Contributors


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Grover


Voss


Buchbauer


Clarke


Fauss


Thornton


Johnston


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Paul


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Rosenthal


Ward

Robert H. Spicknall is president of the bar's endorsed broker/administrator for insurance programs — the Virginia State Bar Members' Insurance Center, an affiliate of Dominion Benefits. He is a certified employee benefit specialist, and he has assisted Virginia lawyers and law firms with health, life, and disability insurance for more than fifteen years. More information: (877) 214-5239 or www.vsbmic.com. [page 23]

Professor Susan S. Grover has taught law at the College of William and Mary School of Law since 1988. Her areas of specialization are civil procedure, employment discrimination, equal opportunity, and women and the law. Grover received a law degree from Georgetown University School of Law and a bachelor's degree from Hollins University. Before joining the William and Mary faculty, Grover practiced law in Washington, D.C. [page 24]

Mark R. Voss of Mark R. Voss and Associates in Manassas, has been a criminal defense attorney for twenty-four years and was an assistant commonwealth's attorney in Alexandria for two years. He has worked in Spanish-speaking communities in Virginia. He has been on the board of Lawyers Helping Lawyers for twelve years. [page 24]

Peter W. Buchbauer, a principal in the Winchester law firm Buchbauer & McGuire PC, primarily practices family law. He is a fellow of the American Academy of Matrimonial Lawyers and chair of the Family Law Section of the Virginia State Bar. [page 32]

David Rust Clarke has been a family law practitioner for more than twenty-eight years. He is a principal with the Fairfax firm Blankingship & Keith PC, and is on the board of governors of the Virginia State Bar Family Law Section. [page 36]

Kimberly P. Fauss practices collaborative law and mediation in the Richmond firm New Growth Ventures. She attended Oberlin College and the University of Virginia School of Law. She practiced in the areas of corporate, health care, and domestic law with the Richmond offices of Hunton & Williams LLP and Troutman Sanders LLP. She is trained in the mediation, collaborative law, and restorative justice processes. kimberlyfauss @newgrowthventures.com [page 40]

Laura A. Thornton is the manager of Laura A. Thornton PLC in Harrisonburg. She is a graduate of the University of Virginia and the University of Richmond School of Law. She served as law clerk to the judges of the Twelfth Judicial Circuit of Virginia from 1992 to 1994 and has been in private practice since. She is president-elect of the Harrisonburg-Rockingham County Bar Association. [page 44]

Janean S. Johnston is an attorney licensed in Minnesota, and she has conducted legal risk-management and ethics audits and reviews nationwide since 1987. She assists Virginia lawyers with overall risk management efforts. [page 51]

Olivier Denier Long has practiced family law in the Washington, D.C., metropolitan area for more than thirty years. He is a member of the Virginia State Bar Special Committee on Technology and the Law and maintains a blog at http://odl-blog.livejournal.com/ [page 52]

Isabel Paul is the librarian for the Henrico Government and Law Library. She has more than twenty years' experience working with judges, attorneys, and the general public in the public law library setting. She also currently serves as the chair of the legislative awareness committee for the Virginia Association of Law Libraries. She has master's degrees in political and library science. [page 54]

Nathan A. Kottkamp, who has a health care practice with McGuireWoods in Richmond, established Virginia's annual Advance Directives Day through the Virginia State Bar Health Law Section. Kottkamp has a bachelor's degree from the College of William and Mary and a master's in bioethics and law degree from the University of Pittsburgh. [page 55]

Stephen D. Rosenthal, a former Virginia attorney general, practices at the Richmond offices of Troutman Sanders LLP in the areas of health care, administrative litigation, and governmental relations. He represents health care providers, insurers, and managed care organizations in regulatory, reimbursement, and legislative matters. He has bachelor's and law degrees from Washington and Lee University. [page 55]

Susan C. Ward is vice president and general counsel for the Virginia Hospital and Healthcare Association, which she joined in 1990. She previously worked as a staff attorney in the Virginia Division of Legislative Services and was assistant director of forensic services in the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services. She has bachelor's and law degrees from the University of Richmond. [page 55]

Talking About Diversity Is Not Enough

I have been receiving and reading *Virginia Lawyer* for over a decade. Most of the time I skim the articles and look to see if I know any of the lawyers who have been naughty and are facing disciplinary action. However when the issue of diversity within the profession began to be addressed in earnest I started reading the articles and the letters to the editor.

I grew up in Connecticut and moved to Virginia for law school. When I first learned that that Martin Luther King Jr. and Robert E. Lee shared the same holiday, I was surprised and in all honesty mortified. My northern sensibilities prevented me from wrapping my head around the fact that the general for the South and one of our greatest civil rights leaders were both acknowledged and honored on the same day.

Fast forward to 2009 and I have seen things change in the commonwealth. I am fortunate to practice in an area where there is great diversity both on the bench and in the bar. This diversity of spirit, belief, race, and religion is one of the things that I love most about my job, and I truly believe my world is richer due to my day-to-day experiences with people who do not always look like or think like me. In the spirit of moving forward with the Virginia State Bar's new initiative to actively pursue diversity I attended the Old Dominion Bar Association (ODBA) Annual Conference. My mentor, Beverly J.A. Burton, is the current president of the ODBA. She is the one who sent me the conference information, and the conference looked fantastic.

It was held at the Gaylord National Resort and Conference Center outside Washington, D.C. The hotel was beautiful and had amazing amenities, the cost was reasonable, and the program was comprehensive. Conference topics ranged from the Ethics of E-mail to Effective Jury Selection and Immigration Issues. The speakers and presenters were all experts in their fields, and many members of the bench were slated to share their experience and expertise.

The biggest surprise that awaited me was that I was the only white person at the conference. While I did not expect to be in the majority, I was disappointed that no other white person in the entire state was a registered attendee. It is my belief that if we as a bar are going to talk about diversity and inclusion, then the reality is that it has to go both ways. Not only do we need to include those in the minority in "our conferences" but those of us in the majority have a responsibility to step forward and include ourselves in "other conferences."

I would not have traded my experience. I had the pleasure of meeting many people whom I have communicated with over the Internet for years. Everyone I met went out of their way to make me feel comfortable, I did get a few questions from those I knew, asking me, "What are you doing at the ODBA with your white self?" My response was the same one I give here: that in order to achieve true diversity and representation from all groups there must be action behind words. Talking about diversity is not enough. One can learn what it feels like to be in the minority, and one must be willing to walk one's talk. So to all of my fellow lawyers practicing in Virginia, I challenge you: choose one conference or continuing legal education program to attend in the next twelve months that would normally not be on your list. I promise that you will learn something about yourself and something about the law, and you will make our bar and the world a better place.

Kate O'Leary
Richmond, Virginia

Letters

Send your letter to the editor* to:
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fax: (804) 775-0582;
or mail to:
Virginia State Bar,
Virginia Lawyer Magazine,
707 E. Main Street, Suite 1500,
Richmond, VA 23219-2800

*Letters published in *Virginia Lawyer* may be edited for length and clarity and are subject to guidelines available at **http://www.vsb.org/site/publications/valawyer/**.

Join a VSB Section

Section membership is open to all members in good standing of the Virginia State Bar. Many sections also have law student and associate memberships. The sections are supported by dues which range from $10 to $35.

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- Business Law
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- International Practice
- Litigation
- Local Government Law
- Military Law
- Real Property
- Taxation
- Trusts and Estates

Find more information online at **http://www.vsb.org/site/members/sections/**.

But Seriously, Folks … New VSB President Ready for Biggest Gig

by Dawn Chase

Picture Jon D. Huddleston, new president of the Virginia State Bar, as the master of ceremonies for a production that involves all of Virginia's lawyers.

He has experience. He used to do stand-up gigs introducing acts during "all-lawyer nights" and fundraisers at Headliners, an Alexandria comedy club. "I had two good jokes — one at the beginning and one at the end — and enough stuff in the middle to get by."

One audience was primarily composed of political partisans helping to retire a campaign debt. They had been coerced into buying tickets, and they weren't particularly receptive to the night's entertainment. "My first really good joke died," Huddleston recollected. Of the experience he said, "I enjoyed it. But it was hard. It was definitely a don't-quit-your-day-job."

He picked himself up and dusted himself off, and he's back in the game. This time, Huddleston is handing the microphone over to other lawyers so they can deliver not punch lines, but interviews about projects they are passionate about, and to which they volunteer their time. He is collecting stories from citizen lawyers across the state.

Huddleston has a tagline for the project: "Virginia Is for Good Lawyers." His venues this time are his column in *Virginia Lawyer* (see page 12), the VSB.org website, his appearances before bar groups, and a Virginia State Bar first — YouTube clips, produced by Madonna G. Dersch of the Virginia State Bar publications staff. The series of clips will be released throughout the year and can be viewed at http://www.youtube.com/user/VirginiaStateBar.

"The purpose is to show lawyers as really integral parts of the community" — a role they have played since Virginia's earliest days, Huddleston said.

"Ours is a profession that is known for time away from home and family and countless hours in pursuit of our profession and service to our clients. But there are many lawyers who have found time to make a difference in their community, who are out walking the walk. …

"Lawyers are part of the big picture. I don't think we're doing a good job as a profession in showcasing what they're doing."

One of Huddleston's first YouTube hand-offs is to attorney Jay M. Weinberg, who is involved in many civic works in Richmond as a board member and benefactor. Weinberg said his commitment to community started as a child. "It was an obligation. It wasn't a choice."

Weinberg recalled his law school dean telling the students that "as lawyers, we were going to be experts in democracy and practitioners in humanity — and that's an awesome responsibility, if you think about it. …

"One change I find most difficult to accept is, I think, when we got out of law school forty years ago we entered a profession. I hate to think I'm going to be retiring from a business."

Citizen lawyers receive a return on their investment. "A commitment to the community in which you live simply makes you a better lawyer," Weinberg said.

HUDDLESTON, forty-nine, practices with Sevila, Saunders, Huddleston & White in Leesburg — a firm he has been with since he clerked there during law school at the College of William and Mary. The firm has nine full-time attorneys.

Huddleston's wife, Cyndy, is an associate dean of the McIntire School of Commerce graduate program at the University of Virginia. They have two sons — Bobby, fourteen, and Jack, nine.

His civic commitment is coaching youth sports, which he has done for more than sixteen seasons. Starting with children as young as four, he has watched them grow in basketball, soccer, and life.

"What led me to the law was a sense of competition," Huddleston said. "I did not have the size or speed to excel on the field." He noted that athletics and trial work are often a matter of winning and losing. "That was an area I saw myself as being able to compete in."

He describes his family law practice as crisis management of people in broken relationships. His approach, he says, is honesty. "It is so easy to fall into the trap of telling your client what they want to hear." What he tries to do instead is

"be blunt with them, if their expectations are unrealistic. …

"I like attempting to get the client from point A to point B as painlessly as possible. If we're doing our job, hopefully we do so with negotiation, rather than put them through the stress and expense of going to trial."

Now clients are coming to lawyers with fewer resources. Huddleston can see a change in practice as a result. "Lawyers are being more judicious in filing motions because of the cost concern." They also are turning more to alternative dispute resolution, which Huddleston sees as a good thing.

"What is often missed in the equation is there is an intangible value to not destroying the other side. Your relationship is going to continue for many years, especially if there are children."

Perhaps Huddleston's practice methods are colored somewhat by his love of competition. In his experience, "trying cases is easy. Settling cases is hard," he said.

His involvement with the Virginia State Bar began with the Young Lawyers Conference during his first year of practice.

In recent years, he sat on the executive committee of the Conference of Local Bar Associations, which he served as chair.

"Bar service for me has been really reaffirming. I think that's especially true when you deal with an area of law that can be as contentious as divorce litigation," he said. Working with the VSB helps him "reconnect with lawyers on a civil basis and a professional basis."

He was sworn in as president on June 19 by Loudoun County Circuit Judge Burke F. McCahill, a former law partner. Huddleston succeeds Manuel A. Capsalis of Arlington in the position.

"I'm excited about it," Huddleston said. "Inevitably, as president, there will be something you face that you didn't see coming."

But Huddleston — sportsman, coach, and lawyer — intends to meet the challenge.

Jon D. Huddleston, president of the Virginia State Bar, prepares a segment for his YouTube series on the good things lawyers do for their communities. The backdrop is a painting, Ed Bordett's *Blue Ridge Steeples*, which hangs in the VSB library.

Biography

Jon D. Huddleston
Sevila, Saunders, Huddleston & White, Leesburg

Education:
Bachelor's and law degrees from the College of William and Mary

Family:
Wife — Cyndy
Children — Bobby, 14; Jack, 9

Leisure activities:
Coaching youth basketball and soccer

by Jon D. Huddleston

Virginia is for Good Lawyers

Any time you have an opportunity to make a difference in this world and you don't, then you are wasting your time on this Earth.

— Roberto Clemente, Pittsburgh Pirates outfielder

LAST MONTH I HAD THE PRIVILEGE OF participating in the Virginia State Bar Admissions and Orientation Ceremony for newly admitted lawyers. My function was to sponsor the admission of the out-of-state candidates who had passed the February bar exam. This was my second opportunity to participate in this ceremony (third, if you count my own admission in the fall of 1986).

This ceremony is a grand and sobering occasion — an inexorable rite of passage from being a law student to being a lawyer. What is the future for this group of disparate individuals? Perhaps this will be a remarkable class. Certainly, it will produce some brilliant lawyers. I suspect it may have its share of judges and professors. Inevitably, a few may run afoul of our professional and ethical mandates, but I hope I am mistaken. What the new lawyers have in common is the promise that lies in their future. How will they shape their practice? What kind of lawyers will they become? Will they be able to maintain balance in their lives – between the competition of family and career, clients, and community? What kind of citizens will they be? Will they recognize what it means to be a Virginia lawyer?

For many years, I have had the honor to participate on the faculty for the Professionalism Course for Law Schools. This program, conceived and nurtured by Judge B. Waugh Crigler and championed by Judge J. Martin Bass and the late Judge David T. Stitt, takes lawyers and judges into each of our law schools to meet with first-year law students to introduce the concepts of civility and professionalism to students at the beginning of their education. It is a wonderful program.

The difference between being a lawyer and being a law student is startling. From a personal accomplishment standpoint, is there anything better than being a law student? They are smart, dedicated, and destined for success. There is not a grandmother around who is not immensely proud. And then suddenly, upon passing one rigorous and comprehensive examination to earn admission to the bar, their public stature dissipates and they join the vilified. How does this happen?

My friend Robert E. "Bob" Battle, a noted Richmond lawyer and comedian, has posited that lawyer jokes have became so ingrained in our culture that we know the punch lines by heart: *A Doberman pinscher. Not enough sand. New Jersey got first choice. There are some things white rats just won't do.*

Apparently, attorney humor is not becoming passé. Recently, in a popular comic strip, I viewed another less-than-subtle bashing of our profession. The tag line was "How to get lawyers to smile for a group picture?" Pan to the photographer: "Say fees!" That one is sure to light up the room. Attorneys as mercenaries: an easy recipe for a chuckle.

We are an easy target for many reasons. We deal in conflict and chaos, misery and trauma. We seldom see people at their best. Often we see them in times of their greatest distress. We champion both popular and unpopular causes. We are appointed to represent the worst in our society. Sometimes we try to help divide personal property or establish custody of children for families that have crumbled Sometimes high-profile, often mundane, we tackle many difficult and arduous tasks. Often, we are our client's only ally.

We dwell in an adversarial system that inherently causes friction. Conflict can sometimes appear to be a zero-sum game. It is easy to see why the public may perceive us as part of the problem. I concede that while some in our profession are problem-creators, the overwhelming number are problem-solvers.

The amoral and parasitic stereotype enshrined in comic strips and late-night talk shows are, simply put, not the lawyers I know. They are not the typical Virginia lawyer. Most attorneys are excellent stewards of our profession, are of high moral conscience, and dedicate themselves selflessly to their communities. Their stories should be the stereotype.

During the next year, I hope to introduce you to some of Virginia's good lawyers, who are unquestionably among her finest citizens.

A Doberman Pinscher

I know two prosecutors in my area who work every weekend volunteering with animal rescue. One has worked virtually every Saturday for five years, the other for nearly three and a half, after being recruited by the first. Imagine giving between 150 to 250 Saturdays to your community. They walk dogs. They do background checks and home visits for potential adoptions. They

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President continued from page 12

transport dogs to events such as Barktober Fest in hopes of helping animals find new homes. I cannot in a few sentences do justice to their commitment and passion to this cause or to their value to our community.

There Are Some Things White Rats Just Won't Do

…Like raising hundreds of thousands of dollars for local charities. My friend, a northern Virginia personal injury attorney, has devoted countless hours and energy to the betterment of the local community. For fourteen years, he and his wife have raised money to support the Foundation for Recurring Respiratory Papilloma, an insidious life-threatening disease that attacks primarily children. For ten of these years, the chief fundraiser has been a hockey tournament at the Verizon Center. He also hosts a law day program that helps support his local bar foundation. For years, his Jazz for Justice program has benefited not only the local bar foundation but the music program at a local university. It doesn't end there. The local Jewish Community Center, the American Cancer Foundation — the list goes on. He recently joked that if he had the money he had helped raise for various causes, he would be wealthy. I submit that he is extraordinarily rich. We are likewise enriched for being his colleagues.

My hope this year is to introduce you to many of our lawyers throughout Virginia who are walking the walk.

Not Enough Sand

He is an excellent divorce lawyer. He is a formidable adversary, always highly prepared. He is one of the best attorneys in the Shenandoah Valley. And at least once a month his team staffs the soup kitchen in his area to help feed the homeless. He has done this for years. Hundreds of citizens of his area have benefited from his hands-on devotion to the community. Moreover, I can write pages about the benefits directly resulting from thousands of dollars he has helped raise for local scholarships.

New Jersey Got First Choice

For more than thirty years, a skilled Richmond lawyer has served the Boy Scouts of America. He is an Eagle Scout. During a recent eight-year stint as scoutmaster, he has helped produce thirty-seven more Eagle Scouts. He has served on regional, national, and international Jamboree committees. He has seldom taken a personal vacation that did not involve some type of scouting activity or outing. His scouting résumé alone far exceeds the length of this article. He has been recognized by the Defense Research Institute for his community service and commitment to scouting. Hundreds of youths throughout Virginia are the better for his efforts.

The Big Picture

These are a few vignettes of some of the members of our profession. There are many others. No other profession is as selflessly devoted to this community as ours. Lawyers invariably seek to give back. They serve on local boards. They build houses for Habitat for Humanity. They raise money. They coach our youth. They do it because they have a passion for this cause. They do it because they feel it is the right thing to do. Invariably, they do it anonymously, seeking neither attention nor acclaim.

My hope this year is to introduce you to many of our lawyers throughout Virginia who are walking the walk. In July, we will begin sharing a series of interviews with Virginia lawyers. We have a YouTube site, http://www.youtube.com/user/VirginiaStateBar, for the display of their interviews. I hope you will enjoy meeting many of our best over the next year. I know but a small number of these dedicated community servants. If this describes a lawyer in your area, let me know. We'd love to try to tell his or her story.

I have also asked several lawyers to write essays about their lives as lawyers to be posted on VSB.org over the next year. I hope I can introduce our bar to many more attorneys who speak and write eloquently about their practice, their profession, their community, and what drives them as people. I hope you will find the message of these Virginia lawyers both interesting and inspirational.

Shortly before I graduated from law school, before my own passage from student to member of the bar, one of my professors noted that as lawyers we were being given the keys to the kingdom. He meant that we would have opportunities to help our communities and its citizenry in ways previously unavailable, simply by virtue of our admission to the bar. He envisioned that we would have the opportunity to make the difference in this world that Roberto Clemente deemed so essential. Join me over the next twelve months in meeting many Virginia attorneys who truly are "difference makers."

Virginia Is for Good Lawyers.

by Karen A. Gould

Good News: VSB Budget Is in the Black

I FREQUENTLY HAVE COMPARED THE Virginia State Bar to an ocean liner trying to reverse course mid-voyage. In recent years, the bar has operated with a deficit budget. Our expenses have significantly exceeded our revenue, and we have dipped into reserves to cover the difference. In FY2006, the deficit amount covered by reserve funds was $287,261. In FY2007, the reserve was tapped for $425,353. In FY2008 the projected deficit was $620,000, but the ship began to turn, and at the end of the year, the actual deficit was only $215,526.

I am delighted to report that the bar ended FY2009 in excellent financial shape. Two significant developments occurred last year: The Supreme Court decided that the judicial system, of which the bar is a part, would follow the governor's lead and eliminate raises for employees. And mindful of the dire state of the economy, the bar's staff continued to find ways to save money, which I have discussed in previous *Virginia Lawyer* columns:

- April 2008: http://www.vsb.org/docs/valawyermagazine/vl0408_exec-dir.pdf
- June/July 2008: http://www.vsb.org/docs/valawyermagazine/vl0708_exec-dir.pdf,
- October 2008: http://www.vsb.org/docs/valawyermagazine/vl1008_ed.pdf
- February 2009: http://www.vsb.org/docs/valawyermagazine/vl0209_ed.pdf
- April 2009: http://www.vsb.org/docs/valawyermagazine/vl0409_ed.pdf

Rather than using $544,400 from the reserve in FY2009 — as was originally projected — we supplemented the reserve by approximately $780,000. This is excellent news for Virginia's lawyers, because the dues increase previously thought to be needed in 2010 can be further delayed.

Additional good news is that the bar's budget for the next fiscal year is $476,816 less than this year's budget. This means that the bar's revenue will exceed expenses by approximately $290,000, and this money can be added to the reserve. Unfortunately, this savings comes at the expense of the hard-working bar staff, for whom a raise has been deferred for the second year.

I thank the bar staff for their efforts in turning the ocean liner that was headed on a collision course with the realities of a failing economy. I also want to thank the bar's officers, Manuel A. Capsalis, Jon D. Huddleston, and Howard W. Martin Jr., the VSB Executive Committee and Council, and our hundreds of volunteers for their support in reducing expenses and maximizing revenue. Having been on the job now for approximately eighteen months, I can attest to the collaborative nature of our work to protect the public, help Virginia's lawyers, and improve access to justice for all, regardless of whether they can pay for legal services.

On a point of personal privilege, I want to thank Manny Capsalis, the outgoing bar president, for his zeal and enthusiastic leadership of the bar this year. He has spent countless hours on the road between his office in Arlington and Richmond, as well as to numerous bar functions throughout the state. He has succeeded resoundingly at the very difficult job of balancing family and a successful criminal law practice and serving as president of the mandatory statewide bar. Thanks, Manny, for all you have done for the lawyers of Virginia this year!

This is excellent news for Virginia's lawyers, because the dues increase previously thought to be needed in 2010 can be further delayed.

Highlights of the Virginia State Bar Council Meeting
June 18, 2009

At its regular meeting on June 18, 2009, the Virginia State Bar Council heard the following significant reports and took the following significant actions:

VSB Budget
Executive Director Karen A. Gould and Alan S. Anderson, vice chair of the Standing Committee on Budget and Finance, reported that the VSB's budget now is in the black. Budget cuts have reversed the bar's deficit spending, and the need for an increase in dues has been postponed. The cuts did not affect services to the public or attorneys. For details, see Gould's column on page 16.

Conrad Clients' Protection Fund Claims
Barry J. Dorans, chair of the Clients' Protection Fund Board, reported that the board has almost finished processing 167 petitions related to Stephen Thomas Conrad. The fund has received $5,767,504.77 in claims and will pay out the aggregate limit of $411,165, which was 10 percent of the net value of the fund the day the first Conrad petition was received.

Diversity Conference Approved
The council voted to establish a conference "to promote diversity in the profession and the practice of law." The council also voted to give the chair of the conference a seat on the council but not on the VSB Executive Committee. A proposal to add a diversity component to the VSB mission statement was taken off the table by the task force. Under the terms approved by the council, the conference will be privately funded through a nonprofit organization. No bar dues will be used to pay for the conference's operations or programs. The proposal has been sent to the Supreme Court of Virginia for approval. Development of the conference was a priority of Manuel A. Capsalis during his presidency in 2008-09.

Paragraph 13 Amendments
The council approved changes to the Rules of the Virginia Supreme Court, Part 6, § IV, ¶13, that would:

- Strike "mutual agreement" language that has not been in use in the disciplinary system for many years.
- Clarify the process and burden of proof for a show cause hearing after a guilty plea or adjudication of a crime.
- Amend the duties of a disbarred or suspended respondent.

The proposals were sent to the Court for approval.

Sale of Law Practice
The council approved a change to Rules of Professional Conduct 1.17, to allow a lawyer who sells a portion of a practice to continue to practice in other areas of law in the same geographical region. The proposal was sent to the Court for approval.

Felony UPL Charge
The council agreed to request the General Assembly to amend Virginia Code § 54.1-3904 to increase the penalty for egregious unauthorized practice of law to a felony. To qualify, the UPL must cause loss of $200 or more — the amount required for felonious larceny. The proposal was sent to the Court for approval.

Advertising Committee Dissolved
The council sunsetted the Standing Committee on Lawyer Advertising and Solicitation, which issued lawyer advertising opinions, monitored compliance with the ethics rules that govern advertising, and occasionally recommended prosecution for noncompliance. The committee's work will be continued by the Standing Committee on Legal Ethics.

CRESPA Amendments
The council approved amendments to conform Consumer Real Estate Settlement Protection Act regulations to statutory changes effective July 1, 2009.

Malpractice Insurance Committee Term Extended
The council extended the term to be served by members of the Special Committee on Lawyer Malpractice Insurance from three to five years, because of the time necessary to learn the subject matter.

MCLE Certification Mailing Discontinued
The council voted to discontinue automatic mailing of mandatory continuing legal education certification forms, for an annual savings of more than $14,000. Lawyers can access the information through the Member Login at VSB.org. By request, the VSB will mail the certification to individual members.

Membership Changes
The council approved amendments that:

- Establish time limits for an attorney to register with the Virginia State Bar after being licensed by the Virginia Board of Bar Examiners or admitted to practice in other categories of membership.
- Allow lawyers to request that their names be omitted from the membership list when it is distributed electronically or otherwise for nonofficial purposes.

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- Clarify the language that defines associate member status.
- Clarify that associate members, as well as active members, can qualify for the disabled/retired class of membership when need arises.

These amendments were sent to the Court for approval.

Payee Notification
A proposal to require insurance companies to notify claimants and judgment creditors when the company issues a settlement check was postponed for consideration until the October 18, 2009, council meeting, to allow more time for comment.

John D. DelBianco receives a $1,750 check at the VSB Annual Meeting from Litigation Section Chair Jennifer L. Parrish for his award-winning essay in the Law in Society Award competition. He is a 2009 graduate of Trinity School at Meadow View in Falls Church, and plans to attend Wake Forest University in the fall. Also pictured (L–R) are Litigation Section Secretary Robert L. Garnier, retired Judge Johanna L. Fitzpatrick, and retired Judge Diane M. Strickland.

Nominations Sought for Disciplinary Board, MCLE Board, and Council Members At Large

President Jon D. Huddleston has appointed a Nominating Committee to consider nominees for board vacancies in 2010 to be filled by the Supreme Court. The Nominating Committee consists of Manuel A. Capsalis, chair; John Y. Richardson; Judith L. Rosenblatt; Aubrey J. Rosser Jr.; and Edna Ruth Vincent.

Vacancies beginning on July 1, 2010, are listed below. Appointments are for the terms specified. The Nominating Committee's recommendations will be acted on by the Virginia State Bar Council in October 2009, and the names of the nominees will then be forwarded to the Supreme Court of Virginia for consideration.

Council Members at Large: 3 vacancies (of which 1 incumbent is eligible for reappointment to a second term). May serve 2 consecutive 3-year terms.

Disciplinary Board: 6 lawyer vacancies and 1 lay member vacancy (of which 4 lawyer members are eligible for reappointment to a second term). District committee service is preferred. May serve 2 consecutive 3-year terms.

Mandatory Continuing Legal Education Board: 3 lawyer vacancies (of which 2 current members are eligible for reappointment to a second term). May serve 2 consecutive 3-year terms.

Nominations, along with a brief résumé, should be sent by **September 8, 2009**, to Manuel A. Capsalis, Chair, VSB Nominating Committee, Virginia State Bar, 707 E. Main St., Suite 1500, Richmond, VA 23219, or e-mailed to Valerie Breeden at breeden@vsb.org.

Irving M. Blank of Richmond Is President-elect of Virginia State Bar

Irving M. Blank, a personal injury attorney in Richmond, is the new president-elect of the Virginia State Bar.

Blank will serve as president for the 2010–11 term. He will succeed Jon D. Huddleston of Leesburg, who was sworn in June 19 during the bar's annual meeting in Virginia Beach.

Blank, a lawyer since 1967, practices with Paris Blank LLP. He holds a bachelor's degree from Virginia Tech and a law degree from the University of Richmond. He is a native of Richmond.

He has served on the bar's governing council since 2003 and on the VSB Executive Committee since 2006. He is on the faculty for the bar's Professionalism Course that is required for all lawyers, and he is a member of the Budget and Finance Committee. He also is a liaison for the VSB committee that reviews candidates for Virginia judgeships.

Blank is a fellow of the Virginia Law Foundation and the American College of Trial Lawyers. He is a member of the John Marshall Inn of Court, the Virginia Association of Defense Attorneys, and the Virginia Trial Lawyers Association.

He was a member of the Virginia Bar Association commission that developed the Virginia Principles of Professionalism, an aspirational set of standards for attorney conduct.

He has served on the board of directors of the Central Virginia Legal Aid Society.

NOTICE: Mailing of the MCLE Interim Report Has Been Discontinued

In the interest of cost savings, the Mandatory Continuing Legal Eduction Department will discontinue the June mailing of the MCLE Interim Report. Please check your MCLE record online at https://member.vsb.org/vsbportal/. Your MCLE deadline is October 31, 2009.

If you do not have access to the Internet you may contact the MCLE Department at (804) 775-0577 to request that a copy of your transcript be mailed.

Hill-Tucker Dinner Draws a Crowd for Scholarships

About two hundred people attended the Oliver W. Hill-Samuel W. Tucker Scholarship Dinner on April 30 at the Virginia Holocaust Museum in Richmond. Juan Williams, a commentator for National Public Radio and Fox News, told stories from one of his books—*Thurgood Marshall: American Revolutionary*. The event, co-sponsored by the Greater Richmond Bar Foundation, raised over $20,000. The money currently supports the education of three law students, and the Oliver W. Hill Scholarship Committee hopes to establish an endowment for future scholarships. The photo shows attorneys Robert J. Grey Jr. of Richmond and Crystal Y. Twitty, event chair.

Recipients of Awards at the VSB Annual Meeting:

FAMILY LAW SERVICE AWARD
Anne B. Holton,
First Lady of Virginia
Presented by the Family Law Section

LEGAL AID AWARD
Freddie L. Goode,
Senior Managing Attorney, Central Virginia Legal Aid Society, Richmond
Presented by the Special Committee on Access to Legal Service

LOCAL BAR LEADER OF THE YEAR AWARD
Rupen R. Shah,
President, Augusta County Bar Association
Presented by the Conference of Local Bar Associations

TRADITION OF EXCELLENCE AWARD
The Honorable Marilynn C. Goss,
Richmond Juvenile & Domestic Relations District Court
Presented by the General Practice Section

The following bar association projects received awards from the Conference of Local Bar Associations during the Virginia State Bar Annual Meeting. The CLBA makes information on winning projects available to other groups that want to sponsor similar programs.

Awards of Merit
Awards of Merit recognize excellence in bar projects that serve the bench, the bar, and the people of Virginia.

Alexandria Bar Association
Eightieth birthday celebration

Metropolitan Richmond Women's Bar Association
Partnership with Safe Harbor domestic violence shelter

Norfolk and Portsmouth Bar Association
Seminar: The Triumph of the Rule of Law Over Massive Resistance

Joint Project of the Alexandria, Arlington County, Fairfax, and Prince William County bar associations
Production of the pictorial *2009 NOVA Bar Directory*

Roanoke Bar Association
Rule of Law Project to bring lawyers into middle school classrooms

Virginia Women Attorneys Association—Loudoun County Chapter
Adoption Day Ceremony and Fair

Certificates of Achievement
Certificates of Achievement honor high achievement in bar projects that serve the bench, the bar, and the people of Virginia.

Alleghany-Bath-Highland Bar Association
So You're 18 panel discussion to teach rights and responsibilities of adults

Henrico County Bar Association
First Annual Professionalism Program to teach the new Principles of Professionalism

Fredericksburg Area Bar Association
Bar Lunch-n-Learn series of continuing legal education
Seminar: Collecting Homeowners Dues in the Small-Claims Court, for laypersons
Indigent Defense Commission training to help lawyers qualify for the court-appointed list.

Prince William County Bar Association
Modest Means Program to help low-income county residents with civil legal matters
Hanging Out a Shingle Program for new lawyers and solo and small-firm practitioners

Virginia Women Attorneys Association — Richmond Chapter
Public Service Summer Stipend Award for a law student engaged in public service work, and Law Day activities

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Martin Recognized by Norfolk & Portsmouth Bar

Howard W. Martin Jr., a former president of the Virginia State Bar, was presented with the Eggleston-I'Anson Professionalism Award by the Norfolk and Portsmouth Bar Association during its annual meeting in May. The award recognizes personal and professional qualities, reputation, and conduct. Two of Martin's partners at Crenshaw, Ware & Martin PLC in Norfolk — Francis N. Crenshaw and Guilford Ware — previously won the award, which is named for two former chief justices of the Supreme Court of Virginia — Lawrence W. I'Anson of Norfolk and John W. Eggleston of Portsmouth. In the photo, Martin stands between the association's immediate past president, John L. Deal (left), and the president for 2009-10, David W. Lannetti.

Local Bar Elections

Augusta County Bar Association
Humes Jefferson Franklin III, President
James Bryan Glick, President-elect
Michelle Kelsay Bishop, Vice President
Whitney Jackson Levin, Secretary
David Leslie Meeks, Treasurer
Rupen Rasiklal Shah, Immediate Past President

Conference of Local Bar Associations
Gifford Ray Hampshire, Chair
Nancy Marie Reed, Chair-elect
Edward Laurence Weiner, Secretary
Plato George Eliades II, Treasurer
William T. Wilson, Immediate Past Chair

Fairfax Bar Association
Corinne Neren Lockett, President
David John Gogal, President-elect
Brett Armen Kassabian, Vice President
Edward Laurence Weiner, Secretary
Jay Barry Myerson, Treasurer
Julie Harry Heiden, Immediate Past President

Henrico County Bar Association
Stanley Paul Wellman, President
Donna Diservio Lange, President-elect
James Walter Hopper, Vice President
Michael James Rothermel, Secretary
Marissa Duncan Mitchell, Treasurer
Christopher Hunt Macturk, Immediate Past President

Metro Richmond Family Law Bar Association
Rebecca Elizabeth Duffie, President
Robert Edward Henley III, Vice President
Vanessa Laverne Jones, Secretary
Christopher Hunt Macturk, Treasurer
Julie Marie Cillo, Immediate Past President

Norfolk & Portsmouth Bar Association
David Wayne Lannetti, President
Jeffrey Lance Stredler, President-elect
Gary Alvin Bryant, Secretary
Nathaniel Beaman IV, Treasurer
Kevin Patrick Greene, YLS Chair
John Lockley Deal, Immediate Past President

The Alexandria Bar Association
Todd Allen Pilot, President
Barbara Sattler Anderson, President-elect
Kathleen Maureen Uston, Secretary
Heather Nicole Jenquine, Treasurer
Gwena Kay Tibbits, Immediate Past President

The Bar Association of the City of Richmond
Gregory Franklin Holland, President
Thamer Eugene Temple III, President-elect
Tyler Perry Brown, Vice President
Hon. Buford M. Parsons Jr., Honorary Vice President
Craig Thomas Merritt, Secretary-Treasurer
William Reilly Marchant, Immediate Past President

Virginia Women Attorneys Association
Chandra Dore Lantz, President
Christine Helene Mougin-Boal, President-elect
Lauren Ebersole Hutcheson, Secretary
Catherine Mary Reese, Treasurer
Kathleen Joanna Lynch Holmes, Immediate Past President
Ms. Ingeborg Ford, Administrative Director (NEW)

In Memoriam

Robert H. Anderson Jr.
Norfolk
September 1920–April 2009

Honorable Joseph Herbert Baum
Arlington
April 1931–April 2009

Cooley C. Berry
Falls Church
December 1913–August 1989

Lawrence E. Blake
Prince George
December 1941–March 2009

Leroy T. Canoles Jr.
Norfolk
May 1925–March 2009

Frank M. Carter
Fairfax
September 1924–January 2009

Charles McKay Chambers
Alexandria
June 1941–May 2009

Harold Ralph Clements II
Grand Prairie, Texas
March 1947–January 2009

Kristin Blair Cooper
Norfolk
August 1961–May 2009

Salvatore J. D'Amico
Alexandria
February 1924–August 2008

Edwin J. Dentz
Woodbridge
April 1924–December 2008

John B. Dinsmore
Virginia Beach
March 1945–January 2009

A. Yates Dowell Jr.
Springfield
December 1920–February 2009

Garland S. Ferguson III
Alexandria
February 1916–February 2008

Milton Mortimer Field
Alexandria
March 1925–June 2008

William C. Garbee Jr.
Richmond
August 1921–April 2009

Jean-Pierre Garnier
Falls Church
March 1933–May 2009

Leslie A. Grandis
Richmond
May 1944–March 2009

John William Hanifin
Ocean Ridge, Florida
August 1921–August 2008

Russell B. Harris
Charles City
January 1919–February 2009

Michael Francis Hughes
Easton, Pennsylvania
July 1959–April 2009

Eugene Marshall Jordan
Hampton
March 1924–November 2008

John William Keith Jr.
Richmond
Septemer 1927–October 2008

Stephen J. Kushnir
Winchester
April 1939–April 2009

Annika Eva Marie Kyrolainen
Richmond
December 1961–November 2008

James F. Lawrence
Fort Belvoir
March 1918–September 2006

Edward Wayne Lentz
Green Valley, Arizona
August 1928–September 2008

Nicholas Malinchak
Arlington
November 1925–December 2008

Preston Brooks Mayson Jr.
Roanoke
June 1932–March 2009

Kelly E. Miller
Richmond
August 1935–May 2009

William B. Moffitt
Alexandria
January 1949–April 2009

Claude T. Moorman II
Plymouth, North Carolina
August 1939–April 2009

Vail W. Pischke
Falls Church
February 1920–April 2009

Preston Sawyer Jr.
Lynchburg
July 1928–March 2009

Gary Richards Sheehan
Fairfax
December 1941–March 2009

Bernard M. Sisson
Triangle
March 1935–March 2009

Richard M. Swope
Virginia Beach
April 1940–December 2008

Donal Brendan Tobin
Westwood, Massachusetts
June 1941–August 2008

Charlotte Lloyd Walkup
Alexandria
April 1910–August 2008

Hon. Robert M. Wallace
Richmond
November 1923–March 2009

William E. Winter Jr.
Gaffney, South Carolina
October 1944–July 2008

Donald G. Wise
Portsmouth
October 1936–May 2009

A Commentary on Health Savings Accounts

by Robert H. Spicknall

Health Savings Accounts (HSAs) were enacted by law as part of the Medicare Prescription Drug Improvement and Modernization Act of 2003 (prescriptions for seniors).

At that time, I anticipated the new HSA approach would appeal to many Virginia State Bar members. As the VSB endorsed broker, I have attempted to make the Virginia legal community aware of HSAs through my publications, mailings, and conversations. My purpose has been not to convince, but rather to inform lawyers about this emerging approach to health insurance. For a full understanding of the fundamentals of health savings accounts, see http://www.vsbmic.com/hsa_vsbmic_2009.pdf.

In the 1940s, federal wage controls prohibited employers from raising employees' salaries. However, health insurance could be added as a benefit. Employers could deduct the cost of this benefit, and it was not taxable to the employer. The employer-provided health insurance system grew through the decades. Many will agree that over time consumers have become insulated from health costs — except for insurance premiums that have escalated almost continuously, despite efforts to curtail them through managed care.

Since the new century began, health insurance premiums have dramatically outpaced most other costs. While wages and profits increased roughly by 20 percent to 25 percent from 2000 to 2007, health insurance premiums doubled. The health savings account approach combines a high-deductible insurance policy with an Individual Retirement Account-like account for health care. Contributions to HSAs are on a pretax basis. Money can be withdrawn to pay for a broad definition of health services. Money in an HSA accumulates tax free from year to year.

Because of the high deductible, the HSA approach has been selected by those who anticipate limited medical expenses. Persons with chronic conditions, and high expected medical costs — including those on numerous expensive brand-name prescriptions — prefer the more traditional health insurance product that requires a smaller deductible or copayments.

The health savings account approach has also appealed to wage earners who are in the high tax brackets. According to the U.S. Government Accountability Office, among tax filers between ages 19 and 64, the average adjusted gross income (AGI) in 2005 for filers with HSAs was about $139,000, compared with an AGI of $57,000 for all other filers. Thus, it may be that HSAs have been selected by those with better-than-average average health and wealth.

Today a one-size-fits-all approach to health insurance does not appeal to many law firms. Partners or owners of a firm will often consider the HSA approach because they can often afford the higher deductible and they find this approach more tax advantageous. They also might have a strong desire to send fewer dollars to a health insurance company. Staff members continue to prefer typical insurance products that offer financial predictability, but many are beginning to consider the value of a lower-premium product.

Nationally, the number of people covered by a health savings account approach continues to increase, according to America's Health Insurance Plans, and shows no sign of slowing.

In January 2008, 6.1 million persons were enrolled in HSAs. http://www.ahip.org/content/default.aspx?docid=25947

In recent years I have told people that the average health insurance deductible in this country was $500. Some suggest that it is now $1,000. As the $1,000 deductible becomes more common — often with 20 percent coinsurance required — more attorneys and staff members may begin to consider the health savings accounts with a deductible that may be considered manageable (e.g., $1,500 or $3,000 with no coinsurance).

We are on an unsustainable path if the price of health insurance continues to outpace other costs by a factor of four. Law firms and solo practitioners will continue to evaluate buy-down options that include increased deductibles, copayments, coinsurance, and out-of-pocket limits. They also will continue to assess provider networks associated with health insurance. As groups move from a low-dollar copayment plan, the deductibles associated with the tax-favored HSA approach will be given greater consideration by more people.

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Assessing Substance Abuse and Mental Health among Lawyers

by Susan S. Grover and Mark R. Voss

A new study suggests that one in three Virginia attorneys have experienced adverse consequences as a result of substance abuse or mental health problems.

The study suggests that 27 percent of Virginia attorneys are unaware of the mental health and substance abuse assistance available to them through Virginia's Lawyers Helping Lawyers (LHL) program. In a time when stresses on the profession are mounting, this lack of awareness could be life threatening for attorneys.

The LHL study surveyed fourteen thousand Virginia attorneys about their perceptions of alcohol and drug use among lawyers, their personal alcohol and drug use, other mental health issues, and their awareness of Lawyers Helping Lawyers. The Virginia State Bar provided contact information for members, and the study was supported by Chief Justice Leroy R. Hassell Sr. and Manuel A. Capsalis, 2008-09 president of the Virginia State Bar.

Confidentiality protocols protected the identity of respondents. The nature of specific answers remains completely confidential and anonymous. The study is helping LHL better understand substance abuse and mental health issues within the legal community and ways in which LHL can effectively serve Virginia's lawyers.

LHL is a volunteer organization that offers help, education, and outreach to fellow attorneys in Virginia in complete confidence. LHL is not a moralistic organization that wants people to stop drinking. LHL wants to ensure that lawyers in trouble get the help they need. Many LHL volunteers have experienced substance abuse or mental health difficulties themselves; others have lived through the experience through loved ones. LHL can be effective only if Virginia lawyers know that its services are available and understand that communications with LHL are held in the strictest confidence. In a profession where reputation is so important, and where traditional stigmas remain alive, understanding this confidentiality is essential.

Absolute Confidentiality

LHL's commitment to confidentiality is absolute. The study shows that some lawyers believe that requests to LHL for assistance may be reported to the Virginia State Bar. Nothing could be further from the truth. LHL's effectiveness depends entirely on lawyers believing the promise that nothing will be disclosed. Because attorneys fear damage to reputation from stigmas associated with alcohol and mental health issues, LHL depends on the legal profession's awareness and belief in the promise of absolute confidentiality. That promise is sacrosanct.

Do Attorneys Seek Help?

Lawyers in Virginia are doubtful about their colleagues' familiarity with LHL's services or their willingness to seek help from LHL or elsewhere. Eighty-one percent of those who responded to the questionnaire indicated that they believe that their fellow attorneys would not seek help for substance abuse or mental health issues. In contrast, those who responded to the questionnaire appear to be comfortable about contacting LHL to get help for themselves. Perhaps attorneys who chose to respond to the questionnaire best understand mental health and substance abuse issues.

Readers who would like more information about Lawyers Helping Lawyers may call (toll free and anonymously) (877) 545-4682 or e-mail info@valhl.org.

How Much Do Virginia Lawyers Drink?

There is a 5 percent difference between perceived and actual problems with alcohol. Nine percent of survey respondents self-reported current or past problems with alcohol. By contrast, responses to questions designed to measure actual practices indicate that 14 percent of respondents have problems with alcohol. This is higher than the national average. As might be expected, fewer attorneys than the national average report using illegal drugs or misusing prescription drugs than the national average.

The study validates the direction that LHL has taken in the past five years to expand services to attorneys for both substance abuse and mental health problems.

Lawyers Have Key Role in Reorganized Magistrate System

Virginia's magisterial system — the first contact many people have with the state justice system — has been reorganized in the past year, in an effort by the Supreme Court of Virginia and the General Assembly to improve the qualifications, training, and consistency of service provided by magistrates statewide.

"Our goal is to make the magistrate system the best that it can be," said Paul F. DeLosh, director of the department of judicial services for the Office of the Executive Secretary (OES) of the Supreme Court of Virginia.

Variations in procedures and application of law by magistrates were documented in a 2007 report to the General Assembly by a Court study group chaired by Thomas S. Shadrick when he was a circuit judge in Virginia Beach.

The General Assembly accepted many of the Court's recommendations for change and proposed legislation that went into effect July 1, 2008.

Now, all chief magistrates hired after that date must be members of the Virginia State Bar, and the newly hired magistrates they supervise must have bachelor's degrees.

Eventually, all magistrates will work full-time — not the combination of part-time and full-time that existed under the previous system. Magistrates serve all cities and counties twenty-four hours a day, seven days a week. They conduct hearings in person or through a video-conferencing system.

The chain of command has been realigned. Instead of reporting to the chief circuit judge of a jurisdiction, magistrates and chief magistrates now are under the supervision of the OES. The executive secretary hires magistrates in consultation with the chief circuit judges in each region.

The state's thirty-two judicial districts have been grouped into eight magisterial regions, each of which has a supervisor who manages and assists the chief magistrates in the region. Approximately 440 persons work as magistrates in Virginia, either full-time or part-time.

Certification requirements have been expanded to include a four-week training session in Richmond for new hires and thirty days of on-the-job training, with additional requirements for the chief magistrate. Training includes topics to prepare them for decisions they will have to make: bail procedures, establishing probable cause, and issuing summonses and arrest, search, and civil warrants.

Magistrates also must obtain twenty mandatory continuing legal education credits annually.

A manual has been developed to set out the requirements for magistrates: limitations on other employment (they can't be law-enforcement officers or work for the federal government, for example); policies to prevent nepotism; and conflict-of-interest rules.

The manual also includes the Canons of Conduct for Virginia Magistrates. Magistrates are required to:

- Avoid impropriety and the appearance of impropriety in all activities.

- Perform the duties of the office impartially and diligently. A magistrate's duties take precedence over all the magistrate's other activities. A magistrate should do his or her work promptly, disqualify himself from matters in which his impartiality may be questioned, and abstain from public comment about pending court proceedings.

- Refrain from political activity inappropriate to the office, including leading a political organization, holding a political office, or soliciting funds for political purposes.

See links to resources on the following page.

Failure to comply with those canons can result in discipline, such as requiring the magistrate to take additional training or adverse personnel actions.

In addition, the canons encourage magistrates to "[u]phold the integrity and independence of the judiciary by maintaining and enforcing high standards of conduct." And the canons allow magistrates to engage in "activities designed to improve the law, the legal system, and the administration of justice."

The procedure for complaining about magistrates also has changed. Previously, complaints typically went to the chief judge who supervised magistrates in a locality, and procedures for handling complaints varied.

Complaints now are submitted on a standardized form to the OES, which reviews the complaint to determine whether it alleges misconduct under the Canons of Conduct. If it does, the mat-

ter is investigated by the magistrate's regional supervisor. Complainants are notified of the findings.

The complaint process is for violations of the canons only. The OES encourages persons with complaints about a magistrate not issuing a warrant or other process in a criminal matter to consult with law enforcement officials or the local commonwealth's attorney.

The manual emphasizes the importance of the magistrate's role on the front lines of Virginia justice.

"It is essential that all magistrates realize that they are members of the State judiciary and that their actions are a direct reflection on the quality of justice in Virginia, especially to tourists and non-residents who may never pass through Virginia again," the manual states.

"The magistrate must be careful to preserve the neutrality of the office when interacting with an attorney for the Commonwealth or a defense attorney as both have a vested [interest] in the outcome of a decision."

Virginia's Magistrate System — Links to Resources

Report on the Virginia Magistrate System (2007)
http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD3472007/$file/RD347.pdf

Magistrate System Organizational Chart
http://www.courts.state.va.us/courtadmin/aoc/djs/resources/magistrateorgchart.pdf

Chief Magistrates List
http://www.courts.state.va.us/directories/chief_magistrates.pdf

Magistrate Manual, with Canons of Conduct
http://www.courts.state.va.us/courtadmin/aoc/djs/programs/mag/resources/magman/toc.pdf

Magistrate Complaint Procedure
http://www.courts.state.va.us/courtadmin/aoc/djs/programs/mag/forms/complaint_form_inst.pdf

Complaint Form
http://www.courts.state.va.us/courtadmin/aoc/djs/programs/mag/forms/complaint_form.pdf

Virginia Courts Website Redesigned

The Office of the Executive Secretary of the Supreme Court of Virginia has redesigned Virginia's Judicial System website — www.courts.state.va.us.

New features on the site include:

- A more prominent search feature.
- Information reorganized into logical categories to help site visitors — lawyers and laypersons — find information faster.
- Tabs designated "For Citizens," "For Legal Community," and "For Students/Teachers."
- A "How Do I …?" drop-down menu that helps visitors target their search.
- An online services page that provides quick information on such subjects as paying fines for driving and other offenses, preparing a form for family abuse protective orders, and calculating fees for filing civil actions and deeds.
- Easy access to forms often used in Virginia's courts.
- Contact information for Virginia's courts and departments in the state courts administrator's office.

The Web address remains the same, but previous users of the site might have to update bookmarks for some pages.

Appointments

The following judges have been appointed to serve pro tem judgeships. The appointees will be subject to election by the 2010 General Assembly.

Circuit Court — *appointed by the governor*

3rd Circuit: **Kenneth R. Melvin,** who formerly represented Portsmouth in the General Assembly House of Delegates, succeeds **Mark S. Davis**, who resigned in 2008.

10th Circuit: **Joel C. Cunningham** of Halifax, formerly a Juvenile and Domestic Relations District judge, succeeds **William L. Wellons**, who retired in December 2008.

12th Circuit: **Harold W. Burgess Jr.**, formerly a Chesterfield J&DR judge, succeeds **John V. Cogbill III**, who resigned.

General District Court — *appointed by the circuit court in each jurisdiction*

3rd District: **Douglas B. Ottinger**, formerly a deputy commonwealth's attorney in Portsmouth, succeeds **S. Lee Morris Jr.**, who retired in January.
4th District: **Joseph A. Migliozzi Jr.** of Norfolk, formerly a capital defender, succeeds **Louis A. Sherman**, who moved to circuit court in October 2008.

9th District: **Jeffrey W. Shaw**, formerly of Dusewicz Soberick & Shaw in Hayes, succeeds **L. Bruce Long**, who moved to circuit court.

31st District: **Steven S. Smith**, formerly of Smith, Hudson and Carluzzo PC in Manassas, succeeds **Craig D. Johnston**, who moved to circuit court.

J&DR District Court — *appointed by the circuit court in each jurisdiction*

24th District: **R. Louis Harrison Jr.**, formerly a solo practitioner in Bedford, succeeds **Philip A. Wallace**, who retired.

27th District: **Harriet D. Dorsey** of Blacksburg succeeds **M. Keith Blankenship**, who resigned in 2008.

31st District: **David Scott Bailey** of Manassas, a former assistant commonwealth's attorney for Prince William County, succeeds **James Bailey Robeson**, who retired.

Vacancies

Circuit Court

9th Circuit: Vacancy created by the death of **N. Prentis Smiley Jr.** of Yorktown in December 2008.

General District

25th District: Vacancy created by the retirement of **A. Lee McGratty** of Staunton in December 2008.

J&DR

10th District: Vacancy created by appointment of **Joel C. Cunningham** of Halifax to circuit court.

12th District: Vacancy created by appointment of **Harold W. Burgess Jr.** to Chesterfield Circuit Court.

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Lawyers Have Key Role in Reorganized Magistrate System

Virginia's magisterial system — the first contact many people have with the state justice system — has been reorganized in the past year, in an effort by the Supreme Court of Virginia and the General Assembly to improve the qualifications, training, and consistency of service provided by magistrates statewide.

"Our goal is to make the magistrate system the best that it can be," said Paul F. DeLosh, director of the department of judicial services for the Office of the Executive Secretary (OES) of the Supreme Court of Virginia.

Variations in procedures and application of law by magistrates were documented in a 2007 report to the General Assembly by a Court study group chaired by Thomas S. Shadrick when he was a circuit judge in Virginia Beach.

The General Assembly accepted many of the Court's recommendations for change and proposed legislation that went into effect July 1, 2008.

Now, all chief magistrates hired after that date must be members of the Virginia State Bar, and the newly hired magistrates they supervise must have bachelor's degrees.

Eventually, all magistrates will work full-time — not the combination of part-time and full-time that existed under the previous system. Magistrates serve all cities and counties twenty-four hours a day, seven days a week. They conduct hearings in person or through a video-conferencing system.

The chain of command has been realigned. Instead of reporting to the chief circuit judge of a jurisdiction, magistrates and chief magistrates now are under the supervision of the OES. The executive secretary hires magistrates in consultation with the chief circuit judges in each region.

The state's thirty-two judicial districts have been grouped into eight magisterial regions, each of which has a supervisor who manages and assists the chief magistrates in the region. Approximately 440 persons work as magistrates in Virginia, either full-time or part-time.

Certification requirements have been expanded to include a four-week training session in Richmond for new hires and thirty days of on-the-job training, with additional requirements for the chief magistrate. Training includes topics to prepare them for decisions they will have to make: bail procedures, establishing probable cause, and issuing summonses and arrest, search, and civil warrants.

Magistrates also must obtain twenty mandatory continuing legal education credits annually.

A manual has been developed to set out the requirements for magistrates: limitations on other employment (they can't be law-enforcement officers or work for the federal government, for example); policies to prevent nepotism; and conflict-of-interest rules.

The manual also includes the Canons of Conduct for Virginia Magistrates. Magistrates are required to:

- Avoid impropriety and the appearance of impropriety in all activities.

- Perform the duties of the office impartially and diligently. A magistrate's duties take precedence over all the magistrate's other activities. A magistrate should do his or her work promptly, disqualify himself from matters in which his impartiality may be questioned, and abstain from public comment about pending court proceedings.

- Refrain from political activity inappropriate to the office, including leading a political organization, holding a political office, or soliciting funds for political purposes.

See links to resources on the following page.

Failure to comply with those canons can result in discipline, such as requiring the magistrate to take additional training or adverse personnel actions.

In addition, the canons encourage magistrates to "[u]phold the integrity and independence of the judiciary by maintaining and enforcing high standards of conduct." And the canons allow magistrates to engage in "activities designed to improve the law, the legal system, and the administration of justice."

The procedure for complaining about magistrates also has changed. Previously, complaints typically went to the chief judge who supervised magistrates in a locality, and procedures for handling complaints varied.

Complaints now are submitted on a standardized form to the OES, which reviews the complaint to determine whether it alleges misconduct under the Canons of Conduct. If it does, the mat-

ter is investigated by the magistrate's regional supervisor. Complainants are notified of the findings.

The complaint process is for violations of the canons only. The OES encourages persons with complaints about a magistrate not issuing a warrant or other process in a criminal matter to consult with law enforcement officials or the local commonwealth's attorney.

The manual emphasizes the importance of the magistrate's role on the front lines of Virginia justice.

"It is essential that all magistrates realize that they are members of the State judiciary and that their actions are a direct reflection on the quality of justice in Virginia, especially to tourists and non-residents who may never pass through Virginia again," the manual states.

"The magistrate must be careful to preserve the neutrality of the office when interacting with an attorney for the Commonwealth or a defense attorney as both have a vested [interest] in the outcome of a decision."

Virginia's Magistrate System — Links to Resources

Report on the Virginia Magistrate System (2007)
http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD3472007/$file/RD347.pdf

Magistrate System Organizational Chart
http://www.courts.state.va.us/courtadmin/aoc/djs/resources/magistrateorgchart.pdf

Chief Magistrates List
http://www.courts.state.va.us/directories/chief_magistrates.pdf

Magistrate Manual, with Canons of Conduct
http://www.courts.state.va.us/courtadmin/aoc/djs/programs/mag/resources/magman/toc.pdf

Magistrate Complaint Procedure
http://www.courts.state.va.us/courtadmin/aoc/djs/programs/mag/forms/complaint_form_inst.pdf

Complaint Form
http://www.courts.state.va.us/courtadmin/aoc/djs/programs/mag/forms/complaint_form.pdf

Virginia Courts Website Redesigned

The Office of the Executive Secretary of the Supreme Court of Virginia has redesigned Virginia's Judicial System website — www.courts.state.va.us.

New features on the site include:

- A more prominent search feature.
- Information reorganized into logical categories to help site visitors — lawyers and laypersons — find information faster.
- Tabs designated "For Citizens," "For Legal Community," and "For Students/Teachers."
- A "How Do I …?" drop-down menu that helps visitors target their search.
- An online services page that provides quick information on such subjects as paying fines for driving and other offenses, preparing a form for family abuse protective orders, and calculating fees for filing civil actions and deeds.
- Easy access to forms often used in Virginia's courts.
- Contact information for Virginia's courts and departments in the state courts administrator's office.

The Web address remains the same, but previous users of the site might have to update bookmarks for some pages.

Conference Examines Tax Issues in Today's Economy

National Taxpayer Advocate Nina E. Olson, who in 1992 founded Virginia's Community Tax Law Project to help the working poor, returned to Richmond April 20 to give a presentation at the Virginia State Bar's Pro Bono and Access to Justice Conference.

Olson (photo 1) focused her talk on federal tax matters related to current events: the tax implications for debt write-offs; availability of relief when the Internal Revenue Service places a lien on income and property; and protection from identity theft.

Other speakers at the event, sponsored annually by the VSB Access to Justice Committee, talked about legal challenges faced by military service members and former prisoners when they return to communities.

The audience included members of Virginia's legal services communities and representatives of military judge advocates general in Virginia.

Clarence M. Dunnaville Jr. of Richmond was awarded the Lewis F. Powell Jr. Pro Bono Award. In presenting the award, Richmond Juvenile and Domestic Relations Judge Marilynn C. Goss said that Dunnaville "gives his heart and soul to everything he does." John C. Brittain, chief counsel and senior deputy director of the Lawyers' Committee for Civil Rights Under Law, paid tribute to Dunnaville's character, bravery, and tenacity.

Dunnaville called Powell "one of my great heroes" for his courage as Richmond's school board chair during massive resistance to court-ordered racial desegregation of public schools. Because of Powell's insistence, Richmond schools did not shut down as schools in other localities did.

Dunnaville also lauded Powell, as a U.S. Supreme Court associate justice, for his role as the swing vote and author of the 1978 *Bakke* decision, which barred quota systems but upheld affirmative action programs. "Without the *Bakke* decision, the whole landscape would be far different than it is today," Dunnaville said. "Without *Bakke*, we might not have an Obama."

Photo 2 shows (left-right) Clarence Dunnaville, Brittain, and two of Dunnaville's sons—Andrew and Peter Dunnaville.

Also at the conference, Miriam Renae Sincell (photo 3, center), a third-year student at the University of Richmond School of Law, was presented with the Oliver White Hill Law Student Pro Bono Award. Tara L. Casey (left), director of the university's Pro Bono Services Program, described Sincell's many legal services projects while a student. Dr. Oliver W. Hill Jr. (right), son of the late civil rights lawyer for whom the award was named, attended the program.

For an article on Dunnaville's and Sincell's achievements, see page 35 of the April 2009 issue of *Virginia Lawyer*. (http://www.vsb.org/docs/valawyermagazine/vl0409_access.pdf)


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photo by Al Covey

Freddie L. Goode of Richmond Receives Legal Aid Award

photo by Al Covey

(L–R) Jon D. Huddleston, Goode, and Manuel A. Capsalis

Freddie L. Goode, senior managing attorney at Central Virginia Legal Aid Society, has been selected for the 2009 Legal Aid Award by the Virginia State Bar's Access to Legal Services Committee.

The award recognizes lawyers employed by legal aid societies licensed by the Virginia State Bar. Recipients are chosen for their advocacy, quality of service, and impact beyond their service area.

Since Goode joined CVLAS as a paralegal and law clerk in 1988, he has become successful in challenging denials of Social Security and Supplemental Security Income. "He also does a considerable amount of representation of older adults and disabled clients," according to the nomination letter from Henry W. McLaughlin III, CVLAS executive director.

Goode visits his clients in their own homes, hospitals, and adult homes. "A large number of clients have been able to escape lives of quiet desperation to enter lives of dignity with a steady income and Medicare because of success in appeals to administrative law judges," McLaughlin wrote.

In addition to Goode's managerial duties at offices in Richmond, Petersburg, and Charlottesville, he routinely carries more than 180 cases and regularly works the agency's emergency rotation, to handle urgent cases such as stopping evictions.

He also has an "extraordinary record of innovation in recruitment and supervision of volunteers," McLaughlin wrote. Goode supervises more than twenty lay volunteers, who help with disability cases. In addition, he trains and backs up attorneys who volunteer to staff a pro bono hotline through CVLAS, in a program sponsored by the Virginia Bar Association.

A native of West Palm Beach, Florida, Goode has a bachelor's degree from Golden Gate University and a law degree from the University of Florida.

The Legal Aid Award was presented June 19, during the VSB Annual Meeting in Virginia Beach.

Indigent Defense Seminar Draws National Speakers

The Fifth Annual Indigent Criminal Defense Seminar — a free continuing legal education program for attorneys who take court-appointed cases — took place April 3, 2009. The program was live in Richmond, with simultaneous webcasts in Weyers Cave and Wytheville.

Speakers included Colette Tvedt of Seattle (shown in photo 1 with Virginia Chief Justice Leroy R. Hassell Sr.). She talked about using persuasive storytelling to minimize sentences.

Also among the seven guest speakers was David S. Rudolf (photo 2, right, with seminar organizer Steven D. Benjamin). Rudolf — of Charlotte, North Carolina, — described how, by risky and provocative cross examination of a codefendant in a case that involved a revenge killing over a drug deal gone bad, he was able to show the jury the codefendant's propensity for violence.

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Pro Bono, Court-Appointed Work in Brunswick, Fairfax, and Franklin Counties Recognized

Lawyers who have done significant pro bono or court-appointed work in Brunswick, Fairfax, and Franklin counties are being recognized by the Virginia State Bar with Circuit Awards.

The awards are part of an ongoing pilot project, now in its third year, to recognize extraordinary contributions to the Virginia judicial system by lawyers in selected circuits. Recipients were nominated by lawyers in their home circuits. Awards will be presented in ceremonies in each designee's jurisdiction.

The 2009 recipients are:

R. Clinton Clary Jr. of the Sixth Judicial Circuit. Clary is a 1979 graduate of Hampden-Sydney College, and he received a law degree from the University of Richmond in 1983. He is a former assistant commonwealth's attorney for Brunswick County. He practices with Slayton Bain & Clary in Lawrenceville.

Since 1987, Clary has taken state court-appointed criminal defense cases with charges that range from misdemeanors to capital murder. He and one other attorney handle most court-appointed cases in Brunswick County.

He is president of the Brunswick County Bar Association, and he recently served on the VSB's Third District Committee for attorney ethics cases.

David A. Furrow of Rocky Mount, in the Twenty-Second Judicial Circuit. He holds bachelor's, master of business administration, and law degrees from the University of Virginia, and has practiced law for almost thirty years.

He has represented many court-appointed clients, and "is known in our circuit as the attorney to appoint to the most serious and difficult cases," according to the nomination letter from John T. Boitnott of the Franklin County Bar Association. Furrow has been appointed counsel in more than fifteen capital murder cases.

In Furrow's representations, "[t]he opposing side to the case and the court will never know the difference between the highest-paying client and the pro bono client, because the quality of representation is the same," Boitnott wrote.

Robert J. Stoney, with the Fairfax firm of Blankingship & Keith PC, in the Nineteenth Circuit. He has a bachelor's degree from the University of Virginia and a law degree from the College of William and Mary.

According to the nomination letter from his firm, Stoney began representing pro bono clients in criminal and civil matters as soon as he began practicing, and continued for over two decades. "His cases have involved cutting-edge legal theories and those that simply — and importantly — provide relief for those individuals who would not have had … counsel" without his efforts.

His cases have involved evictions, three death penalty appeals, domestic violence, and litigation over denied insurance coverage after an automobile accident. He spends up to one hundred hours per year on pro bono cases. He also takes a case or two each year for no fee, and the client donates what would have been the fee to legal aid. He mentors associates in his firm who do pro bono work, and he has helped lead several organizations that promote legal services for indigent persons.

Clary

Furrow

Stoney

CLE Calendar

Virginia Trial Lawyers Association

September Criminal Law Seminar: "The Keys to Unlocking Criminal Justice" — September 17, Roanoke; September 24, Williamsburg; and September 30, Fairfax.

October Advocacy Seminar: "Expert Witnesses" — October 2, Richmond; October 15, Roanoke; October 22, Norfolk; and October 28, Fairfax.

Ethics Telephone Seminar — October 14.

Details: http://www.vtla.com or (804) 343-1143, ext. 310

Virginia Criminal Sentencing Commission

Introduction to Sentencing Guidelines, for attorneys and criminal justice professionals who are new to Virginia's sentencing guidelines — 9:30 AM–5 PM on September 24, Portsmouth; September 30, Roanoke; and October 13, Henrico County.

Advanced Sentencing Guidelines, for experienced users of the Virginia guidelines — 9:30 AM–5 PM on September 2, Fredericksburg; October 6, Portsmouth; October 14, Henrico County; October 22, Lynchburg; and October 29, Roanoke.

Details: http://www.vcsc.virginia.gov or (804) 225-4398

Virginia Lawyer publishes at no charge continuing legal education program information from nonprofit bar associations and state agencies. The next issue will cover October 22–November 16, 2009. Send information by September 1 to chase@vsb.org.

For other CLE opportunities, see Current Virginia Approved Courses at http://www.vsb.org/site/members/mcle-courses or the websites of commercial providers.

When Drafting Contracts, Consider Family Law Consequences

by Peter W. Buchbauer

Every day, clients across the commonwealth visit attorneys. Most of the time, a future divorce is the last thing on their minds. They want documents prepared or advice about a matter that is pressing to them at the time. They may need representation regarding an injury or workers' compensation claim. Unfortunately for them, months or years later those documents, that advice, or the representation might come back to bite them hard during a divorce.

The general practitioner or non-family law attorney should be aware of potential pitfalls for clients, him or herself, and perhaps his malpractice carrier — because family law matters.

Divorce in Virginia is statutory. The primary statutes are *Code of Virginia* §§ 20-91 (grounds of divorce), 20-107.1 (spousal support), 20-107.3 (property division), 20-108.1 and 20-108.2 (child support), and 20-124.3 (child custody and visitation). Attorneys should review these statutes when they have cases that involve titling or re-titling of property, structuring personal injury awards, or business formation. Another statute to consider whenever one drafts a contract or agreement between spouses is Virginia Code § 20-109. In divorce, annulment, and separate maintenance suits, courts are bound by the terms of any stipulation or contract between the parties that involve "the payment of support and maintenance for the spouse, suit money, or counsel fee or establishing or imposing any other condition or consideration, monetary or nonmonetary."[1]

General law attorneys emphasize the avoidance of recordation taxes as a primary reason for drafting a deed of gift.

Understanding the consequences of these statutes and the subsequent case law may prevent unintended consequences for your client and protect you from unhappy communication with your malpractice carrier or the Virginia State Bar.

Real Property

A client consults a divorce lawyer. She says that she inherited property during the marriage. She and her husband moved into the house and have lived there for years. She asks a burning question: "It's mine, right?" The divorce attorney looks across the desk and properly responds, "It depends."

Under Virginia law, there is a rebuttable presumption that property inherited by one spouse is the separate property of that spouse.[2] She confides that the property was re-titled to the parties jointly, as part of a refinance transaction that paid for her new BMW. "That doesn't make a difference, does it?" she asks the attorney. Again, he properly responds, "It depends."

The lawyer explains that Virginia law provides that re-tiling of property transmutes it from separate to marital property.[3] The re-titling does not presume a gift, which permits you to retrace the property to its separate classification.[4] The re-titling places the burden of proof on your client to retrace the asset to rebut the marital property presumption.

Then the attorney asks the burning question, "Do you have a copy of the deed?"

If the property were simply re-titled from the wife to the husband and wife in a general warranty deed, the wife may preserve her separate property, subject to other facts which might provide evidence of gift. However, if the attorney previously suggested a deed of gift because there would be no recordation taxes, the wife is likely going to be cursing her prior lawyer. In *Utsch v. Utsch*[5], the Supreme Court of Virginia held that parol evidence as to intention was inadmissible when the deed on its face provided for a gift. As such, the gift likely transmuted the separate property into marital property and placed it on the table for equitable distribution at the divorce hearing.

General law attorneys emphasize the avoidance of recordation taxes as a primary reason for drafting a deed of gift. But a review of the *Code of Virginia* makes it clear that husbands and wives can transfer property between themselves without a great tax burden[6] in ways other than employing

the deed of gift — a document that may be toxic to the client if the marriage comes to an unhappy end. Divorce attorneys often see this situation arise because a lender wants both spouses' names on the deed for purposes of the refinance transaction and the real estate lawyer elects the deed of gift as the method of conveyance without advising the client of the potential consequences of use of a deed of gift.

But merely employing a deed other than a deed of gift does not totally insolate a client. Where the deed is not a deed of gift, evidence of intent is still relevant and admissible. We all need to recall the requirements of a gift: donative intent, delivery, and acceptance.[7] Take, for example, a former Washington Redskins quarterback, Joe Theismann. Joe wanted to re-title to himself and his new wife jointly real estate owned by him prior to the marriage. His lawyer did not use a deed of gift, so the question of intent was one of evidence at trial. While the court noted that the evidence of intent was in conflict, it stated:

> [Mr. Theismann] acknowledged that he knew that he had made his wife an owner of the accounts and that he wanted her to share equally in the home. He placed no reservation on the transfers of title permitting him to reclaim the property upon divorce or any other circumstance. Mrs. Theismann presented evidence that Mr. Theismann memorialized the transfers of title in cards that he sent to her, which indicated that the Leesburg farm was now "our home" and that the money was hers to spend. Mrs. Theismann testified that Mr. Theismann bragged that he had made her a "millionaire."[8]

Guess what, Joe? Despite the best efforts of your lawyer to protect you, you gave it up by talking and doing a little too much. So when advising a client who requests the preparation of a deed transferring title from the client alone to the client and spouse, a warning is important: Avoid the deed of gift, and counsel your client to refrain from making statements and conducting himself in a manner that might indicate donative intent, unless it is his intention to make a gift and lose all separate property status in the property. If your client wants to make a gift, get it in writing or confirm it to him in writing, so that your file indicates your advice and the client's intent to make a gift. This can help insulate you from a lawsuit later if the client's memory becomes foggy during his or her divorce proceeding.

Business Situations

There are other cases in which titling makes a significant difference in a family law case. After all, title still controls who will own the asset after the divorce is over.[9] Except when it comes to dividing retirement assets, a court may not order the transfer or sale of an asset that is solely titled to only one party, even if it finds that asset to be marital property. This reality must be considered when assisting a married client regarding the establishment of businesses, business interests, or even the acquisition of valuable personal property.

I recently had a case in which my client worked in the cabling industry, mostly for major government contractors. After many years of this work, he had a brilliant idea, "Why not form my own company and bid on these jobs that I'm working anyway?" Brilliant indeed! He met with counsel and considered his options.

After some reflection, he set up a corporation and placed all of the stock in his wife's name. He and his wife believed that this ownership model would qualify the company for preferences in bidding government jobs. The husband used the many contacts he had established over the years of his employment and assembled a well-trained crew. They soon landed a lucrative seven-figure subcontract working at a major government facility. He and his employees all obtained security clearances. The crew was so efficient that the husband only worked about fifteen hours per week. The wife worked less than that. Her role was to answer the telephone when he was out and occasionally write checks or transport the payroll down to the job site. All went well for a time. When the end came, it delivered a crushing blow to the husband. The company he formed, with the contacts he made over many years and the employees he recruited and trained, was then, and would thereafter be, his wife's. Upon separation, wife effectively fired the husband from "her company." She had his security clearance rescinded. He secured a monetary award to compensate for his marital interest in the company, but he had to

If your client wants to make a gift, get it in writing or confirm it to him in writing, so that your file indicates your advice and the client's intent to make a gift.

start a new business venture — without the employees and his security clearance.

The joint ownership of stock can make the difference in your case at divorce. At least for family law purposes, jointly owned stock is preferable to equal amounts of stock issued in each spouse's name. Jointly owned stock is subject to transfer by court order between the spouses at divorce. Solely owned stock is not. The same is true regarding the title of other personal property of significant value.

Another real-life example occurred in a case in which the husband — the sole breadwinner — had a deep affection for Corvettes. During the marriage, the husband purchased twelve Corvettes. Only one was jointly titled; the others were titled solely to him. During settlement negotiations, the wife requested the jointly titled 1966 car and two others. The husband refused. He persisted in his position that no one was getting "his" Corvettes. The matter went to trial and the wife introduced evidence of the value of all of "his" Corvettes. The court made an equitable distribution of the marital property including a monetary award[10] to the wife to compensate her for the eleven marital Corvettes titled solely to the husband. In order to comply with the monetary award, her husband sold "his" Corvettes at two separate auctions, netting only slightly more than the amount of the monetary award. The wife received the 1966 Corvette and a lot of money. The husband left with a broken heart. Understanding that title can be a boom or bust in a divorce is important when advising clients on how they should own assets — business or otherwise — acquired during the marriage.

Injury Recoveries

Finally, consider the personal injury or workers' compensation award you have secured or negotiated for your client. How you address the constituent parts of the award may make a significant difference if your client should later divorce. The

The joint ownership of stock can make the difference in your case at divorce.

Code of Virginia provides that the court may direct payment of a percentage of the marital share of any personal injury or workers' compensation recovery of either party, whether such recovery is payable in a lump sum or over a period of time.[11] "Marital share" means that part of the total personal injury or workers' compensation recovery attributable to lost wages or medical expenses to the extent not covered by health insurance that accrued during the marriage and before the last separation of the parties, if at such time or thereafter at least one of the parties intended that the separation be permanent.[12] But a failure to have the settlement agreement or order clearly delineate what part is potentially marital and what part is clearly separate (pain and suffering) can make for expensive litigation and unintended consequences for your client.

The 2008 case of *Chretien v. Chretien*[13] demonstrates the impact of family law on personal injury cases. A month after their marriage, a husband and wife were involved in a motorcycle accident. The husband was the driver and the wife was the passenger. The wife settled her claim with the insurance companies involved for $149,928.57. She placed all of her recovery into accounts titled in her name alone. Upon divorce, the conflict dealt with the classification of the remaining funds. Were these funds separate or marital property? The statute governing equitable distribution requires a court to classify the marital share of any personal injury or workers' compensation award as marital property. The balance of the recovery would presumably be separate property. However, because of the overall presumption in favor of marital property, the wife bore the burden of proving that some or all of the personal injury recovery was separate property. In this case, the evidence of the nature of her recovery consisted of a letter from an insurance company stating that the recovery was for "injuries resulting from the motorcycle accident." A letter from another insurance company did not specify the basis of the recovery. None of the information the wife presented from the insurance companies identified whether any part of her recovery was for lost wages or uncompensated medical expenses. Consequently, the court of appeals determined that the circuit court erred in finding that the recovery was separate property.

How much easier would the case have presented if the demand letter clearly delineated the lost-wage claim and the breakdown on the medical specials? How much easier would the case have presented with clear evidence on which of the medical expenses was covered by medical insurance? The wife's personal injury counsel could have created a situation in which she easily

could have established the marital share, if any, and thereby exempt the balance of the recovery as her separate property. Fortunately, the wife in *Chretien* still dodged the bullet. The court found that, even if the recovery were presumptively marital property, the fact that her husband's negligence caused the injuries justified the award of the entire sum to her. So, the wife got to keep the award as part of the distribution, rather than as separate property upon classification.

Conclusion

Family law has developed over the past thirty years into a highly specialized area. With a high divorce rate in the United States, it is prudent for non-family-law practitioners to learn about and consider the potential family law consequences of their representations. When in doubt, consult a colleague who practices extensively in the area of family law. Your client may not believe that divorce can happen to him or her. Your client may not care about the potential family law consequences of your representation at the time. But you can be assured he or she will care if divorce becomes inevitable and you failed to protect his or her interest. Because, for the client and for you, family law matters. ■

Endnotes:

1 *Code of Virginia* Section 20-109 C.
2 *Code of Virginia* Section 20-107.3 A. 1.
3 *Code of Virginia* Section 20-107.3 A. 3 (f).
4 *Code of Virginia* Section 20-107.3 A 3 (h).
5 266 Va. 124, 581 S.E.2d 507 (2003).
6 *Code of Virginia* Section 58.1-810 (3).
7 *Theismann v. Theismann*, 23 Va. App. 557, 471 S.E.2d 809 (1996).
8 23 Va. App. at 566, 471 S.E.2d at 813.
9 *Code of Virginia* Section 20-107.3 C.
10 *Code of Virginia* Section 20-107.3 B and D.
11 *Code of Virginia* Section 20-107.3 H.
12 *Code of Virginia* Section 20-107.3 H.
13 53 Va. App. 200, 670 S.E.2d 45 (2008).

Rules to Show Cause: The Sometimes-Friend of the Family Practitioner

by David R. Clarke

Could there be any order that has more components, more moving parts, than a typical divorce order? Matters of continuing spousal and child support, logistics of custody and visitation, obligation of the parties to interact with civility, and the duty to divide assets that range from household furnishings to pensions are but a few of the provisions that may typically be found in a domestic relations order. Parties who are suffering through a separation and divorce may continue to harbor ill feelings and be less than compliant when it comes to following the directives of the court.

What then can the family law practitioner do for a client when the recalcitrant spouse or former spouse runs afoul of the dictates of an order and refuses to pay support, abide by the visitation schedule, market the former residence, follow any other rulings? The only remedy may be to seek a rule to show cause.[1]

Before initiating such an action or defending a client against a rule, the careful practitioner should first understand some not-so-apparent distinctions, subtleties, and concepts inherent in such contempt proceedings. These considerations include service of process, burdens of proof, limitations of relief, and defenses. But perhaps the most important concept to understand is whether the proceeding is civil or criminal in nature.[2]

Although the distinction between criminal and civil contempt is critical, it is not always apparent and marked by a bright line.

This threshold issue is critical. It will determine how the charges of contempt are prosecuted and defended, and what rights may attach to those who find themselves in the uncomfortable position of being the subject of contempt proceedings.

In 1911 in the case *Gompers v. Bucks Stove & Range Company*, the U. S. Supreme Court explained the distinction in this way:

> Contempts are neither wholly civil nor altogether criminal. And "it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both." But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor. It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.[3]

Although the distinction between criminal and civil contempt is critical, it is not always apparent and marked by a bright line. As seen in *International Union v. Bagwell,* a trial court may consider the proceeding to be civil and then be

reversed on appeal when the appellate court deems the proceedings criminal in nature. This reversal results in a dismissal of the findings of contempt.[4]

In *International Union*, unions had repeatedly violated the Virginia trial court's orders that regulated the conduct of a labor dispute. Following a contempt hearing at which the unions were denied a trial by jury, significant fines were imposed. These fines were characterized by the trial court as being civil in nature; that is, imposed for the purpose of coercion, not punishment.[5]

The Virginia Court of Appeals reversed the trial court and vacated the fines. But the Supreme Court of Virginia sustained the trial court's finding that the fines were imposed in a civil proceeding, not a criminal one, and accordingly the unions were not entitled to a jury as a criminal defendant would be.[6] This ruling was then appealed by the unions to the U.S. Supreme Court.

Justice Harry A. Blackmun, writing for the majority, stated:

> Although the procedural contours of the two forms of contempt are well established, the distinguishing characteristics of civil versus criminal contempt are somewhat less clear. In the leading early case addressing this issue in the context of imprisonment, *Gompers v. Bucks Stove & Range Co.,* the Court emphasized that whether a contempt is civil or criminal turns on the "character and purpose" of the sanction involved. Thus, a contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive to vindicate the authority of the court."[7]

The Court found the fines more closely analogous to criminal fines than to civil fines and reversed the Supreme Court of Virginia. The U.S. Supreme Court reasoned that because the underlying proceedings were criminal in nature, the unions were denied due process when not afforded a trial by jury.[8]

The following checklist, drawn from *Gompers* and other cases, assists the practitioner in distinguishing between criminal and civil contempt.

- In order to qualify as a civil proceeding, the contemnor must be afforded an opportunity to purge the contempt; "he carries the keys of his prison in his own pocket."[9]
- A contempt fine is considered civil and remedial if the fine is designed either to coerce a party into compliance or compensate the aggrieved party for losses sustained.
- Civil contempt proceedings are between the parties to the original cause, while criminal proceedings are between the public and the defendant.
- If civil, there must be a valid court order over which the court has continuing jurisdiction.[10]

Thus, distinguishing between criminal and civil contempt proceedings is essential. Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required. But if criminal, the party charged is entitled to a host of procedural protections by the Constitution. These include: a presumption of innocence;[11] proof of guilt beyond a reasonable doubt;[12] notice of the charges;[13] the right against self-incrimination;[14] right to counsel; and the right to a jury trial if the contemnor may be sentenced to a period of incarceration of more than six months.[14]

Additionally, there are limitations on the punishments that may be imposed in cases of summary convictions for criminal contempt. These limitations extend not only to potential periods of incarceration, but also to the amount and scope of the fine.

Pursuant to *Code of Virginia,* 1950 Annotated, § 18.2-457: "no court shall, without a jury, for any such contempt [under Code § 18.2-456(1)], impose a fine exceeding $250.00 or imprison more than ten days.…"[16]

In *Nusbaum v. Berlin*, after finding a practitioner guilty of criminal contempt, the court imposed not only a fine of $250, but also a monetary sanction consisting of a significant award of attorneys' fees and costs.[17] On appeal, the Supreme Court of Virginia affirmed the conviction and the imposition of the fine but reversed the judgment imposing the monetary sanction. The Court agreed with the appellant that the monetary sanction exceeded the maximum fine allowable under Code § 18.2-457 and was beyond the trial court's inherent power to discipline.[18]

With any case which an aggrieved party intends to appeal, the objections to the court's holdings must be noted with specificity in order to preserve grounds for appeal. For example, in *Scialdone v. Commonwealth*, the defendants claimed they were denied due process rights associated with plenary contempt. Although the

Court of Appeals initially agreed with the appellants, the decision of the trial court was nevertheless affirmed because the appellants failed to timely object during proceedings at trial.[19]

More often than not, however, the family practitioner will be litigating civil contempt charges. In these instances, it may prove helpful to understand procedural elements of rules to show cause: how they may (or should) be entered initially, the service requirements, the burdens of proof, and the remedies available. Each is discussed separately below.

Initiating the Rule

How the rule is initially presented to the court may depend on your local practice. Rule 1:12 of the Rules of the Supreme Court of Virginia provides in part that, after the initial process, all copies of all pleadings, motions, or papers shall be provided to each counsel of record on or before the day of filing.[20] It would appear, therefore, that not even the petition for issuance of a rule would be filed with the court without notice to opposing counsel. However that is not the case, at least in all jurisdictions.

It has become common practice in domestic relations cases in the Fairfax County Circuit Court (and perhaps other jurisdictions as well) to file for the issuance of a rule upon affidavit or ex parte evidence without notice. Rhetorical query: How does this practice not violate Rule 1:12? Is not a petition for issuance of a rule to show cause a pleading or "paper" encompassed in the seemingly catchall language of Rule 1:12? Should it not follow that notice to all counsel is required? No doubt defenders of the practice would cite the Fairfax County Circuit Court case of *Fairfax County v. Alward*.[21] However, *Alward* was an unusual case. It appears from the scant record that after a hearing on the merits the defendant had been found in contempt of the court's order. The defendant then asked the court to reconsider the finding. Evidently, one of the grounds cited by Mr. Alward was that the rule served on him had been issued ex parte. In summarily denying the motion for reconsideration, the court reasoned in its one-paragraph ruling that:

> [The issuance of the Rule to Show Cause] simply puts the matter at issue, as does the filing of a Motion for Judgment. Notice to the opposing party always is given thereafter by service of process and opportunity to be heard. The petition for a rule brings to the Court's attention that there may have been a violation of an Order of the Court but does not result in any finding by the Court until a further hearing. Such an initiation of process does not require advance notice, anymore than one must advise an opponent before filing a Motion for Judgment.[22]

But no matter what the rationale, it still remains a challenge to reconcile any ex parte filing with the clear mandates of Rule 1:12. As the Supreme Court of Virginia stated in *Lee v. Mulford*, whatever the local practice may be, it may not alter substantive rights of the parties provided by statute, rules of court, and Virginia case law.[23] Moreover, is initiating a rule to show cause on an ex parte basis really without prejudice to the respondent? Not only does the moving party gain leverage by having a rule in hand, but the putative contemnor has the burden of proof at the outset.

Service of Rule

Virginia Code Ann. § 8.01-314 provides in pertinent part:

> When an attorney…has entered a general appearance for any party, any process order or other legal papers to be used in the proceedings may be served on such attorney of record. … [P]rovided, however, that in any proceeding in which a *final* decree or order has been entered, service on an attorney as provided herein shall not be sufficient to constitute personal jurisdiction over a party in any proceeding citing that party for contempt, either civil or criminal, unless personal service is also made on the party.[24]

The requirements of service are clear enough for a rule to show cause issued after entry of a final order. Query: What if the contempt proceeding were initiated based upon an alleged violation of a *pendente lite* order, and not a final order? Arguably, in such a circumstance, merely sending the rule to counsel of record would suffice without need for personal service on the party.

Burden of Proof

The burden rests upon the moving party to show that the respondent failed in some regard to comply with a valid court order. Although there do not appear to be any Virginia appellate cases that definitively establish the requisite burden of proof, the U.S. Court of Appeals for the Fourth Circuit has held that the moving party must prove noncompliance by clear and convincing evidence, and that willfulness is not an element.[25]

Whatever the burden of proof may be, it is clear that once the disobedience — for example, failure to pay support — is proved, the burden then shifts to the obligor to provide justification for his noncompliance with the order of the court.[26]

In meeting that burden, respondents charged with civil contempt are guaranteed an opportunity to present evidence in their defense. In *Street v. Street,* the Court of Appeals ruled:

> [A] defendant charged with out-of-court contempt must be given the opportunity to present evidence in his defense, including the right to call witnesses. The due process clause of the Fourteenth Amendment requires that alleged contemnors "have a reasonable opportunity to meet [the charge of contempt] by way of defense of explanation." This due process right includes the right to testify, to examine the opposing party, and to call witnesses in defense of the alleged contempt.[27]

Defenses

That which is ordered by the court must be subject to being purged; otherwise no order should be entered for a finding of civil contempt.[28] Additionally, the inability to pay is a valid defense to a charge of contempt. As seen in *Street*, a husband who was without sufficient funds to meet his court-ordered support obligations was not held in contempt because his sad pecuniary state was not of his own doing.[29]

In *Laing v. Commonwealth*, the court set forth the grounds on which a respondent can and cannot successfully assert a defense of inability to pay.

> It is true the inability of an alleged contemnor, without fault on his part, is a good defense to a charge of contempt. But where an alleged contemnor has *voluntarily and contumaciously* brought on himself disability to obey an order, he cannot avail himself of a plea of inability as a defense to the charge of contempt.[30]

Just as self-inflicted poverty is no defense, neither can a respondent rely on the defense that his violation of the court order was unintentional. The absence of the specific intent to violate a court order does not relieve the respondent of the consequences of civil contempt.[31] As declared in *Leisge v. Leisge*, "[t]he sanctity and enforceability of a [finding of civil contempt] should not hinge upon the mental state of an unsuccessful litigant."[32] The court elaborated citing the United States Supreme Court in *McComb v. Jacksonville Paper Co.,* quoting:

> The absence of willfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of non-compliance. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. … An act does cease to be a violation of law and of a decree merely because it may have been done innocently. The force and vitality of judicial decrees derive from more robust sanctions.[33]

Definite Terms

There can be no ambiguity in the language of the order either prohibiting or commanding certain conduct. As noted in *Winn v. Winn:*

> As a general rule "before a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties thereby imposed upon him and the command must be expressed rather than implied." This is … the rule followed in Virginia. In *Taliaferro v. Horde's Adm'r.,* we said that "[t]he process for contempt lies for disobedience of what *is* decreed, not for what *may be* decreed."[34]

Stated differently, there must be an explicit command or prohibition which has been violated in order for a proceeding in contempt to lie.[35]

Scope of Relief

Aside from compelling compliance, the court in civil contempt proceedings may impose sanctions to compensate the aggrieved party for losses sustained because of a respondent's noncompliance with a court's order. "The punishment in a civil contempt proceeding 'is adapted to what is necessary to afford the injured party remedial relief for the injury or damage done by the violation of the injunction to his property or rights which were under protection of the injunction.'"[36] Depending upon the circumstances, the relief may include

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Client Self-Determination in the Collaborative Process

by Kimberly P. Fauss

What is the lawyer's responsibility to the client who has problems more complex than ethical standards address? Lawyers are trained to move beyond simple fixes to the deeper roots of a dispute. The ethics of legal practice prompts us to reflect on how our choices protect the client's interests as well as promote client self-determination. Lawyers develop an understanding of conflict and negotiation skills to meet our clients' needs and help them make informed choices.

In the collaborative process, clients enter into a participation agreement that is their contractual obligation.

There is no practice more focused on the tension of this balancing act than that of family law. Clients are often in distress when they come to us, and their goals may seem elusive. The lawyer is a pivotal advisor during the emotional drama by providing sound information and support. Clients now have more choices than ever when they seek counsel during separation and divorce.

Traditional litigation practice relies upon a formal and predictable structure to protect the client's legal interests. Collaborative practice provides a structure within which clients can take on more responsibility for their most intimate family interests, which may have broader implications than what the law allows.

A lawyer assists the client when he or she listens deeply for these competing questions: "What are my basic legal rights? How do I address the unique situation of my family?" In litigation, clients are bound by a rights-based approach of generic solutions that have been applied in the past within the limits of what a court can order. In collaborative practice, "the law" provides information a client can draw upon to craft a personalized solution, while working together with the spouse and professionals who advise on that family's particular situation. An article in the February 2007 issue of *Virginia Lawyer* described the collaborative process.[1] This article focuses on the collaborative client's responsibilities in an attempt to define how much self-determination lawyers can support under the Virginia Rules of Professional Conduct.[2]

Who is the Collaborative Client?

In the collaborative process, clients enter into a participation agreement that is their contractual obligation. Clients agree to be transparent and provide full information to each other on relevant issues. With the assistance of their separate professional advisors, clients formulate their short- and long-term goals for the family and for themselves. Clients, with the assistance of the professionals, determine which documents are needed, and clients are assigned responsibility for gathering them. Clients brainstorm with the other members of the team to create options to resolve each identified issue. Professionals help evaluate which solution is acceptable. Once the clients have the information they need and all their questions are answered, they agree on settlement terms. In order to do this work, the clients have engaged professionals to provide a limited scope of representation and agreed to modify traditional lawyer-client confidentiality and rules of discovery.[3] Often there is a pattern of continuing conflict between the clients. Consequently, a lawyer's concern is that the client can manage roles that may have been assumed by the lawyer and legal staff in traditional litigation

In the past fifty years, society has evolved from cohesive communities to mobile nuclear units of many varieties.[4] At the same time globalization has broadened perspectives on justice and one-size-fits-all laws.[5] In the United States, differing cultural value systems must be respected, yet unified under one legal system. The focus on individual rights has been fueled by the individual's access to information on every topic through widely available technology and the Internet.[6] Other professional disciplines, such as neuroscience, provide integrative and multifaceted lenses to look at events and facts that help

clients discern the broader implications of their decision making.[7] Professionals assist clients in screening the plethora of information for accuracy, completeness, and relevance. Good and full information gives a client the power to assume personal responsibility and avoid victimization caused by ignorance, limited information, and misinformation.

Clients come to family lawyers with preconceptions about divorce and with a need for guidance in making unfamiliar and emotional choices. Their views are shaped by movies, chat rooms, and memories of past family divorces. Clients are assessed by the professional at intake for their capacity to do the required work. Not every client is capable nor is every case resolvable by cooperative approaches such as mediation and collaboration. Foremost, clients must be able to make decisions and follow through with their commitments. Indications of domestic violence, serious power imbalances between the clients, special needs of the children, or addiction must be evaluated. Some cases may be manageable in collaboration with mental health coaching and supervision. Legal professionals must have the confidence and experience to negotiate complex cases. Indeed, this personal awareness by the lawyer of his own competency is the cornerstone of the Rules of Professional Conduct (Rules).[8]

Is the Legal System Adapting to Collaboration?

These historical changes are paralleled within our practice of social justice. The legal system inherited by the United States emphasized property allocation and distribution, when wives and children were property.[9] While U.S. laws have evolved, property distribution remains a primary function of courts. Until the advent of no-fault divorce statutes in the 1970s, divorce was a battle to determine fault, and it focused on adversarial representation to protect the wronged spouse through property redistribution. As the stigmas of divorce and illegitimacy gradually lifted and an individual's choice to end marriage without fault became normal, family law specialty practices developed. These practices create predictability and place appropriate responsibility for maintaining the children and family systems.[10]

Family law is a relatively new specialty. It has remained primarily a litigation practice. Application of statutory standards and case law provide the framework for dissolving a marriage. A provocative book, *The New Lawyer*, by Julie MacFarlane, describes the greater context of the social shift toward settlement and ethical implications for the litigation model.[11] As the backbone of legal representation, the Rules embrace the roles of lawyer as negotiator and litigator.

Professional ethical rules are intended to maintain a cohesive profession, as well as protect clients against fraudulent or substandard professional competency. The client protection function can be accomplished by providing information: clients can self-determine on any choice so long as they have sufficient information to understand the consequences. Informed consent to make decisions is measured by reasonableness under the circumstances.[12]

The Virginia Rules evolved over the last century from the Canons of Professional Ethics (1908) to the Code of Professional Responsibility (1969) to the last major overhaul in the late 1990s that resulted in the Rules of Professional Conduct (2002).[13] The Rules do not specifically address collaborative practice, since the design is general application, not details. Nonetheless, there are critical generalities that are relevant for family lawyers.

For example, Cannon 7 of the 1969 code compelled a lawyer "to represent a client zealously within the bounds of the law."[14] The current Rules focus instead on the standard of diligence that allows the lawyer to represent the client effectively with a collaborative, problem-solving approach.[15] Even with this significant change, some lawyers continue to apply the litigation ethics embedded in the earlier version.[16]

The lawyer serves as a professional advisor when assessing specific facts, values, and competencies brought by the client, so that the client's decision on how to accomplish their goals can be honored as well. MacFarlane's rule 2.1 on the advisor's role allows consideration of moral, social, and economic factors. Comment 2 addresses consideration of emotional and relational factors. MacFarlane defines this kind of advocacy as "advancing one's client's best and most important interests," in whichever process is chosen.[17] Flexibility, continuing skills development, and evaluative insight are now required.

Legal professionals must have the confidence and experience to negotiate complex cases.

How Can Family Lawyers Adapt to These Changes?

In providing information to clients to help them choose the process for resolving their cases, the family lawyer must understand the skills he will need to succeed. The Virginia Rules require lawyers to present the various dispute resolution options available to clients.[18] This is most challenging for lawyers who have not been trained to perform within the process favored by the client. Sometimes the distinctions in processes are not fully understood by the lawyer. Collaboration within the collaborative process is not equivalent to a collaborative attitude within a traditional litigated case characterized by a rights-based approach to settlement.[19] The contrast is sharp between the lawyer's roles:

> The adversarial lawyer supports the client's negative beliefs about others and accepts the client's view of the facts and the client's self-concept as victim; the collaborative lawyer urges respect for all participants, understands that clients "color the facts," and questions assumptions that relieve clients of personal responsibility.[20]

Family lawyers must grasp these distinctions. Just as litigation has its rules of evidence and court procedures, collaboration and mediation have a tool box specially designed for settlement and client self-determination.

The interest-based negotiation techniques of collaborative practice actually may be more akin to traditional corporate and transactional practice, rather than litigation. Winning is discarded in a zero-sum game along with the underlying assumption of scarcity of resources. Interest-based negotiators seek to create value and expand available resources so that clients can meet actual and anticipated needs. As in negotiating a corporate deal, collaboration begins with identifying the client's specific goals and interests. This requires the lawyer to listen beyond the actual words, and question with curiosity rather than judgment; to balance empathy and assertiveness in interactions with both clients; and to cultivate an awareness of the many barriers to resolution, including values, fears, and responsibilities carried by clients and lawyers. Collaboration grounded in interest-based negotiation techniques actually expands the client's range of options and potential.[21]

These negotiation skills are taught in trainings and experiential workshops rather than in didactic continuing education presentations. Family lawyers who are competent in all dispute resolution processes have many skills. Comment [6] to Rule 1.1 obligates lawyers to continue their study and education to maintain competency.

The collaborative family lawyer must be able to step back from a perceived win or outcome to support the client in assessing what is acceptable for the family system, if that is the client's goal. MacFarlane summarizes the skills needed by family lawyers to meet changing client needs:

> The new lawyer takes on all the traditional professional responsibilities of counsel as well as some additional ones. These include the responsibility to educate the client on a range of alternate process options, to establish a constructive relationship with the other side that does not undermine her loyalty to her client, to commit to the good faith use of appropriate conflict resolution processes and to model good faith bargaining attitudes, to anticipate pressures to settle, and to advocate strongly for a consensus solution that meets, above all, the needs of her client.[22]

As advocates in any process, we lawyers begin by evaluating ourselves and whether we can provide not only competent representation, but also the values-based services a client may be seeking.

Are Protections for Clients Integrated into Collaborative Practice?

Specialized bar organizations guide family lawyers beyond the general considerations of the Rules of Professional Conduct.[23] The American Academy of Matrimonial Lawyers conflates the role of advocacy with the role of counseling: "public and professional opinion has been moving away from a model of zealous advocacy in which the lawyer's only job is to win and toward a counseling and problem-solving model referred to as 'constructive advocacy.'"[24] In collaborative practice, the preeminent specialty organization is the International Academy of Collaborative Professionals (IACP) with a worldwide membership today of more than three thousand members. The IACP has promulgated ethical standards, minimum practice standards, and standards for collaborative trainers and trainings.[25] The focus remains on competency in the professional's continuing education and training, as well as the professional's experience with diverse clients and with complexity in physical, psychological, and emotional factors:

It is important for the practitioner to be able to recognize these factors, as they will necessarily influence the collaborative process and the client's decision making. It is even more important for the practitioner to recognize the limits of his or her ability to effectively deal with these factors and with the client's response to them.[26]

These standards of collaborative practice direct the lawyer to evaluate the client's capacity and unique situation, as well as the lawyer's own capacity to achieve the client's goals.

Collaborative professionals from legal, mental health, and financial backgrounds throughout the commonwealth have established the Virginia Collaborative Professionals (VaCP), a statewide organization committed to the mission and standards of the IACP. The VaCP endorses the IACP practice standards and mandates a significant number of hours in interest-based negotiation training so that members will develop interest-based negotiation competency for use in collaborative practice.

The challenges at this point, however, are: Who will screen professional qualifications and enforce the ethical standards of collaborative practice? How do we as professional providers of services describe that service with one voice to avoid client confusion and substandard practices? How does our self-regulating bar evaluate diligence and competency of the practitioners who facilitate client self-determination in dispute resolution? How do lawyers work as a team with other collaborative professionals who are not bound by our ethical framework to support our clients? These are not new questions for specialized practices that have emerged to meet changing client needs. At the personal level, lawyers must strive to maintain their own ability to bring the highest professional services to clients who entrust their families' well-being with us.

The National Commission of Uniform State Laws has drafted the Uniform Collaborative Law Act, the model form of which is anticipated in July 2009.[27] The act undertakes the formalization of collaborative practice, just as the Uniform Mediation Act did in the late 1990s for mediation.[28] As our self-regulating bar develops reasonable safeguards with consistent practice standards for collaborative practice, our clients will be better informed and supported in making appropriate choices for their personal circumstances. Collaboration provides a bridge from client protection to the lawyer's effective assistance to the client who strives to self-determine. ■

Endnotes:

1 Fauss, K. P., Smith, C. W., & Chiasano, P. V. (February 2007). Collaborative Practice: Solving Family Disputes Outside of Court. *Virginia Lawyer*, *55*(7), 36-40. (http://www.vsb.org/docs/valawyermagazine/vl0207_collaborativ%2316FD3A2.pdf) The central defining feature of collaboration is the contractual disqualification of the lawyers from litigation between the clients. This requirement distinguishes collaborative practice from mediation and other types of settlement negotiations.

2 Virginia Rules of Professional Conduct (2006). Extensive changes to the prior format in the "Model Code of Professional Responsibility" were made in the American Bar Association Model Rules of Professional Conduct in 2002 and have been widely adopted by state bars.

3 These modifications to litigation procedures cause concern for some lawyers, even with the informed consent provided to clients. *See* Letter of ABA Litigation Section commenting on the Uniform Collaborative Law Act dated 4/15/09.

4 Ehrenhalt, A. (1996). *The Lost City: The Forgotten Virtues of Community in America*. Chicago: Basic Books.

5 Daicoff, S. (2005). *Law as a Healing Profession: The Comprehensive Law Movement,* Retrieved May 12, 2009, http://law.bepress.com/expresso/eps/1331

6 The quality of this information and amateur interpretations are often obstacles for professional assistance.

7 Fauss, K.P. (2008). Collaborative Professionals as Healers of Conflict: The Conscious Use of Neuroscience in Collaboration. *Collaborative Review*, *10*(2), 1-9.

8 *See* Comment [6] of Rule 1.1.

9 Breton, D. (2001). *The Mystic Heart of Justice: Restoring Wholeness in a Broken World*. West Chester, PA: Swedenborg Foundation Publishers.

10 Coontz, S. (2005). *Marriage: A History*. New York: Viking.

11 MacFarlane, J. (2008). *The New Lawyer: How Settlement Is Transforming the Practice of Law*. Van Couver: UBC Press.

12 Schneyer, T. (2008). The Organized Bar and the Collaborative Law Movement: A Study in Professional Change, Arizona Law Review. *Arizona Law Review*, *50*(1), 289-336, at 305-310.

13 *Ibid* at 307 FN 86.

14 *Ibid* at 316.

15 *See* Comment [2] of Rule 1.3.

16 Schneyer *supra* at 316 FN 130.

17 MacFarlane *supra* at 206.

18 See Comment [1] to Rule 1.2, requiring lawyers to inform clients of options. This obligation has not been uniformly adopted by other states.

19 Tesler, P. H. (2008). Collaborative Family Law, the New Lawyer, and Deep Resolution of Divorce-Related Conflicts. *Journal of Dispute Resolution*, *2008*(11), 83-130, at 99-104.

20 Schneyers *supra* 302.

21 Tesler *supra* 116 FN 57.

22 MacFarlane *supra* at 221.

23 Schneyers *supra* 308 FN 92.

24 Am. Acad. of Matrimonial Law., Bounds of Advocacy (2000) *at* http://www.aaml.org/go/library/publications/bounds-of-advocacy/, cited by Schneyers *supra* at 316 FN 134.

25 *See* www.collaborativepractice.com.

26 IACP Ethic Commentary to Standard 2: Competence. http://www.collaborativepractice.com/lib/Ethics/Ethical%20Standards%20Jan%20%2008.pdf.

27 Uniform Collaborative Law Act, *available at* http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=279.

28 The National Conference of Commissioners on Uniform State Laws adopted the UMA in 2001. It was endorsed by the ABA in 2002.

Ten Family Law Dos and Don'ts

by Laura A. Thornton

Like most attorneys who specialize in an area of practice, I am frequently asked to answer the same questions and to advise on the same issues. Clients appreciate written reference materials so I give a list of Dos and Don'ts to my family law clients. I hope that your clients will benefit from this handout as well.

While it is supportive to provide diapers, milk, and clothing for your child, support in the court's eyes is money.

(1) DO keep a journal or calendar of daily events that involve your children and your soon-to-be ex-spouse. In most divorce and custody cases, there is a delay of a year or more before a trial, when you may be required to testify about the facts and circumstances surrounding your separation and your involvement with the children — before and after the separation. Keeping a journal will help you to recall specific dates, times, and incidents relevant to your case. If you refer to your journal when you are asked to testify, your testimony will be much more credible.

(2) DON'T sign anything until your lawyer has reviewed it with you. Writings signed by both you and your spouse will be binding as to property issues. It doesn't matter what kind of paper the writing is on, whether it is typed or handwritten, whether the document is notarized, and whether or not there were witnesses to your signature. If you and your spouse sign a document regarding your property or debts, either of you can ask the divorce court to make the document the court's order. In rare circumstances, you may set aside a written agreement, but in general you are legally bound by the terms of a signed written agreement. Even if you and your spouse go to mediation or other alternative dispute resolution, do not sign an agreement until you have reviewed it with your lawyer. Mediators are very understanding and will usually, at the conclusion of a mediation session, tell you that they will type up your agreement and give you an opportunity to review it with your lawyer before you sign it.

(3) DO pay child support as soon as you separate. Whether you have a court order or not, as soon as you separate from your child's other parent, if the child is not living with you, start providing your ex-partner with financial support. There are several reasons you should start paying support right away. First, it's the right thing to do. Second, it may take months before a court will be able to enter an original order of support. When the court does enter the order, your obligation will be retroactive to the date your ex files his or her support petition. So you should pay something right away. Your attorney can estimate your obligation. If you underpay, your arrearage will not be as much as it would have been had you not paid at all. If you overpay, the court may credit you for your overpayment. The third reason for paying support right away is that you demonstrate to the court that you recognize your obligation to care for and support your child, and the court likely will consider your support efforts when determining an appropriate custody and visitation schedule for your case.

Support equals money. While it is supportive to provide diapers, milk, and clothing for your child, support in the court's eyes is money. Pay in cash only if you get a receipt. Otherwise, pay by check or money order so you have proof of payment. The recipient of the support does not have to account for or give you receipts for how he or she spends the support money.

(4) DON'T commit adultery if you want spousal support. This paragraph is not meant to say that adultery is acceptable in any circumstance. However, adultery can have a more significant legal impact in spousal support cases than in cases where spousal support is not an issue.

Adultery is adultery whether it happens before you separate or after you separate. If you have sexual intercourse with someone other than your spouse at any time while you are still married, you are committing adultery. If the court

finds that you have committed adultery, whether before or after your separation, the court can bar you from receiving spousal support, depending on the circumstances. So if you have been a faithful spouse for thirty-five years, while your spouse has been unfaithful for years, and post-separation you have sex once with another person, your ex can ask the court to bar you from receiving spousal support. Your ex may also be barred from seeking spousal support because of his or her adultery. But if you are the likely recipient of the support and he or she is the likely payor (i.e., the ex makes more money than you do), then it matters more to you than to your ex whether you are barred from receiving spousal support.

(5) DO understand that no contact means no contact at all, by any means.
If you are subject to a protective order, you are not allowed to contact the subject of that order by any means, directly or indirectly. You can't talk to the subject of the order in person. You can't call or text him or her. You can't send him or her a card, a note, or flowers. You can't have your brother, mother, sister, or friend, call and talk to him or her for you. This rule is particularly important because violation of a protective order requires a mandatory jail sentence of at least a day.

If the subject of the protective order contacts you, that doesn't mean it is OK to talk to him or her. If the subject of the order calls you and you know it is him or her calling, don't answer. If you pick up the telephone without knowing it is him or her, hang up as soon as you hear the person's voice, without saying anything. You are the person who will be punished for the contact, even if it is the other side that initiated the contact. If you are being contacted by the person who initiated the protective order, talk to your lawyer about it, and your lawyer may be able to obtain the dismissal of the no-contact.

(6) DON'T verbally modify your agreement or order without legally modifying your agreement or order. If you make an agreement with your ex and you put those terms into a written separation or property settlement agreement or make the terms into a court order, the written agreement or court order is controlling. You cannot change the terms of that agreement or order orally. For example, if you have agreed in writing or are court ordered to pay $100 per week in child support and your ex says, "Don't worry about it, you can just pay me $50 per week," you cannot rely upon that statement. If you do so, your ex can take you to court at any time and have a judge order you to pay the difference between the $100 you were ordered to pay and the $50 you paid. Even worse, your ex can ask a judge to hold you in contempt of court and put you in jail for not obeying the court order. A judge may be sympathetic, but must enforce a prior order.

Another common example of this issue is when you and the ex agree to modify your custody or visitation arrangement, but don't get the written agreement or order changed. This invariably leads to problems. For example, your ex's work schedule changes, so now your ex would like you to be with the children for three weekends per month instead of every other weekend. You agree to the ex's request for more than a year. Suddenly, your ex goes back to the old work schedule and tells you that now he or she is cutting you back to the prior every-other-weekend schedule with the kids. If you try to keep the children for the third weekend, over his or her objection, you will be violating the court order and subject to contempt proceedings. So always modify your agreements or order in writing as required by your agreement and with the court.

(7) DO file for modification of your support order as soon as you would like a change. You can ask the court to modify your child support obligation any time there has been a material change in circumstances since the last order was entered. If your income is decreased through no fault of your own, you should immediately file to reduce your obligation. Unlike an original support order, modifications to your support obligation are not necessarily retroactive to the date you file. In modification cases, the judge can't modify your support order any earlier than when your ex is served with your motion to modify your obligation. For example, if you lose your job May 1, you file to reduce your support obligation on August 1, your ex is served with your motion on August 14, and you don't get into court until late October, a judge only has the option of reducing your obligation retroactive to August 14, because that is when your ex was notified of your request to reduce your obligation. A judge cannot go back to May 1 because your ex wasn't served with notice of your request until August 14.

The decision of whether the modification should be retroactive at all is up to a judge. It is not guaranteed that the change will be retroactive. Also, until a judge modifies your support order, everyone must obey the prior order.

(8) DON'T have your girlfriend or boyfriend sleep over when your child is with you. If you are married, you shouldn't have a boyfriend or girlfriend at all — let alone have someone spend the night. There are many legal ramifications to dating while you are married, even if you are separated. Please consult your attorney before dating if you are not yet divorced. However, if you were never married and have a child, or if you are divorced and want to have a boyfriend or girlfriend spend the night with you, do so when your child is with your ex. Virginia case law provides that having a boyfriend or girlfriend spend the night in the presence of your child is exposing your child to an immoral environment. Doing so can be held against you in your custody and visitation case.

(9) DO save your documents. When you divorce, you will likely be dividing your assets and your debts a year after you separate from your spouse. Your attorney and the court will need to know what assets and debts were in existence on the date you separated from your spouse and what has happened to the assets and debts since you separated. By saving your documents, you can save yourself the expense of paying your lawyer to subpoena the documents later. You likely will need your bank statements, pension or retirement plan statements, credit card statements, tax assessments, deeds, deeds of trust, mortgage loan histories, car payment histories, titles to your vehicles, investment account statements, life insurance policy statements, and any other documentation relating to assets or debts in your name, your spouse's name, or your joint names as of the date of separation and as close to the date of your trial as possible.

Your lawyer and the court will also need to know what happened to the assets and the debts after your separation. For example, if you had $10,000 on the equity line secured by your home at separation, but there is $15,000 on the equity line at the trial date, you or your spouse will need to account for the other $5,000. Or, if you have a VISA account at separation and pay it off after the separation, you want to be able to get credit from the court for your reduction of that debt. So you should have your monthly VISA statements from separation until trial. Your lawyer will tell you specifically what documents you should provide.

(10) DON'T bad-mouth your ex to your child or allow anyone else to do so. If you criticize your ex to your child, you are telling the child that something is wrong with the child. Your child knows that he or she is one-half of both of you. So if you tell your child that something is wrong with your ex or that your ex is a bad person, your child may think that something is wrong with him or her. The long-term effects of this diminishment of your child's self-esteem are devastating. This rule applies to other persons in your child's life. It is no less damaging to your child if grandma or Uncle Bob says what a jerk your ex is than if you make the statement. No matter who says it, our child will feel criticized.

So if you tell your child that something is wrong with your ex or that your ex is a bad person, your child may think that something is wrong with him or her. The long-term effects of this diminishment of your child's self-esteem are devastating.

Disclaimer

The Dos and Don'ts set forth above are general principles for application in Virginia family cases and are not meant to be specific legal advice for all cases. You should always consult with a qualified family law attorney about the application of Virginia law to the facts and circumstances of your specific case. ■

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the appointment of a fiduciary or conservator to facilitate discovery or preserve the marital estate,[37] and certainly there is the issue of attorneys' fees and related costs.

In nearly every show cause hearing, as the night follows the day, a litigant will inevitably ask for attorney's fees in having to either prosecute the rule or successfully defend against the rule. Very often the basis for such an award may be found in a provision of the incorporated property settlement agreement. Absent a ratified agreement, however, there is still ample authority for such an award.

> [C]ourts have the power to award counsel fees incurred in divorce cases where contempt proceedings have to be initiated and conducted to enforce an order of the court. This is particularly true where the custody of a child, or child support, is involved because of the court's continuing concern for the welfare of the children, and because a parent's common law duty to support his or her children is not affected by the entry of a final decree in a divorce case terminating the parent's marital relationship.
>
> An aggrieved party to a divorce has the right to petition for relief, and the court has the authority to hold the offending party in contempt for acting in bad faith or for willful disobedience of its order. Consistent with our prior decisions, we hold that in such cases a court has the discretionary power to award counsel fees incurred by an aggrieved party incident to contempt proceedings instituted and conducted to obtain enforcement of an order of the court.[38]

Note, too, that a finding of contempt is not a prerequisite to an award of attorneys' fees. In the case of *Sullivan v. Sullivan,* the former wife filed a motion for a rule to show cause claiming that her former husband had breached their property settlement agreement for failure to maintain a life insurance policy. Following a hearing on the merits, the trial court agreed with the wife that the husband was in breach and awarded her attorneys' fees, but did not specifically find the husband in contempt of court.[39]

Conclusion

Contempt proceedings can be a powerful weapon. A contempt finding may result in a crippling pecuniary sanction, a fine, incarceration, or all of the above. While litigants should be mindful of the potential consequences of noncompliance with valid and explicit court orders, so too should counsel give serious consideration to the advisability of initiating contempt proceedings. Just because a rule can be issued does not necessarily mean that it should be issued. First, there may be less Draconian measures available to the aggrieved party. Second, a thoughtful practitioner ought to weigh the impact contempt proceedings may have on potentially volatile situations, such as when divorced parents continue to co-parent. But, the proceeding information offers instruction should the decision be made to ask a judge to hold a person in contempt. ■

Author's Note: David R. Clarke recognizes and wishes to express his appreciation for the assistance and contributions of Daniel E. Ortiz and Patricia C. Amberly in the preparation of this article.

Endnotes:

1 For statutory authority to enforce orders relating to custody and visitation, as well as other relief under Code § 20-103, see Va. Code Ann. § 20-124.2(E).
2 While this article presents some details about criminal contempt, its focus is upon civil contempt. Details about criminal contempt are included in part to distinguish criminal contempt from civil contempt. When matters of criminal contempt arise, the practitioner should be aware, among other things, of distinctions between "in court" versus "out of court" contempt, "petty contempt" and charges of contempt that warrant plenary proceedings.
3 *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 441-42 (1911) (citation omitted).
4 *International Union v. Bagwell,* 512 U.S. 821, 839 (1994).
5 *Id.* at 823-25.
6 *Id.* at 825-26.
7 *Id.* at 827-28.
8 *Id.* at 835-39.
9 *See In re Nevitt,* 117 F. 448, 461 (8th Cir. 1902).
10 *See Hackler v. Hackler*, 44 Va. App. 51, 602 S.E.2d 426 (2004) (A husband who had repeatedly violated the terms of a *pendente lite* order died before divorce. At his death, the action was abated and the court lost jurisdiction, leaving the wife without redress.)
11 A person charged with criminal contempt is entitled to the benefit of the presumption of innocence, and the burden is on the prosecution to prove the guilt of the accused. *Bryant v. Commonwealth*, 198 Va. 148, 152, 93 S.E.2d 130, 133 (1956); *Calamos v. Commonwealth*, 184 Va. 397, 404-05, 35 S.E.2d 397, 400 (1945).
12 "Mere preponderance of evidence is not sufficient to convict, but the offense charged must be proved beyond a reasonable doubt." *Nicholas v. Commonwealth*, 186 Va. 315, 321-22, 42 S.E.2d 306, 310 (1947) (citation omitted).
13 "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." *Cooke v. United States*, 267 U.S. 517, 537 (1925).
14 "In proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." *Gompers*, 221 U.S. at 444.
15 The right to assistance of counsel and to a jury attach in nonsummary contempt proceedings under the same circumstances as for any other crime. *See Bagwell*, 512 U.S. at 826 (holding that "[f]or 'serious' criminal contempts involving imprisonment of more than six months, . . . the right to jury trial" applies); *Argersinger v.*

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by William T. Wilson, Chair

Solo & Small-Firm Practitioners Forum Continues to Appeal

I BRING YOU GREETINGS from the executive committee of the Conference of Local Bar Associations (CLBA). We have had a great year. By the time you read this, we will have concluded two successful Solo and Small-Firm Practitioner Forums. They took place in May at Shenandoah University in Winchester and in July at the Southwest Virginia Higher Education Center in Abingdon. Speakers for the events included Virginia State Bar Ethics Counsel James M. McCauley. Joseph A. Condo of McLean, a former VSB president, talked about how to deal with stress in the practice of law. Monica T. Monday of Roanoke provided helpful advice on how to protect the record for appeal, and Sharon D. Nelson and John W. Simek of Fairfax provided valuable information about technology for small law firms. A lawyer stopped me in Winchester to tell me the forum was the best continuing legal education program he had ever attended.

The Bar Leaders Institute was held on April 15, 2009, at the Virginia Historical Society in Richmond. Approximately eight-five persons attended. Dr. Terry L. Price of the Jepson School of Leadership Studies at the University of Richmond evaluated the reasons leaders give to justify rule-breaking behavior — a topic addressed in his book, *Leadership Ethics: An Introduction*. Bob Harris, an expert in nonprofit associations, taught a three-hour workshop that covered topics such a bar association's structure, governing documents, setting goals, and planning. Thomas E. Spahn spoke about Virginia's new Principles of Professionalism. A panel led by Edward L. Weiner gave practical advice from experienced bar leaders — David P. Bobzien, Sandra M. Rohrstaff, and William L. Schmidt. The day concluded with an ethics CLE program on Lawyers Helping Lawyers by James E. Leffler and Susan S. Grover.

I am pleased to report that the annual meeting of the VSB at Virginia Beach was highly successful. The CLBA held its annual breakfast on June19, 2009, and the executive committee wore Hawaiian shirts and leis. The Bar Leader of the Year Award went to Rupen R. Shah, a past president of the Augusta County Bar Association who has done many good works for his fellow lawyers and his community. (See page 60.) In addition, fourteen awards were presented to bar associations that carried out exceptional programs in the past year. The breakfast was well attended and we gave a big round of applause to Paulette J. Davidson and other VSB staff for their organizational skills.

Speaking of good programs, one of the flagship projects sponsored by the CLBA is a panel discussion by lawyers and others to explain the *So You're 18* handbook to high school juniors and seniors. The CLBA has a blueprint of the program for your use, and the handbooks can be sent to your bar associations. For details, contact Paulette Davidson at (804) 775-0521 or davidson@vsb.org.

As you may know by now, the diversity initiative passed by a large vote at the VSB Council meeting at Virginia Beach. We now have endorsed an additional conference, called the Diversity Conference, which is designed to promote diversity in the legal profession and in the judiciary. The council also voted to give the chair of the conference a seat on the council but not on the VSB Executive Committee. A proposal to add a diversity component to the VSB mission statement was taken off the table by the Diversity Task Force that developed the proposals. There is no definition of "diversity" in the proposal, but those who sponsored the initiative seemed to think that everyone knows what it means. The funding for the Diversity Conference is supposed to come from private sources. There will be no bar dues money involved. I voted against the proposal, not because I think diversity is a bad thing, but because the word "diversity" was not defined and because it is a major step, in my judgment, away from the normal mission of the VSB. Having said that, however, I plan to join the Diversity Conference in the spirit of, hopefully, creating more diversity in the legal profession and the judiciary without establishing a quota system. We were told by the sponsors of the proposal that the Diversity Conference is not designed to create a quota system, but, unfortunately, we have no guidelines to help us define diversity, so it will be a challenge for us to determine exactly what it is that we are trying to do. Almost everyone agreed that diversity within the profession was a good thing, but the vagueness in the proposal caused a great deal of debate and concern. Hopefully, that concern is not well taken and the Diversity Conference will be successful. The proposal will be sent to the Supreme Court of Virginia for

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by Jennifer L. McClellan, President

Unlocking Our Potential

I CAN HARDLY BELIEVE that another bar year has come to a close, ending not only my term as president of the Young Lawyers Conference, but also my time as a young lawyer.

When I began as president at last year's annual meeting, I adopted the theme "Unlocking Our Potential" to achieve excellence, as attorneys and as a conference. As we closed the year celebrating the conference's thirty-fifth anniversary, then Virginia State Bar President-elect Jon D. Huddleston made us realize we had already achieved excellence.

Last July, we had another successful Oliver Hill/Samuel Tucker Prelaw Institute at the University of Richmond. The institute has now served more than one hundred minority high school students through a summer camp that introduces them to a legal career. The success of this program is evident in the record number — eighty-three students — who applied for twenty-four openings in the 2009 institute. The institute reached a milestone with a field trip to the White House to visit Virginia native Melody C. Barnes, the president's domestic policy adviser and director of his Domestic Policy Council.

Answering VSB President Manuel A. Capsalis's challenge to increase diversity in the profession, the YLC expanded our award-winning Minority Prelaw Conference by adding a program in eastern Virginia at the College of William and Mary to our successful southwest Virginia program at Washington and Lee University, and northern Virginia program at George Mason University. All three programs were a success, with record attendance in southwest and northern Virginia.

We continued the tradition of successful Women and Minorities in the Profession bench bar dinners. This year's celebration honored the thirteen newly elected women and minority judges in the commonwealth. Justice S. Bernard Goodwyn of the Supreme Court of Virginia served as our keynote speaker.

Our Women and Minorities in the Profession Commission is exploring why women leave the practice of law, and will report its findings in a future article in *Virginia Lawyer* magazine or *Docket Call* newsletter.

And we implemented an American Bar Association program for high school students, titled "Choose Law: A Profession for All." This program encourages individuals of color to become attorneys by teaching the importance of the legal profession and how the law affects all aspects of their lives.

We also focused on unlocking the potential of YLC members to be excellent attorneys, beginning with the re-introduction of the improved Professional Development Conference in September. By moving the conference to Richmond in the fall, we were able to draw an exciting array of speakers to live up to the conference's theme, "Learning from the Masters."

We implemented a project launched by the ABA designed to aid young lawyers in determining whether they have chosen the right career path, and if necessary, provide resources to aid in successful career transitions. This program focused on helping young lawyers determine whether and how they should start solo practices. We provided on our website a resource guide developed by the ABA Young Lawyers Division, and hosted a seminar at the VSB Annual Meeting with a panel of solo practitioners who shared their experiences and practical tips.

More than a thousand people were admitted to practice law in Virginia at our largest ever fall Admission and Orientation Ceremony at the Richmond Convention Center. The next day, we continued the tradition of cosponsoring the First Day in Practice continuing legal education seminar with the VSB General Practice Section. This spring, another two hundred lawyers were admitted in the Admission and Orientation Ceremony.

We continued building on our existing programs to provide service to the public in a wide variety of areas. Our Immigrant Outreach Committee conducted its award-winning CLE programs on the Immigration Consequences of Criminal Convictions. The programs in Loudoun and Fairfax counties generated revenue for the YLC for the first time. As a testament to the program's success, the ABA appears to have copied the program. including panel speakers for its own CLE.

The Wills for Heroes program, which has now written more than a thousand wills for first responders across the commonwealth, expanded to Portsmouth and Hanover and Henrico counties. We are assisting Mississippi young lawyers to implement a similar program in their state.

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Senior Lawyers Conference

by Homer C. Eliades, Chair

So Long …

IN MY PENULTIMATE ARTICLE as chair of the Senior Lawyers Conference ("A Lawyer Looks Back," *Virginia Lawyer*, April 2009. http://www.vsb.org/docs/valawyermagazine/vl0409_slc.pdf), I took a trip down memory lane. I was surprised, but very happy, to receive so many responses to these stories. It is amazing to me just how many fellow attorneys can still remember the days of a one-volume *Code of Virginia* and a two-person Virginia State Bar office (Tubby Booker and his secretary). I would like to encourage fellow senior lawyers to share their stories, not only with family and friends, but also with their comrades at the bar. Write them, videotape them, audiotape them, record them on a disc. Perhaps in the next several months we can create some form of an official repository for these memoirs. This might be an interesting project for the Senior Lawyers Conference to take on. Stay tuned!

It is an understatement to say that my year as chair of the Senior Lawyers Conference has been rewarding. I have so enjoyed reuniting with old friends and making new ones. The Virginia State Bar truly has more than its fair share of first-rate attorneys. As I have stated in earlier articles, the Senior Lawyers Conference (the state bar's largest section) has much to offer. I was struck by all of the knowledge and experience that the members have. I was also struck by the not-so-senior attorneys' acceptance of our input and efforts. I truly never got the feeling of being old and in the way!

I want to express my heartfelt gratitude to Patricia A. Sliger, the VSB liaison to the Senior Lawyers Conference, for all of her assistance. Without her energy and know-how, this conference could not have enjoyed its many successes over the last year.

It has been a wonderful fifty-three years of law practice for this eighty-year-old man. I recognize that for every hour that I spend musing about the good ol' days, I should spend another hour coming up with ideas for how we can improve services both to and from our profession in the years to come. If my keen interest in this profession ever wanes, I should probably close out my files, toss the office keys to my son, and head for the golf course. I hope that day will never come.

It is an understatement to say that my year as chair of the Senior Lawyers Conference has been rewarding.

The Virginia State Bar Senior Lawyers Conference honored those who have been members in good standing for fifty years at a Saturday breakfast at the 71st Annual Meeting in Virginia Beach.

Surviving Tough Times

by Janean Johnston, Practice Management Risk Manager

Whether you are in a small firm, a solo practitioner, or in the newly minted category "suddenly solo" (a euphemism for being laid off at a big firm and going out on your own), times can be very tough out there. What can a good, ethical lawyer do to survive the downturn not only in the economy, but in the amount of business coming through the door?

Believe it or not, there are opportunities during these difficult (interesting!) times to become an even better lawyer and build a better practice. When your client load has lessened you will have more time. Spending it wisely can determine how well you ride out these turbulent times.

Try learning something new with your free time. Learn how to use the new computer program you purchased that is still in its original packaging. It could help you become more efficient in the future, when business rebounds. If you haven't had the benefit of case management software, research the choices and decide which would work best for you and your practice.

If you had the misfortune of focusing on one specific practice area, such as real estate, before the bust, now would be a good time to consider building expertise in a practice area that would be complementary and would help protect you during future recessions. By attending the appropriate continuing legal education courses or using your free time to volunteer as an assistant to a practitioner experienced in a chosen area, you can soon become competent in a new practice area. Adding expertise in loan modifications and bankruptcy procedures would serve to protect a real estate attorney during both booms and busts. Whatever your practice areas, analyze and develop complementary skills to recession-proof your practice.

Improve your communication skills. If you have been slow to respond to client telephone calls or e-mails, demonstrate your diligence and commitment to your current clients by promptly responding to any inquiries. Improve your promptness in meeting deadlines and completing work. Timeliness will pay great dividends with your attorney-client relationships, and might inspire increased referrals from happy clients. If you represent business clients, perhaps this would be a good time to learn more about their businesses and even visit their offices — without billing them for this time, of course. Consider starting a blog to demonstrate your expertise, or tweet your current clients about your most recent activities, such as teaching a course at the local community center. By writing articles for a legal publication, you communicate your abilities to other practitioners. Did you know that there are websites through which reporters can ask for comments about legal issues? One of these sites is Help A Reporter Out at www.helpareporter.com. Its founder, Peter Shander, encourages, "Get sourced, get quoted, get famous!" Offering yourself as a resource for comments on your areas of practice might help you bring in new clients.

Getting paid promptly is critical when times are tough and you need every penny. Make sure your fee agreements are concise and easy to understand, and comply with the requirements listed in Legal Ethics Opinion 1606. Read through the agreement with your clients at the outset to ensure that there are no misunderstandings. If a potential client cannot meet the initial advance payment, that is the time to decline the representation or represent the client on a pro bono basis. Send invoices no less frequently than monthly so that your clients are not surprised. If cash flow is an issue, consider dividing your client list and billing clients on a twice-a-month rotation. Call slow-paying clients personally — do not delegate this duty to a staff member — and ask if there is a problem. Usually you will learn that they are also experiencing money problems. You might propose a payment plan, stop working on their matter until you are paid, or end your relationship at that point. (Please do not sue; it usually ends up costing you more money.) Sometimes you will learn that they have an issue with your representation. If the complaint is valid, can you fix it? Or is the complaint due to an unreasonable expectation? Either way, deal with this situation early, and make your best effort to resolve the issue.

During difficult times we all need people who encourage us and believe in us. Your family might be at the top of your support group. Build a group of professional colleagues whom you can count on for support. Expand your circle by meeting lawyers from other geographical areas — people you won't be competing with — at CLE seminars. Many resources are available to members of the American Bar Association. Some of these resources will be covered in my next article.

We talk a great deal about the importance of living a balanced life. Now is the time to begin. Balance work and play, and a life at home as well as the office. When business picks up, this balanced way of living may have become a habit that you don't want to give up.

I encourage "suddenly solo" attorneys — as well as newly admitted lawyers — to call me at (703) 567-0088 for practical advice on setting up your new practice. The learning curve can be considerable, and no one wants to make mistakes or get a letter from the disciplinary section of the Virginia State Bar.

The Demise of Virginia's Anti-spam Law

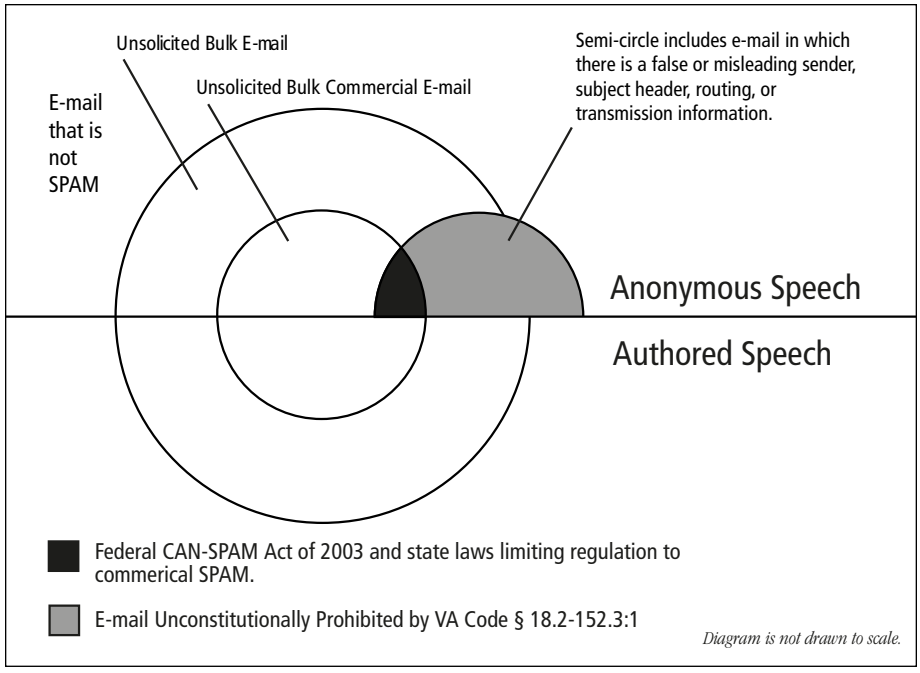
by Olivier D. Long

In September 2008, in the case of *Jaynes v. Commonwealth*, 666 S.E.2d 303, 276 Va. 443 (Va., 2008), the Supreme Court of Virginia voided Virginia's anti-spam statute on the ground that it violated the free-speech clause of the First Amendment to the U.S. Constitution.[1] *Virginia Code* § 18.2-152.3:1 criminalized all unsolicited bulk e-mail exceeding a certain volume in a period of time, without limiting itself to commercial e-mail. The statute provided:

> Any person who:
>
> 1. Uses a computer or computer network with the intent to falsify or forge electronic mail transmission information or other routing information in any manner in connection with the transmission of unsolicited bulk electronic mail through or into the computer network of an electronic mail service provider or its subscribers . . . is guilty of a Class 1 misdemeanor.

If the law had more narrowly defined its target as unsolicited bulk *commercial* electronic mail it probably would have survived. Because it encompassed private protected speech, Jaynes was acquitted.[2]

The various forms of e-mail that constitute speech — and the criminalizing of e-mail called spam[3] — are illustrated in the diagram. Some forms of speech may be criminalized and already are to varying degrees in thirty-four states.[4] Federal regulation pursuant to the CAN-SPAM Act of 2003[5] covers the area of the diagram shaded in black. It is in the gray shaded portion of the semicircle of the diagram that *Jaynes* declared a private right to communicate freely by unsolicited bulk electronic mail must be preserved.



An anti-spam statute properly limited to commercial spam — unlike the one set aside in Virginia — is *Maryland Code* § 14-3002,[6] which provides: "A person may not initiate the transmission, conspire with another person to initiate the transmission, or assist in the transmission of commercial electronic mail" sent to or from a Maryland address that hijacks a domain name or e-mail address, or that contains false or misleading information.

Other issues that preoccupy legislators, litigators, and jurists include defining spam by content (even though content should be irrelevant); requiring identity or subject-line disclosure by senders; and huge civil judgments.

Anonymity, which is the total concealment of an e-mail sender's identity, is one of four possible e-mail headers, and does not define a particular e-mail as spam. (The other three types of e-mail origination data include identities that are stolen, fabricated, and truthful.) State laws often choose to criminalize spam based upon nonexistent, false, or misleading headers, because deceptive e-mails are difficult to trace and filter. They also are the most widely detested. But identity disclosure is not a necessary component of an anti-spam statute, because once an item is unauthorized bulk commercial electronic mail, no First Amendment protection exists, regardless of any subterfuge by the sender.

Civil litigation can produce large damage awards against spammers, based upon the CAN-SPAM Act, state law, and the economic cost to recipients of storing and filtering unauthorized bulk electronic mail. Recent successful plaintiffs include Facebook ($873 million in November 2008) and MySpace ($234

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its approval. Development of the conference was a priority of Manuel A. Capsalis during his presidency in 2008–09.

Since this is my last column as your CLBA chair, I want to take this opportunity to thank you for letting me serve you. It has been quite a trip, but an enjoyable one. My thanks also go out to the members of the CLBA Executive Committee who have been hard-working and supportive: Gifford R. Hampshire, Nancy M. Reid, Edward L. Weiner, John Y. Richardson Jr., Mary M. Benzinger, Jack W. Burtch Jr., Sandra T. Chinn-Gilstrap, Plato George Eliades II, Eugene Millan Elliott Jr., Vanessa L. Jones, George W. Nolley, Susan F. Pierce, and Dillina W. Stickley. Of course, without steady guidance from Paulette J. Davidson, our VSB liaison, I would have been lost most of the time, so a big thank you goes out to her. Other VSB staff — Patricia A. Sliger, Mary Yancey Spencer, Toni B. Dunson, Valerie L. Breeden, Elizabeth L. Keller, Theresa B. Patrick and, of course, VSB Executive Director Karen A. Gould — have been invaluable to me and to the executive committee. I thank you all.

The CLBA is your organization and is designed to help you and your local bar associations. We have many resources and suggestions that will help you with your programs. To get help, all you need to do is contact Mrs. Davidson. In addition, if I can help, please contact me at (540) 962-4986 or wtw1130@aol.com. Your new CLBA chair is Gifford Ray Hampshire of Blankingship & Keith PC, 9300 West Courthouse Road, Suite 201, Manassas, VA 20100; (703) 365-9945; fax (703) 365-2203; ghampshire@bklawva.com. ■

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We were fortunate that Virginia did not experience any natural disasters to trigger the Emergency Legal Services Committee's action plans. However, the committee conducted ELS training to ensure that in the event of a disaster, our volunteers will be prepared.

We ensured the continued success of these and many other programs through a new five-year long-range plan, as well as a newly revamped website. And we ended the year with another tradition — hosting a debate between attorney general candidates Kenneth T. Cuccinelli II and Stephen C. Shannon.

As one of my last acts as conference president, I was proud to vote to adopt the establishment of a diversity conference. In speaking in support of the new Diversity Conference, I reminded the VSB Council, as I reminded the Young Lawyers Conference a year ago, that diversity encompasses more than just gender, racial, and ethnic diversity. In my time with the young lawyers, we have also focused on achieving diversity of region, practice type, and — naturally — age.

Virginia young lawyers have been responsible for some of the most dramatic events in American history:

- At age thirty-three, Thomas Jefferson wrote the Declaration of Independence, which declared not only America's liberty from England, but the unalienable rights of a free people and their relationship to government.

- At age thirty-six, James Madison drafted the Virginia Plan that formed the basis of our government. Madison became the father of the U.S. Constitution and one of the principal authors of The Federalist Papers that led to its ratification. Two years later, he drafted the Bill of Rights.

- At age thirty-five, Spottswood W. Robinson III joined Oliver W. Hill Sr. as counsel to students at segregated R.R. Moton High School in Farmville, who walked out of their dilapidated school. The subsequent lawsuit, *Davis v. School Board of Prince Edward County*, was consolidated with four other cases decided under *Brown v. Board of Education* in 1954. The thirty-eight-year-old Robinson made the first argument before the U.S. Supreme Court on behalf of the plaintiffs.

It is my sincere hope that as the Virginia State Bar continues its efforts to ensure diversity in the bar, it focuses as well on expanding the involvement of young lawyers beyond the YLC. I feel confident that young lawyers stand ready to serve.

In this, my last article as president of the Young Lawyers Conference, I end with the call I gave to those newly admitted lawyers at the Admission and Orientation Ceremony who seek to make an impact on our profession — with apologies to Longfellow and Jefferson:

The profession, with all its fears, with all the hopes of future years, is hanging breathless on thy fate! So come forward, then, and give us the aid of your talents and the weight of your character towards the establishment of excellence in the profession. ■

Family Law Resources: Getting a Jump-Start

by Isabel Paul

FROM ADOPTION AND FOSTER CARE to the dissolution of the family unit to caring for the elderly and incapacitated individuals, family law affects every generation. Fortunately, many resources exist to help navigate the family law minefield. Some publications present in-depth explanations of a particular area of family law, with extensive statutory and case notes. Other sources offer a nuts-and-bolts approach, with procedural outlines and examples of essential forms. Most materials are well-indexed or contain, at the very least, a well-defined contents page.

For the individual whose practice is not exclusively devoted to family law, purchasing a specialized subject collection is impractical. Many of the resources cited in this article may be found at a local academic or public law library (http://www.courts.state.va.us/library/virginia_public_lib.htm).

Treatises

There are two Virginia-specific treatises on family law, excepting elder law issues. A hint: when searching for issues relating to divorce, most will be indexed as subheadings under "divorce," the main heading. Both treatises include a small set of pleading and practice forms and case notes. *Virginia Domestic Relations Handbook* (Lexis-Nexis, 1996 with annual supplements) has the companion *Virginia Domestic Relations Casefinder* (1996, fully updated). *Casefinder* provides access to case digests, chronologically arranged under recognizable subject headings. *Family Law: Theory, Practice, and Forms* (West, 2009, updated annually) contains extremely detailed case annotations or notes.

Numerous treatises cover elder law issues: trust and estate planning, guardianship, elder abuse, Social Security and Medicare, long-term care, and managing the elderly client. For lawyers just starting in elder law, or who take an occasional case, these titles are recommended: *Elder Law: Advocacy for the Aging, 2d* (West, 2008), *A Guide to Elder Law Practice* (Matthew Bender, 2007), and *Elder Law Answerbook* (Aspen, 2d ed. 2008).

For forms that relate to elder law concerns, consult the following: *Elder Law Forms Manual: Essential Documents for Representing the Older Client* (Aspen, lasted updated 2008), with more than one hundred forms, and *Elderlaw 3d* (volume 18A, *West's Legal Forms*, 2008).

Virginia CLE

Virginia CLE publications (http://www.vacle.org) are issued as either practice handbooks — akin to specialized subject treatises — or seminar materials that include basic overviews, annual updates, or "hot topics." They are available in print, CD-ROM, or downloadable formats. The downloadable option allows for individual chapters in most cases and comes at a reduced price.

Handbooks for practicing family law include *Negotiating and Drafting Marital Agreements* (2008), a comprehensive guide to all types of marital agreements, with explanations of tactics, ethics, and strategies involved in the negotiation process. Examples of forms, worksheets, schedules, and checklists are included where appropriate. *Adoption Procedures and Forms: A Guide for Virginia Lawyers* (2006, 2007 supplement) supplies introductory material followed by detailed discussions of the adoption process, with chapters on placement, foster care, types of adoptions, fees and costs, jurisdiction and venue, common challenges, and ethics. An accompanying disc has forms and instructions.

Virginia Family Law: A Systematic Approach presents a thorough examination of divorce, annulment, custody, visitation, support, property, and domestic violence. Chapter narratives reference relevant *Code of Virginia* sections and case law. There is an explanation of the litigation process from the initial formation of the attorney-client relationship through the enforcement and modification of decrees and orders. The current edition (2008, 2009 supplement) contains more than 200 forms.

Currently available seminar materials include: *2008 Annual Divorce Practice Seminar Materials,* which concentrates on the appeal process; *27th Annual Family Law Seminar Materials,* with case analyses 2007-2008, evidentiary issues, ethics, performance-based trial advocacy; *Legislative Insights, and Divorce in a Bad Economy,* covering the legislative process and a discussion of bankruptcy (2009); *Representation of Children As a Guardian ad Litem Seminar Materials,* with basic information as of July 2007 in print format only; *Elder Law Basics Seminar Materials,* about developing a practice, planning for incapacity, "Medicaid 101," and services for the elderly (2007); and *15th Annual Elder Law Seminar Materials,* focusing mainly on taxation and Medicaid issues (2006).

Pamphlets

The Virginia State Bar has created several pamphlets to assist an attorney in communicating basic information to a client. These titles can be ordered from the VSB (www.vsb.org/docs/orderform.pdf) or viewed online:

Guardianship & Conservatorship in Virginia (www.vda.virginia.gov/pdfdocs/Guardbook.pdf)

Children and Divorce (www.vsb.org/site/publications/children-divorce)

Resources continued on page 57

New Virginia Law Tightens Advance Directives, Adds Mental Health Intentions

by Nathan A. Kottkamp, Stephen D. Rosenthal, and Susan C. Ward

FOR NEARLY TWO DECADES, all adults in Virginia have had the right to make their health care wishes known in documents called advance directives, in which they dictate the health care they do or do not want in case they later cannot make their own decisions. These documents have taken two key forms:

- The designation of an agent to make health care decisions for you if you cannot speak for yourself.

- Written instructions — in what is often called a "living will" — about life-prolonging procedures if you have a terminal condition. Life-prolonging procedures are those that will not cure the condition and only prolong the dying process.

On July 1, 2009, Virginia's law changed to expand the types of decisions an individual can make with an advance directive. The changes also address assessment of decision-making capacity; authority of health care agents; situations in which a patient who lacks decision-making capacity protests care recommendations; revocation of documents that express care decisions; and protection of decision makers and providers who act in good faith to carry out patient directions.

The revisions were recommended by the Supreme Court of Virginia's Commission on Mental Health Law Reform to create additional legal authority for individuals to give instructions for their health care, especially if they anticipate losing their decision-making capacity due to dementia or other mental health conditions. The instructions now can address future mental health care, as well as physical health care.

New Decision-making Options and Rights

Under the expanded law, an individual can give instructions in his or her advance directive about all forms of health care — not just end-of-life care, as previously was the case. The directive can apply even if the individual has not named an agent to make decisions for him when he cannot make them for himself. This means that, with an advance directive, a person can now express choices for health care, health care facility admission, maintenance treatments such as dialysis, insulin treatment, or any other health care. *(Code of Virginia §§ 54.1-2983 and 54.1-2984)*

In the interest of public and patient safety, the revised law makes it clear that an advance directive cannot override laws that authorize immediate custody of individuals who may be at risk of harming themselves or others, or judicial orders that authorize certain aspects of mental health care and treatment. *(§ 54.1-2983.3)*

It has always been the case in Virginia that advance directives take effect only when a patient is determined to be incapable of making informed decisions, as determined by his own physician and a second physician who personally has examined the patient. The law now specifically requires that the second physician be one who is not involved in the patient's care, unless an independent physician is not reasonably available. Also, to ensure that the decisions of patients who regain the ability to make informed decisions are honored, the revised law provides that a determination of a patient's regained capacity for decision making requires only one physician to document the finding, in writing. *(§ 54.1-2983.2)*

Generally, Virginia's law does not authorize any treatment under an advance directive that the patient's provider and decision maker know the patient does not want. However, because a patient's condition may cause him to say things he does not mean or that are inconsistent with his previous statements, the expanded law creates two limited exceptions to this policy. The exceptions allow the patient's previously expressed wishes to be carried out in the event the patient protests *after* having been determined to be incapable of making an informed decision. Both of these exceptions contain several safeguards to protect the interests of the patient. *(§ 54.1-2986.2)*

First, an individual may make certain choices in an advance directive that are binding, even if he objects to those choices later, during a time that he has lost his capacity to make decisions for himself. An individual with recurring mental illness, dementia, or other condition that intermittently affects awareness, judgment, or ability to understand circumstances now can direct that he wants his advance directive followed even if he later, while incapacitated, objects to the instructions in the directive. For an individual to make directions that bind over his later objection, his physician also must verify in writing that the individual understands this decision. Even then, the treatment must be medically appropriate and cannot involve withholding or withdrawing life-prolonging procedures.

The second exception prevents decision-making stalemates stalemates in situations in which the patient does not exercise the option to expressly instruct providers on what to do in the event of a later protest. Before the revisions to the

law, there was no specified mechanism for situations in which a patient who is incapable of making informed decisions protests a physician's treatment recommendation made during the patient's incapacity, even if the treatment recommendation would be consistent with the patient's previously stated wishes or the recognized best interest of the patient, as determined by his health care agent or other legally designated decision maker. Providers have been reluctant to proceed in these situations without a court order. The time required to get an order delays care, may result in the patient not receiving the care he originally requested, and adds considerable costs. The revised law allows the patient's agent or other decision maker to authorize the recommended treatment even if a patient who has been determined to be incapable of making an informed decision protests it.

In a second scenario, if the patient objects to a treatment recommendation otherwise allowed in his advance directive, the agent whom he has named in his advance directive (but no other decision maker) can authorize the recommended treatment over his protest. In either case, the treatment recommendation must not involve withholding or withdrawing life-prolonging procedures, and the treatment must be found to be ethically acceptable by an ethics committee or two physicians who are not involved with the patient's care. Ultimately, these provisions allow decision making by someone who knows the patient personally, while providing safeguards that appropriately limit the decision maker's authority in light of the patient's protest.

Regardless of these exceptions, if a patient without decision-making capacity protests the general authority of his agent or other decision maker, then under most circumstances those decision makers no longer will have authority to make decisions. Decisions then must be made under other provisions of the advance directive or other laws, and might require seeking authority from a court.

As under previous law, an individual can revoke an advance directive in writing, orally, by destroying the document, or by directing someone else to destroy it in his presence. The revised law makes it clear, however, that only intentional purposeful actions will revoke an advance directive. For example, if an angry patient tears up his advance directive and does not understand the nature and consequences of his actions, the physical destruction of the advance directive is not a revocation. The directions stated in the advance directive would continue to apply until it is clear that the patient is capable of understanding the significance of his actions as constituting a revocation of the document. *(§ 54.1-2985)*

The revised law also clarifies the rules on the revocation of durable do-not-resuscitate (DDNR) orders, which are issued by physicians to ensure that a patient's desire to forego cardiopulmonary resuscitation is honored by emergency medical personnel and other licensed providers outside of a hospital or nursing home. The change clarifies that only the individual who consented to the DDNR order may revoke it; thus, an authorized decision maker cannot revoke a DDNR order if it was issued based on the request and consent of the patient himself. With this change, a family member cannot demand resuscitation against a patient's wishes when the patient suffers a heart attack, for example. The law now also clarifies that physicians cannot revoke DDNR orders, but they may rescind the order in accordance with accepted medical practice, as is the case with any physician order. *(§ 54.1-2987.1)*

Virginia's health care decision-making law has always protected providers and decision makers from liability if they follow the law in good faith by seeking patient consent as they carry out treatment decisions. However, the revised law has filled gaps that existed in that protection. *(§ 54.1-2988)*

Any individual who has an advance directive may want to create a new document to take advantage of these new decision-making opportunities. If he chooses not to do so, his legally valid advance directive created under previous law continues to be valid. For individuals who create new advance directives, it is helpful to know that advance directives in Virginia need not be on a specific form, written by an attorney, or notarized. They simply must be signed by the individual and two adult witnesses. Nevertheless, to assist all Virginians in creating an advance directive, a free form based on the model suggested under Virginia's law *(§ 54.1-2984)* is available at http://www.vsb.org/site/public/healthcare-decisions-day.

Implementation Resources

Ultimately, advance directives are a powerful tool to accomplish many important health care goals. They help ensure that a patient's wishes are honored; they provide guidance and relieve the burden on family members who might otherwise be left to guess about a patient's health care wishes; and they serve as an opportunity to provide improved care to patients because health care providers are better informed about patients' wishes. Unfortunately, for several reasons — including reluctance to talk about our own mortality and confusion about legal requirements and ways to obtain these documents — it is estimated that no more than one-third of all Americans have empowered themselves through advance directives. In an effort to demystify this topic and the process for creating advance directives, free resources are available at http://www.vsb.org/site/public/healthcare-decisions-day.

Show Cause continued from page 47

Hamlin, 407 U.S. 25, 37 (1972) (holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); *Bloom v. Illinois*, 391 U.S. 194, 198 (1968) (holding "serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution").

16 Va. Code Ann. § 18.2-457; *Scialdone v. Commonwealth*, 53 Va. App. 226, 235 n.7, 670 S.E.2d 752, 757 n.7 (2009) ("A party cannot appeal the trial court's failure to take specific action in response to an irregularity in jury deliberations unless the party asked the trial court to do something about it.") (en banc).

17 *Nusbaum v. Berlin*, 273 Va. 385, 390, 641 S.E.2d 494, 496 (2007).

18 *Id.* at 398-401, 641 S.E.2d at 500-02.

19 *Scialdone,* 53 Va. App. at 238-39, 670 S.E.2d at 758-59.

20 Supreme Court of Virginia Rule 1:12.

21 *Fairfax County v. Alward*, 33 Va. Cir. 28 (1993).

22 *Id.* at 28.

23 *Lee v. Mulford,* 269 Va. 562, 566 (2005).

24 Va Code Ann. § 8.01-314 (emphasis added).

25 *In re: General Motors Corp*., 61 F.3d 256, 258 (4th Cir. 1995).

26 "In a show cause hearing, the moving party need only prove that the offending party failed to comply with an order of the trial court. The offending party then has the burden of proving justification for his or her failure to comply." *See Alexander v. Alexander,* 12 Va. App. 691, 696, 406 S.E.2d 666 (1991) (citing *Fraizer v. Commonwealth*, 3 Va. App. 84, 87, 348 S.e.2d 405, 407 (1986)).

27 *Street v. Street,* 24 Va. App. 14, 20, 480 S.E.2d 118, 121 (1997) (citations omitted).

28 *See Hackler,* 44 Va. App. at 72, 602 S.E.2d at 436.

29 *Street* at 22, 480 S.E.2d at 122.

30 *Laing v. Commonwealth,* 205 Va. 511, 514-15, 137 S.E.2d 896, 899 (1964) (citations omitted).

31 *Leisge v. Leisge*, 224 Va. 303, 309, 296 S.E.2d 538, 541 (1982).

32 *Id.* at 308, 296 S.E.2d at 541.

33 *Id.* at 308-09, 296 S.E.2d at 541 (citing *McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 191 (1949)).

34 *Winn v. Winn*, 218 Va. 8, 10, 235 S.E.2d 307, 309 (citations omitted) (emphasis in original).

35 *See French v. Pobst*, 203 Va. 704, 710, 127 S.E.2d 137, 141 (1962); *see also Petrosinelli v. Peta,* 273 Va. 700, 706-07, 643 S.E.2d 151, 154-55 (2007).

36 *Rainey v. City of Norfolk,* 14 Va. App. 968, 974, 421 S.E.2d 210, 214 (1992) (citing *Deeds v. Gilmer,* 162 Va. 157, 262, 174 S.E. 37, 78-79 (1934)).

37 *See Hackler*, 44 Va. App. at 65-67, 602 S.E.2d at 433-34.

38 *Carswell v. Masterson*, 224 Va. 329, 332, 295 S.E.2d 899, 901 (1982).

39 *Sullivan v. Sullivan*, 33 Va. App. 743, 751-53, 536 S.E.2d 925, 929-30 (2000).

Spam continued from page 52

million by default in May 2008). The drawback to fighting spam with civil suits is that the judgments are difficult to collect.

Revising Virginia's anti-spam statute should not be difficult, given the abundance of models from other states. However, the drafting will require care to not limit or proscribe conduct that is either preempted by federal law or protected by the First Amendment. ■

On March 30, 2009, the Supreme Court of the Unites States denied Virginia's petition for a writ of certiorari in Virginia v. Jaynes. *(http://origin.www.supremecourtus.gov/docket/08-765.htm) Consequently, the Computer Crimes Act remains stricken from the Virginia Code, based upon the judicial determination that it unconstitutionally abridged freedom of speech under the First Amendment. — Editor*

Endnotes:

1 Amendment I provides in pertinent part, "Congress shall make no law … abridging the freedom of speech."

2 Bloggers roundly denounced the *Jaynes* decision for a variety of reasons. They likened spam to someone on a soap box with a bullhorn in a front yard. They contended that unsolicited bulk electronic mail from private citizens, religious proselytizers, or politicians is almost unheard-of; and acquitting Jaynes to protect rights that are rarely utilized was ridiculous. Some advocated banning spam entirely. (http://www.groklaw.net/article.php?story=20080913085404483)

3 The Spamhaus Project defines spam as "unsolicited bulk electronic mail." (http://www.spamhaus.org/definition.html)

4 State anti-spam laws appear at http://www.spamlaws.com/state/index.shtml and are summarized at http://www.spamlaws.com/state/summary.shtml.

5 The Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN-SPAM) of 2003, 15 *U.S.C.* §§ 7701-7713 and 18 *U.S.C.* § 1037, January 1, 2004. This legislation criminalizes certain forms of commercial unsolicited bulk electronic mail.

6 *See also*, *Maryland Code* § 3-805.1.

Resources continued from page 54

Divorce in Virginia
(www.vsb.org/site/publications/divorce-in-virginia)

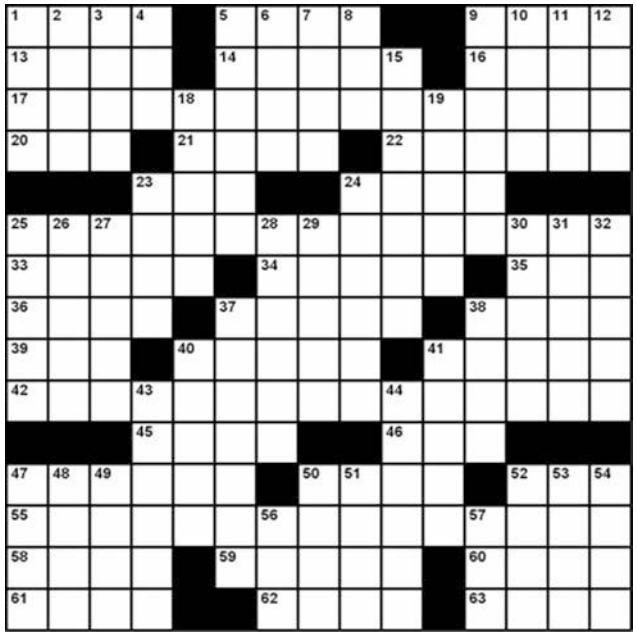
Financial Issues in Divorce in Virginia
(www.vsb.org/publications/brochure/fidiv04.pdf)

Marriage in Virginia
(www.vsb.org/site/publications/marriage-in-virginia).

The Richmond Metropolitan Women's Bar Association has produced *Understanding Your Domestic Relations Rights in Virginia,* which can be ordered by contacting Robin A.R. McVoy at (804) 783-7235 or rmcvoy@sandsanderson.com.

Let's Get Ready to Rumble

by Brett A. Spain



Crossword answers on page 61

Across

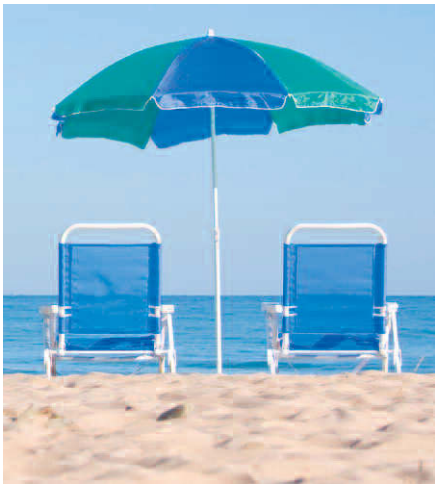
1. Pacific territory
5. CERCLA amendment
9. Aleutian island
13. Laugh-In's Johnson
14. More than once
16. Imitates a dove
17. Hostile difference of opinions?
20. Clever
21. Model Macpherson
22. Green club
23. Patella tendon neighbor (abbr.)
24. Flout
25. Fight between clients perhaps?
33. Male duck
34. Bohemian
35. Swear
36. Ireland
37. Support
38. Lion's pride
39. More for Carlos
40. "Just ____" (Nancy Reagan campaign)
41. Judge Sotomayor
42. Assault on character, e.g.
45. Burnt lime
46. Homer Simpson catchphrase
47. RNC Chairman
50. October birthstone
52. Owns
55. 17A, 25A, or 42A?
58. Press
59. Iraq strategy
60. Nemesis, often
61. Overlook
62. Golfer's gadgets
63. Proton locale

Down

1. Prattles
2. Russian mountain range or river
3. Esq. indicator
4. Connected
5. Ms. McCartney
6. Desertion status
7. Prevalent
8. Guitarist Frehley
9. Acid or chloride variety
10. Defamation or assault
11. Lug
12. Former superpower
15. Income statement item
18. "The Florence of the South"
19. Sean Combs nickname
23. Greenberg or Golic
24. Bubble that burst in 2000
25. Accumulation of fluid beneath the skin
26. Three-note chord
27. Severe
28. Voicebox
29. Construction site sight
30. The Donald's ex
31. Like a dunce cap
32. Fine-tune
37. Valets, e.g.
38. Silence of the Lambs' clue
40. Wee
41. Purloined
43. "_____ Thirteen," Soderbergh film
44. Sayings
47. Slender
48. Actress Hatcher
49. Ids' rivals
50. Shrek, e.g.
51. Congressional staffer
52. Pacino film
53. _____ Domini
54. Plant part
56. Loon
57. Bus. degree

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.



71st Annual Meeting Virginia Beach, Virginia June 18–21, 2009

At the Virginia State Bar's Seventy-first Annual Meeting, Jon D. Huddleston of Leesburg was sworn in as president of the VSB, succeeding Manuel A. Capsalis of Arlington. Irving M. Blank of Richmond became president-elect.

The program included an attorney general candidates' debate and a showcase continuing legal education program, "From Guantanamo to Abu Ghraib: The Changing Landscape of Detention and Prosecution," sponsored by the Criminal Law Section.

Other programs included "Unlock Your Potential," sponsored by the Young Lawyers Conference to help lawyers evaluate whether to start a solo practice.

The meeting included the showing of the film *The Response*, a courtroom drama based on transcripts of Guantanamo Bay military tribunals.

Special events at this year's Lawyers Expo included a Barnes & Noble book sale and family bingo.

And VSB groups honored Virginia lawyers, including the Local Bar Leader of the Year, the Legal Aid Award (see page 29), and attorneys who are in their fiftieth year of practice (see page 50).

1

2

3

1: Jon D. Huddleston (center) of Leesburg is the new Virginia State Bar president. He succeeds Manuel A. Capsalis (left). Irving M. Blank (right) is president-elect, and will become president in 2010.

2: Virginia First Lady Anne B. Holton (left) was presented with the Family Law Service Award by the Family Law Section. The award recognized her work as a legal aid lawyer and J&DR judge in Richmond. Richmond Chief J&DR Judge Angela Edwards Roberts (right) nominated Holton for the award.

3: VSB Executive Director Karen A. Gould presented Manuel A. Capsalis with a caricature that memorializes his presidential year. The caricature, by Glen Allen lawyer Michael L. Goodman, includes references to Capsalis's encounter with a turkey during one of his many road trips and a pilgrimage he took with former president Howard W. Martin Jr. to the Baseball Hall of Fame.

1

2

1: During the presentation "From Guantanamo to Abu Ghraib," Edward B. MacMahon Jr. (at podium) of Middleburg described his defense of Zacarias Moussaoui — who was charged with crimes related to the terrorist attacks on September 11, 2001 — and MacMahon's current work as a civilian legal advisor representing another September 11 defendant at Guantanamo Bay. Other panelists included Terry Kay Rockefeller (woman with arms crossed), whose sister was killed in the attack on the World Trade Center and who opposes the torture and abandonment of due process that followed.

3

2: Past presidents of the Young Lawyers Conference and the president of the Virginia State Bar display a resolution by the General Assembly that commends the conference on its thirty-fifth anniversary. The resolution references the many projects undertaken by the conference and the YLC's contribution to VSB leadership. (left–right) Tracy A. Giles, Sharon Maitland Moon, VSB President Jon D. Huddleston, Jennifer L. McClellan, and Daniel L. Gray.

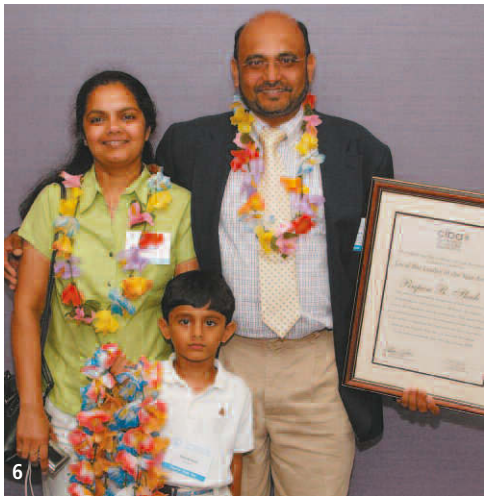
3: Marilynn C. Goss is the 2009 recipient of the Tradition of Excellence Award from the General Practice Section. She now is a Richmond juvenile and domestic relations district judge. The award recognizes lawyers who enhance the esteem of general practice attorneys. Before Goss went on the bench, she was a Central Virginia Legal Aid Society attorney with a diverse general practice serving indigent persons.

1: Huddleston (left) is sworn in by Loudoun County Circuit Judge Burke F. McCahill, a former law partner.

2: Former chairs of the Conference of Local Bar Associations (left–right, front row) VSB President Jon D. Huddleston, Judith L. Rosenblatt, William T. Wilson, John Y. Richardson Jr.; (back row) Aubrey J. Rosser, George W. Shanks, and VSB Immediate Past President Manuel A. Capsalis.

3 & 4: The candidates for Virginia attorney general — Republican Kenneth T. Cuccinelli II (left) and Democrat Stephen C. Shannon (right) — faced off in a debate sponsored by the Young Lawyers Conference.

5: Darrel Tillar Mason (right) is commended for her extensive work with the VSB Committee on Lawyer Malpractice Insurance. Mason "was responsive to numerous requests from the [c]ouncil to address the question of mandatory legal malpractice insurance; advanced the bar's understanding of the issue with her written summary of the debate in Virginia Lawyer magazine; with the committee, evaluated the changes in insurance products offered by the bar's endorsed career; … and helped to draft a consumer guide for lawyers in purchasing professional liability insurance," according to the resolution presented to her by Manuel A. Capsalis (left).



6: Rupen R. Shah, immediate past president of the Augusta County Bar Association, was named Local Bar Leader of the Year for his work on behalf of the bar and the public. An assistant commonwealth's attorney in Staunton, Shah led the establishment of the Valley Children's Advocacy Center, set up a procedure for judicial nominations, organized So You're 18 programs for youths reaching adulthood, and participated in docket reorganization in the local courts. He received the award at a breakfast sponsored by the Conference of Local Bar Association — which distributed leis to attendees — with his wife, Shruti, and son, Adarsh, at his side.