Pod occupants
5. Fundamental
10. Goad
14. Picnic playwright
15. Florida city
16. Hawkeye state
17. Malificent
18. Gagarin and Andropov
19. Bass, e.g.
20. With 61A, theme of this puzzle
22. Christopher Reeves character
23. Look over
24. Lamentation
25. Perry's creator
27. Permit
28. Resolve
32. Mets home
35. Streetcar
39. Icy rain
40. Tree part
41. Sense or man
43. Ahmadinejad's land
44. Chain mail, e.g.
46. "Whip It" band
47. Singer Simone
48. Check presenter
50. _____ kwon do
52. Mil. branch
54. Tom Brady's weakness?
55. Discern
58. Getz or Musial
61. With 20A, theme of this puzzle
64. Unless, legally
65. Former British Prime Minister
66. Small whirlpool
67. Hodgepodge
68. "_____ of thee"
69. Food for swine
70. Black or green
71. Spanish 1 word
72. Camp sight

Down

1. Segment
2. Emissary
3. Deft
4. Market
5. Organized snubs?
6. Sharp
7. Indian garment
8. Existing
9. Science fiction weapons
10. Row of fence posts?
11. Part
12. Actor Clive
13. Foolish
21. Female sheep
26. Guitarist Paul
27. Chain gang?
29. Actress Hatcher
30. Bare
31. Sicilian volcano
32. Chunk of concrete
33. Employ
34. Jane Austen heroine
36. Disencumber
37. Fire
38. Real World stn.
42. Shipment of stolen goods?
45. Legal thing
49. Trix spokesman
51. The Greatest
53. Apocryphal
54. Getting long in the tooth
55. Edge along
56. _____ a good note
57. Sudan neighbor
58. Uppity one
59. Floor option
60. Tajikistan locale
62. Nimbus indicator
63. Aerie

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.