# Contributors


Atkinson


Bamforth


Casey


Feliú


MacKenzie


Malawer


Wagstaff


Wood

**Elizabeth J. Atkinson** practices tax law with LeClairRyan in Virginia Beach. In 2002, she won the American Bar Association Tax Section's pro bono award for her extensive volunteer legal work. She serves on the board of directors of the Community Tax Law Project, which helps low-income taxpayers resolve disputes with federal and state tax authorities. She has a bachelor's degree from the University of Virginia and a law degree from Michigan State University. [page 22]

**Nicholas Bamforth** conducts research in public, human rights, and anti-discrimination law, as well as the philosophy of law. He is a fellow in law at Queen's College, Oxford University. In 2006, he was elected a member of Oxford's Council. He is the author of *Sexuality, Morals and Justice* (1997) and editor of *Public Law in a Mult-layered Constitution* (with P. Leyland, 2003). [page 38]

**Tara L. Casey** is director of the Carrico Center for Pro Bono Services at the University of Richmond School of Law. She is a recipient of the John C. Kenny Pro Bono Award from the Richmond Bar Association. She holds a bachelor's degree from the University of Virginia and a law degree from Washington University. [page 21]

**Vicenç Feliú** is the director of the law library and an assistant professor of law at the University of the District of Columbia School of Law. He received a bachelor's degree in linguistics from California State University at Fullerton, juris doctor and master of laws degrees from Franklin Pierce Law Center, and a master's degree in library science from the University of Washington. He is a member of the bar in the District of Columbia and a member of the Virginia Association of Law Libraries. [page 57]

**Catherine MacKenzie**, Ph.D., is a member of the Bar of England and Wales and of the High Court of Australia. She is a fellow of Selwyn College and university lecturer in environmental law at Cambridge University. She also is research associate in environmental law at Green Templeton College, Oxford University. She has served as a rule of law monitor with the United Nations Mission in Liberia and is currently advising on the establishment of the first law school for women in Saudi Arabia. [page 44]

**Stuart S. Malawer**, J.D., Ph.D., is distinguished service professor of law and international trade in the school of public policy at George Mason University and a member of the Virginia State Bar. He recently published a casebook, *U.S. National Security Law*. He holds a law degree from Cornell University and a doctorate in international relations from the University of Pennsylvania. His article on cyber warfare was presented in 2009 at the Oxford University Workshop on Cybersecurity and sponsored by the International Cyber Center at George Mason University and by St. Peter's College, Oxford. A former chair of the International Practice Section of the Virginia State Bar, Malawer is special editor of the articles sponsored by the International Practice Section featured in this issue of *Virginia Lawyer*. [page 27 and 28]

**Robert H. Wagstaff** has practiced law in the western United States since 1967, emphasizing litigation and constitutional appellate practice. He is former president of the Alaska Bar Association and bar-elected member of the Alaska Judicial Council. He currently is a doctoral student at the University of Oxford, where he has been awarded two postgraduate law degrees. [page 32]

**Erica F. Wood** is assistant director of the American Bar Association Commission on Law and Aging. She has worked primarily on issues that involve adult guardianship, legal services delivery, dispute resolution, health care and managed care, long-term care, and access to court. She is a member of the Virginia State Bar, the Virginia Public Guardian and Conservator Advisory Board, and the Arlington County Bar Association Committee on Law and Aging. She received a bachelor's degree from the University of Michigan and a law degree from George Washington University's National Law Center. [page 20]

## Article Did Not Inform

I am writing concerning the article "Debt Collection: Serving and Supporting the U.S. Economy," which was published in the December 2009 *Virginia Lawyer*.

The article dealt with the Fair Debt Collection Practices Act, commonly referred to as FDCPA. I regret to say that the article was not very educational. It did not inform the reader of anything novel or different regarding either debt collection law or the FDCPA, nor did it provide any insight into either debt collection practice or FDCPA lawsuits. Finally, the author incorrectly referred to the FDCPA as the Fair Debt Collection *Protection* Act (page 38). The article seemed better suited to any of the numerous laypersons news publications.

I expect articles published by the Virginia State Bar to be of high quality content. The bar's publications usually are. However, I regret to state that this article failed to conform to those high standards that we attorneys have come to desire, expect, and respect from the Virginia State Bar.

Elizabeth F. Egan
Richmond

## Respect for "Law" Should Include Flexibility

I'd like to offer a different perspective on lawyers' attire than does Judge Clifford R. Weckstein in his article on lawyers' dress codes. (*Virginia Lawyer*, December 2009, http://www.vsb.org/docs/valawyermagazine/vl1209_addressing.pdf) My perspective probably has its roots in two things: my favorite Latin quotation, *De gustibus non disputantum este* — "There is no disputing/accounting for matters of taste" (footnote: I used this so often that my kids were using it at age five.) — and the fact that, if my memory is correct, when I started practicing in Roanoke (late '60s), the very few women in practice could not wear pantsuits in court — a matter of taste!

However, as a retired teacher of law students about the practical aspects of practicing law, I know that lawyers obviously should not do something they don't need to that will upset the judge before whom a case is being brought. Obviously, that would not be in the client's best interest. This, for me, is the relevance of the judge's article.

From an entirely different perspective on the question of the importance of lawyer's attire, once when I was teaching in Australia there was a spirited public debate about whether barristers should be required to wear wigs in court. The answer seemed obvious to me until a judge made the observation that, from the bench, wigs made all the lawyers look almost the same, which made being objective in a case easier. This eye-opening perspective is probably why I am taking my time and yours to respond to the article.

The important other perspective that I want to present is something I had never thought about until I heard a news story from Japan. It reported that in some government buildings the men who worked there were not allowed to wear ties (or maybe coats and ties) in the summer — the reason being that the buildings would not have to be kept as cool, thereby saving energy. The saving of energy, the world's resources, and global warming have become more meaningful to me as I age. Thinking about what my grandchildren are going to have to face has made it one of the most important issues to me. (Footnote: A quotation from Kurt Vonnegut's *A Man Without a Country* makes the point with power — "I think that the Earth's immune system is trying to get rid of us.")

Obviously, showing respect for "the law" is important. However, that respect used to require that the lawyer be a white male. When there are practical, moral, and not just "taste" reasons for a change in the present practices, there should be the flexibility to change — or at least let's think and talk about them. For having started this discussion in a public forum, I want to thank Judge Weckstein.

John M. Levy
Williamsburg

### Letters

Send your letter to the editor* to:
coggin@vsb.org;
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/**.

by Jon D. Huddleston

# What's in a Name? A Noble Idea

I HAVE MISPLACED SOMETHING and it seems like I have been looking for it forever. Don't you hate that feeling? You can describe it. You swear you saw it recently, but maybe it was longer ago than you thought. Actually, I don't think I am the only one who has misplaced it. I think many of us have. Perhaps most in our profession have. Has anyone seen the term "citizen lawyer"? It seems to have vanished.

I googled it and didn't get a whole lot of returns. I looked on Wikipedia. It's not there. There's a lot of great information on Wikipedia, but you won't find "citizen lawyer." Where did it go and what are we going to do about it?

When our country was in its infancy, George Wythe and Thomas Jefferson helped bring the teaching of law to the universities with the notion that law students should be educated not just in the law, but also as leaders in their communities, states, and country. Indeed, lawyers played a seminal role in the founding of our country, the development of our states, and the direction of our communities. Are we needed any less today than at our founding?

Certainly, the business aspect of our profession has shifted monumentally. My friend and good lawyer John Bredehoft tells me it was Emory Buckner, a New York attorney, who invented the concept of the billable hour several decades ago. To be sure, billing requirements have inexorably removed many attorneys from public service, from community involvement, and too often, from home and hearth. Have we lost our way? Have we lost our souls?

I don't think we have. Over the past several months, I have traveled across our commonwealth meeting good lawyers who epitomize the concept of the citizen lawyer. We have shown some on our Big Picture video series: lawyers like Bill Schmidt from Fairfax, who every Christmas season for seventeen years has been ringing the bell each holiday weekend for the Salvation Army; or lawyer legislator Jennifer McClellan, who makes a difference in her community and in her profession every day; or Petersburg lawyer Joe Preston, who is trying to help get a library built in a community that has waited too long.

Or maybe it's Clinton Clancy from Lawrenceville, who has done so much for access to legal services in Brunswick County. Imagine accepting more than eight hundred court appointments in one year, as Clinton did in 2008. Why don't more people know about the Santa in the Square project that the Roanoke Bar Association puts on each year? This past Christmas, they invited more than four hundred homeless children and their families, and ensured that all were fed and all left with presents. Thanks to the forty lawyers who made this possible. Do you realize what Judge Thomas Shadrick and the lawyers of Virginia Beach have accomplished with a program to mentor elementary students in a distressed school in that city?

I submit that the citizen lawyer is indeed alive and well in Virginia. So let's reclaim the concept. Let's promote not only the term but also the ideal of the citizen lawyer. What if we claimed responsibility for writing the definition on Wikipedia? What if the shining examples of the citizen lawyer through history and today could be shown? Why can't an old-school concept catch up with today's technology?

Let's make it happen.

To do that, we must continue to tell the story. The Virginia Is for Good Lawyers project has proven to be an excellent start. But our roots go much deeper. Justice Harry L. Carrico's championing of the Professionalism Course for newly admitted lawyers has attempted to inculcate the highest aspirations of professionalism and the importance of civic involvement for more than two decades.

Our Conference of Local Bar Associations has for years recognized bar leaders and associations for excellent projects and programs in their communities. The CLBA also provides resources and contact information to share ideas between bar associations — big and small, urban and rural — to maximize the impact of the programs.

Virginia lawyers continue to live the concept that Wythe and Jefferson nurtured more than 250 years ago. So let's bring the term back to the everyday professional lexicon. Let it show up on Facebook, on Twitter, on YouTube, in our newsletters, and this time next year, on Wikipedia.

What do we have to lose but a great descriptor of a marvelous concept?

by Edward L. Davis

# An Overview of the Virginia State Bar Disciplinary Process: Allegations of Misconduct in Criminal Cases

DURING THE FISCAL YEAR ended June 30, 2009, the Virginia State Bar received 4,097 inquiries about attorney misconduct. As in years past, inquiries relating to criminal practice continued to lead the way, accounting for more than one-third of the total, with 1,416 inquiries. Five percent of those inquiries alleged misconduct by prosecutors, 4 percent were either inquiries about judges or requests for information, while the remaining 91 percent alleged misconduct by criminal defense attorneys.

Recent news reports have quoted some sources as questioning whether the VSB is lenient on prosecutorial misconduct while it disciplines defense lawyers merely for missing an appellate deadline. The purpose of this column is to clarify the VSB's position on this issue and explain how the public may not always know what has occurred in attorney disciplinary actions, including investigations of prosecutors.

The procedures for investigating and prosecuting attorney misconduct are set forth in the Rules of the Supreme Court of Virginia.[1] Under these rules, the VSB cannot explain publicly what it is doing in connection with a case during the investigation phase. While a complaint is being investigated, the proceeding is confidential. If no evidence of misconduct is found during the investigation phase, the matter is closed. It remains confidential, and the VSB cannot disclose the results of the investigation to anyone except the complainant and respondent attorney.

The VSB prosecutes allegations of misconduct against prosecutors and defense attorneys alike when there is clear and convincing evidence of misconduct. The VSB evaluates all complaints of attorney misconduct objectively, regardless of the status or position of the respondent. It does not notify the public or the members of the bar once it decides to investigate or prosecute a matter, because the complaint may result in private discipline. It is only after the matter has been referred to a district committee, the VSB Disciplinary Board, or a panel of three circuit judges for adjudication that a disciplinary complaint appears on the public docket, posted at http://www.vsb.org/site/regulation/public-disciplinary-hearings/.

The VSB staff does not adjudicate allegations of attorney misconduct. Because the legal profession is self-regulated in Virginia, teams of attorney and non-attorney volunteers review allegations against their peers and decide whether charges of misconduct should be brought. These volunteers also sit on the panels that decide whether misconduct has occurred and, if so, the level of discipline to be imposed. The only exception is if a respondent attorney chooses to have his or her case heard by a three-judge circuit court instead. If there is an adjudication of misconduct, the level of public or private discipline imposed will depend on the nature and severity of the misconduct, the harm to the public or to the profession, and the existence of a prior disciplinary record.

In some instances, a disciplinary committee may decide to impose private[2] discipline upon an attorney. In that case, no one except for the respondent attorney and the complainant will be told of the result — hence the term "private" discipline. In some instances when a commonwealth's attorney's actions were publicized in a newspaper account but no resulting news story reported on associated disciplinary action, an implication may be inaccurately drawn that there was no disciplinary action.

Usually, when public[3] discipline is given, the bar will issue a press release identifying an attorney as having been disciplined. The VSB always posts the results of public discipline on its website, at http://www.vsb.org/site/regulation/disciplinary-system-actions/.

Ethical charges against prosecutors may involve failure to disclose exculpatory evidence, dishonest conduct, lack of diligence, or improper contact with represented defendants. One's status as a prosecutor does not exempt or mitigate the misconduct. For example, an assistant commonwealth's attorney's law license was suspended for withholding and destroying exculpatory evidence in a securities fraud prosecution.[4] A three-judge court suspended a commonwealth's attorney's license for failing to disclose to the court and victim in a rape case a payment of $25,000 pursuant to an accord and satisfaction.[5] Another three-judge court publicly reprimanded a commonwealth's attorney for lack of diligence.[6] Other prosecutors have been disciplined for improperly contacting defendants represented by counsel in the matter.[7] The VSB has initiated many other disciplinary proceedings against prosecutors that the hearing panels dismissed at trial or on appeal. Cases dismissed at trial or on appeal are also reported in the bar's public disciplinary reports.

Failure to disclose exculpatory evidence has given rise to many complaints of prosecutorial misconduct in news accounts. Many so-called *Brady*[8] violations, however, involve police rather that prosecutorial misconduct. The Virginia Rules of Professional Conduct require that the prosecutor have actual knowledge of exculpatory material.[9] Depending upon the circumstances, constructive knowledge alone may not establish a rule violation by clear and convincing evidence.[10]

News accounts of alleged prosecutorial misconduct often prove inaccurate or lack material facts that affect the outcome of a disciplinary investigation. The bar investigates anonymous complaints, but if attorneys with information about the facts of the case refuse to report prosecutorial misconduct or do not want their names involved in the investigation, these cases are very difficult to investigate and prove. As attorneys, we have an ethical obligation to report violations of the Rules of Professional Conduct that raise substantial questions about an attorney's honesty, trustworthiness, or fitness to practice law.

Likewise, complaints against defense attorneys may lack the requisite level of misconduct to justify the imposition of discipline against them. The bar does not discipline or even investigate lawyers merely for missing a deadline — appellate or otherwise. Discipline has resulted, however, if an attorney engages in a pattern of such behavior, fails to inform the clients about it, or fails to take corrective action.[11]

The VSB's ability to perform its mission is dependent on members of the bar and the public reporting misconduct, assisting with investigations as needed, and participating in the disciplinary process. The disciplinary system is staffed by two hundred conscientious lawyer and lay volunteers who seek to ensure that the public receives ethical legal services and that due process is provided to Virginia's lawyers.

We urge you to get involved with the disciplinary system so that you may better understand how it works and participate in the self-regulation of our profession. Interested volunteers may give their names to their local representatives on the Virginia State Bar Council,[12] or to the Office of Bar Counsel at the VSB.[13]

Endnotes:

1 Rules of the Supreme Court of Virginia, Part Six, Section IV, Paragraph 13.

2 Private discipline is any form of non-public discipline that declares privately the conduct of an attorney improper but does not limit the attorney's right to practice law. It includes a private reprimand or private admonition, with or without terms; a dismissal de minimis; or a dismissal for exceptional circumstances.

3 Public discipline includes the suspension or revocation of an attorney's law license, or a public declaration of the same sanctions listed in endnote 1.

4 *See* VSB Docket Number 93-031-1042, Virginia State Bar Disciplinary Board, October 20, 1994

5 *See* VSB Docket Number 94-000-0248, Chancery MC 4160, Circuit Court, City of Richmond, Manchester Division, December 13, 1993. The commonwealth's attorney donated the $25,000 to local charities during a year that he was up for reelection.

6 *See* VSB Docket Number 98-101-1093, Circuit Court, Giles County, July 12, 1999.

7 *See*, for example, VSB Docket Number 03-010-1051, Virginia State Bar First District Committee, November 17, 2003, http://www.vsb.org/disciplinary_orders/kelleter_opinion.html.

8 *Brady v. Maryland,* 373 U.S. 83 (1963).

9 Rule 3.8(d), Rules of Professional Conduct, provides that prosecutors shall make timely disclosure of the existence of evidence that the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

10 Comment (4) to Rule 3.8 explains that the intent of the rule is to exclude situations where the prosecutor does not know the theory of the defense, so as to be able to assess the exculpatory nature of evidence, or situations where the prosecutor does not have actual knowledge or control over the *ultra vires* actions of law enforcement personnel who may be only minimally involved in a case.

11 *See* VSB Docket Number 08-022-073014, Case No. CL08-6672, Circuit Court, City of Norfolk, April 24, 2009, http://www.vsb.org/docs/Yancey-Final_12-08-09.pdf. The respondent attorney was publicly reprimanded for having failed to file the opening brief in a criminal appeal, resulting in its dismissal. The attorney placed the blame on an appellate briefing service for not informing him of the filing deadline. Contrary to his assertions, the three-judge court found that the brief-printing service advised the attorney three times of the deadline and prompted him further to file the brief by sending him an advanced copy of the appendix several days prior to the deadline. The three-judge court considered the attorney's prior disciplinary record in imposing the sanction.

12 *See* list of VSB Council members at http://www.vsb.org/site/about/council/.

13 Interested volunteers may send their curriculum vitae to evans@vsb.org.

Virginia Supreme Court Justice Barbara Milano Kennan was the keynote speaker at the Virginia State Bar Bench-Bar Celebration Dinner, sponsored by the Young Lawyers Conference (YLC). The gathering occurred January 25 in Richmond. Keenan has been nominated by President Obama for a judgeship on the U.S. Court of Appeals for the Fourth Circuit. Pictured here are (left–right) Sarah E. Bruscia, chair of the YLC Bench-Bar Dinner Committee; VSB President Jon D. Huddleston; Keenan; YLC President Lesley Pate Marlin; retired Circuit Judge Alan E. Rosenblatt, chair of the Virginia Indigent Defense Commission and Keenan's husband; and VSB Immediate Past President Manuel A. Capsalis.

# Local Bar Elections

**Fredericksburg Area Bar Association**
Kenneth Paul Mergenthal, President
Jennifer Lee Parrish, President-elect
Charles Wayne Payne Jr., Secretary
George Ernest Marzloff, Treasurer
Melissa Katharine McCreary, Assistant Secretary
John Edward Franklin, Assistant Treasurer

**Local Government Attorneys of Virginia**
Rhysa Griffith South, President
Lucy Eugenia Phillips, Vice President
Jacob Paul Stroman, Secretary-Treasurer

**Smyth County Bar Association**
Amanda Jill Kinser Lawson, President
Michael Davis Jones, Vice President
Brendan Erich Roche, Secretary
Amanda Jill Kinser Lawson, Treasurer

**The Virginia Bar Association**
Stephen Donegan Busch, President
Lucia Anna Trigiani, President-elect

**VBA, Young Lawyers Division**
Henry Irving Willett III, Chair
Benjamin Webb King, Chair-elect

**Virginia Association of Criminal Defense Lawyers**
Corinne Jane Magee, President
David Leonard Heilberg, President-elect
Burton Leigh Drewry Jr., Vice President
Cynthia Ellen Dodge, Secretary
Jonathan Stanley David, Treasurer

**Virginia Association of Defense Attorneys**
Marshall Howard Ross, President
Dennis John Quinn, President-elect
Glen Alton Huff, Secretary
Lisa Frisina Clement, Treasurer

**Virginia Creditors Bar Association**
Reiss Frederick Wilks, President
Michele Suzanne Cumberland, Vice President
Philip Matthew Roberts, Secretary
George Ryder Parrish, Treasurer

## Keep Up with the VSB — Read the E-News

Have you been receiving your Virginia State Bar E-News?

The E-News is an important way of keeping informed about your regulatory bar.

We only send it out once a month — a brief summary of deadlines, programs, rule changes, and news to keep you on track professionally.

We e-mail it to all VSB members, except for those who opted out of receiving it.

If you didn't get yours, check your spam filter for February 2 and see if it's in there.

If your Virginia State Bar E-News is being blocked by your spam filter, contact your e-mail administrator and ask to have the VSB.org domain added to your permitted list.

# In Memoriam

**A. Russell Beazley Jr.**
Richmond
March 1919–August 2009

**Walker E. Beverly Jr.**
Alexandria
July 1928–November 2009

**William Broady**
Alexandria
September 1926–July 2009

**Timothy Joseph Callahan**
Portsmouth
January 1948–April 2009

**David Charles Dickey**
Stanardsville
March 1941–November 2009

**Hugh M. Durham**
Arlington
November 1921–August 2009

**Corwin Vane Edwards**
Fort Belvoir
December 1914–July 2009

**Leon Ely**
Fort Myers, Florida
February 1916–March 2009

**Benga Lou Farina**
Vienna
March 1964–September 2009

**Edwin J. Foltz**
Gladwyne, Pennsylvania
December 1916–September 2009

**Ernest Alexander Flynn**
Charlottesville
October 1943–September 2009

**Elton E. Gunter**
Winchester
July 1934–October 2009

**A. Marie Hyde**
Charlottesville
August 1940–November 2009

**Catesby Graham Jones Jr.**
Gloucester
June 1925–December 2009

**Stuart Crisler Lindsay**
Locust Dale
April 1949–November 2009

**Hon. John A. MacKenzie**
Portsmouth
September 1917–January 2010

**Michael Edward Mares**
Hampton
July 1952–October 2009

**Stephen Hull McNamara**
Gaithersburg, Maryland
April 1943–December 2009

**Thomas Albert Mickler**
Annandale
November 1922–December 2009

**Susan Lynn Schroeder Mrava**
Fort Campbell, Kentucky
November 1965–February 2009

**Don Robert Mueller**
Richmond
January 1948–November 2009

**Bernard J. Natkin**
Lexington
October 1923–November 2009

**Edward Allen Natt**
Roanoke
August 1945–December 2009

**Robert John O'Neill**
Front Royal
October 1928–December 2009

**Hon. Carleton Penn II**
Leesburg
September 1922–August 2009

**Robert Harvey Rines**
Boston, Massachusetts
August 1922–November 2009

**Hon. Herbert A. Pickford III**
Charlottesville
May 1934–June 2009

**Thomas Hart Robinson**
Richmond
February 1948–September 2009

**Charles Hill Ryland**
Warsaw
October 1913–October 2009

**Philip Lesley Schlamp**
Toms River, New Jersey
March 1924–January 2009

**Philip Hairston Seawell**
Newport News
September 1915–Pctpber 2008

**William Preston Sheffield**
Abingdon
October 1916–October 2009

**Hon. Robert J. Smith**
Richmond
December 1924–December 2009

**Nicholas A. Spinella**
Richmond
February 1924–November 2009

**John C. Testerman**
Fairfax
July 1926–November 2009

**Carol McDonald Tomaszczuk**
McLean
August 1958–November 2009

**Phillip S. Walker**
Hampton
August 1922–December 2009

# Judicial System Posts Court Rules Online

The Rules of the Supreme Court of Virginia are now posted on the Virginia's Judicial System website at http://www.courts.state.va.us/courts/scv/rules.html and will be updated on an ongoing basis.

The rules previously were posted by the Virginia Division of Legislative Services and updated annually.

The rules on the Judicial System site are those that govern Virginia's court system — the jurisdictions of Virginia's courts and procedures at each level.

For Rules of Court Part VI — Integration of the State Bar, the site refers viewers to the Virginia State Bar site, VSB.org. A link (http://www.vsb.org/site/regulation/guidelines/) to the rules that regulate lawyers is on the VSB home page.

For the Canons of Judicial Conduct, the Judicial System site directs viewers to http://www.courts.state.va.us/agencies/jirc/home.html, the portion of its site dedicated to the Judicial Inquiry and Review Commission.

Steven L. Dalle Mura, director of legal research for the Office of the Executive Secretary of the Court, said his office will update rule changes as they occur. Where recommended rule changes are pending, lawyers also can cross-check the Rules of Court with the Judicial System site's What's New page (http://www.courts.state.va.us/news/home.html), where amendments are announced after they are approved.

The VSB is developing a similar continuously updated Web posting of its *Professional Guidelines*, which includes the Rules of Professional Conduct and Court rules for the governance of the bar. Until the new format is introduced, those rules are posted at VSB.org as a pdf document, with amendments posted as a supplement.

# Two Northern VA Legal Aid Corporations Merge

An increase in demand for legal services for the poor and a decline in resources for paying for them have led two legal aid programs in Northern Virginia to merge.

Potomac Legal Aid Society became part of Legal Services of Northern Virginia (LSNV) on January 1. The merged program kept the LSNV name, the staff of both agencies, and all of its client outreach offices, where services are provided. Potomac closed its headquarters office in Falls Church.

James A. Ferguson, executive director of LSNV before the merger, continues in that position. Susan Stoney, formerly executive director of Potomac, is now deputy executive director of the merged LSNV.

Ferguson said the merger will result in a more efficient use of resources.

Both before and after the merger, LSNV received funding from the state and local governments — support that is precarious now as the governments grapple with budget deficits.

Potomac's primary funding source was the federal Legal Services Corporation. The merged program continues to receive the federal money, with the many restrictions that funding places on types of cases it can be used for.

In addition to government support, legal aid corporations statewide are faced with a decline in revenue from the Interest on Lawyers Trust Accounts program.

Ferguson said LSNV would not be able to maintain its level of service without ongoing support from private foundations and contributions from law firms and individual attorneys.

In the fiscal year ended June 30, 2009, LSNV handled 6,100 cases — about 2,000 more than the average for the past eight years.

The services are provided at nine offices, located in Falls Church, Arlington, Fairfax, Manassas, Leesburg, Alexandria, and Fredericksburg. LSNV also has an office at the Fairfax Courthouse.

In addition to the usual legal aid caseload of civil domestic, housing, and public benefits matters, LSNV recently has seen a huge increase in demand for bankruptcy and mortgage foreclosure assistance, Ferguson said. The agency collaborates with government agencies and private industry to address the demand.

But he estimates that probably no more than 20 percent of the need for all legal aid categories is met.

"This is the challenge of this economy: There are so many poor people out there, and there are so many fewer resources to help them. We're doing what we can with what we've got," Ferguson.

For more information on LSNV's programs, see www.lsnv.org.

# Arlington Elder Law Program Can Inspire Other Bars

by Erica F. Wood

SIX TIMES A YEAR at 12:30 PM attorneys sit at a table on the seventh floor of the Arlington County human services building. They unwrap their sandwiches and trade news. Among them are elder law attorneys, trusts and estate practitioners, legal services staff, geriatric care managers, the director of the Area Agency on Aging and perhaps staff from Adult Protective Services. The atmosphere is casual, laced with humor. But the topics are serious — guardianship, Medicaid, long-term care, powers of attorney, and advanced directives.

This is the Arlington County Bar Association Committee on Law and Aging, and it has been holding these meetings for more than twenty-five years.

The committee, organized in the early 1980s, is a brain child of the directors of the area agency on aging and the local legal services program. They asked, why not create a bar association forum so that public and private attorneys interested in elder law (although there was no such term then) could come together to exchange information on practice, learn the latest, and interact with specialists in aging? The group began to meet, and some members have remained constant attendees over the years. The meeting usually includes a speaker, opportunity for questions, and time for discussing knotty practice problems. Sometimes only five members show up, or the room might be packed with more than twenty, as occurred a few years back when the topic was guardianship and mental commitment. The committee is currently cochaired by Edward E. Zetlin and Elizabeth L. "Betsey" Wildhack.

At the meetings, committee members learn about new regulations or trade tips on document drafting. Over the years, topics have included Medicare supplemental insurance, reverse mortgages, the U.S. Department of Veterans Affairs fiduciary program, pooled trusts, annuities, and Medicaid appeals. Speakers have described prosecution of elder abuse cases, changing rules on transfers of assets, new regulations on emergency medical services, do-not-resuscitate orders, the Virginia Department for the Aging's long-term care ombudsman program, and changes in guardianship law. Committee members leave meetings with useful guidance, new contacts, and potential solutions for challenging practice and ethical quandaries.

The committee has moved beyond the exchange of information to action on behalf of the community.

It began cosponsoring Elder Law Day — a May 1 program traditionally held in a senior residential building or a library. The gathering features a notable speaker — such as a legislator, judge, county Board of Supervisors member, or national expert — followed by workshops for seniors.

In 1988, the committee recognized that there were individuals — many elderly and some incapacitated — in the county for whom the court had difficulty securing a guardian. Committee members agreed to serve pro bono as guardians. The committee, with the county Commission on Aging, developed a guardianship program in which trained volunteers perform guardianship services under the direction of a coordinator, and committee members offer advice and training. The Arlington Volunteer Guardianship Program has been operating for twenty years. Committee members train new volunteers on Saturdays; Some members also volunteer as guardians, and some serve on a guardianship screening committee that reviews Adult Protective Services cases for which guardianship might be needed.

In the mid-1990s, the committee saw that some nursing home contracts included illegal, unenforceable, unfair, or ambiguous provisions. Members obtained and analyzed the contracts of area facilities, wrote a detailed report, published a consumer brochure, and won a Virginia State Bar award for the project. On the wave of this success, the committee, with Legal Services of Northern Virginia, received a mini-grant to develop a 2001 *Consumer's Guide to Assisted Living in Virginia* on legal rights and what consumers need to know before they sign the contract.

Other committee projects include continuing legal education programs on elder law and producing letters that take positions on legislative issues or proposed regulations.

If a group like this works in Arlington, why not in other areas of the state?

Local bar association committees on aging bridge the public and the private bar, as well as legal and aging networks. They offer a focal point for elder law attorneys — or any attorneys who find themselves fielding clients' questions about aging issues. Local bar committees on aging have long been promoted by the American Bar Association Commission on Law and Aging. Currently, the Virginia Department for the Aging Project 2025 on elder rights (see http://www.project2025virginia.org/) assists local bars throughout Virginia to form these committees.

With the state's population graying, the committee on law and aging is an idea whose time has come. Get out your sandwiches and begin!

# Legal Education Prepares Students to Weather Tough Times

by Tara L. Casey

"I JUST DON'T THINK I CAN BE A LAWYER," she said.

This law student is approaching graduation with the feeling that her job prospects are dwindling. Her job hunt had hit an interminable traffic jam as she senses that more candidates than opportunities are clogging the marketplace. Adding to her anxiety, she does not know how she will pay back her student loans — a figure nearing six digits. After working so hard to get into law school, do well in her classes, and build a résumé that would land her the job of her dreams, she is considering abandoning a legal career altogether to survive the current economic storm.

Hold on: two words that communicate patience and persistence. Although the job market appears bleak and news of cutbacks and layoffs dominate the headlines, a law student need not fear life after graduation.

True, the landscape is quite different than it was five years ago, when the seeds of becoming a lawyer were sown in a student's brain. Then, law school was viewed as a bridge to a rewarding career that provided a comfortable salary and a fair amount of job security. Now, according to a recent survey by LexisNexis, 21 percent of law students regret attending law school because of the changing legal marketplace. Furthermore, 35 percent of students do not feel adequately prepared to succeed in the new marketplace. Debra Cassens Weiss, "As Law Firms Respond to Crisis, 21% of Law Students Regret Choice," *ABA Journal* online, Dec. 9, 2009, available at http://www.abajournal.com/news/article/as_law_firms_respond_to_crisis_21_of_law_students_regret_choice/

Indeed, a majority of attorneys believe that the recent economic downturn fundamentally changed the "business of law." (Peter Vieth, "A Time of Transition," *Virginia Lawyers Weekly,* Dec. 7, 2009, at 1) In response to these dour times, many see the legal profession in a state of transition. Transition to what remains uncertain. However, as the legal community adapts to the times, a law student must likewise adapt, recognizing that the old way of finding that first job may need to be tweaked to be successful.

Traditionally, a law student believed that good grades and a high class rank from an esteemed law school would guarantee entry into any legal environment. These factors may still influence recruitment in some areas, but many prospective employers are looking for candidates with the added credential of practical skills experience. In the legal profession, where time is money, employers are searching for candidates who already bring a skill set to the workplace. Furthermore, as graduates compete with licensed attorneys for positions, it behooves the law student to acquire skills necessary to level the playing field.

Fortunately, as Renae Reed Patrick showcased in the December 2009 issue of *Virginia Lawyer*, Virginia law schools are rich in clinical and pro bono offerings that span subject matters as well as practice areas. Law students who take advantage of these programs gain an edge in the job market, because employers increasingly value the importance of practical experience in new hires.

Because the economy has affected law students and lawyers alike, there is much fertile ground for networking opportunities. Many attorneys are empathetic to the difficulties law students face in the current job market. As a result, these attorneys — especially alumni — are open to speaking with law students about practice area and personal career path. Introductions to these attorneys may be made by law professors or career services personnel. Although these meetings may not be in reference to a particular position, they provide a law student with an invaluable opportunity to learn more about a specific field as well as cultivate contacts within a legal community.

Additionally, most voluntary bar associations offer student rates for membership. By becoming involved with a bar association during law school, a law student establishes connections within a legal community earlier than his or her peers. Law students who invest time in meeting lawyers outside of the job-search context may find themselves with more opportunities in the long run.

The economy may have altered the marketplace for law students approaching graduation, but legal education itself may be what empowers a student to persevere. During their three years, students are schooled in the art of logical reasoning, regardless of the course or subject matter. Law professors teach students to identify an issue and reason toward a conclusion. As a result, the legal profession is, at its essence, a problem-solving profession.

Currently, law students are facing a daunting problem — a competitive job market in the midst of an economic recession. But because of the training they receive both inside and outside of the classroom, law students are uniquely poised to weather this storm. They just need to hold on.

# Young Lawyers: In Bad Times, Expand Your Skills

by Elizabeth J. Atkinson

ARE THERE TOO MANY LAWYERS IN AMERICA?

With the news of deferred associates, laid-off lawyers, and the high per capita ratio of lawyers in the United States, it certainly seems as if we have too many lawyers.

But from the perspective of judges who see increasing numbers of pro se litigants and from my perspective as a board member of the Community Tax Law Project — a nonprofit that provides legal assistance with tax disputes — there are not enough lawyers.

Perhaps the legal profession has lost its focus as a profession that helps people solve problems.

Recent changes in the legal profession have been widely publicized. The boom years saw explosive growth of the financial sector, and stories of lawyers making $160,000 straight out of law school were widespread. The so-called Cravath model for recruiting, training, and retaining lawyers created competition among the largest law firms for the top graduates of the top law schools and led to ever-increasing starting salaries.[1]

However, corporate clients of the large law firms started to question why they should pay for the training of new law graduates doing such tasks as document production and legal research. Advances in technology have led many law firms to send these legal tasks offshore to places such as India, where the talents of the best graduates can be procured at far less cost per hour. Many new American law graduates now struggle for a foothold in the legal profession, and those in law school right now, seeing recent graduates with deferred offers, are nervous about their futures.

Lawyers who can provide practical solutions to their clients' problems will always be in demand. Those lawyers who can figure out how to deliver services at a reasonable cost will prosper.

The legal marketplace is changing rapidly, and the pace of change has been accelerated by the economic downturn. Law students and new practitioners should develop skills that will be in demand in the new landscape.

One of the most insightful writers on the legal profession today is Richard Susskind, author of *The End of Lawyers?*[2]. In this book, Susskind, who is both a lawyer and a technology expert, uses the analogy of clothing production: you can buy a suit that is mass-produced, partly mass-produced with some tailoring, or completely custom-made. He sees the legal profession adapting to this model. Some legal services can be provided on a large scale through automation. Others will be partly customized — form documents, for example, are adapted for the need at hand. And some services will be fully customized. As the model changes, so will the pricing. Most legal services are now priced by the billable hour. As legal services are commoditized, fixed fees and other predictable pricing models will gain traction.

While we may debate how quickly these changes will come and what form they will take, there is no question that lawyers who can adapt will be able to leverage today's profound changes to their advantage. Clients are increasingly able to demand changes from law firms and entrepreneurial lawyers at smaller firms can attract work that at one time would have been sent only to the largest firms.

Law schools must adapt to these changes also. The traditional legal curriculum has focused on providing students with a broad base of theoretical knowledge of the legal system with core courses on major areas of the law: property, torts, civil procedure, and constitutional law. There is some teaching of basic practical skills, such as legal writing and moot court. However, law students still graduate ill-equipped to practice law. They must undergo a great deal of on-the-job training before they are ready to deal with clients and the business of practice.[3]

Recently, law schools have added clinical courses and third-year practice opportunities so that graduates emerge with more practical skills, such as client interviewing and counseling. All of the law schools in Virginia offer clinical program opportunities. Some schools offer joint degree programs that couple a law degree with business education, such as master's degree in business administration. Law schools also offer master of laws programs that provide specialized training in areas such as tax and employee benefits. Certainly law firms are interested in hiring graduates who can hit the ground running. That is why judicial clerkships are valuable to new lawyers and to law firms alike. Similarly, law firms that have deferred associate offers have encouraged those associates to obtain experience by volunteering for non-profits and providing pro bono legal services.

The practical side of the law school curriculum has traditionally focused on litigation skills, but increasingly law firms value quantitative skills such as accounting. Also, regulatory law and corporate governance law require specialized knowledge. Right now the practice areas that are hot are bankruptcy and consumer law, where understanding of financial data and complex financial instruments is essential. Many lawyers serve as board members of nonprofit organizations, and their expertise is valued because of the increasing complexity of governance issues and the regulation of nonprofits by the Internal Revenue Service and the states.[4]

Many new lawyers have found that working in government service or for a nonprofit is more fulfilling than the starting work at a law firm, which has

often been drudge work. Many cases that have reached the U.S. Supreme Court started with a public interest lawyer or a private lawyer working pro bono. A notable example is Virginia's own Oliver W. Hill Sr. who was part of the team on the cases known as *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Opportunities in government service have been increasing as older government lawyers retire and as regulation creates more legal jobs in the public sector.

Are these changes in the legal profession likely to increase or decrease access to justice? Judges see more pro se litigants because many people either cannot afford an attorney or the financial stakes in the matter do not justify the cost of a lawyer. If we are experiencing an "industrial revolution" in legal services, then technology and scalability of costs will increase broad access to justice, especially for individual consumers.

There will still be a qualitative difference in legal services and the threat that parties with more resources will be able to buy a result. But would that scenario be any worse than the system we have now?

Endnotes:

1 *See* William D. Henderson, "Are We Selling Results or Résumés?: The Underexplored Linkage between Human Resource Strategies and Firm-Specific Capital," Indiana Legal Studies Research Paper No. 105.

2 Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services*, Oxford University Press, 2008.

3 *See*, for example, Charles E. Rounds, "The Need for Back-to-Basics Law Schools" at http://taxprof.typepad.com/taxprof_blog/2010/01/-the-need-for-.html.

4 *See* Guidestar, "The IRS View of Non-Profit Governance," http://www2.guidestar.org/rxa/news/articles/2009/the-irs-view-of-non-profit-governance.aspx.

## On-the-Job Training Opportunities for Lawyers

Thanks to the generosity of Virginia lawyers, the following legal experience opportunities are available to lawyers or law students through foundation-supported internships, externships, and clerkships:

**Public Service Internships for Virginia Law Sudents**
Virginia Law Foundation

Open to first- and second-year law students from Virginia law schools, this program provides stipends to selected students who perform public service legal work over the summer through an approved organization. The internships enable organizations to hire students as paid interns to serve indigent clients and facilitate the administration of justice. In 2010, the VLF will give $5,000 to support internships at each of the eight schools. Applications are made through the individual schools' career services offices. Information: http://www.virginialawfoundation.org/support.htm

**Externships and Judicial Clerkships**
Just the Beginning Foundation

The Just the Beginning Foundation sponsors several pipeline projects to draw youth into the law as a profession. Among them are:

**Externship Program**
A program for law students, the JTBF Externship exposes law students to legal opportunities, helps them build résumés, and assists them through the job market to the job that best suits them. The JTBF matches law students with federal and state judges across the United States. The program encourages judges to provide law students with assignments that will enhance their legal research, writing, and analytical skills. Students work with their judge for a minimum of ten hours per week for one semester for school year externships and a minimum of thirty-five hours per week for eight weeks for summer externships. The application deadlines are February 6, 2010, for fall and summer externships and October 15, 2010, for spring 2011.

**Share the Wealth Clerkship Program**

The JTBF Share the Wealth Judicial Law Clerk Program is a referral program run by eight federal district court judges. It is an opportunity for law students to be considered for eight federal district court clerkships in one interview. The participating judges screen qualified law student applicants, select twelve finalists, and invite the finalists for panel interviews. Those twelve students are then considered for open clerkship positions with the judges.

At the end of this process, students who are not extended offers by the eight-judge panel may have their applications shared with other judges who have requested to receive information about the applicants. Many judges contact the JTBF to seek assistance in identifying competitive candidates from diverse backgrounds for consideration.

Judge Gerald Bruce Lee of the Eastern District of Virginia created the program because he and his colleagues want to encourage more minorities to compete for federal judicial clerkships. These judges accept applications from, consider, and hire law clerk applicants of all backgrounds, and the Share the Wealth application process is in addition to, not in lieu of, traditional application channels. The deadline for 2010 will be in early September.

Information on JTBF programs:
http://www.jtbf.org/index.php?submenu=ExternshipProgram&src=gendocs&ref=LawSchoolPrograms&category=Programs

Virginia attorneys are encouraged to visit the foundations' websites for information on donating to support these opportunities.

Virginia Law Foundation: http://www.virginialawfoundation.org/support.htm

Just the Beginning Foundation:
http://www.jtbf.org/index.php?submenu=Contribute&src=gendocs&ref=contribute&category=Main

# Blogging and Social Networking for Lawyers: Ethical Pitfalls

by James M. McCauley, Ethics Counsel, Virginia State Bar

AS SOCIAL NETWORKING WEBSITES such as Twitter, Facebook, MySpace, and LinkedIn become more popular among lawyers, judges, support staff, and clients, lawyers have to be mindful about ethical concerns that may not be obvious. Some lawyers might say that social networking does not present any novel issues for lawyers to worry about. Lawyers cannot afford to be so cavalier. Experienced lawyers and seasoned judges have suffered professional discipline for the improper use of social networking tools. The informality and speed that characterize social networking sites can contribute to errors and ethical transgressions. Social networks are public, easily searched, and permanently archived.

**Confidentiality**

Rule 1.6 of the Virginia Rules of Professional Conduct requires a lawyer to protect and not disclose a client's confidences and secrets, unless the client consents to the disclosure. Confidences are communications between lawyer and client that are protected under the common law attorney-client privilege. Secrets embrace all other information gained in the course of the lawyer-client relationship that the client wants kept confidential or that, if disclosed, would be detrimental or embarrassing to the client. Unlike Virginia, most states did not keep the "confidences and secrets" formulation when they adopted a rule modeled after American Bar Association Model Rule 1.6. ABA Model Rule 1.6 requires that all information relating to the representation of the client be kept confidential. It is important for Virginia lawyers who are admitted in other jurisdictions to know that other jurisdictions' rules on confidentiality. Under ABA Model Rule 1.6, even the client's identity and the fact of representation are confidential, whereas under Virginia's Rule 1.6, that generally is not the case.

A lawyer who discusses his or her cases on Twitter, Facebook, or a blog risks violating Rule 1.6, absent client consent. A lawyer could easily breach confidentiality on Twitter simply by tweeting to followers what they are doing at that particular time. A lawyer could try to avoid disclosing specific client information by keeping the message general and vague but this would not be interesting to read. A lawyer may consider having the client permit the lawyer to post information about the client's matter on a social networking site. However, the lawyer must ensure that any disclosure will not hurt the client's legal position or embarrass the client.

Since there might be information that is unknown at the outset of an engagement, an advanced consent may not be effective, because it was not informed. The client may be angry with the lawyer for posting information learned after the consent was given. In addition, there is a risk that the posted information may be read by the client's adversary, opposing counsel, or other third parties.

While it may be improper under certain circumstances for lawyers or their agents to mine for an opposing party's personal information on a social networking site, some lawyers don't think, don't know, or don't care that obtaining and using your client's information may be unethical.

The Illinois Attorney Registration and Disciplinary Commission began disciplinary action against an experienced assistant public defender who discussed her cases on her blog. She posted:

> #127409 (the client's jail identification number) This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because "he's no snitch." I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.[1]

In another post, the assistant public defender stated:

> "Dennis," the diabetic whose case I mentioned in Wednesday's post, did drop as ordered, after his court appearance Tuesday and before allegedly going to the ER. Guess what? It was positive for cocaine. He was standing there in court stoned, right in front of the judge, probation officer, prosecutor and defense attorney, swearing he was clean and claiming ignorance as to why his blood sugar wasn't being managed well.[2]

In yet another post, the assistant public defender vividly described her client's perjury in a criminal case.[3] In addition to the blog entries described above, the lawyer referred to a judge as being "a total asshole," and in another she referred to a judge as "Judge Clueless."[4] The Illinois Board has recommended her disbarment.[5]

Criticizing a judge in a blog got lawyer Sean Conway in trouble in Florida. In a conditional plea, Conway agreed to a reprimand for calling a judge an "evil, unfair witch" in a blog post. He claimed in a brief submitted to the Florida Supreme Court that his remarks were protected by the First Amendment, but the court disagreed and affirmed the disciplinary agreement.[6]

On Facebook, a user's profile, photographs, and updates are sometimes available to the public or to any other member who is authorized by the user. Facebook's platform allows users to add such "friends" and to send them messages, as well as leave postings on "friends"' profile pages through "comments" and "wall posts." Fortunately, privacy and security settings on Facebook allow the user to restrict or limit access to the user's profile to only members, the user's "friends," or even a select few "friends." But information can easily fall into the wrong hands. For example, in *People v. Liceaga*, a Michigan murder trial, the prosecutor sought to admit photographs found on the defendant's MySpace page as evidence of intent and planning.[7] The defendant's profile Web page contained photographs of himself and the gun allegedly used to shoot the victim, and in which he was displaying a gang sign.[8]

In *In the matter of K.W.*, a North Carolina court admitted into evidence an alleged child abuse victim's MySpace page as impeachment evidence. The court held that the victim's posting of suggestive photographs along with provocative language could be used to impeach inconsistent statements made to the police about her sexual history.[9]

Courts have also permitted information gathered on a person's social networking site to be used as evidence at sentencing. In *United States v. Villanueva*, the court found that postconviction images on the defendant's MySpace page of the defendant holding an AK-47 with a loaded clip — photos taken after the defendant had been convicted of a violent felony — could be used as evidence to enhance sentencing.[10]

**Trial Publicity**

Virginia Rule 3.6 prohibits a prosecutor or a defense lawyer from making public statements about pending criminal cases in which they are involved if the statement will have a substantial likelihood of interfering with the fairness of a trial by jury. Other states' versions of Rule 3.6 impose the ban in civil cases as well. As jurors use the Internet when they go home for the evening, there is a risk of a mistrial if the lawyers participating in the case are blogging or tweeting about it.[11]

A forty-year-old California attorney had his law license suspended for forty-five days over a trial blog he wrote while serving as a juror. Because of a blog post by Frank Russell Wilson, an appeals court reversed and remanded the felony burglary case, reports the *California Bar Journal.* As a juror, Wilson was warned by the judge not to discuss the case, orally or in writing. Wilson evidently made a lawyerly distinction concerning blogs: "Nowhere do I recall the jury instructions mandating I can't post comments in my blog about the trial," he writes, before posting unflattering descriptions of both the judge and the defendant. He also failed to identify himself as a lawyer to the trial participants, the *Bar Journal* notes.[12]

**Using Pretext to Obtain a Person's Information on a Social Networking Website**

As social networking websites such as Myspace, Facebook, and Twitter continue to become more popular, criminal and civil attorneys across the nation are beginning to find these websites useful for gathering evidence and personal information relevant to their cases. However, lawyers must be mindful of Virginia Rule 8.4(c), which prohibits deception and misrepresentation and Rule 8.4(a), which states that a lawyer cannot use the agency of another to violate the ethics rules. A recent ethics opinion by the Philadelphia Bar Association holds that a lawyer violates Rule 8.4 by employing a third party to go online and gain access to a person's information on Facebook by asking to be their "friend."[13]

**Misrepresentation**

A lawyer requested a continuance claiming a death in the family, but the Galveston, Texas, judge checked her Facebook page and discovered news of a week of drinking and partying. The judge informed the lawyer's senior partner of her misrepresentation. The judge told the *ABA Journal* that the lawyer "defriended" her.[14]

**Ethical Lapses by Judges**

A North Carolina judge has been reprimanded for "friending" a lawyer in a pending case on Facebook, posting and reading messages about the litigation, and accessing the website of the opposing party. *See In the Matter of B. Carlton Terry Jr.*, North Carolina Judicial Stds, Comm'n, No. 08-234 (April 1, 2009). Both the Virginia Rules of Professional Conduct and the Canons of Judicial Conduct prohibit ex parte communications between lawyers and judges about pending matters, subject to some limited exceptions. Virginia Rules of Professional Conduct, Rule 3.5 (e); Canons of Judicial Conduct, Canon 3B(7).

The Florida Supreme Court's Judicial Ethics Advisory Committee has issued an opinion holding that it is judicial misconduct for a judge to add as "friends" on Facebook lawyers who may appear before that judge. The committee believes that listing lawyers who may appear before the judge as "friends" on a judge's social networking page reasonably conveys to others the impression that these lawyer "friends" are in a special position to influence the judge. *See also* Va. CJC, Canon 2B.

**Lawyer Advertising Rules**

Lawyers should review Virginia Rules 7.1 and 7.2 to make sure all statements or claims made via a website, a blog, Twitter, Facebook, or LinkedIn are in compliance with the advertising rules. Rule 7.1 prohibits a lawyer in his or her public communications from making false or misleading statements about the lawyer or the lawyer's services. Rule 7.2 imposes additional requirements on "lawyer advertising," including identifying by name and office address the lawyer responsible for the advertisement. Rule 7.2(e). Consider also reading Virginia Legal Ethics Opinion 1750 (Advertising, Compendium Opinion). Lawyers must ensure the advertising rules are followed if using Internet media to promote their services — especially if they use celebrity endorsements, client testimonials, specific case results, specialization claims, or comparative statements. Moreover, advertising with

electronic media is subject to Rule 7.2(b), which requires that a record be maintained of the advertisement for one year from its last appearance date.

For example, LinkedIn has a section on specialties. In many jurisdictions, lawyers are either forbidden from holding themselves out as specialists or required to meet certain requirements to do so. In some states this means the lawyer must be certified as a specialist under that state's specialization certification program. Virginia does not have such a program. However, Virginia does not prohibit a lawyer from holding out generally as a specialist or expert in an area or field, so long as the claim can be factually substantiated. Virginia's Rule 7.4 prohibits a lawyer from saying that he or she is certified as a specialist, unless the communication also has a required disclaimer that the state of Virginia does not have a procedure for approving or certifying specializations.

A lawyer who tweets about obtaining a huge verdict in a case likely violates Rule 7.2's prohibition against advertising specific case results, because the 140-character limitation on tweets makes it impossible to include the required disclaimer. Rule 7.2(a)(3).[15] Rule 7.2(e)'s requirement of responsible attorney identification may also preclude the use of Twitter as an advertising medium.

Client recommendations or endorsements must be scrutinized by the lawyer for compliance with the advertising rules. South Carolina Ethics Advisory Opinion 09-10 states that a lawyer is responsible for any recommendations, endorsements, or ratings ascribed to that lawyer on a third-party website. If the lawyer cannot monitor and remove or edit noncompliant statements, the lawyer must cease participation on that website. Some legal ethics experts believe a lawyer should not be held responsible for an unsolicited endorsement or recommendation.[16]

LinkedIn has a section on recommendations in which the member can ask other members for a recommendation. Some states do not allow client testimonials, so Virginia lawyers admitted and practicing in other states should be aware of those states' rules. Even if the state, like Virginia, allows client testimonials, endorsements, or recommendations, the testimonials must be monitored, revised, or removed so as to comply with Rules 7.1 and 7.2. For example, the lawyer cannot permit to remain on his or her LinkedIn page a client recommendation that says the lawyer is the "best personal injury lawyer in town," because it is a comparative statement that cannot be factually substantiated.

**Is There a Form of "Solicitation" that Is Prohibited or Restricted?**

Virginia's Rule 7.3 regulates direct communication with prospective clients and states "[i]n person communication means face-to-face communication and telephonic communication." Thus, invitations from a lawyer to a prospective client into the lawyer's LinkedIn or Facebook page would likely not fall within the rule. However, lawyer solicitation rules vary from state to state, so a Virginia lawyer licensed in other jurisdictions should review all applicable ethics rules to determine whether these forms of communication are subject to regulation as a form of solicitation.

**Creating Unintended Lawyer-Client Relationships**

The lawyer must consider whether informational advice on a blog or website creates the impression of giving legal advice that can be relied on by a visitor. Clear disclaimers can be helpful in resolving this problem. The question to ask is, "Does the online resource do anything that would create client expectations?"

Legal information of general application about a particular subject or issue is not "legal advice" and should not create any lawyer-client issues for the blogging or posting lawyer. Appropriate disclaimers will assure this conclusion. However, if a lawyer, by online forms, e-mail, chat room, or a social networking site, for example, elicits specific information about a person's particular legal problem and provides advice to that person, there is a risk that a lawyer-client relationship will have formed. Virginia Legal Ethics Opinion 1842 (2008) addresses this issue somewhat in connection with visitors on a law firm's Web page. The Virginia State Bar's Standing Committee on Legal Ethics believes the lawyer does not owe a duty of confidentiality to a person who unilaterally transmits unsolicited confidential information via e-mail to the firm using the lawyer's e-mail address posted on the firm's website. The person is using mere contact information provided by the law firm on its website and does not, in the committee's view, have a reasonable expectation that the information contained in the e-mail will be kept confidential.

On the other hand, if the law firm's website invites the visitor to submit information via e-mail to the law firm for evaluation of their claim, there will be a limited lawyer-client relationship for purposes of Rules 1.6, 1.7, and 1.9. The law firm may be disqualified under those circumstances if it also represents a client adverse to the website visitor. The website disclaimer might state, for example, that no attorney-client relationship is being formed when a prospective client submits information and that the firm has no duty to maintain as confidential any information submitted. The disclaimer should be clearly worded so as to overcome a reasonable belief on the part of the prospective client that the information will be maintained as confidential. In addition, the committee recommends the use of a "click-through" (or "click-wrap") disclaimer, which requires the prospective client to assent to the terms of the disclaimer before being permitted to submit the information.

**Law Firm Policies and Supervision of Employees**

Lawyers in law firms have an ethical duty to supervise subordinate lawyers and nonlawyer staff to ensure that their conduct complies with applicable professional rules, including the ethical duty of confidentiality. *See* Rules 5.1 and 5.3. To this end, law firms should have policies to govern employees' use of social networking websites during and outside of normal business hours.

**Ethics Watch** continued on page 59

# Global Law and Global Challenges

by Stuart S. Malawer, special editor

As the practice of law becomes more global and public policy analysis increasingly involves transnational issues, an understanding of national, regional, international, and transnational legal systems is now essential. The critical questions of this new decade cannot be addressed effectively without understanding global and legal aspects that affect concerns that scarcely existed before the destruction of the World Trade Center in New York City.

Since September 11, 2001, legal rules address a range of transnational problems, including those created by advances in technology and historic changes in international relations — changes such as the ascendancy of China and petrodollar economies. Many of these rules emerged in the 1980s and 1990s in response to challenges of the post-Cold War era and globalization. But the need for newer rules was turbocharged by unexpected recent challenges, which include terrorism, financial chaos, and environmental and national security.

The emergent rules are drawn from disparate legal systems. This newer body of legal rules is termed "global law," which can be defined as legal rules drawn from different systems that address a range of cross-border topics. The rules originate from public international law (such as the law of war), specialized international legal systems (such as rules governing the international environment, global trade, and international finance), regional legal systems (governing such areas as human rights), and major national legal systems as they confront transnational problems (such as torture, counterterrorism, and cybersecurity). These rules sometimes establish binding obligations, and other times, something less.

To competently practice law and undertake policy analysis in today's world of failing states, transnational terrorism, global pollution, and growing multilateral institutions, practitioners and policy makers must understand the legal contours of this dramatically changing environment. To this end, in summer 2009 George Mason University revamped its annual overseas prelaw program, which previously had focused on traditional issues of British and comparative law. The revised and expanded program now emphasizes critical concerns that have developed over the past decade and offers graduate credits to students in a range of disciplines.*

GMU's Global Law Program was held for two weeks last summer at New College, Oxford. It was taught primarily by Oxford University law professors, who have submitted articles for this special issue of *Virginia Lawyer*, sponsored by the International Practice Section of the Virginia State Bar.

My article addresses cyber warfare and proposes a multilateral response. Robert Wagstaff (Exeter College) discusses terror detentions under American and British law, while Nicholas Bamforth (Queen's College), examines two separate sets of European laws that address human rights and involve the European Union and the European Convention on Human Rights. Catherine MacKenzie (Green Templeton College) assesses international environmental law with a focus on climate change and ecology.

Virginia was founded in the seventeenth century as a trading colony by individuals on an international adventure. Today, Virginians need to develop the same global mindset if we are to thrive in a vastly more complicated — but no less exciting — world.

*http://www.OxfordGlobalLaw.com

# Cyber Warfare:
## Law and Policy Proposals for U.S. and Global Governance

by Stuart S. Malawer

Cybersecurity is the newest and most unique national security issue of the twenty-first century. Cyber warfare uses computer technologies as defensive and offensive weapons in international relations.[1] Until now, there has been no national debate within the United States over the concept of cyber warfare; neither its meaning nor the international laws that govern this concept have been discussed at any length, and nor have the domestic rules regarding it.

The debate over cyber warfare is only now emerging in the United States, the United Kingdom, and the foreign policy dialogue between the U.S., the Russian Federation, and other nations. "[M]uch of the debate on policies related to cyber war is happening behind closed doors."[2] National and international understanding and strategy should be developed, and infrastructure must be implemented nationally and internationally.

It is important to explain cyber warfare between states in the context of domestic and international affairs from a legal-political perspective.[3] This article does not contain a discussion of the related issue of cyberattacks by criminal organizations, terrorists, or nonstate actors.[4]

**Background**

Recent events have given great significance to the use of cyberspace in conflict among nations and international relations generally.

In early July 2009, a wave of cyber attacks, presumably from North Korea, temporarily jammed South Korean and American government websites.[5] This came in the midst of North Korea's multiple and serial missile launches, general diplomatic tension over North Korea's nuclear program, and sanctions threatened by the U.S. and United Nations. This Korean episode followed quickly on the heels of the already well-known Russian Federation's cyber attacks against Estonia in 2007 and Georgia in 2008. Other examples include Israeli cyber attacks on Syria in 2007 and U.S. use of cyber weapons in Iraq.[6]

As a response to the increasing use of cyber attacks in international relations, in June 2009 U.S. Secretary of Defense Robert M. Gates created a new defense cyber command[7] and nominated the director of the National Security Agency to head it. Senate confirmation is pending.[8] In bilateral relations, the United States and Russia have been "locked in a fundamental dispute" over the growing concern over cyber attacks.[9] President Barack Obama addressed the issue of cybersecurity in a major speech on May 29, 2009, and proposed a cybersecurity czar.[10] He nominated Howard A. Schmidt, formerly of Microsoft Corporation, to serve in that position.[11] This speech was accompanied by the release of the administration's *Cyberspace Policy Review*. In December 2009, the United States entered into talks with the Russian Federation on cybersecurity and cyber warfare.[12]

Questions are raised by these recent events include:

- Would the federal government monitor private-sector networks, thus raising a slew of privacy concerns and further fueling debates that were first raised during the George W. Bush era about wiretapping without warrents?
- What would be the expanding role of the military in defensive, offensive, and preemptive cyber operations as the military and the intelligence agencies prepare for digital war?
- What are the rules of international law concerning cyber warfare when a country is attacked and when can it be used prior to an attack?

- Have traditional international law rules that govern armed attack failed to keep current with technology and digital warfare?

Within the last few months, various governmental and expert reports have been issued. They include:

- *Cyberspace Policy Review — Assuring a Trusted and Resilient Information and Communications Infrastructure* (White House, May 2009) [13]
- *Cyber Security Strategy of the United Kingdom — Safety, Security and Resilience in Cyber Space* (U.K. Cabinet Office, June 2009) [14]
- *Technology, Policy, Law, and Ethics Regarding U.S. Acquisition and Use of Cyberattack Capabilities* (National Academy of Sciences and National Research Council, 2009) [15]
- *Securing Cyberspace for the 44th Presidency — A Report of the Center for Strategic and International Studies Commission on Cybersecurity for the 44th Presidency* (Center for Strategic and International Studies, December 2008).[16]

**Highlights from Recent Reports**

*Cyberspace Policy Review — Assuring a Trusted and Resilient Information and Communications Infrastructure* (White House, May 2009)

This report was released in conjunction with President Obama's extended news conference on May 29, 2009. It states that the federal government is not organized to address cyberspace. It acknowledges a need to conduct a national dialogue on cybersecurity and that national security should be balanced with the protection of privacy rights and civil liberties that are guaranteed by the Constitution and that form the bedrock of American democracy.

The federal government should cooperate with other nations and the private sector to solve cybersecurity problems: "Only by working with international partners can the United States best address these challenges"[17]. The report points out a host of issues that need to be resolved, such as defining acceptable legal norms for territorial jurisdiction, sovereign responsibility, and the use of force. Development of national and regional laws to govern prosecution of cybercrime, data preservation, and privacy presents significant challenges.

The report declares that "the Nation's approach to cybersecurity over the past 15 years has failed to keep pace with the threat"[18]. The report does not address cyber warfare. It does not offer policies, but it notes a need for enhanced international cooperation.

*Cyber Security Strategy of the United Kingdom — Safety, Security and Resilience in Cyber Space* (U.K. Cabinet Office, June 2009)

Shortly after the Obama administration released its report, the United Kingdom released a report on cybersecurity. Their reports say that both the United States and the United Kingdom "are increasingly concerned by what they deem to be one of the 21st century's biggest security risks: the threat of cyber attacks"[19]. The U.K. report, like the U.S. report, calls for more international coordination. The report also calls for the creation of a central office of cyber security.

One interesting quote puts the issue of cyber attacks in a clear historical perspective: "Just as in the 19th century we had to secure the seas for our national safety and prosperity, and in the 20th century we had to secure the air, in the 21st century we also have to secure our advantage in cyber space. This Strategy — our first national Strategy for cyber security — is an important step towards that goal"[20].

The report acknowledges the need to comply with core constitutional issues: "Our approach to national security is clearly grounded in a set of core values, including: human rights, the rule of law, legitimate and accountable government, justice, freedom, tolerance and opportunity for all"[21]. It further acknowledges that the national security challenges transcend international boundaries.

In discussing the proposed new office of cyber security, the report declares that it needs to "identify gaps in the existing doctrinal, policy, legal and regulatory frameworks (both domestic and international) and where necessary, take action to address them"[22]. Unfortunately, as in the U.S. report, these shortcomings and defects are not identified, let alone addressed.

*Technology, Policy, Law, and Ethics Regarding U.S. Acquisition and Use of Cyberattack Capabilities* (National Academy of Sciences and National Research Council, 2009)

This report by the National Academy of Sciences approaches more directly the task of delineating the public policy and legal issues of cyber warfare, but it does not give adequate pro-

posals to confront it. It defines "cyber attack" as "deliberate actions to alter, disrupt, deceive, degrade, or destroy computer systems or networks or the information and/or programs resident in or transiting these systems or networks"[23]. This is distinguished from intelligence-gathering activity.

The report reviews the scant public writing on cyber attack and cyber warfare that started in the mid-1990s. One of the earliest studies addressing the strategic implications was published by the RAND Corporation.[24] While this newest report does not provide an analysis of U.S. policy regarding cyber attacks, it includes general findings and recommendations.

The authors hoped that their report would stimulate a public discussion of cyber attack as an instrument of foreign policy at the nexus of technology, policy, ethics, and national security. They consider that cyber weapons are so different from any other weapons that a new legal regime is needed. The authors draw a historical analogy with the debate over and study of nuclear issues fifty years ago. The report acknowledges that the rise of nonstate actors raises new and novel concerns.

The authors consider that a legal analysis of cyber attacks should be based upon the concepts of use of force and armed attack as described in the U.N. Charter. The authors believe that the law governing the legality of going to war and the law defining warlike behavior also applies to cyber attacks. The report declares that "today's policy and legal framework for guiding and regulating the U.S. use of cyberattack is ill-informed, undeveloped, and highly uncertain"[25].

The report concludes that "the conceptual framework that underpins the U.N. Charter on the use of force and armed attack and today's law of armed conflict provides a reasonable starting point for an international legal regime to govern cyberattacks"[26]. The authors recommend that the U.S. government should find common ground with other nations regarding cyber attacks.

*Securing Cyberspace for the 44th Presidency — A Report of the Center for Strategic and International Studies Commission on Cybersecurity for the 44th Presidency* (Center for Strategic and International Studies, December 2008)

This report served as the basis for much of President Obama's speech of May 29, 2009, and its accompanying report. The report concluded that cybersecurity is now a major national security problem, that emerging U.S. policy must respect privacy and civil liberties, and that a comprehensive national security strategy should be developed that incorporates domestic and international dimensions.[27] The report declares that there is a need to modernize authorities, and recommends that the White House should take the lead. "U.S. laws for cyberspace are decades old, written for the technologies of a less-connected era. Working with Congress, the next administration should update these laws."[28]

**Major Issue Confronting the U.S. and Global System**

The United States and other nations should create a sustainable global legal structure that promotes cooperation among nations to confront cyber warfare. Laws that govern the use of force and armed attacks under the U.N. Charter need to be clarified in this digital era. President Obama's reliance on a resurrected notion of the "just war doctrine," as enunciated in his acceptance speech for the Nobel Peace Prize in Oslo, further heightens the need for legal clarity.[29] Is the best defense against cyber attacks the use of robust offensive actions in cyberspace, and is it lawful?[30]

The Convention on Cybercrime adopted by the Council of Europe in 2001 is a good starting place, in addition to the U.N. Charter, in formulating a strategy to update the rules of law and to create a global governance structure to regulate cyber warfare.[31] The U.S. Senate ratified this convention in August 2006 and entered it into force in 2007. The convention highlights the many issues that play a role in regulating cybercrime. It defines five criminal offenses: illegal access, illegal interception, data interference, system interference, and misuse of devices. Even though the Russian Federation is not a member of the Convention on Cybercrime and argues that cross-border searches to investigate Internet crime violates its constitution,[32] the complex issue of regulating cyber warfare is addressed by this convention. National sovereignty, privacy and territorial integrity, and mutual assistance should be considered in formulating a new strategy for cyber warfare.

**Proposal**

Cyber warfare requires greater international legal and diplomatic initiatives — both bilateral and multilateral. Nations have a mutual interest in limiting any resort to cyber warfare.[33] A limitation could help prevent the destruction of both governmental and civil infrastructure and protect the welfare of millions of people. As early as July 2000, the Russian Federation submitted to the United Nations General Assembly a draft resolution, "Principles of International Information Security," that would prohibit the creation and use of tools for a cyber attack.[34]

A diplomatic conference should be convened similar to the naval and disarmament conferences in the interwar period.[35] Attendees could draft a global treaty to regulate cyber warfare and create political institutions that would enforce the adopted rules. The most important set of rules would limit the offensive use of cyber warfare in international relations.

In the interwar period of the 1920s and 1930s, naval conferences limited the number of capital ships (battleships) of the major powers that were capable of offensive operations.[36] The general disarmament conferences limited the right to go to war.[37] However, there were no limitations on the then newest form of offensive weapons — the aircraft carrier.[38] It would probably have been too late. Fleets of aircraft carriers were already afloat. These diplomatic conferences provided "hallow results" and "proved to be a monument to illusion."[39] Like those aircraft carriers that subsequently attacked Pearl Harbor, cyber warfare needs to be restricted and regulated.

The global community saw the consequences of the accumulated failure of the interwar conferences come to fruition in the late 1930s and, for the United States, on December 7, 1941.

This should be sufficient motivation to get it right this time, in the twenty-first century.

Endnotes:

1 General Wesley Clark recently wrote that "There is no form of military combat more irregular than an electronic attack. … It is tempting for policymakers to view cyberwarfare as an abstract future threat." Clark and Levin, "Securing the Information Highway: How to Enhance the United States Electronic Defenses." *Foreign Affairs* 2 (November / December 2009).

2 *Virtual Criminology Report 2009 — Virtually Here: The Age of Cyber Warfare.* 3 (McAfee 2009). This report, released late in 2009, discusses some of the broader and related issues of cyber warfare as well as the implications for the private sector and critical infrastructures.

3 This involves the use of such "weapons" as "logic bombs," "botnets," and microwave radiation that would be used to invade private, government, and military networks.

4 "FBI Suspects Terrorists Are Exploring Cyber Attacks." *Wall Street Journal* (November 18, 2009). Recent Chinese intrusions into Google servers highlight the foreign policy implications of state-sponsored computer intrusions for non-military reasons (commercial and censorship). This has set off a foreign-policy debate in the United States over global Internet freedom parallel to the emerging national-security debate over intelligence gathering and cyberwarfare. "Patriotism and Politics Drive China Cyberwar." *Financial Times* (January 14, 2010); "Web Access is New Clinton Doctrine." *Wall Street Journal* (January 21, 2010).

5 "Cyberattacks Jam Government and Commercial Web Sites in U.S. and South Korea." *New York Times* (July 9, 2009). This attack utilized roughly two hundred thousand computers that resulted in denial of services to both U.S. and Korean government and commercial websites. The attack utilized portions of the five-year-old MyDoom virus. Some experts consider this attack might have been by ordinary criminals. "Crippling Cyber-Attacks Relied on 200,000 Computers." *Financial Times* (July 10, 2009).

6 Only recently was it disclosed that militants in both Iraq and Afghanistan used off-the-shelf technology to intercept live feeds from U.S. Predator drones. "Officers Warned of Flaw in U.S. Drones in 2004." *Wall Street Journal* (December 12, 2009).

7 "Military Command Is Created for Cyber Security," *Wall Street Journal* (June 24, 2009).

8 "Beyond a cyber command, the Pentagon is grappling with a dizzying array of policy and doctrinal questions involving cyber warfare." "Questions Stall Pentagon Computer Defenses." *Washington Post* (January 3, 1010).

9 "U.S. and Russia Differ on a Treaty for Cyberspace," *New York Times* (June 28, 2009).

10 "Obama Outlines Coordinated Cyber-Security Plan," *New York Times* (May 30, 2009).

11 "Obama Names Howard Schmidt as Cybersecurity Coordinator." *Washington Post* (December 22, 2009).

12 This is a new American approach that differed from its earlier position that both the commercial and military use of software should be discussed together. "In Shift, U.S. Talks to Russia on Internet Security." *New York Times* (December 13, 2009). [Hereinafter cited as *U.S.-Russia Talks.*]

13 *Cyberspace Policy Review — Assuring a Trusted and Resilient Information and Communications Infrastructure* (White House, May 2009). [Hereinafter cited as *Obama Policy Review.]* http://www.whitehouse.gov/assets/documents/Cyberspace_Policy_Review_final.pdf

14 *Cyber Security Strategy of the United Kingdom — Safety, Security and Resilience in Cyber Space* (U.K. Cabinet Office, June 2009). [Hereinafter cited as *U.K. Cyber Report*.] http://www.cabinetoffice.gov.uk/media/216620/css0906.pdf

15 *Technology, Policy, Law, and Ethics Regarding U.S. Acquisition and Use of Cyberattack Capabilities* (National Academy of Sciences and National Research Council, 2009). [Hereinafter cited as *National Research Council Report.*] http://books.nap.edu/openbook.php?record_id=12651&page=R1

16 *Securing Cyberspace for the 44th Presidency — A Report of the Center for Strategic and International Studies Commission on Cybersecurity for the 44th Presidency* (Center for Strategic and International Studies, December 2008). [Hereinafter cited as *CSIS Report.*] http://csis.org/files/media/csis/pubs/081208_securingcyberspace_44.pdf

17 *Obama Policy Review* iv.

18 *Id.* v.

19 "Cyber Security Risk," *Financial Times* (June 26, 2009).

20 *U.K. Cyber Report* 5.

21 *Id.* 10.

22 *Id.* 18.

23 *National Research Council Report* S-1.

24 *Strategic Information Warfare: A New Face of War* (Rand Corporation 1996) as cited in *National Research Council Report* viii. This report identifies the earlier writings from 1998 to 2009 discussing international law and digital warfare. *Id.* at note 5 at viii. *See also*, Dept. of Defense, Office of General Counsel, *Assessment of International Legal Issues in Information Operations.* (Dept. of Defense 1999).

25 *National Research Council Report* S3.

*26 Id.*

27 *CSIS Report* 1

28 *Id.* 2.

29 "Remarks by the President at the Acceptance of the Nobel Peace Prize" (December 10, 2009). http://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize.

30 "U.S. Steps Up Effort on Digital Defenses." *New York Times* (April 28, 2009).

31 *Convention on Cybercrime* (concluded in Budapest on November 23, 2001).

32 *U.S.-Russia Talks.*

33 Countries such as China and North Korea may view cyber warfare as advantageous in an asymmetrical conflict with the United States.

34 Cited in *National Research Council Report* at 10-9.

35 "Genuine disarmament was never attempted after World War I, merely arms reduction and limits on certain types of naval weapons." *T. Bailey, A Diplomatic History of the American People* 654 (9th edition, 1974). [Hereinafter cited as *Bailey*.]

36 "The Five-Power Naval Treaty of Washington" (signed February 6, 1922); "The London Naval Conference" (signed April 22, 1930); "The Second London Naval Conference" (signed March 1936).

37 "The Pact of Paris" also known as "The Kellogg-Briand Pact." (signed August 27, 1928).

38 *Bailey* note 10 at 640.

39 *Id*. 648, 650.

# The Aftermath of Terrorism:
## Rule of Law Applies to Detainees in U.S. and U.K.

by Robert H. Wagstaff

On September 11, 2001, four jetliners were hijacked by nineteen non-Iraqi Middle Eastern terrorists, resulting in the deaths of almost three thousand innocent persons in New York City, Pennsylvania, and Arlington, Virginia. The ensuing panicked responses in the United States and the United Kingdom generated ill-conceived, discriminatory, and disproportionate legislative and executive actions that resulted in the detention of thousands without charge or trial. They were subjected to denial of habeas corpus, to secret evidence, to abuse, and to outright torture.

Since 2004, the U.S. Supreme Court and the U.K.'s highest court (the Appellate Committee of the House of Lords, or the "Law Lords") each issued four decisions to halt the illegal and unconstitutional actions taken by their respective legislative and executive branches of government, thereby both recognizing and enforcing the rule of law. The court decisions followed different but parallel paths to achieve the same results. The respective court rulings are consistent with the separation of powers, judicial competence, and the appropriate role of the courts in constitutional democracies.

**Judicial Review**

Since *Marbury v. Madison*[1] in 1803, the U.S. Supreme Court has had the authority to adjudicate the constitutionality of congressional acts and to say "what the law is." But in England, after the seventeenth century civil wars and the execution of King Charles I, parliamentary sovereignty became the touchstone of English law. The majority party in Parliament selects the prime minister, thus inextricably intertwining Parliament and the government. But a significant shift away from parliamentary sovereignty occurred when Parliament enacted the Human Rights Act of 1998 (HRA), which directly adopted the European Convention on Human Rights (ECHR) as domestic law. The HRA gives British courts the power to declare acts of Parliament incompatible with the ECHR, but the courts cannot yet directly hold parliamentary legislation to be unconstitutional. It is then the prerogative of Parliament to modify the incompatible law, and Parliament has always made modifications after a finding of incompatibility. The HRA is considered to be constitutional. The U.K.'s unwritten constitution is based upon the Magna Carta, the common law, the post Glorious Revolution 1688 Declaration of Rights, and various acts and treaties of Parliament. It has been facetiously suggested that the British constitution is not worth the paper it is not written on.

Parliament subsequently enacted the Constitutional Reform Act (CRA) of 2005, legislation that accomplished a direct constitutional restructuring and created a new Supreme Court, thus overtly acknowledging and endorsing the reality of imminent U.S.-style judicial review. Since October 2009, the highest court in the U.K. is no longer part of Parliament. The Law Lords are now Supreme Court justices and have moved out of Parliament into their own building, the historic Guildhall, which was comprehensively redesigned for the new, separate, and distinct Supreme Court of the United Kingdom. The CRA recognizes both the importance of the Rule of Law and the independence of the judiciary. There has thus been a voluntary divesture of absolute parliamentary sovereignty and recognition of the increased role of the judiciary.

The CRA said, "This Act does not adversely affect (a) the *existing* constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle."[2] The act further specifically guarantees continued judicial independence: "The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the *continued* independence

of the judiciary."[3] (emphasis added). This change to the judiciary occurred after the Law Lords' landmark decision in *A v. Secretary of State for the Home Department* (*Belmarsh I*).[4] British historian Anthony King said, "The divorce between the judicial branch and the other branches of government is thus now, or soon will be, total — or at least as total as is humanly possible."[5]

**Post-9/11 Decisions of the U.S. and U.K. Courts**

In their December 2004 *Belmarsh I* ruling, the Law Lords declared that under Section 4 of the HRA, Section 23 of the post-9/11 Anti-terrorism, Crime and Security Act of 2001 (ATCSA) was incompatible with the equality provisions of the European Convention on Human Rights, to which the U.K. is a signatory. ATCSA provided for the indefinite detention of nondeportable aliens suspected of associating with suspicious persons or organizations. HM Belmarsh Prison, southeast of London, was the detention venue. The Law Lords held that it was impermissibly disproportionate to single out noncitizens for such disparate and discriminatory treatment. In June 2008, after a series of preliminary statutorily based decisions and in a parallel landmark decision, the U.S. Supreme Court ruled in *Boumediene v. Bush*[6] that noncitizen detainees held by the U.S. at the Guantanamo Bay Naval Base, Cuba, were entitled to habeas corpus review as a matter of U.S. constitutional law. *Belmarsh I* and *Boumediene* represent a renaissance in both countries of the judicial recognition and enforcement of the rule of law. The *Belmarsh I* decision was based upon the requirements of the HRA, the ECHR, and the common law. *Boumediene* was based on the habeas corpus clause and the due process of law requirements of the Fifth Amendment to the United States Constitution.

Albeit emanating from different sources, these remarkably parallel decisions addressing post-9/11 U.S. and U.K. executive and legislative antiterrorism responses present a dramatic departure from the historical tradition of judicial nonintervention in matters of national security.[7] Both decisions are positive and forceful examples of courts actively identifying and enforcing the rule of law upon the other branches of government. Since 2000, the effective date of the HRA, the Law Lords (now Supreme Court justices) have come to recognize that the U.K. is a rights-based democracy and, insofar as the right to a fair trial is concerned, have in effect adopted the appellate judicial philosophy and rule of the United States.

The rule of law is seen by both the U.S. and U.K. courts to emanate from the Magna Carta of 1215 ("No freeman shall be seized or imprisoned, or dispossessed, or disseized, or outlawed, or exiled … save by the lawful judgement of his peers or by the laws of the land.") and to have matured through the common law so as to be specifically articulated and entrenched in the Human Rights Act of 1998, the first ten amendments to the U.S. Constitution, and the establishing and controlling documents of the European Union and the United Nations. It is correctly said that:

> The "rule of law" refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[8]

**Guantanamo Bay, Cuba**

Four post-9/11 United States Supreme Court cases (*Rasul*,[9] *Hamdi*,[10] *Hamdan*,[11] and *Boumediene*) address the issues of what rights the detainees at Guantanamo Bay possess and what actual constitutional detention authority the president has. Guantanamo Bay was selected by the Bush government as a de jure black hole where neither domestic nor international law, including the Geneva Conventions, applied. President George W. Bush maintained that the United States federal courts had no jurisdiction over the U.S. Naval Base at Guantanamo, and that international treaties prohibiting torture and mistreatment likewise had no application. Bush also declared that the Geneva Conventions did not apply to the detainees in Guantanamo inasmuch as they were not prisoners of war, but rather "unlawful combatants" — a term used by the U.S. Supreme Court in *Ex parte Quirin*[12] to describe German non-uniformed military saboteurs who landed by U-boats in New York and Florida during World War II.

*Rasul* established that the federal habeas corpus statute was applicable to Guantanamo, and *Hamdi* established that a U.S. citizen detained as

an unlawful combatant is constitutionally entitled to habeas corpus and must be given a meaningful opportunity to challenge any evidence against him. In response, Congress passed the Detainee Treatment Act of 2005[13], seeking to nullify *Rasul*. *Hamdan* held that the Detainee Treatment Act did not apply to pending cases and that only Congress — not the executive branch — had the authority to create military tribunals and that such tribunals must be compatible with the Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions. Congress's response was to promulgate the Military Commissions Act of 2006[14], which essentially endorsed the Bush executive tribunals and eliminated habeas corpus for pending cases. Finally, the court directly ruled in *Boumediene* that alien detainees in Guantanamo have a right under the U.S. Constitution to habeas corpus, and that detention in Guantanamo without habeas corpus or due process and the Military Commissions Act itself were unconstitutional.

The majority opinion in *Boumediene* holds that the case presents a distinct separation of powers issue and "the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers … [and] must not be subject to manipulation by those whose power it is designed to restrain"[15]. The majority was concerned that an unchecked executive could outsource detention to alien legal black holes and thereby avoid habeas corpus review and judicial oversight.

The determining quartet of decisions is quite reasoned and reasonable: federal courts have jurisdiction on a U.S. military base and aliens detained there are constitutional persons who have the benefit of habeas corpus. Before being found to be terrorists, the detainees are entitled to a due process fair trial. Given the reality of claimed unitary executive detention seasoned with abuse and torture, without charge or end, the justices of the Supreme Court acted to enforce the rule of law. If they had not, they would have allowed a lawless black hole to exist and would have become complicit in this constitutional terror.

While both the Law Lords and the U.S. Supreme Court have ultimately performed in similar fashion and share the same habeas corpus heritage and principles, the current U.S. Supreme Court differs significantly in its internal workings — a reality apparent in the high degree of contentiousness among the justices that is reflected in the Court's opinions. In contrast, in the U.K. there is unanimity or near unanimity, and always mutual respect and collegiality amongst members of the judiciary.

**HM Belmarsh Prison**

In *Belmarsh I,* eight of the nine Law Lords were satisfied that the alien detentions were unlawful and found the detentions to be a disproportionate and discriminatory response to what was strictly required by the exigencies of the situation, in that citizens and noncitizens are treated differently without rational objective justification.

The Law Lords spoke broadly with strong language:

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these.[16] (Lord Hubert Hoffman)

> The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.[17] (Lord Thomas Henry Bingham)

> Indefinite imprisonment … on grounds that are not disclosed … is the stuff of nightmares, associated whether accurately or inaccurately with … Soviet Russia in the Stalinist era and now … with the United Kingdom.[18] (Lord Richard Rashleigh Folliott Scott)

> It is not for the executive to decide who should be locked up for any length of time, let alone indefinitely…Executive detention is the antithesis of the right to liberty and security of person.[19] (Baroness Brenda Hale)

As with the U.S. Supreme Court, these comments went well beyond the narrow discrimination issue presented and, while arguably dicta, they demonstrate the strength and depth of British judicial hostility to the concept of indefinite detention without charge. The detentions were found to be disproportionately inconsistent with liberty and equality and to actively discriminate against aliens, because British terror suspects thought to pose a similar risk were not detained without trial.

Lord Hoffman held that there was no basis for determining that there was a public emergency. "Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda."[20] He emphasized that "noth-

ing could be more antithetical to the instincts and traditions of the United Kingdom" than indefinite detention without trial.[21] For Lord Hoffman, "[f]reedom from arbitrary arrest and detention is a quintessentially British liberty."[22]

On December 8, 2005, the Law Lords issued their unanimous decision in *A v. Secretary of State for the Home Department* (*Belmarsh II*).[23] At issue again was ATCSA, here focusing upon section 44(3) that permitted the trial court to consider evidence that was not admissible in a court of law. The question presented was whether this section of ATCSA permitted consideration of evidence from a third party obtained through torture in a foreign state. The trial court held that such evidence was now admissible and that the court should examine it to determine the weight that it should be accorded. The Court of Appeal agreed. The Law Lords reversed, ruling unanimously that such evidence was inadmissible as it was inherently unreliable, unfair, offensive to ordinary standards of humanity and decency, and incompatible with the principles on which courts should administer justice. Consequently, torture evidence cannot be used in the United Kingdom irrespective of where and by whom torture had been inflicted.

Lord Hoffmann commenced his speech with some British history:

> On 23 August 1628 George Villiers, Duke of Buckingham and Lord High Admiral of England, was stabbed to death by John Felton, a naval officer, in a house in Portsmouth. The 35-year-old Duke had been the favourite of King James I and was the intimate friend of the new King Charles I, who asked the judges whether Felton could be put to the rack to discover his accomplices. All the judges met in Serjeants' Inn. Many years later Blackstone recorded their historic decision:
>
> "The judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England."
>
> That word honour, the deep note which Blackstone strikes twice in one sentence, is what underlies the legal technicalities of this appeal. The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it. When judicial torture was routine all over Europe, its rejection by the common law was a source of national pride and the admiration of enlightened foreign writers such as Voltaire and Beccaria. In our own century, many people in the United States, heirs to that common law tradition, have felt their country dishonoured by its use of torture outside the jurisdiction and its practice of extra-legal "rendition" of suspects to countries where they would be tortured: see Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House* 105 Columbia Law Review 1681-1750 (October, 2005).[24]

The U.K. has thus determined that torture cannot be successfully outsourced. The decision draws from the common law, international law, the Torture Convention, the ECHR and the HRA.

In *Secretary of State for the Home Department v. MB and AF (Belmarsh III)*,[25] the Law Lords held that the compromise to due process associated with secret evidence is subject to the right to a fair trial. Lord Simon Denis Brown said:

> I cannot accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control.[26]

On June 10, 2009, the Law Lords issued their opinion in *Secretary of State for the Home Department v. AF* (*Belmarsh IV*)[27] ruling that it was unlawful to use secret evidence to place any persons under the judicial restrictions of control orders inflicting house arrest. The ruling by a nine-Law Lord panel was unanimous in finding that it is a fundamental right to have disclosure of sufficient material to enable an answer to an accusation to effectively be made in defense. The ruling specifically held that unless a terror suspect was given "sufficient information about the allegations against him to enable him to give effective instructions to the special advocate," the right to a fair trial would be breached.[28] As Lord James Arthur David Hope said, "The slow creep of complacency must be resisted. If the rule of law is to mean anything, it is in cases such as these that the

court must stand by principle. It must insist that the person affected be told what is alleged against him."[29]

Despite the resonating strength of the courts' decisions, most detainees in both the U.S. and the U.K. remain detained without charge. However, the attorney general's announcement of November 13, 2009, that five suspected 9/11 terrorists will be transferred from Guantanamo to New York City for charge and trial in civilian court is a positive first step towards a rule of law resolution of this problem created by the Bush administration. It was also announced that five other detainees alleged to be involved in the 2000 USS *Cole* attack will be charged and tried before an unspecified military tribunal. But despite the recognition that fair trial and due process is required by the rule of law, the government holds that some indefinite detentions will nonetheless continue to be administered through an as yet undisclosed process.[30]

It has also been announced that no new legislation for the Guantanamo detainees will be sought, and post-*Boumediene* habeas corpus cases will be allowed to go forward. Of thirty persons whose release has been judicially ordered, twenty remain at Guantanamo in custody because no country has been found to take them. Congress objects to any release in the U.S. or to accepting any other responsibility, notwithstanding that the U.S. caused the detentions to occur. As for the other detainees who have been designated for prosecution, it remains undetermined whether these trials will be in front of military tribunals or in civilian courts, and what rules will apply.[31] The Department of Defense has stated that a judicial finding of lack of proof of guilt does not necessarily mean that release will actually occur. The final words have not yet been spoken. The U.K. in turn continues for the moment to use renewable control orders. The home secretary has released two controlees from house arrest rather than disclose any secret evidence.[32]

The battle to determine if the King is law or the Law is king continues.

Endnotes:

1 5 U.S. (Cranch 1) 137 (1803).
2 Constitutional Reform Act 2005 Chpt 4, Part 1(1).
3 Constitutional Reform Act 2005 Chpt 4, Part 3(1).
4 [2004] UKHL 56, [2005] 2 AC 68.
5 Anthony King, *The British Constitution* (Oxford University Press 2007) 148.
6 128 S.Ct. 2229 (2008).
7 *Korematsu v. United States,* 323 U.S. 214 (1944); *Liversidge v. Anderson* [1942] AC 206 (HL).
8 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies. Report of the Secretary-General' UN doc. S/2004/616. 23 August 2004, para. 6.
9 *Rasul v. Bush,* 542 U.S. 466 (2004).
10 *Hamdi v. Rumsfeld*,,542 U.S. 507 (2004).
11 *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006).
12 317 U.S. 1 (1942).
13 Pub. L. 109-48, 119 Stat 2680 (Dec 30, 2005).
14 Pub. L. 109-366, 120 Stat 2600 (Oct 17, 2006).
15 *Boumediene* (n 6) 2259.
16 *Belmarsh I* (n 4) [97].
17 Ibid [42].
18 Ibid [155].
19 Ibid [222].
20 Ibid [96].
21 Ibid [86].
22 Ibid [88].
23 [2005] UKHL71, [2005] 2 AC 221 http://www.bailii.org/uk/cases/UKHL/2004/56.html
24 Ibid [81-82].
25 [2007] UKHL 46, [2008] AC 440 http://www.bailii.org/uk/cases/UKHL/2007/46.html
26 Ibid [91].
27 [2009] UKHL 28, [2009] 3 WLR 74 http://www.bailii.org/uk/cases/UKHL/2009/28.html
28 Ibid [80].
29 Ibid [84].
30 D Linzer and P Finn, "White House Weighs Order on Detention," *Washington Post* (27 June 2009).
31 P Finn, "Administration Won't Seek New Detention System," *Washington Post* (24 September 2009); P Baker, "Obama to Use Current Law to Support Detentions," *New York Times* (24 September 2009); R Bernstein, "A Detainee Freed, But Not Released," *International Herald Tribune* (24 September 2009).
32 R Ford, "New Blow to Terror Control Orders as Second Suspect Released," *TimesOnline* (25 September 2009).

# European Union Law, the European Convention, and Human Rights

by Nicholas Bamforth

In Western Europe, two separate sets of "European level" provisions — the European Convention for the Protection of Human Rights and Fundamental Freedoms (the convention) and the law of the European Union — protect human rights. Each body of law has its own authoritative final court — respectively, the European Court of Human Rights and the European Court of Justice — that rule on legal measures adopted at a national level. However, the relationship between the convention and European Union (EU) law and between the two European-level courts has long been complex and uncertain — not the least because all EU member states are signatories to the convention, but many convention signatories (for example, Turkey) are not members of the EU. While the new Treaty of Lisbon — a treaty between EU member states — allows the EU for the first time to apply for membership in the convention in its own right, it is unclear whether matters will be simplified or further complicated if it joins. In any event, the implications for the relationship between the two courts and for the legal systems of countries that are members of both the convention and the EU may be significant.

To explain these points, the nature of the convention and of EU law must first be considered. By way of general (and very rough) analogy — at least, if Western Europe is moving in a federalist direction — it may be useful to think of the convention as covering much of the territory which, in the United States, is occupied by the Bill of Rights, and of EU law as occupying much of the territory inhabited in the United States by the Commerce Clause of the Constitution. One crucial difference is, however, that the European Community (the key component of the EU) has — unlike the convention — legislative capacity. Its institutions regularly produce regulations and directives that member states are obliged to comply with and that are designed to support treaty provisions.

**The European Convention**

The convention entered into force in 1953. It currently has forty-seven signatory states, including non-EU members such as Russia and Turkey. The convention protects a relatively mainstream list of substantive human rights: life; the prohibition of torture; the prohibition of slavery and forced labour; liberty and security; fair trial; no punishment without law; respect for private and family life, thought, conscience and religion; expression; assembly and association; marriage; freedom from discrimination; protection of property; education; free elections; and the abolition of the death penalty.

Signatory states to the convention are required by Article 1 to give effect to its provisions in national law, and Article 13 grants citizens the right to an effective remedy at a national level if convention rights are violated. However, this is subject to the overarching international law principle that the convention has such force at a national level as the constitutional systems of the signatory states allow. A litigant may take a case to the Court of Human Rights, but the effect at the national (as opposed to international) level of the remedy granted depends upon how, if at all, convention norms and convention jurisprudence are treated within the national legal system.[1] The court thus made clear in *Smith and Grady v.*

*United Kingdom* that while the effect of Article 13 "is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief," it "does not go so far as to require incorporation of the Convention or a particular form of remedy, Contracting States being afforded a margin of appreciation in conforming with their obligations under this provision"[2].

The somewhat ambiguous nature of the convention is evident from a number of the court's judgments. On the one hand, the court has emphasised that "the Convention comprises more than mere reciprocal engagements between contacting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which … benefit from a 'collective enforcement"'[3], and that "[i]n interpreting the Convention, regard must be had to its special character as a treaty for the collective enforcement of human rights. … [T]he object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective"[4]. On the other hand, the court has emphasised that it must not "lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose between different measures which they consider appropriate in those matters governed by the Convention. Review by the Court concerns only the conformity of those measures with the requirements of the Convention"[5]. Furthermore, "[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content" of the requirements of Convention rights and of the permitted restrictions on them, so that national governments retain a "margin of appreciation" when making the initial assessment of the need for an interference with a Convention right, although the court reserves to itself the role of making a final judgment as to whether the reasons cited for the interference were sufficient.[6]

**European Union Law**

The European Economic Community (EEC), as it was initially known, was established by the Treaty of Rome, signed in 1957 to establishment a common market, the approximation of economic policies, the promotion of harmonious development of economic activities, the raising of the standard of living and increasing stability, and the promotion of closer relations between the member states. Free and undistorted competition was to be promoted throughout the common market area, and obstacles to this at the national level removed.[7] Thus, the goals of the original community were very much economic, with broader forms of integration the likely result of the common market. In a similar vein, the prohibition of unequal pay between men and women[8] was viewed as removing an obstacle to undistorted competition. This background is important for human rights since, as authors Paul Craig and Grainne de Burca have put it, as the community/union became gradually more interested in the area, new provisions "were grafted on to a set of treaties which, despite the broad range of powers and policies covered, were for a long time largely focused on economic aims and objectives. This legacy remains significant since, despite its constantly changing and expanding nature, the European Union's dominant focus remains an economic one, and the debate over the appropriate scope of its human rights role remains lively and contested"[9].

A crucial part of the significance of the expanding role of human rights in the EU is what might be described as the differing "legal weights" of EU law and convention rights. The central role played by the distinction between national and international law in the convention context was explained above. The European Court of Justice, by contrast, has long been keen to stress the conceptually unique nature of EU law — whether in the form of treaty articles, regulations, or directives — via the concepts of "direct effect" and "supremacy."[10] In *Van Gend en Loos*, the court said, "The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields"[11]. The court expanded upon this in *Costa*, where it asserted, "By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply"[12]. Consequently, provisions that have met the conditions laid down by the court for direct effect may be relied upon by litigants before national courts regardless of the position in national law. Direct effect provisions automatically take priority over conflicting rules of national law, which must in appropriate circum-

stances be set aside by national courts[13]; national legislation must be interpreted by national courts, as far as this is possible, in the light of the provisions[14]; and damages may be granted against national authorities where national legislation or executive action breaches them[15]. As such, it is possible to categorize "directly effective" EU provisions as having potentially stronger legal weight than convention rights in the national legal systems. This priority is a highly important point for human rights protection whenever those provisions are used to ensure the protection of specified human rights at a national level.

A crucial development in the community's growing concern for human rights was the Treaty on European Union, which entered into force in 1993. The 1993 treaty changed the European Economic Community into the European Community, and established the European Union as the umbrella European body — with the community acting as one pillar of the structure alongside embryonic competences in justice and home affairs (later altered to police and judicial cooperation) and foreign and security policies. The treaty, as reinforced by the subsequent treaties of Amsterdam and Nice, stipulates that the European Union "is founded on the principles of liberty, democracy, respect for fundamental rights and fundamental freedoms, and the rule of law"[16]. Furthermore, the Union "shall respect fundamental rights, as guaranteed by the European Convention … and as they result from the constitutional traditions common to the Member States" (a provision made directly justiciable under the Treaty of Amsterdam)[17]. The Amsterdam Treaty also allowed for a member state which was responsible for a serious and persistent breach of such guarantees to be penalized[18], made respect for human rights a condition of application for membership in the EU,[19] and conferred broad competence on the community legislative institutions to act to combat discrimination based on racial or ethnic origin, religion or belief, disability, age, or sexual orientation, in addition to the originally prohibited ground of sex, with directives later being produced to deal with each of these areas.[20]

In the meantime, an EU Charter of Fundamental Rights was given political approval. The charter is akin to a Bill of Rights for the EU; it makes provision for dignity (including the rights to life and to freedom from torture, slavery, and execution), freedoms (to, for example, liberty, association, expression, ownership of property, and private and family life, as well as social rights such as work, education, conducting a business, and asylum), equality, solidarity (related to labor rights such as fair and just working conditions and a prohibition on child labor), citizenship rights (including to good administration), and justice (focused on the fairness of trials).

Obviously, some of these rights are already found in the European Convention, and the charter stipulates that "the meaning and scope of those rights shall be the same as those laid down by the said Convention"[21]. However, many of the social and employment-related rights are not the same, although they arguably reflect earlier case law of the Court of Justice. A claim affirmed by the statement in the charter's preamble that it reaffirms rights found in the Treaty on European Union and the EC Treaties[22] and the stipulation in the charter that it does not establish "any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties"[23]. Until the Lisbon Treaty, the exact legal status of the charter was unclear; it was frequently referred to by the Court of Justice,[24] and community legislative proposals were checked for compatibility with its provisions, but since the charter was not yet incorporated into the treaties it could not play a more direct role.

The Court of Justice has also played an important part in the development of human rights in EU law. While the court was clear that, in its pre-Lisbon form, the EU had no power itself to join the convention, it also noted that "fundamental rights form an integral part of the general principles of law whose observance the Court ensures"[25] and that respect for human rights was "a condition of the lawfulness of Community acts"[26]. Since the 1970s, it began to draw inspiration from convention and the case law of the Court of Human Rights, when assessing the compatibility with the EC treaties of national measures as well as directives and regulations, arguably encouraging consistency with relevant rights at each level.[27] However, this creates a problem. The Courts of Justice and Human Rights may adjudicate only upon matters falling within EU law and the convention respectively, but the two bodies overlap in the area of human rights, and some cases potentially have both EU law and convention dimensions.[28] How far the two courts have in fact been consistent when dealing with topics that are potentially of concern to both is thus a debatable question,[29] and one with complex consequences where (as, for example, in Britain) there are different mecha-

nisms for protecting EU law and convention rights at the national level.[30]

It is thus clear that while both EU law and the convention are intended to protect human rights, some rights are found in both bodies of law but others are found only in EU law. National law may be assessed by both the Court of Human Rights and the Court of Justice, but the Court of Justice deems itself to have stronger powers in relation to national measures while currently applying convention principles as a tool of interpretation rather than directly. The Court of Justice also has the power to refer to convention rights when assessing community measures. At a national level, relevant EU Treaty provisions, directives, and regulations have direct effect; convention rights have such force as they are granted by national law, the signatory state being liable only in international law if that force is sufficient.

**The Treaty of Lisbon and Human Rights**

How might the Treaty of Lisbon alter things? The treaty entered into force in December 2009. It amends the Treaty on European Union to grant recognition to the rights, freedoms, and principles set out in the Charter of Fundamental Rights, which is granted the same legal value as the treaties, and to allow the EU to apply to join the European Convention.[31]

In relation to the charter — from which Britain and Poland have secured an opt-out[32] — the new legal status may simplify matters somewhat. The Court of Justice will be able to apply the charter directly, and where there is an overlap with the convention — as noted above — relevant rights will have to be given the same meaning and scope. As such, the potential for divergent interpretations of similar rights may perhaps be reduced. In addition, the Court of Justice now has an explicit treaty basis for giving effect to the other rights set out in the charter. This power is hoped to encourage the development of a more visible and accessible set of principles (although those who are opposed to the social rights may be concerned about this. Hence the British opt-out.).

However, were the EU to go ahead and join the convention in its own right, the relationship between the Courts of Justice and Human Rights likely will not be simplified. On the one hand, a protocol agreed to as part of the Lisbon Treaty specifies that accession to the convention shall not affect neither the competences of the EU or the powers of its institutions nor the situation of member states in relation to the European Convention.[33] On the other hand, these provisions are very vaguely drafted, and as noted above the Court of Human Rights is concerned to ensure that the courts of signatories grant sufficiently effective remedies. As such, it is not clear how far the Court of Human Rights might feel emboldened in practice to adopt the position of a reviewing court that tests the compatibility with convention rights of actions taken by EU institutions, and perhaps also the assessments of national law adopted by the Court of Justice — something that would jeopardize the Court of Justice's practical status as the authoritative final court within its own sphere and that would serve to further unbalance the relationship between convention rights and EU law at national level.

**Conclusion**

To American eyes, the two principal Western European systems for the protection of human rights may well seem to be of bizarre complexity. In reality, the existence of the two separate systems is — like so much in the legal world — an accident of history. However, it is likely to be rather a hard accident to tidy up. The European Convention for the Protection of Human Rights and Fundamental Freedoms has a larger and more diverse membership than the European Union, including states (Russia, for example) that might never wish to join the EU. To some extent, the treaty makers and courts may therefore have to make the best of the difficult situation created by the existence of two systems. In relation more specifically to Western European nations, any proposal to reform the EU institutions and legal provisions tends to invoke, in political debate, bitter arguments about the extent to which those nations wish to move toward a fully federal system within the remit of the EU. It is hard to see how any attempt to rationalize the asymmetrical protection of human rights under EU law and the convention could avoid being dragged into the federalism debate. Perhaps it is that debate that Western European nations need first to resolve.

Endnotes:

1 *See* the essays in Conor Gearty (ed.), *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (The Hague: Martinus Nijhoff, 1997).
2 (1999) 29 EHRR 493, para [135].
3 *Ireland* v. *United Kingdom* (1978) 2 EHRR 25, para [29].
4 *Soering* v. *United Kingdom* (1989) 11 EHRR 439, para [34].

5 *Belgian Linguistics (No. 2) Case* (1979) 1 EHRR 252, para [10].
6 *Handyside* v. *United Kingdom* (1976) 1 EHRR 737, para [8].The generosity of the 'margin' varies according to the aim and magnitude of the interference and the nature of the Convention right affected by it: for detailed analysis, see Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford: Oxford UP, 2nd edn., 2009), paras. 6.42 to 6.56.
7 *See*, generally, Paul Craig and Grainne de Burca, *EU Law: Text, Cases and Materials* (Oxford: Oxford UP, 4th edn., 2008), ch.1
8 Article 141 E.C.
9 *EU Law: Text, Cases and Materials*, above, p.380.
10 *EU Law: Text, Cases and Materials*, above, chs. 8 & 10.
11 Case 26/62, *Van Gend en Loos* v. *Nederlandse* [1963] ECR 1 at 12.
12 Case 6/64, *Costa* v. *ENEL* [1965] ECR 505 at 593-4.
13 Case C-213/89, *R.* v. *Secretary of State for Transport, ex parte Factortame* [1990] ECR 1-2433.
14 Case 14/83, *Von Colson and Kamann* v. *Land Nordrhein-Westfalen* [1984] ECR 1891; Case C-106/90, *Marleasing SA* v. *La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.
15 Case C-46/93, *Brasserie du Pecheur SA* v. *Germany* [1996] ECR I-1029.
16 Treaty on European Union, Article 6(1).
17 Treaty on European Union, Article 6(2).
18 Treaty on European Union, Article 7; see also Article 309 E.C. (as amended).
19 Treaty on European Union, Article 49.
20 This was via Article 13 E.C. For discussion, see Nicholas Bamforth, Maleiha Malik and Colm O'Cinneide, *Discrimination Law, Theory and Context: Text, Cases and Materials* (London: Thomson/Sweet & Maxwell, 2008), pp. 95-118.
21 Charter, Article 52(3).
22 Charter Preamble, fifth paragraph.
23 Charter, Article 51(2).
24 *See*, e.g., Case C-540/03, *European Parliament* v. *Council* [2006] ECR I-5769, para [38].
25 [1996] ECR I-1759, para [33].
26 [1996] ECR I-1759, para [340.
27 *See*, for example, Case 44/79, *Hauer* v. *Land Rheinland-Pfalz* [1979] ECR 3727; Case C-84/95, *Bosphorus* v. *Hava Yollari* [1996] ECR I-3953; But for an illustration of the limits to this, see Case C-299/95, *Kremzow* v. *Austria* [1997] ECR I-2629.
28 *See*, generally, Nicholas Bamforth, 'Prohibited Grounds of Discrimination under EU Law and the European Convention on Human Rights: Problems of Contrast and Overlap', ch.1 in Catherine Barnard (ed.) (2006-7) 9 Cambridge Yearbook of European Legal Studies (Oxford: Hart, 2007).
29 *See*, generally, Paul Craig and Grainne de Burca, *EU Law: Text, Cases and Materials*, above, pp. 418-26; Dean Spielmann, 'Human Rights Case Law in the Strasbourg and Luxembourg Courts: Conflicts, Inconsistencies, and Complementarities', ch.23 in Philip Alston (ed.), *The EU and Human Rights* (Oxford: Oxford UP, 1999).
30 For a good example, see *Chief Constable of the West Yorkshire Police* v. *A. (No. 2)* [2004] UKHL 21, [2005] 1 A.C. 51.
31 Treaty on European Union, revised Articles 6(1) and 6(2).
32 Treaty on European Union, Protocol No. 15 (inserted via the Treaty of Lisbon).

# Barking Up the Wrong Tree:
## Current Challenges in International Environmental Law

by Catherine P. MacKenzie

It is almost forty years since the 1972 United Nations Conference on the Human Environment, when the Stockholm Declaration on the Human Environment[1] was concluded. The declaration is recognized by international lawyers as the beginning of international environmental law. But progress has been slow. Notwithstanding four decades of international environmental lawmaking, the fraught negotiations and limited results of the Copenhagen Climate Change Conference of December 2009 demonstrate just how complex the environmental agenda has become. The ink is barely dry on the Copenhagen documents, so it is premature to analyze the success of that round of international lawmaking. There is, however, a clear link between climate change and deforestation, and analysis of international forest law (a largely uncharted area of international law) offers guidance to international lawmakers who struggle to align a desire for environmental protection with the commitment to economic growth that underpins democratic systems of government.

The relationship between international law, climate change, and forests is now widely recognized. Forests first appeared on the international legal agenda in the 1960s, as part of the newly emerging environmental movement, much of the impetus of which was derived from Rachel Carson's book *Silent Spring*[2], which described the effect of DDT on U.S. birdlife. During the 1970s and 1980s, forest management became an increasingly regulated activity, since access to forest resources or to the land on which forests were located was often the key to economic development. While U.S. state and federal forests were generally well-regulated, elsewhere in the world in the late 1980s and early 1990s there were fundamental changes in the forest sector. These were caused by the expansion of commercial logging, particularly in South America and the Asia-Pacific region, by increasing recognition of the rights of indigenous peoples dependent on forests and by changing patterns of land ownership, particularly in the newly emerging republics of the former Soviet Union.

**International Forest Law**

The U.N. is the obvious source of an organized system of relations between states. It is, however, increasingly clear that the U.N. is not well-equipped to deal with complex forest issues. And much of the complexity of these environmental issues arises from issues of sovereignty, which itself has a troubled history. The Peace of Westphalia, a 1648 settlement[3] that ended the Thirty Years' War, is recognized by many lawyers as the origin of the nation state and of the modern system of international law. The Treaty of Westphalia established a system of sovereign states that, while not without ambiguities, served Europe and, following the granting of independence to Europe's colonies, the world for at least three hundred years. Revolutions in sovereignty result from prior revolutions in ideas about justice and legal authority. New ideas challenge the legitimacy of the existing legal order and gain popular support. This leads to protest, to political

upheaval, and eventually to the birth of a new legal order. In early modern Europe, for example, the Protestant Reformation led to a century of war, which culminated in the Peace of Westphalia. In the twentieth century, a new understanding of nationalism triggered protest and revolt that by the early 1960s had led to widespread decolonization. For both revolutions, agreement on sovereignty was the term on which the crisis was settled. Such agreement has not yet been reached for many international environmental issues, and it is now clear that the complex issues that underpin the environmental crisis were beyond the capacity of the system of international law on which the world relied in the 1990s.

At the U.N. Conference on Environment and Development (UNCED) at Rio in 1992, it was assumed that a binding forest treaty was likely to be the most effective path forward[4], but records of the UNCED debates (at which the non-legally binding — and thus toothless — Forest Principles[5] were agreed) confirm that forest issues were poorly defined, the parties polarized, and the future uncertain and deeply problematic. Almost seventeen years later, notwithstanding the creation of a smorgasbord of inconsistent laws[6], poorly coordinated institutions[7], and defective policies and programs[8], little progress has been made. Nations have agreed in principle that more effective international environmental law is a worthy ideal, and numerous instruments have emerged to counter deforestation. These include new treaties, technologies, taxes, incentives, and tradable allowances. Legal scholars have written about the design, negotiation, and implementation of a new forest agreement, and political scientists have analyzed forest negotiations. Meanwhile, many foresters have conceded defeat as the conjunction of legal, political, and economic forces works in favor of continuing forest loss and degradation. Those forces include the absence of good governance (manifested particularly but not only in illegal logging), continuing pressure from the agricultural frontier, market distortions that arise from the lack of valuation of environmental services, and the lack of effective law enforcement agencies in many key forested countries. The most recent U.N. Food and Agriculture Organization figures confirm that deforestation continues at a disturbing rate, particularly in the Amazon, Central Africa, and Asia-Pacific regions.[9] Indeed, countries in which deforestation rates have fallen have achieved this outcome simply because they have no forest left to destroy. The development of international forest law has become a race to the bottom.

The conceptual development of international forest law corresponds closely with the progress of the U.N.'s environmental agenda.[10] In 1992, forests were among the most controversial issues discussed at the UNCED. The failure of delegates to negotiate an international forest treaty demonstrated the complexity of the challenge. The prevailing north-south polarization prevented a consensus between developed nations who were in favor of a new treaty, and developing nations who resented western intervention in issues within their sovereign territory. The results were the Rio Declaration on Environment and Development[11]; the United Nations Framework Convention on Climate Change (to which the Kyoto Protocol was later added); the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests[12] (Forest Principle); and Agenda 21[13], a three-hundred-page plan for achieving sustainable development in the twenty-first century.

The period 1992–95 was characterized by emerging north-south partnerships. Throughout that period and subsequently, the focus of the U.N. in this area was on the development of coordinated policies at an international level to promote the management, conservation, and sustainable development of all types of forests. The emergence of a growing international consensus enabled the U.N. Economic and Social Council to establish an ad hoc Intergovernmental Panel on Forests (IPF)[14] in 1995. In 1997, the panel concluded with more than one hundred negotiated proposals for action related to sustainable forest management. Matters requiring further consideration — either because consensus could not be reached or because further analysis was necessary — included legal instruments, institutions, and issues related to finance and transfer of technology, trade, and environment. Between 1997 and 2000, the Intergovernmental Forum on Forests (IFF) continued the work of the intergovernmental panel. The forum concluded in 2000 with a report[15] that recommended that an international arrangement on forests be established and that included more than 270 proposals for action towards sustainable forest management. Since 2000, the U.N. Forum on Forests has continued the work of the intergovernmental panel and forum. Consistent with the objectives of its predecessors, the primary objective of the U.N.

forum was "to promote the management, conservation and sustainable development of all types of forests … based on the Rio Declaration …[,] the Forest Principles, Chapter 11 of Agenda 21 and the outcomes of the IPF/IFF … in a manner consistent with and complementary to existing international legally binding instruments relevant to forests"[16]. In February 2006, the sixth session of the U.N. Forum on Forests requested that its next session "conclude and adopt a non-legally binding instrument on all types of forests"[17] and decided that the effectiveness of the international arrangement on forests would be reviewed in 2015, at which time a full range of options, including a legally binding instrument, is to be considered.[18] Consistent with this, in 2007 the seventh session of the U.N. forum concluded another non-legally binding forest instrument.

Lawyers not immediately familiar with the intricacies of public international law may query the value of a non-legally binding instrument. They have a point. Recall too that judgments of the International Court of Justice have no precedential value and are — at least in practical terms — unenforceable. One enters the murky world of non-binding agreements, advisory opinions and judgments that may have little long-term significance.

**Nuclear Weapons and Environmental Protection**

Indeed, the uncertainty that arises from the International Court of Justice's 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons[19] offers a timely and troubling reminder of the protection afforded the environment during international armed conflict by international environmental law.[20] That advisory opinion held that environmental treaty obligations cannot have been intended to deprive a state of its right of self-defense under international law. Much research has been undertaken on this topic, and scholars agree that international law provides some protection for the environment during armed conflict. Limitations on methods of warfare and the infliction of unnecessary suffering or damage are well-established. The 1868 Declaration of St. Petersburg, the 1899 and 1907 Hague Conventions (the provisions of which were held to be declaratory of customary international law by the Nuremberg Tribunal), and the 1949 Geneva Conventions all prohibit wanton destruction. The 1868 Declaration of St. Petersburg, for example, asserts "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy[21]". This prohibition is echoed in the 1907 Hague Convention that prohibits the infliction of destruction which is not "imperatively demanded by the necessities of war"[22]. Environmental protection per se entered the international legal agenda in the late 1960s, a date which corresponds broadly with the use of Agent Orange in Vietnam. Subsequently, Additional Protocol I (of 1977) to the 1949 Geneva Conventions prohibits methods of warfare "which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment."[23] The protocol also limits the circumstances in which "works or installations containing dangerous forces," including nuclear power plants, may be made the object of attack.[24] Also in 1977, the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques prohibited the use of environmental modification techniques "having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party"[25].

Following the first Gulf conflict, the International Committee of the Red Cross discussed the creation of a fifth Geneva Convention, intended to provide protection for the environment during armed conflict. It concluded that an additional convention was not needed because protection already exists in international agreements. Some protection is provided by customary international law, and violations of the U.N. Charter entail responsibility under international law to make reparation. Security Council Resolution 687 (1991), for example, holds Iraq liable for "direct loss, damage, including environmental damage and depletion of natural resources" arising from its conflict with Kuwait. A year later, Principle 24 of the 1992 Rio Declaration said, "States shall … respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary." Principle 2 of that declaration echoed Principle 21 of the 1972 Stockholm Declaration, asserting that states have a duty "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction," and U.N. General Assembly Resolution 47/37 (1992) states that "destruction of the environment not justified by military necessity and carried out wantonly is clearly contrary to existing international law."

In the 1996 Nuclear Weapons Advisory Opinion the International Court of Justice referred to several instruments of international law and stated, "while the existing international law … does not specifically prohibit the use of nuclear weapons it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict"[26]. Shortly afterwards, the 1996 Statute of the International Criminal Court categorized certain acts of serious and intentional harm to the environment as war crimes and provided for individual responsibility.[27]

Lawyers who have lived through conflict, served in the military, or visited Hiroshima or Nagasaki may suspect that this analysis overlooks the realpolitik of international law. First, international law is a voluntary system, so states that do not wish to be bound by a new treaty can usually ignore it — and there is no reason to believe that states that routinely breach other aspects of international law would honor international environmental agreements. Second, the International Court of Justice already has stated that obligations deriving from environmental treaties are not intended to deprive states of their right to self-defense. Any act of self-defense is subject to the well-established requirements of necessity, proportionality, and discrimination. Ultimately, acts that meet these requirements are likely to be lawful. Third, a range of dispute resolution mechanisms already exists in international law. Each has advantages and disadvantages, but it is difficult to see how international law on environmental protection would prevent or limit the use of nuclear weapons, in the event that such use was deemed necessary on the grounds of self-defense by a nuclear state.

The question that should have been asked is not whether international law on environmental protection permits the use of nuclear weapons, but what role international law on environmental protection will play in the post-Cold War era. Patricia Birnie, Alan Boyle, and Catherine Redgwell suggest that the law of armed conflict is one of the least sophisticated parts of contemporary international law.[28] In contrast, despite repeated failures to reach binding agreement on issues such as climate change and deforestation, international environmental law is developing rapidly. Environmental protection is now an established element of public international law; more than twenty cases have reached international courts since 2000, courts no longer shy away from arguments based on environmental protection, and there is no doubt that extensive protection for the environment exists in international law, albeit in an uncoordinated collection of legal instruments.

While legal scholars may argue about the intricacies of environmental protection, it is unlikely that pirates in the Gulf of Aden, warlords in the Horn of Africa or those charged with managing the nuclear technology of rogue states are well-versed in international law on environmental protection, and it is difficult to argue that causing them to become so should be the priority of the international community. Our most powerful weapons are unique in their capacity to cause widespread, long-term and severe damage that extends beyond national boundaries, so it is right that such weapons should be regulated on an international basis. But to argue that the use of such weapons may be prohibited on the grounds of international environmental obligations stretches credibility. The "just war" theory has a long and noble history, the principles of necessity, proportionality, and discrimination have long been recognized as customary international law and the Hague and Geneva conventions serve the international community well. Until such time as implementation of international environmental obligations improves, it is doubtful that an analysis of the lawfulness of the use of nuclear weapons, undertaken by reference to environmental obligations, will be fruitful.

In his recent book, published posthumously, Michael Quinlan argues that nuclear weapons have made major armed conflict between advanced states almost impossible, and that this fact is an inestimable benefit to humanity that must not be lost.[29] Clearly environmental considerations must be given serious consideration in military decision making, but the international agenda has changed. Most conflicts are now intrastate, not interstate, and the parties are no longer the two superpowers of the Cold War but rogue states and clandestine warlords. At stake are issues of terrorism, arms control, and human security. It is no longer far-fetched to suggest that within the next few years the Chapter VII powers of the U.N. Security Council, designed to deal with threats to and breaches of international peace and security may be used to intervene in an environmental crisis.

**Paths Forward**

Light is, however, shining through the trees. International environmental law has matured sig-

nificantly since the heady days of the 1992 U.N. Council on Environment and Development at Rio and the 1996 ICJ Advisory Opinion. Most lawmakers in this area now accept that the creation of further international treaties — unless underpinned by identifiable adequate funding, long-term political commitment, and an effective international dispute settlement mechanism — is neither feasible nor desirable. Rather, environmental degradation is best mitigated by a combination of legal, financial, and scientific instruments and processes.

This has enabled lawyers to identify key questions in this area of law and to begin to formulate answers based not on grandiose U.N. documents but on gritty experience. Of those questions, three are likely to interest lawyers dipping their toes into international environmental law for the first time. First what is the proper role of international law in this area? Why, for example, should the International Court of Justice rule on the current *Pulp Mills* case between Uruguay and Argentina involving the operation of a pulp mill on banks of the shared River Uruguay? Is this no more than a regional matter best resolved according to local custom and practice, or does it raise fundamental issues about the role of science in international lawmaking? Second, what are the aims of international environmental law? Is it really sensible to "conserve biodiversity," as the 1992 Convention on Biodiversity states, rather than eradicating malaria-carrying mosquitoes? Third, what makes an international environmental agreement work? Why, for example, did the Montreal Protocol on Substances Which Deplete the Ozone Layer work while the Kyoto Protocol on Climate Change had limited success? These questions challenge the current generation of international environmental lawyers. To resolve them, attorneys must respond in the robust tradition of the common law, rather than pitting themselves against the environmental lobby.

Throughout the last decade, international law was challenged repeatedly. In 1948, the three-hundredth anniversary of the Peace of Westphalia, Leo Gross wrote of the Westphalian system of international law:

> Such an international law, rugged individualism of territorial and heterogeneous states, balance of power, equality of states, and toleration — these are among the legacies of the settlement of Westphalia. That rugged individualism of states ill accommodates itself to an international rule of law reinforced by necessary institutions.[30]

In the same article, Gross predicted the need to find a way "of harmonizing the will of major states to self-control with the exigencies of international society which, by and large, yearns for order under law"[31]. Writing in 1948, Gross was referring to the collapse of the League of Nations, the establishment of the United Nations, the jurisdiction of the Nuremberg and Tokyo tribunals that tried those charged with offences against Allied prisoners of war, and the reconstruction of postwar Europe. More than fifty years later, the tension between the will of major states and the need for order under law remains unresolved. By the beginning of the twenty-first century, globalization had forced the "rugged individualism" of states into an uneasy compromise within the U.N. system, but events of the last decade demonstrate that the U.N. is poorly equipped to deal with complex issues of climate change and deforestation, particularly as some of those issues challenge the principles of sovereignty on which international law is premised.

For an international environmental instrument to be effective, countries must engage fully with that instrument. Engagement requires long-term commitment from the whole country, including politicians and crony businesses — not just from industry, local communities, and citizens. Each of those groups has an important role to play, but the effectiveness requires all of them to be involved. Long-term commitment will develop only when parties can see that their interests are being served. For issues such as the protection of a single species, this is challenging. For matters as complex and diverse as climate change and deforestation, this has been almost impossible. Protection for the environment already exists in international law, albeit in an uncoordinated collection of legal instruments. There are gaps in that protection, but events of the last decade confirm that the biggest challenges are the development of the rule of law in turbulent regions of the world and the identification of a means by which existing law — national and international — can be implemented effectively on a global scale, not the creation of further international environmental agreements. This does not negate the need for law, but suggests that better implementation of existing national and international environmental law is likely to be more effective than the creation of new law.

Clearly, environmental protection is central to security, peace, and justice. Forests provide livelihoods both for a significant number of U.S. citizens and for millions of impoverished people in developing countries. Any diminution in forests may result in a reduction in basic livelihood resources. This, in turn, causes migration into already hard-pressed urban areas or across borders into the sovereign territory of equally impoverished neighboring states. Forced migration separates communities from their livelihoods, their support systems, and their roots, and may lead to the spread of disease, pressure on already fragile ecosystems, and conflict over scarce resources. All too often, the result is civil war and dependence on short term assistance of aid agencies. Consequently, deforestation may be a threat to the territorial integrity and political and economic independence of a state, since it may dislocate communities and force migration and consequential dependence on short-term aid. It follows that the failure to avert deforestation is a threat to sovereignty, to "political independence and territorial integrity"[32] that is just as important as more visible threats and of much longer-term significance, since the consequences affect the global system for generations to come. The challenge now for all U.S. lawyers — not simply the environmental lobby — is to engage with the international environmental agenda to recognize the contribution environmental protection makes to the

development of international peace and security and to legislate within the best traditions of American lawmaking.

Endnotes:

1 U.N. General Assembly Resolution 2994 (XXVII)(1972).
2 Houghton Mifflin, 1962.
3 The settlement included the Treaty of Westphalia of 24 October 1648 between Ferdinand III, the Holy Roman Emperor, and Louis XIV of France and their respective allies, and the Treaty of Osnabruck, also of 24 October 1648, between the Holy Roman Emperor and Sweden.
4 The U.N.C.E.D. also considered proposals for the creation of a new international environmental court and for comprehensive reform of the international legal system, neither of which were agreed.
5 U.N. Document A/CONF.151/26 (1992), Resolution I, Annex III.
6 At least eighteen international agreements relate in part to forests. These include the 1972 World Heritage Convention, 1973 Convention on International Trade in Endangered Species, 1992 Convention on Biological Diversity, 1992 United Nations Framework Convention on Climate Change, 1997 Kyoto Protocol, and the 1983, 1994 and 2006 versions of the International Tropical Timber Agreement.
7 These include the Intergovernmental Panel on Forests, Intergovernmental Forum on Forests, United Nations Forum on Forests, World Commission on Forests and Sustainable Development, Interagency Task Force on Forests, Collaborative Partnership on Forests, the forestry sections of the Food and Agriculture Organization, United Nations Environment Program, United Nations Development Program, the World Bank and the regional development banks, and the World Trade Organization.
8 These include the World Bank Forest Strategy, the EU Forest Law Enforcement and Governance Program, regional forest law programs, and forest certification and labeling.
9 *See* U.N. Food and Agricultural Organization, *State of the World's Forests 2009* (Rome: FAO, 2009).
10 For the history of the U.N. forest process in the period 1992-2006 *see* Canadian Council on International Law (ed.), *Global Forests and International Environmental Law* (London: Kluwer Law International, 1996); D. Humphreys, *Forest Politics: The Evolution of International Cooperation* (London: Earthscan, 1996) and D. Humphreys, *Logjam: Deforestation and the Crisis of Global Governance* (London: Earthscan, 2006).
11 U.N. Document A/CONF.151/26 (1992), Resolution I, Annex I.
12 U.N. Document A/CONF.151/26 (1992), Resolution I, Annex III.
13 UN Document A/CONF.151/26 (1992), Resolution I, Annex II.
14 E.C.O.S.O.C. Decision 1995/226 (1995).
15 U.N. Document E/CN.17/2000/14.
16 E.C.O.S.O.C. Resolution 2000/35 (2000), Paragraph 1.
17 U.N. Document E/CN.18/2006/18 (2006), Paragraph 26.
18 U.N. Document E/CN.18/2006/18 (2006), Paragraph 32.
19 I.C.J. Reports (1996), 66.
20 An earlier version of this section of this article is published in 21 *Journal of Environmental Law* 518 (2009)
21 Preamble.
22 Article 23 (1)(g).
23 Article 35(3).
24 Articles 55(1) and 56(1).
25 Article 1.
26 I.C.J. Reports (1996) 33.
27 Article 8(b)(iv).
28 P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment* 3rd edition, (Oxford, OUP, 2009), 207.
29 M. Quinlan, *Thinking about Nuclear Weapons: Principles, Problems, Prospects* (Oxford, OUP, 2009).
30 Gross, L. The Peace of Westphalia, 1648-1948 (1948) 42 *American Journal of International Law* 20.
31 Gross, 41.
32 U.N. Charter Article 2(4).

# *Virginia Journal of International Law* Celebrates Fiftieth Anniversary

**by Demetra Karamanos**

The *Virginia Journal of International Law* (*VJIL* or *Journal*) celebrates its fiftieth anniversary this year. The *Journal* is the oldest continuously published student-edited international law journal in the world. Founded in 1960, *VJIL* was first printed as the *Journal of the John Bassett Moore Society of International Law*. Today, although it operates under a different name, its purpose and goals remain unchanged. The *Journal* engages and sparks debate on the most cutting-edge topics in international law, while also being a resource for scholars, practitioners, politicians, and law students.

*VJIL* has more than four hundred subscribers, including university libraries, international and domestic law firms, government agencies, courts, and bar associations. Thanks to the efforts of its ninety-nine staff members, *VJIL* is consistently ranked one of the top international law journals in the United States.

To celebrate the publication of its fiftieth volume, *VJIL* has planned a black-tie banquet in the dome room of the Rotunda at the University of Virginia in March 2010. Virginia Law professors and students will join the *VJIL* staff and board of advisors to celebrate this historic occasion. Further, *VJIL* alumni — including former students who worked on the very first volume of the *Journal* — will attend, as well as the contributors to the fiftieth anniversary volume. The banquet will be a celebration of scholarship and social connections,, where international law scholars, practitioners, and students will engage.

In addition to planning the celebratory banquet, the *VJIL* staff has been working to make each issue of the fiftieth anniversary volume particularly special. Each of the four issues includes a commemorative letter and essay by prominent international law scholars or practitioners. Dean Paul G. Mahoney of the University of Virginia School of Law contributed the letter for the first issue, and U.Va. law professor A.E. Dick Howard contributed the essay, which was particularly significant, since Professor Howard was one of the first authors e featured in the *Journal*: one of his pieces was published in the second volume.

The commemorative letter for the second issue was written by Judge Stephen M. Schwebel, the former president of the International Court of Justice and an expert on international law, and the essay was written by M. Cherif Bassiouni, who has chaired and advised the United Nations on myriad issues that have had far-reaching effects on the development of international law norms — particularly in the field of human rights. The third issue will include a letter by John M. Bellinger III, a former legal advisor to the U.S. Department of State, and an essay by Mario Silva, member of parliament for Davenport, Ontario, Canada. Contributors to the *Journal*'s fourth and final issue have not yet been named.

**Demetra Karamanos** is editor-in-chief of the *Virginia Journal of International Law*

by John G. Mizell Jr., Chair

# Spring Cleaning

AS WE NEAR THE END OF WINTER and think about spring cleaning, we should inventory our estate planning — for both our personal family and our legal office.

**Important Documents and Funeral Arrangements**
Each of us can give a very valuable gift to our loved ones by taking a few minutes to list and then find an appropriate place for important documents such as retirement information, life insurance policies, estate planning documents, and funeral arrangements and wishes. Checklists or forms are available to help with the process. Some of the important documents, such as the original will, should be kept in a bank safe deposit box. (Note that, upon the death of the sole lessee of a bank safe deposit box, Virginia Code § 6.1-332.1 authorizes a bank to permit access to a spouse, next of kin, court clerk, or other interested person for the limited purpose of looking for a will or other testamentary instrument; this same code section authorizes searches for powers of attorney and advance medical directives.) Since many important and sometimes difficult decisions have to be made so quickly at a very emotional time when a loved one dies, it can be very helpful to provide guidance and advance planning for your family.

**Last Will and Testament**
Review your will and encourage clients to review theirs every few years. Examine trust provisions with target dates for payout. Prioritize charitable organizations. Choose an executor carefully. Think about the complexity of the estate. Select a competent attorney from the outset. Some clients may choose an executor attorney who can be more objective and neutral than children. For a review of the basics of estate administration, the Senior Lawyers Conference and the Virginia State Bar General Practice Section will present a ninety-minute continuing legal education program on Friday, June 18, 2010, at the VSB Annual Meeting in Virginia Beach.

**Power of Attorney**
The principal should choose an agent to exercise a general power of attorney and select how it is to be exercised. Many of us know horror stories about agents who exercised a general power of attorney in a manner that was contrary to the best interests of a principal. Significant changes are on the horizon in this area of the law. The 2009 Virginia General Assembly approved the Uniform Power of Attorney Act with a planned effective date of July 1, 2010. It was anticipated that further debate would be desirable. Revisions are expected during the 2010 Session of the General Assembly.

It may be advisable to use the standard power of attorney unless there are compelling reasons not to. However, it will still be important to understand the basic provisions of the general power of attorney and craft a document that meets the needs of the individual principal.

**Advance Medical Directive**
Significant changes have occurred recently with the advance medical directive. The Virginia General Assembly revised and enhanced the suggested outline of such a document. There is a trend to explain options that an individual may consider before signing such a document. Under federal law health care providers (especially hospitals) regularly ask patients whether they have an advance medical directive and will often have a basic form available.

**Designation of a Back-up Attorney**
Comment [5] to Rule 1.3 of the Rules of Professional Conduct provides: "A lawyer should plan for client protection in the event of the lawyer's death, disability, impairment, or incapacity. The plan should be in writing and should designate a responsible attorney capable of making, and who has agreed to make, arrangements for the protection of client interests in the event of the lawyer's death, impairment, or incapacity."

Most large and perhaps medium-size law firms build in systems with back-up attorneys in particular cases to provide a helpful safety net. On the other hand, for smaller firms or solo practitioners, it becomes critically important to try to establish a plan to designate a successor attorney.

Richmond attorney Frank O. Brown Jr. provides a one- or two-hour continuing legal education seminar, "Ethics: Protecting You and Your Clients' Interests in the Event of Your Disability, Death, or Other Disaster." If your local bar association has not availed itself of this resource in recent years, I strongly encourage you to extend an invitation to Frank. In addition, the Senior Lawyer's Conference is working on a new project this year to make available an outline of important steps to be taken by an attorney who wishes to wind down a law practice in an orderly manner.

All attorneys — especially senior attorneys — can render a valuable service to their families and communities by using their experience and wisdom to make effective estate planning decisions and successor decisions about their own law practices.

# Unlike Menus, Legal Translations Require Expert Help

by Vicenç Feliú

MANY U.S. PRACTITIONERS are surprised that the materials they need to research foreign and international law — cases, codes, regulations, treatises — are often not available in English. Even when translations are available, you should not assume that they are completely reliable, even when they are official translations. The official Web translation of the Bürgerlichen Gesetzbuches (the BGB or Big German Book) was released in 2007 and quickly withdrawn by the German government because of inaccuracies in the translated text. This being the case, when you cannot find legal materials in English, or when you have reason to question the quality of an English translation, it is best to use a qualified translator.

**Translation and Legal Translation**

No matter the national origin, legal verbiage is always a specialized vocabulary. All specialized fields develop their own terminology, usage, and terms of art, and the law is no exception. The services of a general translator or of a native speaker of the source language (the language from which the translation is derived), therefore, might not produce an accurate legal translation. Native speakers are best used for general translations because they have usage and native intuition on their side. However, a native speaker who has no background in the legal usage of both his or her native tongue and English would be unable to produce accurate, reliable translations of legal documents. Just as you would not hire a non-engineer to provide expert testimony on the technical aspects of building a bridge, obtaining an accurate legal translation requires a translator conversant in the complexities of the law, someone who specializes in the field or has had prior, successful, experience translating law. Several specialized translation services are available on the Web, but you should always make a thorough investigation before buying. Ask for references. Then ask about the type of work they commissioned and their level of satisfaction.

**Online Automatic Translation**

A host of Web- and software-based programs purport to do translations, but they are not designed for legal translation. They use direct translation and syntactical approximation. The programs do a word-by-word literal translation and try to approximate the intended meaning by analyzing the possible context of the passage translated from grammatical and syntactical clues. Their performance can be quirky because they can be fooled by synonyms. For example, the word "teller," which could be a bank teller, a fortune teller, or simply a person telling a story, can wreak havoc with an electronic translation. Online automatic translation programs can be used to deliver a first rough draft translation if you are familiar enough with both the target and source languages to recognize when problems occur. Online automatic translators give the reader a word or idiom, but they don't often provide full, accurate translations. They should never be used to produce a finished translation without thorough editing by a competent translator.

**Print or Electronic Translation Tools**

The assumption that a competent translator works with nothing but personal knowledge is erroneous. Most people confuse translators with interpreters. Interpreters translate extemporaneously in live situations such as conversations or speeches, but translators work with documents of all kinds, using bilingual dictionaries, multilingual dictionaries, source language dictionaries, and grammars. Specialized tools, such as L.D. Egbert's *Multilingual Law Dictionary*, published by Oceana, or Dahl's *Spanish-English Law Dictionary*, available on Lexis-Nexis's reference-law database, in addition to standard bilingual or multilingual dictionaries, ensure accuracy. Like online automatic translators, bilingual and multilingual dictionaries can be used to form an idea of the translation of isolated words or idiom, but they should not be used for complete translation of a document without a strong knowledge of the document's source language.

**Language Learning Programs**

There are many versions and modalities of language learning programs on the market. Most of these programs familiarize the user with the target language so that he can, through applied practice, become fluent. One of the best programs available is the Rosetta Stone suite of languages, which can provide a basic level of proficiency in the everyday usage of the target language, but not its legal vocabulary. Would-be legal translators might want to seek out additional self-help materials, such as *Teach Yourself … Legal Spanish* by Julio Romañach, available from Lawrence Publishing Company, which I have used as a general introduction to Spanish legal terminology and found to be an effective tool for translating legal sources in that language.

**Conclusion**

Legal translation is a rarified and highly specialized field. The practitioner in need of legal translation will be best served by employing the services of a professional who specializes in the intricacies of the field and can ensure accurate and effective translations.

# Expansion of HIPAA Enforcement Raises Ethical Questions

by Alan S. Goldberg

EXPANDING FEDERAL PRIVACY and security requirements to protect health data are presenting new challenges to Virginia attorneys — including on the ethical front.

Attorneys must address the federal Health Information Technology for Economic and Clinical Health (HITECH) Act, enacted as part of the American Recovery and Reinvestment Act (ARRA), Public Law 111-005.

The HITECH Act creates stringent privacy and security requirements for individuals and entities, including Virginia attorneys, who are classified as business associates under rules promulgated for enforcement of the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Congress created the HITECH Act to provide more authority to enforce HIPAA, which in its original form did not contain requirements sufficient for enforcement. Now, enforcement will include many more potential defendants, and penalties may be increased for attorneys involved in health care matters.

Health care providers and others classified as covered entities under HIPAA rules already are required under HIPAA to enter into written agreements with business associates, including attorneys, to protect health information. These are called "business associate agreements."

Beginning February 17, 2010, the HITECH Act will empower the federal government to impose civil and criminal penalties against those business associates who breach privacy or security provisions of HIPAA — including those involving computer data.

An attorney involved in health care and information technology might be obliged to be competent in computer technology systems, including privacy and security risks. The HITECH Act reinforces and expands the universe of technology and professional practice concerns for Virginia attorneys and their clients.

Virginia attorneys who are business associates also are required to impose obligations comparable to those in business associate agreements on agents and subcontractors. Attorneys for business associates also will have to address the new requirements.

Attorneys are assessing how the new rules will affect relationships with their covered entities, business associate clients, agents, and subcontractors. New business associate agreements and related other agreement provisions and new and complex policies and procedures to safeguard protected health information should be considered, and responsibilities of Virginia attorneys under the Virginia Rules of Professional Conduct must be respected.

Before the HITECH Act, HIPAA rules required covered entities to enter into business associate agreements with their HIPAA business associates and include terms and conditions required by privacy and security provisions. The HITECH Act may require new or amended business associate agreements. There is disagreement on this point. The HITECH Act does not automatically incorporate the new requirements in existing business associate agreements by using "shall be incorporated" language. The U.S. Department of Health and Human Services is expected to clarify ambiguity during the rule-making process.

Several areas of professional responsibility are implicated by new or amended business associate agreements involving Virginia attorneys. The rules and clarifying ethics opinions of each relevant jurisdiction in which such attorneys practice law must be reviewed before determining requirements and obligations.

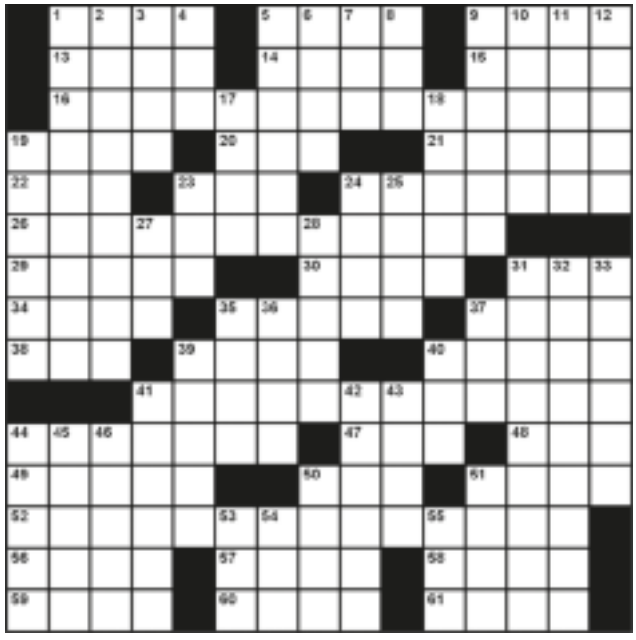
Among the many concerns are if, when, and how an attorney who is a HIPAA business associate must advise a client of the client's entitlement to independent legal representation if a business associate agreement is contemplated between the attorney and the client. There may be a distinct and dispositive difference between entering into an agreement with a client and amending an exising agreement with a client. The professional obligations implicated differ.

There also remains a threshold question that existed before the HITECH Act was enacted: Is an attorney who is not a HIPAA-covered entity required to initiate a discussion with a client that is a HIPAA-covered entity about the requirement that HIPAA imposes upon the client (but not, under HIPAA, upon the attorney) to enter into a HIPAA business associate agreement with the attorney that will contractually burden the attorney? May an attorney instead await a request by a client to initiate the discussion? Would the obligation of the attorney to provide competent representation supersede the attorney's self-interest such that advice to the client that will burden the attorney must nevertheless be given?

If either an attorney or the attorney's client initiates a HIPAA business associate agreement discussion, how should the attorney address the need to provide a form of HIPAA business associate agreement to a client? What negotiating strategy may an attorney use if the attorney knows the negotiating strategies used by a client and how aggressively that client handles negotiations? Should the attorney give the client a form of

# Joe Friday's Talent

by Brett A. Spain



Crossword answers on next page

**Across**

1. Gillette blade
5. Manipulated
9. Guitarist Beck
13. Advertising sign, often
14. _____ contendere
15. Singer Fitzgerald
16. Assault and battery, e.g.
19. Diving position
20. Phil Jackson's outlook
21. Designer Mizrahi
22. Pale or bitter
23. Coach Parseghian
24. Absolution
26. Jury issue
29. Hearst or Duke
30. Foot part
31. Hoof relative
34. Writer Gardner
35. French region
37. Bishop of Rome
38. Bread choice
39. Confront
40. Mea _____
41. Accord partner
44. Gave comfort to
47. Windy road shape
48. Draw
49. Bridges
50. The Greatest
51. Pickle
52. Theme of this puzzle
56. Geometric calculation
57. Plunk (a hitter)
58. Scottish hillside
59. Golfer Sabbatini
60. Range in 35A
61. Man or Wight

**Down**

1. Type of jurisdiction
2. Whistling source in a kitchen
3. Lecherous man
4. Resp. to a question
5. Score an electoral upset
6. Anon
7. Will Ferrell role
8. Morgue desig.
9. High society?
10. Inventor Howe
11. Bob
12. Like
17. Poet Pound
18. Cakewalk
19. Person entitled to a free complaint
23. Singer Winehouse
24. 70's hairdo
25. Fargo star
27. Social ending
28. Roof feature
31. PAC part
32. Judge, at least in Virginia
33. Broke a habit
35. Fill
36. LSD
37. Call alternative
39. Persian language
40. Dosage amts.
41. Week beginning or end (depending on who you ask)
42. Some convicts
43. "Yeah, right"
44. _____ as the eye can see
45. Tricky Dick's V.P.
46. More sound
50. PDQ
51. Prohibits
53. Stern's leag.
54. Coagulate
55. Robert Mueller's org.

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

Crossword answers.

business associate agreement that is favorably oriented toward a business associate client so that the attorney is aggressively favoring the client's interests and not the attorney's interests, or may the attorney use a different form that is more favorable to the attorney and thereby improve the attorney's situation? If another client required the attorney to provide indemnification protection to the client under a business associate agreement, may the attorney nevertheless omit such a clause from the agreement being presented by the attorney to a new client who is not independently represented by another attorney with respect to the new agreement?

Consider also the so-called "rat fink" provisions of the HITECH Act that purport to require an attorney to advise the federal government of the client's noncompliance. Query what should be done to avoid being placed in such an awkward position to eliminate the obligations of the covered entity client to the attorney under the business associate agreement.

The foregoing summary may change, because the Department of Health and Human Services is expected to publish new rules for implementing provisions of the HITECH Act that relate to HIPAA. But even before any such rules are published, Virginia attorneys should consider appropriate ways to address those areas in a manner consistent with professional obligations under the Virginia Rules of Professional Conduct and any other applicable professional responsibility rules.

**Relevant Virginia Rules of Professional Conduct include:**

RULE 1.1 Competence
RULE 1.2 Scope of Representation
RULE 1.3 Diligence
RULE 1.6 Confidentiality of Information
RULE 1.16 Declining or Terminating Representation
RULE 2.1 Advisor
RULE 4.1 Truthfulness in Statements to Others
http://www.vsb.org/docs/2008-09_rules-pc.pdf

**Ethics Watch** continued from page 26

Endnotes:

1 *In the Matter of Peshek*, No. 6201779, Comm. No. 09 CH 89 (Aug. 25, 2009) (recommendation of disbarment).
2 *Id*.
3 The disciplinary complaint stated that not only did Peshek seem to reveal confidential information about a case, but that her actions might also constitute "assisting a criminal or fraudulent act." See Va. Rule 1.2 (c).
4 *Id*.
5 *Id*.
6 John Schwartz, "A Legal Battle: Online Attitude vs. Rules of the Bar," *New York Times* (Sept. 12, 2009).
7 *People v. Liceaga*, No. 280726, 2009 Mich. App. LEXIS 160, *7 (Mich. Ct. App. Jan. 27, 2009).
8 *Id*.
9 See Molly McDonough, "Trial Consultants Add Facebook/MySpace to Juror Research Toolbox," *A.B.A. J.*, Sept. 29, 2008.
10 United States v. Villanueva, No. 08-12911, 2009 U.S. App. LEXIS 3852, *7 (11th Cir. 2009).
11 *Cf.* John Schwartz, "As Jurors Turn to the Web, Mistrials Are Popping Up," *New York Times* (March 17, 2009).
12 *Cal. Bar. J.* (Aug. 2009) accessed January 6, 2010, at http://www.calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/August2009&MONTH=August&YEAR=2009&sCatHtmlTitle=Discipline&sJournalCategory=YES#s10.
13 Philadelphia Bar Ass'n Ethics Op. 2009-02 (March 2009).
14 Molly McDonough, "Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches," *ABA Journal*, July 31, 2009.
15 A second federal lawsuit challenging the constitutionality of Louisiana's new lawyer advertising rules was filed Nov. 24, 2009, by an attorney who claims that the mandatory rules will stifle evolving forms of lawyer speech on the Internet (*Wolfe v. Louisiana Attorney Disciplinary Bd.*, E.D. La., No. 08-4994, filed 11/24/08). The suit claims that the Louisiana rules will unfairly restrict lawyers' modern modes of communication such as blog posts and online discourse, and it charges that the rules will make it difficult or impossible for law firms to place small Internet text ads with Google and other Internet services. The challenged provisions should be struck down as contrary to the First Amendment and the due Process clause of the Fourteenth Amendment, the complaint contends. For example, the bar's requirement that an ad identify the name and address of the lawyer responsible for its content would unduly burden on a "tweet" or message via Twitter because of its 140-character limitation. Wolfe noted that text ads provide only a small space for the advertiser to deliver its message — sometimes no more than 30 or 60 characters. If an attorney is required to provide a name and address, this would virtually eliminate the attorney's ability to say anything else in the ad, he said.
16 Nathan Crystal, *Ethical Issues in Using Social Networking Site, S.C. Bar J.* at 8-10 (Nov. 2009).

# CLE Calendar

**Introduction to Sentencing Guidelines** — 9:30 am–5 pm on February 24 at the Portsmouth Department of Social Services, March 2 at the Henrico County Training Center, and March 23 at the Fairfax County Government Center. $125 fee waived for commonwealth's attorneys, public defenders, and probation and parole staff. Sponsored by the Virginia Criminal Sentencing Commission. Details: http://www.vcsc.virginia.gov/

**Long-term Care Litigation Seminar** — February 26, 8:00 am–5 pm at the Richmond Marriott West. Sponsored by the Virginia Trial Lawyers Association Long-term Care Litigation Section. $190 for members, $220 for nonmembers. Details: www.vtla.com; Alison Love, (804) 343-1143, ext. 310

**Summer CLE Seminar in Ireland** — June 27–July 10 at Trinity College, Dublin. Sponsored by the Virginia Trial Lawyers Association. Details: Jack Harris, (804) 343-1143, ext. 303; www.vtla.com

*Virginia Lawyer* publishes at no charge continuing legal education program announcements for nonprofit bar associations and state agencies. The next issue will cover April 16-July 31, 2010. Send information by March 26 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.

by Gifford Ray Hampshire, Chair

# Local Bars Can Help You Survive Difficult Times

GREETINGS FROM THE Conference of Local Bar Associations (CLBA). We are busy planning the Solo & Small-Firm Practitioner Forum. It will be held on Monday, March 8, 2010, at the University of Richmond School of Law. For some years now, the CLBA has assisted the Supreme Court of Virginia with this forum. The purpose is to inform and train solo and small-firm practitioners on topics such as ethics, law office management, and technology. The forum also provides information on substantive areas of the law, such as appellate practice or jury selection. The idea is to provide solo and small-firm practitioners with information that will improve their practice and quality of life.

This year's forum — the second to be held in Richmond — will feature programs on law office management and finance, and marketing and technology. Another session will offer tips on how to improve your memory in court. A panel on jury selection will include a retired circuit judge. Six hours of continuing legal education credits, including one hour of ethics, will be provided free of charge. For the forum agenda and registration information, go to http://www.vsb.org/site/conferences/clba/.

The Solo & Small-Firm Practitioner Forum is especially relevant in these trying economic times. The January 2010 edition of the *ABA Journal* Law News Now includes a cover story titled "When the Detour Becomes the Destination, How Five Grads Survived the Recession — And How You Can Too." http://www.abajournal.com/magazine/article/when_the_detour_becomes_the_destination. The story tells us how law school graduates from the early 1990s survived the law firm recession of that era, and how lessons from that experience can benefit lawyers attempting to cope with the current downturn. Law school graduates who in better economic times would have expected to have landed jobs with large law firms turned to smaller firms, or opened their own practices. Others performed contract legal work and taught at night. These experiences, the article says, actually created unexpected career opportunities for the new lawyers: the detour into small-firm or solo practice became a successful career path.

The current recession provides similar challenges for law school graduates and big-firm lawyers. Big firms reportedly laid off more than twelve thousand people in 2009 — the worst year ever — and more layoffs are expected.[1] Thus it would seem that, these days, solo or small-firm practice is a likely career alternative for seasoned lawyers as well as recent graduates. The Solo & Small-Firm Practitioner Forum is designed for this increasing segment of practice.

Aside from the organized effort reflected in the forum, individual lawyers have a responsibility to help colleagues in their efforts to find work in difficult economic times. Local bar associations provide good networking opportunities for these efforts. Joining and becoming active in your local bar provides valuable contacts with lawyers who might need permanent or contract assistance. Those lawyers might have clients or acquaintances that have employment needs.

Mentoring is another benefit of local bar membership. Mentoring facilitates ethical and effective solo and small-firm practice. Those of you who are already solo practitioners know how difficult it can be not having someone down the hall to consult about issues that arise. Many local bars across the commonwealth have vibrant mentoring programs and e-mail-based mailing lists that assist solo and small-firm practitioners noodle with the day-to-day challenges of practice. These forums also advertise employment opportunities.

So if you are worried about what 2010 might bring, I encourage you to make a New Year's resolution to attend the March 8 Solo and Small-Firm Practitioner Forum in Richmond. I also encourage you to resolve to become active in your local bar. Not only will participation provide you with an opportunity to serve your community, but it just might assist you in converting an unplanned detour to solo or small-firm practice into a successful permanent career.

1 "The Year in Law Firm Layoffs — 2009." http://lawshucks.com/2010/01/the-year-in-law-firm-layoffs-2009/ (accessed February 3, 2010).

# Look to Your Left, Look to Your Right

by Lesley Pate Marlin

AS RECOUNTED IN NOVELS such as Scott Turow's *One L* and John Jay Osborn's *The Paper Chase*, the dean of a well-known law school welcomed incoming students by telling them, "Look to your left, look to your right — one of you won't be here next year." That admonition seemed entirely fictional to me until several years ago, when I found myself facing the harsh reality of cancer.

The next time you are among a group of people, take a moment to look to your left and to look to your right. One of you will eventually be diagnosed with cancer. That's essentially the statistic. In the United States, one in three women and one in two men will be diagnosed with cancer during their lifetimes. More than 1.4 million Americans will be diagnosed with cancer this year. More than 12 million Americans are currently living with cancer.

A cancer diagnosis turns a person's life inside out and upside down, raising many questions and answering few. Imagine that you have just been told you have cancer. What now? How are you going to pay for necessary treatments? Do you have health insurance? What is covered by insurance, and what is not? What are your options if you don't have health insurance? As you become accustomed to new faces and new words, you sort through all available information. You carefully consider the options, weighing the risks of each possible course of action. Do you want an advance medical directive? Should you have a power of attorney? Do you have a will?

You decide on surgery followed by chemotherapy and radiation. What will the recovery from surgery involve? How long will you be unable to work? Can you take paid or unpaid leave from work? Do you have short-term disability benefits? Are you eligible for family and medical leave? What paperwork will you need to complete? Will you lose your job? Do you qualify for Social Security disability benefits? The doctor recommends genetic testing. How much does it cost? What will it tell you? Is it covered by insurance? What about possible discrimination if the results indicate a genetic predisposition to cancer?

As you recover from the surgery, you begin to prepare for chemotherapy and radiation. Should you take any preemptive action to deal with fertility concerns, and what are the associated costs? Can you return to work while undergoing chemotherapy and radiation? If so, do you need any accommodations at work, and are you entitled to accommodation under the Americans with Disabilities Act? If not, do you have long-term disability benefits? What happens to your health insurance if you have lost your job, are not working, or are unable to work?

A couple of months later, you receive a bill from the hospital for thousands of dollars, purporting to charge you for services rendered by an out-of-network physician during your surgery. Unbeknownst to you, the physician became part of your surgery team, even though you never requested or authorized care from an out-of-network provider. What do you do with the bill? How do you appeal the denial of insurance coverage?

With all of your medical expenses, you have fallen behind on paying some of your bills and now are struggling to pay your mortgage. Creditors are starting to call, after sending you delinquency notices that you never responded to because you were too tired to go through your mail. How should you respond to the creditors? What are your options?

To help cancer survivors navigate many of these legal issues, the Young Lawyers Conference is partnering with the Legal Information Network for Cancer (LINC) to develop an up-to-date legal resource handbook for cancer survivors in Virginia. The handbook will cover legal issues related to paying for medical care with and without insurance; employment; and planning for the future with health care decisions, financial decisions, and decisions regarding the care and custody of children. The handbook will also include a comprehensive resource list. The handbook will be distributed to cancer survivors throughout the commonwealth. The Young Lawyers Conference will sponsor a continuing legal education program on some of the legal issues at the 2010 Virginia State Bar Annual Meeting.

Cancer survivors need the help of doctors as they fight such a terrible disease, but they also need the help of lawyers. So the next time I look to my left or right and find myself next to someone fighting cancer, I will offer to help them as best I can with any legal issues. I hope that you will do the same.